VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P470/2023  Permit Application no.PDPL/0514/2022 |
| CATCHWORDS | |
| Section 82(1) *Planning and Environment Act 1987* (Vic); Heritage Overlay Schedule HO44; Middle Park and St Kilda West Precinct; Demolition; Significant building; Whether the building is structurally unsound and the defects cannot be rectified; Whether the demolition will adversely affect the significance of the heritage place. | |

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| **Applicant** | Mike Danks |
| **Responsible Authority** | Port Phillip City Council |
| **RespondentS** | Daniel Calderazzo |

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| SUBJECT LAND | 115 Erskine Street  MIDDLE PARK VIC 3206 |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 16 and 17 November 2023 & 20 and 21 February 2024 |
| DATE OF ORDER | 10 April 2024 |
| CITATION | Danks v Port Phillip CC [2024] VCAT 326 |

# Order

### No permit granted

1. In application P470/2023 the decision of the responsible authority is set aside.
2. In planning permit application PDPL/0514/2022 no permit is granted.

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| Karina Shpigel  **Presiding Member** |  | Lorina Nervegna  **Member** |

# Appearances

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| For Mike Danks | Thomas Buchan, Town Planner, SongBowden Planning Pty Ltd. He called evidence from the following experts:   * Carolynne Baker, Heritage Consultant, Urbis. * John McFarlane, Civil Engineer, McFarlane & Partners. |
| For Port Phillip City Council | Jun Yu, Solicitor, Best Hooper Lawyers. |
| For Daniel Calderazzo | Scott Edwards, Solicitor, Planning Property Partners. He called evidence from the following experts:   * Bryce Raworth, Conservation Consultant and Architectural Historian, Bryce Raworth Pty Ltd. * Andrew Smith, Structural Engineer, Cracks in the Wall. |

# Information

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| Description of proposal | Demolition of the existing dwelling, construction of two contemporary double storey dwellings, reduction in the number of required car parking spaces. |
| Nature of proceeding | Application under section 82 of the *Planning and Environment Act 1987* (Vic) – to review the decision to grant a permit. |
| Planning scheme | Port Phillip Planning Scheme. |
| Zone and overlays | Neighbourhood Residential Zone, Schedule 1.  Heritage Overlay, Schedule HO44. |
| Permit requirements | Clause 32.09-7 to construct two or more dwellings on a lot.  Clause 43.01 to demolish or remove a building and construct a building or carry out works.  Clause 52.06-3 to reduce the number of required car parking spaces. |
| Land description | The site is located on the northern side of Erskine Street. It is generally rectangular in shape with a frontage to Erskine Street of approximately 5 metres. The rear of the site has a width of approximitley 5.5 meters and has a direct interface to Canterbury Place. The site has a total overall size of 151 square metres.  The subject land is developed with a single storey brick Victorian terrace cottage. The dwelling forms part of a row of four terrace houses to the east.  To the west at 113 Erskine Street, is a recently constructed double storey contemporary dwelling.  To the north is Canterbury Place which has a narrow laneway environment and is characterised by rear fences and garage doors.  The land is located within an established residential area and is in close proximity to the Armstrong Street Neighbourhood Activity Centre. |
| Tribunal inspection | An accompanied inspection was conducted on 17 November 2023. |

# Reasons

## What is this proceeding about?

1. Daniel Calderazzo (‘respondent’) has sought a permit to completely demolish the dwelling at 115 Erskine Street, Middle Park (‘subject land’) and redevelop the land with two contemporary double storey dwellings. The respondent is also seeking a reduction in the car parking requirement for Dwelling 1, which has not been provided with any on-site car parking.
2. Port Phillip City Council (‘responsible authority’) supported the application and issued a Notice of Decision to Grant a Permit. The responsible authority submits the demolition application is justified because of the ‘catastrophic structural failure’ of the dwelling. It says demolition will not have an adverse impact on the broader heritage precinct. The responsible authority’s view is that the proposed replacement building provides an acceptable heritage outcome that respects the neighbourhood character of the area.
3. Mike Danks (‘applicant’) lives directly next to the subject land at 113 Erskine Street and is opposed to the proposal. He has sought review of the responsible authority’s decision under section 82 of the *Planning and Environment Act 1987* (Vic).
4. The key issue in the application is the proposal to completely demolish the existing heritage dwelling on the subject land. The subject land is within Heritage Overlay HO444 *Middle Park and St Kilda West Precinct* and the dwelling is identified as a ‘Significant’ building.[[1]](#footnote-2)
5. The respondent submits that the dwelling was irreparably damaged as a result of construction works on the applicant’s property. He says the dwelling should be demolished because it is now structurally unsound and cannot be retained. The respondent relied on expert engineering evidence of Andrew Smith, who described the structural damage to the dwelling as severe and beyond repair.
6. The applicant disputes that the building is structurally unsound and submits the demolition of a significant heritage building is discouraged by heritage policy in the Port Phillip Planning Scheme (‘planning scheme’). The applicant called expert engineering evidence from John McFarlane whose opinion was that the dwelling is not at imminent risk of collapse or failure and the front part of the dwelling can be retained and repaired.
7. Having regard to our inspection of the subject land, the submissions and evidence of the parties and the policies and provisions of the planning scheme, we are not persuaded that the dwelling should be demolished. We consider that the demolition of the dwelling would adversely affect the significance of the heritage place.

