

Before the Building Practitioners Board

Appeal No. A1392

Between: [OMITTED] (the Appellant)

And: The Registrar

In the matter of: An appeal against a decision of the Registrar of Licensed Building Practitioners to decline a Site AoP 3 Licence.

Decision of the Board under section 330(1)(a) of the Building Act 2004

Hearing Location: Wellington
Hearing Type: In Person
Hearing Date: 13 September 2023
Decision Date: 13 September 2023

Board Members Present:

Mr M Orange, Deputy Chair, Barrister Chair (Presiding)
Ms J Clark, Barrister and Solicitor, Legal Member
Mr P Thompson, LBP, Carpentry

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Licensed Building Practitioners Rules 2007 (the Rules) and the Board's Procedures for the Management of Appeals (the Appeal Procedures).

Decision:

The Board has decided, under section 335 of the Act, to reverse the decision appealed against and to **grant** a Site Area of Practice 3 licence.

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Summary of the Board’s Appeal Decision

[1] The Appellant is granted a Site Area of Practice 3 licence.

The Board

[2] The Board is a statutory body established under the Building Act.¹ Its functions include hearing appeals against certain decisions of the Registrar in accordance with subpart 2 of Part 4 of the Act.

Procedure on Appeal

[3] Under section 335 of the Act, an appeal proceeds by way of rehearing. On hearing an appeal, the Board may confirm, reverse, or modify the decision or action appealed against. The Board may also make any other decision or take any other action that the decision maker (the Registrar) could have made. The Board cannot review any part of a decision or action not appealed against.

The Registrar’s Decision

[4] To become licensed, an applicant person must satisfy the Registrar that they meet the applicable minimum standard for the class or classes of licence applied for. ²The minimum standard is prescribed by rule 4 of the Rules. It states:

¹ Section 341 of the Act.

² Refer rule 9(1)(a) of the Rules

4 MINIMUM STANDARD OF COMPETENCE FOR EACH CLASS OF LICENCE

- (1) *The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.*
- (2) *In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.*

[5] Under rule 12 of the Rules, the Registrar must make a decision on the application. The Registrar's decision to grant or decline a licence must be informed by an assessor's recommendation.³

[6] On 6 July 2023, the Registrar informed the Appellant that his application had been declined. The Appellant was informed of his right to appeal the decision.

The Appeal

[7] On 2 August 2023, the Appellant filed an appeal with the Board against the Registrar's decision.

[8] The Board's Appeals Procedures stipulate that the Registrar is to provide a report that includes all evidence used to reach the decision, including the assessors' recommendation (the Report). The Report noted the Appellant had failed to demonstrate the following competencies for the class of license applied for:

- (a) Competency 3: Organise and manage building projects.
- (b) Competency 4: Manage personnel.
- (c) Competency 5: Provide technical supervision.

[9] Under section 335(4) of the Act, the Board must not review any part of a decision or action not appealed against. On that basis, and on the basis of the Report, the matters under appeal were those noted above.

[10] The burden of proof lies with the Appellant. It is for the Appellant to provide sufficient evidence to establish, on the balance of probabilities, that he meets sufficient of the performance indicators for those competencies that are being appealed to be granted a licence. If the Registrar appears at an appeal hearing,⁴ the matter proceeds using an adversarial process.

[11] The Registrar did not seek leave to appear.

³ Rules 10 and 11 of the Rules

⁴ The Registrar may seek leave to appear and be heard under clause 2.9.16(a) of the appeal procedures either in person or by legal counsel.

The Hearing

- [12] Prior to the hearing, the Appellant provided further evidence to support the appeal. This included details on his qualifications and building experience in relation to the licence class sought. He also provided documentation evidencing contract types, procurement models, site establishment and site procedures. These included examples of the Appellant's experience in managing projects and technical personnel of projects from inception through to obtaining a Code Compliance Certificate.
- [13] At the hearing, the Appellant gave an opening submission in which he summarised his work experience to date and the reasons for wanting to obtain a Site Area of Practice 3 Licence.
- [14] He also explained that the assessor may have placed undue weight on the need for Category 3 building experience in order to obtain an Area of Practice 3 licence. The Appellant expressed the view that both AoP 2 and 3 Site licences apply to Category 1, 2 and 3 buildings and that the distinction between Site AoP 2 and AoP 3 is that AoP 2 relates to "co-ordination or oversight" whereas AoP 3 relates to "management".
- [15] The Board questioned the Appellant on the stages of the full-service project management model his business provides, and he also explained the roles performed by his staff and his management of them. [OMITTED], a minority shareholder and builder who undertook the site foremen role for the business, attended the hearing as a witness for the Appellant. He confirmed the experience of the Appellant as he had outlined it and that the Appellant fulfils a management role within the business and in relation to construction sites.
- [16] The Appellant gave examples of his experience with two Category 3 buildings and a situation when he had to resolve an issue, answered questions on the handover process for a commercial building and gave examples of specified systems. He demonstrated a good knowledge of different contract types and the operation of the Construction Contracts Act, including the recent amendments in relation to retentions.

