

**Report of Preliminary Assessment for State Regulation (Licensure)
of Landscape Architects**

Landscape Architects: Sunrise Application

Docket No. LA-03-0602

**SUMMARY OF TESTIMONY AND EVIDENCE
PRELIMINARY ASSESSMENT ON REQUEST FOR LICENSURE**

On July 1, 2003 the Vermont Chapter of the American Society of Landscape Architects submitted an application for Preliminary Sunrise Review. Their application with attachments and supplemental filings exceeds 200 pages.¹

This report discusses whether there is a need to regulate landscape architects in order to protect the public from potential harm, whether the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability, and whether the public can be adequately protected by other means in a more cost-effective manner.

■ The application does not demonstrate that the unregulated practice of landscape architecture “can clearly harm or endanger the health, safety, or welfare of the public.” 26 V.S.A. § 3105(a). Not one case of harm caused by a Vermont landscape architect has been found.

■ The public cannot reasonably expect to benefit from governmental assurance of initial and continuing professional ability. With no real harm shown, there is no need for governmental regulation. Landscape architects have a national association, the American Society of Landscape Architects, which has standards of education and performance and a well-established system of private sanctions. That society has a code of ethics and disciplinary procedures to assure maintenance of high standards.

■ The existing common law and statutory civil remedies are sufficient to reduce or eliminate whatever potential harm may exist. The few cases in other states involving landscape architects show that the civil actions more than adequately address any harm caused.

Based on our evaluation of the evidence explained below, the Office concludes: **the request for licensure does not meet the criteria for licensure under Chapter 57 of Title 26 and should be denied.**

Background and Regulatory Considerations

State Policy on Regulation of Professions

“It is the policy of the state of Vermont that regulation be imposed upon a profession or occupation *solely* for the purpose of protecting the public. The legislature believes that all individuals should be permitted to enter into a profession or occupation unless there is a demonstrated need for the state to protect the interests of the public by restricting entry into the profession or occupation. If such a need is identified, the form of regulation adopted by the state shall be the least restrictive form of regulation necessary to protect the public interest. If regulation is imposed, the profession or occupation may be subject to periodic review by the legislature to insure the continuing need for and appropriateness of such regulation.”
26 V.S.A. § 3101. (emphasis added)

¹This does not include six bound volumes of statutes and rules from other states.

26 V.S.A. §3102(c) provides: “Any new law to regulate another profession or occupation shall be based on the relevant criteria and standards in section 3105 of this title.”

26 V.S.A. § 3105(a) specifies the criteria and standards employed in the analysis.

“(a) A profession or occupation shall be regulated by the state only when:

- (1) it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;
- (2) the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and
- (3) the public cannot be effectively protected by other means.

Methodology

During the Sunrise review process the Office reviewed relevant literature, interviewed the applicants and other interested parties, held a public hearing, and performed legal and factual research.

This Office submitted a request for information about landscape architects to the Office of the Attorney General, Consumer Rights Division. We reviewed material from the Federal Trade Commission and the Department of Labor, Bureau of Labor Statistics, for additional information about this profession.

Pursuant to 26 V.S.A. § 3101 et seq. the Director of the Office of Professional Regulation held a public hearing on August 19, 2003 in Montpelier to permit the Applicants, Landscape Architects, an opportunity to present evidence to show that they meet the statutory requirements for licensure.

Attending the hearing were several landscape architects, lobbyist/counsel to the applicants, a landscape designer and a land surveyor. The applicants provided supplemental exhibits at the hearing and afterward. The Office has also received correspondence from the Agency of Transportation.

Profile of the Profession

Landscape architects’ clients are predominately municipalities, corporations, real estate developers, state and federal agencies, schools, resorts, hospitals, private landowners, not-for-profit organizations and religious organizations.

Landscape architects explained that they plan the location of buildings, roads, some walkways, as well as the arrangements of flowers, shrubs, and trees. They are involved with projects and environmental improvements such as preservation and restoration of wetlands. Historic preservation is another important task to which landscape architects may apply their knowledge of the environment, as well as their design and artistic talents.

In Vermont, the applicants point out that their professional activities undertaken include: site planning, land-use master plans, visual impact assessments, facility programming, golf course design, transportation planning, streetscapes, signage systems, park planning and design, subdivision design, corporate and commercial facility planning and design, historic preservation, ecological restoration, campus planning, cemetery design, and land management plans.

