

## Before the Building Practitioners Board

	BPB Complaint No. CB26092
Licensed Building Practitioner:	Jayden Thompson (the Respondent)
Licence Number:	BP135056
Licence(s) Held:	Design AoP 1

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### Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

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Complaint or Board Inquiry	Complaint
Hearing Location	Rotorua
Hearing Type:	In Person and on the papers
Hearing Date:	30 November 2023 and 2 February 2024
Decision Date:	19 August 2024

#### Board Members Present:

Mr M Orange, Chair, Barrister (Presiding)  
Mrs F Pearson-Green, Deputy Chair, LBP, Design AoP 2  
Mrs J Clark, Barrister and Solicitor, Legal Member  
Mr G Anderson, LBP, Carpentry and Site AoP 2 (by videoconference)

#### Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

#### Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(b) of the Act.

The Respondent **has not** committed disciplinary offences under sections 317(1)(h) and (i) of the Act.

The Respondent is fined \$4,500 and ordered to pay costs of \$2,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years. A summary of the decision will be published, naming the Respondent.

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## Summary

- [1] The Respondent’s company was engaged to provide the design documentation for a building consent application for a new 2 storey dwelling. The same company using a different Licensed Building Practitioner was engaged to construct the dwelling and that building work was also investigated at this consolidated hearing and is the subject of a separate decision.
- [2] The Board needed to consider whether the Respondent had negligently or incompetently carried out the design building work. The Board requested a Special Advisor to consider the quality and compliance of the Respondent’s building consent application.

- [3] The Board found that the matters reached the seriousness threshold and that a disciplinary offence had been committed. This decision was based on the inadequacy of the information in the plans submitted for building consent. The Board found that the Respondent had carried out design work in a negligent manner.
- [4] The Board also considered whether the Respondent had acted outside the competency of his Design Area of Practice 1 Licence. This involved a consideration of the licensing class and the category of buildings under that class. The Respondent had initially designed a building with a risk matrix of 14, which was a category 2 building, and the Board found that this was outside the competency of his licence class. However, the Board, by a close margin, decided that it did not reach the seriousness threshold and that it would not uphold this disciplinary offence.
- [5] Turning to the issue of disreputable conduct, the allegation involved the Respondent's behaviour towards Council officers. To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities, that the Respondent has brought the regime into disrepute and that the conduct was sufficiently serious enough for the Board to make a disciplinary finding.
- [6] The Board determined that the conduct did not reach the seriousness level of disreputable conduct and did not uphold this disciplinary offence.
- [7] The Respondent is fined \$4,500 and ordered to pay costs of \$2,500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years. The decision is to be published in Codewords with the Respondent being named in that publication.

### **The Charges**

- [8] The prescribed investigation and hearing procedure is inquisitorial, not adversarial. There is no requirement for a complainant to prove the allegations. The Board sets the charges and decides what evidence is required.<sup>1</sup>
- [9] In this matter, the disciplinary charges the Board resolved to further investigate<sup>2</sup> were that the Respondent may, in relation to building work at [OMITTED], have:
- (a) carried out or supervised building work in a negligent or incompetent manner contrary to section 317(1)(b) of the Act;
  - (b) breached section 314B of the Act contrary to section 3417(1)(h) of the Act, IN THAT, he may have carried out or supervised building work which is outside his competence because the Risk Matrix as noted on the building consent is 14 and the Respondent holds a Design-AoP1 licence; and

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<sup>1</sup> Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law. The evidentiary standard is the balance of probabilities, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

<sup>2</sup> The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

- (c) conducted himself in a manner that brings or is likely to bring the regime under this Act for Licensed Building Practitioners, into disrepute contrary to section 317(1)(i) of the Act, IN THAT , he may have behaved in an inappropriate manner to Council building officers.

[10] The Board gave notice that the matters to be further investigated under section 317(1)(b) of the Act at the hearing would be those identified in the Special Advisor's report.

