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# OREGON STATE LANDSCAPE ARCHITECT BOARD

## SPECIAL RULES ADVISORY COMMITTEE – MEETING 1 SUMMARY

November 13<sup>th</sup>, 2017

9:00 AM – 12:00 PM

Portland State Office Building

800 NE Oregon St., Portland OR – Conference Room 1E

### ATTENDEES

Marilyn Alexander, *Association of Professional Landscape Designers – Oregon Chapter*

Hal Beighley, *Oregon State Landscape Architect Board – Non Board Member*

Elizabeth Brewster, *Portland Community College – Landscape Technology Department*

April Chastain, *Clackamas Community College – Horticulture Department*

Craig Kiest, *Registered Landscape Architect – At large*

Molly McDowell-Dunston, *Oregon Landscape Contractors Board – Licensed Board Member*

Michael O’Brien, SRAC Chair, *Oregon State Landscape Architect Board – Registered Board Member*

Jean Senechal-Biggs, *American Society of Landscape Architects – Oregon Chapter*

Angie Snell, *Oregon Landscape Contractors Association*

Susan Smith, *Oregon State Landscape Architect Board – Public Board Member*

Amy Whitworth, *Association of Northwest Landscape Designers*

### STAFF

Christine Valentine, *Oregon State Landscape Architect Board – Board Administrator*

Sylvia Ciborowski (facilitator), *JLA Public Involvement*

Hannah Mills (scribe), *JLA Public Involvement*

### WELCOME & AGENDA

Michael O’Brien, SRAC Chair, opened the meeting at 9:03 AM and welcomed the committee members, thanking them for their participation. He highlighted the importance of this opportunity and asked the members to introduce themselves.

Sylvia Ciborowski, facilitator with JLA Public Involvement, reviewed the agenda. The agenda was as follows:

1. Special Rules Advisory Committee (SRAC) Purpose & Meeting Protocols
2. Background Presentation
3. Defining Our Process & Success
4. Activity & Discussion
5. Public Comment
6. Next Steps & Closing

## SRAC PURPOSE & MEETING PROTOCOLS

The purpose of the meeting was to:

- Review the purpose and charge of the SRAC
- Gain an understanding of the rules and statute that regulate the landscape architecture field
- Begin the discussion of defining “specifications” and “details”

Sylvia referred the committee to the handout illustrating the operating protocols for the meetings. She explained that silence would be interpreted as acceptance and asked the committee members to bring up any issues they have during the meetings. Committee members will designate an alternate that can be present if they are unable to attend a meeting. Sylvia asked that the members limit communication with each other between meetings; however they are encouraged to talk with their constituents about the content and discussions. Christine Valentine, Board Administrator, pointed out that the meetings would follow Public Meeting Law, therefore meetings will be open to the public and all documentation will be made public record.

Sylvia explained that the goal of the group is to reach consensus, with a fallback of a 2/3rds majority vote. She reminded the committee that consensus on a recommendation does not mean that it is their first choice, but that all members can accept it as best for the group. If the group cannot reach consensus or a 2/3rds majority vote, documentation of the committee’s discussion will be provided to the Oregon State Landscape Architect Board (OSLAB) to help inform their decision. There were no objections to this decision making approach. Michael explained that it is not required for the committee to make a recommendation, but that it is the intent.

## BACKGROUND PRESENTATION

Christine used a PowerPoint to give a brief presentation on the Oregon Landscape Architecture statute and rules, beginning with an explanation how Oregon courts interpret statutory language.

A **statute** is a law passed by the Oregon Legislature that grants subject matter authority and the authority to act. A statute can only be modified by the Oregon Legislature; however, a State agency can request a legislative change with the Governor’s approval.

A **rule** is a directive, standard, regulation, or statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. A rule has the force of law once it is adopted, and therefore must be followed. Rules must be consistent with the statute that authorized the agency to adopt it, and provide a standardized process for adoption and amendment.

When interpreting statutory language, Oregon courts consider three elements:

1. Actual words and phrases:
  - The ordinary meaning of words/phrases
  - Assumption that every word has meaning

- Assumption of consistency
  - Grammar, syntax, and punctuation
  - Rules of interpretation per ORS 174.010 & 174.020
2. Legislative history:
- “To assist the court in the construction of a statute, a party may offer the legislative history of the statute... A court shall give the weight to the legislative history that the court considers appropriate.” – ORS 174.020(1)(b), (3)
3. Canons of Construction:
- Techniques of statutory construction that have been used so often they have become “formalized” into “canons” that the court may consider.

