

LANDSCAPE CONTRACTORS BOARD
Minutes of the February 20, 2008
Board Meeting
Roth's IGA, Salem, Oregon

Please note that the minutes will not be approved until the Board meets on March 21, 2008.

PRESENT

Board Members

Matthew Triplett, Chair
Marty Gascoyne, Vice-Chair
Steven Carper
Richard Hollenbeck (until 4:40 p.m.)
Joe Lymp
Larry Thomas
Lisa Walter Sedlacek (by phone until 3:20 p.m.)

Staff

Mike Snyder, Administrator
Kim Gladwill-Rowley, Program Manager
Ken Roth, Investigator

Others

Joanna Tucker-Davis, Assistant Attorney General
Peter Padilla, Padilla Farms
Wes Butler, Butler Landscape Services
Mike Shrock, Living Water Landscape
Ben Cunningham, Eden's Image Landscape
Caleb Folsom, Diligence Landscape
David Sedlack, Aspen Landscape

EXCUSED

None

1. PROCEDURAL

A. Call to Order

The meeting was called to order at 1:00 p.m. by the Vice-Chair in the absence of the Chair at the beginning of the meeting. Chair Triplett arrived at approximately 1:10 p.m.

B. Approval of Agenda and Order of Business

The agenda was approved as written.

C. Approval of Minutes

1. January 17, 2008

The Board reviewed the January 17, 2008 minutes.

Board Action: Moved by Hollenbeck and seconded to approve the minutes of the January 17, 2008 minutes. Vote 5 ayes; 0 nays.

Several edits were suggested.

Moved by Lymp to amend the January 17, 2008 minutes as suggested. Vote: 5 ayes; 0 nays

2. January 18, 2008

The Board reviewed the January 18, 2008 minutes.

Board Action: Moved by Thomas and seconded to approve the minutes of the January 18, 2008 minutes as edited. Vote 5 ayes; 0 nays.

Several edits were suggested.

Moved by Hollenbeck to amend the January 18, 2008 minutes as suggested. Vote 5 ayes; 0 nays

2. Administrator's Report

A. Office Update

The Board reviewed Mr. Snyder's report, which is attached and made a permanent part of these minutes. Mr. Snyder stated he attended the High Desert Conference, which provided a lot of continuing education and approximately 200 people attended. He also reported the Yard, Garden & Patio Show in Portland last weekend was well attended.

The financial audit was completed by Merina & Associates a private CPA firm out of West Linn. Two deficiencies were noted as follow: (1) Journal entries are not individually approved by Administrator before they are entered into QuickBooks. The Administrator allows Cindy to enter all journal entries in terms of income and they are not approved by the Administrator. A private accountant made journal entries and they were not signed off on by the Administrator either. (2) The auditors recommended the civil penalties be eliminated from the books. Mr. Snyder objected to this and is again working with a private accountant to resolve this issue.

Mr. Snyder reported the Construction Contractors Board has now hired 11-12 regional investigators as employees of their agency to do enforcement. Robert Rambo is managing that division and the CCB provided a 4 day training session that included sessions from Department of Justice (DOJ), Department of Revenue, Employment Department and the LCB. Mr. Snyder gave an hour presentation which was well received. The LCB investigators attended 2.5 days of this training. Mr. Roth stated it was good to hear each agency report on how they work and how the agencies can share information. He appreciated the "bigger picture" of the state. There was a very good presentation from an investigator with DOJ regarding report writing and a presentation by Joanna Tucker-Davis on investigative authority. The meeting was helpful in creating a better clarification between the LCB and the CCB license jurisdiction. Board members requested a notice of the CCB hiring 12 new field representatives to be announced in the next LCB newsletter.

Mr. Gascoyne stated it would be nice for the LCB to attend the Lane County Home Show. He will look into obtaining a booth for the LCB. The Lane County show is March 6-9, 2008.

Mr. Snyder stated there is a lot of interest in the continuing education requirement. The listing of approved courses is being prepared and will be published on the website. Requests for approval of classes has been steady and there are about 40 different classes that have been approved and a lot of phone calls regarding the requirement.