### **Procedure**

- [11] This matter was consolidated with the hearing for another Licensed Building Practitioner, which related to the same project [OMITTED].
- [12] Prior to the in-person hearing, the Board received a Special Advisor's report dated 29 August 2023. The Respondent provided a written response to the report dated 22 November 2023.
- [13] The scheduled in-person hearing was adjourned for the Respondents, the Complainant, and the Special Advisor to file further submissions.
- [14] The Board then received the following:
  - (a) Amended Special Advisor report dated 13 December 2023;
  - (b) Complainant's response dated 20 December 2023; and
  - (c) Respondent's submission dated 18 January 2024.
- [15] By Board minute dated 2 February 2024 ,the Respondent was given the opportunity to advise within a specified timeframe whether he wanted the in-person hearing to reconvene. He did not do so. Accordingly, as advised in that minute, the Board has made its decision on the basis of the documentation before it, the submissions received (as detailed above), and the evidence heard.

### **Evidence**

- [16] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed<sup>3</sup>. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [17] The Respondent graduated from university with an architecture degree in 2012. He began work in the family construction business and had experience designing three dwellings before this project. One was a simple 86 sq. metres, another had a multiclad complex envelope of 118 sq. metres, and the final one was a 190 sq. metre 5 bedroom home in a high wind and seaspray zone.

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

- [18] The Respondent operates in an environment with his family where his design work is part of a design/build package offered to clients. His father is the Licensed Building Practitioner carpenter on the projects. Some prefabrication of end product is done in a factory prior to delivery to site.
- [19] On this project, the Respondent did the design work to obtain a building consent for a new dwelling, being a 2 storey residential building with 4 bedrooms, 2 bathrooms, and an integral garage. There was also a separate sleepout with a lounge, bedroom and toilet.
- [20] In addition to the Respondent and the Licensed Building Practitioner Carpenter, evidence at the hearing was given by the homeowner, as well as by Mr Cutbush, Mr Brownless and Mr Reid from the Western Bay of Plenty District Council. They respectively provided some evidence of the impact of the issues and the background on the inspection process but were not substantially called upon to contribute.

### **Negligence or Incompetence**

- [21] To find that the Respondent was negligent, the Board needs to determine, on the balance of probabilities,<sup>4</sup> that the Respondent departed from an accepted standard of conduct when carrying out or supervising building work as judged against those of the same class of licence. This is described as the *Bolam*<sup>5</sup> test of negligence.<sup>6</sup> To make a finding of incompetence, the Board has to determine that the Respondent has demonstrated a lack of ability, skill, or knowledge to carry out or supervise building work to an acceptable standard.<sup>7</sup> A threshold test applies to both. Even if the Respondent has been negligent or incompetent, the Board must also decide if the conduct fell seriously short of expected standards.<sup>8</sup> If it does not, then a disciplinary finding cannot be made.

### Has the Respondent departed from an acceptable standard of conduct

- [22] When considering what an acceptable standard is, the Board must consider the purpose of the Building Act<sup>i</sup> as well as the requirement that all building work must

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<sup>4</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

<sup>5</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>6</sup> Adopted in New Zealand in various matters including: *Martin v Director of Proceedings* [2010] NZAR 333 (HC), *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 (CA)

<sup>7</sup> In *Beattie v Far North Council* Judge McElrea, DC Whangarei, CIV-2011-088-313 it was described as “a demonstrated lack of the reasonably expected ability or skill level”. In *Ali v Kumar and Others*, [2017] NZDC 23582 at [30] as “an inability to do the job”

<sup>8</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 - [21] “Negligence or malpractice may or may not be sufficient to constitute professional misconduct and the guide must be standards applicable by competent, ethical and responsible practitioners and there must be behaviour which falls seriously short of that which is to be considered acceptable and not mere inadvertent error, oversight or for that matter carelessness”.

comply with the Building Code<sup>9</sup> and any building consent issued.<sup>10</sup> The test is an objective one.<sup>11</sup>

- [23] A special advisor was appointed under section 322(1)(d) of the Act to assist the Board. Mr John Rennie is a member of the Chartered Institute of Architectural Technologists, an MNZIBS Registered Building Surveyor, a Licensed Building Practitioner with a Design AoP 3 license and a weathertight homes assessor. He holds a HNC Architectural Technology from Robert Gordon University. He has 34 years experience as an Architectural Technologist and 12 years as a Building Surveyor.
- [24] The Special advisor was asked to consider whether:
- (a) The original building consent design documents were adequate with reference to the number of requests for information from the Council;
  - (b) The Respondent adequately addressed the Council's requests for minor variations and amendments for cladding changes;
  - (c) The Respondent adequately addressed the implications of the change in cladding type;
  - (d) The Respondent accurately documented the finished floor level (FFL) and ensured the FFL complied with the Building Code having regard to the overflow path; and
  - (e) Any further issues.