Judicial review of a rule uses the same interpretation elements as for a statute. In addition the review of a rule also considers:

- Plausible interpretation of the text
- No conflict with other relevant source of law
- Degree of deference statute provided to Board
- Intentions of Board and rulemaking history

Christine then reviewed what is included in the statute that governs the practice of landscape architecture. The Oregon Landscape Architecture Statute (ORS 671.321) specifies that landscape designers can:

- (1)(e) Engage in making plans or drawings for the selection, placement or use of plants or other site features unless plans or drawings are for the purpose of providing construction details and specifications not otherwise exempted.
- (1)(f) Use the title “landscape designer” in connection with the activities described under paragraph (e) of this subsection.
- (1)(h) Provide recommendations or written specifications for soil amendments or planting mediums if the recommendations or specifications are solely for the purposes of plant installation and do not significantly alter the stability of the soil profile or surface drainage patterns.

Christine explained that there is nothing currently in the Landscape Architect rules (OAR Chapter 804) to address landscape design vs. landscape architecture. The rules only address landscape architecture practice via a code of professional conduct and related expectations for Board registrants.

The committee was then given a legislative history of ORS 671.321.

Christine explained that, when the courts look at what a statute means they consider any legislative history from development of the statute. Legislative history is made up of:

- Comments in committee hearings
- Statements in floor debates
- Testimony of non-legislator witnesses

- Statements of committee counsel or other staff
- Amendment history
- Law commission reports

The legislative intent of the effort in 2001 resolved that:

- With respect to landscape design activities, the focus of discussion during consideration of HB 2196 was focused on the type of plans or drawings landscape designers could prepare.
- The final amended language of “construction details and specification not otherwise exempted” as found in ORS 671.321(1)(e) reflected input from landscape designer, landscape architect, and landscape contractor representatives engaged in the legislative process.

Christine pulled specific quotes from the document in the handout about the legislative history and intent of exemptions for landscape design activities:

- *“...conceptual design as being not significantly affecting the public health, safety, and welfare”* (J. Figurski, OSLAB)
- *“...prepare drawings that would represent those elements in terms of the scale and relationship of items within a site. [Landscape designers] could do any sort of drawing that they needed to communicate the idea. Where that individual would cross the line would be at the point they recommend specific installation [and] construction techniques.”* (J. Figurski, OSLAB)
- *“...intent was to ‘restrict landscape designers from preparing detailed construction drawings, grading plans, hardscape specifications (size of lumber, type of screws, etc.), and things along those lines. It is not intended to limit their ability to provide detailed planting plans, or to prepare final drawings with specificity about site features (location, size, suggested materials, etc.)”* (B Laux)

Despite the lack of definitions for: plans, drawings, and construction details and specifications, “site features” is defined in another statute. ORS 671.310(8) states:

*“‘Site features’ means constructed surfaces, steps, retaining walls, fences, arbors, trellises, benches, decks, fountains, ponds, waterways, pools, or other physical elements constructed or proposed for construction in the landscape.”*

Christine noted that there are opportunities to define several terms in the statute through this SRAC process. OSLAB has concerns that the term “plans and drawings” may be too broad to easily define, but they believe there is an opportunity to define “construction details and specifications.” The committee was encouraged to seek clarity and brevity when drafting the definitions to make it easy for OSLAB, practitioners, and the public to understand the language. Christine also noted her appreciation for the presence of the different educators on the committee which will help prepare those who are entering the practice of landscape design.

## DEFINING OUR PROCESS AND SUCCESS

Sylvia explained that prior to this first meeting with the SRAC, she talked to all members by phone to identify key issues that they would like to discuss through the SRAC process. She asked members to refer to the *Key Topic Areas for Discussion by OSLAB SRAC* handout, which lists the main themes from these conversations.

She explained that the top issues to discuss as identified by members are:

- Define Construction details and specifications.
- Water management: discuss role of designers in water management, green infrastructure, and grading and drainage work.
- Discuss scale of projects, and whether there is a certain scale of project that could be exempt from the rules.

