PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor* [2018] QPEC 52
PARTIES:	**CARAVAN PARKS ASSOCIATION OF QUEENSLAND LIMITED (ACN 601 233 612)** (Applicant) v **ROCKHAMPTON REGIONAL COUNCIL** (First Respondent) and **STATE OF QUEENSLAND** (Second Respondent)
FILE NO/S:	4776 of 2017
DIVISION:	Planning and Environment Court
PROCEEDING:	Originating Application
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	15 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2018, 8 and 9 October 2018 and supplementary submissions on 16 and 23 October 2018
JUDGE:	Williamson QC DCJ
ORDER:	**1. Enforcement orders are made in accordance with paragraph [128] of the reasons for judgment.** **2. I will hear from the parties as to costs.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – where applicant seeks a declaration and enforcement orders about the use of premises for overnight parking of RVs in a public park – where applicant contends the start of the use is a new use and constitutes assessable development requiring an effective development permit – where applicant contends use is a not a lawful use – where respondent contends the use is an ancillary use for which no development permit is required – whether a development offence has been committed under ss.163 and 165(a) of the *Planning Act 2016* – whether enforcement orders should be granted restraining the commission of a development offence.

LEGISLATION:	*Acts Interpretation Act 1954* (Qld), ss. 4, 14B and 20C
	Planning Act 2016 (Qld), ss. 163, 165(a), 180, sch. 2
	Planning & Environment Court Act 2016 (Qld), s.11
	Sustainable Planning Act 2009 (Qld), ss. 9, 578, 582 and 682
CASES:	*Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404
	Boral Resources (Qld) Ltd v Cairns City Council [1997] 2 Qd R 31
	Brazil (Concrete) Ltd v Amersham RDC (1967) 18 P&CR 396
	Briginshaw v Briginshaw (1938) 60 CLR 336
	Brisbane City Council v Bemcove Pty Ltd (1998) 104 LGERA 1
	Cascone v Whittlesea Shire Council (1993) 80 LGERA 367
	Cook v Woollongong City Council (1980) 41 LGRA 154
	Drouyn v Rose; Ex parte Rose (1981) 50 LGRA 217
	Foodbarn Pty Ltd v Solicitor General (1975) 32 LGRA 157
	G Percy Trentham Ltd v Gloucestershire County Council [1966] 1 WLR 506
	Gold Coast City Council v Adrian's Metal Management Pty Ltd & Ors [2018] QPEC 45
	Hoe v Manningham City Council (2011) 183 LGERA 441
	Lizzio & Anor v The Council of the Municipality of Ryde (1983) 155 CLR 211
	Morgan-Phoenix v Gold Coast City Council [2007] QPELR 470
	Northcote Food Wholesalers Pty Ltd v Northcote City Council (1994) 84 LGERA 54
	Terra AG Services Pty Ltd v Griffith City Council [2017] NSWLEC 167
	Toner Design Pty Ltd v Newcastle City Council [2013] NSWCA 410
	Woolworths Ltd v Maryborough City Council & Anor [2005] QCA 62
	Woolworths Ltd v Maryborough City Council & Anor (No.2) [2006] 1 Qd R 273

COUNSEL:	M Batty for the Applicant N Loos for the First Respondent
SOLICITORS:	McCullough Robertson for the Applicant Holding Redlich for the First Respondent

Introduction

[1] Caravan Parks Association of Queensland Limited (**CPAQ**) represent the interests of caravan park owners and operators in Queensland. In that capacity, it filed an Originating Application in this Court seeking a declaration under the *Planning & Environment Court Act 2016* (Qld) (**PECA**) and enforcement orders under the *Planning Act 2016* (Qld) (**PA**). The relief is sought in relation to a decision by the Rockhampton Regional Council to permit self-contained recreational vehicles to camp for a period up to 48 hours, for no fee, on public parkland known as Kershaw Gardens (**RV accommodation**). This use started in late 2014[1], and is a continuing use.

[2] While it accepts there is doubt about the utility of the declaratory relief sought in the Originating Application, CPAQ presses for enforcement orders against the Council under s.180 of the PA. The power to grant this relief is enlivened where the court is satisfied a development offence created by the PA has been committed, or will be committed unless restrained. The central issue to be determined in this proceeding is whether a development offence created by the PA has been committed.

[3] In this regard, CPAQ alleges RV accommodation commenced, and has continued, unlawfully in the absence of an effective development approval authorising the making of a material change of use. This is said to constitute a development offence. Two specific offences are alleged, namely, contraventions of ss.163 and 165(a) of the PA.

[4] The Council accepts it does not have an effective development approval to authorise the making of a material change of use for RV accommodation, but opposes the relief sought by CPAQ. It does so on a limited basis. The Council's case focuses on the law in force at the time the Originating Application was heard. It contends no development approval is required to regularise the use because it is 'accepted development' under the PA[2].

[5] The definition of '*use*' in the PA is central to the Council's case. In reliance upon this definition, it contends the existing use of Kershaw Gardens, as a whole, is a single planning unit. It is submitted by the Council that RV accommodation is an ancillary use of Kershaw Gardens, forming part of a single planning unit. The single planning unit is said to be properly characterised by its dominant purpose, namely, a park. This is a defined use in the Council's current planning scheme, Rockhampton Regional Planning Scheme (**the 2015 Planning Scheme**).

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1 The use appears to have been interrupted for an undefined period as a consequence of Cyclone Marcia in late February 2015. Neither party contended the interruption to the use was material to the determination of the proceeding.

2 Exhibit 2, p.735, paragraph 15.

[6] The dispute between the parties calls for an examination of the following issues:

(a) What is an ancillary use?

(b) Is RV accommodation an ancillary use of Kershaw Gardens?

(c) Has s.163 of the PA been contravened and a development offence committed?

(d) Has s.165(a) of the PA been contravened and a development offence committed? And

(e) What relief should be granted?

What is an ancillary use?

[7] The definition of '*use*' in schedule 2 of the PA is in the following terms:

> "***use**, for premises, includes an ancillary use of the premises.*"

[8] The Council submits the existing use of Kershaw Gardens is a park and, by virtue of the definition of use, includes any ancillary use of the premises. The RV accommodation use is said to be an ancillary use of the premises.

[9] The term ancillary is not defined in the PA. It is to be given its ordinary meaning. Authorities indicate that Courts have held the plain meaning of ancillary is 'incidental and subordinate'[3]. The Macquarie Dictionary (3rd edition revised) defines ancillary as meaning '*accessory*', which, in turn, is defined as a '*subordinate part or object; something added or attached for convenience, attractiveness*'. The Oxford English Dictionary (2nd edition) defines ancillary as '*subservient, subordinate*'. The explanatory notes for the Planning Bill 2015 confirm ancillary is to be given its ordinary meaning, namely, an ancillary use is '*subordinate*' to the principal use of premises.

