# AGENDA
# NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE
# PUBLIC NOTICE OF MEETING

**Brian Sandoval**
Governor

**BOARD MEMBERS**
Dale Doerr-President
Sandra Antunez
Cary Baird
Ryan Hansen
Stanon Southwick

**FIELD INVESTIGATION OFFICERS**
Ellis Antunez
Dan Hill
Clair Lewis
Kreg Mebust
Donald Naquin
Rich Shock
Jack Zunino

**DEPUTY ATTORNEY GENERAL**
Henna Rasul

**EXECUTIVE DIRECTOR**
Helen Wright

*****PUBLIC NOTICE OF MEETING*****
**NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE**

**Date:** **Saturday November 14, 2015**
**Time:** **9:30 AM to 1:30 PM**
**Location:** **Office of Stantec Consulting**
**7450 Arroyo Crossing Parkway, Suite 170**
**Las Vegas, Nevada 89133**

## MEETING AGENDA *Pages 1-2*

### 1. CALL TO ORDER- Dale Doerr
a. Introductions of all Other Present, Establish Quorum and Approval of Agenda. *(For Possible Action. Action by the Board on an item may be to approve, deny, amend, or pull or remove the item.)*

### 2. PUBLIC COMMENT PERIOD
No vote may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken. (NRS 241.020)

### 3. STANDING BUSINESS
a. Review and Approve Meeting Minutes of August 15, 2015-Dale Doerr *(For Possible Action. Action by the Board on an item may be to approve, deny, amend, or pull or remove the item.) Pages3-8*
b. Review Board Web-Site *Top Links*; Create Updates as Needed-All Members *(For Possible Action. Action by the Board on an item may be to approve, deny, amend, or pull or remove the item.)*

### 4. OLD BUSINESS
a. Report on Landscape Architecture Program at UNLV-Danny Ortega
b. Continue Discussion/Sort Ideas on Implementing Continuing Education-All Members
1. *Operations Aspect of Continuing Education*-Dale Doerr and Ryan Hansen *Pages 9-10*
2. Discuss Ideas on Public Welfare-All Members

c. Discuss Development of a Board One to Three-Year Strategic Plan-All Members *(For Possible Action. Action by the Board on an item may be to approve, deny, amend, or pull or remove the item.)*

### 5. NEW BUSINESS
a. Effect of North Carolina State Board of Dental Examiners Case on State-Action Antitrust Immunity from the Sherman Act-Henna Rasul *Pages 11-26*
b. Review Annual Audit Report-Helen Wright *Pages27-48*

### 6. ENFORCEMENT
a. Recommend Close Cases 15-03 and 15-04. *(For Possible Action. Action by the Board on an item may be to approve, deny, amend, or pull or remove the item.) Page 49*

## 7. COUNCIL OF LANDSCAPE ARCHITECTURE REGISTRATION BOARD REPORT

a. Report on CLARB Annual Meeting-Sandra Antunez, Cary Baird and Stanton Southwick *Page 50*
b. Appointment of Cary Baird to Region 5 Director *Page 51*
c. CLARB Communique from Joel Albizo *Page 51-92*

## 8. EXECUTIVE DIRECTOR REPORT-Helen Wright *Pages 93-99*

a. Financial Update
b. Operations Update
c. Registration Renewal Update
d. Presentation and Approval of Candidates for Registration in the State of Nevada *(For Possible Action. Action by the Board on an item may be to approve, deny, amend, or pull or remove the item.)*

## 9. PUBLIC COMMENT PERIOD

No vote may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken. (NRS 241.020)

## 10. NEXT MEETING, NEXT MEETING AGENDA ITEMS AND ADJOURNMENT *(For Possible Action. Action by the Board on an item may be to approve, deny, amend, or pull or remove the item.)*

Please Note: The Nevada State Board of Landscape Architecture may address agenda items out of sequence, combine the agenda items, pull or remove the agenda items, in order to aid the efficiency or effectiveness of the meeting or to accommodate persons appearing before the Board. The Board may continue agenda items to the next meeting as needed. (NRS 241.020)
Public comment is welcomed by the Board and will be heard at the beginning of the Board meeting following the Call to Order and Roll and at the end of the agenda prior to the adjournment of the Board meeting. Public comment will be limited to five minutes per person. The Board meeting Chair may allow additional time to be given a speaker as time allows and at his/her sole discretion. Once all items on the agenda are completed the meeting will adjourn.
Prior to the commencement and conclusion of a contested case or a quasi-judicial proceeding that may affect the due process rights of an individual, the Board may refuse to consider public comment. See NRS 233B.126.
Anyone desiring additional information regarding the meeting is invited to call the Board office at
(775) 688-1316. We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify the Nevada State Board of Landscape Architecture, P.O. Box 17039, Reno, Nevada 89511, or call (775) 688-1316, as soon as possible.
The Board may convene in closed session to consider the character, alleged misconduct, professional competence or physical or mental health of a person. (NRS 241.030)
All meeting materials are available for download at the Nevada State Board of Landscape Architecture meeting page of the website http://nsbla.state.nv.us/Agendas.htm.
Meeting materials may also be picked up in person at any one of the following office locations:

- Office of the Attorney General – Carson City
  100 North Carson Street, Carson City, NV 89701 Telephone: 775-684-1100 Fax: 775-684-1108

- Office of the Attorney General – Reno
  5420 Kietzke Lane Suite 202, Reno, NV 89511 Telephone: 775-688-1818 Fax: 775-688-1822

- Office of the Attorney General – Las Vegas
  Grant Sawyer Building, 555 E. Washington Avenue Suite 3900, Las Vegas, NV 89101 Telephone: 702-486-3420 Fax: 702-486-3768.

Pursuant to SB70, Section 4 this notice was posted on August 11, 2015 at 4:00 PM at these locations:

Stantec Consulting, 7450 Arroyo Crossing Parkway, Suite 170, Las Vegas by Cary Baird, Board President _____

Lumos and Associates, 9222 Prototype Drive, Reno by Dale Doerr, Board Member _____.

# NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE
# BOARD MEETING

## August 15, 2015

**Voting Members in Attendance**:
Cary Baird, President of the Board
Sandra Antunez
Dale Doerr
Stan Southwick

**Non-Voting Attendees:**
Helen Wright
Ellis Antunez

The agenda for this meeting was posted pursuant to SB70, Section 4 with documentation in writing that the minimum public notice requirement was achieved on August 11, 2015 prior to 9:00 AM in accordance with Nevada Revised Statute 241 in the following locations:

Stantec Consulting, Las Vegas
Lumos and Associates

Documentation of the posting is available upon request.

Minutes Transcribed by Helen Wright, Executive Director of the Board

| Agenda Item | Discussion | Follow-Up |
|---|---|---|
| *1. Call to Order* | | |
| a. Introductions of all Present<br>b. Establish Quorum<br>c. Approval of Agenda | The August 15, 2015 Nevada State Board of Landscape Architecture Board Meeting was called to order by the President of the Board, Cary Baird at 10:30 AM. It is noted that the number of voting members present represented a quorum. All attendees introduced themselves. The agenda was approved as presented. | Closed. |
| *2. Public Comment Period* | | |
| | There were no public comments. | Closed. |
| *3. Standing Business* | | |
| a. Review and Approve Meeting Minutes of June 27, 2015<br><br>b. Create Quarterly Newsletter/Web-site Updates and Articles | a. The minutes from the June 27, 2015 meeting of the Nevada State Board of Landscape Architecture were reviewed and approved by the Board. The approved minutes will be posted on the Nevada State Board of Landscape Architecture web site.<br><br>b. Stan Southwick will let NVASLA know about the web-site and encourage members to reference the site. There were no updates recommended at this time. This item is a regular agenda item to be completed during upcoming Board Meetings. | a. Post approved meeting minutes to the web-site.<br><br>b. Ongoing. |
| *4. Old Business* | | |
| a. Report on Landscape Architecture Program at UNLV | Members had previously considered ideas to promote Board activities to Landscape Architecture students studying in Nevada. Stan Southwick reported on a meeting with Danny Ortega from UNLV regarding this subject. Mr. Ortega will be invited to attend the next meeting of the Board in November. A report of the meeting follows these minutes. | Invite Danny Ortega to attend the meeting in November. |
| b. Continue Discussion on Implementing Continuing Education | Ellis Antunez presented a report on *Public Health, Safety and Welfare*. All members are asked to bring ideas on what public welfare means to them to the next meeting. A discussion about implementing required *Continuing Education for Registered Landscape Architects in Nevada* continued during this meeting. Dale Doerr and Ryan Hansen will create a flow chart to display the operations aspect of continuing education for further discussion during the next meeting. Tasks and goals to develop a process will be provided; a flip chart is to be utilized as needed. | Members are to bring ideas about Public Health, Safety and Welfare. Dale and Ryan will provide the described process. |

