

LANDSCAPE CONTRACTORS BOARD
Minutes of the May 16, 2014
Board Meeting
930 Chemawa Road NE, Room C/McNary
Keizer, Oregon

PRESENT

Board Members

John Gawlista, Chair
Annie Lee, Vice Chair
William Bumgardner
Larry Hoekman
Molly Dunston
Larry Thomas
Christine Hollenbeck

Others

Katharine Lozano, Assistant Attorney
General
Wes Butler
Ben Cunningham
Andre Bego
Robert Rambo

Staff

Shelley Sneed, Administrator
Kim Gladwill-Rowley, Program Manager
Michael Hintz, Investigator
Jerri Jones, Licensing Specialist

EXCUSED

None

1. PROCEDURAL

A. Call to Order

The meeting was called to order at 8:30 am by the Chair.

B. Approval of Agenda and Order of Business

Board Action: Moved by Ms. Lee and seconded to approve the May 16, 2014 agenda. Vote: 7-0.

C. Approval of March 21, 2014 Minutes

Board Action: Moved by Mr. Bumgardner and seconded to approve the March 21, 2014 minutes with the minor edits. Vote: 7-0.

2. Administrator's Report

A. Office Update

The Board reviewed Ms. Sneed's report, which is attached and made a permanent part of these minutes. Ms. Sneed discussed that the office has been busier overall, with the phones really picking up. Most calls are regarding licensing, but there has also been quite a bit of enforcement calls. Ms. Sneed discussed attendance at PSI a conference in Portland.

Ms. Sneed discussed purchasing/creating a new database system, the options available and costs. LCB could possibly co-develop a system with other agencies to share development costs. Another option is a one size fits all approach; where the LCB would only have access to our information, but again we could share in the costs for development as well as the system. LCB staff are meeting with DAS and other semi independent agencies to discuss options in database design-the group may be able to use a phased in option.

LCB staff also met with DAS regarding online renewal payment and online license renewal processing. A licensee would be able to go online to pay renewals, LCB staff would still have to input this information into the database, but the process for payment would be easily accessible for licensees. In addition, state agencies have the ability to charge back the convenience fee to the licensee; this is something we would need to check into.

The Landscape Architects Board is prepared to have a small informal meeting on June 11th or July 10th. Ms Sneed will provide them with the talking points developed by the LCB. Potentially both these dates work with the board, the board may need to have some members on conference call.

B. 2013-2015 Financial Report/Approval

The Board reviewed the financial statements as of May 1, 2014. \$20,000 was transferred from checking into savings between March and April. Currently the LCB has enough money to cover payroll with an additional \$22,000 to pay for the Landscape Construction exam books. Our current assets increased by \$25,000, but our payables increased nearly \$5,000.

The Profit & Loss Previous Year Comparison report shows the agency's total income is \$11,207 more than last year at this time. Applications/Examinations income is up more than \$12,000. Licensing fees are up nearly \$3,000. Civil penalties are nearly 9% less than last year.

Employee costs overall are 11% less than last year. Since the agency has cut one full time position and has several new employees at lower pay grades, our overall employee costs are significantly lower than last year.

Exam resource material costs are currently less than last year, but Ms Sneed stated she had placed a \$22,000 order due to an upcoming price increase. The expenditure was approved at the previous board meeting.

Postage costs are higher than last year, but the agency spent extra money to publicize the planting license, which accounts for the bulk of the extra expense.

Investigations line items are less than last year, but we are seeing an upsurge in that activity. We currently have 21 contract investigators around the state; which is the most we've ever had. Mr. Hintz has been recruiting and helping them get started. This cost is expected to increase.

The office supplies line item is over budget. Some of that is due to changing out our entire individual license files. We have cleaned out all the old files removing unnecessary information and putting info in new folders with labels. Trade show expenses are higher than last year due to the fact that we didn't do many trade shows last year.

The computer expenses are higher than last year, due to the two new desk tops and server that were purchased. We also had some reconfiguring for the planting license and then we have regular, on-going database work. Ms. Sneed discussed that we are keeping an eye on Mr. Hintz's computer.

The financial review is under the audit line item. That's a once a biennium expense and the \$7,004 reflects the entire expense for that function. Overall the agency has a net income of \$12,713 for the year to date, as opposed to a net loss of \$35,487 last year. That's nearly \$50,000 better than last year.

Looking at the P & L budget to actual report, the agency is \$17,500 over budget for income. Most of that improvement is due to increased application and exam resource sales—both signs of future licensure. Licensing fees are also \$10,441 more than budget for the period. Unfortunately, civil penalties are nearly \$17,000 less than budgeted for the period.