[10] The inclusion of ancillary uses in the definition of '*use*' recognises that multiple uses of the same premises may be treated as a single planning unit. This requires the identification of a principal and subordinate use. This is by no means a novel proposition. The characterisation of a use by reference to principal and subordinate uses is consistent with the classic statement of principle found in *Foodbarn Pty Ltd v Solicitor General* (1975) 32 LGRA 157 where Glass JA said at 161[4]:

> "*It may be deduced that where a part of the premises is used for a purpose which is subordinate to the purpose which inspires the use of another part, it is legitimate to disregard the former and to treat the dominant purpose as that for which the whole is being used. Doubtless the same principle would apply where the dominant and servient purposes both relate to the whole and not to separate parts...*"

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3 *Drouyn v Rose* (1981) 50 LGRA 217, 220 (Andrews J with whom Lucas SPJ and Demack J agreed).

4 This statement was affirmed by Gibbs CJ in *Lizzio & Anor v The Council of the Municipality of Ryde* (1983) 155 CLR 211, 216-217 ('*Lizzio*').

[11] The definition of '*use*' in the PA incorporates an important shift in the law. The shift emerges when the definition is compared to the definition of '*use*' in the repealed *Sustainable Planning Act 2009* (Qld) (**SPA**). The definition of use in SPA required a subordinate use to be '*incidental to and necessarily associated with*' the principal use of premises. A review of past decisions of this Court, and the Court of Appeal, confirm the provision was given a narrow interpretation[5], and set a high threshold for subordinate uses to cross.

[12] In contrast, the PA definition provides for a lower threshold for subordinate uses to cross. It requires a subordinate use to be an ancillary use of premises. This change is a deliberate one, as is confirmed by the Explanatory Notes for the Planning Bill 2015 which state at p.230:

> *"The definition under the old Act required a subordinate use to also be 'necessarily' associated with the principal use of the premises. This resulted in a very 'high bar' for subordinate uses, inconsistent with the approach in other jurisdictions...*
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> ...
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> *The substitution of the term 'ancillary' is intended to provide more flexibility in relation to subordinate uses, consistent with widely applied and well accepted principles about their limitations. These limitations reflect an overall intent to allow for such flexibility while preserving the reasonably anticipated amenity of places, and the capacity of regulators to protect amenity through the regulation of material changes of use."*

[13] An examination of whether a use is a principal or ancillary use is part and parcel of the process adopted to identify the relevant planning unit, and properly characterise a use or uses. A planning unit is the defined physical area used for a particular purpose, including any part of that area where a use is incidental, or ancillary to the achievement of that purpose[6]. In this case, the issue is whether the existing use of Kershaw Gardens is a single planning unit (including RV accommodation), or two separate planning units.

[14] As has long been recognised, the identification of the correct planning unit involves matters of fact and degree[7], and is an evaluative exercise[8]. The identification of the correct planning unit must be decided having regard to the facts and circumstances of each case, and the applicable legislative and planning context. This task may be assisted by reference to a number of matters of general application that can be distilled from earlier cases. Whilst caution needs to be exercised with the earlier cases given differences in relevant legislative provisions, the following matters of general application may assist in the identification of the correct planning unit, where it is asserted it includes an ancillary use, namely:

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5 See the discussion in *Morgan-Phoenix v Gold Coast City Council* [2007] QPELR 470, [8].

6 *Woolworths Ltd v Maryborough City Council (No.2)* [2006] 1 Qd R 273, 290 [38] *citing G Percy Trentham Ltd v Gloucestershire County Council* [1966] 1 WLR 506, 513 (Diplock LJ).

7 *Lizzio* (1983) 155 CLR 211, 217; *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404, 409; *Woolworths Ltd v Maryborough City Council (No.2)* [2006] 1 Qd R 273, 291 [40].

8 *Toner Design Pty Ltd v Newcastle City Council* [2013] NSWCA 410 [7] (Basten JA) ('*Toner Design*') citing with approval *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404, 409 (Meagher JA).

(a) the ascertainment of the purpose of a use may yield the result that more than one separate and distinct purpose is revealed. In that event, the question arises whether one purpose is dominant. The further question that may arise is whether the lesser purpose, or purposes, are ancillary to the dominant purpose[9];

(b) the dominant purpose for which land is used determines the character of the use, and not an ancillary use or uses. This was explained by way of example in *Brazil (Concrete) Ltd v Amersham RDC* (1967) 18 P&CR 396 at 399 where it was said:

> "*It is the primary purpose which determines the character of the user (sic) and not the ancillary uses...Take, for instance, Harrods Store. The unit is the whole building. The greater part is used for selling goods; but some parts are used for ancillary purposes such as for offices and for packing articles for despatch. The character of the whole is determined by its primary use as a shop.*"

(c) where premises are used for two or more purposes, one of which is described as the dominant purpose, and the others described as ancillary to the dominant purpose, the ancillary purpose or purposes take their colour from the dominant purpose[10];

(d) to be an ancillary use requires:

(i) a dominant and subservient relationship[11];

(ii) a use not to merely coexist with, but serve the purposes of the primary use[12];

(e) there is no single test to determine dominant against ancillary. Different criteria that has been adopted in earlier cases for this purpose are not readily susceptible to classification, with each case turning on its own facts[13]. Importantly, however, the matters that are to be taken into account involve planning considerations, and do not turn on relative financial returns to the owner or occupier of the site for each respective use[14];

(f) the concept of ancillary may involve matters of size and scale. As was said in *Toner Design Pty Ltd v Newcastle City Council* [2013] NSWCA 410 at [11]:

> "*Secondly, the concept of "ancillary to" involves matters of size and scale. Thus, two developments each of which was of significant scale in its own right might not demonstrate the relevant relationship of one being dominant and the other being subservient thereto. Examples are not necessarily helpful because the factors to be taken into account will vary as between cases.*

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9 *Cascone v Whittlesea Shire Council* (1993) 80 LGERA 367, 382 cited with approval in *Hoe v Manningham City Council* (2011) 183 LGERA 441, 447.

10 *Cook v Woollongong City Council* (1980) 41 LGRA 154, 159 citing *Foodbarn* (1975) 32 LGRA 157.

11 *Toner Design* [2013] NSWCA 410 [10].

12 Ibid.

13 *Northcote Food Wholesalers Pty Ltd v Northcote City Council* (1994) 84 LGERA 54, 67.

14 *Toner Design* [2013] NSWCA 410 [11].

Broadly speaking, however, the factors to be taken into account will depend on planning considerations..."

(g) the question of dominance against ancillary, is not to be answered by ascertaining whether the nature of the first use makes it necessarily an essential part of the second use[15]; and

(h) where the whole of premises are used for two or more purposes, none of which subserves the others, it is irrelevant to inquire which of the multiple purposes is dominant[16].

[15] In the context of the definition of '*use*' in the PA, the Explanatory Notes for the Planning Bill 2015 discuss, in some detail, what constitutes an ancillary use. They relevantly state at p.230:

"*To be an ancillary use to the principal use of premises, a use should have all of the following characteristics:*

- *The use is subordinate to the principal use. This does not mean that the ancillary use must necessarily be small in relation to (sic) principal use, however the relative scale of the two uses is often a useful indicator;*
- *The principal and subordinate use are located on the same premises and are not separated from each other by other uses of other premises, other than in the case of separation by, for example, a road or a physical feature such as a stream;*
- *There is a functional relationship between the subordinate and principal use, and not with a use of any other premises. For example, if a florist shop in a hospital sells flowers only to hospital visitors and patients, it is likely to be an ancillary use. However if the shop sells flowers to the general public in addition to hospital visitors and patients, then it is not an ancillary use.*

It is not particularly relevant that an ancillary use is similar or quite distinct from a principal use. For example, an administrative office providing accounting and payroll services within a department store is of an administrative character, while the principal use is of a retail commercial character.

