PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*We Kando Pty Ltd v Western Downs Regional Council* [2018] QPEC 65
PARTIES:	**WE KANDO PTY LTD** (Appellant) v **WESTERN DOWNS REGIONAL COUNCIL** (Respondent)
FILE NO/S:	2276 of 2016
DIVISION:	Planning and Environment Court
PROCEEDING:	Application in pending proceeding
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	21 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2018 and supplementary submissions delivered on 16 November 2018
JUDGE:	Williamson QC DCJ
ORDER:	**1. The Application in pending proceeding filed on 19 March 2018 is dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – where applicant seeks a declaration in an applicant appeal about the proposed use of land for a Truck parking use – where the proposed use is not a use for which approval was sought in the development application the subject of the appeal – whether the proposed use is ancillary to existing lawful uses – whether the proposed use will be lawful – whether the court has power to grant the declaration – whether the discretion should be exercised under s.446 of SPA to treat the application as a fresh proceeding for a declaration.
LEGISLATION:	*Planning Act 2016*, ss. 163, 164, 165, 285, 286, 311 *Planning and Environment Court Act 2016*, ss. 7, 11, 47, 76 *Sustainable Planning Act 2009*, ss.446, 456, 461, 496 *Uniform Civil Procedure Rules 1999*, r.13

CASES:	*Caravan Parks Association of Queensland Ltd v Rockhampton Regional Council* [2018] QPEC 052
	Caltex Oil (Aust) Pty Ltd v Best (1990) 170 CLR 516
	Craig v The State of South Australia (1995) 184 CLR 163
	Firefast Pty Ltd v Council of the City of the Gold Coast [1999] QPELR 200
	Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd (2016) 212 LGERA 411
	Grace Bros v Willoughby Municipal Council (1980) 44 LGRA 400
	Knight v FP Special Assets Ltd (1992) 174 CLR 178
	Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 CLR 672
	Lever Finance Ltd v Westminster London Borough Council [1971] 1 QB 222
	Owners of Shine Kobe Maru v Empire Shipping Co Inc (1994) 181 CLR 404
	Perivall Pty Ltd v Rockhampton Regional Council & Ors [2018] QPEC 46
	Waterman & Ors v Logan City Council & Anor [2018] QPEC 44
COUNSEL:	K Wylie for the Appellant J Lyons for the Respondent
SOLICITORS:	Milne Legal for the Appellant King & Company for the Respondent

Introduction

[1] We Kando Pty Ltd, by its application in pending proceeding filed on 19 March 2018, seeks a declaration about the use of land situated at 27150 Warrego Highway, Baking Board (**the land**). The declaration sought is in the following terms:

> "*A declaration, pursuant to s.456(1)(e) of the Sustainable Planning Act 2009 (Q.) (**SPA**), that the parking of trucks (and associated trailers) on the Site, in terms described in paragraph 4 of the grounds below, is lawful, on the basis that such use is ancillary to the existing lawful uses permitted on the Site, or any of them, described in paragraph 2 of the grounds below;…*"

[2] This declaration is sought by We Kando as interlocutory relief in an applicant appeal commenced under s.461(1)(a) of the *Sustainable Planning Act 2009* (**SPA**). The appeal is against the council's part approval of a development application for the land. The development application sought approval to start four new uses and an environmentally relevant activity.

[3] The four uses proposed are Extractive industry, Storage facility, Accommodation building and Noxious industry. These uses are intended to complement the existing use of the land, which is operated by We Kando as a commercial integrated waste facility.

[4] The council refused that part of the development application seeking approval for the Storage facility and Accommodation building. We Kando has indicated it does not wish to persist with its appeal against the refusal of the Accommodation building. This leaves one question for determination in the appeal: should the council's decision to approve the development application, in part, be changed to permit a material change of use for a Storage facility? If approved, this use would facilitate, inter alia, the parking of trucks and trailers that are associated with existing approved uses.