The U.S. Department of Labor, Bureau of Labor statistics states:

Everyone enjoys attractively designed residential areas, public parks and playgrounds, college campuses, shopping centers, golf courses, parkways, and industrial parks. Landscape architects design these areas so that they are not only functional, but also beautiful, and compatible with the natural environment. They plan the **location of buildings, roads, and walkways, and the arrangement of flowers, shrubs, and trees.** (emphasis added)

Increasingly, landscape architects are becoming involved with projects in environmental remediation, such as preservation and restoration of wetlands. Historic preservation is another important objective to which landscape architects may apply their knowledge of the environment, as well as their design and artistic talents.

Many types of organizations—from real estate development firms starting new projects to municipalities constructing airports or parks—hire landscape architects, who often are involved with the development of a site from its conception. Working with architects, surveyors, and engineers, landscape architects help determine the best arrangement of roads and buildings. They also collaborate with environmental scientists, foresters, and other professionals to find the best way to conserve or restore natural resources. Once these decisions are made, landscape architects create detailed plans indicating new topography, vegetation, walkways, and other landscaping details, such as fountains and decorative features....”

Education

Landscape Architects propose as a prerequisite for licensure that applicants either (1) hold a Council of Landscape Architectural Registration Boards certificate and license from another state, or (2) have at minimum a four year degree in landscape architecture plus three years experience and passage of an examination, or (3) nine years experience and passage of a national examination. There are transitional provisions in the proposed statutory language for persons in the field already.

Licensing is based on the Landscape Architect Registration Examination (L.A.R.E.) sponsored by the Council of Landscape Architectural Registration Boards. The L.A.R.E. is a five-section examination given over a three day period. It is developed and administered by the Council of Landscape Architectural Registration Boards (CLARB). CLARB is comprised of the regulatory boards from the U.S. states and Canadian provinces that license landscape architects. As of 2002, 16 states required passage of an additional state examination. These state examinations focus on, laws, and permits, regulations, plants, climate, and other characteristics unique to the state.

Conflict with Other Professions

In connection with this review we spoke with the Vermont Board of Architects and the Vermont Board of Professional Engineers and individual members of Vermont Board of Professional Land Surveyors.

Architects

Architects expressed support for licensing landscape architects. They did not, however, wish to have their board burdened with oversight of landscape architects.

Professional Engineers

The Vermont Board of Professional Engineering on November 6, 2003 formally voted against licensure of landscape architects.

“It is the opinion of the Board that the work performed by Landscape Architects does not impact the health and safety of the public, which is the purpose of licensure. In areas where their work does overlap with engineers, such as retaining walls, outdoor lighting systems and drainage, where the health and safety of the public is a consideration, a licensed professional engineer should be employed due to their relevant experience and training.

The Board points out that there are other opportunities besides licensure under Vermont's statutes for professional recognition.”

The Vermont Society of Professional Engineers wrote to this office in November in opposition to licensure of landscape architects. The Society takes the position that landscape architects should not be allowed to design “items that affect public welfare and safety, which should be done by a licensed professional engineer.”

The Society suggests that landscape architects should provide the functional and aesthetic use of the site; whereas engineers should provide the technical design of the site. They add, “this is probably the intent of the Landscape Architects, but should be clearly stated in the statute as such.” In the proposed statutory language as submitted by the applicant it was not clear. Nor was it clear from comments made at the public hearing.

The landscape architects admit that they are not permitted to design storm water management plans for impaired streams and off-site flows in Vermont and that those activities are limited to licensed professional engineers within the scope of their specialty. September 8, 2003 letter. The applicants argue that they can “undertake these activities in other states, although not necessarily in all other states that have licensing for landscape architects.” Id. If they are still barred in some states, they seek a broader scope of practice in Vermont into the areas previously the domain of engineers. It is not clear from the materials provided that landscape architecture curricula nationwide provide the educational background for all these endeavors. A brief review of landscape architectural curricula shows a wide range of course offerings and requirements.

Planners

The Vermont Planners Association expressed concern that the definition of landscape architecture overlaps with what planners, who are unlicensed professionals, currently perform in Vermont. “The first two of these activities [in the definition] are clearly activities routinely performed by planners.” They suggest that “(1) the preparation, review, and analysis of land use master plans, subdivision plans and preliminary plats; (2) the investigation, selection and allocation of land and water resources for appropriate uses;” be deleted from the definition. If the language is not deleted, the Planners request that § 104(a) specifically exempt members of the planning profession when performing activities customarily included in the practice of planning from licensure under the landscape architects’ proposal.

In apparent response to these concerns the applicants revised their definitional statute and exemption clause. Their new proposed exemption clause would exempt planning.

Land Surveyors

Land surveyors do not object to licensure of landscape architects as a profession. However, the Chair of the Board of Landscape Surveyors expressed concern that landscape architects not perform functions which require licensed land surveyors.

