But Don't We Have an Exemption?

The Role of Exemptions in U.S. States' Landscape Architecture Practice Laws

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In recent years, the American Society of Landscape Architects (ASLA) has lobbied for the passage of state laws that establish regulation of the profession of landscape architecture via their 50 by 2010 campaign (www.asla.org). This effort has been largely successful: as of this writing, these laws have passed in at least 46 U.S. states. In many cases, ASLA's stated goals for these laws are 1) to promote public health, safety and welfare, and 2) to improve the standing of landscape architects, so that they are eligible to compete alongside the other licensed professions for work they are qualified to perform.

Background

The result of these laws is that anyone performing activities that are included in the legal definition of "landscape architecture" in a given state must do so according to the standards established by the law. They are also subject to enforcement actions if such a person fails to meet those standards. In the majority of state licensure laws, the basic standard is the definition of landscape architecture itself, which is often broad in an attempt to describe everything that a landscape architect performs in the course of their work. Further, the laws establish that anyone performing any of the activities included in the definition of "landscape architecture" must be registered with state as a landscape architect.

An obvious problem with this approach is that a description of everything one does in the course of their job is not equivalent to a *definition* of what that profession necessarily requires. Rather, what is *required* of a profession may be expressed in what sets it apart from other similarly described professions. We know that not everything that a landscape architect does in the course of designing a site is in and of itself worthy of state oversight. Some design solutions are straightforward. Although client and budget might reward a unique or artful solution, they do not always require the high level of technical proficiency that landscape architects must maintain as registered professionals who are qualified to design sites that impact public safety. In fact, resolutions for many common landscape problems must be executed according to standards established in local building codes or zoning ordinances (etc). Hence, a *description* of everything one does in the course of their job is not at all equivalent to the list of those activities that should be considered for state oversight.

The current slate of state landscape architecture practice laws does not acknowledge this distinction. These laws are predicated on a description of landscape architecture that is wholly equivalent to a description of landscape design, which might be summarized as "the functional and aesthetic enhancement of land areas." In some states, the stated "definition" is so broad as to overlap with additional vocations within the green industry – not just landscape design.

Given the overlap between the duties of landscape architects and other professionals, it follows that this all-inclusive description of what landscape architects do – without discussion of whether each of these activities is worthy of regulation – results in restrictions for other professionals who find that some aspect of the work they have traditionally performed is adopted as a lawful *definition* of "landscape architecture." To address these purportedly unintended restrictions, many practice laws include exemptions (also called "exclusions" or "exceptions") for certain professions or classes.

Exemptions

At the time a bill is introduced, it is common for local professionals or others who might oppose the bill to negotiate for an exemption to insulate themselves from impact. The bills' sponsors find this to be a convenient way to handle the array of negative consequences which they maintain are unintended but also unavoidable given the language of the bill. This state-by-state threat of opposition results in an array of exemptions from one state to the next. Also, the specific language of an exemption dictates not only what persons, professions, or classes are exempt, but also under what conditions they are exempt.

Some of these groups are easily identified. Gardeners, for example, must make decisions that affect the function and appearance of a property, but their work maintaining gardens cannot broadly be equated with what we commonly understand to be landscape architecture. Hence "gardeners" are often expressly exempted from the law. Similarly, many landscape contractors must make design-based decisions in the course of their work. Their ability to do so is often exempted from the law with the condition that their design work is only done in conjunction with construction that is under their

contract. This is presumably acceptable to ASLA because a common sense understanding of landscape contracting cannot reasonably be confused with that of landscape architecture.

The problem with this thinking is that no reasonable *definition* of landscape contracting could be confused with that of landscape architecture in the first place. If an exemption is necessary to explain the differences between these two professions – which it would be hard to honestly mistake for another – then it follows that the description at issue is faulty. Exemptions represent an end-run around poorly written legislation.

And what of groups who cannot so easily be distinguished on a practical basis from landscape architects if only broad descriptions are considered?

Landscape designers in many states are now experiencing restrictions in their ability to practice their profession as a direct result of their states' landscape architecture practice laws. This occurs because these laws rely on the combination of a broad *description* of landscape architecture coupled with an array of exemptions to explain away "unintended impact." But there are few exemptions to these laws in place that allow landscape designers as a named group to practice all aspects of their traditional scope of work for income. For the sponsors to agree to such a broad exemption without limitation would to undermine the goal of the law itself: public safety. If activity "X" is so fraught with the potential for public hazard that only certain regulated professionals are entrusted to perform it, how could any legislator agree that another unregulated group of professionals can also perform "X" for income without state oversight?

As a result, exemptions for landscape designers almost always include conditions or limitations that do not allow them to practice with the full array of tools traditionally used for that purpose. In effect, the exemptions included in many state practice laws that purportedly allow landscape designers to continue to work, actually prevent them from doing a good job via de facto restriction.

