PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Room2Move.com Pty Ltd v Western Downs Regional Council* [2019] QPEC 34
PARTIES:	**ROOM2MOVE.COM PTY LTD** **(ACN 149 039 805)** (Appellant) **v** **WESTERN DOWNS REGIONAL COUNCIL** (Respondent)
FILE NO:	2255/18
DIVISION:	Planning and Environment Court
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	26 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20, 27, 28 and 29 May 2019
JUDGE:	Williamson QC DCJ
ORDER:	**Orders made in accordance with paragraph [129] of these reasons for judgment.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – where appeal against decision to refuse an extension application under s.87 of the *Planning Act 2016* – whether the currency period for a development approval for non-resident workforce accommodation should be extended – whether there is a need for the development approval – whether the development approval would cut across the respondent's forward planning.
LEGISLATION:	*Planning Act 2016*, ss. 45, 60 86, 87 & Schedule 2 *Planning and Environment Court Act 2016*, ss. 43 and 45 *Sustainable Planning Act 2009*, Schedule 1.
CASES:	*Ausco Modular Pty Ltd v Western Downs Regional Council & Anor* [2017] QPEC 58 *Bunnings Building Supplies Pty Ltd v Redland Shire Council & Ors* [2000] QPELR 193 *Ecovale Pty Ltd v Gold Coast City Council* [1999] 2 Qd R 35 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573

Yu Feng Pty Ltd v Brisbane City Council & Ors [2007] QCA 382

COUNSEL: Mr CL Hughes QC and Mr M Batty for the appellant
Mr JG Lyons for the respondent

SOLICITORS: McCullough Robertson Lawyers for the appellant
McInnes Wilson Lawyers for the respondent

Introduction

[1] On 13 April 2018, the appellant made an application[1] to the Council to extend the currency period for a development approval. The extension sought was for a period of 12 months.

[2] The development approval the subject of the extension application was granted in October 2013, and attaches to land situated at Laycock Road, Miles (**the land**). The approval authorises the making of a material change of use to '*establish non-resident workforce accommodation (1,292 accommodation units)*'. It was granted subject to conditions, some of which have been changed during the life of the approval. The changed conditions require the development to be carried out in 23 stages, with all stages completed within 4 years of the date the use commences. A further condition requires the use to cease within 15 years of its commencement. The currency period for the development approval was due to expire on 15 April 2018.

[3] On 23 May 2018, the Council resolved to refuse the appellant's extension application. This decision was communicated by way of decision notice dated 29 May 2018, which stated six reasons for the refusal, including the following:

> *"The applicant has not demonstrated that overriding community need exists for the development to establish on a site where the use is considered significantly inconsistent with the zoning.*"

[4] This is an appeal against the Council's refusal. The appellant bears the onus, and must establish the appeal should be upheld[2].

The disputed issues

[5] The nature of this appeal is a hearing anew[3]. The primary issue to be determined is whether the extension to the currency period should be granted. The appellant contended it should be extended having regard to 13 discretionary factors[4]. The factors given the most emphasis by the appellant can be reduced to the following propositions, namely:

(a) the appellant has provided an explanation for not starting the development authorised by the approval;

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[1] Which is defined as an '*extension application*' in s.86 of the *Planning Act 2016* (**PA**).
[2] *Planning and Environment Court Act 2016* (**PECA**), s.45(1)(a).
[3] PECA, s.43.
[4] Ex.27, paragraph 3.

(b) significant onsite works have been carried out, and related approvals obtained for the purpose of implementing the approval;

(c) there is a town planning, community and economic need for the proposed development, which can be met in circumstances where there will be no unacceptable impacts;

(d) the proposed development would be an interim use of the land; and

(e) the proposed development complies with Council's current planning scheme, which took effect in June 2017, some 3 years after the approval.

[6] The Council resisted the appeal. It joined issue with the two factors set out in subparagraphs [5](c) and [5](e) above. With respect to (c), it joins issue only in part. The Council does not contend the development would have unacceptable impacts. It does however contend: (1) consistent with its reasons for refusal, there is no current need for the proposed development; and (2) the approval, if extended, would cut across its forward planning for the land, and locality. The Council did not take issue with the factors in subparagraphs (a), (b) and (d) above, which was a sensible position to adopt. Consistent with the Council's position, I was comfortably satisfied on the evidence that the appellant established each of these matters to the requisite standard.

[7] The Council's case primarily focussed on the issue of need. Mr Lyons who appeared for the Council submitted the question of need '*lies at the heart'*[5] of the appeal. It was submitted the issue was determinative of the appeal. In oral submissions, Mr Lyons said[6]:

> "*…I started the case by saying I thought the main issue in this was need, and whoever won need would win the case in terms of whether the extension should be granted. That remains my primary submission.*"

[8] The degree of importance the Council attached to the issue of need is explained, in part, by the introduction of its 2017 planning scheme. This planning scheme includes an overriding need test that did not form part of the superseded planning scheme, which was in force when the development approval was granted in October 2013.

[9] At the time the development approval was granted, the Murilla Shire Planning Scheme 2006 was in force. The land was included in the Rural zone for the purposes of that planning scheme. Non-resident workforce accommodation was not a defined use in the 2006 planning scheme. It made no provision for uses of this character. In June 2017, nearly four years after the approval was granted, the Council adopted a new planning scheme for the entirety of its local government area, known as the Western Downs Planning Scheme. For the purposes of that planning scheme, the land is included in the Medium impact industry zone. In that zone, a number of defined uses are identified as being '*inconsistent development*. One such use is non-resident workforce accommodation[7]. This is a defined use in the 2017 planning scheme. It is neither an industrial use, nor Medium impact industry activity for the purposes of that planning scheme.

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[5] Ex.26, paragraph 23(e).

[6] T3-16, Line 36 to 38.

[7] Ex.10. p.162.

[10] The 2017 planning scheme does not turn its cheek against non-industrial uses on land in an industry zone. Non-industrial uses are anticipated in the Medium impact industry zone, provided they support medium impact industry uses, and do not compromise the long term use of the land for industrial purposes[8]. This is not the only test applying to development that involves the introduction of a non-industrial use into the Medium impact industry zone.

[11] Development that is not consistent with the purpose and intent of the Medium impact industry zone code may still be approved where the following overall outcome of the zone code is satisfied[9]:

> "*Where development is **not** consistent with the purpose and intent of the Medium impact industry zone, overriding community need will need to be demonstrated as well as valid planning justification provided as to why the proposed use cannot be reasonably established in a more appropriate zone.*"

[12] This overall outcome, which applies to development that is not consistent with the purpose and intent of the zone, has two distinct elements.

[13] The first element requires the demonstration of an overriding community need. This was referred to in the Council's reasons for refusal. It contends there is no current need for the development. This provides the underlying rationale for the importance the Council attaches to the issue of need in this appeal.