[5] It is submitted on behalf of We Kando that the purpose of the application before the court is to determine an issue that may bring the appeal to an early end. The issue to be determined is whether the parking of trucks on the land (as particularised in paragraph 4 of the application in pending proceeding) is lawful. It is submitted that the determination of this issue in We Kando's favour will precipitate the end of the proceeding. In this regard, Mr Wylie who appeared for We Kando submitted:

> "*9. Were the Court minded to make the declarations (sic) sought in this application, We Kando's current intention is to discontinue the Storage Use Appeal, such that final orders can be made amending the Extractive and Noxious Industry conditions to reflect those previous (sic) agreed between We Kando and the Council.*"

[6] The use the subject of the application has not commenced. It is a use that is proposed for the land. As I have already said, the proposed use is particularised in paragraph 4 of the grounds of the application filed on 19 March 2018, which states (**Truck parking use**):

> "*4. The Appellant proposes that the parking, on the Land, of trucks and associated trailers be limited to the following matters (**Proposed Truck Parking**):*
>
> *a. Storage, on-site, of trucks and trailers which have delivered waste to the Land;*
>
> *b. Parking of such aforementioned trucks in a prescribed 1.5 Ha area to the immediate north of the powerline easement area;*
>
> *c. Routine servicing of such trucks and their associated trailers; and*
>
> *d. Location of six 'dongas', or relocatable structures, for use for toilets and offices for those persons involved with such aforementioned trucks and trailers.*"

[7] We Kando contends the proposed Truck parking use will be ancillary to the existing lawful use of the land. The existing lawful use is described as a commercial integrated waste facility, which is to be carried out in accordance with four approvals attaching to the land, namely:

(a) a development approval for a material change of use for raw materials recycling and improvement facility, granted 22 July 2005;

(b) a development approval for a material change of use for regulated waste storage facility – evaporation ponds, granted 7 October 2010;

(c) a development approval for a material change of use for public utility (waste landfill site – up to 300,000m^3 per annum), granted 9 February 2017; and

(d) a development approval for a material change of use for public utility (salt storage – up to 630,000m^3), granted 9 February 2017.

[8] Each of the development approvals set out above were in effect on 3 July 2017[1]. The *Planning Act 2016* (**the PA**) applies to each of the approvals as if they had been made under that Act[2].

[9] The application in pending proceeding is opposed by the council. In summary terms, it contends the existing approvals attaching to the land do not authorise the Truck parking use. Central to the council's case is the proposition that a development approval is required to start the Truck parking use on the land because it is assessable development, namely a material change of use. If the council is correct, and the Truck parking use started without a development approval authorising a material change of use, s.163 of the PA would be engaged. This provision of the PA provides it is a development offence for a person to start assessable development without an effective development permit.

[10] The fate of the application in pending proceeding, in my view, turns on three issues: (1) does the court have power to grant declaratory relief in this applicant appeal? (2) should leave be granted under s.446(1) of SPA to permit the application in the proceeding to be treated as if it were an Originating Application, and thereby a fresh proceeding? and (3) whether the Truck Parking use is lawful?

Does the court have power to grant declaratory relief in this applicant appeal?

[11] We Kando relies upon s.456(1)(e) of SPA as the source of the court's power to grant the declaration it seeks. This provision of SPA provides that any person may bring a proceeding in the court for a declaration. There is no such proceeding before the court. This proceeding is an applicant appeal under SPA, which was repealed on 3 July 2017, some eight months before the application before the court was filed. These circumstances raise for consideration a threshold question: does the court have power to grant declaratory relief in this applicant appeal commenced under the now repealed SPA?

[12] The question posed was addressed by We Kando by reference to this court's decision in *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2018] QPEC 46, which dealt with a challenge to the validity of an approval by way of an application in pending proceeding in a submitter appeal. I accept the submission that this decision should not be applied in this case to deny We Kando the relief it seeks. This is accepted because the question examined and answered in *Perivall* by her Honour Judge Kefford is not the same question to be considered in this case.

