

BPB Appeal No. A1004

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 3 Licence 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. The Appellant was offered a Design 2 Licence following advice from the Acting Registrar on 30 July 2008² that he had not demonstrated, by sufficient evidence, his competence in the Design 3 Licence class. The Appellant responded on 5 August 2008 to the Registrar noting that, under s.288 of the Act, he should have been informed of his right of appeal.
- 1.3 On 21 August 2008, the Manager of the Building Practitioners' Licensing Group responded on behalf of the Registrar, advising the Appellant that his application did not meet the requirements of Design 3 Licence class, offering that he accept a licence for Design 2 and advising that if his application was declined he would have the right of appeal to the Board.
- 1.4 On 3 September 2008, the Appellant's wife, on behalf of the Appellant confirmed his acceptance of a Design 2 Licence.
- 1.5 On 28 October 2008, the Appellant lodged an appeal against the Registrar's decision not to approve his application for a Design 3 Licence. The application form noted:

*"I was not advised of my rights of appeal until 21-10-08 and believe I should have been given the opportunity to do so."*³

¹ The Appellant had been successful in respect of his application for Site 3 Licence class.

² This letter did not advise the Appellant of his right of appeal against the Registrar's decision.

³ This was received by the Registrar on 28 October 2008.

1.6 The reasons for the appeal were particularly set out in the Appellant's letter of 15 September 2008:

- (a) That it should not be a pre-requisite for a Design 3 Licence that an applicant had worked on Category 3 buildings;
- (b) There should be a method of progressing from Design 2 to Design 3;
- (c) That his work was predominantly engaged in weathertightness remediation.

1.7 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"⁴ and that the burden of proof lies with the appellant (Clauses 3.10.17 and 3.10.18 of the Board's Appeals Procedures).

1.8 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
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Mark Scully	Acting for the Registrar
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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 The Appellant's application for a Design 3 Licence was received by the Registrar on 20 May 2008. The application was treated as complete on 16 June 2008 and the application proceeded to assessment (under Rule 11).

2.2 The assessment was completed by the Assessor on 24 July 2008. In his report to the Registrar the Assessor stated:

⁴ Refer s.335(2) of the Act.

“(The Appellant’s) documentation is very thorough, extensive and comprehensive. He is working in the field as a Weathertightness Assessor and seems to take on jobs that no one else is prepared to do.”

The Assessor noted that the Appellant had not submitted evidence of his work in relation to design of a Category 3 building. The Assessor noted that, in respect of Competency 4 “Develop, design and produce construction drawings and documentation”, that the Appellant *“was unable to provide any construction drawings that met the requirements for Design 3.”*

The Assessor noted that the Appellant met the other four competencies *“very well”*.

- 2.3 The assessment was peer reviewed on 24 July 2008, and the Peer Reviewer had categorised the Appellant’s submitted Category 3 project as Category 2 because the work *“only consisted of a remediation report without detailing the solution of the repair work . . . he didn’t do any of the original design work for a project from scratch i.e. concept drawings, working drawings and full specification.”*

The Peer Reviewer went on to state:

“I don’t doubt Ian’s capability to do Design 3 work, as he is well qualified to do it, it’s just that he didn’t present any Design 3 projects”.

- 2.4 The Assessor recommended to the Registrar that there was insufficient evidence for the Appellant to be licensed at Design 3, and to offer the Appellant the Design 2 licensing class (under Rule 11).

After taking into account the recommendation of the Assessor, the Registrar decided to offer the Appellant the opportunity to be licensed in the Design 2 class.

- 2.5 On 30 July 2008, the Appellant was formally notified of the Registrar’s decision that the evidence provided was not sufficient to demonstrate competence in the Design 3 licensing class. The Registrar noted that the Appellant did demonstrate the competencies for the Design 2 licensing class and offered him the opportunity to be licensed in the Design 2 licensing class.

- 2.6 In a letter dated 5 August 2008 to the Registrar, the Appellant expressed disappointment that his application for Design 3 class licence was declined. He also noted some concerns about the assessment process.

- 2.7 On 21 August 2008, the Manager, Building Practitioner Licensing responded to the Appellant explaining that the Assessor had noted that the project records provided to the Assessor were all category 2 buildings, which did not meet the requirements for assessment at Design 3.

