CITATION:	*Kalhmera Pty Ltd v Planning for People Incorporated & Ors* [2024] NTSC 48
PARTIES:	KALHMERA PTY LTD as trustee for the MAKRYLOS FAMILY TRUST (ACN 110 883 237) v PLANNING FOR PEOPLE INCORPORATED and DEVELOPMENT CONSENT AUTHORITY and JUNE D'ROZARIO & ASSOCIATES PTY LTD (ACN 009 644 240)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2023-01215-SC
DELIVERED:	5 July 2024
HEARING DATE:	8 August 2023, further written submissions 17 and 21 June 2024
JUDGMENT OF:	Huntingford J

CATCHWORDS:

PLANNING AND ENVIROMENT – APPEAL – application for leave to appeal against decision by Tribunal – appeal restricted to question of law - Tribunal finding of manifest failure – meaning of manifest failure for purposes s 130(7)(a) Planning Act - finding legally unreasonable - Tribunal required to review determination on its merits – failure to substitute correct and preferable decision – application for leave to appeal granted – appeal granted – matter sent back to Tribunal for determination

Planning Act 1999¸ s 49, s 51(1), s 130(4), s 130(7)

Northern Territory Civil and Administrative Tribunal Act 2014, s, 5, s 45, s 46, s 49, s 141

Kalhmera Pty Ltd v Planning for People Inc [2019] NTSC 85; *Development Consent Authority v Phelps* [2010] NTCA 3; *Minister for Immigration and Citizenship v Li* (2103) 249 CLR 332; *Minister for Immigration and Multicultural and Business Affairs v SGLB* [2004] HCA 32; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Williams v Minister for the Environment and Heritage* [2003] FCA 535; *Mpwerempwer Aboriginal Corporation RNTBC V Minister for Territory Families and Urban Housing* [2024] NTSC 4; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; *Association of Islamic Da'wah in Australia v Development Consent Authority* [2020] NTCAT 34; *Planning for People Inc v Development Consent Authority* [2018] NTCAT 984; *White v Development Consent Authority* [2015] NTCAT 10; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; *Osland v Secretary, Dept of Justice* (2010) 241 CLR 320, referred to

REPRESENTATION:

Counsel:

Appellant:	BC Roberts KC
First Respondent:	H Baddeley
Second Respondent:	T Anderson
Third Respondent:	Nil

Solicitors:

Appellant:	Finlaysons Lawyers
First Respondent:	Ward Keller
Second Respondent:	Solicitor for the Northern Territory
Third Respondent:	Nil

Judgment category classification:	B
Judgment ID Number:	Hun2404
Number of pages:	32

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Kalhmera Pty Ltd v Planning for People Incorporated & Ors [2024] NTSC 48
No. 2023-01215-SC

IN THE MATTER of an application for leave to appeal under the *Northern Territory Civil and Administrative Tribunal Act 2014*

BETWEEN:

KALHMERA PTY LTD AS TRUSTEE FOR THE MAKRYLOS FAMILY TRUST
(ACN 110 883 237)
Appellant

AND:

PLANNING FOR PEOPLE INCORPORATED
First Respondent

AND:

DEVELOPMENT CONSENT AUTHORITY
Second Respondent

AND:

JUNE D'ROZARIO & ASSOCIATES PTY LTD
(ACN 009 644 240)
Third Respondent

CORAM: HUNTINGFORD J

REASONS FOR JUDGMENT

(Delivered 5 July 2024)

[1] This is an application for leave to appeal and an appeal (if leave be granted) against a decision of the Northern Territory Civil and Administrative Tribunal (the Tribunal) revoking a determination of the second respondent, the Development Consent Authority (DCA).[1]

[2] Pursuant to section 141 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NTCAT Act), an appeal from the Tribunal is only on a question of law and requires leave of this Court.

[3] The proposed grounds of appeal are summarised as follows:

1. The Tribunal purported to exercise a jurisdiction which was denied to it by s 130(7)(a) of the *Planning Act 1999* (NT) (the Planning Act) because the Tribunal erred in finding that the DCA manifestly failed to take into account the matters in s 51(e) and (n) of that Act; and

2. The Tribunal misconstrued its task in accordance with ss 45 and 46 of the NTCAT Act and s 130 of the Planning Act by purporting to revoke the determination under review without proceeding to determine the correct or preferable decision.

[4] As the success of the application for leave to appeal relied upon the merits of the proposed appeal, the grounds of appeal were fully argued.

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1 The DCA made submissions in relation to the second proposed ground of appeal in view of the importance of that ground to the operation of the *Planning Act* and its interaction with the NTCAT Act but otherwise took no part in the proceeding.

[5] In *Kalhmera Pty Ltd v Planning for People Inc & Anor*[2] (*Kalhmera*), Barr J explained that the critical question on appeal is whether the Tribunal made an error of law. In order for this Court to intervene, the error of law must be such as to vitiate the decision of the Tribunal.[3]

[6] As I have determined that leave to appeal should be granted, I will refer to the applicant as the appellant in this decision.

Background

[7] The appellant is the owner of Lot 7820 Town of Darwin. Lot 7820 is subject to Specific Use Zone SD46, which was established by the Minister for Planning on 9 July 2015. Clause 3 of SD46 is in the following terms:

> Development is to contribute to improving the amenity of the Blake Street precinct as an inner city mixed use area by:
>
> a. creating a landmark development through high architectural quality and distinctive streetscapes;
> b. providing high levels of pedestrian amenity;
> c. designing buildings with active interfaces;
> d. designing buildings to take advantage of views while taking into account potential view corridors of future development reasonably to be expected in the surrounding precinct;
> e. designing buildings to ensure that all building services, plant rooms, elevator shafts, roof-top elements and the like are integrated in the design of the building.