Also, the planning impacts, or a desire on the part of an entity to regulate the use is not determinative of whether the use is ancillary or not. Whether or not a use is ancillary are a matter of fact and degree in the circumstances, and not a matter of opinion.

A helpful approach to dealing with ancillary uses is to consider them as if they were the principal use. For example, a domestic swimming pool or garage can be treated as if it were a 'dwelling house'..."

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15 *Terra AG Services Ltd v Griffith City Council* [2017] NSWLEC 167 [53].

16 *Foodbarn* (1975) 32 LGRA 157, 161.

[16] The Explanatory Notes purport to identify the characteristics a use should have to qualify as an ancillary use. To the extent this is intended to state a test for ancillary uses, it has not been incorporated in the PA by the legislature. It has no statutory force. This aspect of the Explanatory Notes is therefore of limited assistance in the determination of this case. In my view, this is supported by s.14B(1) of the *Acts Interpretation Act 1954*.

[17] For the purposes of s.14B(1), the definition of '*use*' in the PA is not ambiguous or obscure, nor does the ordinary meaning of the definition lead to a result that is manifestly absurd or unreasonable[17]. Accordingly, the assistance the Explanatory Notes can provide is limited to confirming the interpretation of the definition of use. It confirms, consistently with paragraph [9] of these reasons, the definition, and the term ancillary, are to be given their plain meaning. The correct test to consider is whether a use falls within the plain meaning of 'ancillary'.

The RV Accommodation use

[18] It is necessary to set out some relevant background about Kershaw Gardens, and the RV Accommodation use before dealing with the issues to be determined.

[19] Kershaw Gardens is a regional park located at Moores Creek Road, Park Avenue in Rockhampton. It comprises two contiguous lots, namely Lot 230 on SP143262 and Lot 1 on RP619483 (**the land**). Lot 230 is 26.1 hectares in size, and is dedicated as reserve for park and recreation purposes. The Council has control of Lot 230 as trustee, and must manage and maintain this land in a way which is consistent with the purpose of the reserve. Lot 1 is 0.2836 hectares and located in the north-eastern corner of Kershaw Gardens. It is owned by the Council in fee simple.

[20] The land is irregular in shape and, as an amalgam, is approximately 26.4 hectares in size. It is bounded by Moores Creek to the east, Moores Creek Road to the west, Dowling Street to the south, and High Street to the north.

[21] Council's internal planning for Kershaw Gardens divides it into three precincts, namely the South, Central and North Precincts. The Central precinct was recently upgraded and improved with playground facilities, public amenities, barbeques and sheltered seating areas. A network of paths (of which an expansion is planned) is provided for pedestrians to navigate their way through the precincts. The Park is not improved to facilitate use during the night time hours. For example, there is no floodlighting for the network of internal pedestrian paths to be safely traversed at night.

[22] The use of Kershaw Gardens as a large public park has been interrupted in recent years. Cyclone Marcia caused significant flooding in late February 2015 and, as a consequence, the park was closed. Prior to re-opening the park, the Council undertook, and continues to undertake, work to enhance the park facilities for the public benefit. An example of the works undertaken include those referred to in paragraph [21] above.

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17 s.14B(1) of the *Acts Interpretation Act* 1954.

[23] At present, car parking facilities are provided for visitors to Kershaw Gardens in two locations: (1) the Moores Creek Road carpark; and (2) the High Street carpark. RV accommodation is located in the High Street carpark.

[24] The High Street carpark is located in the Northern Precinct of the park. It is accessed via a roundabout and a short section of an internal road. Signage has been placed at the entry to the High Street carpark stating, inter alia:

(a) the site is designated for use by 'FULLY SELF CONTAINED' campers only;

(b) 'NO FACILITIES ARE PROVIDED';

(c) an individual's camping set up 'MUST' allow to wholly contain and store all grey and black water;

(d) 'CAMPING PERMITTED' with a maximum stay of 48 hours; and

(e) camping in tents is not allowed.

[25] The High Street Carpark is about 9,164m^2 in size and is unsealed with a graded gravel surface. In percentage terms, this carpark equates to less than 4% of the total area of the land. There is no floodlighting for the carpark. Nor are essential services (i.e. water, sewer or power) provided for occupants in the RV accommodation area. The closest amenities block is located in the Central Precinct of the park, some 500 metres to the south of the High Street carpark. This existing amenities block does not have shower facilities.

[26] A temporary barrier is located towards the southern end of the High Street carpark. The purpose of the barrier is to create a demarcation between the parking provided for RV accommodation, and the parking provided for visitors as well as contractors who are involved in the redevelopment of Kershaw Gardens.

[27] The evidence establishes the RV accommodation use started in late July 2014. The precursor to the start of the use appears to be a recommendation of the Council's Parks & Recreation committee of 1 July 2014. The committee recommended the Council resolve as follows:

> "*THAT the carpark off High St in Kershaw Gardens be progressed for overnight stopovers for self-contained recreational vehicles and that appropriate approvals be sought and the Land Use Management Plan be revised and the current overnight stop overs at Washpool be discontinued and be signed accordingly.*"

[28] The Council minutes of 8 July 2014 record it resolved to adopt the recommendation of the Parks and Recreation Committee in identical terms to that set out in paragraph [27] above.

[29] The reference to '*appropriate approvals*' in the committee's recommendation of 1 July 2014, and the subsequent Council resolution of 8 July 2014, appears to be a reference to approvals required from the State Government. Internal correspondence between Council officers contained in the evidence, suggest it is accepted that an approval is required from the State Government to permit the land to be used for RV accommodation. This is not a purpose contemplated by the purpose of the reserve.

[30] The minutes of the committee's meeting of 1 July 2014 also reveal that internal advice had been obtained from Council's planning unit. The advice was about whether planning approval was required for the RV accommodation use.

[31] The minutes of the committee meeting state:

> *"Zoning\Town Plan*
>
> *Advice from Council's Planning Unit indicates that the use for parking campervans etc. overnight would be exempt development under Chapter 3 of the Rockhampton City Plan 2005, meaning that no planning approval would be required for this use. It provides that it will be exempt development where "The use of land identified in an Area Map as being Public Open Space for the Purposes of a Park."*
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> *Essentially, the overnight parking of campervans etc. would be an ancillary use to the park use, especially given that no facilities are proposed (i.e. ablution block). The freehold lot is also shown as being for Public Open Space in the first map for the North Rockhampton Consolidation Residential Area. The Q100 flood corridor goes through a very small part of the southernmost corner of the freehold lot.*
>
> *Planning approval would be required if the overnight parking of campervans was to increase in scale and intensity with facilities built to support this use."*

[32] At no time during this proceeding did the Council seek to defend the advice attributed to its planning unit in the committee meeting minutes of 1 July 2014.

