CITATION:	*Kalhmera Pty Ltd v Planning for People Inc & Development Consent Authority* [2019] NTSC 85
PARTIES:	KALHMERA PTY LTD (ACN 110 883 237) and PLANNING FOR PEOPLE INC and DEVELOPMENT CONSENT AUTHORITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory Jurisdiction
FILE NO:	CAT 3 of 2018 (21846427)
DELIVERED:	29 November 2019
HEARING DATE:	13 March 2019
JUDGMENT OF:	Barr J

CATCHWORDS:

PLANNING AND ENVIRONMENT – APPEAL – Application for leave to appeal against decision by Tribunal which revoked consent determination for proposed residential development in a ‘specific use’ zone – Tribunal required to review determination of consent authority on its merits – Proceedings before the Tribunal a review by way of rehearing – appeal to the Supreme Court restricted to questions of law – Applicant failed to

identify a vitiating error of law in the Tribunal's decision – Application for leave to appeal dismissed

Planning Act 1999, s 117(1), s 130(4)(b), s 130(6), s 130(7)

Northern Territory Civil and Administrative Tribunal Act 2014, s 5, s 45, s 46(1), s 141

The Northern Territory Planning Scheme

Wilson v Lowery (1993) 4 NTLR 79; *Development Consent Authority v Phelps* [2010] NTCA 3; 27 NTLR 174, followed

Australian Unity Property Limited as responsible entity for the Australian Unity Diversified Property Fund v City of Busselton [2018] WASCA 38; 237 LGERA 333, referred to

REPRESENTATION:

Counsel:

Appellant:	B Hayes QC, P Quinn
First Respondent:	H Baddeley
Second Respondent:	L Peattie, F Mulvey

Solicitors:

Appellant:	Bowden McCormack Lawyers
First Respondent:	Ward Keller
Second Respondent:	Squire Patton Boggs

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

Kalhmera Pty Ltd v Planning for People Inc & Development Consent Authority [2019] NTSC 85

No. CAT 3 of 2018 (21846427)

IN THE MATTER of an application for leave to appeal, pursuant to s 141 *Northern Territory Civil and Administrative Tribunal Act 2014*

BETWEEN:

KALHMERA PTY LTD (ACN 110 83 237)
Applicant

AND:

PLANNING FOR PEOPLE INC
First Respondent

AND:

DEVELOPMENT CONSENT AUTHORITY
Second Respondent

CORAM: BARR J

REASONS FOR DECISION

(Delivered 29 November 2019)

[1] The applicant seeks leave to appeal the decision of the Northern Territory Civil and Administrative Tribunal ("the Tribunal"), made 30 October 2018, which revoked a determination of the Development Consent Authority (the

second respondent) granting consent to the applicant's proposed residential development at 4 (7820) Blake Street, The Gardens ("the land").

[2] Any appeal from the Tribunal's decision is governed by s 141 *Northern Territory Civil and Administrative Tribunal Act 2014*, which reads as follows:

> **141 Appeal to Supreme Court**
>
> (1) A party to a proceeding may appeal to the Supreme Court against a decision of the Tribunal on a question of law.
>
> (2) A person may appeal only with the leave of the Supreme Court.
>
> (3) On hearing an appeal, the Supreme Court must do one of the following:
>
> (a) confirm the decision of the Tribunal;
>
> (b) vary the decision of the Tribunal;
>
> (c) set aside the decision and:
>
> (i) substitute its own decision; or
>
> (ii) send the matter back to the Tribunal for reconsideration in accordance with any recommendations the Supreme Court considers appropriate;
>
> (d) dismiss the appeal.

[3] The hearing before the Tribunal was a rehearing on the merits, which took into account both the evidence before the Development Consent Authority and evidence admitted by the Tribunal. In this Court, the critical question on any appeal for which leave might be granted is whether the Tribunal committed an error of law. The error of law must be such as to vitiate the decision of the Tribunal,[1] that is, that there is a real possibility (as distinct

1 See *Development Consent Authority v Phelps* [2010] NTCA 3; 27 NTLR 174 at [11], and cases there cited.

from a mere or slight possibility), that the error of law could (but not necessarily would) have affected the Tribunal's decision.[2] The Tribunal's findings of fact are not open for reconsideration on the merits and necessarily stand unless infected by errors of law.