[14] The second element requires an applicant to demonstrate that a proposed use cannot be reasonably established in a more appropriate zone. The Council did not identify the '*more appropriate zone*' in which the approved development could be located. Rather, it focussed on the issue of need. This, in my view, was a sensible position to adopt given: (1) that Non-resident workforce accommodation is inconsistent development in every zone in the 2017 planning scheme; and (2) there is no suggestion that the proposed development will give rise to any unacceptable impacts; and (3) as is discussed later in these reasons, the development was approved by the Council in circumstances where it took into account its future planning for the land, and surrounding locality, which contemplates the land, and its surrounds, being developed for industrial purposes.

[15] The Council did not attach the same level of importance to the second part of its case, which alleges the development will cut across the future planning for the land and locality. Mr Lyons submitted this point does not of itself '*carry the day*'[10]. Rather, the point was relied upon '*in combination*' with the issue of need to resist the appeal.

[16] Against the background of the above, there are three issues to be determined between the parties, namely: (1) is there a need for the development approval? (2) will the development approval cut across the Council's forward planning? and (3) should the discretion to extend the currency period be exercised in the appellant's favour?

8 Ex.10. p.160, Medium impact industry zone code, s.6.2.2.2 Purpose.
9 Ex.10, p.161, overall outcome (18).
10 Ex.26, paragraph 29.

Is there a need for the development approval?

[17] The Council submits there is no need for an approval that provides 1,292 accommodation units for non-resident workers in Miles[11]. The submission assumes the following propositions are established on the evidence, namely: (1) the demand for non-resident workforce accommodation in Miles comes from major projects in the region, including energy and construction projects; (2) at the time the appellant's development approval was granted in October 2013, the demand for non-resident workforce accommodation had peaked, coincident with the CSG Boom; (3) the CSG Boom has ended, and demand for non-resident workforce accommodation in Miles is low, and can be met by an existing comparable facility in Miles as well as a combination of existing short term accommodation facilities, rental housing, and accommodation on mining leases; and (4) the outlook for demand for non-resident workforce accommodation in Miles is expected to deteriorate rather than improve.

[18] To examine each of the above matters, I had the benefit of evidence from two economists, namely Mr Duane (called by the appellant) and Mr Brown (called by the Council). The evidence comprised a comprehensive economic need joint report, two further statements of evidence, and the oral evidence of both experts.

[19] Having regard to the body of economic evidence, I accept the first and second point underpinning the Council's need case (set out in paragraph [17] above) are established.

[20] The first point was established as a matter of agreement in paragraph 102 of the economic need joint report. Mr Brown and Mr Duane agreed the demand for non-resident workforce accommodation comes from major projects in the region, including energy and construction projects.

[21] The second point was established by a concession made by Mr Duane in cross-examination[12]. He readily conceded the approval was granted at a time colloquially referred to as the '*CSG Boom*'. Mr Duane's concession was consistent with empirical data contained in the economic need joint report. That data includes Chart 2, which graphically illustrates the non-resident workforce population in Miles over an 8 year period. It shows the population peaked in 2013 at 275 persons, being the same year the development approval was granted. The population had increased to this number, starting from a base line of 80 persons in 2010, increasing to 110 persons in 2011, and to 195 persons in 2012[13].

[22] I accept that it is also correct to say, as the Council submits, the CSG Boom has ended. Mr Duane fairly conceded in cross-examination that economic conditions have changed since the approval was granted. He said demand for non-resident workforce accommodation fell away sharply after the time the approval was granted in 2013[14]. The reduction in demand for workers accommodation in Miles after 2013 was low, but Mr Duane points to evidence to suggest it has improved markedly in recent times.

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11 Ex.26, paragraph 16(b), 23(e), 25 and 27.
12 T2-13, Line 43 to T2-14, Line 2.
13 Ex.5, p.15.
14 T2-14, Lines 4 to 5 and Ex.6, p.8, paragraph 4.2.

[23] Mr Duane relies upon a recent improvement in economic conditions[15]. An indicator of the level of improvement is reflected in Chart 2 of the economic need joint report. As I said above, this chart graphically shows the non-resident worker population in Miles. In particular, it shows that, for the year 2018, this population increased, and peaked at 201 persons. This population is not as large as it was during the CSG Boom (275 persons), but has increased. This is demonstrated by way of contrast with the 2015 calendar year population. In 2015, the non-resident workforce population in Miles was 105 persons. From 2015 to 2018, the population of non-resident workers in Miles doubled in number.

[24] Whilst the CSG Boom has, on the evidence, ended, the economists expressed different opinions about the current and ongoing demand for non-resident workforce accommodation in Miles, and how that demand (if any) may be met. It is these considerations that underpin the third and fourth points identified in paragraph [17] above. Given the difference in opinions, it is necessary to examine the evidence of Mr Brown and Mr Duane in some detail.

[25] Mr Brown expressed the opinion there was no economic need for the approved development having regard to a number of considerations. One of the material considerations relied upon involved an assessment of where, and how much demand may be generated in, and around, Miles for the approved development.

[26] The economists agreed the demand for non-resident workforce accommodation comes from major projects, including energy and construction projects. Against the background of this point of agreement, the economists identified an '*area of influence*' for the approved development[16]. This included a '*primary*' area extending half way between Miles and Chinchilla, and up to 50 kilometres around Miles to the north, south and west[17]. Within this area of influence, the economists identified the location of a number of known major projects. They agreed on the number and location of the projects, but disagreed as to their status. That is to say, they disagreed about the '*prospect*' the identified projects would proceed, or create demand for the approved development[18].

[27] Mr Brown was far from optimistic that any of the major projects identified in the area of influence would proceed, let alone create demand for non-resident workforce accommodation in Miles. It was his view that '*the prospects for many of the projects…to proceed or create demand for the subject proposal are limited*'[19]. In reliance upon a 2018 publication prepared by the Queensland Government Statistician's Office, he said the demand outlook is likely to be consistent with current levels, but declining over the short term (next 5 years)[20]. He expanded upon this opinion at paragraph 153 of the joint report where he said[21]:

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15 Ex.6, p.8, paragraph 4.2.
16 Ex.5, p.43, paragraph 105.
17 Depicted on Map 3 of Ex.5, p.44.
18 Ex.5, p.46, paragraph 107.
19 Ex.5, p.46, paragraph 107.
20 Ex.5, p.53, paragraph 118.
21 Ex.5, p.63.