[33] The RV accommodation provides no direct commercial benefit to the Council. The accommodation is offered for no fee on public parkland. The question that arises is: what is the underlying purpose of the use? I am satisfied the use is intended to contribute to the local economy in an indirect way. Its purpose is to encourage visitors to stay in Rockhampton, for no fee, at a central location. The location enjoys convenient access to local food, and retail facilities. It is expected visitors will patronise local food and retail facilities, contributing to the local economy and vibrancy of the city. An expectation the occupants of the RV accommodation will patronise local retail facilities is a reasonable one. The use is located only a short walking distance to a large shopping centre, which is adjacent to the High Street carpark access.

[34] As to the functional relationship between the park use and RV accommodation, I am satisfied the evidence established: (1) there is no requirement or special need for the RV accommodation to be located in Kershaw Gardens; and (2) whilst some of the occupants of the RV accommodation use may choose to recreate in Kershaw Gardens, this is likely to be limited in extent.

[35] The lack of a functional relationship between the park use and RV accommodation is confirmed by two matters.

[36] First, the Council only permits self-contained vehicles to utilise the RV accommodation area. There is, as a consequence, no need for occupants of the self-contained vehicles to leave the RV accommodation area and use existing amenities in Kershaw Gardens. Occupants of the vehicles can come and go from the park without using it, or any of its facilities, for passive recreation purposes.

[37] Second, the park is not improved in a way that encourages occupants of the RV accommodation area to engage in passive recreation. This is particularly the case during night time hours. Many users of the RV accommodation area are observed arriving late in the day or at night, when the opportunity to use the park is likely to be limited due to the lack of natural light, or there may be no daylight at all. The network of pedestrian paths within the park are not lit at night. As a matter of ordinary experience, it would be unlikely (for safety and security reasons) that occupants of the RV accommodation area will recreate, at night, in the park when it is not lit for this purpose.

[38] The intensity of the RV accommodation use can be examined having regard to the number of vehicles parked on any given day in the designated parking area. The evidence establishes the intensity of the use varies by season, and time of day. Mr Brown, a Local Laws officer employed by the Council, has regularly inspected the RV accommodation area. The use is subject to regular weekday inspections by Local Laws officers, sometimes twice a day. He has observed that the busiest periods for the use are the months of May, June, late August and September. He has also observed that the busiest times of the day for the use coincide with the hours after sunrise, and leading up to sunset.

[39] In August 2018, the number of vehicles parked in the designated RV accommodation area ranged from 14 to 32 in the morning, and 15 to 32 in the afternoon. In September 2018, the number of vehicles parked in the RV accommodation area ranged from 7 to 21 in the morning, and 0 to 21 in the afternoon. Mr Brown did not suggest the number of vehicles observed in August and September 2018 were, based on his past observations, out of the ordinary. Further, I accept there is a reasonable expectation that the number of vehicles parked in the designated area for RV accommodation is unlikely to abate in the future. This is consistent with Mr Brown's evidence. Given his experience and observations of the use, he was of the view the use was likely to continue to increase in popularity.

Is RV accommodation an ancillary use of the land?

[40] Kershaw Gardens is a large public park that provides an opportunity for passive recreation. The combination of its size, location, and design confirms it is intended to function as a major regional park. It serves the passive recreation needs of residents, tourists and visitors to Rockhampton. This is a matter of context that was uncontroversial between the town planning witnesses called to give evidence at the hearing. This context, in part, frames the central issue to be determined, namely whether RV accommodation is an ancillary use of a major regional park.

[41] I am satisfied CPAQ has established the RV accommodation is not an ancillary use of the land as a major regional park. This is so for the following reasons.

[42] An ancillary use is, by definition, one that is subservient to a principal use. The very nature of the subservient and dominant relationship requires the former to serve, or take its colour from, the latter. This is not the case with the RV accommodation use. It does not take its colour from the park. Nor does it serve the park. There is no relationship of dominance and subservience.

[43] The purpose of the use is to provide a form of accommodation for tourists and travellers. This is not a use that is aligned with a park. As I have already said in paragraph [33] above, a further purpose of the use is to provide an opportunity for the travelling public to be accommodated in a central location, to encourage them to patronise local food and retail facilities. This purpose does not take its colour from the park, nor does the use serve the purpose of the park. Whilst the use is conveniently co-located with the park, I am satisfied there is no special need, or planning requirement for it to be co-located with the park.

[44] The evidence establishes the existing use of Kershaw Gardens comprises two separate purposes that coexist. The position was correctly stated by Mr Reynolds, the town planning witness called by CPAQ, who described the functional relationship between the park and RV accommodation in this way:

> "*...In my opinion, the relationship between the park and the camping is minor and inconsequential to the character of the use. The park is merely a convenience. The RV parking only serves the use of the park in a trivial way, as the primary purpose of the use is to sleep overnight.*"

[45] The identification of a minor and inconsequential relationship as referred to by Mr Reynolds, does not of itself establish that the park and RV accommodation uses are separate and distinct uses. This will turn on the facts of each case. It is the strength of the connection or relationship that will be important, involving matters of fact and degree.

[46] As a matter of fact and degree, the strength of the connection or relationship as between the park and RV accommodation use is limited in a functional sense, and is more a relationship of convenience. Convenience in this case is not an indicator of a dominant and subservient relationship. It is, in my view, a weak connection, and is equally demonstrative of two separate planning units that are located on the same premises.

[47] An example of two separate planning units on the same premises, having a relationship of convenience can be readily identified. One such example is a tower with residential accommodation above a podium containing commercial uses, such as shops and restaurants. The residential and commercial uses are separate planning units, but located on the same premises. Residents in the tower above the podium may, from time to time, patronise the facilities in the podium below. The podium uses would be convenient for the residents. Equally, some residents may choose not to patronise the facilities in the podium below. The convenience of the facilities in the podium is the product of its co-location with the residential use. The uses still remain separate planning units despite the convenience of co-location.

[48] The absence of a dominant and subservient relationship in this case is further reinforced by two particular features of the evidence.

[49] First, the footprint of the High Street carpark is in the order of one hectare. The RV accommodation area consumes some, but not all of this area. Taking a broad view, this means the use takes up less than 4% of the total area of the park, and may be seen as inconsequential in percentage terms. That may be so, but the RV accommodation area is significant and scale.

[50] The scale and intensity of the RV accommodation use does not paint a picture that it is subordinate, or subservient to the park. The evidence points to a contrary conclusion, establishing only a minor connection between the use and the park. Further, the evidence does not suggest there is a relationship, be it direct or indirect, between the park and the size and intensity of the RV accommodation use. Rather, the size and intensity of the use is consistent with the proposition it is separate from the park, and does not need to be co-located with it.

[51] Second, as a matter of fact and degree, the provision of RV accommodation alters the underlying purpose for which Kershaw Gardens is used as a park. The augmentation of the purpose for which Kershaw Gardens has been, and is, used is one indicator RV accommodation is not an ancillary use.

[52] Prior to the commencement of the RV accommodation use, the only purpose of the park was to provide passive recreation space for visitors, residents and tourists of Rockhampton. This purpose did not include the provision of accommodation for the travelling public in self-contained campervans or recreation vehicles.

[53] The commencement, and continuation of RV accommodation, has augmented the purpose for which Kershaw Gardens is, and has been, made available for use by the public. It did so by introducing accommodation for the travelling public in circumstances where there is no functional or planning requirement for that accommodation to be located at Kershaw Gardens. As Mr Reynolds said, and I accept, whilst the location of Kershaw Gardens provides a practical opportunity for RV accommodation, this opportunity is not tied to the use of Kershaw Gardens as a park.

