

BPB Appeal No. A1009

IN THE MATTER OF

The Building Act 2004

AND

IN THE MATTER OF

An Appeal to the Building Practitioners' Board under Section 330(1)(a) by
against a decision of
the Registrar

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1. Introduction

(“the Appellant”) of applied for a Design/Area of Practice 3 Licence under S.288(2) of the Building Act 2004 (“the Act”) and the Licensed Building Practitioners' Rules 2007¹ (“the Rules”).

1.2 The Registrar of Licensed Building Practitioners (“the Registrar”) appointed under S.310 of the Act, declined applications under Rule 12 but offered a Design/Area of Practice 1 Licence instead under Rule 12(1). The Registrar's decision was notified to on 10 January 2011, together with his right to appeal the decision within 20 working days to the Building Practitioners' Board (“the Board”).

1.3 On 14 February 2011², appealed to the Board against the Registrar's decision under S.330(1)(a) of the Act, seeking that, on the basis of further information provided, the Board reassess his application.

1.4 The Appeal was considered in accordance with the Board's “Appeals Procedure”.

The Board decided to hear the appeal in Wellington on 9 May 2011 and invited to be present to make submissions. was unable to attend and the Board resolved to consider his appeal “on the papers” in accordance with Clause 3.10.6 of the Board's Appeals Procedure.

1.5 The Procedure provides that appeals are considered by way of a “re-hearing”³, and that the burden of proof lies with the Appellant (Clauses 3.10.17 and 3.10.18 of the Board's Appeals Procedure).

¹ Incorporating amendments for 2008, 2009 and 2010.

² Received by Board Secretary on 21 February 2011.

³ Refer S.335(2) of the Act.

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1.6 Only Board Members were present for the hearing of the appeal:

Alan Bickers	Board Chairman (Presiding)
David Clark	Board Member
Jane Cuming	Board Member
Brian Nightingale	Board Member
David O'Connell	Board Member
Colin Orchiston	Board Member

1.8 The Board received the Registrar's report of 7 March 2011.

2. Background

2.1 On 7 October 2010, [redacted] submitted his application to the Registrar to be licensed as a Design/Area of Practice 3 building practitioner. The application was treated as complete and was sent for assessment (under Rule 11) on 12 October 2010.

2.2 Assessment Systems Limited (ASL) reviewed the application and arranged an appointment for a face to face meeting for 2 November 2010. The assessment was completed by an Assessor on 15 November 2010, and a peer review of the assessment was conducted on 24 November 2010.

2.3 The Assessor recommended to the Registrar (under Rule 11) that application for the Design/Area of Practice 3 should be declined, and that a Design/Area of Practice 2 should be granted.

2.4 In regard to the Design (Area of Practice 3) application the Assessor found that [redacted] did not meet the requirements for:

Competency 2: Manage the building design process.

Competency 4: Develop design and produce construction drawings and documentation.

After taking into account the recommendation of the Assessor and the requirements of section 286 of the Act, the Registrar decided (under Rule 12) to decline the application for Design/Area of Practice 3, and grant Design/Area of Practice 1.

2.5 In order to become licensed, [redacted] was required to satisfy the Registrar that he met the applicable minimum standards for licensing (under section 286 of the Act). These minimum standards are set out in Schedule 1 to the Rules, in the form of "competencies" which must all be satisfied, as follows:

- *Competence 1:* Comprehend and apply knowledge of the regulatory environment of the building construction industry.
- *Competency 2:* Manage the building design process.
- *Competency 3:* Establish design briefs and scope of work and prepare preliminary design.
- *Competency 4:* Develop design and produce construction drawings and documentation.

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In order to be licensed an application must demonstrate that he/she meets all the Competencies of a Licence Class.

