



SUMMARY REPORT

CALIFORNIA ARCHITECTS BOARD **Landscape Architects Technical Committee**

Exceptions and Exemptions Task Force
May 24, 2012
Sacramento, California

Task Force Members Present

Linda Gates, Chair, Landscape Architect (arrived approximately at 10:20 a.m.)
Christine Anderson, Chair, Landscape Architects Technical Committee (LATC)
Pamela Berstler, President-Elect 2012, Association of Professional Landscape Designers (APLD) California Chapter
Dan Chudy, Building Official, Community Development Department, City of Riverside
Mona Maggio, Executive Officer, Board of Optometry
Baxter Miller, President, California Council/American Society of Landscape Architects (ASLA)
Larry Rohlfs, Assistant Executive Director, California Landscape Contractors Association (CLCA)

Task Force Member Absent

Sheran Voigt, Vice President, California Architects Board (Board)

Staff Present

Doug McCauley, Executive Officer (EO), Board
Vickie Mayer, Assistant EO, Board
Don Chang, Legal Counsel, Department of Consumer Affairs (DCA)
Trish Rodriguez, Program Manager, LATC
John Keidel, Special Projects Coordinator, LATC
Jacqueline French, Enforcement Coordinator, LATC

Guests Present

Ramie Allard, APLD
Kim Larsen
Laura Morton, APLD
Lisa Port, National Advocacy Chair, APLD

A. Welcome and Introductions

Christine Anderson called the meeting to order at 9:45 a.m. She advised that Chair Linda Gates would be taking over the meeting once she arrives. Ms. Anderson welcomed and thanked everyone for attending the meeting.

B. Discuss Purpose of Task Force

Ms. Anderson opened the discussion by reading, “The Exceptions and Exemptions Task Force is charged to determine how the Landscape Architects Technical Committee can ensure clarity about Business and Professions Code (BPC) Division 3, Chapter 3.5, Article 3, section 5641 Chapter Exceptions, Exemptions, and ensure that these provisions protect the public.” She then noted that the first charge of the Task Force would be to provide clarity as to how the public is protected and how clarity is determined and defined. She stated that the Task Force is here to discuss and understand exactly what BPC section 5641 is before moving on.

Dan Chudy stated that from the perspective of a building official, the protection of the public is a very broad range, from any human being, whether it is a property owner or passerby, to the protection of the public in regards to structures. Mona Maggio concurred with Mr. Chudy’s comment.

Pamela Berstler asked what about land design is an issue regarding public health, safety, and welfare. She asked if building code requirements brought the practice of land design to that level. She further asked if there were no associated building code provisions, would there be any land design issue that affects the public health, safety, and welfare. Mr. Chudy commented that his opinion is that if there is not an associated code, then there typically is no jurisdiction or authority over it, but working under that umbrella, there could also be potential hazards associated such as drainage issues, disabled accessibility issues, and the designing of overhead structures or retaining walls. He stated that codes to address proper design exist when potential hazards have been identified.

Baxter Miller stated that the public is not only the public today or the client, but includes everybody from the point of design to the point at which what was created is destroyed and replaced with something else. He indicated that the key to the entire process is that landscape architects are accountable to the regulations. He commented that his understanding of the current exceptions and exemptions is that landscape designers can design. Ms. Berstler acknowledged the shared understanding of conceptual drawings and when an unlicensed person can design. She added that with changes that have occurred such as in advertising, the way the Practice Act is written and applied, affects the understanding of how landscape design is practiced and therefore an unlicensed person can potentially be subject to the enforcement of narrow laws.

Ms. Anderson pointed out that this brings the Task Force back to the issue of clarity. She stated that landscape architects have a clear responsibility to protect the public. She further stated that determining clarity in regards to landscape design means providing clarity for the meaning of tangible objects and conceptual drawings. Larry Rohlfes concurred and stated that the key is clarity about exceptions and exemptions and ensuring the provisions protect the public. Ms. Berstler asked if this would require the Task Force to create a list that would specify what services are acceptable for unlicensed persons to perform and then having the list updated every year. Ms. Anderson noted that the question for the Task Force is how we ensure clarity.