[54] CPAQ submit the RV accommodation use introduced new impacts that did not exist when the land was used only as a park. This was said to represent a further indicator as to why the use was not ancillary. The specific impacts to which reference was made in the evidence, and submissions, include hygiene impacts, social impacts from activities in the park at night, impacts from the increased use of unsealed carpark areas, and impacts from grey water.

[55] I accept, as a general proposition, that the identification of new impacts is a relevant consideration for characterising a use as dominant or ancillary, involving as it does matters of fact and degree. The identification of new impacts, however, are not determinative in this case. The matters of importance here are dealt with in paragraphs [42] to [47] above. The matters discussed therein establish, in my view, that RV accommodation is not an ancillary use of Kershaw Gardens as a major regional park. This finding is reinforced by the matters discussed in paragraphs [48] to [53] above.

[56] The Council submits there are seven matters that demonstrate, as a matter of fact and degree, RV accommodation is ancillary to the use of Kershaw Gardens as a regional park, namely:

(a) the use falls within the words '*and ancillary vehicle parking and other public conveniences*' in the definition of '*park*' in the 2015 Planning Scheme;

(b) the RV accommodation is subordinate to the park use in terms of area, and there is no evidence to establish that the intensity of the activity is disproportionate to the use of the otherwise very popular regional park;

(c) the RV accommodation is located on the same premises as the park;

(d) there is a functional relationship between the RV accommodation and the park. They are collectively a place for passive recreation for the users of the RV accommodation;

(e) the number of vehicles parked in the demarcated area for RV accommodation is in all respects, quite ordinary;

(f) the style of vehicle, campervans and caravans, is quite ordinary for a regional park located on the Bruce Highway, where it can be expected that such vehicles would call into the park; and

(g) people stopping overnight to rest before continuing their journey is a recreation activity within the context of a regional park.

[57] The submissions summarised in paragraph [56](b) to (g) above can be dealt with briefly.

[58] With respect to subparagraph (b), I accept the RV accommodation area is considerably smaller than the total area of the park. However, for the reasons given in paragraphs [49] and [50] above, I do not accept the size of the use, or the suggested lack of evidence about intensity, establishes it is an ancillary use. The size and intensity of the RV accommodation use are, in my view, one of a number of indicators that suggest it is a separate, and independent use from the park.

[59] I accept the submission in subparagraph (c).

[60] As to the submission in subparagraph (d), I accept there is a connection between RV accommodation and the park, but the connection is weak. The connection is not sufficient to establish the use is ancillary to the park for the reasons set out in paragraphs [42] to [53] above.

[61] I do not accept the submission in subparagraph (e). The submission is not established on the evidence and is no more than a general assertion. Mr Loos, who appeared on behalf of the Council, did not identify the evidence relied upon to support the submission.

[62] The submissions in subparagraphs (f) and (g) are, in my view, of no assistance to the determination of the central issue. They are, again, general assertions without support in the evidence. At its highest, the evidence included references to other examples in regional Queensland where parking is provided for recreational vehicles in conjunction with public open space. The evidence did not include an analysis of each use. Nor did the evidence include an analysis of the planning controls applicable to each case to establish the examples were comparable to the present case. The lack of such evidence means the submissions made on behalf of Council in this respect are not persuasive.

[63] The submission in subparagraph (a) requires detailed consideration. The submission calls in aid the definition of '*Park*' in the 2015 Planning Scheme, which is in the following terms:

Column 1 **Use**	**Column 2** **Definition**	**Column 3** **Examples include**	**Column 4** **Does not include the following examples**
Park	Premises accessible to the public generally for free sport, recreation and leisure, and may be used for community events or other community activities Facilities may include children's playground equipment, informal sports fields and ancillary vehicle parking and other public conveniences	Urban common	Tourist attraction, outdoor sport and recreation.

[64] The Council contends RV accommodation falls within the words '*ancillary vehicle parking and other public conveniences*' in the definition above. More particularly, it was submitted the definition as a whole contemplates other activities occurring in a very large regional park located on the Bruce Highway. This was submitted to include a stopover area for passive recreation and overnight rest. Mr Loos contended this activity was captured by the words '*other public conveniences*' in the definition above.

[65] I do not accept RV accommodation falls within the definition of Park in the 2015 Planning Scheme.

[66] As a starting point, it is less than clear as to what was intended to be conveyed by the submission '*other activities*' are contemplated in a park. The activities that are contemplated by the definition are those captured by the first paragraph of the definition. This paragraph speaks of premises being accessible to the public for free sport, recreation and leisure.

[67] The second paragraph of the definition contains those parts that are specifically relied upon by the Council. This aspect of the definition identifies a non-exhaustive list of facilities that may be provided in a park. The facilities are not separate uses. The facilities identified exist to support the park use. So much is clear from the types of facilities expressly envisaged in the definition. The definition refers to playground equipment. This is an example of a 'facility' expected in a park. It is not of itself a use. The same observation can be made with respect to ancillary vehicle parking and public conveniences. They, like playground equipment, are facilities that support the park.

[68] CPAQ has established RV accommodation does not support the park in the manner contemplated by the above definition. It is a separate use of the land. The existing use of the land comprises two separate planning units.

Power to grant enforcement orders

[69] The Originating Application seeks enforcement orders under s.180(3) of the PA. This remedy is discretionary.

[70] Section 180 of the PA provides the court's power to grant an enforcement order. An "*enforcement order*" is defined in Schedule 2 of the PA, relevantly in this case, by reference to s.180(2) which is in the following terms:

> "*(2) An enforcement order is an order that requires a person to do either or both of the following –*
>
> *(a) refrain from committing a development offence;*
>
> *(b) remedy the effect of a development offence in a stated way.*"

[71] The court's power to grant an enforcement order (as defined) is enlivened where s.180(3) of the PA is satisfied. This provision is in the following terms:

> "*(3) The P&E Court may make an enforcement order if the court considers the development offence –*
>
> *(a) has been committed; or*
>
> *(b) will be committed unless the order is made.*"

[72] The power to grant an enforcement order under s.180(3) of the PA is not contingent upon a declaration being made about the commission, or likely commission, of a development offence under s.11 of the PECA. The court need only be satisfied that one of two pre-conditions to the exercise of the power is satisfied. The relevant pre-conditions are expressed in the alternative limbs of s.180(3)(a) and (3)(b) of the PA. CPAQ relies upon subsection (3)(a), namely that a development offence has been committed.

[73] A "*development offence*" is defined in Schedule 2 of the PA by reference to s.161 of that Act. Section 161 of the PA is contained in Chapter 5, Part 2 and is in the following terms:

> "***161 What part is about***
>
> *This part creates offences (each a **development offence**), subject to any exemption under this part or to chapter 7, part 1.*"

[74] Five development offences are created in Chapter 5, Part 2 of the PA. This part of the PA took effect on 3 July 2017.

[75] CPAQ alleges two development offences in Chapter 5, Part 2 of the PA have been committed to enliven the court's jurisdiction to grant enforcement orders. The specific development offences relied upon are contained ss.163 and 165(a) of the PA.

