

LANDSCAPE CONTRACTORS BOARD
Minutes of the December 14, 2007
Board Meeting
Roth's IGA, Salem, Oregon

Please note that the minutes will not be approved until the Board meets on January 18, 2008.

PRESENT

Board Members

Matthew Triplett, Chair
Marty Gascoyne, Vice-Chair
Steven Carper
Richard Hollenbeck
Joe Lymp
Lisa Walter Sedlacek

Staff

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

Others

Joanna Tucker-Davis, Assistant
Attorney General
Tom Hurt, Ewing Irrigation & Mid-
Valley Landscape
Ben Cunningham, Edens Image
Landscape
Judi Ranton, Portland Water Bureau
Martin Venegas
Esequiel Robles
Dan Fahndrich

EXCUSED

Maia Holliday

1. PROCEDURAL

A. Call to Order

The meeting was called to order at 8:30 a.m.

B. Approval of Agenda and Order of Business

The agenda was amended to accommodate the rule hearing and public comment. Deliberation of the rules was moved to 12:30 pm. Item 2.B. was placed under Item 7 – Budget Discussion.

Board Action: Moved by Hollenbeck and seconded to approve the agenda.
Vote 5 ayes; 0 nays.

C. Approval of Minutes

1. September 21, 2007 Work Session Minutes.

The Board reviewed the September 21, 2007 minutes.

Board Action: Moved by Gascoyne and seconded to approve the minutes of the September 21, 2007 minutes as submitted. Vote 5 ayes; 0 nays.

2. November 16, 2007 Board Meeting Minutes

The Board reviewed the November 16, 2007 minutes.

Board Action: Moved by Gascoyne and seconded to approve the minutes of the November 16, 2007 minutes as submitted.

Add Lisa Walter Sedlacek to agenda and remove Ron Overstreet.

Amended Board Action: Moved by Gascoyne and seconded to amend the motion to approve the minutes of the November 16, 2007 minutes with the above correction. 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 reported the Independent Contractor Steering Committee met and discussed re-defining the role of the Steering Committee. One of the issues the committee is facing is the enforcement of the independent contractor statute jointly amongst all agencies involved. This requires the cooperation between the Department of Revenue, Employment Division, Workers Compensation Division, Building Codes, Construction Contractors Board and the Landscape Contractors Board. LCB does not have a privileged relationship in terms of obtaining information from the other agencies. The LCB information is transparent and open to the public and the other agencies. To resolve this issue it may need to go back to the legislature or require interagency agreements. This type of discussion has never taken place before between the agencies. The Department of Justice may need to become involved and this cost will be shared amongst the agencies.

Mr. Snyder reported that there is a Green Conference Seminar in Bend in February 2008. This conference was very successful last year and they have asked Mr. Snyder to participate in a "Tag Keynote Speech". He also reported that the presentation at the OLCA Expo was well attended.

The office has changed to a new payroll service out of Salem and that contact person has visited the LCB office several times and has been extremely connected to the staff.

B. 2007-2009 Financial Report

This item was moved and discussed under Item 7.

3. ADMINISTRATIVE RULES

A. Rule Hearing scheduled at 9:00 a.m.

Chair Triplett made an announcement ten (10) minutes prior to the scheduled rule hearing regarding the hearing topic and procedures.

Chair Triplett opened the rule hearing at 9:00 a.m.

There was no one present that wished to give public comment.

Chair Triplett closed the rule hearing at 9:01 a.m.

Board Action: Moved by Gascoyne and seconded to approve the amendment to 808-001-0020, 808-003-0130 and 808-005-0020 as submitted. Vote 5 ayes; 0 nays.

B. Proposed Rule Amendments

Chair Triplett opened the meeting to public comment at 9:45 a.m.

Ben Cunningham, Eden's Image Landscape.

All Phase landscape license just this year. Mr. Cunningham wanted to know what provision there will be for landscapers who are completely licensed, bonded, insured, no violations, etc in regards to the continuing education requirements. Since provisions have been made for businesses to employ a licensed contractor maybe the same could apply towards continuing education credits. No complaints or no action against a business could possibly apply towards education credits. The Board thanked Mr. Cunningham for his appearance.

Tom Hurt, licensed landscape contractor for Ewing Irrigation.

Mr. Hurt stated he is here to discuss the continuing education. Personally as a licensee he thinks it is awesome. As a distributor they feel strong about education. They offer free and "for-cost" education and wondered how a distributor can get courses accredited. Mr. Hurt believes that longevity in business, claim-free companies and an allowance for a contractor that has provided professional, excellent service to the community should be applied toward continuing education credits, but to also include continuing education; not a free "wave of the wand". Mr. Hurt stated he applauds the Board and everyone involved in changing the title names as it is a pet peeve of his due to the fact landscape contractors are not considered a true trade, but gardeners. Framers are a trade and they only need to take an open book test and build a home. But in order to construct and plant requires an eight hour test; not open book. Everything that can be done in regards to education in projecting an image as a true tradesman is applauded.

