

BPB Appeal No. A1014

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)(b) by the Appellant against a decision of the Registrar

DECISION OF THE BUILDING PRACTITIONERS’ BOARD

1. Introduction

- 1.1. The Appellant of Auckland was licensed for Carpentry and Site/Area of Practice 1 (“AOP 1”) Licenses by the Registrar on 21 August 2009.
- 1.2. The Registrar is required under s.303 of the Act to contact Licensed Building Practitioners (LBPs) on an annual basis seeking their response to the matters referred to in s.303 (1). In the case of the Appellant the Registrar did so on 16 July 2011 seeking his response requiring him to revalidate his licenses and meet the associated fees. The Registrar made further requests in March, April and May 2011 and the Appellant failed to respond as required. In the absence of a sufficient or complying response from the Appellant the Registrar suspended the Appellant’s licenses in accordance with s.303 (4) of the Act with effect from 6 May 2011. The Appellant was also advised that his licences would be cancelled if no response was received within 12 months of the date of suspension.
- 1.3. On 9 May 2011 the Appellant appealed to the Building Practitioners’ Board (“the Board”) against the Registrar’s suspension as provided for under s.330 (1)(b) of the Act, and sought that the licenses be renewed without payment of fees.
- 1.4. On 8 August 2011 the Board considered the appeal on the basis of written submissions from the Appellant and the Registrar, and in accordance with the Board’s “Appeals Procedure”.
- 1.5. The Procedure provides that appeals are considered by way of a “re-hearing”¹, 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 Refer S.335(2) of the Act.

1.6. The following were present for the hearing of the appeal:

Board Members and support staff:

Alan Bickers	Board Chairman (Presiding)
David Clark	Acting Deputy Chairman
Brian Nightingale	Board Member
Dianne Johnson	Board Member
Colin Orchiston	Board Member
William Smith	Board Member
Jane Cuming	Board Member
Tracy Goddard	Board Secretary

Registrar:

Mark Scully

2. The Board received the following submissions

- 2.1.1. Registrar's letter 16 July 2010 to the Appellant requesting response to enclosed annual contact forms and payment of annual fees then due.
- 2.1.2. Registrar's letter 14 March 2011 to the Appellant reminding of the need to respond as required, and advising that the licenses would be suspended if that response was not received by 11 April 2011.
- 2.1.3. Registrar's letter 9 May 2011 to the Appellant advising that as no response to the letter of 14 March had been received, the licences had been suspended effective 6 May 2011, and would be cancelled if no response was received within 12 months of the date of suspension.
- 2.1.4. Application for appeal by the Appellant dated 9 May 2011
- 2.1.5. The Board's Notice dated 15 July 2011 to the Appellant setting out the procedures for the appeal.
- 2.1.6. Submission to the Board by the Appellant dated 21 July 2011
- 2.1.7. Report by the Registrar to the Board dated 3 June 2011.
- 2.2. The Appellant's submission canvassed his acceptance of the Licensed Building Practitioners' scheme, his participation as an "early adopter", and his continued approval of the objectives of it. However, he considered that there had been a lowering of standards and subsequent acceptance benchmarks, and reduced applicable scope of work, which had "*dumbed down*" the scheme. Further, that the delay in implementing the scheme had imposed costs upon LBPs without delivering commensurate benefits.
- 2.3. The Registrar's report expressed the view that the Licensed Building Practitioners' Rules establish the procedures to be followed, and that those procedures were followed. It notes that the Rules are not discretionary in respect of those procedures. Accordingly, the circumstances and actions (or

inaction) by the Appellant left the Registrar with no option but to take the action that he did.

3. The Board's consideration

3.1. Section 292 of the Act states that the minimum standards for licensing to continue are to be assessed in a manner required by the Rules. Part 2 of the Rules sets out the steps the Registrar must follow in regard to annual contact by the Registrar with licensed building practitioners. The steps include:

- Contacting a licensed building practitioner (LBP) at least 30 days before the expiry of the LBP's licence identification card: Rule 14
- Contacting a LBP who fails to reply to the annual contact: Rule 17(1).
- Suspending the license if an LBP has still not responded: Rule 17(2).

3.2. The matters before the Board are thus:

- Did the Registrar follow due process?
- Did the Registrar have discretion to vary the process or waive the fees?
- Does the Board have the jurisdiction to waive fees?

3.3. In respect of Rule 14, the Board notes that the Registrar's "annual contact" letter of 16 July 2010 was only 25 working days prior to the Appellant's anniversary date being 12 months after licensing on 21 August 2009. The Appellant, however, made no reply until being advised his license was suspended on 9 May 2011. Accordingly the Board does not consider that the defect in meeting Rule 14 is material.

3.4. The Appellant failed to respond until after his license was suspended on 9 May 2011 as required by the mandatory provisions of s.303 (4) (a) of the Act. Accordingly the Board considers the Registrar has met the requirements of Rules 17(1) and 17(2) and carried out his mandatory obligation under the Act.

3.5. The Board can find no provision in the Act or the Rules which would provide the Registrar with the discretion to vary those requirements.

3.6. The jurisdiction of the Board in this matter is set out in s. 330(1)(b) of the Act:

330 Right of appeal

- (1) A person may appeal to the Board against any decision of the Registrar to—
- (a) decline to license the person as a building practitioner; or
 - (b) suspend or cancel his or her licensing

3.7. The only avenue under which the Board may grant relief in this matter is set out in s.335(3)(b) of the Act:

335 Procedure on appeal

- (3) On hearing the appeal, the appeal authority—
- (a) may confirm, reverse, or modify the decision or action appealed against; and
 - (b) may make any other decision or take any other action that the decision-maker could have made.

- 3.8. The Board is thus bound by the same provisions as the Registrar, and hence does not have the jurisdiction to waive fees. Accordingly, while noting the Appellant's concerns in relation to the current scope and requirements of the Licensed Building Practitioners' scheme, the relief sought by the Appellant is not within the statutory authority of either the Registrar or the Board.
- 3.9. The Board notes that there are eight or nine months within which the Appellant could reinstate his licenses, failing which they will be cancelled.

4. Board's decision

- 4.1. Pursuant to S.335(3) of the Act the Board confirms the Registrar's decision to suspend Appellant's Carpentry and Site/Area of Practice 1 ("AOP 1") licenses, effective 6 May 2011.**
- 4.2. The Board's reasons are that the Appellant has failed to meet both the requirement for annual notice and for payment of fees as required to maintain those licenses.**

5. Costs

- 5.1. 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.²
- 5.2. The Registrar has indicated that costs will not be sought. Because the Appellant has failed in this appeal, and such failure is a direct consequence of the actions or inactions of the Appellant, the Board does not consider that there are any grounds upon which it could award costs to the Appellant.
- 5.3. Accordingly, the Board directs that costs lie where they fall.

6. Publication of name

- 6.1. Pursuant to S.339 of the Act, the Board may prohibit the publication of the Appellant's name and/or particulars.
- 6.2. The Board has resolved not to publish the Appellant's name.

Signed and dated this 22nd day of August 2011

Alan Bickers
Chairman (Presiding Member)

² The "parties" are the Appellant and the Registrar. The Board is not a party.

Advice Note

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.*