Has s.163 of the PA been contravened and a development offence committed?

[76] Section 163(1) of the PA is in the following terms:

> *"(1) A person must not carry out assessable development, unless all necessary development permits are in effect for the development."*

[77] CPAQ contends assessable development has been carried out in the absence of an effective development permit. The assessable development alleged to have been carried out is a material change of use of the land for RV accommodation. To succeed, CPAQ must prove (on the balance of probabilities[18]) the following elements of the development offence:

(a) development, as defined in the PA, has been carried out on the land; and

(b) the development carried out for the purposes of (a) is assessable development as defined in the PA; and

(c) the assessable development identified in (b) has been carried out in the absence of all effective and necessary development permits.

[78] CPAQ did not prove the first of the three cumulative elements of the offence created by s.163 of the PA. It has therefore failed to establish that a development offence has been committed under s.163 of the PA. This is so for the following reasons.

[79] Development for the purposes of the PA is defined to include, inter alia, '*making a material change of use of premises*'. Schedule 2 of the PA defines '*material change of use*' in the following terms:

> *"**material change of use**, of premises, means any of the following that a regulation made under section 284(2)(a) does not prescribe to be a minor change of use –*
>
> *(a) start of a new use of the premises;*
>
> *(b) the re-establishment on the premises of a use that has been abandoned;*
>
> *(c) a material increase in the intensity or scale of the use of the premises."*

[80] The relevant aspect of the definition for this case is subparagraph (a). It will be satisfied where the '*start*' of a new use of premises is identified. The ordinary meaning of '*start* is '*to commence*'. The plain meaning of '*start*' does not encompass the continuation of a use[19].

[81] The evidence establishes the RV accommodation use started in late July 2014. This predates the PA and raises the following issue: Can an offence be committed under s.163 of the PA if the act relied upon to establish the offence occurred prior to the date the PA took effect (and the offence was created)[20]?

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18 At the upper end of the sliding scale recognised in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

19 For example, see *Woolworths Ltd v Maryborough City Council & Anor* [2005] QCA 62, [18] and [19].

20 As is confirmed by ss.160(2) and 161 of the PA.

[82] The answer to this question is found in s.20C of the *Acts Interpretation Act 1954* (Qld), which relevantly provides:

> "***20C Creation of offences and changes in penalties***
>
> *(1) In this section –*
>
> ***Act** includes a provision of an Act.*
>
> (2) *If an Act makes an act or omission an offence, the act or omission is only an offence if committed after the Act commences.*"

[83] The effect of s.20C(2) means, in this case, that an act or omission of the kind prescribed under s.163 of the PA will only be an offence if committed after 3 July 2017. CPAQ cannot establish the relevant act or omission occurred after this date. The acts relied upon by CPAQ to establish the alleged offence occurred prior to 3 July 2017. No offence has therefore been established against s.163 of the PA.

[84] In my view, a contravention of s.163 of the PA could only be established by CPAQ if: (1) the word '*start*' in the definition of material change of use in the PA is given an extended meaning to encompass '*to continue*'; and/or (2) a transitional provision of the PA can be identified that displaces the operation of s.20C of the *Acts Interpretation Act 1954* (Qld).

[85] I was not referred to any provision, or context in the PA providing a basis to extend the meaning of '*start*' in the definition of material change of use to encompass '*to continue*'. Further, there is no provision of the PA displacing the effect of s.20C in the manner contemplated by s.4 of the *Acts Interpretation Act 1954* (Qld). If that had in fact been intended, it was a simple matter for the legislature to provide for this in the PA.

[86] Mr Batty, who appeared for CPAQ, submitted s.163 of the PA should be applied retrospectively as a means of curing the shortfall in his client's case. This is not a submission I accept. Giving retrospective operation and effect to an offence provision is not an outcome that would, as a general proposition, be lightly reached. Clear words would be required in the PA to achieve this outcome, and those words would need to displace the effect of s.20C of the *Acts Interpretation Act 1954* (Qld). As I have already said, no provision displacing the effect of s.20C exists in the PA.

[87] Accordingly, I am not satisfied CPAQ has established a development offence has been committed under s.163 of the PA.

<u>Has s.165(a) of the PA been contravened and a development offence committed?</u>

[88] The second development offence alleged to enliven the court's power to grant enforcement orders is a contravention of s.165(a) of the PA. The Council's position in relation to this alleged offence is unclear. The following submission was made on behalf of the Council in its Supplementary Outline of Submissions dated 23 October 2018:

> "9 *The Council submits that if the Court does not accept the Council's argument about the stayover area being ancillary to the park use, the Court could make an enforcement order pursuant to section 180 of the PA, with section 180(3) of the PA being* ***potentially satisfied by section 165*** *of the PA.*" (emphasis added)

[89] This submission is equivocal. To concede that section 165 of the PA is '*potentially satisfied*' admits of ambiguity. The provision is either satisfied, or it is not. This is a regrettable submission. Unfortunately, as a consequence, the alleged contravention of s.165(a) of the PA needs to be considered as if it remains an issue in dispute between the parties.

[90] Section 165 of the PA states:

> "***165 Unlawful use of premises***
>
> *A person must not use premises unless the use –*
>
> *(a) is a lawful use; or*
>
> *(b) for designated premises – complies with any requirements about the use of the premises in the designation.*"

[91] CPAQ rely only upon subparagraph (a) of s.165. It contends RV accommodation is not a lawful use of the land. There are two means by which a use may be a lawful use under the PA. The first is where s.290 is engaged. The second is where a use falls within the definition of lawful use in Schedule 2. The potential application of each provision requires an examination of the history of the RV accommodation use against relevant legislation, and planning instruments.

[92] The RV accommodation use started in late July 2014. At this time, SPA was in force. The Rockhampton City Plan 2005 was also in force (**2005 Planning Scheme**). For the purposes of the 2005 Planning Scheme, Kershaw Gardens was included in the Public Open Space zone in the North Rockhampton Residential Consolidation Area. In that Zone, the making of a material change of use for the purposes of a Park was exempt development[21]. In July 2014, ss.235(1) and (2) of SPA provided that a development permit was not necessary to carry out exempt development, nor was it necessary for development of this kind to comply with planning instruments, other than a State regulatory provision.

[93] Park was a defined '*Community/Recreation*' use under the 2005 Planning Scheme. The definition was in the following terms:

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21 s.3.3.1 of the 2005 Planning Scheme.

Park	The use of premises for free outdoor public recreation and enjoyment, and possibly also for any or all of the following: (i) provision of a visually pleasant landscape; (ii) maintenance of natural processes and protection of environmentally sensitive areas, including significant vegetation or culturally significant places; or (iii) educational opportunities associated with the recreation or conservation values of the park or area (e.g. an information hut in a National Park). The term includes such ancillary facilities for non-organised park users as sporting and playground equipment, shelters, carparking areas, educational facilities, barbecue and picnic facilities, seating, toilets, safety lighting, kiosks or the like.

[94] The Council does not contend the RV accommodation use was properly characterised as a Park for the purposes of the 2005 Planning Scheme. This is consistent with the evidence of the town planning witnesses, Mr Ovenden and Mr Reynolds. It also accords with my view of the evidence in its application to the above definition. In my view, RV accommodation is not a Park as defined in the 2005 Planning Scheme. It is a use of premises for the purposes of parking caravans and similar vehicles. For reasons already given, this use is not ancillary to the use of the land for a Park as defined.