Ms. Maggio asked if the LATC had discussed amending the exceptions and exemptions language. Doug McCauley responded that LATC had not. Ms. Maggio asked if there was something specific or complaints that generated the need for the Task Force. Mr. McCauley responded that the LATC received complaints several years back wherein the law was not

properly applied and LATC recognized and rectified the situation and took into consideration the need to consider the current language. He further stated that the LATC committed early on to establish a Task Force of diverse parties to examine the current language.

Ms. Maggio asked about the nature of the complaints. Mr. McCauley responded it was a combination of issues and gave an example of a situation wherein photographs of completed projects potentially gave the implication that construction documents were prepared for the project by unlicensed persons. He stated LATC ultimately clarified that there are no statutes or regulations regarding photographs. Ms. Anderson stated complaints could come from anyone and the complaint could initially be perceived as totally unfounded or have total merit of a potential violation, but the law obligates LATC staff to thoroughly investigate all complaints. She further stated that there have been issues when a licensee comes across a project and realizes that an unlicensed person may have designed it unlawfully.

Mr. Rohlfes asked if the mission of the Task Force is to ensure that the provisions are clear or investigate changing the provisions. Ms. Anderson responded that the mission is both. She stated that the first order of business is to ensure clarity and next would be to address whether the Practice Act currently protects the public. Ms. Berstler suggested that in order to respond to the industry's ever-changing environmental needs, the process cannot only be rearranging words or adding words to the unlicensed person's exemption. She commented on the need to look at the exemption in a new light by looking at numerous scope work, other models, other practice acts that have addressed similar issues, and other states that are changing their practice acts instead of modifying an old act. Mr. Chudy stated that at one time, building codes took the "laundry list" approach and then had to steer away from specific lists because so many situations did not fit neatly onto the list; codes ultimately started utilizing generic definitions. He further stated that sometimes very specific lists, create more questions than they solve.

Chair Linda Gates commented on the importance of the Task Force working together to develop a definition that is clear so anyone that did not have the benefit of being a part of the Task Force will understand the intent of the definition.

C. Review Business and Professions Code (BPC) Section 5641 (Chapter Exceptions, Exemptions)

Ms. Gates opened the discussion by inviting Task Force members to review the existing exceptions and exemptions statutory language and examine what is working or not working. She further stated that the Task Force is open to reviewing Article 3 in its entirety, with the opinion that most of the interest lies with the definition of unlicensed activity. Ms. Anderson reiterated LATC's specific charge of the Task Force to review BPC section 5641. She further clarified that although the Task Force can discuss other areas of Article 3, any outcomes from the Task Force would be formulated as a recommendation to LATC and the Board for final approval. Ms. Gates concurred.

Ms. Gates asked members what areas of interest there were to address and discuss. Ms. Berstler responded that she would like to discuss the process of creating exemptions. She stated that landscape contractors have an exemption to produce construction drawings for projects and asked where the line is to distinguish when landscape contractors are practicing design outside of the exemption. She further stated that she could not see assessing each exemption individually as there will continue to be gray areas in each exemption and instead suggested creating an

additional exemption instead of rewording the current unlicensed person exemption. Ms. Gates responded that it might be possible to distinguish garden design and landscape designers to make it clearer and easier to ascertain parameters for enforcement purposes, but we must also recognize the fact that there are no criteria to become a landscape designer. Ms. Berstler noted that distinguishing the difference between the landscape architect and the landscape designer would make it clear that you would not have to be a landscape architect to perform certain functions that do not rise to the level of public health, safety, and welfare. Ms. Gates indicated that there is no clear definition in the public's mind and the Task Force has a responsibility to create those definitions for the public's protection. She further stated that the nature of becoming a landscape architect ensures a level of training and education and landscape designers are not required to reach a certain level, so there is no threshold to stop someone from calling oneself a landscape designer. Ms. Berstler responded that there is a wide variety of landscape designers, but APLD members mostly have degrees, experience, and certification from other organizations.

Ms. Gates asked Ms. Berstler if she knew of model law in other states. Ms. Berstler responded that she invited Lisa Port, the APLD National Advocacy Chair, to attend the meeting and provide comment, as she has gone through this issue in the State of Washington. Ms. Gates opened up the discussion to allow the public to comment.