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| Agenda Item | Discussion | Follow-Up |
|---|---|---|
| *4. Old Business (cont.)* | | |
| c. Discuss Development of a Board One to Three Year Strategic Plan | The Board agreed to set a road map to project direction over the next 3-year period. Other states in Region 5 have undergone a similar process. Members are reminded that they will attend the CLARB Annual Meeting session on this topic. | Ongoing. |
| *5. New Business* | | |
| a. Review and Approve FY16 Commercial Lease Agreement | The FY16 Rental Agreement was reviewed and approved by the Board. | Closed. |
| b. Elect President of Board and Secretary of Board FY16 | Offices for FY16 will be as follows:<br>• President-Dale Doerr<br>• Secretary-Stanton Southwick | Closed. |
| c. Appoint Executive Director FY16 | Members of the Board voted to reappoint Helen Wright as Executive Director for FY16. | Closed. |
| d. Appoint Field Investigation Officers FY16 | Field Investigation Officers as listed were reappointed for FY16, Cary Baird was added as a Field Investigation Officer.<br>• Ellis Antunez<br>• Clair Lewis<br>• Rich Shock<br>• Jack Zunino<br>• Kreg Mebust<br>• Donald Naquin<br>• Dan Hill | Closed. |

| Agenda Item | Discussion | Follow-Up |
|---|---|---|
| *5. New Business (cont.)* | | |
| e. Select Meeting Dates FY16 | Board Meeting Dates for FY16 will be as follows:<br>• November 14 Las Vegas<br>• February 6 Las Vegas<br>• May 14 Reno | Closed. |
| *6. Enforcement* | | |
| a. Review Current Enforcement Cases by Case Number Only | Stan Southwick reported on recent enforcement cases. There was no action from the Board. | Closed. |
| *7. Council of Landscape Architecture Registration Board Report* | | |
| a. Finalize Plans for CLARB Annual Meeting September 17-19, New Orleans, LA | The Board discussed and finalized plans for the upcoming CLARB Annual Meeting. | Closed. |
| b. Review CLARB Reports | Reports included in the meeting packet were reviewed by meeting attendees.<br>• The SCOTUS Decision that Rocked the Regulatory World<br>• Important Dates and Reminders<br>• The Final Slate of Board of Directors Candidates<br>• Jim Penrod to Lead Veterinary Board Association<br>• Bylaws Changes<br>• President Jackson Presentation at Brazilian Conference<br>• CLARB Bank Account Change | Informational. |
| c. Complete Member Board Awareness Survey | Members completed an awareness survey regarding the recent SCOTUS decision on the Dental Board of NC. | Closed. |

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| 8. Executive Director Report | | |
|---|---|---|
| a. Financial Update<br>b. Operations Update | <u>a. Financial Update:</u><br>The current bank account balance and accounting records are detailed in the financial reports included with this report. The balance to date is $139,778.08 for all accounts. In reviewing the Profit & Loss Budget vs. Actual Report, it is apparent that the Board has received over 87.2% of its projected income, and has spent only 19.6% of its projected expenses. All invoices to this date have been paid.<br><u>b. Operations Update:</u><br>Remember that attending educational events that are not related to the business of the Board on your own time is your own business. The matter does not fall under the State of Nevada Code of Ethics. Refrain from wearing your "*board member hat*" while attending such functions.<br>The new telephone number for the Board is 775 671-3242. Callers are greeted with a professional voice announcing "Thank you for contacting the Nevada State Board of Landscape Architecture; please press 0 to reach Executive Director Helen Wright". The caller is then redirected. Everyone take a minute to update phone contact information.<br>A telephone call to Annalyn Bo Carrillo from Governor Sandoval's office revealed that appointments for the upcoming Board vacancies will not be made until October 2015 or later. She asked that current Board Members continue serving until appointments are made. Additionally, Dale Doerr was asked to apply for a second term; the same conditions apply with him.<br>A new printer/copier/scanner was purchased and installed.<br>Reports to State of Nevada:<br>• *Executive Order 2014-20* established the requirement for a baseline report for aggregate veteran data in Nevada in 2015. This requirement was fulfilled by adding appropriate questions to the registration application and the annual renewal application. The aggregate data will be sent to the Nevada Department of Veterans Services after November 1, 2015.<br>• *The Balance Sheet for FY15 as required by the Legislative Auditor will not be allowed for FY15 as the Board's income exceeded the $75,000 threshold permitted. The Board is now required to submit to an audit which is due to be prepared and delivered to the Chief of the Budget Division of the Department of Administration before November 30, 2015. The Board Bookkeeper, Ann E. Rodewald contacted the Legislative Counsel Bureau for a list of acceptable auditors and has selected Zeth Macy, CPA of Schettler Macy & Associates, LLC to perform the service.*<br>• *Reports to State of Nevada LCB and AB 463 Use of Consultants* have been filed.<br>• *Reports to the LCB Reports of Occupational Licensing Boards* will be filed following the August 15, 2015 meeting. | .Ongoing. |

| Agenda Item | Discussion | Follow-Up |
|---|---|---|
| *8. Executive Director Report (cont.)* | | |
| c. Registration Renewal Update<br>d. Presentation and Approval of Candidates for Registration in the State of Nevada | <u>c. Registration Renewal Update (FY16)</u>:<br>As of this date the following have been processed:<br>• 352 fees paid in full<br>• 12 still outstanding (includes 2 with returned checks)<br>• 8 to inactive<br>• 3 candidates for registration are in process<br>• 3 notifications from CLARB that candidates are eligible for registration/no application received.<br><u>d. Candidates for Registration in the State of Nevada</u><br>The following have submitted an application and are seeking approval for Registration.<br><br>947 Rene Bihan Registration by Reciprocity<br>948 Charles Foley Registration by Reciprocity<br>949 Chad Kovaleski Registration by Reciprocity<br>950 Gregory Flanagan Registration by Reciprocity | Candidates for Registration were approved as recommended. |
| *9. Public Comment Period* | | |
| | There were no public comments. | Closed. |
| *10. Next Meeting and Adjournment* | | |
| | The next meeting is scheduled for November 14, 2015 and will be held in Southern Nevada.<br>There being no further business to discuss, the meeting was adjourned at 1:30 PM. | Closed. |

Respectfully Submitted By: Helen Wright
Executive Director for the Board, Nevada State Board of Landscape Architecture
Approved By: Dale Doerr, President of the Board, Nevada State Board of Landscape Architecture

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## Nevada Continuing Education Unit Requirements

11-2-15 - Dale Doerr

### Points of Discussion for the November Board Meeting

1) Goal: The primary goal of the continuing education requirements would be to ensure that registrants are keeping up to date through self education on the latest laws, environmental requirements and technical skills related to the profession of landscape architecture. A secondary goal is related to our continual opposition to sun-setting laws by the state legislature. The start date should be up for discussion, then notices sent to the licensees in advance.
2) Model states – In Nevada it would make sense to follow the guidelines from our neighboring western states, since our licensees are more likely to be familiar with those requirements. Washington has a good website, and we have a relationship with Karen Kiest. Per Cary's email Washington has not had a drop in membership due to the CEU's, but rather an increase. Other professionals are requiring continuing education and this should not be looked at as a hardship but as an opportunity for growth.
3) A two year license period and related development hours could be used to reduce paperwork. Washington has 24 pdh's per 2 year period, with 12 hours available to carry over into the next 2 years. It also has the "geezer rule" for 25 plus years of licensing – hours are reduced to 4 per year.
4) Activities that are allowed are clearly listed but specific resource material is not. There are maximum pdh's noted for each type of learning, self study, lectures, etc. There is also a minimum of 18 pdh's required out of the 24 total for HSW. Other states have a minimum level of pdh's required for certain categories - ADA, state law, specific state requirements, etc. Q and A forums do help to answer the questions that come up over time – similar to the blue book. Our charge should be to decide how many hours will be required for each category and for a total per year.
5) Each year 5-15% of licensees are audited at random. Applicants are responsible for keeping records for 5 years. They list what to expect if audited, and how to comply with the state requirements. Texas lists those caught and the resulting fines in their state newsletter sent to members online. If there is no teeth to the requirement then fewer people will comply with the requirement. We can make a list describing what the licensees need to provide if they are audited as well.
6) A worksheet is given out for licensees to help them keep track of pdh's, with dates, titles, course providers, and if the class meets HSW issues.
7) Administration time to audit an average of 10% of licensees (4 total) would run about an hour to review the worksheets and notes. The application for licensing will need to be revised – it would not be neccessary to not require CEU's until the first year renewal period. Auditing could be done by one of the board members on a rotating basis, similar

to the review of new applicants. If there are issues writing letters and potentially assessing fines would require more time. This is something that could be done by the enforcement officers for an hourly rate, then sent out by Helen for record – keeping. The potential fines should be reviewed by Henna, with suggestions on what other boards are doing, such as Engineering.

