

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

VCAT REFERENCE NO. Z619/2019

REVIEW AND REGULATION LIST

CATCHWORDS

Review and Regulation List – building surveyor – application for stay of immediate suspension decision by Victorian Building Authority – *Building Act 1993* (Vic) s180A(2A); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s50(3).

APPLICANT	Kamran Zand Basiri
RESPONDENT	Victorian Building Authority
WHERE HELD	Melbourne
BEFORE	Vice President Judge Marks
HEARING TYPE	Stay Hearing
DATE OF HEARING	28 August 2019
DATE OF ORDER	6 September 2019
CITATION	Basiri v Victorian Building Authority (Review and Regulation) [2019] VCAT 1376

ORDER

1. The application for a stay under section 50 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.



Judge Marks
VICE PRESIDENT

APPEARANCES

For the Applicant	In person
For the Respondent	Mr P Hanks QC, with Mr T Wood of Counsel

REASONS

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SUMMARY

- 1 Kamran Zand Basiri has been a registered building surveyor for nearly seventeen years. He was first registered in the category of Building Surveyor (Unlimited) BS-U 18530 on 23 October 2002.
- 2 On 7 August 2019, the Victorian Building Authority suspended his registration, under s180A(2A) of the *Building Act 1993* (Vic). That section states:

The Authority must, by written notice given to registered building practitioner, immediately suspend the registration of the registered building practitioner if the Authority considers it is in the interests of the public to do so pending the show cause process.
- 3 The ‘show cause process’ referred to in s180A(2A) is a process which commences with the Authority giving a notice to a practitioner requiring him to ‘show cause’ why he should not lose his registration. It has a number of steps, designed to give a practitioner the opportunity to defend himself and explain why he should keep his registration, including by applying for reviews of decisions. Once the show cause procedure is completed, one of the options available to the Authority is to suspend a practitioner’s registration. A suspension imposed at that stage (after the show cause process) is to be contrasted to the *immediate* suspension under s180A(2A), which is designed to occur if the Authority considers it is in the interests of the public to do so ‘pending the show cause process’. (Mr Hanks QC said at the hearing that his instructions were that, as at the day of the hearing, the Authority contemplated that a show cause notice would be given to Mr Basiri by 5 September 2019.)
- 4 Mr Basiri’s suspension took effect on 7 August 2019, when he was served with the notice (dated 5 August) of the immediate suspension decision. That same day, Mr Basiri applied to the Victorian Civil and Administrative Tribunal for a review of the decision. He wants it overturned.

- 5 It is unlikely that the review hearing will occur before November 2019, and it may well be later. Before that hearing can take place, both sides will need to file all the evidence they want to rely on at the review hearing. The Authority has already put some evidence, including expert reports, before the Tribunal (in relation to the present stay application) but it proposes to file more evidence before the review hearing. Mr Basiri has also already put some evidence before the Tribunal, but has not had an opportunity to consider fully all the evidence the Authority has already filed, including expert reports. Before the review hearing, Mr Basiri needs time to consider all of the Authority's evidence, and wishes to file further evidence himself, possibly including expert reports in reply. The hearing of the review must then be listed, and is likely to take between two and five days (depending on how many issues remain in dispute by the time of the hearing, and what witnesses are called).
- 6 In his application for review, Mr Basiri also sought a stay of the immediate suspension decision. That stay application was heard before me on 28 August 2019.
- 7 As there is a review application underway, the issue before me on the stay application is whether the suspension the Authority imposed on 7 August 2019 should remain in place pending the determination of the application to review the immediate suspension decision, or whether it should be stayed until the decision on the application for review is made. (If I were to stay the order now, Mr Basiri would continue to be registered for the time being: that is, the 'immediate suspension' would not apply. If the Tribunal were then to decide, on the review hearing, that the Authority's immediate suspension decision should be upheld, any stay imposed now would be lifted and the 'immediate suspension' would *then* apply. On the other hand, if the Tribunal were to decide, on review, that the Authority's immediate suspension decision should be set aside, any stay order would no longer be relevant, as the order it was staying would be set aside. Mr Basiri would continue to be registered going forward.)
- 8 So the issue presently before the Tribunal is: what should happen in the interim? Should the immediate suspension have effect during this period before the review application has been heard and decided, or not?
- 9 For the reasons set out below, I am satisfied that the stay application should not be granted. The suspension imposed on 7 August 2019 will therefore continue to operate.