Ms. Port introduced herself as a certified landscape designer and licensed architect. She stated that in 2009, after months of discussion and negotiations with the Washington chapter ASLA (W/ASLA) and other industry groups, they were able to develop language where the landscape architects gained a law that protects the profession, as well as the public, and did not negatively affect other landscape professionals. She further commented that since the law went into effect in July 2010, there have not been any disciplinary actions towards landscape designers related to the law. Ms. Port continued that the law includes exemptions for landscape design on residential properties, irrigation design, construction site supervision, and preparation of construction documents. She added that Washington does not have a landscape contractor's license. Ms. Berstler asked Ms. Port if there was a statewide license or certification for landscape designers. Ms. Port replied that they do not use the term landscape designer in any language and instead use the term landscape design because of the regulatory problem of not being able to enforce the term "landscape designer." Ms. Gates asked if landscape design had been defined and Ms. Port replied that it had not been defined.

Ms. Gates stated the role of LATC is not to protect the profession of landscape architecture, but to protect the consumer by preserving consumer choice in a manner where they do not endanger themselves, their neighbor's property, and the public. She also stated the mission is to find the point at which the consumer could be potentially at risk when the design is beyond plantings to include items such as arbors and structures. Ms. Berstler shared that items beyond plantings can only be installed and built by a licensed landscape contractor. Ms. Gates added that the homeowner could also build items and many homeowners use laborers to construct their projects.

Ms. Berstler commented on the need to recognize activities of landscape design as a profession because landscape designers are otherwise looked upon as "illegal" by not being a licensed profession. Ms. Gates reiterated that there is nothing to prohibit a person from calling oneself a landscape designer and there is a need to protect the safety of the most naive consumer when design projects involve items such as structures and altering drainage patterns that are a potential threat to public health, safety, and welfare.

Ms. Berstler stated that consumers are asked to engage in activities of water conservation and low impact design. Mr. Miller responded that homeowners are exempt on their individual residences with limits on building, and that the Architects Practice Act specifically states what the exemption is limited to in terms of number of buildings on properties. He further stated the clarity is to make sure the consumer understands the services they are going to receive in terms of the limitations of what designers can do, since they are not regulated, and to make clear to the consumer when the law requires the services of a licensed landscape architect.

Ms. Berstler asked Mr. Miller to clarify a homeowner's requirement to install best management practices and how the homeowner decides which is best and how to implement. She also asked why landscape designers are unable to help. Mr. Miller replied that landscape designers are able to help and can advise, but the key to the process is the expectation of the homeowner to have recourse if the design does not meet codes and are then unable to hold landscape designers accountable at the state level since they are not regulated. Ms. Berstler stated that if there was an issue that a landscape designer's plan was not accepted by a local jurisdiction, the consumer could go to the Board and complain that the plan did not conform to the standard plan. Mr. Miller stated the key to the entire process is to make it as clear as possible for the public to know their rights and to educate them on what services are within the scope of a licensee or unlicensed person.

Ms. Berstler asked how licensed architects deal with the residential exemption for standard construction, as she believes there is a similarity. Mr. McCauley responded that it is important to recognize the history of the provisions. He stated the Board previously regulated building designers and when that profession was deregulated, the exempt area language was developed as part of that solution, which made it a unique situation. Ms. Berstler stated that she is referring not only to the language, but also the idea of design drawings that may include items such as pathways with a six-inch step, elevation, and the materials involved, and whether it would bring it to the level of impacting health, safety, and welfare. If not, she indicated that the consumer should have a choice to hire someone to prepare those types of drawings who is not a landscape architect. Mr. McCauley commented that part of that was the outcome of deregulating the profession and part of the logic was that work on single-family dwellings up to a fourplex, two stories, and a basement would be regulated by building officials through the plan check and inspection process.

Ms. Anderson stated that she is concerned that some jurisdictions allow landscape designers to perform work up to a certain dollar amount, using a monetary basis as the requirement for licensure. She explained that this is concerning because a landscape designer could create a design that could include something that might be detrimental to the public's health, safety, and welfare. She further stated that because some jurisdictions allow that type of waiver, they have no other way to regulate it and the local jurisdiction defers back to our law to govern based on the dollar figure.