[95] Further, the reference to 'carparking areas' in the body of the definition above has no application to the RV accommodation use. The same reasoning for this point applies equally, *mutatis mutandis*, to the second paragraph of the definition of Park in the 2015 Planning Scheme. The relevant discussion with respect to this appears at paragraph [67] above. In short, the definition speaks of 'facilities' and not separate 'uses' that serve the purpose of the park. RV accommodation is not a facility that serves the park, rather it is a separate and independent use involving the parking of caravans and similar vehicles.

[96] In July 2014, the definition of '*use*' in SPA was in the following terms:

> "***use**, in relation to premises, includes any use incidental to and necessarily associated with the use of the premises.*"

[97] To satisfy the definition of use, the RV accommodation was required to be 'unavoidably' or 'inevitably' involved in the park use[22]. No party contended this test was satisfied. The evidence did not suggest otherwise.

[98] The RV accommodation use, when started, involved a new use of the land. The new use was, by definition in s.10 of SPA, a material change of use. As to the proper characterisation of the new use, it did not fall within the definition of Caravan/Cabin Park in the 2005 Planning Scheme. In July 2014, the definition of this use was in the following terms:

Caravan / Cabin Park	Any premises used for the parking and/or siting of caravans (with or without annexures), relocatable homes, onsite cabins or tents for the purpose of providing residential accommodation for fee or reward. The term also includes any manager's office and residence, any amenity buildings and any recreation, entertainment, kiosk or other facilities that cater exclusively for the occupants of the Caravan/Cabin Park.

[99] RV accommodation did not fall within the definition above because, whilst it involves premises used for the parking of caravans (and the like) for the purpose of providing residential accommodation, it does so for no fee or reward.

[100] There was no other defined use in the 2005 Planning Scheme that properly characterised the RV accommodation use when it started in July 2014. The use was therefore an undefined use for the purpose of that planning scheme. This was fairly conceded by Mr Ovenden.

[101] The making of a material change of use for an undefined use in the North Rockhampton Residential Consolidation Area in the 2005 Planning Scheme was assessable development, requiring an impact assessable development application. The Council at no stage during the life of the 2005 Planning Scheme obtained a development approval to authorise the carrying out of this assessable development.

[102] The start of the RV accommodation use in late July 2014, being a new use of the land, occurred without the required effective development approval. This contravened s.578(1) of SPA. This provision relevantly provided at the time:

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22 *Boral Resources (Qld) Ltd v Cairns City Council* [1997] 2 Qd R 31, 35 and *Brisbane City Council v Bemcove Pty Ltd* (1998) 104 LGERA 1, [5].

> "***578 Carrying out assessable development without permit***
>
> *(1) A person must not carry out assessable development unless there is an effective development permit for the development.*"

[103] Section 582(a) of SPA was relevant to the ongoing use of the land for the purposes of RV accommodation. This provision states:

> "***582 Offences about the use of premises***
>
> *Subject to subdivision 2, a person must not use premises –*
>
> *(a) if the use is not a lawful use; or...*"

[104] Section 9 of SPA defines lawful use as follows:

> "***9 Meaning of lawful use***
>
> *A use of premises is a lawful use of the premises if –*
>
> *(a) the use is a natural and ordinary consequence of making a material change of use of the premises; and*
>
> *(b) the making of the material change of use was in compliance with this Act.*"

[105] For the purposes of s.9 of SPA, the RV accommodation use was a natural and ordinary consequence of making a material change of use of the land. The material change of use involved the start of a new use, namely an undefined use. It was assessable development for which an effective development permit was required. No such permit was obtained, and the material change of use was not in compliance with SPA. As a consequence of these matters, the continuation of the RV accommodation use from the date of commencement, up to and including 2 July 2017, contravened s.582 of SPA.

[106] An offence against ss.578 and 582 is, by definition, a development offence under SPA.

[107] The history of the RV accommodation use, and an examination of relevant legislative and planning controls is not complete at this point. The 2005 Planning Scheme was repealed, and the 2015 Planning Scheme took effect on 24 August 2015. At this time, SPA was still in force and, for the reasons given above, the RV accommodation use was not a lawful use for the purposes of s.9 of that Act.

[108] Before turning to deal with relevant provisions of the 2015 Planning Scheme, it is relevant to pause to observe section 682 of SPA which states:

> "***682 Lawful use of premises protected***
>
> *(1) Subsection (2) applies if -*
>
> *(a) immediately before the commencement of a planning instrument or an amendment of a planning instrument, the use of premises was a lawful use of the premises; or*

(b) immediately before an existing planning instrument starts applying to land, the use of premises was a lawful use of the premises.

(2) Neither the instrument nor the amendment can –

(a) stop the use from continuing; or

(b) further regulate the use; or

(c) require the use to be changed."

[109] The purpose of s.682 of SPA was to protect lawful uses from the effects associated with the introduction of a new planning scheme. The protection of the provision is extended where subsection (1) is satisfied. The RV accommodation use did not engage this provision. It was not a lawful use of premises prior to the 2015 Planning Scheme taking effect.

[110] For the purposes of the 2015 Planning Scheme, the land is included in the Open space zone. In that zone, the making of a material change of use for Park was self-assessable development in August 2015. Section 236 (1) and (2) of SPA provided at the time that a development permit was not necessary for self–assessable development, but the development must comply with applicable codes in the relevant planning scheme.

[111] Park is a defined use in the 2015 Planning Scheme. I have already dealt with the application of this definition to the RV accommodation use. It does not apply for the reasons given in paragraphs [66] to [68] above. Tourist park is, however, a definition in the 2015 Planning Scheme that properly characterises the use. It provides:

Column 1 **Use**	**Column 2** **Definition**	**Column 3** **Examples include**	**Column 4** **Does not include the following examples**
Tourist park	Premises used to provide for accommodation in caravans, self-contained cabins, tents and similar structures for the public for short term holiday purposes. The use may include, where ancillary, a manager's residence and office, kiosk, amenity buildings, food and drink outlet, or the provision of recreation facilities for the use of occupants of the tourist park and their visitors, and accommodation for staff.	Camping ground, caravan park, holiday cabins.	Relocatable home park, tourist attraction, short-term accommodation, non-resident workforce accommodation.

[112] I am satisfied the RV accommodation use is properly characterised as a Tourist park under the 2015 Planning Scheme. It involves the use of premises to provide for accommodation in caravans for the public for short term holiday purposes. It is uncontroversial that, in the Open space zone, the making of a material change of use for a Tourist park is assessable development for which a development permit is required. The development application for such a permit is impact assessable[23].

[113] The RV accommodation use was not a lawful use when the 2015 Planning Scheme took effect. The 2015 Planning Scheme did not convert the use from unlawful to lawful. The continuation of the use at the time the 2015 Planning Scheme was introduced involved the commission of a development offence. The offence was against s.582 of SPA for the reasons given in paragraph [105] above.

