

Before the Building Practitioners Board

Appeal No. A1400

Between: [OMITTED] (the Appellant)

And: The Registrar

In the matter of: An appeal against a decision of the Registrar of Licensed Building Practitioners to decline a Design AoP 3 Licence.

Decision of the Board under section 330(1)(a) of the Building Act 2004

Hearing Location By Audio Visual Link

Hearing Type: In Person

Hearing and Decision Date: 16 January 2024

Decision Date: 19 January 2024

Board Members Present:

Mr M Orange, Deputy Chair, Barrister Chair (Presiding)

Mrs F Pearson-Green, LBP, Design AoP 2, Deputy Chair

Mr G Anderson, LBP, Carpentry and Site AoP 2

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 Licensed Building Practitioners Rules 2007 (the Rules) and the Board's Procedures for the Management of Appeals (the Appeal Procedures).

Decision:

The Board has decided, under section 335 of the Act, to confirm the Registrar's decision. The Appellant will **not** be granted a Licence.

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Summary of the Board’s Appeal Decision

[1] The Appellant was not able to establish that he met the primary structure and external moisture competencies for a Design Licence. On that basis, the Registrar’s decision is confirmed.

The Board

[2] The Board is a statutory body established under the Building Act.¹ Its functions include hearing appeals against certain decisions of the Registrar in accordance with subpart 2 of Part 4 of the Act.

Procedure on Appeal

[3] Under section 335 of the Act, an appeal proceeds by way of rehearing. On hearing an appeal, the Board may confirm, reverse, or modify the decision or action appealed against. The Board may also make any other decision or take any other action that the decision maker (the Registrar) could have made. The Board cannot review any part of a decision or action not appealed against.

The Registrar’s Decision

[4] To become licensed, an applicant person must satisfy the Registrar that they meet the applicable minimum standard for the class or classes of licence applied for.² The minimum standard is prescribed by rule 4 of the Rules. It states:

¹ Section 341 of the Act.

² Refer section 286 of the Act and rule 9(1)(a) of the Rules

4 MINIMUM STANDARD OF COMPETENCE FOR EACH CLASS OF LICENCE

- (1) *The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.*
- (2) *In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.*

[5] Under rule 12 of the Rules, the Registrar must make a decision on the application. The Registrar's decision to grant or decline a licence must be informed by an assessor's recommendation.³

[6] On 26 September 2023, the Registrar informed the Appellant that his application had been declined. The Appellant was informed of his right to appeal the decision.

The Appeal

[7] On 26 September 2023, the Appellant filed an appeal with the Board against the Registrar's decision.

[8] The Registrar provided the evidence used to reach his decision, including the assessors' recommendation. The Registrar noted the Appellant had failed to demonstrate the following competencies for the class of license applied for:

- (a) Competency 2: Manage the building design process
- (b) Competency 3: Establish design briefs and scope of work and prepare preliminary design
- (c) Competency 4: Develop design and produce construction drawings and documentation.

[9] Under section 335(4) of the Act, the Board must not review any part of a decision or action not appealed against. On that basis, and on the basis of the Report, the matters under appeal were those noted above.

[10] The burden of proof lies with the Appellant. It is for the Appellant to provide sufficient evidence to establish, on the balance of probabilities, that he meets sufficient of the performance indicators for those competencies that are being appealed to be granted a licence. If the Registrar appears at an appeal hearing,⁴ the matter proceeds using an adversarial process.

[11] The Registrar did not seek leave to appear.

³ Rules 10 and 11 of the Rules

⁴ The Registrar may seek leave to appear and be heard under clause 2.9.16(a) of the appeal procedures either in person or by legal counsel.

