

**BPB Appeal No. A1059**

**IN THE MATTER OF**

the Building Act 2004 (the Act)

**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

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**DECISION OF THE BUILDING PRACTITIONERS BOARD**

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Date and location of hearing:	13 August 2012 at [omitted]
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Appeal heard by:	Colin Orchiston Brian Nightingale Dianne Johnson Richard Merrifield	(Presiding Member) Board Member Board Member Board Member
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Appearances by:	The Appellant  The Registrar, Mark Scully, was available by teleconference
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## 1. Introduction

- 1.1 The Appellant of [omitted] applied for a Design Area of Practice (AOP) 3 Licence under s 288(2) of the Act and the Licensed Building Practitioners Rules 2007<sup>1</sup> (“the Rules”).
- 1.2 The Registrar of Licensed Building Practitioners (“the Registrar”) declined the Design AOP 3 application and instead granted a Design AOP 2 licence, and notified his decision by letter dated 14 May 2012. Notification of the decision included a notice of the right to appeal the decision to the Building Practitioners Board (“the Board”).
- 1.3 On 6 June 2012<sup>2</sup>, the Appellant lodged an appeal to the Board against the Registrar’s decision.
- 1.4 At a pre-hearing teleconference on 1 August 2012 the Presiding Member of the Board informed the parties of the procedural matters for the appeal.

## 2. Licensing scheme

- 2.1 To become licensed, a person must satisfy the Registrar that they can meet all the applicable minimum standards for licensing.<sup>3</sup> The minimum standards are set out as “competencies” in Schedule 1 to the Rules. 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<sup>4</sup>.
- 2.2 Where the Registrar declines an application the applicant has a right of appeal to the Board.<sup>5</sup>

## 3. Scope of the appeal

- 3.1 An appeal proceeds by way of rehearing<sup>6</sup> however the Board will not review matters outside the scope of the appeal<sup>7</sup>.
- 3.2 The appeal seeks the following relief:  
*To be granted a Design AOP 3 licence instead of a Design AOP 2 licence*
- 3.3 In light of s335(4) and the Registrar’s decision letter, the Board interprets its inquiry as including consideration of Competencies 1, 2, 3 and 4.

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<sup>1</sup> Incorporating amendments for 2008, 2009 and 2010.

<sup>2</sup> Received by Board Secretary on 6 June 2012.

<sup>3</sup> S286 of the Act and rule 4 of the Rules.

<sup>4</sup> Clause 4(2) of the Rules

<sup>5</sup> S330(1)(a) of the Act.

<sup>6</sup> S335(2) of the Act

<sup>7</sup> S335(4) of the Act

#### 4. Design Area of Practice 3 Licence

- 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.*

##### *Registrar's report*

- 4.1 The Registrar's decision to grant or decline a licence is informed by an Assessor's recommendation<sup>8</sup>. The Board's Appeals Procedures require the Registrar to provide a report which includes all evidence used to reach the decision, including the Assessor's' recommendation.
- 4.2 In making the recommendation to decline the Design AOP 3 licence application and instead grant a Design AOP 2 licence, the reasons below were recorded by the Assessor:
- The Appellant has a long history in the building industry as a draughtsperson, developer, and designer.
  - Both projects submitted were relatively complex category 3 [omitted] buildings.
  - The referees were positive about the Appellant.

##### *Project 1*

- The file information was limited and the design path was not readily traceable.
- The specification was not specific to the project.

##### *Project 2*

- Project 2 was designed in 2005 - 2006 and is outside reasonable currency.
- The design path could be followed.
- The drawings were prepared by others under contract, and appeared to be thorough.
- The specification was not well edited, and the referenced and included NZIA General Contract (schedules) was out of date.

##### *General*

- The Appellant was not fully prepared for the assessment and much of the relevant information was not available. (*The appointment had been arranged the previous day but the Appellant had known for more than a week that the Assessor was to be in [omitted]*).

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<sup>8</sup> clause 10 and 11 of the Rules

- The Assessor was concerned that the Appellant is accepting the lead role in the design process but relies heavily on the technical and code knowledge of those he contracts work to, and 'offloads' responsibility for the accuracy and completeness of the documentation to those people.
- Due to the nature of the projects the Appellant undertakes, the design path is short circuited and the focus is on designing to optimise the site and to satisfy the resource consent requirements.
- The relationships that the Appellant has with his clients means that conditions of engagement are not always in place. The Appellant sent the Assessor a confirmation of brief and fee proposal for a project as further information but this had no reference to the legal matters that a COE would contain.
- The Appellant did not administer either of the projects submitted and was not able to provide the Assessor with any file of an administered contract. The Appellant's knowledge of this part of the competencies was not at a level expected for AOP 3.
- The Appellant considered that he could estimate the cost of a project without the input of a quantity surveyor.
- The specifications were not to a standard that the Assessor would deem suitable for the projects submitted and the Appellant's inability to provide contract files on a project are of concern.

*The basis for the Registrar's decision to decline the application*, the reasons below were recorded by the Registrar:

- 4.3 The Registrar was of the view that the Design Area of Practice 3 licence should reflect a very high degree of knowledge, skill, and professional practice. The Registrar reviewed the Assessor's report and the Appellant's application. Based on the report the Registrar agreed with the Assessor that none of the competencies were demonstrated at Design Area of Practice 3.