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

The Planning Scheme

[5] The applicable planning scheme is the Northern Territory Planning Scheme ("the Planning Scheme"), under which the land is zoned "Specific Use Darwin No. 46" (to be referred to as "SD 46"). The designated zone is unique to the land. The effect of clause 2.4 of the Planning Scheme is that, despite anything to the contrary elsewhere in the Planning Scheme, the land may be used or developed as specified in Schedule 1 (in which all of the Specific Use Zones are listed), subject to any conditions specified in the Schedule and any further conditions imposed by the consent authority. The second respondent is the relevant consent authority.

[6] The stated purpose of SD 46 is "to facilitate the use and development of the land for a predominantly residential development, with complementary commercial activities."[3] One of the conditions relevant to residential

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2 *Development Consent Authority v Phelps* at [11].

3 SD 46, cl. 1.

development requires that "Development is to include multiple dwellings in a variety of sizes up to a maximum of 118 multiple dwellings."[4]

[7] Clause 3 of SD 46 is very relevant to the proposed appeal. It reads as follows:

> 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, rooftop elements and the like are integrated in the design of the building.

[8] The Tribunal took the view that contribution to the improvement of the amenity of the Blake Street precinct was a separate requirement to the criteria specified in pars (a) to (e) of clause 3. The Tribunal described the chapeau to clause 3 as an "introductory requirement", which it considered to be "an essential overriding requirement of the clause". The applicant and the second respondent contend that the Tribunal thereby fell into error. For reasons explained in [9] – [12] below, I agree with their contentions.

[9] In my opinion, the opening sentence of clause 3 states the outcome which, *it may be assumed*, would be achieved if the development satisfied

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4 SD 46, cl. 5.

paragraphs (a) to (e). The clause sets out the planning objective ("Development is to contribute to improving the amenity of the Blake Street Precinct …) and specifies the means whereby the objective is to be achieved, set out as developer obligations. The clause dictates how the amenity of the Blake Street Precinct is to be improved.

[10] Clause 3 should therefore be interpreted such that it is to be taken for granted that a development will contribute to improving the amenity of the precinct if the criteria in pars (a) to (e) are satisfied. The requirements which the applicant had to satisfy were set out in those five paragraphs. The introductory sentence does not contain any additional "essential overriding requirement".

[11] Counsel for the first respondent contends that the Tribunal's interpretation was correct. He submits that the introductory part should not be seen as a "superfluous statement of effect", and that the interpretation (which I have adopted) would give the introductory words no work to do. The second part of that submission may be accepted. However, one often finds in subordinate legislation (such as planning instruments) that technical principles of legislative drafting do not come into play; in the case of planning instruments because they are drafted by town planners. This was

acknowledged by the Court of Appeal (WA) in *Australian Unity Property Limited v City of Busselton*:[5]

> In construing a planning scheme, it is also relevant to note that schemes are not usually drafted by Parliamentary counsel and are often expressed in terms which lack the precision of an Act of Parliament. Planning schemes should be construed broadly rather than pedantically and with a sensible practical approach. But the exercise remains one of identifying the objective meaning from a consideration of the legislative text, understood as a whole and in the context in which and purpose for which it was enacted.

[12] The interpretation explained in [9] and [10] also makes practical sense. In my opinion, it would be difficult to conceive of a situation in which a landmark development, achieved through high architectural quality and distinctive streetscapes, which provided high levels of pedestrian amenity and which featured buildings with active interfaces, designed to take advantage of views while allowing for future potential view corridors, and with all building services, plant rooms, elevator shafts and rooftop elements neatly concealed, would not contribute to improving the amenity of the Blake Street Precinct as an inner-city mixed use area.[6]

[13] In summary to this point, I have determined that the Tribunal erred in law in the interpretation of clause 3 of SD 46. In my judgment, however, that error

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5 *Australian Unity Property Limited as responsible entity for the Australian Unity Diversified Property Fund v City of Busselton* [2018] WASCA 38; 237 LGERA 333 at [84].

