

BPB Appeal No. A1095

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:	22 April 2013 at [omitted]
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Appeal heard by:	Colin Orchiston Bill Smith Brian Nightingale Jane Cuming	Presiding Member Board Member Board Member Board Member
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Appearances by:	The Appellant The Registrar, Mark Scully, was available by telephone but was not required to participate.
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1.0 Introduction

- 1.1 The Appellant of [omitted] applied for a Design Area of Practice (AOP) 2 Licence under s288(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 Licence application and notified the Appellant of his decision by letter dated 22 August 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 31 August 2012, the Appellant lodged an appeal to the Board against the Registrar’s decision.
- 1.4 At a pre-hearing teleconference on 1 April 2013 the Presiding Member of the Board informed the parties of the procedural matters for the appeal.

2.0 Licensing scheme

- 2.1 To become licensed, a person must satisfy the Registrar that they can meet all the applicable minimum standards for licensing.² The minimum standards are set out as “competencies” in Schedule 1 to the Rules. In determining whether a person met a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1³.
- 2.2 Where the Registrar declines an application the applicant has a right of appeal to the Board.⁴

3.0 Scope of the appeal

- 3.1 An appeal proceeds by way of rehearing⁵ however the Board will not review matters outside the scope of the appeal⁶.
- 3.2 The appeal seeks the following relief:

The grant of a Design Area of Practice 2 Licence.
- 3.3 In light of s335(4) and the Registrar’s decision letter, the Board interprets its inquiry as being restricted to consideration of Competencies 2, 3 and 4 for a Design AOP 2 licence.

¹ Incorporating amendments for 2008, 2009 and 2010.

² S286 of the Act and rule 4 of the Rules.

³ Clause 4(2) of the Rules

⁴ S330(1)(a) of the Act.

⁵ S335(2) of the Act

⁶ S335(4) of the Act

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.*

4.0 Registrar's report

4.1 The Registrar's decision to grant or decline a licence is informed by an assessor's recommendation⁷. The Board's Appeals Procedures require the Registrar to provide a report which includes all evidence used to reach the decision, including the assessor's recommendation.

4.2 The Registrar's report notes, at paragraph 19, the following from the Assessor's recommendations:

" ...

- *[The Appellant] completed a Civil and Structural engineering degree in [omitted] prior to immigrating to New Zealand in 1978.*
- *In 1978 [the Appellant] joined [omitted], [omitted], [omitted], [omitted], Architects and Engineers in Auckland. He began as an architectural and structural draughtsman working on commercial projects.*
- *In 1979 [the Appellant] moved to [omitted] and became the design engineer working on residential, commercial and farm buildings.*
- *In 1986 [the Appellant] joined [omitted] in [omitted] working on residential and commercial projects.*
- *From 1987 to present [the Appellant] has moved to [omitted] and works as a [omitted] on a variety of residential, commercial and farm buildings.*
- *All of the documentation, design work, initial site investigations and client discussions for the projects [the Appellant] provided are prepared by other consultants employed by [omitted].*
- *[The Appellant's] work involves undertaking the design and documentation of the structural engineering details. The documentation for the consent process are compiled and completed by [omitted].*
- *[The Appellant] carries out extensive checking of the completed documentation with respect to ensuring that the engineering and the engineering details are as per his original design and calculations.*

⁷ clause 10 and 11 of the Rules

- *The referee confirmed that [the Appellant] only undertakes the structural engineering work on the projects and all of the other work, such as the architecture, geotech and surveying is carried out by [omitted].”*

The basis for the Registrar’s decision to decline the application

4.3 The Registrar concluded:

“25. I reviewed the assessor’s assessment report and [the Appellant’s] application.

26. I based my decision on the assessor’s recommendations, for the reasons set out above. I did not consider that there was sufficient reason or concern to overrule the assessor’s recommendations.”

5.0 Appellant’s Submissions

5.1 The Appellant had undertaken the structural design of agricultural buildings, residential buildings and light commercial buildings since he commenced in [omitted] in 1986.

