

LANDSCAPE CONTRACTORS BOARD
Minutes of the March 20, 2015
Board Meeting
10685 SW Greenburg Road
Tigard, Oregon

PRESENT

Board Members

Molly Dunston, Chair
William Bumgardner, Vice Chair
John Gawlista
Larry Hoekman
Christine Hollenbeck
Loren Radford

Staff

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

Excused

Annie Lee

Guests

Katharine Lozano, Assistant Attorney
General (arrived at 9:25 am)
Larry Thomas
Tom Vargas
Skye Landauer
Martyn Dunn
Masa Mizuno
Estuardo Donis
Marshall King
Rudy Trujillo
Spencer Putman
Vandehey
Gary Tillman
Edward Anderson
Mike Snyder
Jeff Stevenson

1. PROCEDURAL

A. Call to Order

The meeting was called to order at 8:32 am by Ms. Dunston, Chair.

B. Approval of Agenda and Order of Business

Ms. Sneed added two agenda items under Administrator Search.

Board Action

Moved by Mr. Gawlista and seconded to approve the March 20, 2015 agenda.
Vote: 6-0

C. Approval of Minutes

i. January 15, 2015 Minutes

Board Action

Moved by Mr. Gawlista and seconded to approve the January, 15, 2015 minutes.
Vote: 6-0.

ii. January 16, 2015 Minutes

Board Action

Moved by Ms. Hollenbeck and seconded to approve the January, 16, 2015 minutes.
Vote: 6-0

D. Approval of Amended Minutes

i. July 18, 2014

Board Action

Moved by Mr. Gawlista and seconded to approve the amendment to the July 18, 2014 amended minutes.

Vote: 6-0

ii. September 19, 2014

Board Action

Moved by Ms. Hollenbeck and seconded to approve the amendment to the September 19, 2014 amended minutes.

Vote: 6-0

iii. November 21, 2014

Board Action

Moved by Mr. Gawlista and seconded to approve the amendment to the November 21, 2014 amended minutes.

Vote: 6-0

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 stated that Larry Thomas would be joining the meeting at noon to discuss the administrator search. Ms. Lozano would be joining at 9:30 am.

Ms. Sneed reported that Ms. Dunston, Mr. Bumgardner and Mr. Radford had a conversation regarding the administrator recruitment. The attorneys reviewed the contract with Mr. Thomas and determined he is not an independent contractor; he is now an employee of the board as part time, temporary. Ms. Sneed was ill the day the hearing for Senate Bill 580, but Mr. Thomas testified on behalf of the board.

B. 2013-2015 Financial Report/Approval

The Board reviewed the financial statements as of January 31, 2015. Ms. Sneed stated that the January 31st balance sheet showed that there was a negative cash balance in the checking account at the month end, but that was a temporary accounting situation—the account was not overdrawn. The current assets are \$3,000 less than the previous year, and the agency had \$3,500 less in liabilities, so the net position was positive.

The February 28th balance sheet showed the agency's assets are nearly the same as the previous year. The agency had \$8,000 less liabilities in the previous year and the overall net position was better than last year.

The Profit & Loss Previous Year Comparison Report shows that the agency's overall net income is nearly \$11,500 better than last year. Civil penalties are up nearly \$20,000, but licensing revenue is nearly \$6,000 less than the previous year. The alarming number is that business license fees are down nearly \$7,000; however that could be a timing issue since license renewal forms are sent out 60 days in advance. More licensees may have returned their business license renewal form earlier last year. The Agency is also seeing a number of businesses changing legal form (e.g. proprietorship to LLC, etc.) requiring them to apply for new licenses, that shows under account #4110 as new license fees.

The employee costs show staff wages are higher due to having temporary staff last year and employees receiving compensation increases since last year. Postage costs are down significantly. Investigation expenses are up, which means that our contract investigators have been more active than last year—that activity helped improve civil penalty collections due to an increased number of cases.

Board meeting expenses are higher than last year partly due to having the agency's AAG attending for more time at the board meetings. This is an expense that the Agency needs to keep an eye on. Ms. Lozano's time at board meetings was budgeted at 4 hours per meeting (in person) but the board has been using more of her time due to the program review the Board has been going through. The other factor that impacts this budget section is the number of out of area board members. That's higher than last year, but this is an anticipated cost.

Overall net loss is over \$17,000 better than last year at a net loss of (\$19,596.86) versus (\$36,624.83) in 2014.

The Profit and Loss Budget vs. Actual report is based on the agency's original budget. Once the modification is approved through rule-making, the budget will be updated.

The Agency's income is up 113% compared to the budget; that translates to \$43,000 in incremental income as compared to 2/28/2014. Applications/Examination revenue is up 228%, licensing fees are up 107% and civil penalties are up 113%.

Overall net loss is \$53,000 better than budgeted for this year.

Ms. Sneed stated that because the agency is in a positive income season, it is likely that some funds will be transferred into savings

Board Action

Moved by Mr. Gawlista and seconded to approve the unreconciled financial report. Vote: 6-0

3. EXAMINATION/LICENSE/EDUCATION

The Board reviewed the examination statistics through February 2015. The numbers of tests taken in January, 2015 are higher than the same month last year. The numbers of tests taken in February are lower than the same month last year.

Ms. Gladwill-Rowley reviewed the information/statistics regarding pass rates for first time testers. In 2014 there were 112 first time test takers and 40% passed the exam the first time. In 2013 there were 116 and 57% passed the first time. In 2012 there were 163 and 42% passed the first time.

Ms. Gladwill-Rowley reported that the passing rate is still of concern and that the rates are not increasing. The board had a goal of 60-65%. Ms. Gladwill-Rowley stated that it may be a good time to wait for the new administrator and discuss further.

The Board reviewed the license counts as of March 1, 2015. The number of licenses has remained steady for the last two years.

The Board reviewed the CEH audit statistics from January 1, 2011 through the present. Ms. Sneed reported that in the past the agency has had 100% response, but that has changed. In October only 25% responded. Of those responding most have 100% compliance. If no response is received then a notice of suspension is issued. If licensees haven't completed the CEH audit by the deadline, then staff will take action at that point and licensees will have 21 days to complete the required continuing education.

