

BPB Appeal No. A1114

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:	26 February 2013 at [omitted]
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Appeal heard by:	Colin Orchiston Brian Nightingale Richard Merrifield Bill Smith	(Presiding Member) Board Member Board Member Board Member
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Appearances by:	The Appellant [omitted] [omitted] The Registrar, Mark Scully, attended by telephone for part of the meeting.
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1.0 Introduction

- 1.1 The Appellant of [omitted] applied for a 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 Licence application and notified his decision by letter dated 18 September 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 15 October 2012, the Appellant lodged an appeal to the Board against the Registrar’s decision.

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 S335(3) provides that the Board “*may confirm, reverse, or modify the decision or action appealed against*”. The appeal seeks the following relief:

The grant of a Design Area of Practice (AOP) 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 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 his NZCE (Civil) whilst working as an Engineering Cadet for [omitted] in [omitted] between 1972 and 1977.*
- *[The Appellant] continued working for the [omitted] as an engineer until 1989 when he moved to the [omitted].*
- *In 1993 [the Appellant] joined [omitted] as a contact supervisor in their engineering office.*
- *In 1994 [the Appellant] commenced his own civil engineering business working on dwellings, farm buildings and light industrial projects.*
- *Project 1 involved the investigation of the erosion and the reinstatement of existing [omitted] on a site which had suffered from flooding. The work involved providing a remediation design for the relocation and re-establishment of the existing [omitted].*
- *The Project was considered Category 1 but did not cover all the competencies of a Category 1 project.*
- *Project 2 was a [omitted]. It involved the installation of a [omitted] on a [omitted] to meet national standards required for the [omitted]. [The Appellant] undertook the site investigation of this project and managed it through construction.*
- *The project was outside a building category as it was a civil engineering build. It also incorporated other consultants that carried out the work to achieve planning and building consent approval.*

⁷ clause 10 and 11 of the Rules

- *The assessor requested additional projects that were Category 2 builds but [the Appellant] was unable to do so.*
- *The assessor found that it was not necessary to contact [the Appellant's] referees as the criteria of the Design licence was not met by [the Appellant].*
- *The majority of projects [the Appellant] carries out are for geotech analysis and low level engineering work. He is able to undertake this work as an engineering associate.*

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

4.3 The Registrar concluded:

- "20. I reviewed the assessors report and [the Appellant's] application.*
- 21. I based my decision on the assessor's recommendation, 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 appeared with the support of his wife who assists in the business. The witness (a Chartered Professional Engineer⁸ - structural engineering) was able to expand upon the scope and nature of the appellant's business, and his performance in respect of the range of work carried out.
- 5.2 The written submissions addressed each of the relevant performance indicators on an item by item basis by reference to projects undertaken and the associated documentation and correspondence. This was expanded upon by oral submissions and by responses to questions from the Board. The type and scope of the additional projects provided to the Board (ie not available to the assessor) included [omitted]. The nature of these projects was consistent with the information provided to the assessor that the appellant's business was limited to such work.
- 5.3 The appellant sought a Design AOP 2 licence in order to carry out foundation design work for housing, as this was Restricted Building Work, and because he undertook projects which were not houses, but were nevertheless "buildings" that required a building consent under the Building Act. His submission provided (as an example) a [omitted] which he considered may be classified as Category 2 under the LBP scheme.
- 5.4 The appellant explained that the generality of his work was foundation investigation and design for standard housing, and retaining walls and [omitted]. His clients were a mixture of builders, developers, and designers for whom his work was incorporated into their wider documentation for the project.

⁸ Deemed to be a LBP Design AOP 3.

Each design was prepared on the basis of NZ Standards (particularly NZS 3604), but where specific engineering design was required, the appellant would seek input from a Chartered Professional Engineer.