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1 Being the date the *Sustainable Planning Act 2009* was repealed.

2 ss.286(1) and (3) of the PA.

[13] This case, unlike *Perivall*, does not involve a collateral attack by a submitter against one of many decisions made by an assessment manager during the IDAS process, for which there is no right of appeal. Rather, a relevant question for the court in this case is whether it has power to grant declaratory relief in an applicant appeal under s.456 of SPA in circumstances where: (1) s.456 was repealed on 3 July 2017; (2) there is no transitional provision of the PA providing that s.456 is to continue in force such as to enable new proceedings (seeking a declaration) to be commenced after 3 July 2017; and (3) this application in pending proceeding was commenced in March 2018, some 8 months after s.456 was repealed.

[14] The council's submissions did not address the question posed in paragraph [13] above. Rather, it was submitted on its behalf that the application before the court was '*curious*'. In any event, for the reasons that follow, the jurisdictional question posed in paragraph [13] above is, in my view, answered in the negative.

[15] As has been recognised in two recent decisions of the court[3], this is a court of statutory jurisdiction. Its jurisdiction is defined by s.7 of the *Planning & Environment Court Act 2016* (**the PECA**). This provision states the court has jurisdiction given to it under any Act. The court's jurisdiction in this appeal is derived from SPA and the PA.

[16] The right to commence this appeal was created under SPA, namely s.461(1). That right was exercised by We Kando prior to the repeal of SPA, and prior to the commencement of the PA, which occurred on 3 July 2017. In these circumstances, s.311(2)(a) of the PA is applicable to the appeal. It provides that '*the old Act continues to apply to the proceedings'.* SPA is defined as the old Act in s.285(1) of the PA.

[17] Given SPA continues to apply to the proceeding, it is this Act to which attention must be given to ascertain the court's power to make a declaration in an applicant appeal. Relevantly, this calls for an examination of ss.446, 456 and 496 of SPA.

[18] Section 446 of SPA states, in part:

> "***446 Orders or directions***
>
> *(1) The court may make an order or direction about the conduct of a proceeding it considers appropriate, even though the order or direction may be inconsistent with a provision of the rules.*
>
> *…*
>
> *(3) In deciding whether to make an order or direction, the interests of justice are paramount.*
>
> *…*
>
> *(5) The court or Chief Judge may at any time vary or revoke an order or direction made under this section.*"

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[3] *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2018] QPEC 46 [36] ('*Perivall*') and *Waterman & Ors v Logan City Council & Anor* [2018] QPEC 44 [21].

[19] Section 446(1) of SPA creates a power for the court to make an order or direction '*about the conduct of a proceeding*'. That power does not include a power to make the declaration sought by We Kando. This is so for three reasons. First, the provision does not include a link, or connection to, s.456 of SPA, where an express power to make declarations is provided. Second, a declaration is not an order or direction. They are different types of relief. Third, the declaration sought by We Kando is not about the conduct of the proceeding. The declaration is about the lawfulness of land use, which is substantive in nature. It is a declaration expressly contemplated by s.456(1)(e) of SPA.

[20] Section 446(1) of SPA should not, in my view, be construed to include a power to make a declaration of the kind envisaged in s.456 of SPA. To arrive at a contrary conclusion would require the words '*and declarations*' to be read into the provision[4], and the meaning of the phrase '*about the conduct of a proceeding*' to be stretched beyond its plain and ordinary meaning. There is no statutory context that would require s.446(1) to be construed in a way that permits words to be read into the provision, or alternatively, would require the provision to be given a meaning that is not its plain and ordinary meaning.