"*The outlook for the non-resident population within Western Downs generally is best described as deteriorating or flat. Within the context of the study areas identified for the subject proposal, projects are either indefinitely deferred, contingent on development of other indefinitely deferred projects, facing a challenging development pathways* (sic) *or include their own workers accommodation facilities (e.g. Arrow Surat Gas Project). There is little evidence that might suggest the outlook for the workers accommodation that is not part of a specific project is positive in the short term.*"

[28] The opinion expressed by Mr Brown with respect to the future demand for workers accommodation in Miles, and the surrounding region was founded, in part, upon his interpretation of publicly available data, including government publications containing future population projections. Without seeking to oversimplify his analysis, it is clear the Mr Brown's evidence was consistent with some, not all, of the data published by the Queensland Government Statistician's Office. In a report published by that organisation in 2018, it projected that the non-resident workforce on shift in the Western Downs in the period 2018 to 2024 <u>for existing projects</u> would decline from 2,140 to 1,850 persons. These figures do not however make provision for projected growth in non-resident population arising from projects that are approved, but yet to 'reach financial close'. If growth of this character is taken into account, a different picture to the one Mr Brown adopted emerges. The non-resident workforce in the period 2018 to 2024 is projected to increase from 2,320 to 2,520 persons. In the year 2024, the difference in the projections equates to 670 persons[22].

[29] In addition to an examination of historical data and forward population projections, Mr Brown examined each of the identified major projects to ascertain the likelihood that any of the projects would create demand for non-resident workforce accommodation in Miles in the short term. Mr Brown was pessimistic that any of the identified major projects would generate a demand for such facilities. His pessimism was founded on a range of information sources, including media releases[23], newspaper articles[24] and publicly available documents[25]. It was also founded on undisclosed information said to support an '*understanding*'[26] that Mr Brown had about the status of a number of projects.

[30] To illustrate the significance of the '*deteriorating demand*' for non-resident workforce accommodation, Mr Lyons submitted there was a relationship between the level of demand for non-resident workforce accommodation in Miles, and the provision of facilities that are expected to be provided in accommodation of this kind. Given the low level of demand, he submitted there was a genuine risk the beneficial features of the approved development may be elusive, and never provided[27].

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22 Ex.5, p.52, Table 10.
23 Ex.20 and 22.
24 Ex.16.
25 Ex.5, p.47, paragraph 107(b).
26 Ex.5, p.48, paragraph 107(e).
27 Ex.26, paragraph 14(g).

[31] More particularly, it was submitted that non-resident workforce accommodation typically provide a number beneficial features sought by organisations who utilise accommodation of this kind. The beneficial features include training rooms, first aid areas, gyms and entertainment areas. The approved plans for the development make provision for these very facilities. The point made on behalf of Council was that these facilities will not be provided until stage 10 of the development.

[32] This position is consistent with the conditions of the development approval. By stage 10 of the development, 508 accommodation units would have been constructed and operational without those beneficial facilities. The Council points out there is a genuine risk demand will never reach a level where stage 10 proceeds, with the consequence that the beneficial facilities contemplated in that stage are never provided in the development.

[33] Returning to Mr Brown's evidence, there is one further feature I wish to touch upon, which relates to the opinion he expressed about how the demand, if any, for non-resident workforce accommodation in Miles can be met absent the approved development. Mr Brown was of the opinion that any future demand could be met in one of four ways: (1) by the sole remaining workers accommodation facility in Miles, which has a capacity of about 200 rooms; (2) by existing hotels and motels in Miles that provide a total of 191 rooms for visitors and tourists staying for a period up to 3 months; (3) in local houses, rented by employers and described as staff housing; and (4) by the provision of workers accommodation on mining tenements, which occurred in the region during the resources boom.

[34] Mr Duane was more optimistic than Mr Brown.

[35] In Mr Duane's opinion there is a need for the development approval. Like Mr Brown, this opinion was expressed having regard to a range of considerations, including what Mr Duane considered was an improvement in economic conditions. His view in this regard was supported by Chart 2 of the economic need joint report.

[36] Chart 2 of the economic need joint report graphically illustrates the recent ups and downs in the population of non-resident workers in Miles. It shows that, in 2018, this population had substantially increased, thereby reflecting an increase in demand for non-resident workforce accommodation. The population increased from 105 persons in 2015, to 120 persons in 2016, and to 210 persons in 2018.

[37] Mr Duane's optimism was consistent with the positive market outlook as expressed by a director of the appellant, Mr Czislowski, who said the appellant anticipated there would be an increase in demand for non-resident workforce accommodation in and around Miles over the next five years[28]. This anticipation was based upon Mr Czislowski's industry experience, which includes providing non-resident workforce accommodation in regional areas to meet the demands of major resource and construction projects.

[28] Ex.8, p.8, paragraph 35 to 39; T1-26, Line 30 to T1-27, Line 2.

[38] Mr Duane's opinion was also informed by a detailed examination of a range of economic considerations. Both he and Mr Brown commenced their analysis from essentially the same point, that is, they both defined an area of influence for the development and identified the known major projects in that area. Despite this common starting point, the economists reached different conclusions about current and future demand for the approved development. This was, in part, because Mr Duane (unlike Mr Brown) did not appear to put significant weight on the assessment undertaken to assess the '*prospect*' that any given project would generate a demand for non-resident workforce accommodation. Mr Duane said it was very difficult to project ongoing demand from major projects. This was consistent with a point of agreement in the economic need joint report. It was agreed that '*it was impossible to say with any degree of accuracy'* what the precise demand will be for non-resident workforce accommodation in Miles.

[39] I prefer Mr Duane's evidence about the current and likely future demand generated for non-resident workforce accommodation in Miles. In simple terms, he said identifying the level of future demand is a difficult task, which the experts agreed cannot be calculated with precision. It was the presence of known major projects in and around Miles that satisfied Mr Duane there was a current and anticipated ongoing demand for non-resident workforce accommodation. I accept this evidence.

[40] Despite the point of agreement in the joint report referred to in paragraph [38] above, it appeared Mr Brown approached the issue of demand on the footing that it could be validly assessed with a level of precision. He did so by examining the major projects in the defined area of influence to determine whether there was a genuine prospect that one, or more, of those projects would generate a demand for non-resident workforce accommodation. This assessment assumed considerable importance in the formation of Mr Brown's opinion. It also assumed considerable importance in the written submissions filed on behalf of the Council. The assessment led Mr Brown to conclude, and the Council to submit, that future demand for non-resident workforce accommodation in Miles was low.

[41] Whilst I accept it was relevant for the economists to have regard to an assessment of '*prospects*' for each identified major project in the area of influence, the outcome of that assessment must be approached with a high degree of caution. As the evidence reveals, the outcome of an assessment of '*prospects*' is a matter of speculation. It is not founded upon matters of economic theory, principle or practice. Rather, it is an exercise that involved Mr Brown and Mr Duane examining limited information, to determine, in their view, '*prospects*'. As I have said, the information examined included media reports and forming '*understandings*' obtained by the experts from undisclosed sources. Information of this kind is entitled to little weight. It is, in my view, too far removed from the primary source to be treated as sufficiently reliable to express a strong view, one way or the other, about '*prospects*'.

[42] I do not intend the above to be taken as being critical of the economists. I have no doubt they were attempting to assist the Court with the best information they had available to them. The poor state of the information is a reflection of how difficult it is to obtain reliable information about major projects, and their status. It was acknowledged that there is a high level of secrecy that surrounds the status of major projects.