[8] On 24 August 2021, the DCA made a determination pursuant to s 53 of the Planning Act, approving the appellant's development proposal, delivered a

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2 [2019] NTSC 85.

3 Ibid [3] referring to *Development Consent Authority v Phelps* [2010] NTCA 3, [11].

notice of determination in accordance with s 53A of the Planning Act, and gave written reasons for the determination.[4]

[9] In making a determination as to a development application, the DCA must take into account each of the factors enumerated in s 51(1)(a) – (t) of the Planning Act.

[10] Two of the mandatory considerations are central to this appeal. They are:

a. Section 51(1)(e) which requires that the DCA take into account any written submissions made under s 49 of the Planning Act; and

b. Section 51(1)(n) which requires that the DCA take into account the potential impact on the existing and future amenity of the area in which the land is situated.

[11] In the Planning Act, 'amenity' is defined as:[5]

> In relation to a locality or building, means any quality, condition or factor that makes or contributes to making the locality or building harmonious, pleasant or enjoyable.

[12] Members of the first respondent organisation made submissions to the DCA about the appellant's development application pursuant to s 49 of the Planning Act. Accordingly, the first respondent was entitled to apply to the Tribunal for a

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4 Appeal Book 159-178.

5 *Planning Act 1999* (NT) s 3.

review pursuant to s 117(1) of the Planning Act. The application for review was filed in the Tribunal on 7 September 2021.[6]

[13] The Tribunal conducted a hearing on 29 September 2022 and delivered its reasons[7] on 8 March 2023.

The orders of the Tribunal

[14] The Tribunal found that the DCA had manifestly failed to take into account the potential impact of the development on the existing and future amenity of the area in which the land is situated as required by s 51(1)(n) of the Planning Act. One Tribunal member also found that the DCA had manifestly failed to take into account the submissions made under s 49, as required by s 51(1)(e), at least so far as those submissions related to consideration of amenity pursuant to s 51(1)(n).

[15] The Tribunal ordered that the determination of the DCA be revoked. The Tribunal expressly declined to substitute its own decision for that of the DCA.[8]

Ground 1 – Did the Tribunal err in law in finding that the DCA manifestly failed to take into account matters in s 51(1)(e) and (n) of the Planning Act?

[16] An application for review by the Tribunal is governed by s 130 of the Planning Act, read with Part 3 of the NTCAT Act. Division 3 of Part 3 of the NTCAT Act establishes the Tribunal's review jurisdiction. Section 33 requires that when exercising its review jurisdiction, the Tribunal must do so in accordance with the

6 Appeal Book 1-7.

7 Appeal Book 8 – 65.

8 Tribunal decision, [175], [318] – [320].

NTCAT Act and the Act conferring the jurisdiction, in this case the Planning Act.

[17] At the time of the application, s 130 of the Planning Act was,[9] so far as is relevant, in these terms:

> **130 Determination of application for review**
>
> (2) In determining an application for a review, except an application under section 113 or 115, the Tribunal must take into account the matters specified in section 30P(2) or 51 (as applicable).
>
> (3) …
>
> (3A) …
>
> (4) The Tribunal must, in writing, determine an application for a review of a determination of a consent authority by taking one of the following actions:
>
> (a) confirming the determination of the consent authority;
>
> (b) in respect of an application under section 114 or 117 only – revoking the determination set out in the notice served under section 30X, 30Y, 53A or 53B, substituting the determination of the Tribunal and ordering the consent authority to issue a development permit subject to any conditions the Tribunal thinks fit;
>
> (c) ordering the consent authority to issue or vary a development permit subject to any conditions the Tribunal thinks fit.
>
> (5) …
>
> (6) To avoid doubt, a determination of an application by the Tribunal is a review of the determination of the consent authority or service authority on its merits.
>
> (7) Also, the Tribunal may take action under subsection (4)(b) or (c) only if satisfied:
>
> (a) the consent authority manifestly failed to take into account a matter referred to in section 30P(2) or 51 (as applicable); or

9 Section 130 of the Planning Act was amended with effect from 29 July 2020 *Planning Amendment Act 2020* (NT) but those amendments do not affect this application.

(b) the determination of the consent authority would result in a planning outcome manifestly contrary to a provision of a planning scheme.

[18] Section 45 of the NTCAT Act requires the Tribunal to exercise its review jurisdiction by way of rehearing. Pursuant to s 46(1) the Tribunal's objective in exercising its review jurisdiction is to produce the correct or preferable decision.

[19] Section 130(7)(a) of the Planning Act introduces a requirement that the Tribunal be satisfied that the DCA has manifestly failed to take into account a relevant consideration before its jurisdiction to make an order of the kind referred to in s 130(4)(b) or (c) of the Planning Act is enlivened.

[20] In reaching a decision as to satisfaction regarding the jurisdictional fact in s 130(7)(a), the Tribunal must act reasonably.[10] Unreasonableness in the legal sense is not limited to decisions which are bizarre or irrational.[11] A finding that a particular exercise of power is unreasonable will proceed from an analysis of the scope and purpose of the conferring legislation.[12] The conclusion reached by the Tribunal must be reasonable in the sense that it could have been reached by a person with an understanding of the nature of the statutory function being performed and based upon facts or inferences supported by logical grounds.[13]

[21] The appellant argued that the Tribunal's decision that the DCA had manifestly failed to take into account the matters required by s 51(1)(e) and (n) of the

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10 *Minister for Immigration and Citizenship v Li* 92013) 249 CLR 332, per Gaegler J, 370 – 371.