The Purposes of the Licensing Regime

- [17] The Building (Definition of Restricted Building Work) Order 2011 (New Zealand) stipulates that design work and building work on the primary structure and external moisture-management system of a house or a small-to-medium apartment building is restricted building work. Restricted building work on applies to work that is carried out or supervised under a building consent⁵.
- [18] Under section 84 of the Act:

⁵ Refer section 401B of the Act.

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [19] The Licensing framework does not, however, enable a Site Licence holder to carry out or supervise restricted building work. It is an assurance of knowledge and skill only. The Appellant acknowledged and understood the distinction.
- [20] The introduction of the licensed building practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation⁶:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

- [21] And, as was noted by the responsible Minister during the first reading of the legislative provisions that established it:⁷

A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

- [22] Within that context, it is important that the competence of those who seek to be licensed is thoroughly assessed so as to ensure that the legislative purposes of licensing are advanced, consumers are protected, and buildings are designed and constructed in a manner that makes them safe and healthy.

Board's Conclusion and Reasoning

- [23] On the basis of the evidence received and having taken into consideration the purposes of the licensing regime, the Board has decided that it will reverse the decision appealed against and grant the Appellant a Site Area of Practice 3 licence.
- [24] The Appellant correctly and confidently answered all of the questions put to him by the Board. He was able to demonstrate his knowledge of competencies 3-5 for a Site Area of Practice 3 licence.
- [25] In making its decision, the Board notes that the point of differentiation between Area of Practice 2 and Area of Practice 3 for a Site Licence is not the experience or knowledge in respect of category 3 buildings. It is rather that one requires "co-ordination and supervision" skills, and the other is a question of management skills, effectively one step removed from the hands-on role. The Board decided that the

⁶ Hansard volume 669: Page 16053

⁷ Hansard volume 669: Page 16053

Appellant clearly demonstrated his knowledge and skills at the management level required for Area of Practice 3.

Board's Order

[26] Pursuant to s335(3) of the Act, the Board directs that the Registrar to issue a Site Area of Practice 3 Licence to the Appellant as soon as is practicable.

Costs and Publication

Costs

[27] Under section 338(4) of the Act, the Board may order any party to the appeal to pay to any other party to the appeal any or all of the costs incurred by the other party in respect of the appeal.

[28] The Board has adopted the approach taken by the District Court to costs on appeal.

[29] Based on the above, the Board's costs order is that neither party is to pay costs to the other party.

Publication

[30] Section 339 of the Act provides:

339 Orders as to publication of names

- (1) *On an appeal under this subpart, the appeal authority may, if in its opinion it is proper to do so, prohibit the publication of the name or particulars of the affairs of a licensed building practitioner or any other person.*
- (2) *In deciding whether to make an order under subsection (1), the appeal authority must have regard to—*
 - (a) *the interests of any person (including, without limitation, the privacy of any complainant); and*
 - (b) *the public interest.*
- (3) *If the appeal authority prohibits the publication of the name or particulars of the affairs of a licensed building practitioner, the Registrar must remove the name or particulars of the affairs of that licensed building practitioner from the register in relation to the matter under appeal to the extent necessary to reflect the appeal authority's prohibition on publication.*

[31] Based on the above, the Board **will not** order further publication.

Right of Appeal

[32] The right to appeal a Board decision of this type is provided for in section 330(2) of the Actⁱ.

Signed and dated this 19th day of September 2023



Mr M Orange
Presiding Member

ⁱ Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
(a) *made by it on an appeal brought under subsection (1)*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
(b) *within any further time that the appeal authority allows on application made before or after the period expires.*