Mr. McCauley stated the area with most consumer harm and complaints usually involve consumers who may be unaware of contract requirements, regulatory elements, the ins and outs of the profession, and how to manage projects versus better-informed consumers that may be repeat clients and public agencies. Ms. Berstler stated there are other factors to look at in regards to coordinating projects and pointed out that other states have agreed that a reasonable exemption would be a project that would require three or fewer licensed design professionals. She further

stated the elements that fall within landscape design that do not require the level of licensure is vast and growing.

Ms. Gates stated there is a need to look at the issues that exist today and the need for the residential consumer to have more choice working with landscape designers on projects that do not require a licensee stamp. Ms. Anderson stated the issue was primarily residential landscape design brought about by the discussions of the Scope of Practice and Exemptions and Exceptions Task Force in 2002 and subsequent change to the law, which resulted in complaints. She stated there is a need to look at the data to determine if anything in the law precludes the landscape designer from doing their work or to determine if there is a clarity issue. Ms. Berstler stated that if it is determined to be a clarity issue, then there is a need to look at the other exemptions that are not clear.

Ms. Berstler stated she would like to look at the exemption for landscape contractors where the exemption exceeds the design ability given within their license. Mr. Miller commented that the Contractors State License Board would address that issue. Ms. Gates commented that it goes back to a consumer protection issue and landscape contractors go through the rigors of licensure with the regulation that landscape contractors build without causing harm. Mr. McCauley remarked that Ms. Berstler might be trying to make the point wherein a landscape contractor prepares the design and does not end up doing the construction as well. Ms. Berstler agreed and stated that type of situation brings the landscape contractor into the unlicensed category. Mr. McCauley stated LATC would potentially take action in that type of a situation unless the landscape contractor was able to demonstrate that it was a holistic contract or the client did not end up allowing the contractor to do the construction. Ms. Gates stated the design is not valid unless the landscape contractor builds it and there is a definite need for clarity in that type of a situation.

Ms. Gates stated the discussion is bringing about action items such as retitling, how to provide consumer protection, consumer choice on a residential scale, and landscape contractor clarification and asked the Task Force members if there were any other action items. Ms. Maggio asked if the members should look at the language in other states. Ms. Gates concurred and included looking at model law as well. Mr. Miller stated the challenge is the unknown history of how other states got to the laws that they have as each state gets there differently from each other. Ms. Gates agreed that each state gets there by a different story, but how they got there is interesting as they may have found a way to say something that is exactly the way we would want to say it.

Ms. Anderson commented that she would like to see how other states outreach to consumers, and then craft an outreach campaign to consumers that are most affected. Ms. Berstler stated it would be helpful to find out what a landscape architect does that is unique to the license as most examples they find are of consumers needing services that do not require a licensed professional.

D. Review and Discuss Background Material from 2002 Scope of Practice and Exemptions and Exceptions Task Force

Mr. Rohlfs stated the first step is to look at what was decided in 2002 leading to the Figueroa bill and determine if what was decided back then needs to be changed and if not, the next step would be to determine how clear it is.

Mr. Rohlfes questioned the need for a broader exemption for designers and the necessity to change the law to make it clearer, or whether the issue could be addressed with a simple opinion letter by the LATC. Mr. Miller responded that there would need to be a bill to change the law and you run the risk of having other issues addressed in the bill. He also stated that we could not reject the idea that the law may already be perfectly clear. Ms. Berstler stated that in light of the enforcement actions, it has become clear what the intent and letter of the law is, but it is not in step with the reality of the current marketplace and it is not protecting the consumer by limiting what the landscape designer can do. Mr. Miller stated that Ms. Berstler is talking about the fundamental nature of the license as opposed to clarity, which is what the purpose of the group is to ensure.

Ms. Anderson stated the members have an obligation to consider the items done in 2002. She further stated LATC defines it as a clarity issue as there were many complaints resulting from the 2002 law that brought about the question of whether there was a problem with the law and whether we are now up to date, ten years later, with the current practice. Ms. Gates stated the Task Force is not tasked to protect the license, but to look at the challenges of BPC section 5641.

