

BACKGROUND

This Class 4 judicial review concerned Randwick City Council’s approval of a modification application for a duplex at 8 Hamel Road, Matraville. The original 2022 consent allowed demolition and construction of a two-storey dual occupancy. The 2023 modification added larger ground floor living areas, extra first-floor bedrooms, and amended window and tree protection conditions. The neighbouring owner (self-represented and legally qualified) challenged the modification, arguing that **Council failed to consider the applicable development controls** and that the changes were not “substantially the same development” under s 4.55 of the EPA Act.

KEY FINDINGS

Failure to consider new DCP provisions

- At the time of the modification determination, the Randwick DCP 2023 had commenced.
- Council’s assessment wrongly applied the superseded 2013 DCP and did not engage with the 2023 provisions.
- Two controls were critical:
 - Deep soil permeable surfaces (s 2.5) – required 40% for this site size, but the modification proposed only 32.38%.
 - Rear setbacks (s 3.3.3) – required calculation as the average of adjacent dwellings for each storey (15m at first floor), but the modification allowed only 8m.
- Council’s report claimed “compliance” but gave no reasoning or recognition of the 2023 controls. The Court found this was a failure to consider mandatory considerations, rendering the decision invalid.

Flexibility does not excuse omission

- While DCP provisions are flexible (s 4.15(3A) EPA Act), flexibility presupposes that the provision has been identified and weighed.
- Here, Council never demonstrated awareness of the 2023 requirements or explained any “alternative solutions.”
- As a result, the decision-making process was unlawful.

Substantially the same development

- The Court confirmed the test is whether the “material and essential features” of the modified scheme are the same in essence.
- The modifications (internal layout, windows, tree conditions) did not fundamentally alter the approved duplex.
- Arguments about a concurrent subdivision application were irrelevant because it was a separate process.
- This ground of challenge was dismissed.

IMPACTS AND TAKEAWAYS

- **DCPs must be considered:** Even though they are not binding standards, DCP provisions are a mandatory consideration under s 4.15. Ignoring them is a jurisdictional error.
- **Non-compliance is not fatal:** Flexibility is allowed, but only if the consent authority actually turns its mind to the control and records its reasoning.
- **Assessment reports must be updated:** Using outdated DCPs or boilerplate “compliant” statements creates real legal risk.
- **Practical lesson for councils:** Always identify the DCP in force at the date of determination and explicitly address compliance or justify departures. Failure to do so exposes modification consents to judicial review and invalidity.