[114] Turning to the PA, it took effect on 3 July 2017. At this time, the 2015 Planning Scheme was in force, and was amended to align with changes in terminology in the PA. One alignment amendment involved changing the categorisation of the making of a material change of use for a Park in the Open space zone. It was changed from self-assessable development to accepted development. Section 44(4) of the PA defines '*accepted development*' as development for which a development approval is not required.

[115] A review of the 2015 Planning Scheme reveals that no material amendments were made with respect to the planning controls applicable to the RV accommodation use. The making of a material change of use for Tourist park in the Open space zone remained assessable development after 3 July 2017.

[116] On 3 July 2017, the offence under s.165(a) of the PA was created. To engage this provision, CPAQ must establish the use of the land was not a lawful use on and from this date.

[117] Section 20C of the *Acts Interpretation Act 1954* (Qld) mandates the act that is made an offence by s.165 of the PA must be committed after 3 July 2017. It is admitted, and established on the evidence, that the Council used premises for the purposes of the RV accommodation use, and the use was a continuing use on and from 3 July 2017. The question is whether the use carried out after 3 July 2017 was a lawful use for the purposes of the PA.

[118] As I have already said, there are two provisions of the PA that determine whether the RV accommodation use was a lawful use on and from 3 July 2017. The first provision is s.290. The second provision is the definition of lawful use in Schedule 2. I am satisfied that neither of these provisions are engaged on and from 3 July 2017. This is so for the following reasons.

[119] First, section 290 of the PA states:

> "***290 Lawful uses of premises***
>
> *To the extent an existing use of premises is lawful when the old Act is repealed, the use is taken to be a lawful use on the commencement.*"

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23 Table 5.4.3.2.

[120] Given the findings in paragraphs [92] to [113] above, I am satisfied CPAQ has established the RV accommodation use was not a lawful use of premises under the repealed SPA. The making of the material change of use contravened s.578 of SPA. The continuation of the use contravened s.582 of SPA. Accordingly, s.290 of the PA is not engaged here.

[121] Second, a lawful use is defined in Schedule 2 of the PA as:

> "***lawful use**, of premises, means a use of premises that is a natural and ordinary consequence of making a material change of use of the premises in compliance with this Act*"

[122] The definition of lawful use has two parts. First, it involves the identification of a use of premises that is a natural and ordinary consequence of making of a material change of use. Second, it requires the material change of use of premises identified to be in compliance with the PA.

[123] The evidence establishes the RV accommodation use constituted a new use of the premises when started. By definition, this was a material change of use under SPA. The continuation of the use in those circumstances is the natural and ordinary consequence of the making of that material change of use, thereby satisfying the first part of the definition of lawful use.

[124] The second aspect of the definition requires an examination of whether the identified material change of use is in compliance with the PA. I am satisfied the making of a material change of use of the land for the RV accommodation use has at no time been lawful. No development approval has ever been obtained by the Council to authorise the start of the use, let alone an approval to regularise it. The start of the new use constitutes assessable development for which the current laws in force require necessary development approvals. Those approvals do not exist. Compliance with the PA cannot be demonstrated.

[125] Accordingly, the continuation of the RV accommodation use is not a lawful use as defined in Schedule 2 of the PA. I am, as a consequence, satisfied the Council has used the land in contravention of s.165(a) of the PA.

What relief should be granted?

[126] I am satisfied CPAQ has demonstrated a development offence (as defined in the PA) has been committed. The offence is a contravention of s.165(a). The power to make enforcement orders under s.180 of the PA is therefore enlivened.

[127] The power to grant enforcement orders is discretionary in nature. Discretionary considerations do not play a part in the outcome of these proceedings. There are no discretionary reasons that militate against granting the enforcement orders sought. The Council did not plead, or persist with any submission to the contrary.

[128] I will grant enforcement orders to bring the identified development offence to an end. The terms of the orders will be as follows[24]:

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[24] The final order will, in addition, need to include the note required by rule 665(3) of the UCPR.

*"**UPON THE COURT BEING SATISFIED THAT** a development offence has been committed, namely a contravention of section 165(a) of the Planning Act 2016*

***It is ordered pursuant to section 180(3) of the Planning Act 2016 that**:*

1. *By 4pm on 15 February 2019, the First Respondent, and its agents servants and contractors, cease the use of land formally described as Lot 230 on SP143262 and Lot 1 on RP619483 (**the Land**) for the purposes of a Tourist Park as defined in the Rockhampton Regional Planning Scheme 2015;*

2. *Upon compliance with paragraph 1, the First Respondent, and its agents, servants and contractors, not resume the use of the Land for the purposes of a Tourist park as defined in the Rockhampton Regional Planning Scheme 2015 in the absence of an effective development permit authorising the making of a material change of use;*

3. *By 4pm on 15 February 2019, the First Respondent is to:*

    (a) *remove signage from the Land identifying that it may be used for the purposes of a Tourist park as defined in the Rockhampton Regional Planning Scheme 2015;*

    (b) *notify, in writing, the Campervan & Motorhome Club of Australia Limited that the existing use of the Land for the purposes of overnight camping by occupants and visitors in recreational vehicles, campervans, caravans and tents is not a lawful use of the Land and has ceased;*

    (c) *publish public notices which advise that the use of the Land for the purposes of a Tourist Park as defined in the Rockhampton Regional Planning Scheme 2015 is not permitted on the Land in the following ways:*

        (i) *in at least one newspaper that circulates generally in the First Respondent's local government area;*

        (ii) *in a prominent location on the First Respondent's website; and*

        (iii) *on the noticeboard of the First Respondent's public office in Bolsover Street, Rockhampton."*

[129] The enforcement orders do not include a requirement for the land to be restored to the condition it was in prior to the commission of the development offence. Nor do the orders require signage to be erected advising the RV accommodation use is unlawful. I was not satisfied that either of these orders should be made. The development offence will, in my view, be addressed by a combination of compliance with the injunctive orders (paragraphs 1 and 2), coupled with compliance with the order requiring the removal of signage that indicates the use is a lawful use of the land.

[130] During the course of oral argument, Mr Loos submitted on behalf of the Council that the operation of the enforcement orders, if granted, should be suspended to enable a development application to be made to regularise the use. The submission was not foreshadowed in the Council's Statement of Facts, Matters and Contentions. Nor was it a submission made in any outline filed on behalf of the Council. The submission was only made in response to a query from the Court as to the time frames that should be stated in any enforcement order, as is required by s.180(7) of the PA.

[131] The proposed suspension of any enforcement order was not an issue in dispute between the parties. I therefore decline to suspend the operation of the enforcement orders at this stage. That said, in setting the time for compliance with the orders, I have fixed a period of nearly three months from the date of the orders. This period is intended to provide an opportunity for the Council to make an application to suspend the operation of the orders under s.181(4) of the PA if it so wishes.

[132] In addition to enforcement orders, the Originating Application seeks a declaration and consequential orders. Mr Loos submitted there is no utility in the declaration sought by CPAQ. This was conceded by Mr Batty on the premise that enforcement orders would be sufficient to remedy the development offence. Given Mr Batty's concession, and given I am satisfied it is appropriate for enforcement orders to be made, I decline to grant the declaration and consequential relief sought by CPAQ under s.11 of PECA.

[133] Finally, the Originating Application seeks an order as to costs. I will hear from the parties with respect to costs.