Ms. Anderson suggested beginning with BPC section 5641 and to discuss the exempt areas as well as whether the language sufficiently protects the public. Mr. Miller commented that if landscape contractors are working beyond their scope, the issue is something that may extend beyond the exceptions and exemptions provided in BPC section 5641. Don Chang reiterated that when landscape contractors exceed the scope of their license by design only, the LATC should focus on BPC section 5641. Ms. Gates asked Ms. Berstler her opinion of how BPC section 5641 could be fixed and Ms. Berstler suggested adding another exemption.

Ms. Berstler asked if there would be any discussion regarding certification or licensure and Ms. Gates replied that it is not within the power of the Task Force to do so. Ms. Gates commented on the need for the discussion to be brought back to determining the challenges of interpreting BPC section 5641.

Mr. Rohlfes questioned how it was determined single family residential was singled out for the exemption. Ms. Gates stated the objective was to provide the consumer more choices as more consumers were requiring services to shape their landscape. Mr. Rohlfes asked if the current language accomplishes health and safety concerns that are paramount (such as drainage, retaining walls above three feet, and overhead structures), and if not, there might be a need to change the language. He further stated that it is not clear to him how a commercial landscape is different from a residential landscape and proposed that it could be discussed. Ms. Gates asked Mr. Chudy, as a building official, whether the language works. Mr. Chudy responded that it works, but prefers the language used in BPC section 5537 of the Architects Practice Act as it refers back to conventional construction parameters and is clear on what can and cannot be designed. He further stated if the design is within the parameters, then anyone can prepare the plans, but once the design is outside the parameters, a licensee is required.

Mr. Miller asked Mr. Chudy whether it becomes the responsibility of the building department once they sign off on plans. Mr. Chudy responded that it is the responsibility of whoever signs the plans whether it is the owner of the property, a contractor, an architect or a landscape architect. He further stated that in the case of a landscape architect, the stamp does not suffice if it exceeds the construction parameters of the code.

Ms. Gates stated one of the issues was the confidence that the person constructing the items such as deck systems, retaining walls, and trellises would ensure to adhere to codes. Mr. Chudy stated those types of items require permits, but there are exemptions for retaining walls less than three feet in height from the footings and structures and for storage sheds less than 120 square feet. Mr. Miller stated more jurisdictions are putting more into the permit process within the last ten years that has provided more clarity in terms of what homeowners can or cannot do. Ms. Anderson stated that while there are some cities that are very clear about it, we also have to look to the cities that are not as sophisticated in their building department practices in reviewing codes.

Ms. Berstler stated her interest lies in a better understanding of where it is determined that designing is no longer landscape design and the services of a landscape architect are required. Ms. Gates replied it is the point at which the consumer is at risk and requires a level of guaranteed expertise. Mr. Miller stated the definition of the law is clear. Ms. Berstler replied that if Mr. Miller is saying the current definition clarifies what it is that a landscape architect can do that is different from a landscape designer, then the definition definitely needs to be changed. Mr. Miller disagreed and stated the question is whether it is a lack of clarity or a lack of scope.

Ms. Berstler asked what the process would be to come to the determination. Mr. Miller asked that Ms. Berstler first define the lack of clarity and then the discussion can begin on how to address clarity through things such as outreach, market studies, and surveys of consumers to deal with the lack of clarity, and if there is the desire to change the language then that would be a scope issue. Ms. Berstler asked whether a design that is a planting plan and arrangement of tangible objects would only be able to be residential and Mr. Miller responded that it would and again her question is about scope of a landscape designer and not clarity. Ms. Berstler stated the concerns are interpreting elements such as preparing drawings, sketches, conceptual design, and placement of tangible objects that are currently unclear. She further stated there is a need to not only make the interpretation more clear, but to also look into creating a broader exemption that includes all of the elements, as well as other issues that are currently confusing such as the clarification of single family dwellings. Mr. Chudy stated the exemption is clear and Ms. Berstler is possibly looking for the exemption to say something that it does not. Mr. Rohlfs said that if the exemption does not protect the public, determining clarity might be moot at this point. Ms. Gates commented on the need to determine whether the issues lie in the lack of clarification or whether to expand the scope.

Ms. Maggio commented on the fact that there are no regulations or title acts for landscape designers and that anyone can call oneself a landscape designer. Ms. Berstler agreed with Ms. Maggio's comment. Ms. Maggio stated the concern at the consumer level is that a consumer may look at the landscape designer title and assume that a license has been obtained for the profession. She further stated that landscape architects by way of education, training, and the licensing examination have met certain qualifications that are regulated by the State of California. Mr. Miller added that landscape architects were regulated because there was a need.