6 The Tribunal, at Reasons par 83, stated, "it is possible to envisage a development that meets all of the criteria of (a) – (e) but which would not contribute to improving the amenity of the locality." However, such a possibility is a remote possibility, as was conceded by counsel for the present first respondent, in this submission to the Tribunal: "… Theoretically you could envisage a landmark development through high architectural quality that does not contribute to improving the amenity of the area… a sleepy English village that is green and peaceful and calm. If you put into that village the Empire State Building … [it] might be a landmark development through high architectural quality but it might not necessarily improve the amenity of the area." (Transcript 27/09/2018, p. 10.1).

of law was not such as to vitiate the decision of the Tribunal, essentially because the Tribunal was not satisfied that the proposed development created a landmark development through high architectural quality and distinctive streetscapes, as required by clause 3(a) of SD 46. The Tribunal observed, correctly in my view, "…it remains unassailable that 3(a) is a discrete requirement that must be complied with". For reasons I explain in [19] – [25] below, that part of the Tribunal's decision did not involve an error of law and can stand independently of any other part of the decision which was infected by error. As a result, it did not matter that the Tribunal found that the development did not satisfy the additional requirement which the Tribunal wrongly held to have applied.

Proceedings in the Tribunal – statutory context

[14] After the second respondent granted consent to the applicant's development application on 9 May 2018, the first respondent applied to the Tribunal for a review of the second respondent's determination, pursuant to s 117(1) *Planning Act 1999*. In accordance with s 130(6) *Planning Act 1999*, the nature of the review was "a review of the determination of the consent authority … on its merits".

[15] Pursuant to s 45 *Northern Territory Civil and Administrative Tribunal Act 2014*, the Tribunal was required to conduct the review by way of rehearing. The stated objective of the Tribunal exercising its review jurisdiction is to

"produce the correct or preferable decision".[7] However, that is potentially in tension (or part tension) with s 130 (7) *Planning Act 1999*, which provides (relevantly to the present appeal) that the Tribunal may take action by way of revocation of a determination only if satisfied that the consent authority manifestly failed to take into account a matter referred to in s 51 *Planning Act 1999* or that "the determination of the consent authority would result in a planning outcome manifestly contrary to a provision of a planning scheme." [8] The tension is resolved by reference to s 5 *Northern Territory Civil and Administrative Tribunal Act 2014*, which provides that a 'relevant Act' (defined to include an Act that confers jurisdiction on the Tribunal) may modify the operation of the *Northern Territory Civil and Administrative Tribunal Act 2015* in relation to an exercise of jurisdiction conferred; further, that if there is an inconsistency between the *Northern Territory Civil and Administrative Tribunal Act 2015* and a relevant Act, the relevant Act prevails to the extent of the inconsistency.

[16] In the present case, therefore, s 130 (7) *Planning Act 1999* prevailed, as acknowledged by the Tribunal.[9]

The Tribunal's decision and reasoning

[17] The Tribunal found that the proposed development was not a landmark development created through high architectural quality and distinctive

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7 See s 46 (1) *Northern Territory Civil and Administrative Tribunal Act.*

8 See *Planning Act 1999*, s 137 (4) (b), s 137 (7) (a) and (b).

9 Reasons, pars 11, 107.

streetscapes.[10] Further, the Tribunal was not satisfied that the proposed development appropriately contributed to improving the amenity of the Blake Street Precinct.[11] The Tribunal considered that that non-compliance with "either or both" of the "essential criteria under clause 3" was contrary to a provision of the Planning Scheme, and, consequently, the determination of the second respondent to approve the proposed development resulted in an outcome manifestly contrary to a provision of the Planning Scheme. On the basis of those findings, the Tribunal decided that, pursuant to s 130(7)(b) of the *Planning Act 1999*, it should revoke the determination under s 130(4)(b) of the Act.[12]

[18] I have referred in [8] – [13] above to the Tribunal's error in finding that contributing to improving the amenity of the Blake Street Precinct was an independent essential criterion under clause 3 of SD 46. That is a question of interpretation and nothing further need be said. I therefore turn to consider the Tribunal's decision that the proposed development was not a landmark development.

[19] The Tribunal's reasoning in relation to of clause 3, par (a) of SD 46, as to whether or not the proposed development would create "a landmark development through high architectural quality and distinctive streetscapes", starts at par 49 of its Reasons for Decision. After referring to the parties'

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10 Reasons, pars 40, 52, 72, 89, 118.