### **Discussion & Questions**

Sylvia asked members whether there is interest in discussing any additional issues not identified in the handout. Members made the following comments:

- It was noted that “health, safety, and welfare” in regards to water management is a key concern for landscape architects and may need more clarification. There are many components that are critical to protecting the public. It’s important to regulate who is performing this work that affects human health, safety and welfare. Mike noted that health, safety, and welfare was the key component of the Board’s statutory mission. Christine said this was generally true of all licensure boards in Oregon.
- Sylvia asked the committee if there was interest in defining the term “plans and drawing.”
  - It was noted that there have been attempts in the past to establish these definitions. In a previous effort, defining “concept plan” proved difficult due to the loose nature of the term, and it was difficult to shape the language in a way that was defensible. It may be more effective to spend time defining “specifications” and “details.”
  - It was suggested that it may be beneficial to look at the language used by the Contractors Board that defines the term “plan.”
- There was interest in discussing the logistics of who is allowed to sell designs as it pertains to landscape designers vs. contractors vs. landscape architects.
  - If a landscape designer sells a design without details or specifications and a contractor prepares the construction details and installs the work, there are no issues about responsibilities.
  - Over the years, OSLAB and OLCB have discussed concerns about contractors selling designs without installation and what these means for consumer protection if a design is flawed. These conversations were partially related to debate over language in OLCB statutes about “plan and install” and what that meant. The general expectation in the industries is that contractors will generally plan and install—not sell designs only.

- Some committee members were interested in connections between the committee’s work and OLCB licensure. For example, it was noted that students at PCC and CCC programs often look towards eventually obtaining a license from OLCB.

## ACTIVITY & DISCUSSION: CONSTRUCTION SPECIFICATIONS AND DETAILS

There are some elements of a plan that are clearly “specifications and details” and fall into the domain of landscape architecture. Alternatively, there are some elements more adequately described as “notes” that designers put in their plans to provide design intent. Then there are elements that fall into more of a “gray area” and need more discussion to determine their designation. Sylvia explained that the goal of this discussion would be to shrink that “gray area” and clarify what kinds of elements landscape designers can include in their plans without stepping into the field of landscape architecture.

Committee members were asked to individually brainstorm and write down the elements they thought fall into each category, one element per sheet. Sylvia collected the sheets and arranged them on the wall according to each category and asked members to give a brief explanation and discuss with the committee. Below are the lists of comments and discussion relating to each category:

### YES – “CONSTRUCTION DETAILS & SPECIFICATIONS”

- Detailed descriptions of materials for installation. Landscape designers have to be more vague in their descriptions which can be difficult for a contractor when trying to prepare bids.
- Section drawings, specifications, and written directives that provide enough information to construct an element
- Paving specifications – how a structure is constructed.
- Irrigation component specifications.
- Installation details (can build from a plan)
- Specifications written directives
- Structural engineering – how a deck or freestanding structure is put together (joints, attachments).
- Specifying fasteners for a deck
- Retaining wall section
- Grading plans and movement of earth.
- Grading plan
- Footings
- Material types:
  - Lumber type
  - Base preparation
  - Strength or compaction of the stone
  - Structure, hardware, connections – choosing lumber size appropriate for holding up the structure
  - How the posts are connected

## GRAY AREA (NOT SURE IF THIS FALLS INTO “CONSTRUCTION DETAIL & SPECIFICATIONS”)

Material descriptions (Where is the line between what it is and how it goes together?):

- Landscape designers can describe a material, but only landscape architects should be able to identify material details that impact construction. It is important for the protection of health, safety, and welfare to ensure materials are appropriate for construction.
- It is difficult to get accurate comparative bids on a project without being able to describe materials.
- Landscape designers need to be able to identify materials in order to ensure integrity of their aesthetic intent.
- One person asked whether it would be appropriate for a landscape designer to make reference in a plan to the manufacturer for installation standards.
  - Participants were split on whether this is appropriate or not. Some noted that intuitively that seems reasonable; however, it’s important that the landscape designer is not risking themselves in the process. If a homeowner is doing the installation, there’s no guarantee they will understand the site and know the best application of the manufacturer’s standards. If an installation fails due to homeowner error using manufacturer instructions at the direction of a landscape designer, the designer could be liable. Referencing designs and specifications would not guarantee successful installation.
  - Contractors (installers) are required to have a license and be insured. Landscape designers do not have similar requirements.
- It was suggested that cost to a client be considered a part of “welfare.”
- Paving materials: Participants discussed to what extent “paving materials” details should be considered construction details.
  - A landscape designer should be able to identify the aesthetic intent. It seems like designer should be able to designate the surface treatment as an aesthetic detail (type of material, color, or cut or natural edges, for example).
  - Contractors need to ensure the success of installation in regards to strength, compaction, and safety of the homeowner.
  - Specifying edging material for a gravel path.

Grading, drainage, and water management:

- Stormwater:
  - Stormwater conveyance – how stormwater is moving through a site. This needs more specificity as to how it can be addressed in a landscape plan by a landscape designer. Is water that is moving over the ground more of a landscape design consideration? Is this a matter of scale and site details?
  - Placement and flow through of stormwater planters in regards to infiltration.
  - Landscape designers can often design a sitting or retaining wall in terms of specifying height, but it can become an issue for the direction of stormwater depending on grade and amount of water on a site.