The agency's hearing officer panel costs are nearly \$2,500 more than budgeted, but our AAG advice line item is \$2,000 less than budgeted—they offset each other. The board meeting expenses are \$5,500 less than budgeted.

Overall the agency's net income is \$81,000 better than originally budgeted. Ms. Sneed will be working on a budget amendment for the July board meeting. Ms. Sneed reported the biennial bills that were paid the first part of the biennium will not be due the second part of the biennium.

Board Action: Moved by Mr. Thomas and carried to approve the unreconciled financial report. Vote 7-0.

C. Proposed Staff Changes to Budget

At the November board meeting the board approved aligning LCB staff compensation with the DAS compensation plan. There was a memo sent out September 10, 2013 by DAS that talked about changes to compensation and benefits for non-union employees.

The memo outlined a 1.5% Cost of Living Adjustment (COLA) as of 12/1/13 and a 2% COLA as of 12/1/14 (unless it is adjusted earlier due to health care cost savings).

When the November request to the LCB board was made, the COLAs were not taken into consideration. The November changes were based on the old pay scales. If the board wants to keep staff in line with other state employees for compensation and benefits, there is some retroactive pay due to employees due to the December 1, 2013 COLA changes. The total cost of the retroactive pay, without taxes, is \$1,375. The total monthly change in salaries is \$289.

Ms. Sneed's recommendation is that the board consider this retroactive pay for current staff based on the commitment to following the DAS compensation structure.

Board Action: Moved by Mr. Bumgardner and carried to bring the staff into alignment with state retroactive to December 1, 2013. Vote 7-0.

3. PROGRAM REPORTS

A. Examination Report

The Board reviewed the examination statistics from 2003 through April 2014. The number of tests taken in March & April 2014 is higher than the same months last year. Discussion by board regarding pass rates; test stress was discussed as a factor, also, the possibility that being open book has caused applicants to not prepare as well. Ms. Gladwill-Rowley discussed that there have been changes and that she will note what specific changes were made on the next examination statistics.

Section D has been eliminated from the examination process and was agreed that section D would no longer be included in the packet.

B. License Count

The Board reviewed the license counts as of May 1, 2014. The number of licenses has remained steady for the last two years.

Ms. Gladwill-Rowley discussed renewals and that we now track these numbers which has allowed the LCB staff to see the trends and that March through July is the busy time for processing renewals.

C. Enforcement

The board reviewed case 14-03-052.

Request to omit name from the enforcement section of the newsletter, but not from website search. If a consumer can't find information about a business on the website they can still call the office to check on enforcement issues or concerns.

Ms. Sneed commented that we strive to be consistent. By allowing this we have then given someone a benefit and those that didn't ask they are still listed on the website. If we are going to allow this we should make this available to all.

Ms. Hollenbeck stated that this information is still available to the customer and wonders what the benefit is of having this information listed in more than one place.

Ms. Gladwill-Rowley stated that for the unlicensed this would be the only place where the information could be found on the website. The board discussed offering this elimination for licensed businesses; but not unlicensed. In the past it was part of a settlement. This is only listed on the website until the next listing goes up; approximately two months.

Ms. Dunston doesn't feel that by including the info on the website that it would tarnish the name, since the infraction is so minor. Ms. Hollenbeck wonders if this could be added to their response form as another tool to encourage settlement. The Board agreed this should be made available to all respondent's. The consensus was made to honor the request.

D. Claims (Dispute Resolution)

The board reviewed a listing of closed claims from March 1, 2014 through April 30, 2014. There were five claims closed.

E. Education

The Board reviewed the CEH audit statistics from January 1, 2010 through the present.

Ms. Sneed – crises calls for CEH are mostly non existent. She rarely receives calls for last minute CEH needs and that mostly the calls are for CEH due in a couple of weeks. Doesn't seem to be as cumbersome as it has been in the past.

4. EXCEPTIONS FILED BY RESPONDENT (Case #13-08-252)

A. Training for Exception Process

Assistant Attorney, Katharine Lozano provided training for LCB regarding the exceptions process. She explained that the Administrative Law Judge (ALJ) hears both parties and creates a record and makes a proposed order. If the party does not think the ALJ did a good job they can file for exceptions with the Board. When it moves to the exception stage no more information can be submitted—the record was closed at the end of the hearing. Board can either affirm the proposed order by issuing a final order, or board can issue an amended proposed order if they also believe the ALJ is incorrect or an error was made.

The Board options are:

- Affirm the proposed order by issuing a final order
- Issuing an amended proposed order if also believe the ALJ is incorrect; or
- Remand the case back to ALJ to receive more evidence.

