

BPB Appeal No. A1005

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 Appellant A1005 against a decision of the Registrar

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1. Introduction

- 1.1 Appellant A1005 applied for a Design 2 License under the Building Act 2004 ("the Act") and the Licensed Building Practitioners' Rules 2007 ("the Rules")¹.
- 1.2 The Registrar of Licensed Building Practitioners ("the Registrar") appointed under s.310 of the Act, declined the Appellant's application under Rule 12 and the Appellant was notified of the Registrar's decision on 1 December 2008, together with his right to appeal the decision within 20 working days to the Building Practitioners' Board ("the Board").
- 1.3 On 17 December 2008, the Appellant appealed to the Board against the Registrar's decision under s.330(1)(a) of the Act and seeking that, on the basis of information provided, the Board re-consider his application and to approve the issue of a Design 2 License.
- 1.4 The appeal was considered by the Board in Auckland on **2 March 2009**, in accordance with the Board's "Appeals Procedures".

The Procedures provide that appeals are heard by way of a "re-hearing"² and that the burden of proof lies with the appellant (Clauses 3.10.17 and 3.10.18 of the Board's Appeals Procedures).

- 1.5 Those present for the duration of the hearing of the appeal were:

The Appellant

Alan Bickers	Board Chair (Presiding),
David Clark	Board Member,
Jane Cuming	Board Member,
Patrick Lawrence	Board Member,
Graham Moor	Board Member,

¹ The Appellant had been successful in respect of his applications for Carpentry and Site License class.

² Refer s.335(2) of the Act.

David O'Connell	Board Member,
Colin Orchiston	Board Member.
Tracy Goddard	Board Secretary
Mark Scully	Acting for the Registrar

No members of the public were in attendance.

The Board's deliberations were conducted in private, with the Board Secretary being the only other person in attendance.

2. Background

- 2.1 On 3 October 2008, the Appellant submitted his applications to be licensed as a Building Practitioner in the classes of Carpentry, Site 1³ and Design 2. The application for Design 2 class (which is the subject of this appeal) was treated as complete on 3 October 2008 and the application proceeded to assessment (under Rule 11).
- 2.2 The assessment was completed by the Assessor on 18 November 2008, and a peer review was completed on 18 November 2008,
- 2.3 The Assessor recommended to the Registrar that the Appellant's application should be declined (under Rule 11) because he had not demonstrated that he met the requirements of competencies 1 and 5 of the Design 2 License Class. In view of the fact that the Appellant had not met the requirements of Competency 1, the Assessor was not able to support an offer of a Design 1 License.

The minimum standards for a Design 2 License, which are set out in Schedule 1 of the Rules, take the form of "competencies", all of which must be met. The relevant competencies which need to be demonstrated are:

- **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.
- **Competency 5:** Explain the process of construction observation and contract administration.

- 2.4 After taking into account the recommendation of the Assessor, the Registrar decided to accept the Assessor's recommendation and decline the Appellant's application to become licensed as a Design – Class 2 Building Practitioner.

³ The Appellant was successful in obtaining Licenses in Carpentry and Site 1 classes.

- 2.5 On 1 December 2008, the Appellant was formally notified of the Registrar's decision to decline the application for the Design 2 licensing class, and of his right to appeal the decision (under Rule 13(3)).
- 2.6 On 17 December 2008 the Appellant appealed to the Board against the Registrar's decision to decline his application to be licensed as a Design – Class 2 Building Practitioner and set out his grounds. The Appellant sought, by way of a decision from the Board, that it reverse the Registrar's decision.

3. Appellant's Case

- 3.1 The Appellant presented written submissions to the Board supported by other exhibits and spoke to his submissions.

He was critical of the Assessor's questions, which he said were not "open" and contained inherent assumptions. He challenged a number of matters in the assessment in relation to their appropriateness, accuracy and rigour.

The Appellant provided an update of his standard specification and spoke to a number of exhibits contained in the documentation of his appeal.

- 3.2 The Board members sought clarification of a number of matters contained in the appeal documentation and the written and oral submissions including:
- (a) Appropriate risk management for underground utility services shown on construction drawings;
 - (b) The statutory requirements applicable to Code Compliance Certificates under the Building Act 2004;
 - (c) Definition of different categories of buildings and application of the licensing regime to those;
 - (d) Use of specialist secondary designers such as structural or geotechnical engineers;
 - (e) Allocation of building risks, potential liability and management of that;
 - (f) Aspects of the NZ Building Code, NZS 3604, Acceptable Solutions and Alternative Solutions and other design and building standard documents;
 - (g) Contract documents and contract administration, including Construction Contracts Act 2002;
 - (h) References and details in his design drawings.

3.3 In response to a question from the Chair, the Appellant confirmed that the decision he sought from the Board was the issue of a Design 2 License.⁴

4. Registrar's Report

4.1 A written report was received from the Registrar dated 20 January 2009. The report covered the following:

4.2 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).

The minimum standards are set out in Schedule 1 of the Rules, and take the form of "competencies" all of which must all be satisfied. (Refer 2.6)

These competencies may be demonstrated by meeting some or all of the performance indicators that are also set out in Schedule 1 (Design 2 competencies) of the Rules. In carrying out an assessment, the Assessor must use methods prescribed by the Registrar (see Rule 11(1)).