## what does the planning scheme say?

1. The subject land is located with Heritage Overlay, Schedule HO444. The purposes of the Heritage Overlay include conserving and enhancing heritage places, conserving and enhancing elements which contribute to the significance of heritage places and ensuring development ‘does not adversely affect the significance of heritage places’.[[2]](#footnote-3)
2. Clause 43.01-1 requires a permit to demolish or remove a building and the decision guidelines in Clause 43.01-8 requires consideration to be given to:

* The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.

…

* Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.[[3]](#footnote-4)

…

1. The overall objective of heritage conservation policy in Clause 15.03-1S is the conservation of places of heritage significance through conservation, enhancement and retention of those elements that contribute to the importance of the heritage place.
2. The local heritage policy at Clause 15.03-1L sets out general strategies that include:

* conserving and enhancing significant and contributory buildings;
* maintaining the integrity and intactness of heritage places
* avoiding development that would result in the incremental or complete loss of significance of a heritage place by demolishing or removing a building or feature identified as significant or contributory.

1. The strategies applicable to ‘Demolition and relocation’ in Clause 15.03-1L explicitly *discourage* the demolition of a significant or contributory building and *encourage* conservation. Relevantly the policy includes the following strategies:

* Prioritise the conservation, restoration or adaption of a heritage place over demolition.]
* Discourage the complete demolition of any building or feature that contributes to the significance of a heritage place unless the building or feature is structurally unsound and the defects cannot be rectified.
* Avoid demolition where it would result in the retention of only the facade and/or external walls of a Significant or Contributory building.
* Avoid the demolition of a Significant or Contributory building unless new evidence has become available to demonstrate that the building is not of heritage significance and does not contribute to the heritage place.

## What is significant?

1. The subject land is located within Heritage Overlay HO444 ‘*Middle Park and St Kilda West Precinct’*.
2. The subject land, together with the row of terraces to the east at 117, 119 and 121 Erskine Street, are identified as being a ‘Significant heritage place’ in Heritage Policy Map (December 2021), which is an incorporated document pursuant to clause 72.04 of the planning scheme.
3. The Statement of Significance[[4]](#footnote-5) identifies that the Middle Park/St Kilda West Precinct is of historical and aesthetic significance to the City of Port Phillip. Historically the precinct is significant as a notable and highly atypical expanse of late nineteenth and early twentieth century inner-suburban residential development. Aesthetically, the precinct is significant for its fine and largely intact streetscapes of Victorian and Edwardian housing.

## what was the evidence concerning impacts on the heritage place?

1. It was not in dispute that the dwelling on the subject land was constructed in the late Victorian period, in the late 1880s, as one of a row of four attached single storey terraces.
2. Ms Baker’s evidence was that the front of the dwelling has changed little since it was constructed and it retains the following original details:

* front façade of tuckpointed biochrome brick;
* hipped roof, clad in corrugated galvanised steel and rendered brick chimney projecting from the roof ridge;
* timber framed tripartite window;
* original four panelled timber door; and
* front verandah with convex corrugated galvanised steel roof and cast-iron lacework frieze extending the full width of the front façade. The verandah floor is paved in quarry tiles and edged in basalt.