[43] Once it was established that major projects create demand for non-resident workforce accommodation in Miles, and there are a number of planned major projects conveniently located to Miles, Mr Duane's assessment proceeded to consider the appropriate supply and demand balance to be struck in that context. Mr Duane's opinion was that the appropriate balance involved an excess of supply relative to demand.

[44] At paragraph 125 of the economic need joint report Mr Duane said:

> "*...supply should always be in-excess of demand such that there is occupancy well below 100% to accommodate for potential peaks which could be either expected or unexpected, and to provide for choice of location and operator. These are important elements to the worker accommodation village market within the Miles region.*"

[45] The opinion expressed by Mr Duane assumes the demand for non-resident workforce accommodation can spike, which may or may not be predicted. This is supported by s.3.2.2.2(3) of the Council's 2017 planning scheme. This provision, which is contained within a section of the Strategic plan dealing with[29] the '*most significant issues expected to define future development in the region*', and the '*key matters the planning scheme as a whole seek to address*', states:

> "*The likely impacts of the rapidly expanding resources section on the Western Downs are highly dependent on the location, magnitude and operation of individual mining and petroleum projects. Notwithstanding , the flow-on effects of this sector are* ***likely to result in demand spikes in non-resident workforce accommodation*** *and supporting services, including industry, retail and commercial activities.*" (emphasis added)

[46] It was pointed out by counsel for the appellant that Mr Duane was not alone in his view that supply should be well in excess of demand to accommodate expected and unexpected peaks. My attention was drawn to evidence that Mr Brown had given in this Court about the need for a non-resident workforce accommodation facility in Bowen. In that case, Mr Brown was supportive of the need for such a facility, and he stated in his evidence[30]:

> "*In relation to the workers accommodation villages, supply should always be in-excess of demand such that there is occupancy well below 100% to accommodate for potential peaks which could be either expected or unexpected, and to provide for choice of location and operator.*"

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29 Ex.10. p.37, s.3.2.2(1).

30 Ex.25, p.36, paragraph 69.

[47] Mr Brown was reminded of this evidence during cross-examination[31]. After an initial unconvincing attempt to quarantine its effect to the specific circumstances of the case where the evidence was given, Mr Brown ultimately conceded the inevitable. Consistent with his earlier evidence to this Court, he conceded that supply for non-resident workforce accommodation should always be well in excess of demand to cater for peaks, which may or may not be predicted. I was left far from persuaded that Mr Brown's assessment, and ultimate opinion in this case was consistent with, or took into account this concession.

[48] I accept Mr Duane's evidence that the supply of non-resident workforce accommodation in Miles should always be well in excess of demand. This opinion is supported by the following features of the evidence that were not subject to challenge, nor were they controversial.

[49] First, Mr Duane's opinion was supported by Mr Brown's concession.

[50] Second, it was supported by evidence, which established that, for many years, the supply of non-resident workforce accommodation in Miles has well exceeded demand. This balance changed recently as a consequence of the closure of a number workers accommodation facilities in Miles. The balance, at present, does not favour an excess of supply relative to demand.

[51] The economic need joint report reveals that, at the peak of the so-called CSG Boom in 2013, the number of non-resident workers in Miles was 275 persons. Quite apart from any existing facilities, in 2013 the Council granted two approvals for non-resident workforce accommodation in Miles, namely[32]: (1) an approval for land at McNulty Street, Miles providing 405 rooms; and (2) an approval for land at Hookswood-Pelham Road, Miles providing 629 rooms. These two approvals alone meant the supply of non-resident workforce accommodation in 2013 included at least 1,034 rooms for 275 persons (3.76 rooms per non-resident worker). This balance was altered in favour of supply in the years that followed because of the drastic reduction in the population of non-resident workers in Miles. In contrast, there is, at present, only one workers accommodation facility in Miles with about 200 rooms. The non-resident population in Miles for the year 2018 was 210 persons[33]. This supply level equates to less than 1 room per non-resident worker in Miles. The approved development, if extended, would return that balance to levels where there is a comfortable excess of supply.

[52] Third, the evidence established there were clear economic and social planning reasons to support an excess of supply of non-resident workforce accommodation relative to demand. As I have already said, there appeared to be little controversy between Mr Duane and Mr Brown that the nature of the demand for workers accommodation is difficult to predict. In their joint economic need report they agreed '*it is impossible to say with any degree of accuracy what the precise demand will be for non-resident worker accommodation in Miles over the next five years*'[34]. The extent to which demand is unpredictable, in part, provides the rationale for the view that occupancy rates should be well below 100%. The other reason is the need to ensure known economic and social consequences that may flow from insufficient supply are avoided.

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31 T2-29, Line 42 to T2-30, Line 20.
32 Ex.5, p.32, paragraph 77.
33 Ex.5, p.15, Chart 2.
34 Ex.5, p.53, paragraph 118.

[53] I am satisfied having regard to the evidence of Mr Duane and Mr Powell that an insufficient supply of non-resident workforce accommodation in a town like Miles has the potential to give rise to known, and serious economic and social issues. The central issue is one relating to local housing affordability, and is recognised in the Council's 2017 planning scheme. Section 3.2.2.1(3) of the Strategic plan states:

> "*Fly-in/fly-out (FIFO), drive-in/drive-out (DIDO) non-resident temporary workers may relocate to the region on a temporary basis. Accommodation for these workers is and can be met by the current accommodation providers in the region. It is necessary to ensure that sufficient accommodation options are available for non-resident temporary workers given that housing affordability can become an issue for people in lower low* (sic) *socio-economic brackets should non-resident temporary workers reside in dwellings in residential areas*."

[54] It was Mr Duane's evidence that when major projects are committed, the construction process can commence within a short period of time. This creates a small window for a peak in demand to be recognised, and responded to. If it is assumed, as is the case in Miles, there is insufficient capacity in existing facilities to accommodate the increased demand created by a new project, alternative sources of accommodation need to be considered. This is unlikely to include a new large accommodation facility to take up the demand. The time taken to obtain a planning approval to authorise such a facility is too slow to respond within the window of additional demand. The result being that investment in new accommodation would lag investment in construction, and would not be responsive to the need.

[55] During high periods of demand, such as experienced in Miles in 2013, large increases in rental housing prices occurred because there was substantial demand created by major projects for accommodation, coupled with insufficient non-resident workforce accommodation options. This also resulted in an increase in house prices, with consequential social impacts on low socio-economic members of the community. The increase in house prices, and weekly rental values, ultimately impacted on access to housing. Large increases in house prices and rents leads to division in places such as Miles, with existing residents priced out of the market.

[56] All of the discussion to this point about Mr Duane's evidence has focussed on the demand side of the economic need equation. In relation to supply, Mr Duane and Mr Brown expressed different views. As I have already said, Mr Brown suggested the demand, if any, for non-resident workforce accommodation in Miles can be met in one of four ways, which are identified in paragraph [33] above. This included a suggestion that the demand, if any, could be met in existing hotels, motels, rental housing and on-site tenement camps. Mr Duane disagreed.