Ohio's law (OH Statutes, Section 4703.30 et seq.), for example, includes the following exemption: *"Nothing…prevents a landscape designer from engaging in, for a fee, the design of spaces utilizing plant materials and ancillary paving and building materials or arranging for the installation of the materials."* Because it is not stated whether they are also permitted to adjust grades or drainage as part of the "design of spaces," this cannot be assumed. But in fact, how is it possible to properly design a planting bed without some control over surface drainage or without altering the grade at and surrounding the planting area? In fact, it is required in the practice of landscape design to properly influence these conditions. Unfortunately, in Ohio, *" 'Landscape architecture' includes:"* but is not limited to *"the shaping and contouring of land… forms; the determination of grades; and the determination of surface …water drainage…."*

At a minimum, this division of planting from grading and drainage reflects a poor understanding of the practice of horticulture on the part of the authors of the law. More seriously this results in de facto restrictions on landscape designers in Ohio who cannot, for a fee, design even a planting plan with guaranteed success, because they are not permitted to adjust grades sufficient to make optimal use of surface water or to influence relevant subsurface features or materials that contribute to the long term health or survival or the plantings.

This restriction on the practice of landscape design exists and is subject to interpretation regardless of whether it reflects the true intention of the law. While it is unreasonable to assume that those who favor this law would elect to tie the hands of designers in this fashion, that is a moot point. It is now the law in Ohio. Indeed, much of the work that includes such a limited array of non-technical solutions as indicated above – i.e., adjust grade to allow for artful arrangement of plant material, capture surface water to maximize its use to support plants – is so basic that landscape architects generally do not seek it unless it is part of a larger, more technically sophisticated scope. Certainly the educational and training standards asked of those sitting for the licensure exam exceed this limited non-technical realm. But unfortunately for Ohio landscape designers, according to the law they must consult with a licensed landscape architect or otherwise exempt professional when they consider grade alterations as part of their landscape designs. And unfortunately for Ohio consumers, the range of low cost options for designs including even minor grade alterations has been effectively limited. This has occurred in the name of promoting public safety by limiting the scope of unregulated professionals.

To be sure, any consequences of this law for designers are wholly dependent on the enforcement of the statute. And we have every reason to expect that enforcement actions made possible by these laws will increase.

Across the country we are now seeing the introduction of new laws and ordinances inspired by better public awareness of conservation. These laws will be a boon for the cause of sustainability in design, as they highlight the central role of grade alteration and site drainage in protecting our watershed, our soils and our public health. Professional landscape designers should be key players in the interpretation of these laws and in their execution in non-technical site designs in every state. But unless landscape designers are allowed to alter grades, soils and soil components, and unless they are allowed to influence drainage in some way, they are legally prevented from proper execution of even those aspects of site design that their state laws purportedly allow them to do through relevant language or exemptions. Again, this is allowed to occur in the name of public safety.

If public safety is the primary argument in support of laws promoting state licensure – and it is a compelling one – then the demonstrated ability to affect public safety using technically sophisticated, complex solutions should be the standard by which a profession is distinguished from other similar professions. This high standard of technical competency is exactly what landscape architects are educated, trained and tested for in the majority of states at this time. To allow any law to rest on fuzzy language invites confusion for practitioners, regulators and consumers alike. Exemptions for certain professions merely make this situation more palatable.

Design decisions that affect safety and for which standards are not already established by state or local codes or ordinances provide a clear opportunity for the participation of landscape architects to contribute to our built environments in a way that only they are trained to do. Most landscape designers are not looking to do this type of work; those who wish to do so may seek appropriate training. Since nothing will ever affect landscape architects' abilities to pursue or perform unregulated activities, there is no harm to them if the descriptions of their services are revised within our state laws to be true definitions of their profession. By defining what makes them unique, landscape architects will distinguish themselves not only from designers – whose work only work impacts safety in otherwise regulated (i.e., coded) situations – but also from other licensed professionals, whose combinations of skills is not equivalent to their own.

This clarification eliminates the need for exemptions altogether. It would result in good clear legislation that really does promote public health, safety and welfare. More importantly, it frees non-regulated designers to evaluate and utilize the full array of activities in order to design efficient, healthy, and beautiful spaces for their clients.

If you are facing a title or practice bill in your state, APLD can assist you with strategy, letter writing or editing, or in other ways to help you communicate your opinion effectively to your representatives. APLD does not employ a lobbyist at this time. We do not have the ability to monitor the introduction of bills in all states. We are reliant on our members to contact us before we can be of assistance to them.

If you hear of a bill being introduced at your state legislature that you think could impact your right to practice, please contact Laura Kuhn, Chair of Legislative Affairs, immediately with this information at onebirch@comcast.net.

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