11 Ibid 364 per Hayne, Kiefel and Bell JJ

12 Ibid 364-366.

13 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32, [38] per Gummow and Hayne JJ.

Planning Act was "manifestly unreasonable". [14] In essence, the appellant's complaint is that the Tribunal erred in its reasoning process in reaching the state of satisfaction necessary to establish the jurisdictional fact in s 130(7)(a) of the Planning Act because it focused upon the errors of law which it found that the DCA made and failed to properly consider what the appellant says is the clear evidence that the DCA did take the s 51(1)(e) and (n) factors into account.

[22] The position of the first respondent is that the Tribunal's decision is not unreasonable in the legal sense because, although it cannot be said that the DCA entirely ignored the matters in s 51(1)(e) and (n) of the Planning Act, it clearly and plainly failed to properly consider them due to errors of legal principle which impermissibly constrained its approach.

The Tribunal's analysis of the DCA's failure to take into account

[23] Each of the factors in s 51(1) of the Planning Act must be taken into account by the DCA when arriving at its determination. To take a factor into account in this context means that the decision maker must give "proper, genuine and realistic", as opposed to token, consideration to the relevant matters.[15]

[24] In *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing*[16] Barr J considered s 90(1) of the *Water Act 1992* (NT) which requires that the relevant decision maker must "take into account" various factors when making certain decisions as to water licenses. His Honour

14 In the sense described by Mason J in *Aboriginal Affairs, Minister for, v Peko-Wallsend Ltd.* (1986) 162 CLR 24, 41-42.

15 *Williams v Minister for the Environment and Heritage* [2003] FCA 535, [29].

16 [2024] NTSC 4.

noted that taking into account a factor means that it is necessary to engage in an "active intellectual process" directed at those factors.

[25] There is no guidance in the Planning Act as to how the s 51(1) matters are to be taken into account, or the weight to be given to any particular factor. There is, no indication from the text of the legislation that any particular matter is more important than any other in the DCA's consideration. Further, the list is not exhaustive, as s 51(1)(t) requires the DCA to take into account "other matters it thinks fit". A decision regarding a development application under the Planning Act involves the balancing of many different factors.[17] The DCA is therefore required to consider each of the listed factors, alone and collectively, together with any other matter it thinks fit, and has a discretion as to the relative importance it assigns to any particular prescribed matter.[18]

[26] The DCA is required to provide written reasons for its decisions.[19] The reasons should show how each of the s 51(1) Planning Act factors were taken into account, but there is considerable flexibility in the way in which reasons are constructed. For example, it is not essential (although it may be convenient) to set out a separate discussion of each factor under a discrete heading. Matters which are clearly and obviously irrelevant need not be specifically mentioned. If there is, as may often be the case, overlap in the relevant circumstances to be

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17 Ibid [44] – 48] see discussion on similar provision of the *Water Act* by Barr J in *Mpwerempwrer*,

18 The chapeau to s 51 of the Planning Act was amended by the *Planning Amendment Act 2020* (NT), s 36 with effect from 31 July 2020 to read "A consent authority must, in considering a development application, take into account any of the following relevant to the development". The words "relevant to the development" were not present in the version of the Act agreed to be applicable to this application.

19 Planning Act, ss 53A, 53B, 53C.

considered relating to individual factors, the DCA reasons may refer back to earlier sections, or discuss criteria compendiously.

[27] Courts exercising supervisory jurisdiction over a body such as the Tribunal will not interfere lightly with Tribunal decisions. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[20] the High Court said that it is well settled that the reasons of a decision maker under review are "not to be construed minutely and finely with an eye keenly attuned to the perception of error".[21] The same restraint applies to the Tribunal when reviewing a determination of the DCA.

[28] The term "manifestly failed" is not defined in the Planning Act. The phrase is to be given its ordinary meaning. The *Macquarie Dictionary*[22] defines "manifest" to mean "readily perceived by the eye or the understanding; evident; obvious; apparent". In other words, a failure is "manifest" when it is plain, clear and obvious.

[29] What constitutes a manifest failure will depend upon the circumstances of the case. In my view, the concept of manifest failure has regard not only to the "plainness" or "obviousness" of the failure, but also to its consequences in the legal sense. In other words, whether the DCA has manifestly failed to take into account a relevant matter will include consideration of whether any identified failure to take a matter into account could, but not would, have had a bearing upon the outcome of the decision. Such a result is inherent in the purpose of the

20 (1996) 185 CLR 259.

21 Ibid, per Brennan CJ, Toohey, McHugh and Gummow JJ at 271, quoting with approval French and Cooper JJ in *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 272 and 287.

22 See *Association of Islamic Da'wah in Australia v Development Consent Authority* [2020] NTCAT 34

restriction in s 130(7) of the Planning Act, which is to ensure that appeals from planning decisions are focused upon planning merit and not legal technicality.[23]

Errors of law on the part of the DCA

[30] There are three errors of law which The Tribunal said infected the DCA's consideration of s 51(1)(n) of the Planning Act and, in the decision of Member Hastwell, s 51(1)(e), with the result that the DCA manifestly failed to take into account those matters.

[31] The first concerns the relevance of part of the decision of Barr J in 2019 in *Kalhmera Pty Ltd v Planning for People Inc*.[24] The appeal in that matter arose out of proceedings related to an earlier scheme for development of Lot 7820. One of the issues for decision was whether the words "contribute to improving the amenity of the Blake Street Precinct" in the chapeau to clause 3 of SD46 involved a requirement to consider amenity which was additional to the individual matters set out at paragraphs (a) to (e) of that clause. His Honour found that the chapeau stated the outcome which it was assumed would be achieved if the development satisfied the numbered paragraphs and therefore did not import an additional requirement.[25]

[32] Whether the s 51(1)(n) requirement to consider the potential impact upon the existing and future amenity of the area in which the land is situated is met by consideration of the matters relevant to the amenity of the Blake Street

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23 Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 2 December 2004, 8405 (Dr Burns, Minister for Lands and Planning).