- 2.6 These competencies may be demonstrated by meeting some or all of the performance indicators for that Competency that are also set out in Schedule 1 (Design Competencies) of the Rules. In carrying out an assessment, the Assessor must use the 'Assessor Guidelines' prescribed by the Registrar (see Rule 11(1)).
- 2.7 The competencies address a broad range of skills and knowledge a design practitioner should be able to demonstrate. These address the skills and knowledge necessary for a designer to be able to satisfactorily demonstrate compliance with the New Zealand Building Code. The competencies also address other skills that a competent designer is expected to demonstrate, for example managing the design process of establishing a design brief in consultation with a client.
- 2.8 The Registrar must take into consideration the Assessor's recommendation before making a decision under Rule 12(2).

Reliance on the Assessor's recommendation does not mean that the Registrar cannot reach a different view about an applicant from the view reached by the Assessor. The Registrar is required to maintain an independent view. In the normal course of events, however, the Registrar will accept a recommendation of an Assessor, unless there are strong reasons for not doing so.

- 2.9 In making the recommendation to decline the Design/Area of Practice 3 application, the reasons below were recorded by the Assessor.
- (a) There was a lack of evidence supplied to cover the Design 3 competencies, and an inability to verify verbal claims of his involvement in a significant design 3 project.
 - (b) provided evidence of one medium sized educational alteration (Design 2) which extended from pre-design through to completion.
 - (c) There were omissions and errors in processes outlined in the educational project, and an almost complete lack of evidence on the larger rest home project.
 - (d) has no formal qualification, does not belong to any professional body and has very little record of any continued professional development.
 - (e) practises alone and is very much out of touch of many critical aspects of the current regulatory regime (eg was unaware of the Construction Contracts Act, and made references to himself being an Architect, very much contrary to the Architects Act 2006 (sic)).
 - (f) experience would see him confidently cope with Category 2 buildings, but his over confidence and keenness could see him creating problems for more complex Category 3 buildings unless he upskills

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himself and can show evidence in the future of overcoming the concerns raised elsewhere in this report.

- (g) The first referee [redacted] hinted at areas where his role as the client's property manager has exceeded that of [redacted] and some areas where [redacted] documentation was lacking. [redacted] was somewhat surprised at [redacted] application for a LBP licence as he had been made to believe that [redacted] was a Registered Architect.
- (h) The second referee [redacted] outlined the work [redacted] did for [redacted] over an 18 month period. He advised that although the buildings involved were Category 3, [redacted] involvement did not include any formal on-site administration.

2.10 The Registrar based his decision to decline the Design/Area of Practice 3 application solely on the Assessor's recommendation, for the reasons set out above. He did not consider that there was sufficient reason or concern to overrule that part of the Assessor's recommendation.

2.11 The Assessor recommended that [redacted] be granted the Design/Area of Practice 2 licence. The Registrar's reasons for instead granting the Design (Area of Practice 1) licence are outlined below.

- " 27. *Two parts of the Assessor's report on [redacted] regarding the word 'architect' caused me concern:*
- *The first referee, [redacted] had thought that [redacted] was an architect.*
 - *[redacted] is reported as referring to himself as an architect during his meeting with the Assessor.*
28. *[redacted] has claimed that over a 25 year career as a designer in the building industry, he has been involved with many projects including at Design 3 level.*
29. *I appreciate that changing circumstances mean that sometimes records and/or key people will not always be available. However, I was concerned that [redacted] appears to have struggled to provide the Assessor with evidence to verify his account of his experience.*
30. *A key part of Design Competency 1 is the ability of the designer to explain the importance of and operate within the scope of individual competence, and recognise when other expertise is required.*
31. *[redacted] is reported as lacking formal qualifications, not affiliated to any professional body, lacking evidence of continued professional development, and working alone.*
32. *I was concerned that the Assessor noted in his report:*
- *Concerns in some critical areas of insurance, progress claim processes and final certification.*
 - *A Code Compliance Certificate had not been obtained several months after practical completion and occupancy of the school,*

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especially as this related to fire alarm, building warrant of fitness and occupancy issues.

- There was no evidence of the insurances being put in place, even though blank pro-forma pages from NZS 3910 had been included. This was also the situation with other schedules in the conditions of contract which led to some questioning as to whether the contract was not just too formal.
- A complete lack of understanding of and compliance with the Construction Contracts Act.

