

BPB Appeal No. A1003

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) the Appellant against a decision of the Registrar

DECISION OF THE BUILDING PRACTITIONERS' BOARD

1. Introduction

- 1.1 The Appellant applied for a Design 2 License under the Building Act 2004 ("the Act") and the Licensed Building Practitioners' Rules 2007 ("the Rules")¹.
- 1.2 The Registrar of Licensed Building Practitioners ("the Registrar") appointed under s.310 of the Act, declined the Appellant's application under Rule 12 and the Appellant was notified of the Registrar's decision on 28 July 2008, together with his right to appeal the decision within 20 working days to the Building Practitioners' Board ("the Board").
- 1.3 On 14 October 2008, the Appellant appealed to the Board against the Registrar's decision under s.310(1)(a) of the Act and seeking that, on the basis of information provided, the Board re-consider his application based on new material to be produced and approve the issue of a Design 2 or Design 1 License as appropriate.
- 1.4 The appeal was lodged outside of the 20 working days required under s.331(a) of the Act, but the Board had regard for the Appellant's pleading that he was overseas during the period and there was a difficulty sending emails to the Board's Secretary. Pursuant to its authority under s. 331(b), the Board agreed to consider the Appellant's appeal.
- 1.5 The appeal was considered by the Board on 4 December 2008, in accordance with the Board's "Appeals Procedures".

The Procedures provide that appeals are heard 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 Procedures).

¹ The Appellant had been successful in respect of his application for a Site 2 License class.

² Refer s.335(2) of the Act.

1.6 Those present for the duration of the hearing of the appeal were:

The Appellant

Alan Bickers	Board Chair (Presiding),
Paul Blackler	Board Deputy Chair,
David Clark	Board Member,
Jane Cuming	Board Member,
Patrick Lawrence	Board Member,
Graham Moor	Board Member,
David O'Connell	Board Member,
Colin Orchiston	Board Member.

Tracy Goddard Board Secretary

Mark Scully Acting for the Registrar

No members of the public were in attendance.

The Board's deliberations were conducted in private, with the Board Secretary being the only other person in attendance.

2. Background

- 2.1 On 28 April 2008, the Appellant submitted his applications to be licensed in the classes of Design 2 and Site 2. The application for Design 2 class (which is the subject of this appeal) was treated as complete on 23 May 2008 and the application proceeded to assessment (under Rule 11).
- 2.2 The assessment, which included an interview by the Assessor, was completed on 30 May 2008 and a peer review was conducted on 1 July 2008.
- 2.3 In his report to the Registrar, the Assessor noted that the Appellant met the requirements of Competencies 1, 2, 3 and 5 of the Design 2 License requirements, but there was insufficient evidence to demonstrate that he met the requirements of Competency 4 – *“Develop, design and produce construction drawings and documentation”*. The Assessor recommended that the application be declined.
- 2.4 The Assessor did not recommend that the Registrar issue the Appellant with a license for the Design 1 class, because he considered *“that the drawing and specification deficiencies observed in the applicant’s project records would also be apparent if the applicant was designing category 1 buildings”*.
- 2.5 After taking into account the recommendation of the Assessor and the requirements of s.286 of the Act, the Registrar decided to decline Appellant’s application (under Rule 12), and did not offer the lower class of design license.

- 2.6 On 28 August 2008, the Registrar formally advised the Appellant of the decision to decline the application for a Design 2 license and his right of appeal to the Board under Rule 13(3).
- 2.7 On 14 October 2008,³ the Appellant appealed to the Board against the Registrar's decision and set out the grounds of appeal.

3. Appellant's Case

- 3.1 In the documents which he presented for consideration of the Board, the Appellant submitted two sets of drawings:

He also submitted an unsigned "*Short Form Agreement for Consultant Engagement*" apparently for the first of these projects.

- 3.2 In his oral submissions to the Board, the Appellant stated that these new plans were submitted in an attempt to address the deficiencies, particularly in relation to requirements of E2/AS1 for weathertightness, which had been referred to in the Assessor's report.

- 3.3 He submitted that the original designs⁴ he submitted had been approved by Far North District Council for building consent purposes before the Council had obtained accreditation as a building consent authority and implemented more rigorous processes. The Appellant highlighted a number of features of the drawings.

- 3.4 In response to questions from the Board, the Appellant stated as follows:

- (a) His understanding of the differences between Categories 1, 2 and 3 buildings;
- (b) He explained detailing (and lack of) in his drawings and specification matters;
- (c) His design "process";
- (d) Matters of drafting conventions in relation to the presentation of design features on his drawings.

The Appellant asked the Board to "*narrow its consideration to the points lacking in the original documents*".

4. Registrar's Report

- 4.1 A written report was presented to the Board from Craig Hill, Acting Registrar dated 20 November 2008. The report covered the following:

- 4.2 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).

³ Although this was beyond the 20 working days in which an appeal should be lodged, the Board agreed to consider it.