[57] Mr Duane's opinion is simply stated and, in my view, accords with a practical and common sense approach. He says that non-resident workforce accommodation serves a different market, with different requirements to the market that is served by hotels, motels and rental housing. I accept this evidence. It is undoubtedly correct. The differences between a workers camp and a hotel/motel are substantial, both in physical and operational terms. Whilst Mr Brown sought to downplay these differences as '*preferences*' of employers, they are nonetheless differences.

[58] I would also add that hotels and motels are different in a planning sense, as is recognised by the Council's 2017 planning scheme. They are separately defined to non-resident workforce accommodation. They are different uses, regulated in different ways.

[59] Each of these differences were recognised by this Court in the context of a large workers camp located at Chinchilla[35]. I note the Council was a party to that appeal and contended, unsuccessfully, that the need for non-resident workforce accommodation could be met in existing short term accommodation facilities, such as hotels and motels.

[60] I also reject the suggestion that the demand, if any, for non-resident workforce accommodation can be met on mining tenements, as occurred during the CSG Boom. The Council's case, and Mr Brown's evidence, ignores that this type of accommodation was provided in the past because of a lack of non-resident workforce accommodation in towns like Miles. It was not provided as an alternative in its own right. It was provided as a matter of necessity.

[61] The Council's reliance upon the provision of non-resident workforce accommodation on mining tenements to meet future demand was, in any event, surprising given two matters. First, as is obvious, accommodation of this nature would be provided outside of Miles. This outcome appears to be contrary to what is anticipated by the Council's future planning. The 2017 planning scheme encourages non-resident workers to contribute to the community by, inter alia, locating in designated centres[36]. This outcome has a recognised social and economic benefit for centres, such as Miles. Second, the suggestion was contrary to the preponderance of evidence. The prevailing trend for organisations that require non-resident workforce accommodation is to favour larger facilities located in towns. Those facilities are conducted by specialist operators. This is in preference to those organisations operating self-managed facilities on mining tenements. The primary reason for the preference is clear enough - the provision of workers accommodation is not a miner's core business[37].

[62] Mr Duane's evidence was not limited to rebutting Mr Brown's contention that the demand, if any, for non-resident workforce accommodation could be met in the way suggested at paragraphs 156 and 157 of the economic need joint report. It is clear from Mr Duane's evidence that he relied upon the paucity of supply of comparable facilities in Miles to conclude there is a need. The current supply of non-resident workforce accommodation in Miles comprises only one existing facility, which offers about 200 rooms[38]. Unlike the approved development, this is not a large non-resident workforce accommodation facility.

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35 *Ausco Modular Pty Ltd v Western Downs Regional Council & Anor* [2017] QPEC 58 at [44], [46] and [59].

36 Ex.10. p.41, s.3.3.2.1(3).

37 T1-26, Line 25; Ex.5, paragraph 83.

38 Ex.5, p.34, Table 5 and Ex.6, p.8, paragraph 4.1, 1st bullet point.

[63] In circumstances where there is only one non-resident workforce accommodation facility in Miles, Mr Duane made a simple, but important point: a significant increase in demand for non-resident workforce accommodation could not be accommodated by the only existing facility in Miles[39]. I accept Mr Duane's evidence in this regard, which takes on particular force once it is appreciated that the increase in demand to which he refers does not have to be the equivalent of a boom. An increase in demand could not be accommodated even if it was assumed that only one of the major projects identified on Map 3 of the economics joint report was to proceed, and generate a significant uplift in demand for non-resident workforce accommodation.

[64] I also accept Mr Duane's evidence about the state of the existing market in Miles for non-resident workforce accommodation. His evidence establishes there is an absence of competition and choice for facilities of this kind in Miles. The proposed development, if granted an extended currency period, would increase choice and competition in circumstances where there presently is none. This point was conceded by Mr Brown[40].

[65] Despite his concession, Mr Brown appeared to give little, if any, weight to the absence of competition in Miles. To do so, in my view, undermined the reliability of his evidence. To give the matter little, if any, weight had the consequence that Mr Brown ignored a matter this Court has long recognised is an indicator of need. This Court has recognised for many years that an increase in competition and choice in circumstances where none exists is an indicator that development is fulfilling a need[41].

[66] In the conclusion section of the economic need joint report, Mr Duane at paragraph 145 said:

> "*..there is need for the subject development to operate in part as a workers accommodation facility due to the fluctuating nature of the mining industry and resources/energy sector, as well as the servicing and growth of major projects resulting in peak periods of demand that are difficult to predict. These peak periods of demand should be accommodated for…*"

[67] For the reasons given above, I accept Mr Duane's conclusion set out above.

[68] Mr Duane's conclusion does not of itself mean there is an '*overriding community need*' for the proposed development as envisaged by the Council's 2017 planning scheme.

[69] The various provisions of the Council's 2017 planning scheme calling for the demonstration of an '*overriding community need*' are not prescriptive. The provisions do not identify how such a need may be demonstrated. This, in my view, puts the test into a similar category as the '*overwhelming need*' test prescribed in the superseded Brisbane City Plan 2000. This test was considered by the Court of Appeal in *Yu Feng Pty Ltd v Brisbane City Council & Ors* [2007] QCA 382 (***Yu Feng***).

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39 Ex.6, p.8, paragraph 4.1, 1st bullet point.

40 T2-38, Line 30 to 35.

41 *Bunnings Building Supplies Pty Ltd v Redland Shire Council & Ors* [2000] QPELR 193, 198 [21].

[70] Williams JA described the phrase '*overwhelming need*' as being in the nature of a '*motherhood statement*'. He said the factors that may constitute an overwhelming need will vary enormously. In particular, he held there would be an infinite variety of facts that could impact on the decision whether or not there was an overwhelming need. The relevant facts are not limited to an examination of demand and supply considerations[42]. The range of considerations applicable will include matters that are both qualitative and quantitative in nature.

[71] In my view, the observations made by Williams JA in *Yu Feng* equally apply to the '*overriding community need*' test prescribed in the Council's 2017 planning scheme.

[72] Is there an overriding community need in the circumstances of this case?

[73] The assessment for this question starts from the premise there is an economic need for the development approval. This represents a good start to the assessment, the force of which is only enhanced once it is appreciated that: (1) the proposed development will increase choice and competition in a market where none presently exists; and (2) it is common ground the need can be met by the approved development absent any unacceptable impacts.

[74] These matters, taken in combination with the following, satisfy me the appellant has demonstrated an overriding community need as referred to in the Council's 2017 planning scheme, particularly in overall outcome (18) of the Medium impact industry zone code.