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

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ADAM PAUL LAXALT
*Attorney General*

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*Assistant Attorney General*
NICHOLAS A. TRUTANICH
*Chief of Staff*

# MEMORANDUM

*Date:* August 21, 2015

*To:* State of Nevada's Professional Boards

*From:* J. Brin Gibson, Bureau Chief of Gaming and Government Affairs
Ketan D. Bhirud, Head of Complex Litigation

*Subject:* Effect of *North Carolina State Board of Dental Examiners* Case on State-Action Antitrust Immunity from the Sherman Act

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**PRIVILEGED AND CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION**

## Issue Presented:

As you are likely aware, on February 25, 2015, the United States Supreme Court decided *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101, 1104 (2015). In that case, the Court held that a state board (on which a controlling number of decision makers are active market participants in the occupation the board regulates) cannot invoke state-action antitrust immunity *unless* the State provides active supervision of the anticompetitive conduct. This memorandum, which memorializes prior advice, briefly discusses the implications for the State of Nevada's professional boards.

## Background on *North Carolina State Board of Dental Examiners* Case:

### Factual Background:

The North Carolina State Board of Dental Examiners (the "NC Board") is a state executive agency charged with regulating the practice of dentistry. By statute, at least six of the NC Board's eight members must be actively practicing dentists. The six dentist members are elected by other practicing dentists. While the enacting statute provides the NC Board with broad enforcement powers over licensed dentists, the NC Board's authority over unlicensed practitioners is extremely limited. If the NC Board believes that an unlicensed person is practicing dentistry, the NC Board can seek an injunction or refer the case to the state attorney general for criminal prosecution. The

**PRIVILEGED AND CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION**

NC Board's actions are generally not subject to review by another state entity. Its actions are only subject to review when it promulgates regulations.

In the 1990s, dentists in North Carolina began offering teeth whitening services—a very profitable service. In the 2000s, non-dentists in North Carolina began offering teeth whitening services at a lower price than dentists, including many board members. This led to complaints from dentists. The complaints, however, focused on the low prices rather than any health or safety concerns. In response, the NC Board sent cease-and-desist letters to the non-dentists directing them to stop offering teeth whitening services. The letters, which stated that teeth whitening constituted the practice of dentistry, warned the non-dentists that the unlicensed practice of dentistry is a crime. The letters had their intended effect. Non-dentists stopped offering teeth whitening services.

In 2010, the Federal Trade Commission ("FTC") filed an administrative complaint charging the NC Board with violating Section 5 of the Federal Trade Commission Act ("FTC Act")'s prohibition on anticompetitive and unfair methods of competition. The NC Board moved to dismiss, alleging state action immunity.

**State Action ("*Parker*") Immunity Doctrine:**

Under the state action immunity doctrine, actions of the state as the "sovereign," such as those of the legislature or state Supreme Court, are automatically exempt from federal antitrust laws based on federalism concerns.[1] Other public actors not clearly considered the sovereign, including hospital authorities or municipalities, have been required to show that the state has articulated a clear policy to allow the anticompetitive conduct, which requires displacement of competition in ways that the state must have foreseen and explicitly or implicitly endorsed (the "clear articulation" requirement) in order to receive antitrust immunity.[2] And a private entity working with the state could receive such immunity if its conduct also was actively supervised (the "active supervision" requirement).[3]

**Holding:**

The United States Supreme Court held that non-sovereign actors entrusted by a state to perform state actions, such as state boards, enjoy state action immunity only when the restraint is (1) clearly articulated and affirmatively expressed as state policy; and (2) "actively supervised by the state."[4] In its decision, the Court rejected the argument that the NC Board, as a state executive agency, should be treated as a sovereign actor automatically entitled to immunity under *Parker*. The Court also rejected the argument that the NC Board, like a municipality, should only be required to show clear articulation. The Court reasoned that, even if more traditional agencies should only have to show clear articulation, the fact that the NC Board was composed of active market participants made the policy justifications underlying the exemption of some non-sovereign actors from the active supervision requirement inapplicable. In

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[1] *Parker v. Brown*, 317 U.S. 341 (1943).

[2] *See FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 (2013) (finding Georgia hospital authority law did not satisfy this standard).

[3] *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980).

[4] *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101, 1111-12 (2015).

conclusion, the Court determined that, even if the board could show clear articulation, it could not show active supervision and therefore was not entitled to immunity.

## Conclusions and Implications:

As a preliminary matter, it is unclear what the long-term practical impact of this decision will be. State boards—even those controlled by active market participants—remain free to regulate conduct in *procompetitive* ways. The Court's decision only addresses whether these agencies can claim state immunity when they act in potentially *anticompetitive* ways.

***That being said, board members for the State's professional boards need to be aware that they, the board, and the State may be subject to potential liability if the board engages in <u>anticompetitive</u> activity.***

Anticompetitive activity refers to a wide range of conduct whereby actors seek to restrict competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality. Generally speaking, boards engage in this behavior when they are acting in the best interests of existing professionals in the field rather than new-entrants and consumers.

KDB:mkm

# FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*

## I. Introduction

States craft regulatory policy through a variety of actors, including state legislatures, courts, agencies, and regulatory boards. While most regulatory actions taken by state actors will not implicate antitrust concerns, some will. Notably, states have created a large number of regulatory boards with the authority to determine who may engage in an occupation (*e.g.*, by issuing or withholding a license), and also to set the rules and regulations governing that occupation. Licensing, once limited to a few learned professions such as doctors and lawyers, is now required for over 800 occupations including (in some states) locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers.[1]

In general, a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated. However, across the United States, "licensing boards are largely dominated by active members of their respective industries . . ."[2] That is, doctors commonly regulate doctors, beekeepers commonly regulate beekeepers, and tour guides commonly regulate tour guides.

Earlier this year, the U.S. Supreme Court upheld the Federal Trade Commission's determination that the North Carolina State Board of Dental Examiners ("NC Board") violated the federal antitrust laws by preventing non-dentists from providing teeth whitening services in competition with the state's licensed dentists. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). NC Board is a state agency established under North Carolina law and charged with administering and enforcing a licensing system for dentists. A majority of the members of this state agency are themselves practicing dentists, and thus they have a private incentive to limit

* This document sets out the views of the Staff of the Bureau of Competition. The Federal Trade Commission is not bound by this Staff guidance and reserves the right to rescind it at a later date. In addition, FTC Staff reserves the right to reconsider the views expressed herein, and to modify, rescind, or revoke this Staff guidance if such action would be in the public interest.

[1] Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny*, 162 U. PA. L. REV. 1093, 1096 (2014).

[2] *Id.* at 1095.

competition from non-dentist providers of teeth whitening services. NC Board argued that, because it is a state agency, it is exempt from liability under the federal antitrust laws. That is, the NC Board sought to invoke what is commonly referred to as the "state action exemption" or the "state action defense." The Supreme Court rejected this contention and affirmed the FTC's finding of antitrust liability.

In this decision, the Supreme Court clarified the applicability of the antitrust state action defense to state regulatory boards controlled by market participants:

> "The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* [*Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)] active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

In the wake of this Supreme Court decision, state officials have requested advice from the Federal Trade Commission regarding antitrust compliance for state boards responsible for regulating occupations. This outline provides FTC Staff guidance on two questions. *First*, when does a state regulatory board require active supervision in order to invoke the state action defense? *Second*, what factors are relevant to determining whether the active supervision requirement is satisfied?

Our answers to these questions come with the following caveats.

- Vigorous competition among sellers in an open marketplace generally provides consumers with important benefits, including lower prices, higher quality services, greater access to services, and increased innovation. For this reason, a state legislature should empower a regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers. The Federal Trade Commission and its staff have frequently advocated that states avoid unneeded and burdensome regulation of service providers.[3]

- Federal antitrust law does <u>not</u> require that a state legislature provide for active supervision of any state regulatory board. A state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust

[3] *See, e.g.*, Fed. Trade Comm'n Staff Policy Paper, *Policy Perspectives: Competition and the Regulation of Advanced Practice Registered Nurses* (Mar. 2014), https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf; Fed. Trade Comm'n & U.S. Dept. of Justice, Comment before the South Carolina Supreme Court Concerning Proposed Guidelines for Residential and Commercial Real Estate Closings (Apr. 2008), https://www.ftc.gov/news-events/press-releases/2008/04/ftcdoj-submit-letter-supreme-court-south-carolina-proposed.

laws. If the state legislature determines that a regulatory board should be subject to antitrust oversight, then the state legislature need not provide for active supervision.