- 2.8 On 27 August 2008, the Appellant wrote to the Manager, Building Practitioner Licensing. He argued that his project records were category 3 buildings and suggested that his broader body of work (which did not form part of the project records listed in his application) related to category 3 buildings. He also

argued in favour of a broader approach to assessment, and requested that the Registrar's decision regarding his application be reviewed.

- 2.9 On 2 September 2008, the Manager, Building Practitioner Licensing responded to the Appellant by fax. He stated that all licensing applications are assessed in accordance with carefully established criteria, and noted that the points made in the Appellant's letter of August 27 did not alter the Assessor's assessment. The Manager encouraged the Appellant to give careful consideration to the offer of the Design 2 licensing class before the offer expired.
- 2.10 On 3 September 2008 the Appellant responded to the Manager, Building Practitioner Licensing by fax accepting the offer of the Design 2 licensing class.
- 2.11 On 18 September 2008, the Registrar formally notified the Appellant he was licensed in the Design 2 class.
- 2.12 On 15 September 2008, the Appellant wrote to the Manager, Building Practitioner Licensing. The Appellant again expressed concerns with the assessment process and requested that these concerns be taken to the Board for its consideration. The Appellant also discussed the progression to a higher class of licensing and training for LBPs as well as a range of non-licensing related matters.
- 2.13 On 1 October 2008, the Manager, Building Practitioner Licensing replied by noting that it would not be appropriate to put an individual assessment before the Board outside of the appeal process. Information and comment was also provided on progression to a higher class of licensing and training for LBPs.
- 2.14 On 28 October 2008, the Appellant appealed to the Board against the Registrar's decision not to offer the Design 3 licensing class.

3. Appellant's Case

- 3.1 The Appellant made a written submission to support his appeal which contained the following points:
- (a) His concerns with the assessment process as outlined in his various communications with the Department of Building and Housing; and
 - (b) The extent of documentation which had been submitted with his original application.

It was also noted that the recording of the telephone interview conducted by the Assessor had been lost and that a complete transcript was not available. It was also noted that the Assessor was unavailable and could not attend the appeal hearing as a witness which was requested by the Appellant.

The Appellant brought a support person to the hearing.

- 3.2 The Appellant submitted extensive documentation to support his written submission consisted of the following:
- 3.3 In his oral submission to the Board, the Appellant stated, amongst other things that –
- The assessment process places too much weight on the categories of the projects submitted without regard for the complexity of the technical issues considered in design;
 - “Design” is not confined to drafting and comprises a much wider range of skills;
 - A thorough understanding of the various requirements of the Act underpinned the Competencies for Design 3;
 - That his work was of a highly complex nature which required a comprehensive knowledge of building science, technology and performance;
 - That his techniques of communicating design of remediation work on buildings involved multi-coloured drawings and sketches;
 - That he had a clear understanding of the limits of his competence and knew when to seek specialist advice and where to source that from.
- 3.4 The Appellant submitted that the Assessor was focussed on the presentation of architectural drawings and did not give sufficient weight to design processes (which may not relate to architecture).

He submitted that the process of assessment should seek to focus on a Building Practitioner’s capability to undertake work of the class and category of building under consideration and not requiring a demonstrable record of having done such work.

That although a submitted project may be category 2, the complexity of the design work may be in excess of what might be expected for Category 3 building.

4. Registrar’s Report

- 4.1 A written report was presented to the Board from Craig Hill, Acting Registrar, dated 19 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 section 286 of the Act).
- 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:** Provide contract 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 3 competencies) of the Rules. 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 that 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 frame of reference for the competencies is provided by the “Descriptor” for the licensing class. For Design 3, the Descriptor states –

“This licence class covers practitioners designing Category 1, 2 and 3 buildings”.

The explanatory note under the Descriptor explains that –

“Category 3 buildings are buildings that present a high risk to occupants, or are of high community importance, or have been assigned Category 2 status under the Historic Places Act 1993.”

4.7 The Registrar must take into consideration the Assessor’s recommendation before making a decision (under Rule 12(2)).