24 [2019] NTSC 85.

25 Ibid [7] – [10].

precinct"referred to in clause 3 of SD46 was not an issue for determination in *Kalhmera* and, therefore, the reasons for decision in that case have nothing to say about it. There was no challenge in this appeal to the Tribunal's finding[26] to that effect.

[33] The second, related, legal issue concerned the difference between the "area" in relation to which amenity is required to be considered as defined in Planning Zone SD46 on the one hand and s 51(1)(n) of the Planning Act on the other. Counsel for the DCA argued before the Tribunal, with the support of the appellant,[27] that the bounds of the "Blake Street precinct as an inner city mixed use area" referred to in clause 3 of SD46 and "the area in which the land is situated" in s 51(1)(n) of the Planning Act are necessarily the same.[28] It was submitted before the Tribunal that because the areas were practically or effectively the same, once the DCA had considered the five sub-paragraphs of clause 3 of SD46, it had necessarily also taken into account the potential impact on the existing and future amenity of the "area in which the land is situated" as required by s 51(1)(n) of the Planning Act.[29]

[34] The Tribunal found that the Blake Street precinct and the area in which the land is situated are not the same. The Tribunal decided that the Blake Street precinct was the area comprising Lot 7820 and the adjoining parts of Blake Street and Gardens Hill Crescent, as explicitly identified in the planning instrument, SD46,

26 Tribunal decision, [171], [291], [294] – [295]

27 Tribunal decision, [299].

28 Tribunal decision, [296] – [297].

29 Tribunal decision, [298].

whereas the "area in which the land is situated" referred to in s 51(1)(n) of the Planning Act was a broader area.[30] In this appeal there is no challenge to that finding. The appellant accepted that the two areas are not the same, legally or geographically, and therefore satisfaction as to matters relating to "amenity of the Blake Street precinct" in clause 3 of SD46 does not necessarily involve taking into account the potential impact upon the amenity of the area in which the land is situated, as required by s 51(1)(n).[31]

[35] The third error of law said to have been made by the DCA concerns a failure to make a distinction between the consideration of amenity by the Minister at the time of the rezoning of Lot 7820 in 2015, and the requirement that the DCA take into account the potential impact on the existing and future amenity of the area in which the land is situated under s 51(1)(n) of the Planning Act.

[36] The DCA referred in its reasons to a statement by the Tribunal in an earlier proceeding concerning a different development application relating to the same land[32] to the effect that the criteria in SD46 and the application process "did not require a reconsideration of the impacts of rezoning on amenity". Member Levy said that the DCA relied on the 2018 observation by the Tribunal to mean that the Minister's consideration of amenity for rezoning in 2015 meant that the DCA had no practical function to perform in considering amenity pursuant to s 51(1)(n) of the Planning Act.[33] Member Hastwell noted that the Minister could

30 Tribunal decision, [306] – [308].
31 Transcript, 8/8/23, p 30. The second respondent, referring to the *Hardiman* principle, did not make submissions on the issue.
32 *Planning for People Inc v Development Consent Authority & Kalhmera Pty Ltd* [2018] NTCAT 984.
33 Tribunal reasons [187], [279] – [287], [311] – [312].

not alter the operation of s 51(1)(n) by rezoning.[34] There is no reference in the Tribunal's reasons to a submission by any party before the Tribunal that the rezoning meant that s 51(1)(n) of the Planning Act did not apply. Nor is there any doubt that the earlier rezoning does not affect the need for the DCA to consider the s 51(1)(n) Planning Act criterion in relation to a planning application.

The Tribunal's decision as to "manifestly failed"

[37] In finding that the DCA had manifestly failed to take into account the potential impact of the development on the existing and future amenity of the area in which the land is situated, Member Levy found that the DCA "considered that compliance with the five subparagraphs of clause 3 of SD46 meant that it had fulfilled its obligation to consider "amenity" under s 51(1)(n)".[35] In the paragraphs immediately following, the learned member goes on to refer to the DCA's submissions to the Tribunal as a basis for that finding.[36]

[38] After making findings about the various legal issues described above,[37] Member Levy referred to the fact that the Blake Street precinct in clause 3 of SD46 and the area in which the land is situated in are not the same and went on to say:

> It also follows that the DCA failed to consider the potential impact on the existing and future amenity of that larger "area", as required by s 51(1)(n). This was a manifest legal error.

34 Tribunal reasons [170].

35 Tribunal decision [292].

36 Tribunal decision [293 – [297].

37 Tribunal decision, [301] – [308].

[39] Member Levy said that the failure to take the s 51(1)(n) Planning Act factor into account was not a "mere technical error". His reasons note the DCA's reference to the consideration of amenity in the rezoning in its reasons and that that process did not remove the need for the DCA to take into account the s 51(1)(n) criterion when considering a development application.[38] A footnote to that part of his reasons refers to the fact that the DCA had considered "amenity" under 51(1)(n) of the Planning Act in relation to a previous development application regarding the same land and expressed the view that it should have done so in this application "but as conceded in its written determination dated 24 August 2021, did not do so."[39]

[40] In making the finding that the DCA did not consider the s 51(1)(n) Planning Act criterion, Member Levy appears to have relied upon the submissions of counsel for the DCA before the Tribunal, which he said were to the effect that by reaching satisfaction as to the matters under clause 3 of SD46, the DCA had fulfilled its obligation to take into account the amenity consideration in s 51(1)(n).[40] The submissions were not before this Court. Submissions made to the Tribunal are not evidence of what the DCA took into account. There is no evidence that a concession was made by counsel on behalf of the DCA that they did not take into account s 51(1)(n) in making their decision, notwithstanding the (now conceded erroneous) submissions as to the law. Nor can I find any clear concession to that effect in the DCA's reasons, notwithstanding the member's

38 Tribunal decision [310].

39 Ibid

40 Tribunal decision, [292] - [298] and footnotes referred to therein.

statement to that effect referred to above. Member Levy appears to have drawn an inference about what the DCA failed to consider in reliance on the reasons and counsel's submissions.