[21] In deciding an appeal, s.496(1) of SPA states '*the court may make the orders and directions it considers appropriate*'. Like s.446, there are three reasons why this provision does not found a power for the court to grant the declaration sought by We Kando. First, the provision does not include a link, or connection to s.456 of SPA, where an express power to make declarations is provided. Second, the provision confers a power to make an order or direction. As I have already said, these are different forms of relief to a declaration. Third, the declaration sought by We Kando is about the lawfulness of a land use. The use the subject of the declaration is not a use for which approval is sought in the appeal. It is proposed as a hypothetical alternative to the development application before the court. In this sense, the declaratory relief sought by We Kando is not for the purposes of '*deciding the appeal*' before the court.

[22] I would add to the above there is, in my view, no relevant context in SPA to suggest a '*declaration*' is to be treated as being interchangeable with '*order*' or '*direction*' for the purposes of ss.446 or 496 of SPA. Rather, two parts of s.456 suggest an order and a declaration are different relief under SPA: (1) the heading to s.456, which states '*Court may make declarations <u>and</u> orders*'; and (2) section 456(7), which states the '*court may also make <u>an order about a declaration</u> made by the court*'.

[23] I am conscious that ss.446 and 496 of SPA are statutory provisions that confer a power upon the court, and those provisions do not contain express limitations such as to preclude the power to grant declarations. To construe these provisions subject to a limitation that is not express may, on one view, be contrary to an established principle of statutory interpretation. It is well established that statutory provisions containing a grant of power upon a court are to be construed broadly, and not by reference to unexpressed limitations. This is because the power granted to a court is to be exercised judicially, and in accordance with principle[5].

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4 Compare with s.47(2) of the PECA.

5 *Owners of Shine Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404, 421 and *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 205.

[24] This however needs to be contrasted with a competing principle of statutory interpretation. In *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678 Mason J said:

> "*…It is accepted that when a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications,* ***the general power cannot be exercised to do that which is the subject of the special power****. In Anthony Hordern and Sons Ltd. v. Amalgamated Clothing and Allied Trades Union of Australia Gavan Duffy C.J. and Dixon J. said:*
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> > *"Extensive and unfettered as the authority of the Court of Conciliation and Arbitration to award preference in settlement of a dispute might have been in virtue of its general power, yet, when s. 40 expressly gives a special power, subject to limitations and qualifications, surely it must be understood to mean that the Court shall not exercise an unqualified power to do the same thing.* ***When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.***"
>
> (emphasis added)

[25] If it is accepted, contrary to my view, that ss.446 and 496 of SPA include a power to grant declarations, the powers conferred on the court by those provisions are fairly characterised as general powers. They are not subject to any express limitation or qualification. This can be contrasted with s.456 of SPA, which confers a specific power to grant declarations. The declarations power is subject to two express qualifications: (1) s.456 contemplates that the declaratory relief may be sought in a proceeding (other than an appeal) specifically brought for that purpose; and (2) the court's power is limited to making declarations about one of five stated matters contained in subsections (1)(a) to (e) inclusive.

[26] The contrast between the general powers and the specific declarations power, in my view, is illustrative of the circumstances that engage the principle referred to in *Leon Fink*. The relevant principle requires the general powers to yield to the specific power. That is to say, the specific power (s.456) excludes the operation of the general powers (ss.446 and 496), which might have otherwise been relied upon as founding the power to grant a declaration. It is my view this represents the correct approach to be adopted to the proper interpretation of ss.446 and 496 of SPA[6].

[27] We Kando did not rely upon ss.446 or 496 as the source of power for the relief it seeks. Rather, it relies upon s.456(1)(e) and (6) of SPA, which states:

> "***456 Court may make declarations and orders***
>
> *(1) Any person may bring a proceeding in the court for a declaration about any of the following -*
>
> *…*

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6 Where it is contended ss.446 and 496 of SPA confer a power on the court to make a declaration.

> *(e) the lawfulness of land use or development;*
>
> …
>
> *(6) The court has jurisdiction to hear and decide a proceeding for a declaration about a matter mentioned in subsection (1).*"

[28] Section 456 of SPA is of no assistance to We Kando.