The land surveyors believe that, “[L]andscape architects are not trained in the land surveying functions related to boundary location and subdivision.” A revised Landscape Architecture definition eliminates the troublesome wording and is now supported by the Board of Land Surveyors.

Unresolved Conflict

The landscape architect proposal leaves some areas of unresolved conflict with other professions for the following reasons. First, the broad definition of landscape architecture and the exemption from the proposed licensing statute would make determinations of unlicensed practice very difficult. Any person claiming to be a member of another profession, licensed or unlicensed, could claim exemption from the licensing laws for landscape architects. Second, reciprocal exemptions do not exist in all the enabling statutes of those other professions. Third, and most important, there is a significant disagreement between the Engineers, who do not believe the Landscape Architects should be allowed to design construction documents, and the Landscape Architects who believe they have that expertise.

Proffered Rational for Regulating This Profession

Applicants argue that Vermont's regulatory scheme puts them at a disadvantage. They state that engineers perform many of the functions which landscape architects are also qualified to perform. Because engineers are licensed, they are seen as having a higher degree of expertise in these areas than landscape architects. The landscape architects argue they are denied professional recognition in those areas in which they are capable to practice simply because they lack a license. This concern, however, is not a safety issue. Safety is the core inquiry of the sunrise process.

For example, the applicants state that under current Vermont law they cannot design storm water management plans for impaired streams and off-site flows. These activities, they say, are limited by statute or rule to licensed professional engineers. The applicants say that they can perform these activities in other states, "although not necessarily in all other states that have licensing for landscape architects." Attachment 2, September 8, 2003. They posit that licensure will lessen the chance that improper wetlands activities will occur, with there being more licensed professionals to handle wetland activities. There is no proof for this claim. This position ignores the fact that licensed professionals are required now, and implies that regulation of engineers is somehow insufficient or that there are not enough engineers to handle the issue.

The applicants say that limitations on what landscape architects can do are created by both state and municipal laws and regulations. They describe these limitations as "totally artificial." The applicants submit they are barred from certain work activities because they lack a license.

VTrans Use of Landscape Architects

They cite VTrans which they say eliminates landscape architects from consideration for doing bicycle paths, small roadways, intersection improvements and sidewalks, activities they "perform in other states."

VTrans "has in the past and currently does utilize the services of Landscape Architects. The primary use of this professional skill has been for the development of landscaping plans for our transportation projects." VTrans believes that landscape architects can be used as they are now to develop landscaping plans for agency transportation projects. They appropriately serve as members of "a *Design Team* because of their ability to produce conceptual drawings and renderings that enable the public to better understand what the finished project will look like. None of the drawings were of such a detail that the project could be constructed from them." It is our opinion that the landscape architecture curriculum does not include sufficient course work in the areas of material properties and traffic engineering to allow for the complete and correct design of either a roadway or separate bike/ped facility." October 14, 2003 letter from David J. Scott, P.E., Director of Program Development, Vtrans.

Agency of Transportation Use of Landscape Architects

The Agency of Transportation has landscape architects on its staff. It does contract with Landscape architects for outside the agency projects. For the design of bicycle paths and related projects applicants, however, the agency has determined that it must require professional engineering plans. The plans must address finite details within the scope of practice of engineers or surveyors. The AOT standards could just as easily read “licensed professional engineers and land surveyors and architects as specific projects require, as determined by the Agency.” The AOT standards do not bar landscape architects from certain work merely because landscape architects are unlicensed.

Landscape Architects are seen by AOT as providing good design and conceptual planning expertise. Final plans differ from design plans, however. Final plans for bike paths or similar projects require more than just designing or laying out a path on a parcel of property. These projects are seen by AOT as the engineering equivalent of building roads. The agency requires detailed engineering plans regarding elevations, angles of curvature, grades of pavement or surface, thickness of pavement, and more. Landscape Architects are seen by AOT as being able to complement professional engineers, land surveyors and surveyors, but not to replace them in their core functions which the agency requires for these projects. The Agency does use “qualifications based reviews” when it employs Landscape architects. Licensure plays no role in AOT landscape architect use decisions.

Whether or not landscape architects are licensed will not affect the AOT’s use of landscape architects. The Agency will use landscape architects, as it does now, in areas where their expertise can be employed. The Agency will not use landscape architects where it believes engineering, land surveying or architectural services are required. Future regulation of landscape architects by licensure will not affect landscape architects’ work with AOT. Conversations with VTrans.