4. ENFORCEMENT

The Board reviewed a listing of final actions taken from January 1, 2015 to February 28, 2015. There were 67 cases closed during that time period. Of those, 42 cases ended in a civil penalty (29 of them were unlicensed, and 13 of them held a license). Ms. Sneed reviewed the agency's process for trying to get current insurance/workers comp from licensees and that it is time consuming for staff.

A. Consent Agenda

1. Immediate Action

A listing of actions is attached and made a permanent part of these minutes. No items were removed from this portion of the consent agenda.

2. Administrative Action

A listing of actions is attached and made a permanent part of these minutes. Crystal River Construction Inc. was pulled from the Consent Agenda.

5. Site Checks; No Violation

A listing of actions is attached and made a permanent part of these minutes. No items were removed from this portion of the consent agenda.

Board Action

Moved by Mr. Gawlista and seconded to approve the consent agenda except for Crystal River Construction Inc. which was pulled from the Administrative Action Consent Agenda.

Vote: 6-0.

Crystal River Construction Inc

Board Discussion

In regards to Crystal River Construction Inc, staff clarified that the staff recommendation is against both the person who laid the sod, as well as, Hank Elliott, dba: Crystal River Construction Inc. The person laying the sod, Glenn Carroll, was not employed by Crystal River and was working as an independent contractor.

Board Action

Moved by Mr. Radford and seconded to affirm the staff recommendation to issue a penalty against Hank Elliott & Crystal River Construction for operating as a landscape contracting business and Glenn Carroll for acting as a landscape construction professional and landscape contracting business without a valid license.

Vote 6-0

B. Enforcement Cases for Discussion

1. Advertising without a License

a. Ron Ketcham

SUMMARY

The respondent lists the abovementioned activities under the skills section of his LinkedIn site. Does that constitute advertising for landscaping work and thus constitute an advertising violation?

OAR 808-003-0010 outlines the agency's rules about written advertising:

808-003-0010 -- Written Advertising

(1) All written advertising, except telephone and internet directory line listings and uniforms, shall include the landscape contracting business license number.

(2) Advertising shall include, but not be limited to:

(a) Newsprint classified advertising and newsprint display advertising for work subject to ORS 671.510 through 671.710;

(b) Telephone or internet directory space ads, display ads and line listings;

(c) Business cards;

(d) Business flyers;

(e) Business letterhead;

(f) Business signs at construction sites; and

(g) Websites.

Here is some information about LinkedIn from their website:

“Our mission: Connect the world’s professionals to make them more productive and successful

Only LinkedIn connects the world’s professionals and gives them an authentic means to establish their own professional profile online, connect with trusted contacts and extend their professional network, and exchange information, ideas, and insights to make better, faster decisions.”

Although LinkedIn is focused on professional networking, is it and could it also be used for advertising to the public? Or, does the public Google prospective contractors for background information and use it to help make a landscape contracting purchasing decision?

CONCERNS/ISSUES

Unclear if this is advertising for landscaping work or as a landscape construction professional.

Board Action

Moved by Mr. Bumgardner and seconded that this is not a violation and a penalty should not be issued. Vote: 6-0.

Board Discussion

Ms. Sneed reviewed the process for advertising violations; looking at the Skills page on LinkedIn you will find a variety of items related to Landscaping. The question is when people post on LinkedIn is that advertising? They are talking about skills and abilities, but typically LinkedIn is not geared toward consumers, however if a consumers searched on the web they may find this advertisement.

Mr. Gawlista stated that he did not feel that they were making an offer to provide services. They are just listing their abilities. The way that LinkedIn works is that others can endorse someone for any skills they want even if they don’t actually have them. He may have mentioned he had some of these skills but anyone could add these skills to his page. Ms. Dunston does not feel that this is advertising.

Ms. Sneed agreed with Ms. Dunston but wanted the board to discuss. Ms. Hollenbeck stated that if this person were directly sending people to that page for information then maybe that would be an advertising violation. Ms. Hollenbeck does not feel LinkedIn is advertising

b. Arbor Now LLC

SUMMARY

This case came to the Board at a prior meeting and the issue was that the company advertises that installation is free.

Michael Hintz, LCB Investigator, contacted Jason Lee Catherman, Managing Member of Arbor Now LLC on January 27, 2015 via phone. They discussed the advertisement and how the business is operated. Mr. Catherman said that he doesn't have a price list of trees and plants that he uses. He works with wholesale nurseries and gets really good prices on them. One of the nurseries he works with is D and J Retail Nursery on Foster Road. They give him reduced contractor prices. Mr. Catherman said that he gets wholesale plants and then looks at the prices at Portland Nursery. He sells his plants and trees at less than full retail per Portland Nursery's price list but there is mark up and profit. He's used the planting work as a marketing tool for his business and didn't know that it required a license. He offers a \$100 discount if a customer buys more than \$600 worth of tree work. The customer can either have the \$100 discount or choose to have a tree planted for free if they prefer.

Mr. Catherman said that he would stop installing plants and trees until he could get a license.

CONCERNS/ISSUES

Is this enough evidence to pursue the advertising violation?

Board Discussion

Ms. Lozano stated what we have now is admitting to a profit in what he is doing, as far as selling trees. She recommends issuing a subpoena for their customer list and then subpoena invoices from those customers to get a better sense of what the actual charge is and what is invoiced. Then compare to what others in the same area are doing. He may only be charging for the trees and installing for free, but this check will show that. Investigator Hintz's impression is that he was not trying to pull something and/or did not know it may have been a violation. He also believes he will cooperate with the investigation.

c. David Wonser

SUMMARY

Respondent advertised on Portland Craigslist saying, "My heavy duty rototiller is great for tilling soil or sod in yards, gardens, and small fields." The agency opened an advertising without a license case for the verbiage.

Respondent phoned Ms. Sneed on March 5, 2015 to discuss the reason for the penalty. He then submitted an email stating that the ad was meant to offer services for preparing space for edible gardens and agricultural acreage. He stated that he is uninstalling lawn and garden space to prepare for agricultural production.

Board Action

Moved by Ms. Hollenbeck and seconded to dismiss this case. Vote: 6-0.

