

BPB Appeal No. A1048

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 13 January 2012 the Appellant of [omitted] 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 a Design AOP1 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 March 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 AOP2 Licence.
- 1.4 A pre-hearing teleconference was convened by the Acting Deputy Chair (Presiding Member) of the Board with the Appellant on 18 May 2012. The Board's Secretary was in attendance.
- 1.5 The Board decided to hear the appeal in Auckland on 29 May 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 March 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:

David Clark	Acting Deputy Presiding Member (Presiding)
Jane Cuming	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

1.8 The Board received the Registrar's report of 13 April 2012.

2. Background

2.1 The Appellant submitted his application to the Registrar to be licensed as a Design AOP 2 building practitioner on 13 January 2012.

2.2 On 20 January 2012 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 13 February 2012 and the Assessor recommended to the Registrar (under Rule 11) that the Appellant application for Design AOP 2 should be declined and that Design AOP 1 licence be granted. He found that the Appellant did not meet Competencies 3 and 4 for a Design AOP 2 licence.

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 license and grant a Design AOP 1 licence, on the basis that Competencies 2, 3, and 4 had not been demonstrated.

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.
- Project 1 was an alteration to the Appellant's own house, a Category 1 building. The documentation produced by the Appellant demonstrated the range of Competencies at Design 1 but was not of a reasonable standard for a Design 2 licence.
 - The second project presented by the Appellant was for the completion of working drawings under contract to an architect (referee [omitted]).
 - The referee [omitted] was happy with the work produced by the Appellant, but was not confident that the Appellant would be able to provide a complete design service for Category 2 buildings.
 - The second referee, engineer [omitted], had done a lot of work over the years for the Appellant. [omitted] is reported as commenting that the majority of projects undertaken for the Appellant are simple works for geotech and beam and foundation work.
 - The Appellant was not able to provide other examples of Category 2 buildings that he had sole responsibility for designing.
- 3.6 The Registrar's agreed with the Assessor's recommendation that the Appellant did not demonstrate Competency 3 (*Establish design briefs and scope of work and prepare preliminary design*) and Competency 4 (*Develop design and produce construction drawings and documentation*). However, the Registrar also decided that there was insufficient evidence to demonstrate that Competency 2 (*Manage the building design process*) had been met.

- 3.7 As a result, the Registrar's decision was to decline the application for a Design AOP 2 licence and instead grant a Design AOP 1 licence.
4. The Appellant's Submissions
- 4.1 The Appellant affirmed his evidence then made written and oral submissions to the Board. He explained he offered a design service on his own account as well as undertaking contract draughting for a local architecture firm. His work was "mainly up to building consent" and he did not get involved in contract administration. He had nominated Project 1 and Project 2 in his original application to reflect the range of work he did on his own account and "contributed to" as a contractor. In light of the assessors comments he wished to submit new evidence of Category 2 work he had "sole responsibility for designing".
- 4.2 The Appellant referred to comprehensive new information which he provided in respect of three Category 2 buildings:
- Project A ([omitted]); The Appellant had developed the initial scheme for Stage 1 more than 5 years ago and had more recently done the documentation for resource consent for Stage 2 and Stage 3 of this community facility. The client was represented by a chairman who provided a written reference outlining his satisfaction with the client liaison and professional service provided by the Appellant.
 - Project B ([omitted]); The design work related to the development of a new childcare facility, and the structural and fire safety upgrade of an existing light timber framed hall with new commercial kitchen, offices and mezzanine floor. Construction was completed in 2009. The Appellant submitted a written reference from the Project Manager who described the scope and complexity of the work and his satisfaction the job was achieved on time, within budget with very few variations.
 - Project C ([omitted]); Over the last 3 years the Appellant has worked on the site redevelopment, including the relocating of a [omitted] and church, removal of an existing hall and the construction of a new hall and office complex joined to the relocated church. The [omitted] who is also an experienced building contractor provided a written reference outlining the complexity of the job and attesting to his satisfaction with the Appellants problem solving skills and technical ability.
- 4.3 The Appellant also made oral submissions in respect of the projects and described in some further detail as to his involvement with his clients, the type of work that he undertook in receiving the instructions, the briefing with his clients, the development of the design through to working drawings and his on-going contact with his clients.
- 4.4 It can be noted that the Appellant's submissions focused on the three new projects in particular (rather than the projects originally submitted as part of his application) in order to establish that the performance indicators under each of the competencies had been met. Indeed, although he did refer briefly to the information which had been submitted in support of his original application for

licensing, he preferred the Board to focus on the new projects which he had submitted.

- 4.5 Throughout his submissions the Appellant responded to questions from the Board which concentrated on the performance indicators under competency 2, 3 and 4.

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 license:

- *Competency 1: Comprehend and apply knowledge of the regulatory environment of the building construction industry.*

The Registrar responded to the Board

In relation to Competency 2 for the Design AOP 2 license 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. The Registrar also noted the Appellants terms of engagement were seriously deficient in terms of recommended practice.

In relation to competency 3 the Registrar stated the Appellant had limited experience in the process of developing design briefs and scope of work and preparing preliminary design documentation.

In relation to competency 4, the Registrar noted that the standard of the Appellant's construction drawings and documentation was good and he noted the evidence put before the Board had not been made available to the assessor.

- 5.2 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.

In relation to performance indicator 2.2.3 *Explain the processes of construction observation*, the Board was satisfied with the Appellant's explanation, with the exception of conditions of contract.

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 B. His knowledge was, however, limited.

- 5.3 In relation to Competency 3 the Board notes except for the Category of building, the competencies are the same for Design AOP 1 and AOP 2.

The Appellant did not demonstrate to the Board he had met performance indicator 3.2.6 *Present information to clients on timelines and costs* for Category 2 buildings however there was strong evidence provided in support of all other performance indicators.

- 5.4 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
- 5.5 The Board considered that the Appellant provided sufficient evidence to demonstrate that he met sufficient performance indicators to be considered to meet the requirements of Competencies 2, 3, and 4 and understood the importance of working within his competence.
- 5.6 The Board, therefore, concluded that the Appellant did meet the competency requirements for a Design AOP 2 licence. The Board, therefore, resolved to grant the appeal but would strongly urge the Appellant to expand his competence in conditions of engagement, conditions of contract, contract administration processes, and methods of procurement; and that he also become more familiar with building occupation requirements.

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 AOP 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 AOP 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 AOP2 Licence.

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 Both parties were asked as to whether they wished to make submissions as to costs. The Appellant advised that he did not wish to seek costs although the Registrar asked that costs be reserved. In the circumstances therefore the Board invites costs to be submitted to the Board. The Board would request that the Registrar file his submissions (if any) as to costs within ten working days of the receipt date of this decision with the Appellant having the right to respond five working days thereafter.

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 name to 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 day of May 2012

David Clark
Acting Deputy Chair
(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.*