11 Reasons, pars 73, 89.

12 Reasons, par 89, 118.

submissions as to what constitutes a "landmark development", the Tribunal observed that a "landmark development" must have something about it that sets it apart from other developments. It needed to be "something special" or "remarkable". Moreover, this defining characteristic had to be achieved, in the words of clause 3(a), "through high architectural quality and distinctive streetscapes". At Reasons par 50, the Tribunal observed that a "landmark development" did not necessarily have to physically stand out against its background; that the characterisation of a development as "landmark" solely or primarily on the basis of its physical prominence was misconceived. At Reasons par 51, the Tribunal stated that the word "landmark" in clause 3(a) meant that the development must have a 'landmark quality' rather than the building itself being a landmark. The Tribunal thus adopted a qualitative rather than a purely quantitative (height, mass or physical appearance) meaning of "landmark".

[20] I reproduce below pars 52 – 64 of the Tribunal's Reasons (footnote references deleted):

> 52. In coming to our decision that the proposed development is not a "landmark development" we have considered the opinions of the experts we have been provided with.
>
> 53. In their reasons for decision the DCA referred to the opinions of experts proffered by Kalhmera and ultimately determined that
>
> > "The authority agreed with DAS' view that the development is unique and would be readily identifiable.[13] Its identity arises from the building height relative to the existing

13 The reference to 'DAS' was to the internal technical branch of the Department, known as 'Development Assessment Services'.

> buildings in the area, and its uniqueness from its character as a high density mixed use residential development".

In our view the DCA correctly identified the basis on which expert opinion attached to the application for development formed the view that the development was "landmark" as relating to the height and density.

54. One of those opinions was that of June D'Rozario who authored the section 46 report which was provided to the DCA in support of the 2018 application. Ms D'Rozario asserted that the development met the "landmark" criteria as follows:

> "The proposed development will be a landmark, because it will be a prominent and conspicuous building in the Blake Street Precinct. Its prominence and conspicuousness arise from building high relative to existing buildings in the Blake Street Precinct, its architectural quality and landscape design, all of which will make the building stand out against its background."

55. Similarly, Leslie Curtis in his report in support of the 2017 application asserted that:

> "… the height and scale of the proposed development will clearly be visually dominant and will therefore become a highly legible landmark."

56. In his updated report of 3 September 2018, Leslie Curtis refers to his own earlier report of February 2017 and opines that:

> "In my opinion, a fair assessment of the proposed development, having regard to the context and reasonable expectations would conclude the proposal demonstrates a high quality design response that will positively contribute to and create a distinctive streetscape and will also provide a legible landmark that enhances the image and identity of the locality."

57. While both of the opinions of June D'Rozario and Leslie Curtis refer to quality of design it is clear that their characterisations of the development as "landmark" rely heavily on its height and physical conspicuousness.

58. Zone SD46 does not preclude a landmark development from being big but it requires that the landmark quality is to be achieved through "high architectural quality and distinctive streetscapes". In our view neither June D'Rozario or Leslie Curtis demonstrate how the proposed development achieves this.

59. In her later undated report Ms D'Rozario considers "landmark development" more directly on the basis of design characteristics.

She assesses the "landmark" status of the development against a definition proposed by Professor Nield:

> "Professor Nield defines a landmark development as one that introduces a new standard – a "game changer" with new urban design standards while responding to a significant site.
> I submit that the proposed development meets this criterion, on the following bases –
>
> - The proposal introduces new urban and design standards. This can be seen in:
>   - The landscape ratio. The proposal provides 2,890 m2 or 45.9% of the site area of landscaped communal open space, compared to 15% required for ordinary apartment buildings. Of the communal space, 2,095 m2 or 33.25% has a width of more than 6 m, compared to 15% required for ordinary apartment buildings.
>   - Integration of building and landscape and adjoining streetscape, compared to no specific requirement for ordinary apartment buildings.
>   - Deep setbacks, between 13.5 m and 15.9 m for most of Gardens Hill Crescent and 17.0 m rear setback, compared to 10.5 m maximum setback for ordinary apartment buildings.
>   - A site coverage ratio of 0.416 from third storey above ground level (maximum permissible by SD46 is 0.5), compared to no site coverage ratio for ordinary apartment buildings."

60. In our view the development needs to achieve something beyond these criteria to achieve landmark status. All of the above characteristics of the development are technical standards required by subsequent clauses of SD46 and the table to clause 12. The requirement for "a landmark development through high architectural quality and distinctive landscapes" is a criteria of its own. Compliance with other clauses is necessary but does not of itself satisfy the need to comply with the qualitative standard imposed by clause 3(a).