Adequacy of Original Building Consent Drawings with reference to the Requests for Information (RFIs)

- [25] Mr Rennie described the 60 Council RFIs as "excessive". He cited examples including – finished floor levels not shown, below slab drainage not reflected on drainage plan, tiled shower details not shown, lack of roof bracing, roof flashing dimensions not shown. Further, certain manufacturers specifications were not included -for example, - balustrade details and engineering design, waterproofing membrane certification, prolam beam and joist calculations.
- [26] He made specific mention of the request from the Council for the locations of the safety glass to be included in the elevations. Mr Rennie's opinion was that *"While the relevant standard to determine the location requirements had been included within the specification it is expected that a designer will interpret those requirements and communicate the locations on the plans. It is not sufficient to rely on the builder to*

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<sup>9</sup> Section 17 of the Building Act 2004

<sup>10</sup> Section 40(1) of the Building Act 2004

<sup>11</sup> *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 at p.71 noted that the tribunal does not have to take into account the Respondent's subjective considerations.

*obtain and interpret standards to determine where safety glazing may be required on a building.”*

- [27] Mr Rennie’s conclusion was that the plans and specifications submitted to the Council were *“inadequate”* and as submitted *“would not have been sufficient for a competent builder to follow on site.”*
- [28] In response, the Respondent considered Mr Rennie’s opinion on the significance of the 60 RFIs to be subjective. He submitted that 20 of the RFIs were seeking further clarification when the material was already within the plans and specifications submitted; only 40 RFIs referred to missing or noncompliant matters, and only 12 of the RFIs resulted in a revision to the originally submitted design, all of which were minor.
- [29] He stated in his written submission: *“The inference that the number of requests for further information from WBOPDC, regarding the plans and specifications submitted for building consent, demonstrates professional negligence or incompetence is unsubstantiated and unfounded.”*
- [30] The Respondent refuted the examples relied on by Mr Rennie as evidencing incomplete elements in the drawings and considered them to be minor issues because they were shown on the site, plumbing or roofing plans even if they were not present on the floor plan.
- [31] In response to manufacturer specification information not being included, the Respondent said these were details yet to be determined.
- [32] The Respondent’s consistent message in his responses was that his family-based design/build team worked in a way which meant any issues, as highlighted by Mr Rennie, were insignificant because the team worked together on site to address them.
- [33] The Respondent submitted that Mr Rennie’s statements were *“Subjective opinion based on personal experience of industry norms. As stated previously, we are a whanau design and build contractor, with my father as construction manager, myself leading the design and my brother (a qualified carpenter of 9 years) as site manager. Our design and build processes are reciprocal, based on a strong culture of teamwork and responsibility, unlike the rest of the industry where the builders blame the architect and vice versa.”*
- [34] The Respondent stated that he knew every tradesperson involved in the build and that his design process acknowledges and responds to those people’s skills and knowledge. The plans provided included *“a degree of understanding and trust that the trades people that would construct the building were suitably qualified and experienced to read and interpret the proposed design and achieve compliance with their trade specific regulations.”*

- [35] Mr Rennie responded that a number of the RFIs included items which could have been reasonably identified within the Building Consent application checklist available on the Council website and that completing this checklist would have enabled the Respondent to eliminate RFIs in respect of floor levels, ventilation, handrails, smoke alarms, gas fire, roof bracing, and surface finishes to wet areas.
- [36] As regards missing details on the plans, Mr Rennie, while accepting that the details were in some instances on the plans in different places, pointed to significant details that were still missing in respect of finished floor levels (cladding clearances could not be determined), tiled shower installation (no information on the rebate or how waterproofing was to be done), and bracing nominated but positioning not shown on framing plan.

#### Addressing of Council's requests for minor variations and amendments to cladding

- [37] The requests for minor variations and amendments are recorded at para 6.2.2 of Mr Rennie's report – there were 10.
- [38] Mr Rennie concludes – *“When reviewing the inspection records and the repeated requests for minor variations to be submitted, particularly in relation to bracing changes these have not been responded to in a timely manner. The Respondent ought to have documented the as-built changes prior to calling for further inspections to enable them to be presented to council at the next inspection. Instead works have continued on site and further inspections were called for putting at risk the changes already implemented on site had council not improved them.”*
- [39] The Respondent strongly refuted the accuracy of the facts relied on by Mr Rennie to do his assessment: *“All inspectors at every single inspection confirmed that work was okay to proceed. Therefore, the works and various minor variations can only be deemed to have been carried out in accordance with the requirements of WBOPDC”.*
- [40] Mr Rennie accepted some amendments to the factual details he relied upon but did not depart from his conclusion.