The Hearing

- [12] Prior to the hearing, the Appellant provided further evidence and submissions to support his appeal. It is noted that in doing so, the Appellant responded to the competencies for a Site Licence as set out in the Rules, not the Design competencies. His documentary evidence included comprehensive fire designs. He did not provide any design or documentation relating to other design facets.
- [13] At the hearing, the Appellant, who is an engineer, stated that he is in the process of being chartered so that he can become a Chartered Professional Engineer. Under section 291 of the Act and clause 5 of the Building (Designation of Building Work Licensing Classes) Order 2010 (the Licensing Class Order), a Chartered Professional Engineer is treated as if they are licensed in Design AoP 3 and Site AoP 3. He noted that the process to become chartered is long and arduous. He submitted that he needed to hold a Design Licence so that he could provide Certificates of Design Work for fire safety systems design.
- [14] The Board put to the Appellant that, whilst he may be competent as regards the design of fire safety systems, he may not meet the competencies for primary structure and external moisture as set out in the Rules. In this respect, there are three types of design work that are classified as Restricted Building Work (RBW) and for which a person must be licenced (or be deemed to be licensed) to carry out or supervise. They were established by clauses 6 and 7 of the Building (Definition of Restricted Building Work) Order 2011 (the RBW Order). They state:

6 Certain design work relating to primary structure or external moisture-management systems of residential buildings to be Restricted Building Work

- (1) *The kinds of design work described in subclause (2) are Restricted Building Work for the purposes of the Act.*
- (2) *The design work referred to in subclause (1) is the preparation of any drawing, specification, or other document, according to which—*
- (a) *the primary structure of a house or a small-to-medium apartment building is proposed to be constructed or altered; or*
- (b) *any external moisture-management system attached to or forming part of a house or a small-to-medium apartment building is proposed to be constructed or altered.*

7 Certain design work relating to fire-safety systems of small-to-medium apartment buildings to be Restricted Building Work

The preparation of any drawing, specification, or other document, according to which any fire-safety system attached to or forming part of a small-to-medium apartment building is proposed to be constructed or altered is Restricted Building Work for the purposes of the Act.

[15] The RBW Order also defines the types of buildings that it relates to. For example, it defines a small-to-medium apartment building as:

small-to-medium apartment building means a building that—

- (a) contains 2 or more residential units or residential facilities; and
- (b) does not contain parts that are neither residential units nor residential facilities; and
- (c) has a maximum calculated height of less than 10 m.

[16] Maximum calculated height is, in turn, defined as:

maximum calculated height, in relation to a building, means the vertical distance between the highest point of its roof (excluding structures such as aerials, chimneys, flagpoles, and vents) and the lowest point of the ground

[17] The small-to-medium apartment building definitions are mentioned as any design work on buildings that fall outside of those parameters, is not Restricted Building Work, and the Appellant can undertake it without any form of Licensed Building Practitioner licence.

[18] On the basis of clauses 6 and 7 of the RBW Order, there are three types of design work that are Restricted Building Work:

1. primary structure;
2. external moisture-management systems; and
3. fire-safety systems.

[19] It was in relation to the third item, fire safety systems, that the Appellant sought to be licensed. He accepted that he was not competent to carry out design work in relation to the other two types of restricted design work.

[20] The question for the Board was whether it could grant a licence that only covered the design of fire safety systems.

The Purposes of the Licensing Regime

[21] The Building (Definition of Restricted Building Work) Order 2011 (New Zealand) stipulates that design work and building work on the primary structure and external moisture-management system of a house or a small-to-medium apartment building is Restricted Building Work. Restricted Building Work on applies to work that is carried out or supervised under a building consent⁵.

[22] Under section 84 of the Act:

All Restricted Building Work must be carried out or supervised by a Licensed Building Practitioner [who is licensed] to carry out or supervise the work.

⁵ Refer section 401B of the Act.

[23] Given the above provisions, a person who wishes to carry out or supervise Restricted Building Work, other than as an owner builder, must be licensed.

[24] The introduction of the Licensed Building Practitioner regime was aimed at improving the skills and knowledge of those involved in residential construction. The following was stated as the intention to the enabling legislation⁶:

The Government's goal is a more efficient and productive sector that stands behind the quality of its work; a sector with the necessary skills and capability to build it right first time and that takes prides in its work; a sector that delivers good-quality, affordable homes and buildings and contributes to a prosperous economy; a well-informed sector that shares information and quickly identifies and corrects problems; and a sector where everyone involved in building work knows what they are accountable for and what they rely on others for.

[25] And, as was noted by the responsible Minister during the first reading of the legislative provisions that established it:⁷

A robust licensing scheme with a critical mass of licensed builders means consumers can have confidence that their homes will be built right first time.

[26] Within that context, it is important that the competence of those who seek to be licensed is thoroughly assessed so as to ensure that the legislative purposes of licensing are advanced, consumers are protected, and buildings are designed and constructed in a manner that makes them safe and healthy.