61. The adherence to the specifications referred to by Ms D'Rozario effectively amounts to the fact that the "design proposed for the development exhibits a level of quality consistent with the general requirements of the zoning". This much was conceded by Ian Mitchell in his expert opinion. Clause 3(a) requires something over and above this.

62. In our view the opinion of Ian Mitchell accurately captures the nature of the "landmark development" quality required. Ian Mitchell recognises the quality of the proposed development. He states that:

> "the building is well articulated and appears to recognise its tropical environment both in terms of some shading and the landscape illustrated. Attention appears to have been paid to cross ventilation in the individual apartments and this has had a positive impact on the articulation of the buildings".

However, he goes on to conclude that, despite these qualities:

> "while the proposed design for the projects exhibits a consistent and desired level of quality for a building in the general context of the zone, it does not evidence characteristics which will allow it to be considered a 'landmark' building or development as required by the site's zoning."

63. Ian Mitchell offers some suggestions of design elements that might be considered. Significantly he also describes some characteristics that might be expected of a "landmark development" including:

- A significant presence on the street. This may be as a result of the building's form…
- Exhibit a timeless quality consistent with high architecture…
- Potentially include an element of public realm…
- Contribute to street life…
- Provide transparency…

64. In our view these more aesthetic considerations are what is required by clause 3(a). The possibilities are endless but in our view the defining criteria will be whether or not a high architectural quality and distinctive streetscapes are combined in such a way as to invest the development with a "landmark" quality.

[21] As mentioned in [17] above, the Tribunal found that the proposed development was not a landmark development created through high architectural quality and distinctive streetscapes. That decision was essentially a decision of fact. No appeal would lie from that decision. To the

extent that the decision involved the interpretation of the expression "landmark development", it could be characterized as a decision of mixed fact and law. In my view, however, the present applicant has not established any error of law on the part of the Tribunal in relation to its 'qualitative rather than purely quantitative' interpretation of the expression "landmark development".

[22] The applicant contends asserts that the Tribunal's decision at pars 49 and 67 (extracted in [19] and [20] above) reveals an error of law in the interpretation of clause 3(a) of SD 46. The Tribunal there determined that for a development to be a "landmark development", it had to have some special or remarkable quality that set it apart from other developments.[14] The applicant takes particular issue with the Tribunal's reasoning that the proposed development needed to be "something special" or "remarkable" and, in the context of the specific use zone, "something out of the ordinary".[15] The applicant submits that these terms are "a series of superlatives which represent a major departure from the language employed in clause 3 of SD 46". I reject that submission. As a matter of semantics, the terms are not superlatives. Further, in my view, they do not depart from the language employed in clause 3 of SD 46, and certainly do not represent a major departure therefrom. In an attempt to characterize the Tribunal's interpretation as extreme, or at least unfair or unreasonable, the applicant

14 Reasons, par 67.

15 Applicant's outline of sumissions, par 51.

advances a definition of "remarkable" as 'notably or conspicuously unusual' or 'extraordinary'. That definition does appear in the Macquarie Dictionary, but the given usage example is '*a remarkable change*'.[16] The Macquarie Dictionary contains a second definition of 'remarkable', namely 'worthy of remark or notice'. In my opinion, that second definition more closely aligns with the Tribunal's use of the word 'remarkable' in Reasons, pars 49 and 67.[17]

[23] The Tribunal's observations at par 67 put its use of the word 'remarkable' in proper context:

> Clause 3(a) is designed to ensure a particular standard of development. It must employ high architectural quality and distinctive streetscapes in such a way as to create a "landmark development". In the context of this specific use zone the development must be something out of the ordinary. It must have some special or remarkable quality that sets it apart from other developments.

[24] The Tribunal considered the opinions of a number of experts as to the characteristics which would make a development a "landmark development", including June D'Rozario, town planner; Leslie Curtis, architect, Professor Lawrence Nield, architect,[18] and Ian Mitchell, architect, ultimately preferring the opinion of Ian Mitchell.[19] In their written submissions, counsel for the applicant refer in detail to the expert evidence of June D'Rosario and Leslie Curtis in relation to the suggested high architectural

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16 Macquarie Dictionary 4th ed'n, 2005.