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 Appellant 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 the 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) Competency 4 – the Appellant was unable to provide any construction drawings that met the requirements for Design 3 (i.e. that related to Category 3 buildings).
 - (b) The one house set of drawings presented for assessment was Category 2.
 - (c) All other projects presented by the Appellant for assessment were Category 2 buildings that were not originally designed by the Appellant but worked on by him as a weathertightness assessor.

The Assessor noted that the Appellant covered the remaining competencies very well and showed the skills he has when it comes to the type of projects he undertakes.

- 4.11 The Registrar's decision to offer the Appellant a different licence class (and in effect declining the original application) was based solely on the Assessor's recommendation to offer a different licensing class for the reasons set out above.

- 4.12 The Assessor's report provided descriptions of four project records that were considered as part of the application:

The Assessor's descriptions in his report make it clear that the building projects presented for assessment were Category 2 buildings.

The Registrar did not consider that there was any reason or concern that would lead him to overrule the Assessor's recommendation.

The Registrar had not considered the evidence and information provided with the Appellant's appeal.

- 4.13 In his oral submissions in support of the Registrar's report, and responses to questions from the Board members, Mr Scully stated:
- (a) Applicants must demonstrate their competency in the assessment process. For a Design 3 Licence, applicants must demonstrate a competency in the design of "large, complex buildings by their experience".
 - (b) That the Appellant has not presented any new evidence to demonstrate the required competencies for Design 3 Licence.
 - (c) In order to progress from Design 2 to Design 3 Licence, a Licensed Building Practitioner would be expected to gain experience with Design 3 under the supervision of a mentor. While the Licensing Scheme was in a voluntary phase the use of a mentor was not a requirement.

- 4.14 Mr Scully counselled the Board not to use an appeal to re-design the Licensing Scheme or to conduct a re-assessment of the Appellant's application.

5. Appellant's Closing Submissions

- 5.1 The Appellant reiterated that assessment should not be a mechanistic process of producing a history of work of the required building category. Assessment should be about an applicant demonstrating his/her capability.
- 5.2 That the assessment of his application was not a fair assessment and that the documents to assist applicants made no reference to specific categories of buildings.
- 5.3 The Appellant submitted that the costs of the appeal should fall where they were – with the respective parties.
- 5.4 The Appellant indicated that he had no objection to the publication of his name in any report of the appeal.

6. Registrar's Closing Submissions

- 6.1 On behalf of the Registrar, Mr Scully submitted that, in his opinion, there was no new evidence submitted of any significance and sought costs from the Appellant of \$11,000 in favour of the Registrar.

7. Board's Consideration and Findings

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

- 7.1 The Board considered that there were matters of significance in this appeal which related to the interpretation of the Competency requirements and Performance Indicators in the Rules used by the Registrar and Assessors.
- 7.2 The Board considered that it was important to distinguish between the processes of "design" and "drafting". It noted that Competency 4 for the Design 3 Licence requires that a Practitioner "*Develop design and produce construction drawings and documentation*".

The relevant Performance Indicators included:

- 4.1 Apply design standards and identify and produce design solutions.*
- 4.2 Apply comprehensive knowledge of building science, technology and building performance.*
- 4.3 Coordinate and integrate specialist design inputs as required.*
- 4.4 Prepare developed design drawings and specifications.*

....

An applicant may demonstrate he/she has the relevant competency by meeting some or all of the performance indicators.

- 7.3 The Board considers that in the interpretation of the term “design” a focus on the drafting of drawings, particularly architectural drawings, would be too narrow. “Design” involves a range of processes comprising the analysis of needs, service requirements and operating conditions, and the synthesis of elements, materials and systems to achieve the desired objectives. The Board also recognized the various stages of design (preliminary, developed, contract documentation) and the different requirements of these especially in terms of detail. In interpreting the competences and performance indicators for the Design 3 Licence the Board found it helpful to consider the approaches of the design professions (architecture and engineering) to the definition of design work.