- Antitrust analysis – including the applicability of the state action defense – is fact-specific and context-dependent. The purpose of this document is to identify certain overarching legal principles governing when and how a state may provide active supervision for a regulatory board. We are not suggesting a mandatory or one-size-fits-all approach to active supervision. Instead, we urge each state regulatory board to consult with the Office of the Attorney General for its state for customized advice on how best to comply with the antitrust laws.

- This FTC Staff guidance addresses only the active supervision prong of the state action defense. In order successfully to invoke the state action defense, a state regulatory board controlled by market participants must also satisfy the clear articulation prong, as described briefly in Section II. below.

- This document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.

## II. Overview of the Antitrust State Action Defense

"Federal antitrust law is a central safeguard for the Nation's free market structures . . . . The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *N.C. Dental*, 135 S. Ct. at 1109.

Under principles of federalism, "the States possess a significant measure of sovereignty." *N.C. Dental*, 135 S. Ct. at 1110 (*quoting Community Communications Co. v. Boulder*, 455 U.S. 40, 53 (1982)). In enacting the antitrust laws, Congress did not intend to prevent the States from limiting competition in order to promote other goals that are valued by their citizens. Thus, the Supreme Court has concluded that the federal antitrust laws do not reach anticompetitive conduct engaged in by a State that is acting in its sovereign capacity. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). For example, a state legislature may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. Dental*, 135 S. Ct. at 1109.

Are the actions of a state regulatory board, like the actions of a state legislature, exempt from the application of the federal antitrust laws? In *North Carolina State Board of Dental Examiners*, the Supreme Court reaffirmed that a state regulatory board is not the sovereign. Accordingly, a state regulatory board is not necessarily exempt from federal antitrust liability.

More specifically, the Court determined that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates" may invoke the state action defense only when two requirements are satisfied: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. *N.C. Dental*, 135 S. Ct. at 1114.

- The Supreme Court addressed the clear articulation requirement most recently in *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). The clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id*. at 1013.

- The State's clear articulation of the intent to displace competition is not alone sufficient to trigger the state action exemption. The state legislature's clearly-articulated delegation of authority to a state regulatory board to displace competition may be "defined at so high a level of generality as to leave open critical questions about how

and to what extent the market should be regulated." There is then a danger that this delegated discretion will be used by active market participants to pursue private interests in restraining trade, in lieu of implementing the State's policy goals. *N.C. Dental*, 135 S. Ct. at 1112.

- The active supervision requirement "seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming [antitrust] immunity." *Id.*

Where the state action defense does not apply, the actions of a state regulatory board controlled by active market participants may be subject to antitrust scrutiny. Antitrust issues may arise where an unsupervised board takes actions that restrict market entry or restrain rivalry. The following are some scenarios that have raised antitrust concerns:

- A regulatory board controlled by dentists excludes non-dentists from competing with dentists in the provision of teeth whitening services. *Cf. N.C. Dental,* 135 S. Ct. 1101.

- A regulatory board controlled by accountants determines that only a small and fixed number of new licenses to practice the profession shall be issued by the state each year. *Cf. Hoover v. Ronwin*, 466 U.S. 558 (1984).

- A regulatory board controlled by attorneys adopts a regulation (or a code of ethics) that prohibits attorney advertising, or that deters attorneys from engaging in price competition. *Cf. Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

# III. Scope of FTC Staff Guidance

A. This Staff guidance addresses the applicability of the state action defense under the federal antitrust laws. Concluding that the state action defense is inapplicable does not mean that the conduct of the regulatory board necessarily violates the federal antitrust laws. A regulatory board may assert defenses ordinarily available to an antitrust defendant.

1. **Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.**

Example 1: A regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without raising antitrust concerns. A regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Example 2: Suppose a market with several hundred licensed electricians. If a regulatory board suspends the license of one electrician for substandard work, such action likely does not unreasonably harm competition. *Cf. Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc).

2. **The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344 n. 6 (1987).**

Example 3: A state statute requires that an applicant for a chauffeur's license submit to the regulatory board, among other things, a copy of the applicant's diploma and a certified check for $500. An applicant fails to submit the required materials. If for this reason the regulatory board declines to issue a chauffeur's license to the applicant, such action would not be considered an unreasonable restraint. In the circumstances described, the denial of a license is a ministerial or non-discretionary act of the regulatory board.

3. **In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the "sham exception." Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).**

Example 4: A state statute authorizes the state's dental board to maintain an action in state court to enjoin an unlicensed person from practicing dentistry. The members of the dental board have a basis to believe that a particular individual is practicing dentistry but does not hold a valid license. If the dental board files a lawsuit against that individual, such action would not constitute a violation of the federal antitrust laws.

B. Below, FTC Staff describes when active supervision of a state regulatory board is required in order successfully to invoke the state action defense, and what factors are relevant to determining whether the active supervision requirement has been satisfied.

### 1. When is active state supervision of a state regulatory board required in order to invoke the state action defense?

***General Standard***: "[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

***Active Market Participants***: A member of a state regulatory board will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.

- If a board member participates in any professional or occupational sub-specialty that is regulated by the board, then that board member is an active market participant for purposes of evaluating the active supervision requirement.

- It is no defense to antitrust scrutiny, therefore, that the board members themselves are not directly or personally affected by the challenged restraint. For example, even if the members of the NC Dental Board were orthodontists who do not perform teeth whitening services (as a matter of law or fact or tradition), their control of the dental board would nevertheless trigger the requirement for active state supervision. This is because these orthodontists are licensed by, and their services regulated by, the NC Dental Board.

- A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant.

***Method of Selection***: The method by which a person is selected to serve on a state regulatory board is not determinative of whether that person is an active market participant in the occupation that the board regulates. For example, a licensed dentist is deemed to be an active market participant regardless of whether the dentist (i) is appointed to the state dental board by the governor or (ii) is elected to the state dental board by the state's licensed dentists.

***A Controlling Number, Not Necessarily a Majority, of Actual Decisionmakers*:**

- Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (*e.g.*, through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.

- Whether a particular restraint has been imposed by a "controlling number of decisionmakers [who] are active market participants" is a fact-bound inquiry that must be made on a case-by-case basis. FTC Staff will evaluate a number of factors, including:

  - ✓ The structure of the regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board's authority.

  - ✓ Whether the board members who are active market participants have veto power over the board's regulatory decisions.

Example 5: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of five board members. Thus, no regulation may become effective without the assent of at least one electrician member of the board. In this scenario, the active market participants effectively have veto power over the board's regulatory authority. The active supervision requirement is therefore applicable.

  - ✓ The level of participation, engagement, and authority of the non-market participant members in the business of the board – generally and with regard to the particular restraint at issue.

  - ✓ Whether the participation, engagement, and authority of the non-market participant board members in the business of the board differs from that of board members who are active market participants – generally and with regard to the particular restraint at issue.

  - ✓ Whether the active market participants have in fact exercised, controlled, or usurped the decisionmaking power of the board.

Example 6: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of a majority of board members. When voting on proposed regulations, the non-electrician members routinely defer to the preferences of the electrician members. Minutes of

board meetings show that the non-electrician members generally are not informed or knowledgeable concerning board business – and that they were not well informed concerning the particular restraint at issue. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

Example 7: The state board of electricians consists of four non-electrician members and three practicing electricians. Documents show that the electrician members frequently meet and discuss board business separately from the non-electrician members. On one such occasion, the electrician members arranged for the issuance by the board of written orders to six construction contractors, directing such individuals to cease and desist from providing certain services. The non-electrician members of the board were not aware of the issuance of these orders and did not approve the issuance of these orders. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

### 2. What constitutes active supervision?

FTC Staff will be guided by the following principles:

- "[T]he purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control" such that the details of the regulatory scheme "have been established as a product of deliberate state intervention" and not simply by agreement among the members of the state board. "Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." The State is not obliged to "[meet] some normative standard, such as efficiency, in its regulatory practices." *Ticor*, 504 U.S. at 634-35. "The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Id*. at 635.

- It is necessary "to ensure the States accept political accountability for anticompetitive conduct they permit and control." *N.C. Dental*, 135 S. Ct. at 1111. *See also Ticor*, 504 U.S. at 636.

- "The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State.' Further, the state supervisor may not itself be an active market participant." *N.C. Dental*, 135 S. Ct. at 1116–17 (citations omitted).

- The active supervision must precede implementation of the allegedly anticompetitive restraint.

- "[T]he inquiry regarding active supervision is flexible and context-dependent." "[T]he adequacy of supervision . . . will depend on all the circumstances of a case." *N.C. Dental*, 135 S. Ct. at 1116–17. Accordingly, FTC Staff will evaluate each case in light of its own facts, and will apply the applicable case law and the principles embodied in this guidance reasonably and flexibly.