17 The New Shorter Oxford Dictionary, 1993, defines 'remarkable' as "1. Worthy of notice or observation; extraordinary, unusual, striking; 2. Perceptible, noticeable. Also, likely to attract attention, conspicuous."

18 See the discussion in relation to Professor Nield at Reasons, pars 24-26.

19 Reasons, pars 62-64, extracted in [20] above.

quality of, and the distinctive streetscapes created by, the proposed development. However, as is apparent from the parts of the Tribunal's decision extracted in [20] above, in particular pars 58, 60, 63 and 64, the Tribunal rejected the views of those experts and found as a matter of fact that the proposed development was not a landmark development created through high architectural quality and distinctive streetscapes.

[25] In my opinion, the Tribunal's finding was a carefully considered finding of fact, and clearly open to the Tribunal. The finding is not reviewable in this Court, where an appeal is limited to a question of law. Indeed, provided that there is no error of law and there is *some* evidence on which the finding is made, a finding of fact cannot be disturbed, even on the basis that it may be "perverse" or "against the evidence or the weight of the evidence or contrary to the overwhelming weight of evidence", or because it is said to ignore the probative force of other evidence.[20] In the present case, it was not an error of law for the Tribunal to take a different view of the facts to that taken by the second respondent, as the applicant appears to contend.[21]

[26] Both the applicant and the second respondent contend that the Tribunal erred in law by failing to have regard or sufficient regard to the Minister's reasons for amending the Planning Scheme by re-zoning the land in accordance with SD 46.[22] Counsel for the second respondent submit that the Minister's

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20 See *Wilson v Lowery* (1993) 4 NTLR 79 at 84.

21 Applicant's outline of submissions, pars 53, 61.

22 Applicant's outline of submissions, pars 67-69; second respondent's outline of argument, pars 46-59.

reasons were instructive and relevant because they identified the 'precise purpose' for which SD 46 was created.[23] The implicit suggestion is that the precise purpose was otherwise difficult to ascertain. However, that submission fails to take into account clause 1 of SD 46, which is expressed in very clear terms:

> The purpose of this zone is to facilitate the use and development of the land for a predominantly residential development, with complementary commercial activities.

[27] If clause 1 is read with the requirement for a landmark development through high architectural quality and distinctive streetscapes, set out in clause 3(a), and with the other paragraphs of clause 3, the precise purpose of the SD 46 zone is made clear both expressly and by implication. Counsel for the second respondent do not identify any relevant part of the Minister's reasons which was not taken up in the text of SD 46. No error of law is made out.

[28] Counsel for the second respondent also contend that a reading of the Minister's reasons lends weight to the interpretation of clause 3 which I have adopted in [9] to [12] above, namely that the development *will* meet the overall requirement of clause 3 if it satisfies the criteria in each of pars (a) to (e) thereof.[24] The Minister's reasons were clearly drafted in the context of and in response to a previously proposed development similar to that considered by the second respondent and the Tribunal, and read, in part, as follows:

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23 Second respondent's outline of argument, par 50.

24 Second respondent's outline of argument, par 51.

> The predominantly residential development, with complementary and subsidiary commercial activities, will improve the amenity of the Blake Street district and provide housing choice with ready access to facilities and services in the nearby central business district.

[29] The second respondent contends that the Tribunal denied itself recourse to material which might have led it to correctly interpret the chapeau to clause 3 of SD 46. As a result, the Tribunal viewed the chapeau to clause 3 as an essential overriding requirement of the clause, additional to the requirements of pars (a) to (e) of clause 3, and thereby fell into error. Although there may be some merit to the submission, it is not necessary for me to determine the source or origin of the Tribunal's error, because the error was a non-vitiating error, for reasons explained in [13] above. The specific failure to take into account the Minister's reasons did not adversely affect the Tribunal's separate consideration of clause 3(a) of SD 46 and the Tribunal's finding that the proposed development was not a landmark development.

