

BPB Appeal No. A1042

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 **the Appellant** against a decision of the Registrar

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1. Introduction

- 1.1 The Appellant applied for Design Area of Practice (AOP) 3 Licence under S.288(2) of Building Act 2004 ("the Act") and the Licensed Building Practitioners' Rules 2007¹ ("the Rules").
- 1.2 The Registrar of Licensed Building Practitioners ("the Registrar") declined the application and issued a Design AOP 1 licence. The Appellant was notified of the Registrar's decision on 13 February 2012, together with his right to appeal the decision within 20 working days to the Building Practitioners' Board ("the Board").
- 1.3 On 6 March 2012², the Appellant appealed to the Board against the Registrar's decision under S.330(1)(a) of the Act, seeking that, on the basis of information provided, the Board upholds his application and grants him Licensed Building Practitioner status in Design AOP 2.
- 1.4 The Board decided to hear the appeal in Auckland on 8 May 2012. The Appeal was considered in accordance with the Board's "Appeals Procedure".
- 1.5 A pre-hearing teleconference was convened by the Chairman of the Board with the Appellant on 26 April 2012. The Board's Secretary was in attendance.
- 1.6 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).
- 1.7 The following were present for the hearing of the appeal:

¹ Incorporating amendments for 2008, 2009 and 2010.

² Received by Board Secretary on 6 March 2012.

³ Refer S.335(2) of the Act.

Board Members and support staff:

Alan Bickers	Board Chairman (Presiding)
David Clark	Acting Deputy Chair
Jane Cuming	Board Member
Colin Orchiston	Board Member
William Smith	Board Member

Pam Lwee Board Secretary LBP Appeals and Complaints

Appellant and supporting witnesses⁴:

The Appellant

Registrar and support:

Mark Scully

1.8 The Board received the Registrar's report of 7 March 2012.

2. Background

2.1 The Appellant submitted his application to the Registrar to be licensed as a Design AOP 3 building practitioner on 4 November 2011.

2.2 On 7 November 2011, the Registrar wrote to the Appellant advising him that his application for Design AOP 3 was complete and had proceeded to assessment.

2.3 Assessment Systems Limited (ASL) reviewed the application.

2.4 The assessment was completed on the 24 November 2011 and the Assessor recommended to the Registrar (under Rule 11) that the Appellant's application for Design AOP 3 should be declined and that Design AOP 1 licence be granted.

3. The Registrar's Report & Submissions

3.1 In order to become licensed, the Appellant was required to satisfy the Registrar that he met the applicable minimum standards for licensing (under S.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.

For the Design AOP 2, these competencies are:

⁴ The Appellant's spouse was in attendance but did not give evidence.

- *Competency 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.*

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

3.2 These competences may be demonstrated by meeting some or all of the performance indicators of the Rules. In carrying out an assessment, the Assessor appointed by the Registrar must use the "Assessor Guidelines" prescribed by the Registrar. The Registrar must take into consideration the Assessor's recommendation before making a decision but is not bound by the recommendation.

3.3 In making the recommendation to decline the application, the reasons below were recorded by the Assessor:

- The Appellant has a career in draughtsman spanning almost 40 years. He completed the NZCE (Civil) qualification in 1985.
- The Appellant undertakes drafting work for [omitted], a Chartered Professional Engineer based in [omitted]. They employ the Appellant to undertake all their engineering documentation, and also employ the Appellant to undertake some site visits on their behalf.
- All of the work the Appellant carried out for [omitted] is supervised and signed off by [omitted].
- The initial project examples submitted by the Appellant was work carried out for [omitted].
- The Appellant provided the Assessor with two examples of work that he was solely responsible for. These were both category 1 buildings.
- The Appellant clearly met the standard for Design area of practice 1.

3.4 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 a Design AOP 3 licence and grant a Design AOP 1 licence.

3.5 The Registrar noted that:

- Based on the Assessor's report, the Appellant is an experienced designer, and has been involved in some quite complex building design work.
- However, there was a significant difference between working on a project that someone else has responsibility for designing, and having direct responsibility for designing a project.

- This principle applies in particular to Competency 2 – ‘*Manage the building design process*’, and Competency 4 – ‘*Develop design and produce drawings and documentation*’. (It also applies to Competency 3 – ‘*Establish design briefs and scope of work and prepare preliminary design*’, although the assessor reported that this Competency had been met).
- The Appellant was able to produce evidence of projects that he has directly responsible for designing. The Assessor judged these projects to be Category 1.

4. The Appellant’s Submissions

4.1 The Appellant made written submissions to the Board supported by other documentation as evidence, including drawings of his work. His submission included information on 4 projects:

1. [omitted] new house;
2. [omitted] Library;
3. Additions and alterations to a house for [omitted]; and
4. New house for [omitted] and [omitted].

Supporting documentation for these projects was provided, including verification (3 May 2012) from [omitted] (Chartered Professional Engineer) in respect of Projects 1 and 2. Verification for Project 3 was provided from [omitted] and Project 4 was verified by an extract from the [omitted] District Council’s building consent file.

The Appellant explained that for Projects 1 and 2 he had worked for [omitted] and carried out drafting of the building structure, while for Projects 3 and 4 he had undertaken full design documentation.

4.2 He submitted that Projects 1 and 2 were Category 3 building while Project 3 and 4 were Category 2.

The Appellant considered that he was competent with Category 2 buildings and should be licensed for AOP 2. He submitted that in regard to providing full design documents, his commissions were generally difficult, sloping coastal sites and he had a good reputation for the quality of his work with these.