Municipalities and Landscape Architects

Applicants also point out that several communities around state limit who can submit plans and drawings in support of subdivision or site plan applications to “licensed engineers” or “land surveyors.” Applicants point out that several municipalities through various laws or rules require licensed professionals to submit certain plans. If true, two possible inference arise: 1) municipalities use licensing as a screening device to ensure that plans are submitted by people whose expertise can be assumed. Since state laws require that land surveyors, engineers and architects be licensed by the State of Vermont, their competence can be assumed. 2) Municipalities specified certain licensed professions because the specificity of plans requires a level of knowledge which only professional engineers and land surveyors possess. If licensure is required for the first reason, then like the Agency of Transportation, municipalities could use qualifications based reviews to ensure that the people they deal with are competent. If the second inference is true, the State agencies are making use of distinctions not based on licensure, but based on a belief that the skill of the other professional is required. In that case, licensure would not help the Landscape Architects.

The applicants state that as professionals who often submit “site plans” they do so with a “range of professionals, paraprofessional, and even applicants with no land use planning experience. The level of professional expertise required depends on the scope of the project and the particular legal requirements of the specific permitting process.” They point out that some towns have no requirements, others require the participation of a landscape architect, licensed land surveyor or licensed professional engineer.

The applicants submit that “expert site planning increases the property value for a community and encourages shoppers to chose a business district or shopping center.” Application page 8.

The applicants suggest that their expertise in site planning (Application page 8) enables them to avoid

non-compliance with the Americans with Disabilities Act. The applicants admit that the ADA does not require a professional engineer, or a landscape architect. Landscape architects, they contend, add to ADA compliance with an aesthetically pleasing product. ADA regulations do not appear to specifically address landscape architects as a profession with particular responsibilities under the Act, although general knowledge of the act may be beneficial for design practitioners. The federal government does not require its own landscape architects to be licensed.

The applicants complain that Vermont's failure to license landscape architects creates hurdles for them if they wish to practice in other states. They have no Vermont license to use to seek licensure through reciprocity with other states.

We do not see granting licenses to ease out-of-state practice as justification for additional state regulation. A Vermont landscape architect wishing to practice out of state may elect to comply with that state's licensing provisions. The sunrise statutes do not include promoting Vermonters' access to out of state licensing markets as a justification for additional professional regulation.

Requirements of Sunrise

Access to State and Municipal Projects

1. If, as the applicants submit, they are qualified to submit plans and take the lead role in certain projects, their quest for licensure arises from other agencies' requirement of a license, not from a need to protect the public. Licensure should not substitute for a proper use of agency discretion in selecting contractors.
2. Under the sunrise laws the decision on regulation of this profession cannot be based on the applicants' desire to be considered for certain types of work. The language and intent of 26 V.S.A. §3105 do not sanction the regulation of new professions to enable them to obtain more employment.
3. Most municipal planning requirements are designed so that individuals can submit their own plans. A licensed professional is **not** required. Vermont wishes to keep, as much as possible, planning tasks accessible to individuals and not force them to have to employ high priced professionals for every project.
4. In their testimony at the sunrise review hearing the applicants discussed the activities they perform which require some type of state or municipal permit. The applicants argue that under current law only licensed civil engineers can undertake "planning the use of land and water." They submit that they are trained to do the same work. They admit that there is overlap between what engineers do and what they propose to do. They argue, "if it is important enough to license engineers to this work, then it must logically also be important enough to license landscape architects to do the same work..." We found no evidence that state agencies view engineers and landscape architects as equivalent professions. As seen above, the state agencies see the distinction between having sufficient competence and training on one hand and license status on the other. They require other professions for well articulated reasons, not based on licensing.
5. The statutory presumption is against regulation: Only when it is shown that health, safety and welfare cannot be otherwise assured is new regulation considered.

Public Harm

The lynch pin of professional regulation in Vermont, as stated above, is whether the profession, unregulated, “can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative.” 26 V.S.A. § 3105(a)(1).

This Office contacted the Attorney General’s Office of Consumer Protection and learned that in the past six years there have been 75 complaints against businesses engaged in landscaping. These complaints do not distinguish landscape architects and landscape designers or landscapers, the people who actually do the planting and maintenance of plants. Information provided by that office show that no one currently employed at the office had any recollection of any claims arising from improper planning or design of any project. Complaints the office responded to included complaints of trees dying, products not being delivered, shoddy workmanship, breach of warranty or similar complaints.

The Federal Trade Commission enforces a variety of consumer protection laws enacted by Congress. The FTC’s web site reveals no action taken against any Vermont landscape architects.

A Westlaw review of Vermont court decisions revealed no cases in which the term “landscape architect” appeared.