Board Discussion

Ms. Sneed reviewed the ad with the board regarding tilling up the lawn mainly for agriculture use. Mr. Wonser responded stating he is only rototilling for someone to install agricultural products. The ad states his rototiller is great for tilling soil or sod in yards

2. Operating without a License

a. Darrell Stewart/A Cut Above Professional Lawn Care Inc & Cory Haines

Ms. Dunston recused herself

SUMMARY

Irrigation blowout with the use of compressed air

LCB Contract Investigator, Stephen Meyer observed Darrell Stewart conducting an irrigation blow out using a compressor. Cory Haines was also on the job site. Mr. Stewart stated he only performs this type of work when Mr. Haines is with him so he will not be in violation.

LCB Investigator, Michael Hintz spoke with Monica Stewart, Corporate Officer for A Cut Above Lawn Care Inc by phone who stated:

- Her CCB company usually subcontracts to LCB companies for blow out work, but they were under the impression that Cory Haines was licensed and they could work with him;
- Cory Haines is her son; but not an employee of their company;
- Cory Haines has an LCP license;
- Cory Haines does most of the work and her husband (Darrell Stewart) only helps him;
- They paid Cory Haines several hundred dollars to help with this job and several others;
- They only charge \$85 per blow out.

Cory Haines history

January 22, 2013 submitted application for LCP license
February 13, 2014 granted LCP license (Irrigation plus Backflow)
June 6, 2014 Installed a paver patio/deck
July 25 2014 Notice of penalty for patio/deck installation
September 2, 2014 Signed Stipulated Order to reduce penalty (paid reduced penalty)
October 28, 2014 Supervising blow out of irrigation system with the use of compressed air

Cory Haines was fined for not having a business license prior to the performance/supervision of the irrigation blow out in this case. Mr. Haines knew before this job that he needed a business license.

STAFF RECOMMENDATION

1. Issue a civil penalty against Darrel & Monica Stewart & A Cut Above Professional lawn Care Inc (Jointly & Severally) for operating as a landscape contracting business and a landscape construction professional without a valid license.
2. Issue a civil penalty against Cory Haines for acting as a landscape construction professional (supervising landscaping work) without being employed by a landscape contracting business.

Board Action

Moved by Mr. Bumgardner and seconded to uphold staff's recommendation.

Mr. Bumgardner withdrew his motion after the board discussion.

Board Discussion

Ms. Lozano asked Mr. Hintz to explain the connection with Monica Stewart. Specifically, Cory and Darrel were observed doing the work, what shows that Monica and A Cut Above were hired to the job? Mr. Hintz stated that they were a part of the business.

Ms. Lozano stated that there is a clear case for Cory and Darrel but that there is not substantial information to tie A Cut Above to the Job. Mr. Hintz stated that Monica would provide additional documentation to show that A Cut Above was involved.

Ms. Lozano stated that the board could move forward with Cory and Darrel, but should have additional documentation to tie A Cut Above and Monica to the work being performed.

Ms. Gladwill-Rowley asked if they would be treated as unlicensed individuals or as an unlicensed business. This decision will be made after further information is provided

- b. 15-02-047 Copperline Homes Inc & 15-02-048 Antonio Orozco-Rodrigues**

Ms. Dunston recused herself

SUMMARY

Installation of an irrigation system

On April 16, 2013, respondent submitted an estimate to Chuck & Susan Burke of 1506 NW Awbrey Rd in Bend, OR. This estimate included a note: "Landscaping – I already have the grading, **irrigation**, some plant materials, bark mulch, sod, etc."

On June 26, 2013, respondent submitted an invoice to the Burkes with a description "LANDSCAPE, FENCING, and DRIVEWAY completed per sales agreement" for \$10,000.

Respondent holds an active CCB license and may install a fence and a driveway with this endorsement. However, respondent cannot perform the irrigation installation (mentioned in the estimate) without a license with the LCB, which respondent does not have.

Mark Wilhite held an LCP license (#12851) that expired February 28, 2013. He was also a member of an LLC (Earths Art LLC #8757). However, LCB records show he is no longer a member as of September 9, 2011. Mark Wilhite was also the owner of a sole proprietorship (#7846) that expired February 29, 2008.

LCB Investigator Michael Hintz spoke with Chuck Burke, owner of 1506 NW Awbrey Rd who stated he had witnessed Mark and Joshua Wilhite along with a Hispanic subject whom he knew as Antonio installing the irrigation system at his residence. Mark Wilhite told the investigator the Hispanic subject was Antonio Orozco and he is an employee of Mr. Wilhite's landscaping company, but wasn't sure what company paid him and referred the investigator to his son, Joshua Wilhite.

Joshua Wilhite told the investigator they had performed the landscaping work at all three job sites, but didn't know Antonio's full name. He stated Antonio is in Mexico now and he only has a phone number for him (this number is disconnected). Joshua Wilhite said Antonio was not an actual employee, but would have been paid by Copperline Homes. He was unsure if he had issued a 1099 to Antonio.

Mark Wilhite has e-mailed LCB Investigator Hintz stating:

- Antonio Orozco – he works for them from time to time doing labor work for Mr. Wilhite and Copperline Homes and he is not affiliated with any landscape company. Antonio was not the contractor nor did he represent himself as a landscaper. Antonio may have done some ditch digging and general labor at these job sites.
- He (Mark Wilhite) owed the three residences and he is responsible for the landscaping.
- Until recently he has been an LCP for 17 years in Oregon and 20 in California
- He acquired the property in 2005 and held onto the property through the recession until the fall of 2012 and then decided to build these properties as vacation rentals.
- During construction, the real estate market started to rebound, so they changed their minds and decided to sell the three properties. 1506 was purchased by Charles and Susan Burke prior to completing the landscaping. (See attached e-mail for more details).

- The other two homes were completed (including landscaping) months before they were ever under contract.
- Their initial intent was to keep them for themselves as rentals/owners. When they decided to sell, they never considered they may be technically doing anything wrong by landscaping and irrigating these properties.
- He has not done landscaping for any custom clients since letting the LCP expire.
- He is done with landscaping and builds houses now.
- He requests the LCB not issue a penalty because “at worst it was a clerical error by not renewing my license in a timely manner.”

STAFF RECOMMENDATION

Issue a civil penalty to respondent for operating as a landscape contracting business without a valid license (3 counts – 3 different job sites).

Issue a civil penalty to Antonio Orozco for operating as a landscape contracting business and landscape construction professional without a valid license.