Mr. Snyder gave a presentation to OLCA at their planning retreat. OLCA is struggling with membership, sustainability in terms of "green" and the continuing education courses. Mr. Snyder gave them a glimpse of what was discussed at the LCB planning session and they were very receptive to the licensing idea. The CLT program is now changed to a CLP program. The CLP may be easier to obtain now that some of the requirements have been eliminated. This has allowed some individuals to qualify for the LCB exam. Mr. Triplett stated this is not easier, but realigned with the occupation based upon an industry analysis of what is required by

people performing landscape work. OLCA is hopeful the CLT (now CLP) will integrate with the LCB one-licensing system.

3. PROGRAM REPORTS

A. Examination Report

Mr. Hollenbeck distributed a copy of the exam committee minutes from the February 2, 2008 meeting. The committee is working on the question bank for the owner/managing employee exam. They currently have 170 questions written and will continue writing questions until they have a minimum of 200 questions in the bank. He believes the questions will be completed by the deadline of March 1, 2008. The committee also began reviewing the grading and drainage section of the current landscape construction professional exam.

4. OLD BUSINESS

A. Criteria to Measure Direct Supervision

The Board reviewed a suggested rule amendment from Ken Roth. Mr. Roth discussed the "direct supervision" definition with the LCB investigators. Mr. Roth stated when site checks are performed the investigators are making a determination of direct supervision.

Mr. Roth's suggested rule amendment states the person working should know who the supervisor is and the last time this person was given instructions. The amendment also requires the person supervising the work know who is on the job site. The biggest issue is the time frame for making the determination about whether or not there is direct supervision. Mr. Roth reported that in February 2008 the investigators have performed 10 site checks where a licensed landscape contracting business was performing work. Three of the landscape construction professionals were on site, five were in contact within 15 minutes, and the other two took 20 minutes to reach the licensee.

Mr. Triplett stated that the requirement to meet with the employee each day tends to get more difficult. He wonders out of those ten businesses mentioned by Mr. Roth who would have met this requirement. Mr. Roth stated out of the five he performed three LCP's were on the job site and the other two knew the jobs and the names of the individuals working and were able to describe the work being performed. He further explained they can meet before they go out to the job site in the morning and the Board needs to determine if it is face to face or over the phone.

Mr. Gascoyne stated he is not comfortable with a 15 minute timeframe for the employee to contact the LCP and the rule implies the employee must use a phone for voice communication. Also, one of the investigators believed it should be voice and not texting. Mr. Triplett stated if he was in a meeting, he would prefer a text to a phone call. The Board believes texting would not be acceptable for problem resolution. Mr. Roth stated the important issue is that the unlicensed employee can contact the LCP. If that's the purpose, it would say "equipped to communicate" and could include texting in the context of this discussion. Mr. Triplett stated he believes a 30-minute timeframe to reach the LCP is reasonable.

The statute says "direct supervision". If not directly supervised, the unlicensed employee(s) are in violation. Meeting once a day could be considered direct supervision. The timeframe (15 or 30 minutes) is arbitrary. Mr. Gascoyne stated he tells his crew not to call him while he is negotiating with a client. He believes he outlines the instructions prior to being unavailable. If it's an emergency, obviously, they are going to call him anyway. He hopes the lead man would explain Mr. Gascoyne is unavailable and hopes the investigator realizes it is not an emergency. When he meets with the lead guy that evening or the next morning the lead guy can tell him the investigator stopped by. The investigator should use discretion, but it appears discretion is being taken out of the equation.

Ms. Tucker-Davis stated the investigators are in position of having to prove a negative. What do they do when told "I can get a hold of him"? Depending on who it is puts the investigators in the place of making that call and how do they do it. Clear guidelines are important to explain why something was or was not done. Ms. Walter-Sedlack believes the LCB needs clearly defined rules. Mr. Lymp stated he believes there should be clear criteria for the investigators. Mr. Roth stated the investigators would like to be given discretion, but the legal part is more difficult to prove. Investigators need to make decisions using objective, clear guidelines or it leaves it open to an accusation of bias.