[29] The provision was repealed on 3 July 2017. As a consequence, its continued operation must be provided for in the transitional provisions of the PA, or the PECA. There are two relevant transitional provisions to which I was referred, namely s.311 of the PA, and s.76 of the PECA. Neither of these provisions provide for s.456 to continue after 3 July 2017 as a power to grant a declaration in an existing merits appeal under SPA. Further, these provisions do not contemplate that new proceedings may be commenced in the court under s.456 of SPA after 3 July 2017. Put simply, s.456 of SPA has been repealed, save for limited circumstances. Those limited circumstances do not apply to this case having regard to s.311 of the PA, and s.76 of PECA.

[30] If, contrary to my view, it is assumed that s.456 of SPA continues with full force and effect as a consequence of a transitional arrangement under the PA, there is a further difficulty confronting We Kando.

[31] Section 456 created a right for any person to bring a proceeding for a declaration. The plain meaning of the phrase '*bring a proceeding*' involves a party taking a step to start a new proceeding (other than an appeal) in the court. This does not encompass a circumstance where a declaration is sought in an application in pending proceeding. So much is confirmed by s.456(8). This subsection deals with the service of a proceeding for declarations on the chief executive. It requires a person who '*starts*' a proceeding under s.456 to give notice to the chief executive officer on the day it starts.

[32] We Kando's application is an application in pending proceeding. It is not a proceeding in its own right, nor does it start a proceeding for the purpose of s.456(1). Reliance on s.456 of SPA in these circumstances is, as a consequence, misguided.

[33] The failure by We Kando to identify the correct source of the court's power for the relief it seeks can be explained by reference to paragraph 5 of Mr Wylie's written submissions. He submitted:

> "*5. As this proceeding commenced on 13 June 2016, the repealed Sustainable Planning Act 2009 (SPA) continues to apply.*"

[34] The submission quoted above includes a footnote that has been omitted. The footnote cites s.311(2)(a) of the PA as authority for the proposition advanced. An examination of this provision reveals the submission was incorrect. SPA does continue to apply, but not without qualification. Section 311(2)(a) provides SPA will continue to apply '*to the proceedings*'. The proceedings are those that engage s.311(1)(a). It is this applicant appeal commenced under s.461 of SPA that engaged s.311(1)(a) of the PA.

[35] No submission was made on behalf of We Kando as to how s.456 of SPA '*continued to apply*' in a proceeding commenced under s.461. A submission to this effect would not have been persuasive in any event given the power to grant relief in an applicant appeal is contained in, inter alia, s.496. As I have already said, this provision does not include a power to grant a declaration under s.456.

[36] Accordingly, whilst SPA continues to apply to this proceeding, the right of appeal exercised does not include a right to seek declaratory relief under ss.446, 456 or 496 of SPA. The right to seek relief under s.456 of SPA has been lost. This is not cured by any transitional provision of the PA or the PECA. The court, as a consequence, does not have power to grant declaratory relief in this appeal under s.456(1)(e) of SPA.

Should leave be granted under s.446(1) of SPA to permit the application to be treated as if it were an Originating Application for a declaration under s.456 of SPA?

[37] As an alternative position, it was submitted on behalf of We Kando that any jurisdictional defect in its application for a declaration may be cured by an order under s.446(1) of SPA. More particularly, the court was invited to make an order that the application in the proceeding be treated as if it were commenced by way of an Originating Application for declarations under s.456 of SPA.

[38] This court has recently described alternative relief of this kind as being '*akin to a request for an order under r 13 of the Uniform Civil Procedure Rules 1999*'[7] (**UCPR**). This rule of the UCPR applies if the court considers a proceeding started by claim should have been started by application, and may more conveniently continue as if started by application. The relief that may be granted under r.13 of the UCPR is discretionary in nature, as is the relief that may be granted under s.446 of SPA.