Board Action

Moved by Mr. Radford and seconded to uphold the staff's recommendations to issue a civil penalty to respondent for operating as a landscape contracting business without a valid license (3 counts – 3 different job sites). Issue a civil penalty to Antonio Orozco for operating as a landscape contracting business and landscape construction professional without a valid license.

Vote: 6-0 (Ms. Dunston recused)

c. Green Star Lawn Care LLC & Eugenio Chavez Rodriguez

SUMMARY

Installation of trees & waterfeature.

LCB Contract Investigator, spoke with Eugenio Chavez, homeowner who stated:

- His company was performing the work on this job site;
- He was installing a water feature, a rock retaining wall, and planting trees;
- He was subcontracted by another licensed landscaper, but could not recall the name.

LCB Investigator, Michael Hintz spoke with the respondent who stated:

- He did plant a tree, however he did not charge for this work;
- The tree was not part of the signed contract;
- He did not provide the tree;

- Diego Guzman is his employee;
- He is in the process of obtaining workers' comp coverage.

Respondent does have an active CCB license, but it shows the respondent as "exempt" – no employees; which means respondent has no workers' compensation coverage. On February 18, 2015, respondent had an employee on the job site (Diego Guzman).

Respondent provided a copy of the contract, which shows the respondents contracted for the water feature and retaining wall for \$14,000 and does not include the planting of trees.

CONCERNS/ISSUES

ORS 671.520(1) and OAR 808-002-0500 state, in part, landscaping work includes ornamental water features. ORS 671.540(1)(d) exempts CCB licensee from licensure with LCB when performing the "Installation of fences, decks, arbors, driveways, walkways or retaining walls" – it does not include water features.

ORS 701.010 exempts LCB licensees from licensure with the CCB when "operating within the scope of a license issued under ORS 671.510 to 671.760" that "constructs fences, decks, arbors, patios, landscape edging, driveways, walkways or retaining walls and meets the applicable bonding requirements under ORS 671.690". This does not include water features because LCB licensees did not need an exemption from CCB to perform something that is already in the LCB statute.

If ORS 671.520 states a LCP constructs ornamental water features and OAR 808-002-0500 states it is considered landscaping work, and there is no exemption for a CCB licensee to construct an ornamental water feature, does water features fall under the jurisdiction of only the LCB? Or can CCB licensees construct ornamental water features?

LCB Board minutes dated March 20, 2002 show the board at that time had this discussion. It appears there was a **change to ORS 671.520(2) in 2001**:

- Prior to 2001 it read: "the construction of fountains and drainage and irrigation systems for decorative vegetation"
 - Effective 1/1/2001 it read: "the construction of ornamental water features and drainage and irrigation systems for decorative vegetation"
- In 2005 "decorative vegetation" was removed.

It appears the statute excluded CCB licensees from performing water features. However, there was never any intent to exclude CCB licensees from doing this type of work, as long as it did not include decorative vegetation. The way the language is written appears that the construction

of ornamental water features falls under the LCB jurisdiction, similar to drainage and irrigation systems.

CCB licensees do construct water features as an “improvement to real estate”.

STAFF RECOMMENDATION

No Violation; no action. Refer to CCB for workers’ compensation issue.

Board Discussion

Tabled for future meeting.

d. Lyda Excavating Inc & Michael Vernon Lyda

SUMMARY

Installation of plants & trees.

LCB Investigator, Michael Hintz observed respondent and his workers removing ivy and some other invasive plants. Investigator Hintz also observed a copy of an official plan issued by Washington County lying on the embankment. It called for the planting of a number of plants. He observed newly planted vine maple, Oregon Grape and some species of Willow.

LCB Investigator, Michael Hintz spoke with “Mike” at the job site (later determined to be Mike Lyda) who stated:

- He had contracted with Washington County;
- He planted the plants according to the contract with Washington county;
- He did not believe he needed an LCB license and has been doing this sort of work for years.

Zach Morris, Project Manager for Washington County:

- Stated his agency awarded a contract to respondent that included the planting of a number of plants along SW 92nd;
- Provided documentation of the work that included planting plants according to a planting plan;
- Stated the amounts to be paid for the two bid items involving planting is \$3,750 and \$760;
- Stated the plans were revised after the bid process and an additional \$5,400 was approved to install a jute matting and plant plugs in the bottom of a water quality swale;
- Explained the respondent received partial payments according to a schedule for the plant material;
- Explained the bidding process requires bidder to disclose proposed subcontractors (under certain conditions such as dollar amount of work and/or percent of total work) at the time of bidding and respondent did

not get the county's consent to subcontract work if awarded the work. Respondent did subcontract certain portions of the project, but not the planting or landscaping as far as the county is aware.

STAFF RECOMMENDATION

Issue a civil penalty against Mike Lyda & Lyda Excavating Inc (Jointly & Severally) for operating as a landscape contracting business.

Board Action

Moved by Mr. Gawlista and seconded to uphold staff's recommendation to issue a civil penalty against Mike Lyda & Lyda Excavating Inc (Jointly & Severally) for operating as a landscape contracting business.

Vote: 6-0.

- e. Green Ridge Lawn Maintenance LLC & Martin Womack McKibben.

SUMMARY

Irrigation blows with the use of compressed air (2 counts)

LCB Investigator, Michael Hintz spoke with respondent and Jan Pederson (homeowner of 658):

- Respondent performed the irrigation blow out at both addresses;
- Respondent performs regular maintenance work at these job sites;
- Respondent was paid \$50-\$55 by Ms. Pederson for the blow out.

Investigator Hintz spoke with the wife at 688 W St. Helens who stated respondent performs maintenance work at their address and likely did the blow out of the irrigation system, but was not sure. Her husband has not called back as of this date.

On the internet on a business directory posted by a real estate company, there is an entry for the respondent's business that displays the company offers "irrigation turn on and blow outs".

CONCERNS/ISSUES

In the past, if the advertisement for irrigation blowouts did not also state "with the use of compressed air" or something similar, it was not a violation. The statute specifically states you need a license to "maintain irrigation systems with the use of compressed air". Just the word "blow out" does not necessarily mean "with the use of compressed air".

STAFF RECOMMENDATION

Issue a civil penalty respondent for operating as a landscape contracting business by performing the two irrigation blows with the use of compressed air. Discuss the advertisement further.