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. However, the competencies also address other skills that a competent designer is expected to demonstrate, for example managing the design process or establishing a design brief.

The frame of reference for the competencies is provided by the "Descriptor" for the licensing class. For Design 2, the Descriptor states –

"This license class covers practitioners designing Category 1 and 2 buildings."

The explanatory note under the Descriptor explains that –

"Category 2 buildings are buildings of moderate complexity for commercial or residential use."

4.3 The Registrar must take into consideration the Assessor's recommendation before making a decision (under Rule 12(2)).

It is important to appreciate the proximity of the Assessor to the applicant. The Assessor formed a view about the competence of the Appellant through direct contact with him, by reviewing his work, and by talking to his referees. The Registrar does not have all of this information available when making a decision, and must rely on the Assessor to be his "eyes and ears".

⁴ On 3 March 2009, the Appellant advised the Board Secretary that he had not intended that this response mean that he would not consider the offer of a Design 1 License if it was offered.

Reliance on the Assessor 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. However, in the normal course of events the Registrar will accept a recommendation of an Assessor, unless there are strong reasons for not doing so.

4.4 In making the recommendation to decline the application, the following reasons were recorded by the Assessor:

- (a) *Competency 1:* The knowledge of the current amendments to NZS 3604 and the revisions to the NZ Building Code were very limited. The Appellant did not hold current copies in his office or have access to this information online. The basis undertaking of client engagement was not able to be demonstrated. (The Appellant disputed some of the Assessor's comments and demonstrated by production of documents which he had brought with him to the hearing that the Assessor was incorrect on some matters).
- (b) *Competency 5:* The Appellant was not able to explain the importance and process of contract documentation, observation and the processes of such work. Although he had undertaken some of this work, his documentation was not presented and it appeared that he only had a brief understanding of the full process and only undertook parts of the work when issues arose.

The Assessor noted that after discussion with the peer reviewer it was agreed that Competency 1 had still not been satisfied, therefore was not able to support an offer of a Design 1 licensing class.

The Registrar did not consider that there was any justifiable reason for him not to agree with the Assessor's recommendation.

4.5 In response to questions from Board members, the Registrar's representative stated:

- (a) In his submissions to the hearing, the Appellant had focused on the assessment process rather than demonstrating to the Board that he met the requirements for Competencies 1 and 5.
- (b) As the Board has stated in previous appeal decisions, the fact that a building consent authority has issued a building consent based on the Appellant's design does not demonstrate that the requirements of Competency 1 have been attained and this is more important for a Design 2 License.
- (c) The Registrar's representative assured the Board that the Assessor had appropriate qualifications and experience to assess a Design 2 License application.

4.6 The Appellant made responses to the Registrar's representative in respect of some of his comments.

5. Appellant's Closing Submissions

- 5.1 The Appellant estimated that his expenses in making the appeal were \$1000 (approximately) and that the cost of his time in preparing and at attending the hearing was \$5000 (approximately). While he would be happy to recover these he was agreeable to the Parties carrying their own costs.
- 5.2 The Appellant advised that he had no objection to publication of his name in any report of the appeal.

6. Registrar's Closing Submissions

- 6.1 The Registrar's representative stated that the costs of the appeal to the Registrar were "substantial", but the Registrar was not seeking payment of costs from the Appellant.

7. Board's Findings

After due consideration of the Appellant's submissions and evidence, and the Registrar's report, the Board found as follows:

- 7.1 That the Appellant had not demonstrated to the Board's satisfaction that he met the requirements of Competency 1 "*Comprehend and apply knowledge of the regulatory environment of the building construction industry*" necessary to qualify for a Design 2 Building Practitioners' License.
- 7.2 That he had not demonstrated to the Board's satisfaction that he met the requirements of Competency 1 necessary for a Design 1 Building Practitioners' License. The Board considered that his knowledge of the regulatory environment including provisions of the Building Act 2004, the Building Code, amongst others was lower than the level that it expected.
- 7.3 That the Appellant had not demonstrated to the Board's satisfaction that he met the requirements of Competency 5 "*Explain the process of construction observation and contract administration*". The Board considered that the Appellant displayed a low level of knowledge about the formation and administration of construction contracts for buildings, particularly of the complexity of Category 2. He did not demonstrate an adequate knowledge of the Construction Contracts Act 2002.
- 7.4 The Board was not satisfied from the Appellant's submission that he had an appreciation of the limits of his competency in several areas and was only prepared to work within those.

8. Board's Decision

- 8.1 The Board has resolved by unanimous decision to confirm the decision of the Registrar to decline the Appellant's application for a Design 2 License and not to offer a Design 1 License.
- 8.2 The Board's reasons are that the Appellant has not demonstrated to the Board's satisfaction that he meets the standards for Competency 1 required

by the Design 1 or 2 License, or Competency 5 required by the Design 2 License.

- 8.3 The Board has resolved that the Appellant and the Registrar meet their own costs of the appeal.
- 8.4 The Board directs that there be no publication of the Appellant's name, but the salient points of the Board's decision may be published.
- 8.5 That the Appellant be advised that under the provisions of s.330(2) of the Act, he may appeal the Board's decision to the District Court.

Alan Bickers
Chairman (Presiding Member)

17 March 2009