### 3. What factors are relevant to determining whether the active supervision requirement has been satisfied?

FTC Staff will consider the presence or absence of the following factors in determining whether the active supervision prong of the state action defense is satisfied.

- The supervisor has obtained the information necessary for a proper evaluation of the action recommended by the regulatory board. As applicable, the supervisor has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies, and reviewed documentary evidence.

  - ✓ The information-gathering obligations of the supervisor depend in part upon the scope of inquiry previously conducted by the regulatory board. For example, if the regulatory board has conducted a suitable public hearing and collected the relevant information and data, then it may be unnecessary for the supervisor to repeat these tasks. Instead, the supervisor may utilize the materials assembled by the regulatory board.

- The supervisor has evaluated the substantive merits of the recommended action and assessed whether the recommended action comports with the standards established by the state legislature.

- The supervisor has issued a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision.

  - ✓ A written decision serves an evidentiary function, demonstrating that the supervisor has undertaken the required meaningful review of the merits of the state board's action.

  - ✓ A written decision is also a means by which the State accepts political accountability for the restraint being authorized.

**Scenario 1: Example of satisfactory active supervision of a state board regulation designating teeth whitening as a service that may be provided only by a licensed dentist, where state policy is to protect the health and welfare of citizens and to promote competition.**

- The state legislature designated an executive agency to review regulations recommended by the state regulatory board. Recommended regulations become effective only following the approval of the agency.

- The agency provided notice of (i) the recommended regulation and (ii) an opportunity to be heard, to dentists, to non-dentist providers of teeth whitening, to the public (in a newspaper of general circulation in the affected areas), and to other interested and affected persons, including persons that have previously identified themselves to the agency as interested in, or affected by, dentist scope of practice issues.

- The agency took the steps necessary for a proper evaluation of the recommended regulation. The agency:

  - ✓ Obtained the recommendation of the state regulatory board and supporting materials, including the identity of any interested parties and the full evidentiary record compiled by the regulatory board.

  - ✓ Solicited and accepted written submissions from sources other than the regulatory board.

  - ✓ Obtained published studies addressing (i) the health and safety risks relating to teeth whitening and (ii) the training, skill, knowledge, and equipment reasonably required in order to safely and responsibly provide teeth whitening services (if not contained in submission from the regulatory board).

  - ✓ Obtained information concerning the historic and current cost, price, and availability of teeth whitening services from dentists and non-dentists (if not contained in submission from the regulatory board). Such information was verified (or audited) by the Agency as appropriate.

  - ✓ Held public hearing(s) that included testimony from interested persons (including dentists and non-dentists). The public hearing provided the agency with an opportunity (i) to hear from and to question providers, affected customers, and experts and (ii) to supplement the evidentiary record compiled by the state board. (As noted above, if the state regulatory board has previously conducted a suitable public hearing, then it may be unnecessary for the supervising agency to repeat this procedure.)

- The agency assessed all of the information to determine whether the recommended regulation comports with the State's goal to protect the health and

welfare of citizens and to promote competition.

- The agency issued a written decision accepting, rejecting, or modifying the scope of practice regulation recommended by the state regulatory board, and explaining the rationale for the agency's action.

**Scenario 2: Example of satisfactory active supervision of a state regulatory board administering a disciplinary process.**

A common function of state regulatory boards is to administer a disciplinary process for members of a regulated occupation. For example, the state regulatory board may adjudicate whether a licensee has violated standards of ethics, competency, conduct, or performance established by the state legislature.

Suppose that, acting in its adjudicatory capacity, a regulatory board controlled by active market participants determines that a licensee has violated a lawful and valid standard of ethics, competency, conduct, or performance, and for this reason, the regulatory board proposes that the licensee's license to practice in the state be revoked or suspended. In order to invoke the state action defense, the regulatory board would need to show both clear articulation and active supervision.

- In this context, active supervision may be provided by the administrator who oversees the regulatory board (*e.g.*, the secretary of health), the state attorney general, or another state official who is not an active market participant. The active supervision requirement of the state action defense will be satisfied if the supervisor: (i) reviews the evidentiary record created by the regulatory board; (ii) supplements this evidentiary record if and as appropriate; (iii) undertakes a de novo review of the substantive merits of the proposed disciplinary action, assessing whether the proposed disciplinary action comports with the policies and standards established by the state legislature; and (iv) issues a written decision that approves, modifies, or disapproves the disciplinary action proposed by the regulatory board.

Note that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.

**The following do <u>not</u> constitute active supervision of a state regulatory board that is controlled by active market participants:**

- The entity responsible for supervising the regulatory board is itself controlled by active market participants in the occupation that the board regulates. *See N.C. Dental*, 135 S. Ct. at 1113-14.

- A state official monitors the actions of the regulatory board and participates in deliberations, but lacks the authority to disapprove anticompetitive acts that fail to accord with state policy. *See Patrick v. Burget*, 486 U.S. 94, 101 (1988).

- A state official (*e.g.*, the secretary of health) serves ex officio as a member of the regulatory board with full voting rights. However, this state official is one of several members of the regulatory board and lacks the authority to disapprove anticompetitive acts that fail to accord with state policy.

- The state attorney general or another state official provides advice to the regulatory board on an ongoing basis.

- An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency. The independent state agency perfunctorily approves the recommendations of the regulatory board. *See Ticor*, 504 U.S. at 638.

- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board. *See Patrick*, 486 U.S. at 104-05.

*NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE*

*Financial Statements*

**JUNE 30, 2015**

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# NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE

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## INDEPENDENT AUDITORS' REPORT

To the Board of Trustees of the
Nevada State Board of Landscape Architecture
Reno, Nevada

**Report on the Financial Statements**

We have audited the accompanying financial statements of the governmental activities and the General Fund of the Nevada State Board of Landscape Architecture (Board) as of and for the year ended June 30, 2015, and the related notes to the financial statements, which collectively comprise the Board's basic financial statements, as listed in the table of contents.

***Management's Responsibility for the Financial Statements***

Management is responsible for the preparation and fair presentation of these financial statements in accordance with accounting principles generally accepted in the United States of America; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

***Auditor's Responsibility***

We conducted our audit in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

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We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinions.

***Opinions***

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the governmental activities and the General Fund of the Nevada State Board of Landscape Architecture as of June 30, 2015, and the respective changes in its financial position and the budgetary comparison for the General Fund for the year then ended in conformity with accounting principles generally accepted in the United States of America.

***Other Matters***

*Required Supplementary Information*

Accounting principles generally accepted in the United States of America require that the management's discussion and analysis on pages 3 through 7 be presented to supplement the basic financial statements. Such information, although not a part of the basic financial statements, is required by the Governmental Accounting Standards Board, who considers it to be an essential part of financial reporting for placing the basic financial statements in an appropriate operational, economic, or historical context. We have applied certain limited procedures to the required supplementary information in accordance with auditing standards generally accepted in the United States of America, which consisted of inquiries of management about the methods of preparing the information and comparing the information for consistency with management's responses to our inquiries, the basic financial statements, and other knowledge we obtained during our audit of the basic financial statements. We do not express an opinion or provide any assurance on the information because the limited procedures do not provide us with sufficient evidence to express an opinion or provide any assurance.

**Other Reporting Required by *Government Auditing Standards***

In accordance with *Government Auditing Standards*, we have also issued our report dated [report date], on our consideration of the Board's internal control over financial reporting and on our tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements and other matters. The purpose of that report is to describe the scope of our testing of internal control over financial reporting and compliance and the results of that testing, and not to provide an opinion on internal control over financial reporting or on compliance. That report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering the Board's internal control over financial reporting and compliance.

Reno, Nevada
[report date]

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# NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE

## MANAGEMENT'S DISCUSSION AND ANALYSIS
## JUNE 30, 2015

As management of the Nevada State Board of Landscape Architecture (Board), we offer readers of the Board's financial statements this narrative overview and analysis of the financial activities of the Board for the fiscal year ended June 30, 2015. We encourage readers to read the information presented here in conjunction with additional information that we have furnished in the Board's financial statements, which follow this narrative.

**Financial Highlights**

- Program revenues increased by nearly $20 thousand or 33% from the prior year. This change is largely due to the increase in the annual license renewal fee from $150 to $200 in response to the economic recovery.
- Expenses experienced little to no change from the prior year.

**Overview of the Financial Statements**

This discussion and analysis is intended to serve as an introduction to the Board's basic financial statements. The Board's basic financial statements consist of three components; the 1) Government-wide financial statements, 2) Fund financial statements and 3) Notes to the financial statements.

**Government-Wide Financial Statements**

The government-wide financial statements are designed to provide the reader with a broad overview of the Board's finances, similar in format to a financial statement of a private-sector business.