The Board will discuss this further at the March meeting to determine if the rule should be amended.

B. Licensing Discussion

BUDGET

The Board reviewed the Profit & Loss Budget vs. Actual from July 2007 through January 2008, which is a 7-month period into the current budget. When the budget was created it was not determined which months provide more income. This statement just divides the budget numbers evenly each month to average it out for the budget period. September through January is usually a slow period for income.

The Board discussed collecting more of the civil penalties and suspending less through settlement agreements. They believe they have an obligation to enforce the law. If the full penalties are enforced, the illegal activity will continue. There is nothing to hold over the unlicensed individual to get them to pay the penalty. The Board discussed the difficulties with collection. The current licensees are paying for enforcement. Mr. Snyder states enforcement should pay for itself and if the unlicensed become licensed, the situation is a win-win for everyone.

Mr. Gascoyne inquired as to what percentage of assessed civil penalties are being suspended on average and of those agreements reached where penalties are suspended if compliance is met, what percentage of those are meeting that obligation (what percentage of settlement agreements are being fulfilled?). He also wondered if the LCB has recourse through revenue to collect tax refunds and kickers.

Staff explained the files that are referred to the Department of Revenue do collect tax refunds and kickers. Mr. Snyder stated he believes 50% of what is assessed is being collected, that 30%-40% of the settlement agreements were not complied with and the respondent now owes the money and it becomes a collection issue. Mr. Roth stated collections are important and the LCB can do better on collecting. He is excited to work with the other agencies and the LCB investigators can get involved in locating assets. This is another advantage to having the investigators as employees.

Chair Triplett stated suspending half the civil penalties and giving up on collecting is not acceptable. Mr. Gascoyne stated the agency needs a bottom line for suspensions. Mr. Carper stated the LCB should focus its efforts on those who want to be in this industry and to research a way to focus and refine a policy to gain more revenue and not chase down dead ends. The Board discussed the newsletter showing the suspensions, but it does not show those that did not comply with the settlement agreement and now the full penalty is due. Mr. Roth believes only ¼ of those that sign settlement agreements comply with them. More hearing requests are being received. The LCB could spend \$2,000 to prove the respondent owes \$1,000. The option to reduce the penalty by admitting guilt and obtaining a license is a business decision that saves the cost of a hearing. Then, if they don't follow through with the license, they owe the full penalty without a hearing. Ms. Tucker-Davis explained the Board does not have the authority to recoup legal fees.

Mr. Thomas stated he understands the explanation of how the LCB enforcement is operating and how it relates to the consumer protection, but what about the consumer who files a complaint about the unlicensed. Are they happy with the compromises? Mr. Snyder stated the consumer usually has no problem with the unlicensed until something goes wrong and then the consumer has no rights because they hired the unlicensed. Part of the enforcement is to get restitution for the damages if the unlicensed is willing. The LCB offers a reduction if a reasonable attempt to settle with the consumer was made and many times Mr. Roth mediates these situations. The unlicensed cannot make any repairs, so it comes down to a financial settlement and the consumer is happy with that. If the person becomes licensed with the LCB and complaints are filed, there is consumer protection afforded by the required bond.

Mr. Hollenbeck stated he supports the idea to bring people into compliance with the license. He wants to review the idea of a suspension of penalty for a reoccurrence of violations and a possible double fine. Mr. Carper agreed with Mr. Hollenbeck and believes it is important to encourage compliance and find a way to adjust the suspension rate. It appears to be an effective tool, but also believes there needs to be discouragement to this behavior.

Mr. Snyder stated the investigators are developing relationship with District Attorneys and Police Departments. These agencies have not been willing to put someone in jail.

Mr. Gascoyne stated the reason for all of this discussion is recognition by the LCB decision for deficit spending over \$8,000/month. The Board knows this cannot continue and needs to turn it around. Mr. Snyder stated he wants the Board to

review the budget continuously and that staff is trying to make it work by asking for clear rules so enforcement is definitive. He believes the LCB has to make an enforcement footprint and he wants it to be substantial, which takes capitalization.