EVIDENCE

- 10 The Authority was represented at the hearing by Mr Peter Hanks QC and Mr Thomas Wood. Written submissions were filed before the hearing, and were added to by oral submissions.
- 11 The Authority relies on two affidavits sworn by Robert Charles John Chappell. Mr Chappell is the Manager of the Practitioner Discipline Unit

within the Authority's Compliance and Enforcement Division. There are over 600 pages of exhibits to the affidavits. In summary, Mr Chappell deposes to the following.

- 12 The Authority has been established under the *Building Act* as the regulator of the building and plumbing industries in Victoria. Delegates of the Authority employed in its Practitioner Discipline Unit assess possible grounds for disciplinary action, and take disciplinary action, against registered building practitioners under Division 3, Part 11 of the Act, if they reasonably believe a ground for taking disciplinary action against a registered building practitioner exists.
- 13 Mr Basiri has been the subject of various disciplinary actions, by the Authority. These include:
 - (a) on 7 December 2015, being reprimanded and ordered to pay fine in the sum of \$4,000.00 plus costs of \$3,467.50 with respect to contraventions of the Act in carrying out building works at 23 Edith Street, Dandenong, 16 Noble Street, Noble Park and 19 Festival Crescent, Keysborough;
 - (b) on 4 April 2017, being reprimanded and ordered to pay fine in the sum of \$7,167.00 plus costs of \$8,602.00 with respect to contraventions of the Act in carrying out building works at 31 Anne Street, Dandenong;
 - (c) on 4 April 2017, being reprimanded and ordered to pay fine in the sum of \$9,664.20 plus costs of \$19,201.50 with respect to contraventions of the Act in carrying out building works at 38 King Street, Dandenong; and
 - (d) on 2 December 2017, being reprimanded and ordered to pay fine in the sum of \$7,000.00 with respect to contraventions of the Act in carrying out building works at 12 Close Avenue, Dandenong.
- 14 On 4 April 2017, a penalty imposed by the Building Practitioners Board Victoria included the requirement that Mr Basiri give an undertaking about the types of buildings he would work on going forward. The penalty required:

That by 30/04/2017 the practitioner provide in writing an undertaking that from 1/05/2017 the practitioner:

 - (a) Accept only appointments to act as the Relevant Building Surveyor in relation to buildings in the categories of class 1 and class 10 as classified in the Building Code of Australia and refuse all other appointments as the Relevant Building Surveyor;
 - (b) Issue building permits only for buildings in the categories of class 1 and class 10 as classified in the Building Code of

Australia.

- 15 Mr Basiri has been the subject of ongoing investigations by the Authority in relation to various building sites where building notices and/or emergency orders have been issued. Mr Chappell states, in his affidavit sworn on 19 August 2019:

On 5 August 2019, I briefed the VBA's Executive Director, Operations (the Executive Director) on the state of the investigations referred to in paragraphs 8 – 21 above. The VBA's Executive Director, Operations is one of three officers to whom the VBA has delegated functions for the purposes of s 180A (2A) of the Act.

The Executive Director informed me that, based on the matters outlined in paragraphs 8 -21 above, and having regard to the matters listed in s 180A (2B)(b) and (c) of the Building Act, the Executive Director considered that it was in the interests of the public to immediately suspend Mr Zand Basiri's registrations as a building practitioner, and, as required by the Act, the Executive Director immediately suspended those registrations.

