

BPB Appeal No. A1054

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

DECISION OF THE BUILDING PRACTITIONERS BOARD

Date and location of hearing:	10 July 2012 at [omitted]
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Appeal heard by:	Colin Orchiston Jane Cuming Brian Nightingale Bill Smith Richard Merrifield	(Presiding Member) Board Member Board Member Board Member Board Member
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Appearances by:	The Appellant [omitted] witnesses for the Appellant The Registrar, Mark Scully, was available by teleconference
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1. Introduction

- 1.1 The Appellant of [omitted] applied for Design Area of Practice (AOP) 2 Licence under s 288(2) of the Act and the Licensed Building Practitioners Rules 2007¹ (“the Rules”).
- 1.2 The Registrar of Licensed Building Practitioners (“the Registrar”) declined the Design AOP 2 application and notified his decision by letter dated 10 April 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 8 May 2012², the Appellant lodged an appeal to the Board against the Registrar’s decision
- 1.4 At a pre-hearing teleconference on 20 June 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.³ The minimum standards are set out as “competencies” in Schedule 1 to the Rules. In determining whether a person meet a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1⁴.
- 2.2 Where the Registrar declines an application the applicant has a right of appeal to the Board.⁵

3. Scope of the appeal

- 3.1 An appeal proceeds by way of rehearing⁶ however the Board will not review matters outside the scope of the appeal⁷.
- 3.2 The appeal seeks the following relief:
Grant of a Design AOP 2 licence. If the Appellant is not granted a Design AOP 2 licence, she seeks at least a Design AOP 1 Licence.
- 3.3 In light of s355(4) and the Registrar’s decision letter, the Board interprets its inquiry as being restricted to consideration of Competencies 2, 3 and 4.

¹ Incorporating amendments for 2008, 2009 and 2010.

² Received by Board Secretary on 8 May 2012.

³ S286 of the Act and rule 4 of the Rules.

⁴ Clause 4(2) of the Rules

⁵ S330(1)(a) of the Act.

⁶ S335(2) of the Act

⁷ S 335(4) of the Act

4. Design Area of Practice 2 Licence

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 recommendation⁸. The Board's Appeals Procedures⁹ require the Registrar to provide a report which includes all evidence used to reach the decision, including the assessors' recommendation.
- 4.2 In carrying out an assessment, the Assessor appointed by the Registrar must use the "Assessor Guidelines" prescribed by the Registrar. The Registrar must take into consideration the Assessor's recommendation before making a decision but is not bound by the recommendation.
- 4.3 In making the recommendation to decline the application, the reasons below were recorded by the Assessor:
- The Appellant worked part time as an architectural designer and part time as a [omitted].
 - The Appellant's regulatory knowledge was at a level to be expected from someone involved in [omitted].
 - Project 1 was a \$65,000 fit out to a commercial building. No consent had been applied for, and the assessor identified several items that he considered were deficient.
 - Project 2 was for \$50,000 of remedial works at a school to address Notice to Fix items associated with an old building consent that was never issued with a code compliance certificate. The assessor identified several items that he considered were deficient or not well executed.
 - Both projects submitted with the application were minor in nature. There was no design involved in either project and there was insufficient documentation to show consistency of competence.
 - The Appellant had minimal knowledge of contract administration and construction observation.
 - Project 3 was a residential alteration. Inconsistencies in the drawings indicated that a quality control system was not used.
 - The Appellant has been in the industry a short time, most of it working in someone else's practice. Until recently she has not undertaken additional learning to up-skill and gain the knowledge needed to fully meet the competencies for a Design applicant.
 - The Appellant was borderline between not having a licence and having Area of Practice 1.

⁸ clause 10 and 11 of the Rules

⁹ Ibid

Appellant's Submissions

- 4.4 Extensive submissions were made available to the Board ahead of the hearing. Included were specifications and drawings for a category 1 house alteration at [omitted], and for a sleepout in [omitted], all as undertaken by the Appellant in her role as a principal of [omitted]. 3 other house projects – for which the Appellant indicated she had taken primary responsibility as an employee with [omitted] – were represented by various drawings specifications and documents.
4. Four witnesses attested to the Appellant's experience and knowledge in drafting, design and specification preparation. Three were employees at [omitted] who worked with the Appellant in [omitted]; the fourth was a builder who had commissioned the sleepout project. The Board's questioning revealed that one witness was both the Appellant's business partner and life partner, and the evidence given was considered accordingly.
- 4.6 A further project – comprising a rolling upgrade of a community facility implemented by [omitted] – was submitted at the hearing. Whilst this work was in the nature of interior fitout and alterations, the Board accepted this as a category two project.
- 4.7 The general import of the submissions and witness statements was to the effect that the Appellant had a good knowledge of Standards and compliance and good skills in drafting and documentation ahead of the procurement and construction process; but very limited exposure to subsequent activities.
- 4.8 It was apparent that the Appellant had very limited experience in taking primary responsibility for the design outputs for category 2 buildings.

Board's consideration

- 4.9 The Board noted that the Registrar was satisfied that the Appellant met the following competencies for the Design AOP 2 licence:
- *Competency 1: Comprehend and apply knowledge of the regulatory environment of the building and construction industry.*
- 4.10 The Board then considered the Design AOP 2 licence Competencies 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.
- 4.11 The Board considered that the Appellant had a minimum of experience in taking primary or direct responsibility for category 2 projects or for carrying out specific design. It was apparent that the documentation was thorough and well-presented when it dealt with standard solutions or the incorporation of manufacturer's information, but weak in detailing where an analysis of specific circumstances – or perhaps practical building knowledge - was required.
- 4.12 The Design AOP 2 Competency 2 performance indicators vary from the Design AOP 1 Competency 2 performance indicators by the addition of requirements to be able to understand and explain construction observation, contract administration and occupation requirements. Whilst the Board

accepts that Design AOP 2 practitioners may not actually be involved in these activities, it cannot overlook the fact that these performance indicators are distinguishing elements between Design AOP 1 and Design AOP 2. The Appellant failed to convince the Board that she had more than a rudimentary awareness of such issues. A similar lack was apparent in respect of Competency 4 performance indicators in relation to contracts.

Board's findings

- 4.13 Whilst recognising that not all the performance indicators are required to be met, a majority of the Board concluded that the Appellant did not meet sufficient of the performance indicators to demonstrate the competency requirements for a Design AOP 2 licence.
- 4.14 However, the Board was satisfied that the Appellant provided sufficient evidence to demonstrate that she met the Design AOP 1 competency requirements.

5. Board's Decision

- 5.1 Pursuant to s335(3) of the Act, the Board has resolved to reverse the Registrar's decision and license the Appellant with a Design Area of Practice 1 Licence.**
- 5.2 The Board directs the Registrar to issue a Design Area of Practice 1 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.¹⁰
- 6.2 The Board invites submissions from the Appellant and the Registrar on costs (If any), to be supported by evidence, not later than 10 working days following the date of the receipt of this decision.

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.

¹⁰ The "parties" are the Appellant and the Registrar. The Board is not a party

- 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 July 2012.

Colin Orchiston
(Presiding Member)

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.”*