Chair Triplett stated it is time to do something differently. Mr. Snyder stated that imposing more fines does not necessarily mean that is the answer. Mr. Lymp stated he agrees with Mr. Hollenbeck of no suspension of fines for reoccurring violations. He believes it is important to bring them into compliance, which is the ultimate goal, but also believes the LCB is giving up too much on assessment of penalties.

Mr. Gascoyne stated the reduction of penalties is "sugar coated" and there is no stick at the other end. A reduction of 75% is too much and he also agrees with Mr. Hollenbeck regarding the reoccurring violations and double fines.

Chair Triplett requested staff bring further information regarding settlement agreements and collection of fines to the next board meeting. He believes the Board is talking about the big picture without enough data.

The board reviewed the current budget expenses. Mr. Snyder stated he is concerned about the upkeep of the examination when Mr. Hollenbeck is no longer available to the Exam Committee. Mr. Hollenbeck has been discussing his position with another educator and is hopeful he will be able to find a replacement soon. He also believes the board representation should remain on the Exam Committee. Mr. Hollenbeck is happy to stay with the committee, but his term with the board is up in December 2008. Mr. Snyder stated he would like to have someone else administer the exam and take it out of staff's hands. Maintaining the question bank and rotation is not happening as it should. It needs some real attention to maintain the exam at the level it needs to be maintained. Mr. Hollenbeck was asked to work with Mr. Snyder on ideas for maintenance.

Mr. Snyder stated changing the office location was a large, unexpected cost as was the web development.

LICENSING DISCUSSION

Mr. Hollenbeck states he supports the direction of the licensing and has discussed this with other educators and they believe the exam should be a requirement. The CLT or degree should be a qualifier to sit for the exam, but the LCB exam should still be required.

The competency stamps should be set up according to phases and be obtained through training or the CLT should be acceptable. Accessibility is important since the CLT is only given one time a year, currently. Also, they must qualify to take the test and not be able to challenge the qualifications. Community colleges could work with the LCB to build classes around getting students prepared.

Mr. Snyder asked the question that if a test is required does that constitute a license or a certification. Are they same thing? Also, does this bring it back to a 2-license system? Ms. Tucker-Davis stated if there is control over this person, it is a license. The new licensing system may have created another level of licensing to two licenses and a certification. Chair Triplett wondered if the LCP layer is still part of

the system. Mr. Hollenbeck stated someone needed to know the entire job and how to set it up and he feels strong about this. He also mentioned OLCA supports it. The CCB model is not moving forward.

The one license system includes competency stamps and including the LCP is just a certification they pass with an exam or a course. There is no license, so there is no enforcement over this person. The only regulation would be for the landscape contracting business. Ms. Tucker-Davis stated this model gives up the regulation of the LCP. Mr. Gascoyne stated this may not be reducing the accountability, but refocusing the accountability into one place. Mr. Snyder stated the industry operates as if there is no competency and if competency is wanted, then the board needs to make it so and the Board has made a clear decision that the exam is adequate and desirable.

Chair Triplett wondered what is the LCB's job. It is an educating, licensing, enforcement body? A legislative change body? He stated the LCB is trying to force something at this point. Statutes are in place to enforce and were put into place for a reason. The legislature wanted direct supervision by the LCP. Why? To ensure competency? Accountability? Who is accountable? Does the LCB have to tell them the only way the work is competent is if an LCP is on the site?

Mr. Gascoyne stated there needs to be a licensed construction professional and not a permit process like CCB. The CCB model only works because of the permit process. If the LCP is not on the job site, what do we need him for? The LCP is the only person who is tested and proven competency. If competency is not in the field, is it necessary and if not why have an LCP? "Require more regulation and testing and stamping and otherwise identifying? Don't know this model accomplishes anything they wanted to accomplish. Makes things significantly more difficult. Make it easy instead of significantly more complex. Are internal struggles a reason to make a change to the existing structure?" He does not believe the board is unified.