5.2 A significant proportion of this work is done using a proprietary engineered timber system. In addition he undertakes structural specific design work for the suppliers of that system, and structural review for other design LBPs.

5.3 Whilst the majority of design work undertaken was engineering in nature, the Appellant described examples where “architectural” design processes were also undertaken.

5.4 He currently has ongoing design commissions for residential projects. These projects involve him in gathering the client’s brief, preparing preliminary designs for their consideration, seeking preliminary cost estimates, and documenting the designs ready for the building consent application and construction.

5.5 During the construction process he advised that he attended the site and inspected construction aspects, but that he did not become involved in contract administration.

5.6 The Appellant indicated that at various times he had undertaken fire design assessments and resource consent submissions.

5.7 The Appellant supplied written references from housing clients, a previous employer, and builders.

6.0 Board’s consideration

6.1 The Board noted that the Registrar was satisfied that the Appellant met the following competencies for the Design AOP 2 licence:

Design Area of Practice 2 Licence:

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

- 6.2 The Board then considered Competencies 2, 3 and 4 for a Design AOP 2 licence. These competencies can be demonstrated by meeting some or all of the performance indicators as listed in Schedule 1 of the Rules.
- 6.3 The LBP scheme is competency based, and it is up to the practitioner to demonstrate their competency.
- 6.4 The Board was satisfied that the Appellant met sufficient of the performance indicators for Competencies 2, and 3, with the exception of those discussed further below.
- 6.5 The Board notes that design AOP 1 and AOP 2 competencies are related to Category 1 and Category 2 buildings respectively. Further, in past appeals, it has noted that performance indicators 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), and 3.2.4 (Document environmental and social impacts when developing design solutions) represent the key differences between Design AOP 1 and AOP 2. To obtain a AOP 2 licence an applicant or appellant should demonstrate that they meet these indicators and provide verified evidence of having designed Cat 2 buildings.
- 6.6 The Appellant submitted that he was available as required to attend to structural issues arising during construction, but it was not apparent to the Board that he was involved in ongoing contract observation, nor that he was able to sufficiently explain that role. The Appellant made it clear that he was not involved in contract administration, and he was unable to satisfy the Board that he could sufficiently explain it. The Board considered that the depth of knowledge in respect of occupancy requirements was insufficient. Notwithstanding the Appellant's description of resource consent submissions, the Board was not satisfied that the documentation of environmental and social impacts met the relevant performance indicator.
- 6.7 On the evidence before it, the Board was not satisfied that the Appellant had met these key performance indicators that differentiate AOP 1 from AOP 2. Accordingly, it considered that a Design 2 AOP licence could not be granted.
- 6.8 In respect of Competency 4, the appellant did not provide the Board with the plans or specifications of the work he had indicated he had done. Accordingly, whilst the Board sighted photos of some buildings, and testimonies from owners and/or builders, it was unable to satisfy itself on the extent to which the appellant had carried out the design and documentation, or the quality of it.
- 6.9 *Board's findings*

The Board concluded that in the specific circumstances of this appeal the Appellant did not meet the competency requirements for a Design AOP 2 licence. It also concluded that the competency requirements for a Design AOP 1 could be met only on the basis that the appellant provided verifiable

evidence that he had carried out or supervised design documentation which sufficiently met performance indicators 4.1.4 and 4.1.7 for Competency 4. Accordingly, and on reliance upon the Building Act at s337 and on 3.11.4 of the Board's Appeal procedures, those specific performance indicators should be referred back to the Registrar for reconsideration.

7.0 Board's Decision

7.1 Pursuant to s337 of the Act the Board directs the Registrar to reconsider whether the appellant has carried out or supervised design documentation which sufficiently meets the performance indicators 4.1.4 and 4.1.7, and if so, to license the Appellant with a Design Area of Practice 1 Licence as soon as practicable.

8.0 Publication of Name

8.1 Pursuant to s339 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 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 to be made public.

Signed and dated this 30th day of May 2013.

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.”*