The *Statement of Net Position* presents information on all of the Board's assets, plus deferred outflows of resources, less liabilities, less deferred inflows of resources, with the balance reported as the net position. Over time, increases or decreases in net position may serve as a useful indicator of whether the financial position of the Board is improving or deteriorating.

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The *Statement of Activities* presents information showing how the Board's net position changed during the most recent fiscal year. All changes in net position are reported as soon as the underlying event giving rise to the change occurs, regardless of the timing of the related cash flows. Thus, revenues and expenses are reported in the statement for some items that will only result in cash flows in future fiscal periods.

**Fund Financial Statements**

A fund is a grouping of related accounts that is used to maintain control over resources that have been segregated for specific activities or objectives. The Board uses fund accounting to ensure and reflect compliance (or non-compliance) with finance-related legal requirements, such as the Nevada Revised Statutes (NRS) and the Board's regulations.

Unlike the government-wide financial statements, fund financial statements focus on near-term inflows and outflows of spendable resources, as well as on balances of spendable resources available at the end of the fiscal year.

The Board's General Fund is a governmental fund. Governmental funds focus on how assets can be readily converted into cash, and what monies are left at year-end that will be available for spending in the next year. Governmental funds are reported using an accounting method called *modified accrual accounting* that provides a short-term spending focus. As a result, the governmental fund financial statements give the reader a detailed short-term view that helps him or her determine if there are more or less financial resources available to finance the Board's programs.

**Notes to Financial Statements**

The notes to the financial statements provide additional information which is essential for a full understanding of the information provided in the government-wide and fund financial statements.

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**Government-Wide Financial Analysis**

The following is a summary of the Board's government-wide Statement of Net Position as of June 30, 2015:

**NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE**
**NET POSITION**

| | |
|---|---|
| **Assets** | |
| Current assets | $ 157,631 |
| **Liabilities** | |
| Current liabilities | 2,381 |
| **Deferred Inflows of Resources** | 72,800 |
| **Net Position** | |
| Unrestricted | $ 82,450 |

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**Governmental Activities**

The Board's governmental activities for the year ended June 30, 2015 is presented in the following table:

**NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE**
**CHANGES IN NET POSITION**

| | | |
|---|---|---|
| **Revenues** | | |
| Program revenues: | | |
| Charges for services | $ | 79,600 |
| General revenues: | | |
| Earnings on investments | | 21 |
| Total Revenues | | 79,621 |
| **Expenses** | | |
| Services and supplies | | 69,224 |
| Total Expenses | | 69,224 |
| Change in Net Position | | 10,397 |
| **Net Position, July 1** | | 72,053 |
| **Net Position, June 30** | $ | 82,450 |

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**Economic Factors / Other Significant Matters**

The Board is charged with, and given statutory authority, to provide public protection through licensure and regulation of Landscape Architects. The Board provides direction of staff actions towards its mission of public protection through licensure and disciplinary measures.

Overall revenue increased due to the change in license renewal fees, and in the opinion of management, will stay at this level to insure an acceptable level of cash flow for operations. As a result, a consistent and stable source of revenue should continue to provide sufficient financial resources for the Board to achieve its desired goals and objectives.

**REQUESTS FOR INFORMATION**

This report is designed to provide an overview of the Board's finances for those with an interest in this area. Questions concerning any of the information found in this report or requests for additional information should be directed to:

Nevada State Board of Landscape Architecture
P.O. Box 17039
Reno, NV 89511

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**FINANCIAL STATEMENTS**

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# NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE

STATEMENT OF NET POSITION AND
GOVERNMENTAL FUND BALANCE SHEET
JUNE 30, 2015

| | General Fund | Adjustments | Statement of Net Position |
|---|---|---|---|
| **ASSETS** | | | |
| Cash and cash equivalents | $ 136,631 | $ - | $ 136,631 |
| Accounts receivable | 19,200 | 1,800 | 21,000 |
| Total Assets | $ 155,831 | 1,800 | 157,631 |
| **LIABILITIES** | | | |
| Accrued payroll liabilities | $ 2,381 | - | 2,381 |
| **DEFERRED INFLOWS OF RESOURCES** | | | |
| Unavailable revenue - licensing fees | 71,000 | 1,800 | 72,800 |
| **FUND BALANCE** | | | |
| Unassigned | 82,450 | (82,450) | - |
| Total Liabilities, Deferred Inflows of Resources, and Fund Balance | $ 155,831 | | |
| **NET POSITION** | | | |
| Unrestricted | | 82,450 | 82,450 |
| Total Net Position | | $ 82,450 | $ 82,450 |

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*See accompanying notes.*

# NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE

STATEMENT OF ACTIVITIES AND GOVERNMENTAL
FUND REVENUES, EXPENDITURES AND
CHANGES IN FUND BALANCE
YEAR ENDED JUNE 30, 2015

| | General Fund | Adjustments | Statement of Activities |
|---|---|---|---|
| **EXPENDITURES/EXPENSES** | | | |
| Board expenses | $ 8,510 | $ - | $ 8,510 |
| Meetings and training | 13,052 | - | 13,052 |
| Office expenses | 7,618 | - | 7,618 |
| Personnel | 36,155 | - | 36,155 |
| Professional fees | 3,889 | - | 3,889 |
| | 69,224 | - | 69,224 |
| **PROGRAM REVENUE** | | | |
| Licensing fees (charges for services) | 79,600 | - | 79,600 |
| Net Program Revenues (Expenses) | 10,376 | - | 10,376 |
| **GENERAL REVENUE** | | | |
| Earnings on investments | 21 | - | 21 |
| Net change in Fund Balance/ Net Position | 10,397 | - | 10,397 |
| **FUND BALANCE/NET POSITION** | | | |
| **Beginning of Year** | 72,053 | - | 72,053 |
| **End of Year** | $ 82,450 | $ - | $ 82,450 |

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*See accompanying notes.*

# NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE

STATEMENT OF REVENUES, EXPENDITURES AND CHANGES IN FUND BALANCE - BUDGET AND ACTUAL - GENERAL FUND
YEAR ENDED JUNE 30, 2015

| | Original And Final Budget | Actual | Variance To Final Budget |
|---|---|---|---|
| **REVENUES** | | | |
| Licensing Fees | $ 79,656 | $ 79,600 | $ (56) |
| Earnings on investments | - | 21 | 21 |
| | 79,656 | 79,621 | (35) |
| **EXPENDITURES** | | | |
| Board expenses | 9,500 | 8,510 | 990 |
| Meetings and training | 13,225 | 13,052 | 173 |
| Office expenses | 9,545 | 7,618 | 1,927 |
| Personnel | 36,830 | 36,155 | 675 |
| Professional fees | 5,900 | 3,889 | 2,011 |
| | 75,000 | 69,224 | 5,776 |
| Excess (Deficiency) of Revenues Over (Under) Expenditures | $ 4,656 | $ 10,397 | $ (5,811) |

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*See accompanying notes.*

## NOTE 1 – SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

The Nevada State Board of Landscape Architecture (the Board) is the licensing and regulatory agency for landscape architecture in the State of Nevada. The Board is regulated by the Nevada Revised Statutes (NRS) Chapter 623A, which also specify the authorized activities of the Board.

### *Reporting Entity*

Effective July 1, 2001, Chapter 353 of the Nevada Revised Statutes (NRS) was amended to exempt certain professional and occupational boards from the state budget act and the provisions governing the administration of state funding. The provisions of Chapter 353 do not apply to boards created pursuant to chapters 623 to 625A, inclusive, 628, 630 to 640A inclusive, 641 and 656 of the NRS and the officers and employees thereof. Accordingly, the Board's budgeting and accounting practices and procedures have been removed from the oversight of the Department of Administration.

The Board's financial statements are not included in the financial statements of the State of Nevada since the State does not exercise financial or administrative control over the Board. This is in conformance with GASB codification Section 2100, *Defining the Government Reporting Entity*.

### *Financial Statement Presentation*

The Board is defined as a single-program special-purpose entity under GASB Statement No.34, paragraphs 136–137 (GASB Cod. Secs. Sp20.105-106). This classification allows for the preparation of GASB 34 financial statements under an optional reporting method which combines the fund and the government-wide statements into a single presentation. Under standard GASB 34 methodology, the government-wide statement of net position and statement of activities are presented independently from the respective fund balance sheet and statement of revenue, expenditures, and fund balance. A reconciliation of adjustments provided on the modified financial statements demonstrates the changes from the fund financial statements to the government-wide statements in order to assist the reader in evaluating these statements. The Board has utilized this optional method of presentation.

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***Measurement Focus and Basis of Accounting***

The basic financial statements include both government-wide and fund financial statements.