After a final order is issued, the respondent has the opportunity to file with the Oregon Court of Appeals.

B. Exceptions

Andre Bego, Artisan Landscaping Services

Mr. Bego testified that he had a hearing with an ALJ and is now at the board meeting to present his mitigating circumstances with this case. He believes the Board has discretionary powers to see the case through to the end.

Mr. Bego stated he is not making a denial regarding the advertising without a license, but wants to give information as to why the advertisement happened through a third party. One advertisement there was a laundry list of services including irrigation. He understands there is concern from the board regarding the business name including the word Landscaping. At the time the business held a CCB license and the majority of the work performed is regulated by CCB.

Mr. Bego further stated that he has worked extensively with Cindy Clark, but that she is not longer employed with the LCB. He had issues with bonding because he had to file bankruptcy for medical reasons. He could not obtain the LCB license from a financial standpoint because he had no money. Now credit and bonding is reasonable, so he now holds an LCB license, but admits he did not have one at the time of the advertisement.

Mr. Bego stated he is before the Board today to ask for a reduction in the fine. He further stated that he believes there is not enough work to support more licensees in the landscaping field.

Chair Gawlista moved the Board meeting out of public session at 10:23 a.m. All members of the public left the room.

Chair Gawlista moved the Board back into public session at 10:33 a.m. No decision was made out of public session.

The board believes a financial hardship is not a good reason to disregard the laws and rules.

Board Action: Moved by Mr. Thomas and carried to affirm the ALJ's proposed order. Vote 7-0

5. Public Comment

Chair Gawlista open the public comment session of the meeting. No one was present to speak. Chair Gawlista closed the public comment session of the meeting. The board asked the Administrator to tell Mr. Bego that they appreciate his financial concerns but need to uphold the law.

6. OLD BUSINESS

A. 2014 Strategic Plan

Staff will bring the to-do list from the plan and the board will touch bases on this at the next meeting.

B. Agriculture Exemption Rule Review

The Board's legal counsel, Katharine Lozano, stated that she checked into rules regarding agriculture exemptions. She didn't find anything hard line, or to adopt, but discussed a few ideas and recommended the following:

All Plants including but not limited to, trees, shrubs, vines or trees which have their situs of production on a farm or vineyard and are used by humans or animals as food and grown for commercial sale.

The Board directed staff to proceed through the rulemaking process.

Board directed staff to invite ODOT, BOLI and George Kral (who is involved in reforestation) to a future board meeting to discuss the work being done in right-away and reforestation.

The Board asked legal counsel to move forward with writing a rule for restoration after the next board meeting.

C. Landscape Work Group Update

Mr. Thomas stated he does not have any update or information to discuss. There is a group within OLCA that is working on a proposal. Ms Sneed reported at the last OLCA executive meeting. The talking points were given to Shelley, when the topic came up someone in the room asked that Ms. Sneed not be present, unaware she had the document. Talking points were developed by a group assigned by OLCA, but not agreed to yet by OLCA's executive committee. The discussion was late in their agenda. Ms. Sneed had not heard of any decision. The work group has a meeting scheduled the last week of May. Some of the topics on their agenda were:

- One license system
- Change in penalties for licensed vs. unlicensed
- Raising the bond to be the same as CCB

Chair Gawlista opened floor to Wess Butler

Wess Butler, in attendance, stated that he and his group are looking at deregulating the industry to a certain extent. They asked the board to consider process from beginning and look at what is currently being discussed. Look at the big picture, what are we discussing, are we providing more information to consumers, so that they are better informed? Consumers need to get smarter. He is looking forward to the work session. Wess Butler realizes that many may disagree. We need to focus on free enterprise not more regulation. Mr. Butler is here for his children and his grandchildren. He does not expect any benefit for himself.

Mr. Thomas– knows OLCA is working on aligning points. Are the people that Mr. Butler is working with working on preparing a packet of information?

Wess Butler stated that they are working on it.

Ms. Lee asked the name of their group. Ms. Sneed stated that she believes it is Oregon Landscaping Alliance and that they are registered with the Secretary of State Business registry.

Ms. Sneed attended an OLCA chapter meeting in Salem. One of the topics that came up was the work group. Ms. Sneed stated that it is good to have OLCA but folks must also self represent. Different to have them as individuals talking to representatives, good to self represent in process. The personal phone calls and contacts made a difference when individuals came out with SB557.

D. Proposed Rule Amendment/Hearing held 3/25/14

The Board reviewed a proposed rule to further clarify the definition of “employee” and require admission or denial of each fact with a request for hearing on enforcement cases.