[39] I am not satisfied that an order should be made permitting the application to be treated as an Originating Application for declaratory relief under s.456 of SPA. There is no transitional provision of the PA that preserves a right to commence fresh declaratory proceedings under that provision after 3 July 2017. To permit the application to be treated as a fresh proceeding commenced under s.456 of SPA in such circumstances would, in my view, impermissibly permit We Kando to do indirectly that which cannot be done directly. Such a course is prohibited by the repeal of SPA, coupled with the absence of transitional provisions in the PA or the PECA providing for the continued operation of s.456[8].

[40] Further, there is no utility in allowing the application to proceed as a fresh proceeding, be it under s.456 of SPA, or s.11 of the PECA. The proceeding lacks utility because: (1) the court has no jurisdiction to grant the relief under s.456 of SPA; and (2) even assuming the court did have jurisdiction to grant the declaration sought, the proceeding would fail for the reasons set out in paragraphs [41] to [70] below.

Is the Truck Parking use lawful?

[41] The purpose of this application is for We Kando to obtain a declaration that confirms it is authorised to commence, and carry on, the Truck parking use without first having to obtain a development permit for a material change of use for this purpose.

[42] We Kando contend the Truck parking use may commence absent a development approval because it will be lawful. The basis for this contention is succinctly articulated in the declaration it seeks, which states the use will be lawful:

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7 *Perivall* [2018] QPEC 46 [67].

8 *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516, 522-523.

> *"…on the basis* ***that such use is ancillary to the existing lawful uses*** *permitted on the Site, or any of them, described in paragraph 2 of the grounds below'.*

[43] The declaration sought, and submissions made on behalf of We Kando, invite the court to ask and answer this question: Is the Truck parking use lawful because it is ancillary to existing lawful uses permitted on the land? This is the wrong question, and if asked and answered, would lead the court into error[9].

[44] The question posed by We Kando incorrectly assumes the lawfulness of the use is determined by whether it is ancillary to an existing use. This does not resolve whether the Truck parking use can be started, and continued, in the absence of an effective development permit. Rather, the correct question to be asked and answered is: whether the Truck parking use, if started and continued on the land, would give rise to the commission of a development offence under ss.163, 164 and 165 of the PA? It is these provisions of the PA that will inform whether the proposed future use of the land will be lawful. Neither party addressed these provisions of the PA in this application.

[45] Before turning to deal with the correct question to be asked and answered, I pause to observe that the parties argued the application on the basis that the real controversy between them turned on whether the development approvals relied upon by We Kando should be construed subject to the definition of '*use*' in the PA, or alternatively SPA. We Kando contended for the PA definition. The council contended for the SPA definition.

[46] The submissions made by both parties assumed it was permissible to construe the existing development approvals by reference to an extrinsic document, namely SPA or PA. No reference was made to relevant authority in support of this assumption[10].

[47] To the extent it is necessary to dispose of this matter of controversy between the parties, it is my view that the lawfulness of the Truck parking use is to be judged in this case by reference to the PA. This is so for two reasons: (1) there is no suggestion the existing approvals contain an express prohibition against the use commencing on the land; and importantly, (2) the use is intended to be commenced and continued under the PA. Whether a future use of the land will give rise to the commission of a development offence is to be answered by reference to the law in force at the time the use is intended to commence, and continue. To focus on the repealed SPA in this context, has the potential to cause the wrong question to be asked and answered.

[48] Mr Lyons submitted it would be an error to examine the lawfulness or otherwise of the Truck parking use by reference to the PA. To do so, he submitted, would require the PA to be given retrospective effect (which is not clearly provided for in the Act), and confer an unintended benefit on approvals to which s.286(3) of the PA applies.

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9 *Craig v The State of South Australia* (1995) 184 CLR 163, 179.