Board Action

Moved by Mr. Gawlista and seconded to uphold staff's recommendation for operating and advertising violation.

Vote: 6-0

Board Discussion

Ms. Lozano stated that there is an operating violation; there is a good argument for an advertising violation as well, because you have an operating violation with compressed air. This is in an area that it would be required to use compressed air; there is really no other way to do the work.

3. Other/Misc.

a. Distinctive Landscaping and Design Inc

Worker's Comp Issue

SUMMARY

The LCB office received a certificate of insurance from SAIF showing workers' compensation coverage for the respondent. This certificate shows respondent's coverage period is from February 1, 2014 to February 1, 2015. On January 28, 2015, LCB office staff contacted SAIF to obtain an updated certificate of coverage. LCB staff were told that coverage cancelled December 6, 2014 and sent the LCB office a notice showing the cancellation of policy #993190 effective December 6, 2014.

On February 4, 2015, the LCB office received a Certificate from respondent's showing new workers' compensation coverage from February 5, 2015 to February 5, 2016.

Respondent now has current coverage, but had a lapse in coverage from December 6, 2014 to February 5, 2015.

STAFF RECOMMENDATION

Issue civil penalty for failure to maintain workers' compensation coverage from December 6, 2014 to February 5, 2015.

Board Action

Moved by Mr. Radford and seconded to uphold staff's recommendation to issue a civil penalty for failure to maintain workers compensation coverage. Vote: 6-0

Board Discussion

From December 6, 2014 to February 5, 2015 there was no coverage, but there was a license.

b. Danny F Sieh, dba: Scenic Landscapes

Contract Issue

SUMMARY

On October 28, 2014, the LCB office received correspondence from an attorney who is representing a homeowner (Don Arkens) in a current litigation case with Danny Sieh. The attorney asserts noncompliance of agency rules regarding contract standards. The parties entered into a contract (see attached), which included the installation of an "18 inch wall type to be determined." He further asserts Mr. Sieh is requesting payment based on a verbal contract (see attached First Amended Complaint – page 2 where Mr. Sieh admits to a verbal agreement to increase the length of a wall from 12 feet to 50 feet in exchange for \$1,026).

It appears the parties entered into a written contract in the summer of 2013. The initial contract for the retaining wall only states "18 in wall type to be determined" and the total cost of the contract specifically states it does not include the cost of the wall. After the written contract was signed they entered into a verbal agreement to extend the length of the wall that was mentioned in the initial contract.

LCB Investigator, Michael Hintz spoke with the homeowner who stated he did have a verbal agreement with Mr. Sieh to extend the 12 foot wall to about 25 feet and there was no written contract or change order. The homeowner has only paid the \$1,500 down required by the initial contract. The wall was not finished or detailed properly and the homeowner refused to pay the respondent, which resulted in the respondent filing of a breach of contract case in court.

The attorney asserts the initial contract does not include: a payment schedule and it demands more money than the itemized breakdown total. He also asserts there was no written contract or change order to extend the retaining wall.

The homeowner told the LCB Investigator, Michael Hintz, that on January 29, 2015 the parties met with an arbitrator for the court and the Arbitrator ruled in the homeowner's favor stating that he did not have to pay the respondent any additional monies due to the quality of work. A copy of that award has not been received in the LCB office as of February 5, 2015.

CONCERNS/ISSUES

Items the attorney believes are incorrect regarding the written contract:

1. No payment schedule

Respondent's contract states "Down payment: \$1500" and 5 days to complete. Does this imply a payment schedule of some sort? Based on the attorney's response to the respondent in the Motions to First

Amended Complaint - page 4(see attached), he asserts balance due upon completion cannot be implied.

2. It demands more money than the itemized breakdown totals.
The costs listed on the contract are \$1300 + \$2900 + \$250 = \$4,450. The contract states the total cost is \$4,550. This is \$100 more than the itemized breakdown totals. The attorney asserts it is not a clerical error because the respondent was given an opportunity to correct it and refused to do so. This is not a violation of the contract standards.

The cost and type of materials to be used for the retaining wall were not included the initial contract. However, respondent's First Amended Complaint to the court states the verbal contract was to increase the length of the wall in exchange for an additional \$1,026. Respondent admits in the Complaint to performing the installation of the retaining wall and expected to be paid the additional \$1,026. However there is no written contract, amendment nor change order.

Board Action

Moved by Ms Hollenbeck and seconded to assess a civil penalty for failure to comply with minimum standards for contracts and working without a written contract. Vote: 5-1

Board Discussion

Respondent's contract stated that there was no schedule of payments; however it did state that a percentage was to be paid up front. If there is not a payment schedule, does that mean that non payment is implied? It could be interpreted either way. Typically a contract would state what specific amounts are due at a particular time.

The intent of the contract may be unclear, but it seems that it was implied that final payment would be made.

C. Adamson Landscape Concepts LLC

SUMMARY

OAR 808-003-0010(1) states all written advertising shall include the landscape contracting business license number.

On March 16, 2015, the LCB received a copy of respondent's advertisement on the side of a truck. This ad did not contain the respondent's 4-digit LCB number. Upon further investigation, it was discovered the 4-digit number was on a sticker issued by the LCB in prior years. This sticker was on the back window of the truck.

CONCERNS/ISSUES

In the past, licensees were told if the number was any where on the vehicle (even on a sticker not in view of the ad) this was in compliance with the rule.

Board Discussion:

Ms. Sneed reviewed a previous case which was dismissed because the number was not legible. Ms. Sneed stated that there should be further discussion regarding the placement and size of the license number. Ms. Lozano asked if the stickers were supplied by the LCB. The answer was yes. Ms. Lozano also asked if there had been a rule regarding that the sticker could not be used anymore. The answer was no. Ms. Lozano suggested that the board review the rule. In the past the license sticker anywhere on the vehicle was acceptable. If the board is no longer going to allow those stickers, that needs to be made clear to all licensees.

Ms. Lozano also recommended that the board use specifics in the rule; that a board issued sticker with the license number placed anywhere on the vehicle is not a valid way to list the license number, unless it is part of the vehicle where the advertisement is located. The information should go out to all licensees in multiple ways so that the information is made clear to everyone.

Staff was directed to review the rule and revise it to be more specific about how the license number should be displayed in written advertisements.

