

BPB Appeal No. A1038

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 On 28 October 2011 the Appellant applied for Design Area of Practice 2 (AOP 2) Licence under S.288 (2) of Building Act 2004 ("the Act") and the Licensed Building Practitioners Rules 2007 ("the Rules").
- 1.2 The Registrar of Licensed Building Practitioners ("the Registrar") appointed under S.310 of the Act, declined the Appellant's application, but granted him a Design AOP 1 Licence under Rule 12 and the Appellant was notified of the Registrar's decision on 3 February 2012, together with his right to appeal the decision within 20 working days to the Building Practitioners Board ("the Board").
- 1.3 On 28 February 2012¹, 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 grants a Design AOP 2 Licence.
- 1.4 A pre-hearing teleconference was convened by the Chairman of the Board with the Appellant, the Appellant, on 10 April 2012. The Board's Secretary was in attendance.
- 1.5 The Board decided to hear the appeal on 23 April 2012. The Appeal was considered in accordance with the Board's "Appeals Procedure".
- 1.6 The Procedure provides that appeals are considered 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 Procedure).

¹ Received by Board Secretary on 28 February 2012.

² Refer S.335 (2) of the Act.

- 1.7 The following were present for the hearing of the appeal:

Board Members and support staff:

Alan Bickers	Board Chairman (Presiding)
Jane Cuming	Board Member
Brian Nightingale	Board Member
Colin Orchiston	Board Member
William Smith	Board Member

Pam Lwee Board Secretary LBP Appeals and Complaints

The Appellant and supporting witnesses:

The Appellant

Registrar and support:

Mark Scully

Others in attendance:

Sharn Christensen, DBH staff member

- 1.8 The Board received the Registrar's report of 6 March 2012.

2. Background

- 2.1 The Appellant submitted his application to the Registrar to be licensed as a Design AOP 2 building practitioner on 28 October 2011.
- 2.2 On 31 October 2011, the Registrar wrote to the Appellant advising him that his application for Design AOP 2 was complete and had proceeded to assessment.
- 2.3 Assessment Systems Limited (ASL) reviewed the application.
- 2.4 The assessment was completed on the 29 November 2011 and the Assessor recommended to the Registrar (under Rule 11) that the Appellant's application for Design AOP 2 should be declined and that Design AOP 1 licence be granted.
- 2.5 After taking into account the recommendation of the Assessor and the requirements of S.286 of the Act, the Registrar decided (under Rule 12) to decline the application for a Design AOP 2 licence and grant a Design AOP 1 licence.

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 Design AOP 2, these competencies 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.*

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 must use the "Assessor Guidelines" prescribed by the Registrar (see Rule 11(1)).

3.3 The competencies address a broad range of skills and knowledge that a competent practitioner should be able to demonstrate.

3.4 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.

3.5 In making the recommendation to decline the application, the reasons below were recorded by the Assessor.

- The Appellant has approximately 10 years experience in the design industry and has undertaken some training but has yet to gain a formal qualification.
- The Appellant has a good level of experience and a good approach to his work practices, has good office systems, and a well set out home office.
- The Appellant was able to demonstrate a good understanding of the regulatory environment.
- Formal engagement with clients was not as good as it could be. the Appellant does not currently get involved with contracts, contract administration or construction observation. He was not

able to convey a basic understanding of general conditions of contract or contract administration roles, and stated that he had no intention to provide these services.

- The Appellant demonstrates a very good standard of drawing and detailed documentation.

4. The Appellant's Submissions

4.1 The Appellant made written and oral submissions to the Board. In these he referred to three additional pieces of information which he provided –

- His revised conditions of engagement;
- Notes concerning observation of construction including reference to NZS 3910: 2003 *General Conditions of Contract for Building and Civil Engineering Construction*, and
- Evidence of recent completion of a short course on tender administration.

The Appellant stated that the nature of his design work predominantly related to Category 2 buildings and he cited a number of examples of work that he had carried out as a designer. He referred to the occasions when, on request from his client, he was required to attend on site but confirmed that construction observation was not a service which he currently offers his clients.

4.2 The Board questioned the Appellant on a range of matters concerning construction observation, conditions of contract, contract administration matters and matters concerning occupation requirements for new buildings.

5. Board's Consideration

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

The Registrar did not consider that the Appellant met the requirements of Competency 2 for AOP 2 "*Manage the building design process*".

5.2 The Board then considered Competency 2. This Competency can be demonstrated by meeting some or all of the performance indicators as listed in Schedule 1 of the Rules.

The Board noted the provisions of the Rules in relation to the performance indicators applicable to AOP 1 and AOP 2 for Competency 2.

AOP 2 has 3 additional performance indicators compared with AOP 1 which are:

- “ 2.2.3 Explain the processes of construction observation;*
- 2.2.4 Explain the processes of contract administration;*
- 2.2.5 Advise building owner on occupation requirements.”*

The Board considers that in order to demonstrate that he meets the requirements for Competency 2 for AOP 2, the Appellant must demonstrate his knowledge in respect of these 3 indicators because they are the point of differentiation with AOP 1. Hence, the Appellant must be capable of demonstrating that he substantially meets the requirements of performance indicators 2.2.3, 2.2.4 and 2.2.5.

The Board noted that for 2.2.3 and 2.2.4 the Appellant must be capable of “explaining” the processes. Similarly, for 2.2.5, in order to provide advice he needed to be knowledgeable about the range of requirements in order to provide competent advice to a building owner.

- 5.3 Through his responses to the Board’s questions, the Appellant did not demonstrate that he had other than superficial knowledge of processes of construction observation and contract administration. His knowledge of occupation requirements was better but still insufficient to demonstrate that he met the requirements of the performance indicator 2.2.5.
- 5.4 Overall, the Appellant did not demonstrate to the Board’s satisfaction that he substantially met the requirements of performance indicators 2.2.3, 2.2.4 and 2.2.5. The Board concluded that the Appellant failed to provide evidence to demonstrate that he met the requirements of Competency 2 for a Design AOP 2 licence.
- 5.5 The Board considered that the quality of the Appellant’s drafting and design documentation was of a high standard and that he demonstrated a diligence in expanding his knowledge and experience as a designer. It was likely that in the future he could demonstrate the required competency provided that he gained sufficient training and experience.

6. Board’s Decision

- 6.1 **Pursuant to S.335 (3) of the Act, the Board has resolved to uphold the Registrar’s decision not to issue the Appellant with a Design Area of Practice 2 Licence. The appeal is, therefore, declined.**
- 6.2 The Board considers that subject to obtaining training and additional experience working as a designer on construction observation and contract administration, and advising building owner on occupational requirements, the Appellant may be capable of meeting the competencies of Design AOP 2 at a future date.

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.³
- 7.2 The Board invited submissions from the Appellant and the Registrar on costs.
- 7.3 Neither the Appellant nor the Registrar sought costs.
- 7.4 The Board, having considered the circumstances of this appeal and the submissions, directs that 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. The Board invited submissions from the Appellant on this matter. The Appellant indicated that he would prefer that his name was not published.
- 8.2 The Board, having considered the circumstances of this appeal, directs that the name and the particulars of the Appellant not be published.

Signed and dated this 6th day of May 2012

Alan Bickers
Chairman
(Presiding Member)

³ 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.*