[41] Member Hastwell concurred with Member Levy that the legal errors had resulted in the DCA failing to take into account the s 51(1)(n) Planning Act criterion.[41] Her reasons refer to incorrect advice given in the Development Assessment Services (DAS) [42] report "when it advised that all that was required for the consideration of amenity for s 51(1)(n) was a consideration of the 5 sub-clauses of clause 3 of SD46".[43]

[42] The DAS report to the DCA set out and discussed the matters to be taken into account under s 51(1) of the Planning Act. Its wording is closely followed in the DCA's reasons and therefore it can be inferred that the DCA considered and, at least largely, adopted those parts of the report. However, the DAS report does not determine what the DCA took into account, or the way in which it did so. The DAS report was prepared for the DCA's assistance, and is relevant evidence as to what was taken into account, but it is not part of the DCA's reasons.

[43] It is clear from the Tribunal's reasons that they were aware that the question of the potential impact of the development on the existing and future amenity of the area in which the land was located was a matter which overlapped with other considerations under s 51(1) of the Planning Act. Member Levy expressly

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41 Tribunal decision [174].

42 An administrative division of the Northern Territory agency with responsibility for the Planning Act.

43 Tribunal decision [168]. Appeal Book 89 – 130, particularly from 94.

acknowledged that the DCA considered some matters relating to amenity as part of its determination[44] and referred to the quality of the architecture and landscaping as an issue which related to both clause 3 of SD46 and s 51(1)(n) considerations.[45] He went on to identify the consideration of "amenity" in each of those requirements.[46]

[44] However, Member Levy found that the approach of the DCA meant that "the task was incomplete" such that there was a manifest failure to consider the s 51(1)(n) Planning Act criterion. This was a finding that the DCA had not taken the potential impact upon the existing and future amenity of the area in which the land is situated into account in a real sense because, he inferred, that the DCA believed it was not required to consider factors other than those raised under clause 3 of SD46 and only in relation to the Blake Street precinct.

Consideration

[45] The reasons of the DCA show that it appreciated the need to take into account the potential impact on the existing and future amenity of the area in which the land is situated as required by s 51(1)(n) of the Planning Act. The question in this appeal is whether the Tribunal unreasonably concluded that the DCA had, nonetheless, manifestly failed to do so.

[46] Although the Tribunal referred in its reasons to consideration by the DCA of the role of amenity in the rezoning process, there is nothing in the reasons of the

44 Tribunal decision [316].

45 Tribunal decision [278].

46 Tribunal decision [284] – [286].

DCA which clearly indicates that that in any way restricted its consideration. The issue is mentioned at the beginning of section 6 of the DCA's reasons.[47] That placement immediately before a recitation of the definition of "amenity" in the Planning Act, suggests that the comments are primarily introductory or background matters. In context, the rezoning issue was only relevant because, as is noted in the section of the DCA reasons dealing with submissions, the objectors had raised "incorrect zoning" as an issue before the DCA, both in relation to SD46 and to the applicability of the High Density Residential zone, which also applied due to a provision of SD46.[48] The reference to re-zoning in the DCA reasons needs to be read with that in mind.

[47] The DCA summarised at paragraph 5 of section 6 of its reasons[49] its earlier findings about the amenity in relation to the Blake Street precinct. The next paragraph, referring to the import of Barr J's decision in *Kalhmera* is in the same terms and appears to be imported from the DAS report. [50]

[48] However, the DCA's conclusion as to the s 51(1)(n) criterion is in different terms. It was not part of the DAS report. The DCA summarised their findings under the s 51(1)(n) criterion as follows:

> The proposed development complies with the non-discretionary requirements of Zone SD46 (including clause 3(a)-(e)) and the Authority concluded that the potential impact on the existing and future amenity of the area is consistent with what could

47 Appeal Book 177.

48 Appeal Book 172-176 and DAS report Appeal Book 107.

49 Appeal Book 177.

50 Appeal book 120 and 130 (in the same terms).

> reasonably be expected from any development in accordance with the zone provisions and, further, pursuant to the express provisions of the SD46, improves the amenity of the Blake Street precinct.

[49] This passage makes direct use of the wording in s 51(1)(n) and states that the impact on the existing and future amenity of the area is consistent with a development in compliance with the zone. There is no clear failure to consider s 51(1)(n) of the Planning Act flowing from that conclusion because the two things are not mutually exclusive. Indeed, consideration of the potential impact on the existing and future amenity of the area of a development in compliance with SD46 was the very matter which the DCA was obliged to take into account.

[50] It is also not clear to me that the reference to "the area" in the conclusion of the DCA is constrained in the way in which the Tribunal said it was. The reference to s 51(1)(n) of the Planning Act and the separate reference to "the Blake Street precinct" later in the paragraph, does not lead to a clear inference that the DCA have restricted their consideration of amenity only to the Blake Street precinct, notwithstanding the preceding paragraphs. The use of the expression "and, further," before reference to improvement of the amenity of the Blake Street precinct, suggests to me that the DCA were considering that as an additional circumstance. It does not compel a conclusion that the DCA had failed to consider the broader area as required by s 51(1)(n) of the Planning Act.