5. Public Comment

At 1 pm, Ms. Dunston, Chair, opened the public comment session of the meeting.

Ed Anderson, 81 years in business. It may be nice that after so many years less CEH could be required. Ms. Sneed stated that new legislation may be coming in the near future regarding CEH requirements.

Jeff Stevenson – Mr. Stevenson thanked the board for their work.

Public Comment closed at 1:03 pm

6. Claims (Dispute Resolution)

A. Consent Agenda

1. **9255-101, Barkdusters Inc vs.
Liberty Landscape Inc
SUMMARY OF COMPLAINT
Failure to pay for material supplies**

FINDINGS

Invoice #0-22232 dated July 24, 2014 for Aged Hemlock Blown for \$538.50.

The job site is located in the State of Oregon.

The claim form shows a \$41.00 charge for tools, interest and/or services charges. This amount is not allowed per OAR 808-004-0250(1).

STAFF RECOMMENDATION

Issue Notice of Contested Case/Arbitration that respondent pay claimant \$538.50.

Board Action

Moved by Ms. Hollenbeck and seconded to approve the consent agenda.
 Vote: 6-0

B. Board Review of Claim Cases

1. 8077-103, Christine Susan Furnish vs.

Greg DeHaven dba: Artspace by Design

At the December 18, 2014 Board meeting the Board decided to issue a contested case notice/arbitration award that the respondent pay the claimant \$15,218 for damages. However, the Board wanted the give the respondent an opportunity to respond to the alleged damages and the cost for the repairs prior to the notice being issued.

Respondent did submit a written response with one further document – see pages 4-8 and the new column below. The claimant has also submitted a response to the respondent’s statements – see page 9.

Claimant and respondent entered into a written contract for only a portion of the landscaping work completed for a total of \$7,100. During the project the scope of the work increased, but no contract or change orders were written for the additional work. Claimant has paid respondent a total of \$18,499.25.

	Description of Claim Item	Issues	Estimated Cost for repair	Response dated 2/19/2015 from Mr. DeHaven
1	Irrigation System Update	Insufficient water coverage and spraying decks, fences, house, pathways, & driveways with some planting areas not being sprayed at all	\$3,190	2 more popup heads need to be added to provide complete coverage. If a conversion to drip is undertaken, this is a complete change. I modified a system that was already in place by relocating some spray heads, moving some, adding some.
2	Outdoor Lighting System	Replaced with high voltage using extension cords buried in the ground – tripped breakers, fixtures full of water, plug ends sealed with a glue mixture; lights on the two	\$4,490 (Cut in half 2245)	I feel responsible for the lighting, even though it was meant to be seasonal. If Susan says she lost any frozen goods due to the breaker being tripped, I want

		spiral trees were to be special long-lasting lights for over 440 a string – instead installed Christmas lights		to pay her for that.
3	Dead Plants & Trees	Lack of water due to insufficient irrigation system and burlap coverings and plastic ties not removed	\$1,108 (1108)	The sequoia was being undercut (root pruning) every year to dramatically reduce its mature size. The Japanese maple by the hot tub was already in place when I started. The plant on the bamboo that was stated to mature at 12 feet was consistently being espaliered and would have never outgrown the space it was in.
4	Fence	No fence posts; nailed to neighbor's old fence; and falling apart	\$2,935 (2935)	Side fence (east). We had a long conversation which included her sharing that she did not have a friendship with the elderly neighbors and did not want to take out the existing fence as should be done. Directed me to put new fence boards on the old loose posts to save money. I gave her an estimate on both removal of the old fence and rebuilding a totally new fence, and applying new wood to the existing as is. We talked about how it would not last as long and the drawbacks of the "bandaid" approach and she still opted for the project as performed.
5	French Drain	Inoperable; solid pipe and not surrounded with rock; holes poked in with a pick	\$1,195 (1195)	We discussed a similar project as the new proposal she received and the cost. She said that was a lot of money and wanted a less expensive drainage. I designed a smaller and still effective approach and she directed me to proceed with that. Note: comments in the

				claim were that the drain was not fabric wrapped and holes were drilled in the pipe without being wrapped. This is incorrect. I installed the drain with a collector, WRAPPED perf-pipe, and a hand-crafted diffuser outlet, which is not wrapped so it would function correctly.
6	Patio	(front & back) breaking off at the edges (nothing to retain the edge); not set to grade; gray stones dyed brown – dye did not last and are partially back to their original gray color with some brown	\$1,205 (remove)	Both patios were installed using the exact same process that is suggested in the new work. I doubled the size of the back (cut stone) patio at no extra cost. I see in a photo that 2 or 3 stones at the have settled out. These can be easily reset and do not justify a complete removal and rebuild
7	Gravel Path	No filter or barrier fabric – used thick layers of plastic which does not allow water to absorb into the ground; gravel runs off when raining	\$1,095 (remove)	The gravel path pre-existed my work on her home. I added a ½ yard of fine gravel to it.
8	3 Decorative Bamboo Structures	Falling apart	Not claimed on Monetary Damages Itemization	No response
9	Paving stone walkway	Moved by respondent to the corner edge of the wood deck. Needs to be moved back to the original location as the trees he planted are overgrown and the path ends at the corner of the deck, which present a danger to those using the path	Not claimed on Monetary Damages Itemization	No response
		Total Cost for Repairs:	\$15,218	He agrees to pay \$8,000

Board Discussion

Mr. Radford was not privy to the previous discussion of the case. Did the contractor who came up with the costs have any potential vested interest in

the results? Ms. Gladwill-Rowley stated that; yes a contractor had put together the estimate for repairs and that sometimes a claimant may hire the contractor that prepared the bid for repair for the claim, potentially the contractor could benefit if he was hired to do the repairs.

The homeowner and respondent started with a written contract but several items were added verbally. Ms. Gladwill-Rowley reviewed additional documentation provided by the respondent.