1. According to Ms Baker, the dwelling on the subject land is a significant heritage place that remains largely intact to its original form, notwithstanding the non-original tall brick fence at the front of the property.[[5]](#footnote-6) The dwelling forms part of a streetscape and a broader precinct that is significant for its streetscapes of Victorian and Edwardian building stock.
2. The dwelling is also one of a row of four Victorian terraces that have a high degree of uniformity and legibility to Erskine Street. Ms Baker’s assessment was that the dwelling on the subject land is a matched pair with the dwelling at117 Erskine Street to the east. The dwellings at 119 and 121 Erskine Street are less intact but retain many original features and according to Ms Baker, ‘the four residences together form a cohesive group in a central location in the block of Erskine Street between Nimmo and Armstrong Streets.’
3. Ms Baker’s view was that the total demolition of the dwelling on the subject land would have an adverse impact on the Erskine Street streetscape as well as the broader Middle Park/St Kilda West Heritage Precinct. The Victorian terrace house is identified as a significant building in a precinct that is of significance for its streetscapes of Victorian and Federation residences. It would also reduce the intactness of the row of four Victorian terraces.
4. Mr Raworth’s view was that the Victorian character of the north side of Erskine Street has been eroded by the redevelopment of adjacent sites with modern buildings. Erskine Street is a diverse streetscape because there are a variety of architectural styles. Even the row of terraces has undergone varying degrees of change, with 117 and 121 both having contemporary double storey rear additions and 119 and 121 have non-original high rendered brick fences, have been overpainted and had their chimneys removed.
5. Mr Raworth’s view was that the demolition of the dwelling will not have an adverse impact on the heritage place because the dwelling is at the ‘lower end’ of significance and it sits within a diverse streetscape. According to Mr Raworth, demolition is acceptable because of the building’s poor structural condition and the impact on the heritage place will be very low, particularly as the dwelling is at the western edge of the group of terrace houses, so it won’t result in a ‘missing tooth’.

## is the dwelling structurally unsound?

### Heritage policy

1. The responsible authority’s heritage policy in clause 15.03-1L of the planning scheme discourages the complete demolition of any building or feature that contributes to the significance of a heritage place, unless:

the building or feature is structurally unsound and the defects cannot be rectified.[[6]](#footnote-7)

1. The terms ‘structurally unsound’ and ‘the defects cannot be rectified’ are not defined in the policy or the planning scheme. In *Advant Pty Ltd v Port Phillip CC*[[7]](#footnote-8) the Tribunal considered an earlier iteration of the policy[[8]](#footnote-9) and what constitutes ‘structural unsoundness.’ Member Code (as he then was) held:

… In my view, the term connotes a high level of unsoundness given the context of allowing a contributory building in a heritage place to be demolished contrary to an overarching policy in this scheme to protect, conserve and enhance such a building. It needs more than defects that would be normal or not unexpected for a structure of that age that has been maintained to a normal standard and in the particular circumstances of the particular structure and its setting.

Accordingly, if a building is structurally unsound for the purposes of demolition policy in this scheme, its structural core comprising its walls, roof or foundations must be more likely than not to fail to such an extent, within the medium term without repair or remedial works, as to make the building likely to collapse or unable to be reasonably or safely occupied.

1. We are in broad agreement with this explanation of ‘structural unsoundness’ and we observe that whether a building is structurally unsound and the defects cannot be rectified will turn on the facts of each case.