Mr. Roth stated from performing investigations and claim mediations he believes the hard decision is to determine whether or not it is better to license more people to protect the consumer or is it better to license a few with the hope there is a better quality job. Mr. Gascoyne stated it is implied the consumer protection is the majority, if not all of, the LCBs job. The professionalism and competency is where the second license comes in trying to improve the minimum standards. Mr. Roth stated the professionalism should come from the trade association; it is not the state's job. Mr. Gascoyne agreed.

Mr. Thomas stated he supports the test and large companies need more than the owner of the business to be responsible for the competency in the field.

Chair Triplett recommended this be put out to the industry and public for comment. The Board has taken it as far as it can and should request input from the industry. The Board chair and another board member will make an effort to travel the state to receive input. The industry may have the same dilemma as the Board and then the Board won't get a clear picture, but will still need to make a final decision. They believe that making a decision will be easier if they hear from other members of the industry. They will attempt to meet the deadline for the 2009 legislation and plan on

a placeholder. A decision will be in place by June 2008 to either have a legislative concept or not.

TRAVEL REIMBURSEMENT FOR BOARD CHAIR

Board Action: Moved by Mr. Gascoyne and seconded to adopt a policy to permit chair of board to receive reimbursement for travel related to board activities subject to approval by the board Administrator. Vote: 4 ayes; 0 nays

ADDITIONAL 10% PAY INCREASE FOR AGENCY HEADS

The Board follows the DAS policy for compensation. On July 1, 2007 DAS policy was a 10% increase for all agency heads. Mr. Snyder was not comfortable taking this 10% increase. The advantages to following DAS policies for compensation is that DAS looks at salary surveys and the LCB does not have to do that. Being a semi-independent agency, the LCB is not tied to DAS policies and may adopt its own.

Board Action: Moved by Mr. Lymp and carried to follow DAS guidelines as set and give the Administrator a 10% pay increase. Vote: 4 ayes; 0 nays

5. NEW BUSINESS

A. Proposed Rule Amendments

Ms. Gladwill-Rowley reviewed several proposed rule amendments. The Board determined staff will write rule amendments to:

- charge \$20 for reprint of license cards,
- amend the definition of "Manages or Shares in the Management" to be it's own rule and to include the preparation or administration of contracts for landscaping work performed by the business;
- procedures for removal from probationary status; and
- Amend incorrect references.

Ms. Tucker-Davis explained Ms. Gladwill-Rowley was working on information for contested case hearings. This information notifies people about whether they can represent themselves or if they must get an attorney. The CCB has a statute that states corporations can have a representative at a hearing and is not required to be represented by an attorney. Generally they need to be represented by attorneys and this practice just came over to LCB without further thought. The LCB does not have the same statute.

The practice has been to allow corporations to be represented by owners, but a rule should have been in place. If the board wants to continue this practice, a temporary rule must be in place. If not, a rule should be in place stating so because the rule is not consistent with what was practiced and needs to be cleared up. If it is allowed the authorized representative needs to give proof to the ALJ of their authority in decision making for the corporation.

Board Action: Moved by Gascoyne and seconded to create a temporary rule stating a party or limited party participating in a hearing before the LCB may be represented by an authorized representative as provided by OAR 137-003-0555. Vote: 4 ayes; 0 nays.

6. PUBLIC COMMENT

Chair Triplett opened the meeting to public comment at 6:13 p.m.

David Sedlack stated he was listening to the discussion and was very impressed and appreciated the differences of opinion. The comment in the end of getting it right is accurate. He will write his comments and e-mail them to Mr. Snyder. He further stated he was impressed the Board entertained so many different options. Some seemed to be conclusive statements and yet conclusions aren't made. He addressed the following quotes made during the meeting:

"Short on funds, need more". Get more on more fines or higher fines. What's that got to do with function. Fining people to get funds. Fines won't stop violations. Fine them, have to collect and there is a problem. Impressed with Mr. Snyder's strategy to get into fold, great spirit to approach. Makes a lot of sense on one hand if board is trying to go down a certain road. But if one doesn't make any presumptions the road board should be going down sounded like "get them involved so they are indentured to board". Clear competency is subjective. If so, then how can the board objectively do anything about it. Asked why does consumer assume competency of licensees. Because that's what they've been told to assume. Why does the board assume responsibility, who asked the board to care? Consumers go to legislature and state a problem? Doubt it. Why do consumers hire licensees? It's the law and don't want to hire outlaws, they want a quality job and expect it from a professional. Outlaw's less likely to do professional job. Why does consumer expect the board to protect them. Board inferred they will (protect them) through advertising and other PR sorts of things. Mentioned looking out for people who cannot afford to hire lawyers. "don't know if it's the government's job to lookout for those people". Subjective thing. Where to draw the line?