33. Viewed in the context of the omissions noted in paragraph 32 above, I was concerned that [redacted] does not know what he does not know, and that this lack of self awareness could create risks for his clients.

Summary of concerns

34. If I granted [redacted] the Design/Area of Practice 2 licence recommended by the Assessor, the public would have the right to expect that [redacted] meets the minimum standard of competence for designing complex residential work and commercial buildings less than 10 metres tall (i.e. Category 2 buildings).

35. My concerns around the use of the word 'architect', a lack of corroborated evidence, and indications that [redacted] may not know what he does not know, all raised doubts for me about whether [redacted] meets the competencies for Design/Area of Practice 2."

3. The Appellant's Submissions

3.1 [redacted] presented a written statement to support his appeal, together with the following additional documentation which was examined by the Board:

- 1.0 Response package (summarising his case).
- 2.0 Case study 1: [redacted] plans, specification, tender documents.
- 3.0 Case study 2: [redacted] plans & specification.
- 4.0 Supporting documents:
 - 4.1 [redacted] – plans
 - 4.2 [redacted] - plans
 - 4.3 [redacted] perspective only
 - 4.4 [redacted] - plans
 - 4.5 [redacted] – perspective only
 - 4.6 [redacted] – 3 storey commercial
 - 4.7 1200 seat auditorium
 - 4.8 [redacted] – residential dwelling

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3.2 Some of the matters referred to in submissions are outlined below:

1. *That there seemed to be a miss communication of the information presented to fully show my involvement in the design process across the presented designs.*
2. *That the information presented showing developed design and construction drawings did represent the level demanded to undertake construction of the appropriate level.*
3. *That one of the project designs presented was wrongly interpreted in terms of my involvement for site management within this project and, therefore, was seen in a very negative light rather than reviewing the working drawings as presented to demonstrate my management and coordination ability.*

...

5. *The recommendation from the Assessor that a Design 2 licence be granted and that this was subsequently downgraded by the Registrar to a Design 1 with minimal supporting evidence.*
6. *The perception that I had presented myself as an 'Architect' – when this was never the fact and that I understand the legal ramification of doing so. It seems to me that this point has been focused on by the Assessor and Registrar when undertaking my review. I expressed to the Assessor at the time that 'one day I would like to apply for registration as an Architect'.*

On review for this appeal I now accept that there are only two projects that fully comply to the requirements of Design 3 class. This was an honest mistake while reading the documentation my mind read 'a building 10m or greater in height' where in reality it request a building that are at least 12m in height to fit the criteria.

...

It was noted that I lack any formal qualification. That is only partly true – as you will see from my attached letter from the Qualification Authority you will see that I completed 95% of my NZCAD back in and then later went back to school to start a higher education in but again did not complete due to the birth of our first child.

Another point of note is that I am not affiliated to a professional body. For the record, I have been attending the ADNZ meeting since October 2009 and was ask to hold my application as they rewrote their application terms through 2010. I applied in late December 2010 but my application is now on

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hold awaiting this appeal with the Licensing board prior to approval being given. As a condition to membership you are required to be a Licensed Building Practitioner with the ADNZ.

...”

4 The Board's Consideration

4.1 The Board has considered [redacted] submissions and examined the additional documentation that he has provided.

4.2 The Board notes the difficulty that both an Assessor and the Registrar face when an applicant's submitted documentation does not contain some form of independent verification of his/her involvement with a project, particularly in relation to Design and/or Site Licences for Categories 2 and 3 buildings. The Board considers that it is proper for the Assessor and/or the Registrar to seek verification of an applicant's scope of involvement and the specifics of that. Such information is required for the Assessor and Registrar to be satisfied that the competency requirements of the Rules have been met. For Design and Site Licences for Areas of Practice 2 or 3, the Board considers that Assessors and the Registrar need to adopt a conservative approach and that it is essential that some suitable form of verification is provided by an applicant given the design risks associated with these more complex categories of buildings.