[75] First, the Council's most recent statement of planning intent, published in June 2017, recognises there is a planning need to provide for the larger forms of permanent and temporary non-resident workforce accommodation in Miles. Section 3.3.2.1(3) of the Strategic plan states:

> *"Chinchilla, Miles and Wandoan are the focus for permanent and temporary non-resident worker accommodation and take advantage to* (sic) *the proximity to current and future resource sector activities in the district and the established urban service networks. Larger forms of permanent and temporary non-resident worker accommodation are predominantly located in Dalby, Chinchilla and Miles to minimise the social and economic impacts on other centres."*

[76] From a planning perspective, it is unsurprising Miles would be a focal point for non-resident workforce accommodation. The 2017 planning scheme designates Miles a District Centre[43], having a specialist function as a regional service hub[44]. This is in no small part due to its proximity to major transport corridors and resource projects[45].

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42 *Ecovale Pty Ltd v Gold Coast City Council* [1999] 2 Qd R 35, 46-47.
43 Ex.10, p.41, s.3.3.2.2.
44 Ex.10, p.41, s.3.3.2.1(2).
45 Ex.10, p.41, s.3.3.2.1(4)

[77] Second, the present supply of non-resident workforce accommodation in Miles does not meet the Council's stated planning intent for the town. At present, larger forms of this type of accommodation are to be provided in this District Centre. Mr Brown conceded that the only existing accommodation facility in Miles is not a large facility[46]. It is not sufficiently large to meet present demand, nor any spike in demand. The proposed development is a larger form of non-resident workforce accommodation facility and would meet the stated planning intent. As a staged development, it would be well placed to respond to any increase in demand, be it small or large.

[78] Third, it was Mr Brown's evidence that non-resident workforce accommodation is, in effect, a '*mitigation strategy*'. It is a strategy applied where major projects are located in areas with small resident labour markets. At paragraph 154 of the economic need joint report, Mr Brown said that non-resident workforce accommodation seeks to mitigate inflation in local accommodation and housing markets, which is recognised in s.3.2.2.1(3) of the 2017 planning scheme. This provision is extracted at paragraph [53] above.

[79] The importance of non-resident workforce accommodation in Miles was made clear by the economists at paragraph 63 of their joint report, which records the following point of agreement:

> "*In summary, it can be seen that there is little supply for residential housing within the Miles Market, due to the lack of population growth generally over a long period of time. This means that when major infrastructure projects are occurring, house and rental prices increase significantly without the opportunity to bring other accommodation online quickly.* ***In this type of market, worker accommodation facilities are very important****.*" (emphasis added)

[80] Against the background of this point of agreement, the lack of large non-resident workforce accommodation facilities in Miles is pause for concern. The supply, comprising only one facility, is insufficient to guard against the adverse impacts recognised in s.3.2.2.1(3) of the 2017 planning scheme. It is this provision which contains an acknowledgement of the mitigation strategy referred to by Mr Brown in his evidence.

[81] The position with respect to supply of non-resident workforce accommodation in Miles materially improves if the currency period for the approved development is extended. This, as a consequence, is a matter of public interest and is supportive of the development approval remaining on foot. As a staged approval, the appellant will be able to respond in a timely way to the demand for non-resident workforce accommodation in Miles. In doing so, it will also provide choice in terms of facilities, and an operator. This, in turn, adds to competition. These economic benefits are matters in the public interest. They can be achieved absent any unacceptable economic and amenity impacts.

[82] The Council sought to diminish the appellant's need case by suggesting there is a genuine risk the beneficial features of the approved development may never be provided[47]. This assumes the facilities provided in the development will first appear in stage 10, after more than 508 rooms have been established on the land.

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[46] T2-34, Lines 7 to 10.

[47] Ex.26, paragraph 14(g).

[83] The risk raised by the Council is remote having regard to the evidence of Mr Czislowski. He confirmed the facilities about which the Council was concerned could be provided in advance of stage 10. I accept this evidence because:

(a) the development approval does not restrict the appellant from providing the facilities prior to stage 10 of the development;

(b) the facilities could be provided as part of stage one of the development given it will include the construction of the building pad where these facilities are to be provided as part of stage 10; and

(c) the kitchen and dining hall for the entire development is to be constructed in stage 1. As Mr Czislowski confirmed in his oral evidence, the kitchen and dining facility will be of such a size that, in the early stages, there will be ample space to accommodate a gym and entertainment area prior to the commencement of stage 10.

Does the approval cut across the Council's forward planning?

[84] The Council contends the development approval cuts across its forward planning for the land and locality, which is earmarked for industrial development under the 2017 planning scheme. This point was not relied upon by the Council as a reason for refusal in its own right. Mr Lyons submitted the point, in isolation, '*does not carry the day*'.

[85] I agree with Mr Lyons. The point does not carry the day. This is because, contrary to the Council's case, the development approval will not cut across the forward planning intent for the land and locality.

[86] As I have already said, the land is included in the Medium impact industry zone under the 2017 planning scheme. That zone is one of a number of zones that implement a broader planning strategy for Miles. At the core of the strategy is the designation of Miles as a District centre. It is intended to function as a service hub. To support this function, a substantial bank of land has been identified as being suitable for a range of industrial purposes, accommodating varying levels of impact. The land allocated for industrial purposes in the 2017 planning scheme in Miles is equivalent to 50 years of supply[48].

[87] The Council has recently resolved to amend the application of its industrial strategy to the land. It has resolved to remove the land from the Medium impact industry zone, and include it in the High impact industry zone. This foreshadowed amendment does not alter the overarching planning strategy for Miles.

[88] The proposed development will not cut across the Council's planning strategy with respect to industrial development in Miles. Nor will it cut across the proposed amendment to the zoning of the land. This is because: (1) the approved development will be an interim use, and will not alienate the land for industrial purposes; (2) in supply terms, the land represents a small fraction of the 50 year supply of industrial land in Miles, meaning its use for the approved development will not give rise to any land supply issues; (3) the approval requires the land to be developed in a way that will facilitate its use for industrial purposes in due course; and (4) the development approval was conditioned by the Council to guard against reverse amenity impacts.

48 Ex.5, p.58, paragraph 142.

[89] With respect to point (3) above, the approved development will, on the evidence, leave a positive legacy. It will result in the land being improved by operational works for roadworks, stormwater, water infrastructure and sewage infrastructure[49]. The roadworks will also include an intersection and rail level crossing upgrade that will benefit the land, and broader locality[50]. Further, the implementation of the development approval has already resulted in a number of external services being connected to the land, namely telephone, power and water. I am satisfied that each of these elements will contribute to the land, in the longer term, being used for industrial purposes.

[90] With respect to point (4) above, it is clear from the development approval, and its history, the Council considered the potential for reverse amenity impacts. The Council officer's report recommending approval, in part, dealt with this very issue.