Create more regulations than can be reliably enforced. Like to see good jobs. Thinks it's impossible. More regulations is creating more than can be enforced. Making playing field uneven. Giving outlaws advantage. Lawful people paying the fees and jumping through the hoops. Most middle sized companies cannot afford it. Do we need competency testing? Who is we? Consumer ask for it? Competency is no guarantee of quality. Unlicensed person might do great job and licensee might do poor job. No guarantee of quality or competency. Can't test for it.

Educate people, 20 hours of continuing education and they will know more things, but the likelihood of the things they learn they can apply to any given day is a chance in 10. It's like establishing a state school system to require school forever, but not give consumer assurance that person knows more about "that valve".

Competition from licensee or unlicensed person. Anything to do with purpose of board to decide? Less competent people to become licensed. That means more incompetent licensed competition. More competitive. Consumer wants more competition and quality. Market driven thing. Not a regulated thing.

What requires competency? Some things do and some don't. Create another set of regulations to determine if they are doing something that requires competency. Identify when doing what to see if competency is required.

Health safety and welfare – what board is given to regulate. To be as limited as possible. Can design some things that need engineering and/or permits. Most part, just gardeners. Backflow does require health safety and welfare. Some things require certification. Emphasize backflow test because is public hazard issue. Too much fertilizer on a bush is not a health, safety and welfare issue.

All these things that are outside that arena are (for) trade associations that (to) have the opportunity to capitalize on. Encourage people to do so. He will be working on ways to highlight the professionalism that he has by the credentials he has and looking for peers and training each other. OLCA does those things. Thinks it needs beefed up. If public says can hire someone off the street and not know it, and OLCA advertises training, people will be more interested in hiring OLCA members. Force him to join OLCA or start another association. Feeds into the continuing education basis. No competency testing, no justification for continuing education.

Peter Padilla, Padilla farms

Would like to congratulate the board. Periodically attended some meetings and appreciates the discussion. Thinks it reflect back on first part of meeting, possibly some of those things could be moved aside in great force by what was talked about towards the end of the meeting and direction of change. If change is for a more simplified form, he applauds the board for being willing to have that as an option. To not think landscape contracting businesses or those wanting to enter are going to be rolled over in the process and develop businesses to sustain families, live in communities, work with neighbors.

Heard positive things. Wide open, on the table. Appreciate door being open to get information out statewide. Agrees with that aspect of consumer protection where the business has the ability to become licensed. Areas of competency, correcting work that's been done by licensed contractor is something we all see. Correcting work by unlicensed is something we face. Competency is placed back into the industry. Opens up an avenue for not only OLCA but promotes establishment of a few more viable landscape associations that do have different emphases. Gives them the ability to educate, test and work at the competency of those who become members of that association. Have the ability to advertise and promote to consumer. Consumer gets choice and the industry is directed. Business needs to be licensed.

Board could look at promoting businesses that promote business competency. Applauds board, pleasure listening. As far as legislature acting and creating laws and who was responsible – legislature doesn't come up with this on its own. Board or association or an individual presents it. Process is out there and laws don't get changed unless someone pushes it.

Chair Triplett closed public comment at 6:32 p.m.

7. ADJOURNMENT AND NEXT MEETING SCHEDULE

Moved by Gascoyne and seconded to adjourn the meeting.

The meeting adjourned at 7:36 p.m. The next meeting of the Landscape Contractors Board will be March 6, 2008 by conference call.

Respectfully Submitted,

Kim Gladwill-Rowley
Program Manager