[30] The second respondent further contends that the Minister's reasons "provided guidance as to the meaning of 'landmark development.'" Counsel refer to the fact that the SD 46 rezoning determination was made in the context of "a particular proposed development with corresponding specifications."[25] I refer also to the extract from the Minister's reasons in [32] above. The Tribunal expressed the view that the Minister's reasons for the rezoning did not assist in determining the meaning of the expression 'landmark development'. I agree. No error of law is made out. It is clear

25 Second respondent's outline of argument, par 53.

from the text of SD 46 that any development had to be with the consent of the consent authority, which was required to assess any proposed development against the specific provisions of SD 46, including clause 3(a) and all of the more technical requirements set out in clauses 5 to 12. The assessment and decision as to whether any proposed development would, inter alia, create a landmark development through high architectural quality and distinctive streetscapes was left to the consent authority. In that context, I agree with the Tribunal's statement reproduced below:[26]

> The reasons for the Minister's decision cannot be used as a de facto approval of the specific development or to establish improved amenity or landmark status. That would be to usurp the role of the DCA as provided under the *Planning Act*.

[31] The applicant and second respondent have not demonstrated any error of law on the part of the Tribunal, apart from the ultimately inconsequential error of law referred to in [28] – [29].

Was revocation of the consent authority's determination an error of law?

[32] Having found that the proposed development was not a 'landmark development' as required by SD 46, the Tribunal held that the determination of the consent authority to approve the development would result in an outcome manifestly contrary to a provision of the Planning Scheme. On that basis, it revoked the determination.

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26 Reasons, par 100.

[33] The second respondent contends that the Tribunal erred in law: that it misapplied s 137(7)(b) *Planning Act 1999* by failing to identify any manifest error in the determination before taking action under s 130(4)(b).[27]

[34] However, it should be noted that the Tribunal's order to revoke the first respondent's determination was on the basis that the consent authority's approval, if carried through, would result in a planning outcome manifestly contrary to a provision of the Planning Scheme. To that extent, the second respondent's submissions are not on point. The second respondent contends that the Tribunal did not identify error in the Reasons of the consent authority for its conclusion that the proposed development was a "landmark development". However, as mentioned in [17] and [24] above, the Tribunal made it clear why it did not consider that the proposed development was a "landmark development", and by implication why it disagreed with the consent authority, which had found to the contrary. Moreover, even if the second respondent's contention were correct, it must be remembered that the task of the Tribunal was to produce "the correct or preferable decision" after a rehearing on the merits.

[35] In further submissions, the second respondent refers to a number of similarities between the approach of the Tribunal and that of the second respondent, and to the absence of disagreement in certain respects.[28] Counsel for the second respondent submit that the Tribunal and the consent authority

27 Second respondent's outline of argument, par 31.

28 Second respondent's outline of argument, par 33-36.p

applied the same criteria to identify whether the proposed development would create a 'landmark development', namely "high architectural quality and distinctive landscapes".[29] The relevance of that submission is unclear, given that the quoted expressions are simply drawn from clause 3(a) of SD 46. The main thrust of the second respondent's argument is that the only difference between the Tribunal and the consent authority was in relation to "matters of opinion and taste".[30] As a result, it could not be said that the outcome of the consent authority's determination was *manifestly* contrary to a provision of a planning scheme so as justify revocation of the determination by the Tribunal.

[36] It is obvious that the Tribunal and the consent authority disagreed as to what constituted a 'landmark development' and as to whether the proposed development conformed to the requirements of clause 3 of SD 46. They assessed the evidence differently and arrived at different conclusions. No doubt their respective assessments involved forming opinions as to the architectural design and aesthetic qualities of the proposed development. That much is clear from the extracts reproduced in [20] above. However, once the Tribunal found that the proposed development was not a 'landmark development' (through high architectural quality and distinctive streetscapes), it followed logically that the development (if built) would have been in breach of clause 3(a), that being one of the most significant

29 Second respondent's outline of argument, par 32.

30 Second respondent's outline of argument, par 36.

requirements of SD 46. The proposed development would have failed to achieve that which the zoning expressly required. I see no error in the Tribunal's conclusion that the determination of the consent authority would result in a planning outcome *manifestly* contrary to a provision of the planning scheme. As I see it, this was an 'all or nothing' situation unlike, for example, a dispute or difference over the extent of a waiver granted for front or side setbacks, or a shortfall in car-parking spaces.

Conclusion

[37] The applicant has not established grounds on which an appeal might succeed on a question of law, and accordingly, leave to appeal should be refused. The application for leave to appeal filed 5 November 2018 should be dismissed.

[38] I will hear the parties on the issues of (1) consequential orders (if any) and (2) costs.