⁴ The plans submitted with the original application for the License were not submitted to the Board for review.

- 4.3 The minimum standards are set out in Schedule 1 to the Rules, and take the form of “competencies” which must all be satisfied as follows:
- **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.
 - **Competency 5:** Explain the process of construction observation and contract administration.
- 4.4 These competencies may be demonstrated by meeting some or all of the performance indicators that are also set out in Schedule 1 (Design 2 competencies) of the Rules (attached). In carrying out an assessment, the Assessor must use methods prescribed by the Registrar (see Rule 11(1)).
- 4.5 The competencies address a broad range of skills and knowledge a design practitioner should be able to demonstrate. These address the skills and knowledge necessary for a designer to be able to satisfactorily demonstrate compliance with the New Zealand Building Code. However, the competencies also address other skills that a competent designer is expected to demonstrate, for example managing the design process or establishing a design brief.
- 4.6 The Registrar must take into consideration the Assessor’s recommendation before making a decision (under Rule 12(2)).
- 4.7 In the Registrar’s view, the Assessor:
- (a) is a reputable and experienced practitioner,
 - (b) has been selected as a person appropriate to be an Assessor and has been trained in assessment,
 - (c) has met the applicant and reviewed his design work first hand.
- 4.8 It is important to appreciate the proximity of the Assessor to the applicant. The Assessor formed a view about the competence of the applicant through direct contact with him, by reviewing his work, and by talking to his referees. The Registrar does not have all of this information available when making a decision, and must rely on the Assessor to be his “eyes and ears”.
- 4.9 Reliance on the Assessor 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. However, in the normal course of events the Registrar will accept a recommendation of an Assessor, unless there are strong reasons for not doing so.

- 4.10 In making the recommendation to decline the application, the following reasons were recorded by the Assessor:
- (a) There was a lack of specific detailing on plans for important E2/AS1 weathertightness issues.
 - (b) There was a lack of detailing for holding down and fixing plates which are nominated as Kn capacity, but not detailed on plan for the onsite builder to implement.
 - (c) The applicant lacks an adequate contractual agreement with his clients.
 - (d) The building specification is still in its infancy and very reliant on standard (non-specific) general clauses.
- 4.11 The Assessor suggested that the items noted should improve with ongoing professional development.
- 4.12 The Registrar based his decision on the Assessor's recommendations to decline the application, for the reasons set out in 4.10 (above).
- 4.13 In his supplementary comments to the Board, on behalf of the Registrar, the Appellant noted that neither the Assessor nor the Registrar had assessed the new documents produced by the Appellant in support of his appeal.
- 4.14 The Appellant also referred to the Registrar's decision not to offer the Appellant a Design 1 License because the deficiencies in the documentation were equally applicable to the competencies required for the lower class of license.

5. Appellant's Closing Submissions

- 5.1 The Appellant submitted to the Board that the costs of the appeal should lie where they fall with the parties.
- 5.2 He also advised that he had no objection to publication of his name in any report of the appeal.

6. Registrar's Closing Submissions

- 6.1 On behalf of the Registrar, Mr Scully sought an award of \$1,000 for costs in favour of the Registrar.

7. Board's Findings

After due consideration of the Appellant's submissions and evidence and the Registrar's report, the Board found as follows:

- 7.1 It did not disagree with the assessment that the Appellant had demonstrated that he met the requirements of Competencies 1, 2, 3 and 5 of the Design 2 license.
- 7.2 In respect of the requirements for Competency 4, "Develop, design and produce drawings and documentation", that the Appellant had not demonstrated to the Board that he could meet the requirements of the Design 2 or Design 1 License. The Board considered that the drawings

presented by the Appellant did not communicate the design requirements well and contained a number of errors.

- 7.3 The Board does not consider that the fact that a local authority accepts the designer's documents as adequate for the purposes of issuing a building consent is, on its own, a sufficient demonstration of the competencies required for a Design License.

While this may represent that some of the indicators for Competency 4 may be met, an applicant for a Design License must demonstrate compliance with all competencies required by consistently meeting a sufficient number of performance indicators.

- 7.4 The Board was not satisfied by the Appellant's submission that he had an appreciation of the limits of his competence and was only prepared to undertake work which was within those.

8. Board's Decision

- 8.1 The Board has resolved by unanimous decision to confirm the decision of the Registrar to decline the Appellant's application for a Design License and not to offer a Design 1 License.
- 8.2 The Board's reasons are that the Appellant has not demonstrated that he meets the standards for Competency 4 required by the Design 1 or 2 License.
- 8.3 The Board has resolved that the Appellant and the Registrar meet their own costs of the appeal.
- 8.4 The Board directs that there be no publication of the Appellant's name, but the salient points of the Board's decision may be published.
- 8.5 That the Appellant be advised of the provisions of s.330(2) of the Act under which he may appeal the Board's decision to the District Court.

Signed and dated this day of December 2008

Alan Bickers
Chairman
(Presiding Member)