[51] The amenity of the Blake Street precinct was not irrelevant to consideration of the potential impact of the development on the amenity of the area in which the land is situated. The Blake Street precinct was the area where the greatest

potential impact on amenity could be expected. While consideration of whether the development resulted in improvement of the amenity of the Blake Street precinct as an inner-city mixed use area would not encompass all matters required to be considered under s 51(1)(n), the circumstances considered in relation to the smaller area (the Blake Street precinct) overlapped with and were therefore relevant to the overall assessment. The DCA therefore was required to take them into account as part of its consideration under this criterion.

[52] It is also relevant that the DCA was considering an unusual and very specific planning instrument with very prescriptive conditions applying to a single Lot in an area adjacent to other planning zones. The DCA explained in detail earlier in the reasons[51] why it found that the development complied with each of the requirements of SD46. Consideration of the potential impact upon the amenity of the wider area by a development compliant with the requirements of SD46 was, while again not the only aspect to be considered, not inconsistent with the DCA taking into account impact on the area in which the development was situated as required by s 51(1)(n).

[53] The DCA sets out in its reasons a summary of the topics covered in the submissions received under s 49 of the Planning Act, taken from the DAS report.[52] The DAS report catalogues each of the topics raised, the appellant's response and the "DAS comment". A number of matters raised by submitters,

51 Appeal Book, 164 – 172.

52 Appeal Book, 106-107.

and specifically considered by the DCA, illustrate how the DCA took into account the s 51(1)(e) and (n) criteria.[53]

[54] The impact of traffic on the surrounding road network is a clear example. The DCA considered that issue in detail.[54] The submitters' concerns, including traffic congestion in surrounding streets[55] are set out, as is the applicant's response, the position of the Darwin City Council and the results of an additional traffic study which was carried out for the appellant.[56] The impact of traffic is an example of a consideration which arose for consideration under a number of the s 51(1) criteria,[57] and which was also required to be considered by clause 4(g) of SD46.

[55] Further examples of issues raised by submitters relevant to the potential impact of the development upon the amenity of the broader area related to noise, privacy (particularly the overlooking of private open space in neighbouring residences), overshadowing and access to light. These matters were dealt with in the DCA's reasons at some length.[58] The issues of overlooking open private space and noise from balconies was dealt with in the DAS report which was considered and adopted by the DCA.[59] As to noise from the neighbouring amphitheatre, the submitters raised a concern that future noise complaints might

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53 Appeal Book 172 – 176.

54 Appeal Book,170.

55 Ibid

56 Appeal Book 172 – 173.

57 Such as 51(1)(a) the planning scheme applying to the land, (e) submissions, (k) public facilities available in the area – such as for parking, (n) potential impact upon amenity, (p) public interest, (t) other matters

58 Appeal Book 174 – 175.

59 Appeal Book 109.

impact the use of that venue. The DCA responded to the submitters' concerns by imposing a condition on the approval requiring a warning to residents.

[56] The DCA stated in its reasons that it had "carefully considered" the submitters' concerns, along with the response provided by the appellant and that it had taken all comments into account and considered their concerns.[60] Although such statements are not determinative, the DCA then went on to consider in detail the submissions, addressing matters raised such as the requirement for "landmark development" in SD46, adjoining road width and relevant policy, timing of the application, amendments to the planning scheme, maintenance of the landscaping (in relation to which the DCA imposed a condition on the approval), inner city zone application, and apartment design including light and ventilation among other matters.[61]

[57] It is a requirement of clause 13 of SD46 that the high density residential planning zone (Zone HR) also applies to the land. The DCA was therefore required to and did consider clause 7.8 of that planning instrument. The purpose of clause 7.8 is to promote designs which are "pleasant for the occupants and do not unreasonably affect the use and enjoyment of adjacent land". That clause also sets out a range of specific requirements which buildings in that zone need to address.[62] The appellant submitted that clause 7.8 of Zone HR was "precisely

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60 Appeal Book 175.

61 Appeal Book 176.

62 Appeal book at 84, contained in DAS assessment at p 18.

the 51(1)(n) enquiry in the context of one of the SD46 considerations".[63] The appellant also pointed out that in the DAS report those considerations were addressed, including a finding that the building has minimal or no overlooking of private open space and habitable rooms of adjacent dwellings.[64] A conclusion which was adopted by the DCA in its reasons for determination.[65]

[58] In taking into account the submissions pursuant to s 51(1)(e), relevant to "amenity impacts" the DCA reasons state:[66]

> Regarding amenity impacts, the Authority relied on the NTSC decision of the previous proposal, which states that the compliance of subclause 3(a) to 3(e), of SD46 ensure that the development will contribute to improving the amenity of the Blake Street Precinct, as an inner-city mixed-use area. The decision clearly indicates that if (a) – (e) is achieved, then the development automatically is considered to improve the amenity of the Blake Street Precinct. The authority noted that the development complies with the requirements of the clause and nondiscretionary requirements of Zone SD46 and all discretionary requirements of Zone SD46, excepting a minor variation sought to clause 7.5 (Private Open Space).

[59] Noting that this passage does not appear in the section of the reasons dealing with the s 51(1)(n) consideration, but rather that dealing with s 51(1)(e), the paragraph does not clearly say that compliance with clause 3 of SD46 will improve the amenity of the "area in which the land is situated", within the meaning of s 51(1)(n) of the Planning Act. It is a reference to compliance with the zone requirements improving the amenity of the "Blake Street precinct". A

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63 Transcript 8/8/23 p 19.