10 For example, no reference was made to *Fraser Coast Regional Council v Walter Elliot Holdings* (2016) 212 LGERA 411, 421-422 [26] for the purposes of establishing why it is permissible to construe each of the extant approvals by reference to SPA or PA as extrinsic material.

[49] The '*benefit*' to which Mr Lyons referred is to one particular change in the legislation, namely the change to the definition of '*use*' in the PA[11]. That definition provides a lower threshold for subordinate uses in comparison to its counterpart in SPA.

[50] I reject these submissions.

[51] In the first instance, s.286(3) of the PA makes it clear that the approvals to which it applies are to be treated as given under the PA. This, in my view, is a strong indicator that the starting point for the examination of the rights conferred under such an approval is the PA. Further, and in any event, this is a case about a future use of land that is proposed to start, and continue under the PA. The SPA does not authorise this development to start, or continue. It is the PA that will determine whether a development offence would be committed. Applying the PA to the Truck parking use in this context does not give the Act retrospective effect.

[52] To the extent the change in legislation (from SPA to the PA) brings with it a benefit for approvals to which s.286(3) of the PA applies, the PA does not confer an unbridled opportunity for a land owner, or occupier, to start a new ancillary use of land. The Act contains at least two relevant constraints in this regard.

[53] First, a material change of use approval may be granted subject to conditions, including a condition requiring development to proceed in accordance with, or generally in accordance with an approved plan, or plans. The introduction of the new definition of '*use*' in the PA does not displace such a condition. A condition of this nature, if imposed on an approval, must be complied with where: (1) a new ancillary use is proposed for land; and (2) an existing approval to which s.286(3) of the PA applies is relied upon to authorise that new ancillary use. A failure to comply with conditions, including a condition requiring development to be generally in accordance with an approved plan, would constitute a development offence under s.164 of the PA, and be unlawful.

[54] Second, it should also be remembered that the introduction of a new ancillary use must not give rise to new assessable development for which an approval is required. Section 163 of the PA provides it is a development offence to carry out assessable development in the absence of all effective development permits. This offence provision requires a new ancillary use of land to be examined to ensure it does not give rise to new assessable development, namely a material change of use. A material change of use includes '*a material increase in the intensity or scale of the use of the premises*'. The Truck parking use is intended to occupy an area of 1.5 ha. Whether this will give rise to a material change of use as defined in the PA will be a question of fact and degree.

[55] Returning to the central issue to be determined, the Truck parking use, in my view, will be lawful where it is established that ss.163, 164 and 165 of the PA would not be engaged if the use started, and continued under the PA. I will deal with each of these provisions in turn.

[56] Section 163(1) of the PA states:

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[11] The definition in the PA is intended to be more flexible than its counterpart in SPA. It has a lower threshold for subordinate uses, being '*ancillary*' uses rather than '*incidental to and necessarily associated with*' the primary use. See the discussion in *Caravan Parks Association of Queensland Ltd v Rockhampton Regional Council & Anor* [2018] QPEC 052, particularly at paragraphs [11] and [12].

> "***163 Carrying out assessable development without permit***
>
> *(1) A person must not carry out assessable development, unless all necessary development permits are in effect for the development.*"

[57] '*Development*' is defined in the PA to mean, inter alia, '*making a material change of use of premises*'. A '*material change of use*' is defined in Schedule 2 of the PA in the following terms:

> "***material change of use**, of premises, means any of the following that a regulation made under s 284(2)(a) does not prescribe to be minor change of use –*
> *(a) the 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.*"

[58] We Kando's case focused on the first limb of the definition of '*material change of use*'. It contended the Truck parking use was not a new use of the land, but rather ancillary to existing approved uses. This submission was founded upon the definition of '*use*' in the PA, which states: "*for premises, includes an ancillary use of the premises.*"

[59] I accept, as was conceded by Mr Lyons, the Truck parking use would be ancillary to the existing approved uses on the land, assuming the PA definition of '*use*' applied. This means the new ancillary use would not be a 'new use' of premises for the purposes of the first limb of the definition of material change of use. I am satisfied the first limb of the definition of material change of use in the PA would not be engaged by the proposed Truck parking use.