[91] The issue was raised in an adverse submission made during the public notification period. It asserted the use was incompatible with adjacent future industrial uses[51]. The officer's report stated in response to the issue:

> "*…The site and surrounding lots are located in a "Future Industrial Area" under the draft Western Downs Planning Scheme, Strategic Map 1.1 Settlement Pattern (currently in public notification). Although this document is in draft form, it does give some weight in the assessment process of the proposed development and needs to be taken into consideration.*
>
> *Buffers on the northern, western and southern boundaries 10 metres in width are conditioned to help mitigate potential noise pollution and provide amenity to the residents. Further, bedroom windows are conditioned to be double glazed to help mitigate any existing and potential noise emissions.*"

[92] The reverse amenity mitigation measures referred to in the Council officer's report are reflected in conditions of the development approval. In particular, the conditions of approval require[52] a 10m setback to Laycock Road; a 15m setback to side boundaries; 5-10m of the setback area is to be landscaped; and windows are to be double glazed.

[93] In the context of an allegation that the approved development will cut across Council's forward planning, I note paragraph 144 of the economic need joint report. In that paragraph, Mr Brown expressed concern that the approved development could sterilise surrounding land for industrial purposes. The basis for his concern was as follows:

> "*While this might not be significant in terms of the remaining land supply, the subject site and any impacted area would represent that part of the southside Medium impact zone which is closest to trunk infrastructure. Hence, approval could force industrial development further away from trunk infrastructure services unreasonably adding to the cost of development.*"

[94] I do not accept Mr Brown's evidence about sterilisation. His opinion in this regard represents no more than an assertion. It was not supported by any economic analysis or costings, as would be expected to establish the serious contention raised by him.

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49 These works were approved by the Council in September 2018.
50 Ex.4, p.14, paragraph 24.
51 Ex.18, p.27.
52 Ex.3, paragraph 64.

[95] Further, the assertion does not sit comfortably with other unchallenged parts of the evidence. There is an unchallenged body of evidence about the works required to facilitate the development of the land. Those works will involve the improvement of trunk infrastructure that will benefit the surrounding locality, and be carried out at the appellant's expense. To suggest the development, which is limited in life and required to undertake trunk infrastructure works, will sterilise surrounding land in an economic sense is, in my view, unsubstantiated.

[96] For these reasons, I am satisfied the approved development will not cut across the Council's forward planning for the land, or locality. It is an interim use that will, in due course, facilitate the land being given over to a purpose that is consistent with the Council's forward planning.

Exercise of the discretion under s.87 of the Planning Act 2016

[97] The nature of the appeal before the Court is a hearing anew[53]. In such an appeal, the Court hears the matter afresh on fresh material[54], and is empowered to exercise the same discretion conferred on the assessment manager at first instance. In this case, the discretion to be exercised is a power to assess and decide an extension application under s.87 of the PA. This type of application is not a development application as defined in Schedule 2 of the PA.

[98] A '*development application*' is defined in Schedule 2 of the PA as meaning an application for a development approval. This does not include an extension application, which is a different species of application. It is separately defined in Schedule 2. The definition of '*extension application*' calls up s.86(1) of the PA, which states:

> "*A person may make an application (an* ***extension application****) to the assessment manager to extend the currency period of a development approval before the approval lapses.*"

[99] The assessment and decision making framework for an extension application is prescribed in s.87 of the PA. It was common ground that ss.87(1) and (2) of the PA jointly confer a broad discretion on the assessment manager (and this Court on appeal) to assess and decide an extension application. I agree.

[100] Section 87(1) of the PA states:

> "*When* ***assessing*** *an extension application, the assessment manager may consider any matter that the assessment manager considers relevant, even if the matter was not relevant to assessing the development application.*" (emphasis added)

[101] The assessment manager (and this Court on appeal) in assessing an extension application may have regard to '*any matter it considers relevant*'. The breadth of the assessment includes '*matters*' that were irrelevant to the assessment of the original development application. An example of such a matter is an applicant's personal circumstances.

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53 s.45 of PECA.

54 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573, 597 [57].

[102] The approval granted by the Council in October 2013 was the subject of impact assessment. Any future application for the approved development would also require impact assessment under the PA. Evidence going to the personal circumstances of an applicant was irrelevant to the assessment and decision making process under the *Sustainable Planning Act 2009*[55] for an impact assessable application, which was in force when the Council decided to grant the approval in October 2013. Evidence of this character is also irrelevant to the assessment of an impact assessable development application under s.45(5)(b) the PA.

[103] An extension application is a different proposition to a development application. As was the case here[56], evidence of an applicant's personal circumstances may be required to explain why development was not started before an approval lapses. I regard such evidence as relevant to the assessment of an extension application. I also regard the explanation given by the appellant here, and the reasons underpinning it, as relevant to the assessment of its extension application, even though the explanation was, in part, founded upon matters of '*private economics*' or '*personal circumstances*'.

[104] Section 87(2) of the PA requires the assessment manager (and this Court on appeal) to decide the extension application in one of three ways: (1) give the extension sought; or (2) refuse the extension sought; or (3) extend the currency period for a period that is different from the extension sought. The power to '*decide*' the extension application is subject to one requirement. Irrespective of which way the final exercise of the discretion falls, the assessment and decision making function must be performed in a way that advances the purpose of the PA[57]. Save for this requirement, the power to decide an extension application is expressed in broad terms.

[105] Against this statutory background, I now turn to consider the exercise of the discretion.

[106] The appellant advances 13 discretionary reasons in support of granting the extension. I have reduced the most significant of those reasons to the matters set out at paragraph [5] of these reasons for judgment. Having regard to paragraph [5], and the reasons for judgment which follow it, I am satisfied the appellant has established each of the following matters, namely it has:

(a) provided a credible and adequate explanation for not starting the development authorised by the approval;

(b) started significant onsite works and obtained related approvals to facilitate the start of the development;

(c) demonstrated there is a town planning, community and economic need for the proposed development, which can be met on the land with an absence of unacceptable impacts; and

(d) demonstrated the proposed development is an interim use of the land in the sense it has a life limited by a condition of the approval, thereby avoiding the alienation of the land from its intended purpose under the 2017 planning scheme.

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55 Definition of '*grounds*' in Schedule 1 of the Act.

56 The appellant's explanation for not starting the development included the inability to secure a funding facility for the project. (Ex.8, p.5, paragraph 25).

57 s.5(1) of the PA.

[107] Each of the above matters favour granting the extension sought, being a period of 12 months.

[108] In addition, the appellant contended there was a further reason in support of granting the extension. It contended the development complies with the applicable regional plan, and 2017 planning scheme.

[109] The Council accepts the development approval would advance some of the objectives of the regional plan[58]. It says this is of little relevance given the 2017 planning scheme appropriately reflects the regional plan. Whilst I do not agree that this is a question of relevance, but rather a matter of weight, I agree the development would advance some of the broadly stated objectives in the regional plan. This attracts little weight given, as the Council contends, the regional plan is reflected in the 2017 planning scheme. The more important matter to be considered is the consistency of the approval with the 2017 planning scheme.