### What was the evidence?

1. The applicant relied on the engineering evidence of John McFarlane. Mr McFarlane was of the view that the front part of the building is structurally sound and the damaged part of the existing building can be retained and repaired.[[9]](#footnote-10) His view was that underpinning to the existing walls is not required, as he believes the western wall was underpinned externally from the adjoining site at 115 Erskine Street and there are no further signs of settlement.
2. Mr McFarlane’s evidence was that the structural works required to retain the front part of the building are “not complex and are reasonably straightforward”. His view was that a permanent steel support system is required for the chimney and roof frame and that common masonry repair techniques can be used to repair wall cracks up to 15 mm. According to Mr McFarlane the rear part of the dwelling is structurally unsound and at risk of collapse, but the front of the building is structurally sound.
3. The respondent relied on the engineering evidence of Andrew Smith. Mr Smith has prepared six written reports concerning the condition of the dwelling on the subject land over the period 15 October 2018 to 25 October 2019.[[10]](#footnote-11) All of the reports were tendered and adopted as part of his evidence. We note that the reports were not prepared in accordance with Practice Note – PNVCAT2 Expert Evidence and some included a cover sheet that referred to a proceeding in the Building Appeals Board of Victoria.
4. Mr Smith confirmed that he was engaged by the respondent’s family in 2018 to investigate the cause of extensive cracking in the dwelling and his reports were prepared in the context of the building protection works process and responding to the building surveyor. As a result the reports contain material that is largely irrelevant to the review proceeding as they do not specifically address the central issue concerning the condition of the dwelling and whether it is ‘structurally unsound and the defects cannot be repaired,’ pursuant to the heritage policy.
5. From our reading of these reports, it would appear that Mr Smith’s initial opinion (in his report dated 15 October 2018) was that the entire original building required underpinning using wide spread footings at 0.9 metres deep x 1 metre wide (reinforced footings). But on further inspection, he stated in his report dated 3 April 2019 that the entire building was by this time severely fractured and in need of reconstruction with deep footings that at are at least 3 metres deep. His view is that the works would not be economical, so accordingly his recommendation is for the entire dwelling to be demolished and reconstructed.
6. Mr Smith’s oral evidence to the Tribunal was that the dwelling on the subject land is structurally unsound and unsafe. The removal of the internal propping would result in the roof collapsing. The visible cracks in load bearing walls is evidence of structural damage. In his opinion the western wall is totally shattered and the building does not have structural integrity. He conceded that he was never asked about the front façade and has no opinion about that façade wall.
7. We acknowledge that Mr Smith has had a long history with the subject land and appears to have intimate knowledge of the condition of the dwelling. However, given his role in representing the respondent and his family during the protection works process, we cannot give his opinions the weight of an independent expert. We also do not endorse his statement to the Tribunal that the ‘house’ is his client and not the respondent and his family.
8. The responsible authority did not call any evidence, but relied on a pre-application response from Daniel Rossi, the Municipal Building Surveyor. In an internal Port Phillip email dated 25 February 2021, Mr Rossi states:

I am familiar with this site and have carried out site inspections in the past. The dwelling has suffered from a catastrophic structural failure due to the basement excavation that was carried out on the adjoining building site. The building was evacuated and cannot be occupied due to the extensive structural propping that has been carried out both internally and externally to stop the dwelling from collapsing into the adjacent excavation. I have attached a Google photo of the external propping for your reference. The dwelling is without a doubt structurally unsound so I am confident to provide that advice at preapplication stage, however if the owner decides go to a full Planning Application, their application should be accompanied with some professional reporting by a Registered Structural Engineer.

1. Mr Rossi was not called to give evidence, so his opinion was not tested through cross examination. It is not clear when he inspected the site or what the purpose of those inspections were, as they appear to have occurred before the permit application was lodged with the responsible authority on 27 July 2022. We do not know what aspects of the dwelling’s condition led Mr Rossi to state the building was ‘without a doubt structurally unsound’ or why he was of the view the dwelling cannot be occupied. Mr Rossi did not consider whether rectification works were possible. The responsible authority did not indicate that an emergency order had been made under the *Building Act 1993 (Vic)*.[[11]](#footnote-12) We have not given any weight to Mr Rossi’s statement.
2. We were also taken to some of the reports that seem to have been commissioned in the earlier building dispute between the applicant and the respondent. This included an engineering report from J & P Building Solutions and a building repair assessment from Dome Builders. As none of the authors of those reports were called to give evidence in the hearing, their opinions could not be tested through cross examination. Accordingly, have not placed any weight on this material.

### Findings

1. It was generally not in dispute that the front portion of the dwelling comprising two rooms, rendered brick chimney and hipped iron clad roof are the original portions of the heritage place. The tuckpointed biochrome brick front façade and verandah form part of the significant building. The rear non-original extension with skillion roof do not contribute to the importance of the heritage place.
2. We are not persuaded that the whole dwelling on the subject land is structurally unsound and the defects cannot be rectified.
3. We accept that the dwelling has defects and the original Victorian structure requires rectification works. However, the evidence did not establish that the original structure is so unsound, that it is at risk of imminent collapse or substantial failure.
4. Having regard to the modest dimensions of the front rooms, the single storey scale of the dwelling, the modest structural spans of the roof members and the relatively light weight roof structure (i.e. galvanized steel as opposed to terracotta tiles or slate), we find it difficult to accept that the 3 metre plus deep footings recommended by Mr Smith would be required to stabilise the western wall.
5. It is not necessary for us to make a finding about the soil classification of the site, but we note our concern at the considerable difference in opinion between the two engineers on this issue.
6. We accept the evidence of Mr McFarlane that the structural works required to retain the original part of the building are not complex and are reasonably straightforward. We also accept his evidence that there are a variety of engineering solutions for providing lateral stability to the building and this will depend on the ultimate design of any future proposal.
7. We accept Mr McFarlane’s view that the wall cracks in the western wall and internal arches are capable of rectification.
8. We were not persuaded that the existence of structural popping within the dwelling is evidence that the dwelling is at imminent risk of collapse. Temporary propping is commonly used to support old buildings while construction work is being carried out. We also note that both engineers gave evidence that footing movement had stabilised and there was no sign of further settlement.
9. There was no evidence before the Tribunal to support Mr Smith’s view that it would not be economic to stabilise the dwelling or make it structurally sound. The Tribunal was only provided with a summary of estimates, contained in the respondent’s written submissions. There was no evidence led regarding the cost of rectification works.