*Government-Wide Statements*

The government-wide Statement of Net Position is presented on a full accrual, economic resource basis that recognizes all long-term assets as well as long-term debt and obligations.

The government-wide Statement of Activities reports both the gross and net cost of each of the Board's functions. The functions are also supported by the general government revenues. The Statement of Activities reduces gross expenses by related program revenues and operating grants. The Statement of Activities is also presented on a full accrual basis where revenues are recorded when earned and expenses are recorded when a liability is incurred, regardless of when the related cash flows take place.

*Fund Financial Statements*

Governmental fund financial statements are reported using the current financial resources measurement focus and the modified accrual basis of accounting. Revenues are recognized when measurable and available (susceptible to accrual). Interest and surcharges are accrued when their receipt occurs within sixty days after the end of the accounting period so as to be measureable and available. Expenditures generally are recorded when a liability is incurred, as under accrual accounting. However, certain expenditures are recorded only when payment is due.

The General Fund is the Board's sole fund; therefore, it accounts for all financial resources of the general government.

***Accounts Receivable***

For the governmental fund financial statements, the accounts receivable represent fees collected within 60 days subsequent to year end that are an available resource for the current year.

For the government-wide financial statements, the accounts receivable represents fees due as of yearend. All amounts are considered fully collectible by management.

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***Unavailable revenue***

By provisions of statute, the Board administers its licensing registration on an annual basis. Unavailable revenue represents licensing fees received prior to fiscal year end for the subsequent year's renewals.

***Use of Estimates***

The preparation of financial statements in conformity with generally accepted accounting principles (GAAP) requires management to make estimates and assumptions that affect the reported amounts and disclosures. Accordingly, actual results could differ from these estimates.

**NOTE 2 – CASH AND CASH EQUIVALENTS**

The Board maintains all of its cash and certificates of deposit in a major commercial bank. The time certificate of deposit is held in the name of the Board. The accounts are insured by the Federal Deposit Insurance Corporation (FDIC) with a limit of $250,000 in the aggregate.

By provisions of statutes, the Board is required to deposit all money in banks or savings and loan associations located in the State of Nevada.

**NOTE 3 – NET POSITION AND FUND BALANCE**

***Net Position***

Equity is classified as net position in the government-wide financial statements. Net position is categorized as invested in capital assets (net of related debt), restricted and unrestricted.

Net position is reported as restricted when there are limitations imposed on their use either through legislation or through external restrictions imposed by creditors or laws or regulations of other governments.

As of June 30, 2015, the Board's net position was comprised of:

- *Unrestricted Net Position* – Net position of the Board which is not restricted for any project or other purpose.



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***Fund Balance***

The Board has adopted Governmental Accounting Standards Board (GASB) Statement No. 54, *Fund Balance Reporting and Governmental Fund Type Definitions*, which establishes standards for fund balance classifications that comprise a hierarchy based primarily on the extent to which a government is bound to observe constraints imposed upon the use of the resources reported in governmental funds. The Board reports the following classifications:

*Non-spendable* – amounts that cannot be spent because they are either (a) not in spendable form or (b) legally or contractually required to be maintained intact.

*Restricted* – amounts that can be spent only for specific purposes because of constitutional provisions, charter requirements or enabling legislation or because of constraints that are externally imposed by creditors, grantors, contributors, or the laws or regulations of other governments.

*Committed* – amounts that can be used only for specific purposes determined by a formal action of the Board. The Board is the highest level of decision making authority for the Board. Commitments may be established, modified, or rescinded only through ordinances or resolutions approved by the Board.

*Assigned* – amounts that do not meet the criteria to be classified as restricted or committed but that are intended to be used for specific purposes. Under the Board's adopted policy, only the Board may assign amounts for specific purposes.

Appropriated assigned fund balance is an appropriation of existing fund balance to eliminate a projected budgetary deficit in the subsequent year's budget in an amount no greater than the projected excess of expected expenditures over expected revenues.

*Unassigned* – the residual classification for the General Fund.

When both restricted and unrestricted resources are available for use, it is the Board's policy to use externally restricted resources first, then unrestricted resources – committed, assigned, and unassigned – as needed, unless the Board has provided for otherwise in its commitment or assignment actions.

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**NOTE 4 – RELATED PARTY TRANSACTION**

On May 13, 2014, the Board entered into an agreement to lease office space within the private residence of the Executive Director. The term of the lease commences on July 1, 2014 and ends June 30, 2015, renewable annually. Total lease payments for the year ended June 30, 2015 were $3,600.

**NOTE 5 – COMPLIANCE WITH NEVADA REVISED STATUTES AND NEVADA ADMINISTRATIVE CODE**

The Board conformed to all significant statutory constraints on its financial administration during the fiscal year.

**NOTE 6 – CONVERSION TO GOVERNMENT-WIDE FINANCIAL STATEMENTS**

Adjustments on the face of the financial statements were made to the fund balance sheet and statement of revenue, expenditures, and changes in fund balance in order to reconcile the fund statements to the government-wide statements of net position and activities. This adjustment details the effect of accounts receivable and unavailable revenue of $1,800 for licensing fees collected more than 60 days subsequent to year end.

**NOTE 7 – SUBSEQUENT EVENTS**

Management has evaluated subsequent events through [report date], the date the financial statements were available to be issued. The Board has determined there are no material transactions that have not been disclosed.

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**COMPLIANCE SECTION**

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**REPORT ON INTERNAL CONTROL OVER FINANCIAL REPORTING AND ON COMPLIANCE AND OTHER MATTERS BASED ON AN AUDIT OF FINANCIAL STATEMENTS PERFORMED IN ACCORDANCE WITH *GOVERNMENT AUDITING STANDARDS***

To the Board of Trustees of the
Nevada State Board of Landscape Architecture
Reno, Nevada

We have audited, in accordance with the auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards,* issued by the Comptroller General of the United States, the financial statements of the governmental activities and the General Fund of the Nevada State Board of Landscape Architecture (Board) as of and for the year ended June 30, 2015, and the related notes to the financial statements, which collectively comprise the Board's basic financial statements and have issued our report thereon dated [report date].

**Internal Control over Financial Reporting**

In planning and performing our audit of the financial statements, we considered the Board's internal control over financial reporting (internal control) to determine the audit procedures that are appropriate in the circumstances for the purpose of expressing our opinions on the financial statements, but not for the purpose of expressing an opinion on the effectiveness of the Board's internal control. Accordingly, we do not express an opinion on the effectiveness of the Board's internal control over financial reporting.

A *deficiency in internal control* exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct, misstatements on a timely basis. A *material weakness* is a deficiency, or a combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented, or detected and corrected on a timely basis. A *significant deficiency* is a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

Our consideration of internal control was for the limited purpose described in the first paragraph of this section and was not designed to identify all deficiencies in internal control that might be material weaknesses or, significant deficiencies. Given these limitations, during our audit we did not identify any deficiencies in internal control that we consider to be material weaknesses. However, material weaknesses may exist that have not been identified.

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**Compliance and Other Matters**

As part of obtaining reasonable assurance about whether the Board's financial statements are free of material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements, noncompliance with which could have a direct and material effect on the determination of financial statement amounts. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests disclosed no instances of noncompliance or other matters that are required to be reported under *Government Auditing Standards*.

**Purpose of this Report**

The purpose of this report is solely to describe the scope of our testing of internal control and compliance and the results of that testing, and not to provide an opinion on the effectiveness of the entity's internal control or on compliance. This report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering the entity's internal control and compliance. Accordingly, this communication is not suitable for any other purpose.

Reno, Nevada
[report date]

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# NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE

AUDITORS' COMMENTS
JUNE 30, 2015

## STATUTE COMPLIANCE

Our comments related to the Board's compliance with significant statutory constraints are reported in Note 5 to the financial statements.

## AUDIT RECOMMENDATIONS

We did not note any financial weaknesses of a magnitude to justify inclusion within our report.

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| Date Case Opened | Case # | Complaint | Follow-up | Current Status |
|---|---|---|---|---|
| 5-13-2015 | 15-03 | Practice Without License-Complaint filed with Board. | Cease and desist letter sent 8-30-2015 asking for a written plan of correction by 9-30-2015. Satisfactory response 11-14-2015. | Recommend close case 11-14-2015. |
| 6-9-2015 | 15-04 | Practice Without License-Complaint filed with Board. | Cease and desist letter sent 8-30-2015 asking for a written plan of correction by 9-30-2015. Satisfactory response 11-14-2015. | Recommend close case 11-14-2015. |

## CLARB Annual Meeting Summary

There were 41 Member Boards in attendance with 24 Boards represented by both the MBE and a MBM.