[60] That is not, however, the end of the matter. It is necessary to consider all aspects of the definition of material change of use in the PA, which comprises three separate limbs. It was necessary for We Kando to prove that each limb of the definition was not engaged in this case. In particular, this required an examination of whether the Truck parking use would give rise to a material increase in the intensity or scale of the existing approved uses. I was not referred to any evidence that would support a finding that the third limb of the definition would not be engaged in this case. The failure to do so, in my view, means We Kando cannot discharge the onus.

[61] As a consequence, I am not satisfied that We Kando has established the Truck parking use would not give rise to assessable development requiring a development permit for the purposes of s.163 of the PA. It has therefore failed to establish that the Truck parking use will be lawful having regard to s.163 of the PA.

[62] Section 164 of the PA states:

> "***164 Compliance with development approval***
>
> *A person must not contravene a development approval.*"

[63] Each of the existing approvals relied upon by We Kando are granted subject to conditions, including conditions requiring the approved material changes of use to be carried out in accordance with approved plans. The court was not directed to the approved plans in submissions, nor any condition requiring compliance with approved plans. In particular, I was not referred to any plan that approves a Truck parking area of 1.5 ha in the location proposed. That is not however fatal.

[64] It has been recognised by courts for many years that a condition of approval requiring development to be carried out generally in accordance with approved plans does allow for some deviation in the final form of development[12]. The need for flexibility in the comparison between approved plans and final plans of development requires no explanation[13]. There is, however, a limit to the extent of flexibility that may be enjoyed in this context.

[65] The extent of flexibility has been examined in many cases in this court. This has occurred in the context of the '*generally in accordance with*' test. The authorities make it clear that the extent of flexibility contemplated by the test will turn on the facts and circumstances of each case. The issue is one to be examined by reference to the town planning consequences of the departure from the approved plans.

[66] We Kando did not address whether the Truck parking use would comply with the conditions of its existing approvals. More particularly, it did not refer to any evidence that would support a finding that the proposed Truck parking use would be generally in accordance with approved plans forming part of any, or all, of the existing approvals for the land. As a consequence, We Kando has failed to establish that the Truck parking use will be lawful having regard to s.164 of the PA.

[67] Finally, s.165 of the PA states, in part:

> "***165 Unlawful use of premises***
>
> *A person must not uses premises unless the use –*
>
> *(a) is a lawful use; or…*"

[68] Central to the operation of s.165 of the PA is the identification of a *'lawful use*'. This is a defined term in Schedule 2 of the PA, which states:

> "***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.*"

[69] It can be seen from the definition above that its application, in any given case, is not determined by whether a use is ancillary. The plain meaning of the definition requires it to be demonstrated that a use satisfies two things: (1) the use is a natural and ordinary consequence of making a material change of use of premises; and (2) the material change of use of premises complies with the PA.

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12 *Lever Finance Ltd v Westminster London Borough Council* [1971] 1 QB 222, 230 and *Grace Bros Pty Ltd v Willoughby Municipal Council* (1980) 44 LGRA 400, 406-407.

13 *Firefast Pty Ltd v Council of the City of Gold Coast* [1999] QPELR 200, 202 Line D.

[70] We Kando did not address the two elements of the definition identified above. Further, it did not submit how, and why, the Truck parking use was a lawful use as defined. We Kando has therefore failed to establish that the Truck parking use will be lawful having regard to s.165 of the PA

[71] Given the matters set out in paragraphs [41] to [70] above, I am not satisfied the Truck parking use would be lawful.

Conclusion

[72] For the reasons set out above, the application in pending proceeding filed on 19 March 2018 is misconceived.

[73] The application is dismissed.