#### Addressing the implications of the cladding change

- [41] The cladding at ground level was changed from brick cladding to a monolithic sheet cladding system (James Hardie monotek). An amendment for this change was lodged by the Respondent on 23 September 2020 and the Council asked for clarification of
- (a) The vertical junction between the weatherboards and the monotek; and
  - (b) The vertical and horizontal junctions between the axon panel and the monotek.
- [42] Mr Rennie considered there was *“inadequate consideration...given on how the monotek was to interact with the brick rebate already formed in the perimeter foundation.”* The details as presented did not comply with the manufacturers' requirements and, in Mr Rennie's opinion, would be unlikely to achieve the

performance requirements under E2: External moisture or B2: Durability of the Building Code.

- [43] Mr Rennie further highlighted conflicts in the drawings at the junction of the monotek with the cladding to the upper level. He also said that the actual installed detail included a h-mould which did not align with the drawings.
- [44] A further change to cladding was made in November 2021. It was proposed to change the monotek sheet cladding system on the ground floor and the horizontal weatherboard and vertical panel cladding to the upper floors to an autoclaved aerated concrete cladding system (Specialised EZpanel).
- [45] These changes, Mr Rennie, concluded misrepresented the ability of the proposed cladding to interact with the already constructed roof overhang and fascia.
- [46] Mr Rennie concluded that there was a failure to adequately detail the interaction of the proposed cladding with the other cladding materials, foundations and roofing elements.
- [47] The Respondent denied the claim that he failed to adequately address the implications of the cladding changes. He considered that all of the issues raised had relatively simple solutions that would have been resolved had they been able to complete the works.
- [48] With respect to the allegation of inconsistent drawings for the h-mould detail, the Respondent said that both details were on the plans and were *“acceptable code compliant”* options and on reviewing the *“practicality of construction and cladding sequencing”* the most appropriate option (h-mould) was chosen.
- [49] He said there was an intention to address the base of the wall cladding, *and “the AAC was not intended to work in 100% with every detail of the existing construction and some minor alterations were obviously required to achieve compliance with the second building consent amendment.”*

#### Documentation of Finished Floor Level

- [50] The issue here was whether the finished floor level complied with the Building Code, having regard to the overland flow path. Having reviewed the Western Bay of Plenty District Council flood maps, the as-built floor levels and an email from [OMITTED] to the Council confirming the finished floor level was consistent with architectural plans, Mr Rennie was *“unable to determine whether the overland flow and its relationship to the floor level has been resolved to the satisfaction of the council.”*
- [51] The Respondent did not comment on this matter.

## Other issues

### ***Design errors***

- [52] Mr Rennie also noted errors in the structural design and sizing of the deck post, deck edge beams and verandah roof beams. These resulted in the need for a specific engineered design to be undertaken and physical remedial work on site.
- [53] The Respondent refuted this allegation as an *“inaccurate statement”*. He stated that the span and constructability of the beams was appropriately considered at concept phase *“but in hindsight should have been reiterated through developed and design [sic].”* He further said that *“the span calculations were completed using a continuous span, which in hindsight was very difficult to achieve.”* He further acknowledged that this was a design oversight on his part but that he has since changed his approach to including relevant notes for span and size calculations alongside the relevant structural member on the relevant framing plan.
- [54] Mr Rennie acknowledged that a continuous span calculation had been used and as this was unachievable, this resulted in the need for the specific engineered design and remedial work.

### ***Design costs***

- [55] Mr Rennie also raised in his report that the construction contract stated that architectural design was included in the lump sum. However, other documentation suggested that further sums had been charged for design in addition to the lump sum. Mr Rennie noted that he had not seen a contract for these design works.
- [56] In response, the Respondent said there was a separate contract in place for architectural design services, RMA planning consultation, project management and surveying. Mr Rennie, in response simply stated that he had not seen the contract.