*Competency 1*

- 4.4 In the Assessor's view, the Appellant delegates understanding of regulatory knowledge to others. While the Board has previously found (appeal A1004) that it is not necessary for a Design Area of Practice 3 licensee to personally produce drawings, the Board expects the licensee to retain oversight of that work.

*Competency 2*

- 4.5 No evidence of contract administration or construction observation was provided. This is a requirement at Design Area of Practice 3.

*Competency 3*

- 4.6 Insufficient evidence was provided of formal client briefs, and there was insufficient evidence of developing preliminary design.

*Competency 4*

- 4.7 The Board considers it acceptable to delegate drawing to others (refer appeal A1004). However, the Assessor reported a lack of understanding of, or responsibility for code compliance, and found that the specifications were not specific to the project and/or not well edited and referenced outdated information.

*Appellant's Submissions*

- 4.8 The Appellant gave evidence that whilst currently a sole practitioner focused on the design of “high end” residential projects, he had in the recent past employed several staff and engaged contract staff, and been responsible for their management and technical review. A long-term ex-staff member was still engaged on his projects on a contract basis, and when additional resources were required he engaged technical drafting firms to develop his sketch plans into documentation suitable for consent applications and construction. The Appellant acknowledged that whilst the developer-driven nature of his projects meant that his attendances on site during construction were limited, it was his usual practice to attend as required to clarify the documentation and/or update for changes and unexpected circumstances.
- 4.9 The Appellant submitted examples of specifications and project drawings for recent and current projects as evidence that he had first-hand involvement and responsibility for that work.
- 4.10 In relation to contract administration and contract observation roles, the Appellant submitted documentation spanning 2005 to 2008 in respect of two Category 2 or 3 buildings and which indicated the extent of his involvement.
- 4.11 The submissions included photos or computer renderings of several three to five storey [omitted] projects dated between 1999 and 2012 and undertaken by the Appellant using the same structural consultants and repeat commissions from the developers.
- 4.12 In response to questions from the Board, and reference to the drawings submitted at the hearing, it was apparent that the Appellant generally took projects to the “Developed Design” stage before hand-over to outside drafting agencies.
- 4.13 Accordingly his involvement in the actual production of the construction information was limited: generally to reviewing and redlining, refining the design as it evolved, responding to queries from the drafting team, resolving planning and consultant co-ordination issues, and preparing the specifications and contract documentation.
- 4.14 Specifically, he indicated that the responsibility for the technical outcomes was dependent on his approvals and acceptance ahead of the construction process.
- 4.15 In relation to the Assessor’s comments about the specifications and contract documentation, the Appellant acknowledged that they may not be “best practice” but nevertheless they were adequate for the purpose of a developer-controlled project, and much of the finer detail was arranged directly between the developer and the construction contractors.

*Board's consideration*

- 4.16 The Board noted that the Registrar was not satisfied that the Appellant met any of the competencies for the Design AOP 3 licence.
- 4.17 The Board then considered Competencies 1, 2, 3 and 4. These Competencies can be demonstrated by meeting some or all of the performance indicators as listed in Schedule 1 of the Rules.
- 4.18 Because the Appellant was granted a Design License AOP 2, the Board's considerations were focussed on issues which differentiated AOP 2 from AOP 3.
- 4.19 The Board sought assurance that the Appellant actually took responsibility for and was capable of carrying out the tasks required by the competencies. It considered recent examples of documentation carried out by the Appellant in preparing site information, sketch designs, resource consent drawings, developed design to instruct technical staff, and site instructions, and concluded that the required skills were demonstrated, repeatable, and current.
- 4.20 The Board considered the arrangements between the Appellant and the technical staff as described by him, and the extent to which he guided, reviewed, approved and implemented that work on site. It concluded that the Appellant was responsible for the outcomes.
- 4.21 Whilst noting that demonstration of the competencies relating to contract administration and site observation may have been reliant on activities undertaken beyond the timelines set out in the guidances provided to the Assessors, the Board, consistent with previous appeal decisions, considered that it had the discretion to take a wider view. On that basis it accepted that the evidence established that the Appellant had and could still undertake those tasks to the required performance levels.
- 4.22 The Board noted with concern that in the absence of an affiliation with any professional association, the Appellant lacked an involvement in peer support and peer review, and participation in skills maintenance and upskilling for the changes in the industry and regulatory environment.

*Board's findings*

- 4.23 The Board found on the evidence that the Appellant met sufficient of the performance indicators in Competencies 1, 2, 3 and 4 for a Design Licence AOP 3.

**5. Board's Decision**

- 5.1 Pursuant to s335(3) of the Act, the Board has resolved to reverse the Registrar's decision not to issue the Appellant with a Design Area of Practice 3 Licence. The appeal is therefore upheld.**
- 5.2 The Board now directs the Registrar to issue a Design Area of Practice 3 Licence to the Appellant as soon as practicable.**

**6. Costs**

- 6.1 Pursuant to s338 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.<sup>9</sup>
- 6.2 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.

**7. Publication of Name**

- 7.1 Pursuant to s339 of the Act, the Board may prohibit the publication of the Appellant's name and/or particulars.
- 7.2 The Board invited submissions from the Appellant on prohibition of publication of the Appellant's name and the Appellant requested his name be withheld.
- 7.3 The Board having considered the circumstances of this appeal directs that the name and the particulars of the Appellant are not to be made public.

Signed and dated this ..... day of August 2012.

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Colin Orchiston  
(Presiding Member)

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<sup>9</sup> 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 Act:

**“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;*

...

(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);*

...

**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.”*