The applicant has furnished several cases which they argue shows examples of public harm. Applicants submitted 12 scenarios in their original application to show how landscape architects protect public safety. The applicants also submitted 21 additional case histories in Attachment 12 to their September supplemental filings.

The scenarios speak of harm resulting from projects which were improperly designed or implemented. They suggest that use of licensed landscape architects could have prevented these potential risks. The implication of these examples is that had landscape architects been involved in the design of a skate park, the design of a park and pond, the design of the ski area which apparently damaged wetlands, the harm would not have occurred.

Analysis of Cases Submitted: Nature of Harm

The scenarios submitted by the applicants argue that use of landscape architects may be a prudent planning decision to avoid problems and future harm. The applicants’ scenarios make good promotional material urging consumer employment of landscape architects.

There is no known instance of a Vermont Landscape Architect causing harm to the public health, safety or welfare. Applicants have provided no example of a Vermont landscape architect problem, let alone one for which regulation would have made a difference. The office has been provided no example of unqualified landscape architects causing harm in Vermont.

The application admits that many of the other states’ enforcement statistics regarding landscape professionals are not available. They provided Wisconsin statistics which showed not one action taken against any of that state’s 450 landscape architects in the previous five years. (Application page 23). If this statistic is indeed representative, it strongly suggests that this is a profession whose unregulated practice does not clearly harm or endanger the health, safety, or welfare of the public.

The underlying theme of the cases submitted by the applicants is that had a licensed landscape architect been involved, no harm would have occurred. The applicants suggest that the failure to employ a landscape architect caused injury. They suggest that others, licensed or unlicensed, lack the harm preventing expertise of landscape architects. There is no evidence that this is true.

Assurance of Initial and Continuing Professional Ability

We conclude that the public would not benefit from a governmentally imposed assurance of initial and continuing professional ability.

Other Means to Effectively Protect the Public

On page 14 of their application the applicants argue,

“[I]t is difficult for a client of a public space, or the community at large that uses a public space to successfully litigate against the design that fails to adequately produce the public benefits of such spaces. Only in cases of serious environmental damage that becomes apparent within a short time after the design is implemented or a physical injury due to negligence is there sufficient recourse for malpractice. With litigation providing only very limited opportunities for relief, it is imperative that the profession be licensed.”

The applicants submitted more cases to support this contention. In none of the cases submitted would a licensing sanction have benefitted the injured party. The applicants speak of a Board’s power to order restitution as an remedy and deterrent. Vermont Boards have no restitution authority.

Licensing landscape architects would not give recourse for damages for a design that fails to adequately produce the benefits sought. Licensing this profession would not permit anyone harmed to obtain monetary redress. Licensing this profession, if harm were not remote or were not speculative, might possibly play an additional role in preventing harm. There is no indication from any material submitted that licensing landscape architects would result in a safer or healthier Vermont or a higher level of welfare than exists today.

What is clear from these cases, however, is that the tort system can compensate the victims of malpractice.

The applicants, through their professional organization, the American Society of Landscape Architects have a code of conduct. Their code may be accessed at, <http://www.asla.org/governance/ldrshdbk/code.htm> They have an ethics committee to resolve complaints against members. They possess a well-established system of private sanctions that can cure unprofessional acts of landscape architects. Consumer fraud may be addressed by other Vermont avenues, like the Attorney General’s Consumer Affairs Office.

Alternatives to Licensure

The applicants state that certification or registration are not appropriate regulatory means, that licensure is the only appropriate form of regulation. They cite “life or death” impact that numerous aspects of their professional jobs implicate. September 8, 2003 letter page seven. See discussion on harm, ante. This argument is not persuasive.

Conclusions

The evidence provided by the applicants or obtained by this office do not show that landscape architects as an unregulated profession have in the past caused any harm in this state. There is no indication from any

other source that remaining an unlicensed profession in the performance of their various activities can clearly harm or endanger the health, safety, or welfare of the public. They have not shown that the potential for any harm is anything but remote and speculative. There is no nexus between licensure of this profession and prevention of harm.

Using the criteria of 16 V.S.A. § 3105, we conclude:

(1) It has not been demonstrated that the unregulated practice of landscape architecture can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;

(2) The public does not need through regulation an assurance of initial and continuing professional ability.

(3) The public is effectively protected by other means.

(4) Existing common law sanctions are sufficient to reduce or eliminate any harm.

(5) No stronger civil remedies or criminal sanctions have been required, tried, or found to be insufficient.

(6) No lesser form of regulation, like registration or certification is justified.

Recommendation

The Office recommends that Landscape Architects **not be subject to professional regulation** in Vermont.

Jessica G. Porter, Director
Office of Professional Regulation
Vermont Secretary of State
December 8, 2003