### ***Project management***

- [57] The Respondent’s role appeared to Mr Rennie from the email evidence he reviewed to extend beyond the design phase to project management functions during the build, and that this may be considered to be outside the Respondent’s area of competence. He stated, *“Numerous failed inspections and the record from the council meeting in July 2020 demonstrate that compliance with the consent was not being achieved despite the respondent undertaking construction monitoring.”*
- [58] The Respondent characterised this allegation as an *“inaccurate assessment of the facts”*. He stated project management and contract administration was completed as a team, because of Covid council inspections were booked in advance, and then sometimes the work was not ready to inspect. He submitted: *“Waiting for every single element within every single inspection to be complete before booking the inspection would have resulted in months of additional delays to the completion date for a client who was desperate to move in...Add to this the fact that the client made numerous changes, additions and alterations to the design during the project...The*

*result was an environment that led to numerous “Not Complete” or “Failed” inspections, which were always resolved as quickly as possible, with all issues being cleared at the time of the last inspection conducted with [the Respondent’s company]”.*

- [59] In response, Mr Rennie accepted the Respondent’s statement that project management was undertaken by a number of individuals on behalf of the Respondent’s company and as such the Respondent was not solely responsible.

### Conclusion

- [60] The Board finds that the Respondent has demonstrated a high level of negligence, bordering on incompetence. This finding is based on the extensive RFIs asked by the Council, and the conclusion that the plans, as submitted, were not capable of being built by a competent builder. The categorisation by Mr Rennie of the RFIs being “excessive” cannot be dismissed as “subjective” as the Respondent submitted. It is self-evident that the plans are inadequate and the RFIs acceptable when many of the matters in the Residential checklist were not even adequately addressed.
- [61] The Respondent’s attitude that because he is part of a family-based design/build team, these issues can all be worked out on site is not acceptable. The Respondent’s work approach was wrapped in admiral sentiments and the approach may reap benefits for them but that does not remove the need to have a professional approach to the Council requirements.
- [62] It is important that any Licensed Building Practitioner who picks up his drawings, regardless of the Respondent’s continued involvement, is able to follow the plans. The Respondent seems to be impliedly stating that it is not important for his drawings to be complete and accurate because of the team approach to design/build used by their company.
- [63] The Respondent is reminded that the Building Consent Authority’s role is to check that the design work has been carried out in accordance with the Building Code. It is not uncommon that a building consent authority will identify issues with designs and specifications. The question the Board will often have to answer is whether those issues should have been identified and dealt with prior to the consent being submitted. In this respect, it is noted that the building consent authority’s job is to grant or refuse a building consent. It is not its role nor responsibility to assist a designer to develop its designs to the point where they achieve compliance with the Building Code.
- [64] A designer should be aiming to get their design and specifications right the first time and not to rely on the building consent authority to identify compliance failings and to assist them to get it right. In this respect, it is also to be noted that under section 45(3) of the Act, a licensed building practitioner with a design licence must submit a certificate of work with a building consent that states that the design complies with the building code:

- (3) *The plans and specifications that contain the design work referred to in subsection (2) must be accompanied by a certificate of work—*
- (a) *provided by 1 or more licensed building practitioners who carried out or supervised that design work; and*
  - (b) *that identifies that design work; and*
  - (c) *that states—*
    - (i) *that the design work complies with the building code; or*
    - (ii) *whether waivers or modifications of the building code are required and, if so, what those waivers or modifications are.*

[65] The Board also notes the provisions of section 14D of the Act which states:

**14D Responsibilities of designer**

- (1) *In subsection (2), designer means a person who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code.*
- (2) *A designer is responsible for ensuring that the plans and specifications or the advice in question are sufficient to result in the building work complying with the building code, if the building work were properly completed in accordance with those plans and specifications or that advice.*

[66] On this basis, the Board finds that the Respondent negligently carried out design work.

Was the conduct serious enough

[67] Given the Board's conclusion that the Respondent's design work verged on incompetence, the Board, which includes persons with extensive experience and expertise in the building industry, decided that the Respondent's conduct was sufficiently serious enough to warrant a disciplinary outcome.

[68] The Board noted that in reaching the finding that the matters reached the seriousness threshold, it has placed weight on the deficiencies in the drawings submitted for building consent and, in particular, the manner in which the cladding changes were addressed. Issues such as project management, design costs, continuous span design calculations and the finished floor level were not considered to be serious enough to contribute to the finding of negligent conduct.