Board Action: Moved by Ms. Lee and carried to adopt OAR 808-009-0315 and amend OAR 808-002-0360 as presented. Vote 7-0.

7. NEW BUSINESS

A. New Proposed Rule Amendment (request to go through rulemaking process)

(Temporary Rules into Permanent Rules)

1. Clarifies that providing false information to the board is dishonest or fraudulent conduct (OAR 808-002-0330)

Ms. Gladwill-Rowley reported this rule has been filed as a temporary rule and needs to go through the rulemaking process to become final. The temporary rule is only in place until September 27, 2014. She further stated this will be filed to be retroactive back to January 1, 2014. The Board directed staff to go through rulemaking process.

2. Removes the free copy of the plant CD to an applicant (OAR 808-001-0020) The CD is available on the Board's website. The Board directed staff to go through rulemaking process.

(Proposed Amendment to Permanent Rules)

3. Removes the option for the CD Version of the Owner/Managing Employee Study Guide (OAR 808-001-0020)
The CD Version of the Owner/Managing Employee Study Guide is no longer available in the LCB office. The Board directed staff to go through rulemaking process.

B. Executive Session/Pursuant to ORS 192.660(2)(f)

Ms. Sneed introduced Robert Rambo (Bob) to board. She reported that legal counsel recommended Bob to assist in getting through a new process for enforcement cases and has been working with staff the past couple of weeks.

Mr. Rambo stated that when he attend the first meeting and heard what the issue was he wanted to put his heels into the ground on behalf of staff and the LCB. He stated he was impressed by the willingness of LCB staff to sculpture the new process that will have to go into effect. There is an obstacle, but we will go around it and build the base to address these issues.

Chair John Gawlista moved the meeting into executive session to hear advice from legal council at 11:35 am.

Chair John Gawlista moved the meeting out of executive session and back into public meting at 12:11 pm. No decisions were made in executive session.

The board reviewed a memorandum regarding staff's plan for changes to the enforcement program process. Ms. Sneed explained that the staff's role is to help keep the board on the right track. LCB staff wants to ensure that the board is clear as to what had happened in the past and to be aware that any changes will set precedent for the future.

Ms. Sneed reviewed the LCB Investigation Process Flow Chart with board. Legal counsel suggested that a matrix be developed that can help with the decision of what is clearly within the boards jurisdiction and what is not. Ms. Sneed agreed that she would work on that for the board. Legal counsel stated that this matrix should be used for minor and inconsequential work, CCB work and maintenance decisions.

Ms. Sneed reported that enforcement cases will be separated out into routine cases or complex cases and some may be moved around in the future. Routine cases will be opened and a Notice of Intent will be issued by staff. However, prior to a final order being issued, the board will review the case and make a decision. Complex cases will come before the board for a decision prior to staff

opening and issuing a Notice of Intent. The board will make decisions regarding whether the LCB has enough evidence to move forward on the case.

If the case requires an investigation, the information will be gathered and reported to the board. The board will review and make a decision if they want to move forward. The Board will also decide what type of action needs to be taken. Staff will use due diligence and confer with legal counsel to ensure that the information (case) is as complete as possible when submitted to the board.

Ms. Sneed reviewed the questions that will be answered prior to bringing a case to the board. Staff will get verification that the work being done falls under the jurisdiction of the LCB. The board will be responsible to decide if the issue is a violation or not.

The Board discussed the use of subpoenas. Legal counsel suggested using a subpoena server; not contract investigators. Staff or investigators may serve Notices of Intent.

The Board will receive an Investigation Summary form (overview) of every case on the consent agenda. The board will use this to get an understanding of the case. Ms. Sneed reviewed how the form will be used in future board meetings. The investigation summaries will be included in all board member packets.

Legal counsel reminded board members that that they should use the first few moments of board meeting to set the tone of the meeting and to lay out what the expectation will be regarding public comment. Staff will work on a document for the chair outlining this information. Mr. Thomas suggested this outline be laminated and put on the door so people coming and going understand the policy regarding when the opportunity for public comment will take place and how much time they will have.

Mr. Hintz reviewed with the Board the type of evidence usually seen for LCB enforcement cases. Criminal cases have to prove "beyond a reasonable doubt". LCB Enforcement cases are civil and only have to prove a "preponderance of evidence". This is the burden of proving that the allegation is true with only a 51% threshold. LCB can take anonymous information and hearsay to a hearing. The more information the agency has the more likely that they can show what actually happened.

The board does not take criminal action. Staff provide information to district attorneys, but it is not be LCB's case. It is the district attorney's charge to pursue the case, if they so choose to.