64 Appeal Book 85, DAS report p 19.

65 Appeal Book 165.

66 Appeal Book 176.

different area. That was a matter which the DCA could take into account pursuant to a number of s 51(1) criteria.

[60] Member Hastwell found that as a result of the failure to take into account the s 51(1)(n) amenity consideration, there was also a manifest failure to take into account "to the extent required, or in some instances at all, those aspects of the objector's submissions that went to the effect that the development would have on the wider locality."[67] Member Levy made no findings as to manifest failure to take into account the submissions as required by s 51(1)(e) of the Planning Act.

[61] The purpose of the requirement for a manifest failure in s 130(7)(a) of the Planning Act is to ensure that decisions of the DCA are not overturned on legal technicalities. The focus is to be on the planning merits of the application. Satisfaction that the DCA has manifestly failed to consider a matter required by s 51(1) is not to be lightly reached. A plain and obvious failure does not have to be a catastrophic failure. It must, however, be a failure which could have some real consequence in the making of the determination. The reasons of the Tribunal do not explain how the DCA failed to consider the question of wider amenity or the submissions of the objectors in a way which engaged with the consequences of that failure.

[62] In its reasons, the Tribunal refers to "manifest error" or "manifest legal error" [68] on the part of the DCA. The test for s 130(7)(a) is not whether a legal error was

67 Tribunal decision [173].

68 See Tribunal reasons at [81], [89], [133], [184], [185], [188], [189], and [316], and "manifest legal error" in [309]

made, but whether the DCA manifestly failed to take a mandatory consideration in s 51 of the Planning Act into account. The focus upon legal error has misdirected the Tribunal's enquiry. The legal error was only relevant if the clear result was that the DCA must have failed to take the relevant matters into account. In this case, it may be that the DCA made one or more of the legal errors identified by the Tribunal. It is not, however, plain or obvious that a possible error in that regard meant that the DCA failed to take into account the s 51(1)(e) or (n) factors when coming to their determination when the reasons of the DCA are read as a whole.

[63] The process of active intellectual engagement with the various factors in s 51(1) of the Planning Act is necessarily multifactorial. For the reasons set out above it was not reasonable for the Tribunal to infer that a reference to improvement of the amenity of the Blake Street precinct meant that the DCA had manifestly failed to take into account the potential impact of the development upon the existing and future amenity of the area in which the land is situated, or the s 49 submissions.

[64] Therefore, I am of the view that the Tribunal has erred in law in finding that the DCA manifestly failed to consider the matters required by s 51(1)(e) and (n) of the Planning Act. The result is that leave to appeal on ground 1 must be given and the appeal on ground 1 allowed.

Ground 2 – Was the Tribunal required to make its own determination about whether to consent, vary or refuse the development application?

[65] The question of law raised by the second ground of appeal is whether, having determined that the DCA had manifestly failed to take into account a requirement of s 51(1) of the Planning Act, the Tribunal erred in making an order revoking the DCA's determination without making the correct or preferable decision in relation to the development application.

[66] There is no conflict between s 130(7)(a) of the Planning Act and s 45 of the NTCAT Act. To the extent that there is any tension between the jurisdictional limitation in s 130(7) of the Planning Act and the objective that the Tribunal make the correct or preferable decision as set out in s 46(1) of the NTCAT Act, it is resolved by s 5 of the NTCAT Act, which provides that in the event of inconsistency, the provisions of the conferring Act prevail.

[67] The Tribunal must conduct a rehearing which is a review of the determination of the DCA on the merits. If, on the rehearing, the Tribunal decides that the correct or preferable decision is to confirm the determination of the DCA in accordance with s 130(4)(a) of the Planning Act, it can proceed to make that order without considering the matters in s 130(7). The Tribunal is not required to adopt a bifurcated procedural process by first conducting a hearing to decide whether s 130(7) of the Planning Act is satisfied, and then conducting a rehearing on the merits.

[68] Counsel for the DCA described the drafting of s 130(4)(b) of the Planning Act as "unfortunate". It was pointed out that it was argued in *White v Development*

Consent Authority[69] that that sub-section meant that the Tribunal was not able to simply set aside a decision of the DCA but is obliged to substitute its own determination and order the consent authority to issue a development permit subject to conditions. Bruxner P rejected that interpretation. His Honour was, with respect, correct to do so. In that case, his Honour was satisfied, pursuant to s 130(7)(b), that the determination of the consent authority would result in an outcome was manifestly contrary to the relevant planning scheme,[70] and made it clear in his reasons that, therefore, the development application should not be consented to.[71]

[69] The statement of Bruxner P in *White* that the Tribunal may "take one or more of the steps identified" [72] in s 130(4)(b) of the Planning Act should be read in the context of that decision, it does not support the general proposition that the Tribunal may proceed to revoke a decision of the DCA, having been satisfied of the matters in s 130(7)(a), without determining the correct or preferable decision which the DCA should have made in relation to the development application. Until the correct and preferable decision is determined the Tribunal's task is not complete.

[70] The dispositions generally available to the Tribunal on review are set out in s 50 of the NTCAT Act. One of the options available is to send the matter back to the

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69 *White v Development Consent Authority & Tomazos Property Pty Ltd ATF Tomazos Property Discretionary Trust* [2015] NTCAT 010, [162] – [167].

70 *Planning Act* s 130(7)(b).

71 *White*, above n 6, at [6].

72 Ibid [167].

decision maker for reconsideration, with any recommendations the Tribunal considers appropriate. Section 130(4) of the Planning Act contains no power to send a matter back to the DCA[73] and is therefore inconsistent with s 50. The result of the inconsistency is that, pursuant to s 5(1) of the NTCAT Act, s 130(4) prevails.