On 5 August 2019, a Notice of Immediate Suspension was issued to Mr Zand Basiri, in the form of a letter signed by the Executive Director. In addition to giving notice of the suspension, the letter included reasons for the suspension and references to provisions of s 183A of the Act, which require a suspended practitioner to give notice of a suspension to others.

- 16 There are presently 1,519 open permits issued by Mr Basiri and held in the Authority's permit levy system. The majority of them were issued prior to him giving the Authority the undertaking restricting the types of buildings he would work on.
- 17 Mr Basiri represented himself at the hearing. He filed written submissions with over 100 pages of attachments, and swore an affidavit that those submissions were true. He also made oral submissions.
- 18 Mr Basiri says that a stay of the decision should be granted for various reasons including:
- The emergency orders and building notices the Authority relied on in issuing the immediate suspension notice do not prove that Mr Basiri acted incompetently in carrying out his role of surveying the buildings years earlier, and issuing building permits and occupancy notices.
 - He did not breach his responsibilities in allowing combustible cladding to be installed on some apartments, because the cladding he inspected was compliant with regulations; and on some occasions the builder installed non-compliant cladding and covered

it up before Mr Basiri inspected the building, so Mr Basiri could not see the non-compliant cladding when he inspected.

- He has become more careful since being the subject of disciplinary action and should not be punished twice for earlier mistakes.

RELEVANT CONSIDERATIONS

- 19 The Tribunal's power to stay various administrative decisions arises under s50(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the VCAT Act). It includes the power to stay an immediate suspension decision made by the Authority under s180A(2A).
- 20 The power to stay under s50(3) is discretionary, to be exercised after full consideration of the circumstances and facts of each case.
- 21 Mr Basiri, in applying for the stay, has the onus of establishing that the Tribunal should exercise its discretion and order a stay. That onus has not been discharged in this case.
- 22 In deciding whether to grant a stay of an order the subject of a review, there are various considerations to be weighed up: see *Bell v Liquor Licensing Victoria* [2000] VCAT 214 at [12]-[16] (Kellam J), and *Ali v Taxi Services Commission* [2014] VCAT 1437 at [17] (Senior Member Proctor). They include:
 - Whether the failure to grant a stay would render nugatory the application for review;
 - Whether it is in the community interest that a stay be granted, which involves weighing the public interest against the private rights of the applicant;
 - Whether there is a serious question to be tried on review; and
 - The period of time that will elapse before the hearing of the application for review.
- 23 I deal with each of these considerations below.

Application for review will not be rendered nugatory if stay is not granted

- 24 As submitted for the Authority:

The application for review will not be affected if a stay is not granted. If the review of the immediate suspension is successful, then the immediate suspension will be lifted and the applicant will be registered, subject to the outcome of the show cause process. If the review of the immediate suspension is unsuccessful, the immediate suspension will stay in force, at least until the show cause process has concluded.

Community interest favours refusal of stay

- 25 The importance of the issue of the interests of the public is expressed within s180A(2A) itself. The section was included in the *Building Act* in September 2018. Parliament has chosen to vest a power in the Authority that requires the Authority to immediately suspend the registration of a registered building practitioner if the Authority considers it is in the interests of the public to do so, pending a show cause process – in the words of the section, the Authority ‘*must*’ do so. The section is designed to protect the public in those circumstances.
- 26 It has been said that ‘particular care may need to be exercised before a stay is granted’ where ‘the decision in question includes a disciplinary penalty imposed under a regulatory regime’. This was said by Cavanough AJA, in *Maund v Racing Victoria Ltd* [2015] VSCA 276 at [39], in the context of a stay of a VCAT determination, affirming a decision that Mr Maund be disqualified from engaging in work as a licensed racehorse trainer, pending an appeal under s148 of the VCAT Act.
- 27 The interests of the public in a matter involving ‘the protection of the public’ from a building practitioner, ‘who poses a risk to public health and safety’ is a more significant factor than, for example, the interests of the public might be in a liquor licencing matter: see *Piesse v Medical Board of Australia* [2017] VCAT 1615 at [46] (Member Wentworth).
- 28 In *Haddara v Taxi Services Commission* [2016] VCAT 759, Deputy President Lambrick stated in the context of a suspension of driver accreditation that:
- Interim suspension is, in my view, a way to protect the public pending a full consideration of what is treated by the Act as a very serious matter.
- 29 Likewise, I consider that the immediate suspension imposed by the Authority here is a means to protect the public pending the full consideration of a very serious matter: whether the registration should be suspended.
- 30 In my view, the interests of the public in these circumstances are to safeguard the public’s safety by ensuring Mr Basiri is not in a position to do any work as a building surveyor at this stage. As discussed below, the Authority has concerns about Mr Basiri’s competency. There are 1519 open permits issued by Mr Basiri, and held in the Authority’s permit levy system. The majority of them were issued prior to the time when Mr Basiri gave the Authority an undertaking restricting the types of buildings he would work on. The greater the number of buildings Mr Basiri is involved with, the greater the number of people whose interests may be placed at risk if a stay were granted, and he were allowed to continue operating as a building surveyor at the moment.