Item 1, irrigation: The initial discussion was based on changing the system to drip irrigation system which would be more suitable for that type of landscape. Not sure how just add in two more pop up heads addresses the issues of coverage. Mr. Radford asked if they were just renovating the system or if a new system was to be installed. Ms. Dunston stated that it was a retro. Ms. Lozano stated that this was a breach of contract and also negligent work. Mr. Radford stated two options: one would be to change heads; the other is a new install of an irrigation system. Mr. Bumgardner stated some of the plants were not receiving adequate water. Mr. Hintz stated the contract grew over time. Mr. Bumgardner discussed how the original board decision was made, that it also included damages that occurred. After the \$8,000 claim was made the homeowner had a contractor give an estimate to fix the work and the damages. Mr. Hoekman asked about amending contracts, Ms. Sneed stated that all amendments need to be in writing and agreed to and that could happen via email or text messages. Mr. Radford stated that the irrigation changes were not in the original contract but just agreed upon by both parties.

Ms. Lozano asked since there was no contract if there was no breach of contract and wonders if the work was negligent. The business was not installing a drip system, but altering an existing irrigation system, but had overspray on desks and fences and no coverage where it was needed.

The Board directed staff to obtain a bid from the claimant to correct the existing irrigation system in the front yard.

Item 2 Lighting: Looks like lighting was not a low voltage lighting system but a line lighting system—high voltage wiring, not wrapped with anything just plugged in. Mr. Hintz stated that all the lights had water in them. Lozano stated that this may be a referral to the electrical board. There may be breach of contract since the contract says low voltage lighting was to be used, but that is not what was installed. Mr. Gawlista stated that the board could uphold the original decision and use breach of contract as the justification. Mr. Radford noted that what the original contract was for was 6 low voltage lights and that the new estimate was for something different. Board should take this into consideration. Ms. Dunston stated that \$2,245.00 would seem like a reasonable amount for the lighting.

Item 3 Dead Plants and Trees: The original estimate regarding the dead plants and trees still stands.

Item 4: Fencing: The fence was installed by being attached to the neighbor's fence. Respondent states that claimant did not want to pay for a new fence. Ms. Lozano stated that there seems to be a breach of contract. Board feels that the original estimate for the fence is still valid.

Item 5: French Drain: No photos of the issue with the french drain were available. Mr. Hintz did not see it when he was at the site doing the initial investigation and it is not in the contract. Regardless of how the work was done and the material being used, the french drain is not operating properly and needs to be fixed or reinstalled for proper drainage.

Item 6 Patio: Ms Lozano stated that based on the contract, the claimant got what she paid for. It does not appear that what was installed was different from what the contract stated.

For the next meeting staff will obtain further information from both parties regarding what claimant did and what he did not do and a new estimate to correct the existing irrigation system. New information will be discussed at a future meeting.

Board is in agreement with all issues except for the irrigation. The irrigation will be the only item discussed at the next meeting. This should be referred to the electrical board.

7. OLD BUSINESS

A. Proposed Amendments to OAR 808-001-0008/Amended Budget hearing held/adopt amendments/requires a motion

This rule amends the operating budget from July 1, 2013 through June 30, 2015.

Board Action

Moved by Mr. Gawlista and seconded to approve the proposed amendment.
Vote: 6-0.

B. Review of Draft Strategic Plan

Board Action

Moved by Mr. Bumgardner and seconded to approve the mission statement as outlined in Memo 8-E.

Vote: 6-0.

Ms. Sneed identified action items and who would be a part of which actions. Ms. Sneed suggested that the Board table making a decision regarding setting a date to finish the strategic plan until the new administrator is on board.

Ms. Sneed discussed that in regards to the online renewal process, there is a new step in the process that needs to be approved by the Department of Justice before it moves on. The contract is ready, the fees have been agreed upon.

C. OSLAB/LCB Meeting Minutes from 1-14-2015

The board reviewed the minutes from the January 14, 2015 joint meeting of the OSLAB and LCB. The Board will not adopt these items since this was a joint meeting.

8. NEW BUSINESS

A. Washington Landscape Companies Advertising at Portland Trade Shows

The board agrees that no action will be taken regarding Washington Landscape Companies that are participating in the Trade Shows in Portland and that information will be provided to licensees in the next newsletter

B. ADA Requirements

This was tabled for a future meeting.

C. Jurisdiction of Water Features

LCB laws and rules (ORS 671.520(1) and OAR 808-002-0500) state, in part, landscaping work includes ***the construction or repair of ornamental water features***. ORS 671.540(1)(d) exempts CCB licensee from licensure with LCB when performing the “Installation of fences, decks, arbors, driveways, walkways or retaining walls” – it does not include water features.

CCB Law (ORS 701.010) exempts LCB licensees from licensure with the CCB when “operating within the scope of a license issued under ORS 671.510 to 671.760” that “constructs fences, decks, arbors, patios, landscape edging, driveways, walkways or retaining walls and meets the applicable bonding requirements under ORS 671.690”. This does not include water features because LCB licensees did not need an exemption from CCB to perform something that is already in the LCB statute.

If LCB law (ORS 671.520) states an LCP constructs or repairs ornamental water features and OAR 808-002-0500 states it is considered landscaping work, and there is no exemption for a CCB licensee to construct or repair an ornamental water feature, does water features fall under the jurisdiction of only the LCB? Or can CCB licensees construct ornamental water features?

LCB Board minutes dated March 20, 2002 show the board at that time had this discussion. It appears there was a ***change to ORS 671.520(2) in 2001***:

- Prior to 2001 it read: “the construction of fountains and drainage and irrigation systems for decorative vegetation”
- Effective 1/1/2001 it read: “the construction of ornamental water features and drainage and irrigation systems for decorative vegetation”
In 2005 “decorative vegetation” was removed.

It appears the statute excluded CCB licensees from performing water features. However, there was never any intent to exclude CCB licensees from doing this type of work, as long as it did not include decorative vegetation. The way the language is written appears that the construction of ornamental water features falls under the LCB jurisdiction, similar to drainage and irrigation systems.

CCB licensees do construct water features as an “improvement to real estate”.

Board Discussion

Ms. Lozano suggested that she and the Construction Contractors Board legal counsel discuss this and come up with amended language. Continue to table enforcement case pending legal advice regarding the water feature issue.

D. Administrator Search

Larry Thomas has spent some time going through archives to create a template to go through this process. The first thing that needs to be reviewed is the job description. Ms. Sneed stated that she works with DAS Human Resources to help with reviewing the job description.

When you hire a new administrator you may review the job description to see if any adjustments need to be made. The interview questions and essay questions are not being included with this information that is being reviewed so those applying do not have access to these questions.