Has the Respondent been negligent or incompetent

- [69] Based on the above findings, the Respondent has undertaken design work in a negligent manner.
- [70] Accordingly, the Board finds that the Respondent has committed the disciplinary offence under section 317(1)(b) of the Act.

**Working Outside Competence**

- [71] There are two types of disciplinary offence under s 314B. The first relates to representations as to competence (314(a)). The second relates to carrying out or supervising building work outside of a licensed person's competence (s 314(b)).
- [72] The relevant provision in the present case is working outside of one's competence, and section 314B(b) of the Act provides:

*A licensed building practitioner must—*

*(b) carry out or supervise building work only within his or her competence.*

- [73] In the context of the Act and the disciplinary charge under s 317(1)(h) and 314B(b), a Licensed Building Practitioner must only work within their individual competence. In this respect, it should be noted that if they hold a class of license for the building work, they are undertaking but are not able to successfully or efficiently complete the building work, then it may be that they are working outside of their competence.
- [74] The Respondent holds a Design AoP 1 Licence. Licensing classes are designated under section 285 of the Act. The current ones were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a Licensed Building Practitioner can carry out or supervise. Under clause 4 of the Order the following are the types of building work each class of licence can carry out:

<b><i>Licensing class</i></b>	<b><i>Type of building work</i></b>
<b><i>General Licence Classes</i></b>	
Design	Design work for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building

- [75] The Building (Designation of Building Work Licensing Classes) Order 2010 defines areas of practice as:

***area of practice 1, area of practice 2, and area of practice 3, in relation to licensing, or an application to be licensed, in a licensing class, have the same meanings as in the rules.***

- [76] The “rules” are the Licensed Building Practitioners Rules 2007. It contains the following definitions:

***area of practice*** means a category of building work of the type set out in Schedule 2

***area of practice information*** means information about every area of practice in respect of which a licensed building practitioner has demonstrated that he or she has met the minimum standards of competence for that licensing class

- [77] The following is the current licensing matrix for design from the Rules:

<b><i>Licensing class</i></b>	<b><i>Type of building work</i></b>
<b><i>General Licence Classes</i></b>	
Design	Design 1 (Category 1 buildings) Design 2 (Category 1 and 2 buildings) Design 3 (Category 1, 2 and 3 buildings)

- [78] A Category 1 Building is one that has a Risk Matrix score of 12 or less.

Has the Respondent worked outside his competence

***Risk Matrix***

- [79] Mr Rennie’s initial view was that the Risk Matrix score for the dwelling was 19. The Respondent calculated it as 14. Both calculations put the building as a category 2 building. The Respondent’s design license is an Area of Practice 1, so that the building may have been considered outside the Respondent’s competency.
- [80] After questioning at the hearing, the Respondent submitted that the correct Risk Matrix calculation was 13. He also said that the Risk Matrix, as originally calculated, was a “*worst-case scenario of the maximum risk score*”. In his written submission, on reassessing the score, the Respondent calculated a Risk Matrix of 12 and stated, “*this building is not outside of my competency.*”
- [81] In answer, Mr Rennie concluded: “*the risk matrix has been presented as a whole building calculation and therefore taking the roof/wall intersection as 5 would change the overall risk score presented to 19. However, the acceptable solution E2/AS1 allows for the calculation of risk to be undertaken on an elevation or wall face basis. In assessing each of the elevations individually I have determined that the highest wall face and elevation risk returns a risk rating of 17.*”
- [82] Accordingly, Mr Rennie stood by his observation that “*as this is a category 2 building, then this may be considered to be outside the competency of the respondent.*”
- [83] The Risk Matrix score is not the determinative factor in whether the Respondent has committed a disciplinary offence under section 317(1)(h) of the Act. It is a competency based assessment and a Licensed Building Practitioner holding a Design

AoP 1 licence can design a building with any Risk Matrix score if he has the skill and competence to do so.

- [84] At the time, the Respondent's experience was all Category 1 buildings, having done approximately 5 single storey new builds. The findings the Board has made in respect of the Respondent's negligent design work inform the Board's decision that the Respondent was working outside his personal competence.