- 31 In *Fruigniet v Law Institute of Victoria* [2011] VSCA at [10], in relation to a stay application involving a legal practitioner's entitlement to practice, Harper JA and Macaulay AJA stated:

However, for matters of this nature relevant considerations can be further refined. The principles governing stay applications in proceedings of this kind have been set out by the former President, Winneke P (with whom Chernov JA agreed) in *Woods v The Legal Ombudsman*:

Legal practitioners who seek a stay of orders made by their disciplinary Tribunal, while an appeal is pending or for any other reason, have the onus of persuading the Court that such a stay should be granted. There are a number of balancing factors which will bear upon the Court's decision as to whether such an indulgence should be afforded. The first is that disciplinary proceedings against those who hold themselves out to the public as fit to practise (in this case the solicitors) are *sui generis*. The discipline imposed, whilst punitive in its application to the practitioners involved, is very largely protective of the public interest. Other matters which this Court will take into account will include the seriousness of the conduct which has led to the Tribunal's decision and the prospects which the instituted appeals have of succeeding.

[citations omitted].

- 32 Similarly here, the discipline imposed on Mr Basiri, in having his registration suspended under s180A(2A), is punitive in its application to him. But it is 'very largely protective of the public interest'. The Authority's concerns for the public interest is the reason for its imposition of the immediate suspension.

There is not a serious question to be tried

- 33 One of the issues I need to consider is whether there is a 'serious question to be tried' about whether the Authority's decision to impose immediate suspension should be upheld.
- 34 In considering this, I have had regard to the evidence presently before the Tribunal on the stay application.
- 35 As indicated above, the review hearing is yet to take place, and more evidence will be before the Tribunal at that time. At that review, it will be for the Tribunal to make its own decision as to whether Mr Basiri must be immediately suspended pursuant to s180A(2A), on the basis of all the evidence then before the Tribunal.
- 36 I am not satisfied that there is a serious question to be tried about whether the Authority's decision to impose immediate suspension should be upheld, on the evidence before the Tribunal on the stay application.

- 37 The Authority considered it was in the interests of the public to immediately suspend the registration. Having reached that view, it was then required to suspend the registration, under s180A(2A).
- 38 The evidence establishes that in reaching its immediate suspension decision the Authority had regard to two (of three) matters specifically set out in s180A(2B) as matters it was entitled to have regard to. Relevantly, it had regard to:
- Facts establishing that Mr Basiri has allowed others under his control to perform building work that poses a risk to the health and safety of persons (relevant under s180A(2B)(b)).
 - The fact that the Mr Basiri has been the subject of multiple adverse disciplinary actions by the Authority (relevant under 180A(2B)(c)).