The position opens the 25th of March and closes the 10th of April. The system to receive the application packets will be mailed in a certain size envelope directly to the office and will be maintained until the selected review committee has an opportunity to review and make a selection of the candidates. Each reviewer scores candidates individually, with discussion followed by committee members to review the matrix and make a decision of who should be selected for the next step of the interview process. Candidates will be invited via phone to come to interview. The agency will make the accommodations for the facility where the interviews will take place. The day of interviews will consist of 1 hour interviews for each candidate, other candidates work on timed questions that will be reviewed at the end of the day. In addition, candidates will need to have a 10 minute power point presentation, expressing why they are the best candidate for the position. The candidates leave for the day and the panel will score each candidate individually, the facilitator will run the matrix so that all panel members can see where the candidates fall within the matrix. At that point a recommendation will be made to the board.

The final process for the board is to select the candidate, choose the salary rate, and make the offer. If the offer is accepted, an additional meeting after the reference calls and background check will be necessary to make the final determination.

The agency will not be reimbursing candidates to attend the interview. The interview panel will consist of a senior staff member, the current administrator, two board members, and one outside person

Ms. Sneed shared when she was called regarding the application process, she wasn't sure about everyone being together but from her perspective she thought it was a great process because she was able to meet all the other candidates and see what their strengths and weaknesses were.

For the background and reference check, if something negative comes back, the board would have to decide what to do next, whether they would want to move on to the next candidate that was at the top of the matrix, or open up the application process again.

A change of director audit will be required for the two months prior to the last Administrator's separation of employment and two months into the new Administrator's employment. The cost is expected to be approximately \$2,500 - \$3,000.

Ms. Sneed worked with Ms. Lozano regarding a Memorandum of Understanding between the LCB and the Optometry Board. Ms. Sneed will need to be employed as an interim administrator with the LCB to avoid any legal issues. Ms. Lozano stated there are rules related to holding two dual lucrative positions. Ms. Sneed could not be in both positions at the same time, unless in interim or temporary. Approving Ms. Sneed as "Interim Administrator" will allow any action that she takes during that transition to be valid during that time. The LCB will reimburse the Optometry board for the hours that she is working for the LCB. Ms. Sneed's last day will be March 25, 2015.

Board Action

Moved by Mr. Hoekman and seconded to accept the Memorandum of Understanding and authorize Ms. Dunston to sign it on behalf of the LCB hiring Ms. Sneed as Interim Administrator and paying the Oregon Board of Optometry for her time beginning March 26, 2015 and continuing until a permanent Administrator is hired. Vote 6-0.

Moved by Mr. Gawlista to approve the proposed hiring plan with public input and a written offer letter. Vote: 6-0

The Review panel will consist of: John Gawlista, Molly Dunston, and Larry Hoekman. This panel will meet on April 15th to review the applications to determine who to be interviewed.

The Interview Panel will consist of: Kim Gladwill-Rowley, Shelley Sneed, Molly Dunston, Bill Bumgardner & Jim Denno (CCB Administrator). If Ms. Sneed has a conflict of interest, Larry Thomas will be part of the Interview Panel. This panel will meet on April 24th to interview the final candidates.

A conference call board meeting will take place on April 28th at 3:00 p.m. to discuss the final candidates and determine who to offer the position.

If that person accepts the offer, a conference call board meeting will take place on May 4th at 3:00 to approve the hiring of the final candidate, only if the candidate passes the reference and background checks.

9. LEGISLATION

A. Review of Bills Tracked by Staff

Board Discussion

Ms. Sneed asked if anyone on the board wants to be set up on Bill Tracker: Ms. Hollenbeck, Mr. Bumgardner, and Mr. Radford would like to be set up on Bill Tracker.

B. SB 580/Landscape Work Group/Update

The Board reviewed SB 580.

C. SB 180/Abolish LCB, license with CCB

Ms. Sneed reported she believes this bill will not be heard because of the work done to create SB 580.

D. SB 181/Abolish CEH

Ms. Sneed reported she believes this bill will not be heard because of the work done to create SB 580.

E. HB 3304/Eliminate exam and experience, probationary & managing individual

Representative Dallas Heard is interest in offering a hands-on exam. He currently has landscape construction professional and business licenses. The bill as it is written eliminates the exam, the experience and the probationary license and managing. Nothing has happened with this bill so far. The LCB would need to get permission from the Governor's Office to oppose the bill.

Loren Radford wrote a position paper on providing a hands-on test. Ms. Sneed reported she spoke with Representative Heard and proposed to keep the written test and use the CLT exam as an option. He wants to remove barriers of entry, specifically for those whose first language is not English.

Good bye Shelley Sneed, Administrator

Ron Vandehey spoke regarding the changes in the industry and the changes that have taken place. He congratulated Loren in regards to his new position with the board. He stated there have been some fine administrators in the past, including Mike Snyder. Ron was worried about what would happened when Mr. Snyder left, but the board was very lucky to at that point to hire Ms. Sneed. She has done a wonderful job and has hired an amazing staff. He wishes Ms. Sneed well

in her future position. He stated he appreciates all of the board members and the staff. God bless.

Mr. Hintz stated that he know that all staff feel that same way that Ms. Sneed has been a great supervisor and mentor. To have that balance of being an effective leader and administrator and a good balance

Mr. Thomas stated there was a lot of uncertainty amongst the board and staff when hiring a new administrator in 2011. During Ms. Sneed's tenure, he has observed closely and appreciated working with her and wishes her the best in her next position.

Ms. Sneed stated that the board and staff are amazing and that this was a difficult decision for her. It is always easy to jump ship when there is lots of conflict, but this was not the case. She believes everyone needs to go where their passion lies. There are some great folks in the industry and this has been a great learning opportunity. As a board we have gone through some rough stuff. The meeting in Medford was a great learning experience. The agency explained why we do what we do. She wishes the agency nothing but the best and looks forward to possibly coming back in May with the new administrator. She will do everything she can to help the new administrator be successful.

Thank you John Gawlista

Ms Dunston provided John Gawlista with a certificate for his service to the board as the past chair.

9. ADJOURNMENT AND NEXT MEETING SCHEDULE

The meeting was adjourned at 2:21 pm. The next meeting of the Landscape Contractors Board will be April 16, 2015 by conference call.

Respectfully Submitted,

Jerri Jones
Licensing Specialist