The “*Competency Standards for Professional Engineers*” (IPENZ) state:

“Competency 4: Design or develop solution to complex engineering problems in accordance with good practice for professional engineering:

Indicators:

- *Identifies needs, requirements, constraints and performance criteria;*
- *Develops concepts and recommendations that were tested against engineering principles;*
- *Consults with stakeholders;*
- *Evaluates options and selects solutions that best matched needs, requirements and criteria;*
- *Plans and implements effective, efficient and practical systems or solutions;*
- *Evaluates outcomes.”*

The Board considered that similar attributes could be applied to architectural design, with the addition of the consideration of human use, cultural and community values, aesthetics, and urban design.

- 7.4 The Board considers that for the assessment of the Design 3 Licence that the production of “architectural” drawings is not essential, although it is one indicator of competency. At the Design 3 level it is to be accepted that the “designer” may not necessarily undertake drafting, but may produce sketches or other documents for a draftsman to work from. He/she will nevertheless review the drawings produced by the draftsman to ensure they achieve the designer’s objectives and communicate these clearly. Regard must also be had for designers in disciplines other than architecture, such as structural or fire engineering, and for multiple designers to work on specific elements of a building. The expectation that there would be a single designer or draftsman for a Category 3 building should not be considered as the norm, hence the importance of coordinating and integrating the inputs of several persons. Because the work may be in the nature of changes to an existing building, consideration of a practitioner’s competency must also provide for alterations and remediation on equal terms with the design of new buildings.

- 7.5 In respect of the Assessor's concern that the applicant had not submitted evidence of work on Category 3 buildings, the Board considered the performance indicators set out in Competency 1:

"1.2 Comprehend and apply knowledge relevant to Category 1, 2 and 3 buildings.

1.3 Explain the relevance of building-related legislation to the design of Category 1, 2 and 3 buildings."

The Board considered that in evaluating the competency of an applicant for a Design 2 or 3 Licence, that an established record of work for that category of building was not essential, although it is an important indicator. If an applicant is able to demonstrate his/her capability to work at the appropriate level this should be a consideration in assessing his/her competency. The Board recognized that without a "track record" the assessment of competency was more difficult and that, in such circumstances that there was a burden of proof on the applicant to demonstrate his/her competency to the Assessor.

- 7.6 Having regard for the Appellant's submissions, the Registrar's report, the provisions of the Rules and the matters referred to in paragraphs 7.2 to 7.5 (inclusive), the Board concluded that:

- (a) The work produced by the Appellant demonstrated his capability of working at the level expected of a Design 3 Licensed Building Practitioner, although he had not presented a record of specific projects for Category 3 buildings.
- (b) The Appellant's work demonstrated many of the elements of "design" and that he met sufficient of the performance indicators of Competency 4 for the Design 3 Licence.

The Board also noted the comment of the Peer Reviewer who stated *"I don't doubt Ian's capability to do Design 3 work, as he is well qualified to do it, it's just that he didn't present any Design 3 projects"*.

Accordingly, the Board decided, by majority, to uphold the Appellant's appeal.

8. Board's Decision

- 8.1 Pursuant to s.335(3)(a) of the Act and Clause 3.11.3 of the Board's appeals Procedures, the Board has resolved to reverse the Registrar's decision not to issue the Appellant with a Design 3 Licence.
- 8.2 Pursuant to Clause 3.11.6 of the Board's Appeals Procedures, the Board directs the Registrar to issue a Design 3 Licence to the Appellant as soon as practicable.
- 8.3 The Board's reasons are that the Appellant has demonstrated, to the Board's satisfaction, that he meets all of the competency requirements of the Design 3 Licence.

- 8.4 The Board requests that the Registrar have regard for the matters referred to in paragraphs 7.3 to 7.5 of this decision, in respect of the assessment of applicants for Design Licences in the future.
- 8.5 The Board considered an award of costs on the principle that “costs follow the event”. On that basis, the Appellant could have been eligible for an award of costs, but as he did not seek costs from the Registrar, the Board has resolved that the Appellant and the Registrar meet their own costs.
- 8.6 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.

9. Other Matters

- 9.1 The Board expressed its concern that the transcript of the telephone interview with the Assessor was not available and requests the Registrar review arrangements for recording of interviews of applicants by Assessors to avoid any recurrence of this situation.

Signed and dated this day of January 2009.

Alan Bickers
Chairman
(Presiding Member)