Mr Basiri has allowed others under his control to perform building work that poses a risk to the health and safety of persons

- 39 In its notice of immediate suspension, the Authority refers to Mr Basiri having issued building permits and occupancy permits for five buildings, which were later the subject of building notices and emergency orders.
- 40 Building notices were issued for four of those buildings (two in 2017 and two in 2018) on the ground that ‘the building is a danger to the life, safety or health of any member of the public or of any person using the building’.
- 41 With respect to one of those four buildings, an emergency order was also issued (in 2017) on the ground that the building is ‘a danger to life arising out of the condition of the Building’.
- 42 The fifth building (which has not received a building notice) has received two emergency orders which were issued on the ground that the building is ‘a danger to life arising out of the condition of the Building’.
- 43 Building notices may be served under s106 of the *Building Act*, which relevantly provides:

Subject to section 107, a municipal building surveyor or a private building surveyor may cause a building notice to be served on an owner of a building, land on which building work is being or is proposed to be carried out or a place of public entertainment if the building surveyor is of the opinion that any one of the following circumstances exists—

.....

(d) the building, land or place or building work on the building, land or place is a danger to the life, safety or health of any member of the public or of any person using the building, land or place or to any property.

44 Emergency orders may be made under s102 of the *Building Act*. Relevantly, s102 provides:

A municipal building surveyor may make an emergency order under this Division if the municipal building surveyor is of the opinion that the order is necessary because of a danger to life or property arising out of the condition or use or proposed use of—

(a) a building;

45 Mr Basiri argues that the building notices and emergency orders are not evidence of any wrongdoing by him, and so the Authority should not have relied on them in reaching its decision.

46 However, in my view, the fact that a qualified surveyor is of the opinion that those buildings are a danger to life (or safety or health in the case of building notices) for the reasons set out in the notices, is itself evidence that the Authority may rely on in issuing an immediate suspension notice under s180A(2A).

47 Whilst not all the matters mentioned in the relevant building notices and emergency orders are necessarily referable to Mr Basiri's competency as a building surveyor, it is sufficient that some are. For example, an emergency order was made on 18 January 2019, by Matthew Harvey, a municipal building surveyor, in relation to a property at Culcairn Drive Frankston South. It records that Mr Harvey is of the opinion that the emergency order is necessary because:

1. There is a risk to life and safety of the occupants as a result of the existing conditions of the building including the use of combustible cladding...

2. There is evidence of combustible cladding in the building

3. The site includes 41 carparks that are not sprinkler protected

4. The buildings have unprotected openings and directly impact on paths of egress.

48 Further, various expert reports have been filed with the Tribunal – and were part of the Authority's ongoing investigations before the immediate suspension decision was made – about a number of buildings Mr Basiri issued building permits and occupancy permits for. They clearly set out expert opinions that Mr Basiri should not have allowed the issuing of building permits for those buildings.

49 For example, in a lengthy report dated 30 June 2019, Ari Akvitidis states his views about Mr Basiri's work in relation to a property at Hutton Street, Dandenong. The following extract is from the executive summary of the detailed report:

I confirm that I am an authorised person under Division 2 of Part 13

of the Building Act and appointed to carry out this function in writing by the VBA on the 6 September 2017.

An inspection of the site and part of the building common areas was carried out in the presence of Mr. Wayne Rossetto of the VBA and an officer of the owner's corporation on Thursday 7 June 2018.

I carried out a detailed review of the package of documents sent to me by the VBA as listed in section 1.3 of this report and prepared this report on the basis of the requirements of the brief attached in Appendix 'B' of this report.

A brief summary of my observations and conclusions are presented as follows:

- The design documentation presented to the RBS for building permit application did not demonstrate sufficient compliance to allow the issuing of a building permit;
- The plans did not adequately detail fire rated wall and floor systems and contained numerous errors in that regard;
- The issued building permit is substantially flawed in detail, information and content;
- The RBS should not have issued the building permit for this project based on the information provided to him at that time;
- The building external walls comprise expanded polystyrene cladding.
- The fire engineering brief did not follow the requirements of the International Fire Engineering Guidelines (IFEG 2005) which is a document endorsed by the Society of Fire Safety, the AIBS and the Australian fire-fighting authorities;
- The CFA, was not consulted as a relevant stakeholder as part of the FEB process in relation to performance requirements which nominate firefighting operations or fire brigade intervention as a relevant consideration.
- The fire engineering designs / alternative solutions do not adequately address all of the relevant/ required BCA performance requirements for the building. In particular the design omitted to address the issue of internal fire isolated stair discharge (BCA D1.7) which is evident on the building design plans.
- There are numerous unprotected openings (i) between different building classifications and (ii) within 3m of a fire source feature which have not been documented as a performance (alternative)

solution.