- In Central Oregon, specifically in Deschutes and Crook Counties, landscape plans are required as a part of the building permit process. The intention of this requirement is to ensure that post-development stormwater runoff does not exceed pre-development stormwater runoff. Currently, architects and building designers are preparing site grading plans, but often they do not include landscape elements that may contribute to additional stormwater runoff. Due rapid growth and development and the low number of landscape architects, it has been difficult to meet the needs of the region. What qualifies architects and building designers to do grading plans, and can this issue be addressed?
  - Creating language aimed at addressing an issue that is specific to only one jurisdiction would have statewide impacts. Jurisdictions can have their own rules that override the state rules.
  - The American Society of Landscape Architects has a summary of legislation from states across the country, mostly in regards to exceptions for landscape designers.
- Indicating where to keep stormwater on site.
- Reducing impervious surface area or improving onsite infiltration such as through placement of site features or cutting the concrete surface flow.
- Could there be distinctions based on % slopes, volume of earth movement, whether water management is on-site vs. offsite, or new land development vs. preexisting development?
- What are cities in Oregon requiring for stormwater management and should this inform the committee discussion?
- Rain garden:
  - Directing a downspout to a rain garden.
  - Specifying planting medium for a rain garden.
  - Rain garden sizing and placement.
  - Water quality, and berm and swale selection.

#### Construction:

- Construction notes as opposed to specifications and details.
- Comparing bids:
  - Landscape designers can advise their clients when they are comparing bids for construction by guiding them to ask the right questions in regards to cost – client advocacy.
  - The line gets blurred when determining whether landscape designers can provide construction administration and observation. Often homeowner consultation with contractors can be dealt with more successfully by landscape designers.
  - Is it appropriate for landscape designers to provide additional construction details at the request of a contractor for bidding purposes?
- It would be helpful to determine the difference between written vs. verbal direction.
- Specifying the size of posts for a pergola could be an aesthetic or structural consideration.
- Elements that require permits – who can design?



- Construction of patio covers.

Drawings:

- Could a designer provide boilerplate or online drawings of things like irrigation or lighting to a client?
- Sections? (to scale)
- Elevation? (to scale)

## **NOT “CONSTRUCTION DETAILS & SPECIFICATIONS”**

Structures and design elements:

- Deck size and placement of steps and landings
- Patio layout plan
- Paving layout
- Raised vegetable beds
- Soil amendments
- Design intent
- Aesthetic detail
- Illustrative drawings (to scale, show site elements)
- Perspective drawing to convey design intent
- Plan dimensions: Patio size, radius curve, path width
- Elevation drawings
- Sitting walls height, thickness (mass), cap detail – overhang or not
- Size of lumber for a proposed structure
- Low voltage fixture selection
- Information not involving construction

Material types:

- Color, size, manufacturer, source
- Type of finish (surface treatment)
- Aesthetic description
- Post size (for aesthetic reasons)

Other

- Preparation of plans using Sketch-up

## **PUBLIC COMMENT**

Three members of the public were present at the committee meeting. Below is a summary of the comments they provided.

- Catherine Trzybinski: Asked about the term “rain garden” and whether it was considered a site feature. It is a term that could have many different meanings and would be hard to define. Other

states may have boilerplate language regarding landscape designers. If found, the language will be submitted to Christine for the committee to review.

- Barbara Simon: Requested that the committee provide clarity on details that landscape designers get involved in such as sitting vs. retaining walls, fences and gates, walkways, etc. (Committee members responded that these are all important discussion topics, but with the amount this committee has to go through, it's possible that there won't be enough time to cover everything. )
- Bethany Rudemark: Expressed appreciation for this process to better define the rules, and felt that the current ambiguity has been doing a disservice to those working in the field.

## NEXT STEPS & CLOSING

Sylvia asked that two or three committee members develop their own definitions of “construction details and specifications” and bring them to the next meeting for discussion. If possible, these will be emailed to committee members prior to the meeting. Committee members were given the plans that were brought as examples for them to review. Michael expressed that he was encouraged by the discussion and looked forward to further robust conversations. He thanked the committee for their participation and closed the meeting at 12:00 PM.

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The minutes of the 11/13/2017 SRAC meeting were approved with revisions at the 12/05/2017 SRAC meeting.

Respectfully submitted,

Christine Valentine, Administrator