The burden of proof of his/her scope of involvement with submitted projects lies with an Appellant (refer 3.11.18 of the Board's Appeals Procedure) and in this case the Appellant has not met that requirement to the Board's satisfaction.

4.3 It would be a matter of concern if [redacted] was representing himself as a "Registered Architect". There is, however, insufficient evidence to confirm that this has occurred.

4.4 The Assessor had recommended to the Registrar that [redacted] be offered Design/Area of Practice 1 in respect of one competency and Area of Practice 2 in respect of another competency. The Rules require that the requirements of all competencies be met for the issue of any licence. Consequently, the Board endorses the approach taken by the Registrar that in such circumstances the lower of the alternative Areas of Practice may only be offered as being the Area of Practice where all competency requirements have been demonstrated.

4.5 [redacted] assertion that he lacks any formal qualification "*is only partly true*" is not accepted by the Board. A person is either formally qualified or they are not. Until the NZ Qualifications Authority has awarded a qualification to a person they are not qualified. Progress towards a qualification or partial completion of the qualification requirements does not mean that the qualification will ultimately be conferred.

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4.6 [redacted] was not a member of ADNZ⁴ when applied for a Licence and had not applied to be a member. The requirements of ADNZ for admission as a Professional Member are:

- “ 1. Must be a Licensed Building Practitioner who holds a Design Licence or Registered Architect.*
- 2. Must maintain CPD requirements (including skills maintenance points and ADNZ meeting attendance).*
- 3. Must have Professional Indemnity Insurance in place to a minimum value as set by the ADNZ Board.*
- 4. Must sign a declaration that they will abide by the Architectural Designers New Zealand Inc Constitution and the Society's Code of Ethics.”*

[redacted] is not currently listed as an ADNZ Professional Member, notwithstanding that he is a Licensed Building Practitioner – Design/Area of Practice 1 and is, therefore, eligible for membership subject to him meeting the other requirements for ADNZ admission.

4.7 The Registrar concluded that [redacted] did not meet the requirements of Competencies 2 and 4 (refer 2.4). The Board has examined the additional documentation provided by [redacted] but has not carried out a detailed reassessment of this against the performance indicators for these competencies as set out in the Rules. The Board has concluded that, subject to verification of the work submitted, it is possible that [redacted] may meet the competency requirements of Design/Area of Practice 2, but not Area of Practice 3.

The Board has, therefore, decided to require the Registrar to arrange for a re-assessment of [redacted] application against the requirements of Area of Practice 2.

5. Board's Decision

5.1 Pursuant to S.335(3) of the Act and Clause 3.11.4 of the Board's Appeals Procedure, the Board has resolved to direct the Registrar to arrange for [redacted] application to be reassessed against the minimum standards for Design/Area of Practice 2 Licence, having regard to additional documentation provided by him and subject to him providing verification of the scope of his involvement.

5.2 The Board's reasons are that [redacted] has provided additional information not previously seen by the Assessor or Registrar.

⁴ Architectural Design New Zealand Inc

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5.3 The Board reserves its decision on costs and/or publication of the Appellant's name.

6. Costs

6.1 Pursuant to S.338 of the Act, the Board may order any party to the appeal to pay any other party any or all of the costs incurred by the other party in respect of the appeal.⁵

6.2 The Board invites submissions from the Appellant and the Registrar on costs, to be supported by evidence, not later than 15 June 2011.

7. Publication of Name

7.1 Pursuant to S.339 of the Act, the Board may prohibit the publication of the Appellant's name and/or particulars.

7.2 The Board invites submissions from the Appellant on prohibition of publication of the Appellant's name, not later than 15 June 2011.

Signed and dated this 31st day of May 2011

Alan Bickers
Chairman
(Presiding Member)

Advice Note (not part of Board's Decision)

Extracts from the Building Act 2004:

333 Right of Appeal

(1) A person may appeal to the Board against any decision of the Registrar to—

⁵ The "parties" are the Appellant and the Registrar. The Board is not a party.

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- (a) *decline to licence the person as a building practitioner; or*
- (b) *suspend or cancel his or her licensing.*

(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); or*

...

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.*