The Structure of the Licensing Regime

[27] Clause 4 of the Licensing Class Order established the following types of design licence:

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

[28] The Licensing Class Order allows for Areas of Practice. With regard to design, three areas of practice have been established, and they map back to category 1, 2 and 3 buildings, which are defined in Schedule to the order.⁸ As such, the licence classes

⁶ Hansard volume 669: Page 16053

⁷ Hansard volume 669: Page 16053

⁸ Unfortunately, the categorisation used does not align with the RBW Order when it comes to height, with a different definition of building height being used (a category 3 building is a building whose building height is or exceeds 10 metres where— building height means the vertical distance between the upper surfaces of the floors of the building's lowest and highest storeys).

have been designed around types of building, not types of restricted design work (primary structure, external moisture management systems and fire safety systems). Given the design of the licensing regime, any person granted a design licence is authorised to carry out all three types of restricted design work. It follows that to issue a licence, the Registrar must be satisfied that the applicant meets sufficient performance indicators in relation to all three types of restricted design work. In this instance, as regards primary structure and external moisture management systems, the Registrar's decision was that the Appellant did not. At the hearing, the Appellant accepted that he did not have those competencies.

- [29] This compares with the licensing frameworks for roofing, external plastering, brick and blocklaying and foundations, where the Licensing Order also refers to categories of buildings but where the areas of practice are centred on the types of Restricted Building Work being undertaken. In roofing, for example, the Areas of practice are concrete or clay tile roof, profiled metal roof and wall cladding, metal tile roof, roof membrane, torch on roof membrane, liquid membrane roof, and shingle or slate roof. Had the same framework been used for design, then the Registrar could have considered a licence that was limited to fire safety systems. Because the framework does not use that structure, there was no avenue for the Registrar to grant a limited or restricted licence, and it follows that the Board must confirm the Registrar's decision.
- [30] In making its decision, the Board has noted that it is constrained by the legislative framework and cannot make a decision that is not in accordance with it. As such, whilst the Board may consider that the Appellant is competent to carry out design work related to fire safety systems, it cannot grant him a licence. The Board does, however, consider that consideration should be given, from a policy perspective to the creation of areas of practice for design that relate to the types of restricted design work (primary structure, external moisture management systems and fire safety systems). To that end, it directs that a copy of this decision be provided to the Building Systems Performance team with the Ministry of Business Innovation and Employment.
- [31] The Board also notes that the same issues arise with other aspects of design. Often, a Licensed Building Practitioner will submit a Certificate of Design Work that includes design work from another professional. The Board has observed that, in doing so, the Licensed Building Practitioner will rely on some form of undertaking from the other professional, such as a Producer Statement.

Board's Conclusion and Reasoning

- [32] On the basis of the above, of the evidence received and having taken into consideration the purposes of the licensing regime, the Board has decided that it will confirm the decision appealed against.

Costs and Publication

Costs

[33] Under section 338(4) of the Act the Board may order any party to the appeal to pay to any other party to the appeal any or all of the costs incurred by the other party in respect of the appeal. The Registrar did not appear. As such, the Board does not need to consider costs orders.

Publication

[34] Section 339 of the Act provides:

339 Orders as to publication of names

- (1) *On an appeal under this subpart, the appeal authority may, if in its opinion it is proper to do so, prohibit the publication of the name or particulars of the affairs of a Licensed Building Practitioner or any other person.*
- (2) *In deciding whether to make an order under subsection (1), the appeal authority must have regard to—*
 - (a) *the interests of any person (including, without limitation, the privacy of any complainant); and*
 - (b) *the public interest.*
- (3) *If the appeal authority prohibits the publication of the name or particulars of the affairs of a Licensed Building Practitioner, the Registrar must remove the name or particulars of the affairs of that Licensed Building Practitioner from the register in relation to the matter under appeal to the extent necessary to reflect the appeal authority's prohibition on publication.*

[35] Based on the above, the Board will not order further publication.

Right of Appeal

[36] The right to appeal a Board decision of this type is provided for in section 330(2) of the Actⁱ.

Signed and dated this 13th day of February 2024



M Orange
Presiding Member

i Section 330 Right of appeal

- (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)*

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.*