- The doors to the fire isolated exit stair are not provided with fire door tags or fire door signage as required by BCA party D2.23.
- The ground floor carpark is not properly or appropriately fire separated from the ground floor residential entry lobby as required by BCA Part C2.8.
- The fire isolated stair does not discharge directly to outside as required by BCA Part D1.3 / D1.7.
- Egress from this stair occurs internally within a non-fire isolated lobby at ground level with exposure to non-fire isolated rooms and enclosures (i.e. combined breaches of BCA Spec C1.1, BCA C2.8, BCA C3.11. BCA D1.7 etc.).
- The service penetrations observed in common area rooms, enclosure and cupboards have not been properly constructed or protected to comply with BCA Part C3.12-C3.15;
- The ground floor carpark does not have a direct exit to outside as required by BCA Part D1.2 (egress currently only from vehicular gate).
- A performance solution has not been carried out or documented for the external wall cladding in accordance with BCA part F1.

It is my opinion that the RBS could not have been satisfied that the building work could comply with the Building Act pursuant to section 24 and should not have been satisfied that the building was suitable for occupation pursuant to section 44 of the Building Act 1993.

- 50 Mr Basiri says, in relation to buildings that had the wrong cladding installed, that this was not his fault. It was the builder's. He says that the cladding he authorised was appropriate (QT cladding) and where he saw cladding which had been installed, it was QT cladding. He says the builder installed other, non-compliant, cladding and covered it up before he inspected the building, so he could not see it. These are matters he may choose to put evidence before the Tribunal about at the review hearing (or deal with in the show cause procedure). The present evidence before the Tribunal does not satisfy me that there is a serious question to be tried in relation to the Authority's immediate suspension decision.
- 51 Mr Basiri also says that since late 2016, when he first offered to give the undertaking restricting the sorts of buildings he would work on (the undertaking then ordered to be given in April 2017), he has principally worked on domestic buildings and carports. However, the Authority makes

it clear that its overriding concern is as to his competence and compliance with regulations generally.

Mr Basiri has been the subject of multiple disciplinary actions by the Authority.

- 52 These are detailed above.
- 53 The Authority argues that the ‘previous actions have evidently not acted as a disincentive’ to Mr Basiri failing to comply with necessary regulations. Mr Basiri argues that this is not the case, and that although he has made errors in the past, which he regrets, he has already been punished for them by way of disciplinary proceedings and fines, and has changed his ways. The last disciplinary action resulting in fines and orders was made in December 2017, nearly two years ago.
- 54 At some length, Mr Basiri detailed all the steps he has taken to improve the way he works, including taking on far less work, and limiting the sorts of buildings he will work on.
- 55 However, the fact is that Mr Basiri has been the subject of many disciplinary actions. This is a relevant factor to consider at the time of the immediate suspension decision. It does not amount to double punishment – as he submitted – to consider these. The Authority is required under s180A(2A) to consider the past disciplinary history of this nature in making its decision.

The period of time that will elapse before the hearing of the application for review

- 56 As discussed above it is likely to be a minimum of two months before the hearing of the application for review, and it may well be longer.

Other issues

- 57 Mr Basiri says that the suspension causes harm to his family and him, and to his company, its past and current projects and all stakeholders.
- 58 However, these difficulties do not outweigh the other considerations I have dealt with above.
- 59 Having considered the relevant factors, I will not exercise my discretion to stay the immediate suspension order.



Judge Marks
VICE PRESIDENT