- 5.5 The appellant is (by his description) a “[omitted] member of IPENZ” and an “Engineering Associate” under the [omitted]; accordingly he has professional ties which underpin his requirement to work within his competency. He emphasised that he had no inclination to undertake design work for buildings beyond that currently undertaken; he acknowledged that he would not be able to demonstrate the competence that he could do so; and that for both ethical and business reasons he would not carry out such work in the foreseeable future. Accordingly he sought a licence on the basis of his current competency, and for the purposes only of carrying out work similar to that in his submission.

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:

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. 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 In respect of the performance indicators in Competencies 2 and 3 the Appellant was able to describe his level of competence despite the limited scope of the work he carried out. With the exception of 2.2.4 (as discussed below) the Board was satisfied that the Appellant had sufficiently demonstrated competence across sufficient of the performance indicators.
- 6.5 In respect of Competency 4 the Appellant was only able to relate his level of competence to the limited scope of the work he carried out. The Board was not satisfied that the Appellant met sufficient of the performance indicators in relation to the design of the full scope of buildings that might be expected to fall within Categories 1 and 2.
- 6.6 The Building (Designation of Building Work Licensing Classes) Order 2010 establishes that foundation work would be RBW and therefore its design is required to be carried out by an LPB. However, the question before the Board was whether the limited scope of design work carried out by the Appellant was sufficient to satisfy the minimum competencies required for a design licence.
- 6.7 The Registrar was connected to the meeting by telephone and responded to questions from the Board and the Appellant. The Registrar expressed the view that the public policy issues underlying the LBP scheme were focussed on better design and construction performance of the critical elements (“Restricted Building Work”) of housing projects. Accordingly, in his view, the

granting of a design licence was dependent on demonstrated competency across the whole range of that work.

- 6.8 This view suggests some difficulties where the design of a building incorporates an element of specialist design carried out by a LBP, but the specialist designer is unable to obtain a licence until demonstrating competency across the whole range of work for the category of that building.
- 6.9 In the Board's view, the circumstances of this appeal required further consideration of the public policy objectives, and whether they would be met.
- 6.10 The Board is unable to grant a conditional licence or one which is limited in the scope of work to be carried out. Publications by the (then) Department of Building and Housing address the issue of a designer's individual competency in relation to the AOP specified in their licence. The Board notes the provisions of s. 314B of the Act which state that:

"A licensed building practitioner must –

- a) Not misrepresent his or her competence;*
- b) Carry out or supervise building work only within his or her competence."*

- 6.11 The Board noted the Appellant limits his scope of work to [omitted]. Bearing in mind the statutory obligations of s.314B the Board considers that in the specific circumstances of this appeal the granting of a licence would be consistent with the public policy objectives.
- 6.12 The Building (Designation of Building Work Licensing Classes) Order 2010 describes Category 1 as (in common parlance) a single family home, but the requirement that the building be "neither an ancillary building nor an outbuilding" is common to Categories 1, 2 and 3. Accordingly, an ancillary building such as the [omitted] in the appellant's submission is not RBW and a licence is not required for it.
- 6.13 The Board recognises that some of the other work carried out by the Appellant may fall into Category 2 by reason of being part of a Category 2 building. An AOP 1 licence would not remove the opportunity for the Appellant to undertake such work as long as it was within his competence to do so.
- 6.14 The Board, in past appeals, has noted that performance indicators 2.2.3, 2.2.4 and 2.2.5 represent the key differences between Design AOP 1 and AOP 2 and to obtain a AOP 2 licence an applicant or appellant must demonstrate that they meet these indicators. The Board considered that the Appellant did not sufficiently meet performance indicator 2.2.4, despite submissions that he had acted as "Engineer to the Contract" under NZS3910. Accordingly it would not be appropriate to license him at AOP 2.

Board's findings

- 6.15 In the specific circumstances of this appeal, 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 for a Design AOP 1 Licence.

7.0 Board's Decision

- 7.1 Pursuant to s335(3) of the Act the Board has resolved to modify the Registrar's decision and to license the Appellant with a Design Area of Practice 1 Licence.

- 7.2 The Board directs the Registrar to issue a Design Area of Practice 1 Licence to the Appellant 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 ...5th day of ..April..... 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.”*