#### Was the conduct serious enough

- [85] The Board discussed at length whether the conduct reached the seriousness threshold. By a very close margin the Board decided that the conduct did not reach the threshold.
- [86] The Respondent is advised, however, that it would have been prudent to have sought advice from a more experienced practitioner.

#### Has the Respondent breached section 314B of the Act

- [87] The Board finds that the Respondent has not breached section 314B of the Act and has not committed a disciplinary offence under section 317(1)(h) of the Act.

#### **Disrepute**

- [88] Conduct which brings or is likely to bring the regime into disrepute is that which may result in the regime being held in low esteem by the public. Examples include:
- criminal convictions<sup>12</sup>;
  - honest mistakes without deliberate wrongdoing<sup>13</sup>;
  - provision of false undertakings<sup>14</sup>; and
  - conduct resulting in an unethical financial gain<sup>15</sup>.
- [89] The Courts have consistently applied an objective test when considering such conduct.<sup>16</sup> The subjective views of the practitioner, or other parties involved, are irrelevant. The conduct need not have taken place in the course of carrying out or supervising building work.<sup>17</sup>
- [90] To make a finding of disreputable conduct, the Board needs to determine, on the balance of probabilities,<sup>18</sup> that the Respondent has brought the regime into

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<sup>12</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>13</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>14</sup> *Slack, Re* [2012] NZLCDT 40

<sup>15</sup> *Colliev Nursing Council of New Zealand* [2000] NZAR 7

<sup>16</sup> *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401

<sup>17</sup> *Davidson v Auckland Standards Committee No 3* [2013] NZAR 1519

<sup>18</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

disrepute and that conduct was sufficiently serious enough for the Board to make a disciplinary finding.<sup>19</sup>

#### The conduct complained about

- [91] The allegation made by two Council officers was that the Respondent's behaviour was *"arrogant and at times intimidating ...They would often stand over you while carrying out the inspection and would try to manipulate the inspection, if you questioned their work, they always had an answer to come back with..."*
- [92] The Respondent stated *"we wholly and unequivocally refute the completely fabricated, unsubstantiated and defamatory statement of claim that we were ever threatening or intimidating to any party..."* He pointed out that of 11 site inspections, the two officers who complained had completed only one site visit each, and the officers involved in the other 9 had not complained.
- [93] The Respondent defended his right to engage in robust discussion and challenge issues raised by council inspectors.
- [94] At the hearing the Council officers described the inspections as having an intense vibe and a passive/aggressive tone but confirmed that there had been no verbal or physical threats and no inappropriate language used.

#### Was the conduct serious enough

- [95] On the basis of the above matters, and the facts as presented in the complaint, the Board has decided that the allegations of disreputable conduct do not reach the threshold.
- [96] The Respondent should note, however, that the Code of Ethics became enforceable as a ground for discipline on 25 October 2022. The alleged conduct is of a type, had it occurred within the appropriate timeframe, that the Board may have considered it under the Code of Ethics.

#### Has the conduct brought the regime into disrepute

- [97] The Respondent's conduct has not brought the regime into disrepute and he has not committed a disciplinary offence under section 317(1)(i) of the Act.

#### **Penalty, Costs and Publication**

- [98] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Act<sup>ii</sup>, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [99] The Board heard evidence relevant to penalty, costs, and publication during the hearing and has decided to make indicative orders and give the Respondent an

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<sup>19</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

opportunity to provide further evidence or submissions relevant to the indicative orders.

### Penalty

- [100] The Board has the discretion to impose a range of penalties.<sup>iii</sup> Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.<sup>20</sup> It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:<sup>21</sup>
- (a) protection of the public and consideration of the purposes of the Act;<sup>22</sup>
  - (b) deterring other Licensed Building Practitioners from similar offending;<sup>23</sup>
  - (c) setting and enforcing a high standard of conduct for the industry;<sup>24</sup>
  - (d) penalising wrongdoing;<sup>25</sup> and
  - (e) rehabilitation (where appropriate).<sup>26</sup>
- [101] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases<sup>27</sup> and applying the least restrictive penalty available for the particular offending.<sup>28</sup> In all, the Board should be looking to impose a fair, reasonable, and proportionate penalty<sup>29</sup> that is consistent with other penalties imposed by the Board for comparable offending.<sup>30</sup>
- [102] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.<sup>31</sup>
- [103] In this matter, the Board adopted a starting point of a fine of \$4,000 because the Board's finding was that the conduct was at the upper end of negligence and bordering on incompetence. As such, a fine of this level is consistent with other penalties imposed by the Board for comparable offending.