Judy Ranton, Portland Water Bureau.

Ms. Ranton stated she has been extremely active in following the continuing education rules. Many landscapers and water providers manage the same resource: water. She stated that she understands longevity and lack of customer complaints are important to landscapers, but customers have no clue about best practice management and do not know if they are getting the best service unless there is a problem. Irrigation technologies and best management practices for soils and plants are constantly changing. Anyone in the industry needs the continuing education and needs to understand about the resources they are managing, including pollution prevention. She further stated they have courses available now and have been available for years that are free and given in February, March, October and November. They are extremely aware of timelines for landscape contractors. The only comment to proposed rules is to allow electronic submission of courses for approval.

Chair Triplett closed the public comment period at 9:57 a.m. and announced the board will be deliberating on the rules this afternoon at 12:30 p.m.

4. PROGRAM REPORTS

A. Examination Report

Board members reviewed the exam statistics through November 2007. At 2:45 p.m. today no more information will be input into the GL Suite database for that day. The download will be shipped overnight and downloaded into the new database. Beginning next week both systems will be used until the end of the year. If the new system is working properly, GL Suite will no longer be used. A new contract has

been signed with Q-Test and is now a flat fee. This contract also includes two new computers.

B. License Count

Board members reviewed the current license count. As of November 30, 2007 there are 1611 actively licensed individual landscape contractors and 1250 actively licensed landscape businesses.

C. Exam Committee Report/Hollenbeck

Mr. Hollenbeck reported the Exam Committee began working on the manual for the owner/managing employee testing. The sections were set and specific sections were assigned to members to begin writing questions. A new member was added to the Exam Committee, Christine Hollenbeck. They reviewed the manual Mr. Snyder prepared and one of the items required for the examination will be a manual for the course providers. Mr. Hollenbeck is cross-checking the existing questions to the manual to make sure they are included in the test. The existing laws and rules examination is being matched to the task analysis. Most of the test material is to be done by the January 2008 meeting and in place by March 2008.

D. Enforcement

Board members reviewed a listing of final actions taken from October 1, 2007 through November 30, 2007. There were 97 cases with final actions taken. The board reviewed the summary sheet that shows a monthly summary of site checks and enforcements performed in the different counties for September and October. The board also reviewed the written report submitted by Ken Roth, Lead Investigator.

The definition of direct supervision was discussed. The statute is clear on direct supervision; however the rule definition has caused an ambiguity and will be discussed again at the January 2008 work session. Ms. Walter Sedlacek asked if the rules that are being created are creating more tension on the job sites. Mr. Roth stated he believes it is because the rules are now being enforced by the LCB and there are more investigators. There is greater exposure and more earnest in what the LCB is doing. This board has never had an enforcement arm as it does today. In instances where the investigators are aware of potential violence they need to take support with them or contact the police in order to be safe. All investigators have law enforcement training, except Mr. Roth. Mr. Roth reported the investigators conduct a lot of site checks where the licensed business has everything in place and are extremely proud and passionate about their work. Mr. Roth reported there are specific individuals who are required to be on the payroll every hour landscape work is being performed. The unlicensed individuals performing the work do not know who the licensed supervisor is or how to get in touch with him/her. The Assistant Attorney General was involved in interpreting what went on in the field and how the rules and statutes were interpreted for one specific case where the board took action in this area.

E. Claims (Dispute Resolution)

There were 22 claims opened and 16 claims closed from October 1, 2007 through November 30, 2007. The Board may wish to discuss mediation prior to the filing of a

claim at the January 2008 work session. The Board reviewed the written report submitted by Ken Roth, LCB Mediator. The board would like to discuss the bonding issues at the January 2008 work session. The few businesses that have had a lot of claims filed recently should not have an influence on all the other licensed businesses. Overall, this industry is operating well.

F. Education

Mr. Snyder reported the manual for the owner/managing employee is coming along. The Governor's Report is being finalized. The trade shows are continuing to be a good thing and he is pleased with the educational opportunities that are there.

5. CLAIMS EXCEPTIONS

Assistant Attorney General, Joanna Tucker Davis reviewed the contested case process and consideration of exceptions with the Board. In the claim process a consumer makes a complaint, the agency issues a proposed order and either party can request a hearing. If a hearing is requested it is referred to the Office of Administrative Hearings. The Administrative Law Judge (ALJ) is impartial and does not work for the agency. Their job is to hear the facts and make a decision and issue a proposed order. If one of the parties disagrees, they can come before the board and the board reviews the case to determine if the ALJ's order is correct.