## Will the demolition of the dwelling adversely affect the significance of the heritage place?

1. Notwithstanding the diversity in the Erskine Street streetscape, we concur with Ms Baker’s assessment that the dwelling on the subject land forms part of a row of four Victorian terraces that have a high degree of uniformity and legibility to Erskine Street. The dwelling on the subject land remains largely intact to its original form and forms part of a streetscape that is of significance for its streetscapes of late Victorian and Edwardian building stock.
2. We consider that the demolition of the dwelling would reduce the intactness of the row of terraces and would unreasonably detract from the significance of the heritage place both in terms of the Erskine Street streetscape and the broader Middle Park and St Kilda West heritage precinct.
3. We were also not persuaded that the dwelling is structurally unsound and beyond repair. Whilst the two engineers were not in agreement about the overall condition of the dwelling, they each provided evidence about the works required to be undertaken to the dwelling to rectify the structural damage to the building. Mr Smith did not say the dwelling was unrepairable but that the cost of repairing and permanently stabilizing the dwelling with 3 metre deep footings would be uneconomic. However no evidence of estimated construction costs was tendered to the Tribunal and the respondent did not call expert evidence from a licenced quantity surveyor.
4. We agree with the applicant for review that there is a high bar for permit applicants to completely demolish significant heritage buildings. Heritage policy does not support the demolition of significant and contributory places with the emphasis on conservation of heritage buildings and fabric.
5. We consider that the complete demolition of the dwelling will result in the incremental loss of a significant heritage place and would have an adverse impact upon the Erskine Street streetscape as well as the broader heritage precinct. These are outcomes that are not supported by Port Phillip’s heritage policy.
6. We find that the total demolition of the dwelling on the subject land would adversely affect the significance and integrity of the Erskine Street streetscape and the Middle Park and St Kilda West Heritage Precinct.

## other matters

1. The proposed demolition of the dwelling is a threshold issue in the application. In light of our findings that the demolition of the dwelling would adversely affect the significance of the heritage place and is not therefore supportable, it is not necessary for us to consider the design of the proposed replacement dwellings.

## Conclusion

1. For the reasons given above, the decision of the responsible authority is set aside. No permit is granted.

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| Karina Shpigel  **Presiding Member** |  | Lorina Nervegna **Member** |

1. As identified in the Incorporated Document ‘*City of Port Phillip Heritage Policy Map* (2021)’, where the subject land is highlighted in red. [↑](#footnote-ref-2)
2. Clause 43.01 – Purpose. [↑](#footnote-ref-3)
3. Clause 43.01-8 Decision guidelines. [↑](#footnote-ref-4)
4. Contained within incorporated document, *The City of Port Phillip Heritage Review* (2021), Vol. 1, Section 6: Part 3, pages 505 – 506. [↑](#footnote-ref-5)
5. The dwelling also contain a rear modern addition behind the front hipped roof. [↑](#footnote-ref-6)
6. Clause 15.03-1L Heritage policy, Strategies, Demolition and relocation. [↑](#footnote-ref-7)
7. [2016] VCAT 1113. [↑](#footnote-ref-8)
8. At the time, the local policy did not contain the words ‘and the defects cannot be rectified’. [↑](#footnote-ref-9)
9. We were informed that Mr McFarlane was initially denied access to the site. His evidence to the Tribunal was that the accompanied site inspection confirmed the views he expressed in his written expert report. [↑](#footnote-ref-10)
10. Mr Smith’s reports are dated 15 October 2018, 19 November 2018, 3 April 019, 17 June 2019, 15 August 2019 and 25 October 2019. [↑](#footnote-ref-11)
11. Section 102 of the *Building Act 1993* (Vic) states that a municipal building surveyor may make an emergency order if surveyor is of the opinion that the order is necessary because of a danger to life or property arising out of the condition or use or proposed use of a building [↑](#footnote-ref-12)