4.3 The Appellant was asked to differentiate between “contract observation” and “contract administration”. He admitted that his experience with the latter was minimal, but he had a general awareness of the tasks. He had little knowledge of the various forms of general conditions of contract and advised that there was minimal demand for designers, like himself, to provide contract administration services in the [omitted] District.

5. Board’s Considerations

5.1 The Board noted that the Registrar was satisfied that the Appellant met the following competencies for a Design AOP 2 licence:

- *Competency 1: Demonstrate knowledge of the regulatory environment of the building construction industry.*
- *Competency 3: Organise and manage building projects.*

The Registrar responded to the Board stating that –

- The Appellant’s drafting work was very good;
- He appeared to be a careful designer;
- Project 1 and 2 were of limited relevance because he was not the primary designer and were Category 2 buildings (not 3 as the Appellant submitted);
- It was important that the Appellant work within the limits of his competence.

5.2 In relation to Competency 2 for the Design AOP 2 licence, the Registrar stated that the ability to explain elements of contract administration was important for the relationship with clients for them to better understand the risks of a project and their contractual obligations and obligations under the Construction Contracts Act 2002. The Registrar also noted that the Appellant’s terms of engagement were seriously deficient in terms of recommended practice.

5.3 In relation to Competency 4, the Registrar agreed that the standard of the Appellant’s drafting was very good. He drew attention to the Board’s previous decisions concerning the difference between “design” and “drafting”.

5.4 The Board then considered Competencies 2 and 4. These Competencies can be demonstrated by meeting some or all of the performance indicators as listed in Schedule 1 of the Rules.

In relation to Competency 2: *Manage the building design process*, Design AOP 2 is differentiated from AOP 1 with regard to the category of building and performance indicators 2.2.3, 2.2.4 and 2.2.5 which apply to AOP 2.

The Board was satisfied that the Appellant met the requirements of performance indicators 2.2.1 and 2.2.2 in relation to Category 2 buildings.

5.5 In relation to performance indicator 2.2.3 *Explain the processes of construction observation*, the Board was satisfied that, with the exception of conditions of contract, the Appellant’s competence was very strong and he was a good communicator.

In relation to performance indicator 2.2.4, the Appellant did not demonstrate to the Board that he was competent to explain the processes of contract administration. He lacked experience with contract administration and, as a result, his ability to explain the processes was minimal.

In relation to performance indicator 2.2.5, the Appellant did have some knowledge of occupation requirements and had advised on these in relation to Project 2. His knowledge was, however, limited.

- 5.6 In relation to Competency 4: *Develop design and produce construction drawings*, the Board was satisfied with the Appellant's responses outlining his experience with Category 2 buildings for all the performance indicators except 4.2.6: *Demonstrate knowledge of conditions of contract and methods of procurement*. The Appellant explained that these were processes with which he was not involved. The Registrar had placed emphasis on the importance of this competency.
- 5.7 In order to demonstrate that he meets the requirements of a Competency, the Appellant needed to meet sufficient of the performance indicators. The Board noted that the indicators for Competency 4 were identical for AOP 1 and AOP 2, except for the category of building. The Registrar had accepted the Appellant met the requirements for AOP 1, notwithstanding his inability to meet the requirements of performance indicator 4.1.6. Hence, it noted that the Registrar must have concluded that the Appellant met sufficient of the performance indicators for Category 1 buildings. Given his experience with Category 2 buildings, the Board reached the same conclusion but would have been more comfortable if the Appellant could demonstrate greater proficiency in relation to performance indicator 4.2.6.
- 5.8 The Board faced a dilemma in relation to Competency 2, given that it sees performance indicators 2.2.3, 2.2.4 and 2.2.5 as the differentiators between AOP 1 and AOP 2. The Appellant has clear limitations in relation to processes of contract administration. He also has considerable strength in many other aspects of the design process. The Board concluded that, on balance, that the Appellant met the requirements of Competency 2. The Board would, however, strongly recommend to the Appellant that he undertake some professional development in terms of conditions of contract, contract administration processes and methods of procurement and that he also become more familiar with building occupation requirements. The Appellant is also urged to develop and implement formal terms of engagement for his design work.
- 5.9 The Board, therefore, resolved to grant the appeal recognising that the Appellant is a very good design draftsman and careful in his approach but would strongly urge him to expand his competence in relation to the matters where he lacks experience through professional development.

6. Board's Decision

- 6.1 **Pursuant to S.335(3) of the Act the Board has resolved to reverse the Registrar's decision not to grant the Appellant with a Design Area of Practice 2 Licence.**
- 6.2 **Pursuant to Clause 3.11.6 of the Board's Appeals Procedure, the Board directs the Registrar to issue a Design Area of Practice 2 Licence to the Appellant as soon as practicable.**
- 6.3 The Board's reasons are that the Appellant has demonstrated, to the Board's satisfaction, that he meets all of the competency requirements of the Design AOP 2 Licence.

6.4 The Board recognised that on balance the Appellant demonstrated great strengths in some areas and weaknesses in other areas, contributing to the understanding of why the Registrar and Assessor were justifiably concerned.

7. Costs

7.1 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

7.2 Neither the Appellant nor the Registrar sought costs. The Board having considered the circumstances of this appeal directs that the costs shall lie where they fall.

8. Publication of Name

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

8.2 The Board invited submissions from the Appellant on prohibition of publication of the Appellant's name and the Appellant requested his names and clients names be withheld.

8.3 The Board having considered the circumstances of this appeal directs that the name and the particulars of the Appellant are not made public.

Signed and dated this 30th day of May 2012

Alan Bickers
Chairman
(Presiding Member)

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

Advice Note (not part of Board's Decision)

Extracts from the Building Act 2004:

330 Right of Appeal

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