The board decides based only on the record as it exists. New evidence cannot be taken into consideration. The board does have the ability to refer it back to the ALJ with an explanation to the ALJ for further hearing if the board believes there was not enough evidence. A new hearing is held and a new order is issued.

Another option is to accept the ALJ's proposed order as is or modify the order. If the board determines the historical facts need amending, there needs to be a preponderance of evidence. If the board determines the analysis needs amending, the board needs to explain why. The board can agree with the facts, but disagree with the analysis with an explanation in the Final Order. The purpose of the exceptions is for the parties to explain why the board should or should not modify the order. The parties tell why they think the proposed order is right or wrong. The claimant has the burden of proof. Did they prove it? Did the person who filed the exceptions show the board what was wrong?

Chair Triplett closed the meeting to the public and entered into Executive Session at 11:00 a.m. to deliberate privately on case #7400-105 under the authority of ORS 192.602(1).

Chair Triplett returned to public session at 11:43 a.m.

Board Action: Moved by Lymp and seconded to affirm the Administrative Law Judge's decision based on the evidence given. Vote: 5 ayes; 0 naves.

6. DELIBERATION AND ACTION ON RULES IN 3(B)

The Board

- i. Notification of Adverse Judgments

- Board Action:** Moved by Gascoyne and seconded to approve the amendments to 808-003-0015 and 808-003-0230 as submitted. Vote 5 ayes, 0 nays.
- ii. Claims
Board Action: Moved by Gascoyne and seconded to adopt the amendments to 808-002-0590, 808-002-0495, 808-002-0220, 808-002-0325, 808-004-0250, 808-004-0340 and 808-004-0530 as submitted. Vote 5 ayes, 0 nays.
- iii. Probationary License
Board Action: Moved by Gascoyne and seconded to adopt the amendments as submitted for 808-003-0015, 808-003-0018, 808-003-0035, 808-003-0040, 808-003-0045, 808-003-0060 including the suggested amendments proposed separately as submitted. Gascoyne requested to delete 808-003-0018 in his amendment. Vote 5 ayes, 0 nays.
- iv. Exam for Managing Employee or Owner
Board Action: Moved by Gascoyne and seconded to adopt the proposed rule amendments to 808-002-0625, 808-030-0010, 808-030-0020, 808-030-0030, 808-030-0040, 808-030-0050, 808-030-0060, 808-030-0070. Vote 5 ayes, 0 nays.
- v. Continuing Education
The board discussed the random sample audit. There was concern that some licensees may not take the classes and wait until they are audited. Record keeping may become an issue. If staff is requested to obtain these records, another staff person will be needed. Record keeping needs to be placed on the course provider and the licensee. Community service must be industry related. This needs to be general, flexible and not onerous. Oregon State University and several community colleges have contacted the agency about developing E-courses to help meet the CEH requirements.
Board Action: Moved by Gascoyne and seconded to adopt the proposed rule amendments to 808-040-0010, 808-040-0020, 808-040-0025, 808-040-0030, 808-040-0040, 808-040-0050, 808-040-0060, 808-040-0070, 808-040-0080.

The board discussed the continuing education units versus continuing education hours. The statutes require continuing education hours. Units have a definition issue, i.e. three credit hours could equal one unit. Continuing education hours is defined as an hour of credit. It was determined that continuing education hours should remain.

The board discussed reducing the required number of education hours from 20 hours every two years to 8 hours every year, which is one day a year. Also a two-year license for individuals was discussed. It was determined to keep 20 hours every other year and keep the individual licenses to one year. The approval of courses needs to be delegated to the administrator.

The Board believes the continuing education requirement will be disruptive for the LCB office staff for a period of time. There will also be an increase in paperwork going through the office.

Mr. Roth stated it appears the honor system is taken in regards to the bond amount, but not in regards to the continuing education. The bond amounts are being looked at during site checks. The bond amount issue needs to be discussed at the January 2008 work session.

Amendment to Motion: Moved by Gascoyne and seconded to amend his motion to include 808-040-00250 the deletion of paragraph 5 sub paragraph (h), to correct in 808-040-0040 paragraph 1 reworded to read "technical subjects, subjects that may qualify for technical subjects include, but are not limited to: ", and the wording of paragraph 3 sub paragraph (e) change to read : "serving as a volunteer on landscape related boards and commissions or designated committees" and in 808-040-0050 paragraph 1 sub paragraph (a) change to read "to be received on a form provided by the board at least 30 calendars days prior to the presentation..."

Vote to adopt amendment to motion: 5 ayes, 0 nays.