Mr. Miller stated that codes apply to everyone whether they are licensed or unlicensed and as it relates to what we are discussing, we are comparing a guild that have ethical and educational requirements versus the State of California that regulates that in order to practice in this area, a standard has been created that has to be met. He further stated the need is to determine at what point does an activity not require regulation by the State. Ms. Berstler stated the definition now says that anything outside of planting plans and the placing of tangible objects requires the hiring

of a licensed landscape architect and feels it is unreasonable to ask that of a homeowner. Mr. Chudy disagreed with Ms. Berstler's interpretation of the exemption stating the consumer in a single family dwelling can do the project themselves or hire someone with no experience, but when a project entails building a structure, a permit is required and if the structure is not exempt then an architect or engineer would need to review it. He advised Ms. Berstler to refer to the beginning sentence of the exemption wherein it states, "This chapter shall not be deemed to prohibit any person..." from doing any of the things, that Ms. Berstler has concerns about. Ms. Anderson agreed with Mr. Chudy's assessment.

Ms. Gates commented the need of the Task Force to create action items for the next meeting. She asked the Task Force members to come back with ideas of how the exemption might be clarified. She further stated another action item would be looking at laws from other states. Mr. Miller replied that he would be able provide information on laws from other states. Ms. Anderson stated the Council of Landscape Architectural Registration Boards (CLARB) has a Determinants of Success Study that gives an understanding of what the scope of landscape architecture is and suggested that the Task Force could look at CLARB's occupational analysis as well.

Mr. Rohlfes commented that his opinion of clarifying the exemption would be determining the definition of construction detail or construction documents and asked Ms. Gates whether the proposition would be that the Task Force opens up the whole definition with ideas on how to rewrite the exemption. Ms. Gates replied that the Task Force will wordsmith and come up with other ideas with the intent of reviewing each members ideas before the next meeting.

Ms. Maggio asked if the Architects Practice Act defines documents and scope as detailed as what we are contemplating for landscape. Mr. Chang replied that things such as instruments of service are not defined. Ms. Maggio stated if that were the case, then she would have a concern with rewriting the exemption. She further suggested instead of changing the law specifically, we might want to steer in the direction of having it put into regulation because as the landscape profession evolves, it would be easier to make a change in regulation than in legislation. Ms. Gates stated it would be a good thing to discuss at the next Task Force meeting. She further commented that once we figure out what we want to do, we could then figure out the simplest way to achieve it.

Ms. Gates asked for the Task Force members to submit information to be included in the meeting packet for the next Task Force meeting by August 16, 2012. Ms. Gates requested that the information on the occupational analysis and practice law from other states be included in the next meeting packet.

E. Public Comment Session

Ms. Gates asked if any members of the public would like to address the Task Force.

Laura Morton stated she had been a part of the University of California, Los Angeles (UCLA) extension program for landscape architecture. She stated being part of the program led her to the realization that the level of education for a landscape architect was not something she was drawn to as the projects were on a grander scale and were more technical than what she was able to live up to at the time. She stated she found herself drawn to other aspects of the green industry and became a landscape designer. She stated there are many levels within the green industry and that

there is a need for another level for those professionals in the industry that have Bachelors and Masters Degrees in landscape architecture.

Ramie Allard stated she is on the APLD legislative committee and is a licensed C27 landscape contractor. She stated she is participating in the process of examining the code that is already in place to protect the health, safety, and welfare of the community and she appreciates that the APLD is able to be a part of the Task Force and participate in the discussion.

Ms. Gates asked Ms. Port whether she wanted to contribute anything further. Ms. Port commented on the fact that these types of discussions are happening nationwide. She further stated that finding out what other states are still grappling with and what solutions they have come up with will be interesting.

F. Select Future Meeting Dates

Exceptions and Exemptions Task Force meeting tentatively scheduled:

September 6, 2012, 9:30 a.m., Sacramento.

Adjourn

- **Chair Linda Gates adjourned the meeting.**

The meeting adjourned at 1:05 p.m. (approximate).