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<sup>20</sup> *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

<sup>21</sup> Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

<sup>22</sup> Section 3 Building Act

<sup>23</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>24</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

<sup>25</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

<sup>26</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

<sup>27</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>28</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

<sup>29</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>30</sup> *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

<sup>31</sup> In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

- [104] The Respondent submitted considerable detail on the way the business is now run, including the provision of housing, food and pastoral care to his employees and its role in vocational training.
- [105] There were aggravating factors. The Respondent had a management role on site and assumed responsibility for many aspects of the project. He directed the building operations. There has been significant impact on the homeowner with a long road ahead to achieve compliance, because of the way in which the construction work was undertaken. It is also of some weight that this complaint was instigated by the Westland Bay of Plenty District Council to assist the homeowner.
- [106] Taking the noted factors into account, the Board decided to increase the penalty from the starting point and to set the fine at \$4,500.

### Costs

- [107] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.<sup>32</sup>
- [108] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings<sup>33</sup>. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case<sup>34</sup>.
- [109] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings, simple, moderate, and complex. The current matter was moderate. Adjustments are then made.
- [110] The hearing was consolidated with another matter [OMITTED]ff and occupied between a half and a full hearing day. A Special Advisor was appointed. The Board then further deliberated after receipt of the written submissions. Accordingly, the Board has set a total costs award of \$5,000 which is to be apportioned equally between the two consolidated matters.
- [111] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$2,500 toward the costs of and incidental to the Board's inquiry.

### Publication

- [112] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,<sup>35</sup> and he will be named in

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<sup>32</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74

<sup>33</sup> *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

<sup>34</sup> *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

<sup>35</sup> Refer sections 298, 299 and 301 of the Act

this decision, which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.

- [113] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.<sup>36</sup> Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.<sup>37</sup>
- [114] Based on the above, a summary of the decision will be published. The Respondent will be named in that publication.
- [115] The Respondent should also note that the Board has not made any form of suppression order and as such, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

### Section 318 Order

- [116] For the reasons set out above, the Board directs that:

**Penalty:** Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$4,500.

**Costs:** Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$2,500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

**Publication:** The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(l)(iii) of the Act.

**In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website and a summary of the decision, naming the Respondent will be published.**

- [117] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

### Submissions on Penalty, Costs and Publication

- [118] The Board invites the Respondent to make written submissions on the matters of disciplinary penalty, costs and publication up until the close of business on **26 September 2024**. The submissions should focus on mitigating matters as they relate to the penalty, costs and publication orders. If no submissions are received, then this

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<sup>36</sup> Section 14 of the Act


<sup>37</sup> Kewene v Professional Conduct Committee of the Dental Council [2013] NZAR 1055

decision will become final. If submissions are received, then the Board will meet and consider those submissions prior to coming to a final decision on penalty, costs and publication.

### **Right of Appeal**

[119] The right to appeal Board decisions is provided for in section 330(2) of the Act<sup>iv</sup>.

Signed and dated this 5<sup>th</sup> day of September 2024.



**Mr M Orange**  
Presiding Member

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#### **<sup>i</sup> Section 3 of the Act**

*This Act has the following purposes:*

- (a) *to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
  - (i) *people who use buildings can do so safely and without endangering their health; and*
  - (ii) *buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
  - (iii) *people who use a building can escape from the building if it is on fire; and*
  - (iv) *buildings are designed, constructed, and able to be used in ways that promote sustainable development:*
- (b) *to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.*

#### **<sup>ii</sup> Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
  - (a) *do both of the following things:*
    - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*

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- (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
  - (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
  - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
  - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
  - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

**iii Section 318 Disciplinary Penalties**

- (1) *In any case to which section 317 applies, the Board may—*
  - (a) *do both of the following things:*
    - (i) *cancel the person's licensing and direct the Registrar to remove the person's name from the register; and*
    - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
  - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
  - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
  - (d) *order that the person be censured:*
  - (e) *order that the person undertake training specified in the order:*
  - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

**iv Section 330 Right of appeal**

- (2) *A person may appeal to a District Court against any decision of the Board—*
  - (b) *to take any action referred to in section 318.*

***Section 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.*