Vote to adopt the amended motion: 5 ayes, 0 nays.

7. BUDGET DISCUSSION

The board reviewed the financial report for 2007-2009 biennium. The board would like a report that shows period to date in comparison to last year and last month.

At this point the administrator is transferring money from the savings into the checking account on a monthly basis. The board is hopeful the civil penalties created by the increased enforcement will balance it out in the near future.

Mr. Snyder reported that each employee categorizes their time spent in the different programs and he has begun to put vacation time and sick time as a percentage of classifications. They were being reported under administrative time.

The board reviewed a profit & loss statement for the enforcement program only.

The projection was to transfer \$10,000 per month from savings and it has taken \$70,000 from savings for 5 months. The negative cash flow was expected to see how the program works. This has put pressure on the enforcement team. The staff is currently reviewing the civil penalty assessments.

After one year (June 30, 2008) the budget will be re-evaluated. One option is to increase fees to cover the costs of enforcements. If enforcement is being conducted, the industry may be more eager to pay an increased licensing fee. Kicker checks and tax returns are held and given to the LCB by the Department of Revenue when cases are referred to them. Mr. Carper stated possibly the unpaid civil penalties could be publicized with material suppliers or even on the board's website.

Mr. Snyder reported at the last meeting the board requested information regarding the number of settlement agreements and an excel spreadsheet was created. The board reviewed this spreadsheet. Prior to semi-independency status most of the LCB enforcements were not being performed and 20% of any civil penalties collected were placed in the general fund. Under semi-independence 100% of the civil penalties collected are kept with the LCB.

Mr. Snyder believes licensing is an important function. To bring people into compliance is a valuable step and getting licensed is being in compliance. If only money is collected, they will violate the laws again. If they obtain a license, there is consumer protection.

Mr. Snyder reported the board chair does some traveling. There is no budgeted line item for board chair travel and there is no policy in place. He inquired whether or not the board wished to include a specific budget amount for the board to travel and should it be approved. The board believes it is a reasonable item and should discuss it at the January 2008 work session.

Mr. Snyder distributed a copy of the 2007-2009 Management Compensation Package. The LCB has determined to follow the state payroll policies. During 2003-2005 state employee salaries were frozen. During the 2005-2007 biennium they were unfrozen. In 2007-2009 a new contract was signed and the Governor sent out a statement to bring state employee salaries back to where they were supposed to be and gave a 3% increase to all employees. Also, managers received an additional 3% and an agency head received a 10% increase. All LCB staff were given increases, except for the agency head 10% increase which the administrator would not do without board approval. If the LCB diverts from DAS policies, a new policy needs to be written. This will be discussed at the January 2008 work session.

8. LICENSING WORK SESSION

This topic was deferred to the January 2008 work session.

8. NEW BUSINESS

A. Irrigation Maintenance Jurisdiction

Chair Triplett closed the meeting to the public and entered into Executive Session at 2:30 p.m. to deliberate privately on a memo supplied by Assistant Attorney General, Joanna Tucker Davis under the authority of ORS 192.660(2)(f).

Chair Triplett returned to public session at 3:10 p.m.

B. Review Financial Policies

Mr. Snyder reported the semi-independent agencies can adopt policies and do things differently than other state agencies. The Board adopted policies in the past and the staff has recently reviewed some of them and have requested some amendments.

Board Action: Moved by Gascoyne and seconded to amend financial Policy C. Payable Processing Approval Authority item 1 to read "any approved, invoice payable up to \$5000 of his/her own merit". Vote 5 ayes; 0 nays.

Board Action: Moved by Hollenbeck and seconded to adopt the Financial Policy as revised December 14, 2007. Vote 5 ayes; 0 nays.

Chair Triplett opened the meeting to public comment.

Esequiel Robles, Licensee

Mr. Robles stated he is concerned about the unlicensed individuals performing landscape work. When they get caught and they get a fine and the fine becomes final, it is only \$50 or \$100. He stated it is difficult to understand when he is paying all his license fees, workers

compensation and money to perform the job. The unlicensed don't pay anything and can afford to undercut legitimate businesses. He believes that if the unlicensed receive a fine, they should pay the fine and pay the consequences. It is hard for small businesses to make a living.

Chair Triplett closed the public comment of the meeting.

9. PUBLIC COMMENT

Chair Triplett opened the meeting to public comment at 2:00 p.m. There was no public present at that time. Chair Triplett closed the public comment period at 2:00 p.m.

11. ADJOURNMENT AND NEXT MEETING SCHEDULE

The meeting adjourned at 4:05 p.m. The next meeting of the Landscape Contractors Board will be meeting in January 2008 in Florence, Oregon.

Respectfully Submitted,

Kim Gladwill-Rowley
Program Manager