[110] I am satisfied the appellant has demonstrated the approved development is consistent with important planning objectives expressed in the 2017 planning scheme. This is not to suggest that I have assessed the development (with the benefit of evidence) to determine whether it complies with each and every provision of the 2017 planning scheme. It was unnecessary for me to do so. Neither party suggested it was required in the circumstances. I agree with that approach given this is, after all, an extension application, and not an application for a development approval.

[111] The provisions of the planning scheme that were most important in this case were contained in the Strategic plan and Medium impact industry zone code.

[112] A review of the Strategic plan reveals it encourages development of the kind approved in Miles. The Council did not suggest otherwise. This encouragement is given to achieve a number of objectives expressly stated in the planning scheme. One of those objectives involves the provision of a mitigation strategy to avoid the social and economic consequences known to occur where there is a peak in demand for non-resident worker accommodation, and that demand cannot be accommodated.

[113] Miles is earmarked by the planning scheme for larger forms of non-resident workforce accommodation. The proposed development falls within this category of development, and will contribute to meeting the underlying mitigation strategy recognised in the Strategic plan. As a consequence, I am comfortably satisfied, for the purposes of an extension application, the proposed development is consistent with the Strategic plan.

[114] At first blush, the zone code provisions are more problematic for the approved development. The development is inconsistent development in the Medium impact industry zone. This is not of itself fatal. It needs to be read with the statement that follows the table of inconsistent development for the zone, which states:

> "*Development listed as an inconsistent use can be considered on its merits where it reflects the purpose and intent of the planning scheme.*"

[115] The above provision of the zone code calls for the development to be considered against the purpose and intent of the planning scheme.

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58 Ex.26, paragraph 23(h)(i).

[116] The evidence of the town planning witnesses was directed, in part, to whether the approved development complied with the purpose and overall outcomes of the Medium impact industry zone code. These provisions anticipate non-industrial uses in the zone, subject to meeting certain qualifications. The relevant qualifications are contained in the following provisions of the zone code, which state:

> "***6.2.2.2 Purpose***
> *...*
> *It may include non-industrial and business uses that support Medium impact industry uses where they do not compromise the long term use of the land for industrial purposes.*"

And:

> "*The overall outcomes sought for the Medium impact industry zone are as follows:*
> *...*
> *(2) Other non-industrial uses occur where they are ancillary to or directly support the industrial functions of the zone. Office and direct sales are only established where ancillary to an industrial activity on the site.*"

[117] I am satisfied the development approved will not compromise the long term use of the land for industrial purposes. This is so for the reasons set out in paragraphs [85] to [92] above. This point was also conceded by the Council's town planning witness, Mr Perkins[59]. Compliance was therefore demonstrated with the first of two provisions set out above.

[118] Overall outcome (2) of the zone code contemplates that non-industrial uses occur where they are ancillary to, or directly support the industrial function of the zone. It was not suggested by the appellant that the approved development is an ancillary use. Rather, it contended the use would directly support the industrial function of the zone.

[119] A valiant attempt was made to establish the use would directly support the function of the zone. Whilst I was not persuaded this is so, the significance of the issue is materially diminished once overall outcome (18) of the Medium impact industry zone code is taken into account. This overall outcome is set out at paragraph [11] above, and anticipates that non-industrial uses may occur in the zone where, inter alia, an overriding community need is established. I am satisfied the appellant has demonstrated compliance with this overall outcome.

[120] In the light of paragraphs [112], [113], [117] and [119] above, I am satisfied the appellant has demonstrated the approved development complies with material aspects of the 2017 planning scheme, which serve to highlight the public interest would be well served by allowing the approval to remain on foot. This is a strong factor that favours granting the extension requested. It is compelling when combined with the other factors dealt with at paragraph [106] above.

[121] There is one further matter I consider relevant to the exercise of the discretion under s.87 of the PA, which favours granting the extension sought.

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[59] T1-53, Line 16 to 21.

[122] Whilst the discretion to assess and decide an extension application is expressed in broad terms, the exercise of that discretion should, in my view, be informed by, inter alia, a point of context that can be easily overlooked. That context relates to the underlying rationale for an extension application.

[123] A development approval, and the right to carry out the assessable development it authorises is not a right that, once granted, can be exercised in perpetuity. It is a right that can be lost[60]. It will be lost if the development approval lapses at the end of a defined currency period. A phrase that was coined many years ago to capture this legislative intention was: '*use it, or lose it*". Once an approval lapses, a fresh application and new development approval is required where there remains an intention to proceed with the development. There is a reasonable expectation that the subsequent application and decision making process would involve considerable public and private expense.

[124] Section 86 of the PA, in my view, is clear recognition by the legislature of circumstances where no town planning purpose is served by development repeating the statutory assessment and decision making process simply because the approval which authorises it has, or will lapse. It is a vehicle that serves the wholesome purpose of avoiding the public and private expense associated with the development application and approval process, where, on balance, no town planning purpose would be served by it.

[125] This context informs the exercise of the discretion under s.87 of the PA. It invites the assessment manager (and this Court on appeal) to ask itself this question: is there a town planning imperative for the development, and its approval, to be the subject of a fresh assessment and decision under the PA?

[126] Mr Lyons submitted on behalf of the Council there was such a town planning imperative. In oral submissions he conceded[61] the only imperative arising on the Council's case was one relevant to the issue of need. For reasons already given, I do not accept that need in this case establishes a planning imperative for the development to be subjected to a fresh development application process. The evidence establishes there is a proven need for the development. Whilst the nature or strength of the demand that underlies that demonstrated need has changed over time, no planning purpose would be served by an examination of this issue in the context of a development application. There was, and remains a town planning and community need for the development.

[127] The question posed in paragraph [125] is, in my view, answered in the negative in this case. This is because: (1) the development approved, and its conditions, do not give rise to a planning issue that was not otherwise considered by the Council at first instance; (2) the new planning scheme adopted by the Council in 2017, some three years after its first assessment of the development, is supportive of the approved development; (3) the evidence comfortably establishes there is no public opposition to the development that may have provoked a new submission that was adverse to the development[62]; and (4) the approved development will not, if implemented, give rise to any unacceptable impacts that require consideration over and above the Council's assessment in 2013, or later by virtue of the permissible change requests made by the appellant under the *Sustainable Planning Act 2009*.

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60 As is contemplated by s.85 of the PA.

61 T3-17, Line 20 to 24.

62 Mr Perkins at T1-57, Line 19 to 20 conceded there was an '*absence of public opposition*' to the proposed development.

Conclusion

[128] The appellant has discharged the onus and the extension sought should be granted

[129] Subject to hearing from the parties, the orders of the Court will be:

1. The appeal is allowed.
2. The respondent's decision of 23 May 2018 refusing the appellant's extension application is set aside.
3. The appellant's extension application is approved.
4. The currency period for the development approval dated 17 June 2015, attaching to land described as Lot 6 on RP 203808, is extended to 26 July 2020.

[130] I will also hear from the parties as to the consequential orders, if any, required by s.87(6) of the PA.