In gathering evidence investigators get as much information as possible, i.e. who, what, when and where. This is the beginning of an investigation. Investigators gather as much information from those reporting the alleged violation, take photos, gather license plate information and ask questions of the workers,

homeowner, and neighbors. Basically getting the information about what type of work is being done and who is doing it. Investigators will also check for permits, such as backflow and check with material suppliers.

Ms. Sneed reviewed the LCB Civil Penalties Matrix with board. This is information about what is being used to decide penalties for cases. She also reviewed the Enforcement File Checklist with the board. Ms. Sneed reviewed the information that is available in the office and on the website regarding advertising, what is landscape maintenance, the basic steps to becoming licensed and consumer information. These are all educational pieces and are sent out with notices to unlicensed individuals.

C. Board Review of Investigated Cases

1. Advertising without a License

Turf-N-Oregon

This advertisement is for “Artificial Grass & Putting Greens”

Staff will bring all research items about artificial turf being used to create patios, and walkways. This will be discussed at a future meeting.

Epperson Putting Greens

This advertisement is for “Putting Greens and Artificial Lawns”

Staff will bring all research items about artificial turf being used to create patios, and walkways. This will be discussed at a future meeting.

Michael Flaherty, Veridian Designs

This advertisement is for landscape design work. This business held a prior LCB license, but the license has expired. The Board discussed “consultation” and what that may mean. This advertisement does not state “installation”. No action will be taken.

Portland Edible Gardens

This advertisement offers tree planting from an unlicensed business, which is a violation. The raised flower beds also advertised could be a violation, depending if nursery stock is installed in them. If they are planting trees, berries or nursery stock they are in violation. The Board believes this is a violation for the planting of trees, and would also like staff to let them know that if they are planting nursery stock, vines or shrubs they would be in violation and would need to be licensed.

Mr. Thomas stated that the board may want to review the statue definition of nursery stock and write a new one.

Board Action: Moved by Mr. Thomas and carried to issue a Notice of Violation for advertising the planting of trees without a license and let them know of the other concerns. Vote: 7-0.

All Seasons Home & Yard Care LLC

Staff reported this case was opened for advertising without a license. The Respondent requested a hearing. The advertisement was for sod installation services.

Board Action: Moved by Ms. Hollenbeck and carried to direct the staff to move forward with the hearing process. Vote: 7-0

2. Failure to Pay on a Claim

Respondent failed to pay in full an amount owed to a claimant under a final order of the board. An order for payment became final on February 3, 2014. Respondent's bond paid \$10,000; leaving \$2,500 plus interest and attorney fees. To date, no payment arrangements have been made. Ms. Dunston recused herself due to a potential conflict.

Board Action: Moved by Mr. Hoekman and carried to Issue a final order to revoke the business license. Vote 6-0 (Ms. Dunston recused)

3. Operating & Advertising without a License

Respondent installed a driveway, walkway and landscape edging and advertised using the name "Jolley Landscaping and Property Maintenance".

Board Action: Moved by Ms Lee and carried to Issue a Notice of Civil Penalty for operating and advertising. Vote 7-0.

4. Failure to pay court judgment

On April 28, 2011, the Deschutes County Circuit Court issued a General Judgment showing that respondent owed a landscape contracting business debt. Respondent has not paid this debt. Ms Gladwill-Rowley received an e-mail from the collection agency that they have come to a payment arrangement. The payment arrangement will be brought to a future board meeting to determine if respondent may have a license while payment are being made.

D. Claims Filed with Both LCB when Licensee also has a CCB License

Legal counsel stated the LCB cannot accept claims filed against an LCB licensee that is also licensed with the CCB. An LCB exemption states that the landscaping statutes do not apply to CCB licensees when installing, fences, decks, arbors, driveways, walkways or retaining walls. This means the LCB claims process does not apply to those licensees as well. If the work performed was strictly LCB work and not one of those items listed above, the LCB could accept and process a claim. Staff was directed to bring this issue to the Landscape Work Group.

Mr. Thomas thanked Mr. Rambo for his participation, input and attendance at this meeting.

8. ADJOURNMENT AND NEXT MEETING SCHEDULE

Board Action: Moved by Ms. Lee and carried to adjourn the meeting. Vote: 7-0. The meeting adjourned at 307 p.m. The next meeting of the Landscape Contractors Board will be June 19, 2014 by conference call. The following meeting will be held on July 18, 2014 in Salem.

Respectfully Submitted,

Kim Gladwill-Rowley
Program Manager

Jerri Jones
Licensing Specialist