[71] Unless the Tribunal substitutes its own decision, the status of a development application after the Tribunal has made a positive finding pursuant to s 130(7)(a), and determined to revoke the DCA's decision, is unclear. I have considered whether the concept of "revocation" in s 130(4)(b) of the Planning Act means that when a determination is revoked, there is necessarily an implied decision of the Tribunal that the development application should not be consented to. However, because rejection of an application on review under s 114 or s 117 is not the only possible outcome,[74] even where the Tribunal decides that revocation of the DCA determination is appropriate, I think that the better view is that there is no implied rejection of an application in that circumstance.

[72] I have also considered the effect of the use of the word "and" after the phrase "substituting the determination of the Tribunal" in s 130(4)(b). I have come to the view that the use of the word "and" should not be taken to mean that the two actions, "substituting the determination of the Tribunal and ordering the consent authority to issue a development permit" must occur together. Requiring the

73 As the Tribunal correctly determined, Tribunal decision [175].

74 For example rejection may not be an option available on review of a s 114 decision.

consent authority to issue a development permit on substitution of its own decision does not make sense if that decision is not to consent to the planning application. However, I do not think that it follows that the Tribunal can revoke a determination without substituting its own decision. In context, and considering the purpose of the legislation, the last phrase does nothing more than indicate that if the Tribunal takes the step of revoking the DCA's determination and substituting its own decision, it also has the power to order the DCA to issue a development permit, if that is appropriate in the circumstances.

[73] This interpretation is consistent with the separate power in s 130(4)(c) by which the Tribunal may order the consent authority to issue or vary a development permit. The occasion to issue a permit, presumably, does not arise where a development permit is already in existence. An existing development consent would need to first be revoked using the power in s 130(4)(b). However, as the Tribunal can only take action under one of (a),(b) or (c), the last phrase of (b) makes it clear that, on revocation, a new development permit can also be ordered if that is necessary to the correct and preferable decision.

[74] The nature of the merits review jurisdiction of bodies such as the Tribunal is well understood. In exercising its jurisdiction the Tribunal is not acting as a court, although it must act judicially. [75] Unlike a court considering an appeal on a question of law, the Tribunal when undertaking a merits review under the Planning Act must determine the correct or preferable decision.

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75 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419 per Bowen CJ and Deane J.

[75] In this matter, the Tribunal said at [318]:

> One option would be for the Tribunal itself to consider the question of amenity under s 51(1)(n) by reference to the evidence in this hearing. In my view that is not the appropriate course in the circumstances, noting in particular that at first instance the DCA is the appropriate entity to perform that function.

[76] In taking that approach, the Tribunal has misunderstood what it was required to do. The "correct or preferable decision" which the Tribunal needed to make in this case was a decision determining the development application. There is nothing in the reasons which indicates that the Tribunal had formed a view that the correct or preferable decision was to consent, vary, or not consent, to the development application. That required consideration on the merits, which the Tribunal expressly declined to do.[76]

[77] I note that the Tribunal can, at any stage of a proceeding before it, invite the DCA to reconsider its decision within a specified time in accordance with s 49 of the NTCAT Act. It is a discretionary matter and in this case the Tribunal made a decision not to request a reconsideration, as it was entitled to do. In circumstances where there is no power to remit, a power to require the primary decision maker to reconsider, can be useful, including in cases where there is uncertainty as to whether a decision maker has failed to take a particular matter into account, or where the original decision maker has specialist expertise not available to the Tribunal. These are not the only examples. However, whether the Tribunal invites a decision maker to reconsider, or not, the obligation upon

76 Tribunal decision, [318].

the Tribunal to conduct the re-hearing and come to its own decision on the merits remains.

[78] In this case, the Tribunal has failed to properly exercise its jurisdiction on the review by failing to determine the correct or preferable decision in relation to the development application. It follows that it is in the interests of justice to grant leave to appeal on ground two, and the appeal must be allowed.

Disposition

[79] The appellant submitted that this Court should substitute its own decision for that of the Tribunal pursuant to the power in s 141(3)(c)(i) of the NTCAT Act, and that decision should confirm the decision of the DCA. The appellant submitted that this was the appropriate disposition because, on the appellant's case, there would be no more work for the Tribunal to do other than confirm the DCA decision. I do not agree.

[80] Although I have found that the Tribunal erred in law in finding that the DCA had manifestly failed to consider the relevant s 51(1)(n) Planning Act factors, I have done so on the basis of the reasons given by the Tribunal and the evidence before this Court on the appeal, which was confined to the DCA reasons and the DAS report. It is plain from the Tribunal's reasons that the Tribunal received and considered much more evidence than was presented on this appeal.[77] It also appears that the error in relation to ground 1 may have been contributed to by the way in which the case was argued in the Tribunal. It would not be appropriate

77 Tribunal decision, [65] – [79]

for me to make any order which determines an issue, including whether s 130(7)(a) is satisfied in this appeal. This is not a case where there are uncontested facts which would enable the court on appeal to make findings necessary to determine the issue in dispute.[78]

[81] Further, even if that were the case, the failure by the Tribunal to properly carry out its function, as found in relation to ground 2, means that there is a considerable lack of clarity about what is and what is not still in dispute between the parties. The respondents claim that the areas of dispute are significant and point to numerous grounds of review which were not addressed in the Tribunal's decision because the Tribunal disposed of the matter in the way that it did. Therefore, it is appropriate that the matter be returned to the Tribunal for rehearing.

Orders

1. The decision of the Tribunal of 8 March 2023 is set aside.
2. The proceeding is sent back to the Tribunal for reconsideration in accordance with these reasons.

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78 *Osland v Secretary, Dept of Justice* (2010) 241 CLR 320, [20]