**Members Unanimously Approve Resolution to Amend CLARB Bylaws**
Members approved a resolution to amend the CLARB bylaws that includes new eligibility requirements for leadership, a voting MBE Director position on the Board of Directors, phasing out the Alternate Regional Director position and granting authority to the Board to adjust regional boundaries.

**Members Provide Input on Model Law**
As CLARB works to revise the Model Law and Regulations this coming year, member input, such as ensuring the model does not unduly restrict access to practice, providing clear guidance on exemptions and strengthening the scope of practice, will be taken into consideration.

**CLARB Working to Help Boards Be More Strategic**
This year's workshop helped members recognize the value of strategic planning. As members look to CLARB for support in beginning and maintaining the process, we are thinking creatively about how to address this need.

**Members Discuss Staying Relevant through Changing Times**
In the Future of Licensure session, members discussed changes in the licensure environment; potential disruptors of regulation and the need to defend; adapt and innovate all at the same time, noting that forced change may occur when it falls out of step with the public mood.

**Presidential Recognition Award Presented to Firm for the First Time**
CLARB President Jerany Jackson presented the Presidential Recognition Award to the Northeastern consulting firm Milone & MacBroom in recognition of their culture of service and long-time commitment to CLARB.

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**Highlights from the September Board of Directors Meeting**
The Board of Directors met on September 16 to review progress on programs, finances and strategic initiatives. Key outcomes included approving the budget with no increase to member dues and fees and validating the 50th anniversary meeting plan to host the Annual Meeting in New York City in 2020.

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**FOR IMMEDIATE RELEASE**

**Nevada Landscape Architect Elected as Regional Director of International Organization**

RESTON, VIRGINIA (UNITED STATES) – October 1, 2015 – Nevada landscape architect Cary K. Baird has been elected to a two-year term as Region 5 Director for the Council of Landscape Architectural Registration Boards (CLARB).

As the Region 5 Director, Baird will represent CLARB members from Alaska, Arizona, British Columbia, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington. He previously served as the Alternate Regional Director (2013–2015).

Baird has served on the Nevada State Board of Landscape Architects since 2006 and has represented his Board at CLARB meetings throughout that time. During his service to the Board, where he currently serves as President, Baird is helping to build a five-year strategic plan with its purpose to enhance transparency with registrants and the community.

Baird is an active member of the American Society of Landscape Architects (ASLA), and was nominated in 2014 for Nevada's ASLA Landscape Architect of the Year for contributions made to the profession. Additionally, Baird volunteers with the local water authority providing lectures that promote water and native landscape sustainability practices to landscape industry professionals.

Baird earned a bachelor's degree in design and urban planning from Arizona State University. He is currently licensed in Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, Texas and Utah and is also a CLARB Certified landscape architect.

About CLARB
Since 1970, CLARB has been dedicated to ensuring that all individuals who affect the natural and built environment through the practice of landscape architecture are sufficiently qualified to do so. CLARB and its members work together to establish standards for education, experience and examination required for the professional licensure of landscape architects. CLARB's members include the licensure boards that regulate the profession of landscape architecture in the United States; Puerto Rico; and the Canadian provinces of Alberta, British Columbia and Ontario.

For more information, please contact Andrea Elkin, Communications Manager (aelkin@clarb.org or 571-432-0332).

###

## CLARB Communique: FTC Issues Guidance on U.S. Supreme Court Antitrust Decision Involving Regulatory Boards

Joel Albizo

As we've discussed in previous Communiques--and at the recent CLARB Annual Meeting--the U.S. Supreme Court's decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission (FTC) has generated actions and questions.

Predictably, the anti-regulation community has used the ruling to make new appeals and we've seen at least one Governor issue an executive order in response.

The FTC just issued guidance (thank you, Doreen Frost!) to help states better understand and comply with the new law of the land. Naturally, it won't answer every question--and it may raise some new ones--but it's a start.

Here's the guidance paper, plus a few related resources that may help you stay up-to-date:

- **FARB press release summarizing new FTC guidance**
- **FTC guidance**
- **CLARB presentation to ASLA Licensure Summit on case** (This also includes some charts and graphs based on the short MBE survey we conducted in August.)

Meanwhile, we continue to work with NCARB, NCEES and other regulatory associations to ensure that we have good awareness of this evolving issue and how we can best respond, individually and collectively.

I enjoyed seeing so many of you in New Orleans and look forward to our next conversation, whether it be virtual or in person. In the meantime, please call or **email me** if I can help in any way or if you have thoughts or ideas you'd like to share--they are always warmly welcomed.

# FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*

## I. Introduction

States craft regulatory policy through a variety of actors, including state legislatures, courts, agencies, and regulatory boards. While most regulatory actions taken by state actors will not implicate antitrust concerns, some will. Notably, states have created a large number of regulatory boards with the authority to determine who may engage in an occupation (*e.g.*, by issuing or withholding a license), and also to set the rules and regulations governing that occupation. Licensing, once limited to a few learned professions such as doctors and lawyers, is now required for over 800 occupations including (in some states) locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers.[1]

In general, a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated. However, across the United States, "licensing boards are largely dominated by active members of their respective industries . . ."[2] That is, doctors commonly regulate doctors, beekeepers commonly regulate beekeepers, and tour guides commonly regulate tour guides.

Earlier this year, the U.S. Supreme Court upheld the Federal Trade Commission's determination that the North Carolina State Board of Dental Examiners ("NC Board") violated the federal antitrust laws by preventing non-dentists from providing teeth whitening services in competition with the state's licensed dentists. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). NC Board is a state agency established under North Carolina law and charged with administering and enforcing a licensing system for dentists. A majority of the members of this state agency are themselves practicing dentists, and thus they have a private incentive to limit

* This document sets out the views of the Staff of the Bureau of Competition. The Federal Trade Commission is not bound by this Staff guidance and reserves the right to rescind it at a later date. In addition, FTC Staff reserves the right to reconsider the views expressed herein, and to modify, rescind, or revoke this Staff guidance if such action would be in the public interest.

[1] Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny*, 162 U. PA. L. REV. 1093, 1096 (2014).

[2] *Id.* at 1095.

competition from non-dentist providers of teeth whitening services. NC Board argued that, because it is a state agency, it is exempt from liability under the federal antitrust laws. That is, the NC Board sought to invoke what is commonly referred to as the "state action exemption" or the "state action defense." The Supreme Court rejected this contention and affirmed the FTC's finding of antitrust liability.

In this decision, the Supreme Court clarified the applicability of the antitrust state action defense to state regulatory boards controlled by market participants:

> "The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* [*Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)] active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

In the wake of this Supreme Court decision, state officials have requested advice from the Federal Trade Commission regarding antitrust compliance for state boards responsible for regulating occupations. This outline provides FTC Staff guidance on two questions. *First*, when does a state regulatory board require active supervision in order to invoke the state action defense? *Second*, what factors are relevant to determining whether the active supervision requirement is satisfied?

Our answers to these questions come with the following caveats.

- Vigorous competition among sellers in an open marketplace generally provides consumers with important benefits, including lower prices, higher quality services, greater access to services, and increased innovation. For this reason, a state legislature should empower a regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers. The Federal Trade Commission and its staff have frequently advocated that states avoid unneeded and burdensome regulation of service providers.[3]

- Federal antitrust law does <u>not</u> require that a state legislature provide for active supervision of any state regulatory board. A state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust

[3] *See, e.g.*, Fed. Trade Comm'n Staff Policy Paper, *Policy Perspectives: Competition and the Regulation of Advanced Practice Registered Nurses* (Mar. 2014), https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf; Fed. Trade Comm'n & U.S. Dept. of Justice, Comment before the South Carolina Supreme Court Concerning Proposed Guidelines for Residential and Commercial Real Estate Closings (Apr. 2008), https://www.ftc.gov/news-events/press-releases/2008/04/ftcdoj-submit-letter-supreme-court-south-carolina-proposed.

laws. If the state legislature determines that a regulatory board should be subject to antitrust oversight, then the state legislature need not provide for active supervision.

- Antitrust analysis – including the applicability of the state action defense – is fact-specific and context-dependent. The purpose of this document is to identify certain overarching legal principles governing when and how a state may provide active supervision for a regulatory board. We are not suggesting a mandatory or one-size-fits-all approach to active supervision. Instead, we urge each state regulatory board to consult with the Office of the Attorney General for its state for customized advice on how best to comply with the antitrust laws.

- This FTC Staff guidance addresses only the active supervision prong of the state action defense. In order successfully to invoke the state action defense, a state regulatory board controlled by market participants must also satisfy the clear articulation prong, as described briefly in Section II. below.

- This document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.

## II. Overview of the Antitrust State Action Defense

"Federal antitrust law is a central safeguard for the Nation's free market structures . . . . The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *N.C. Dental*, 135 S. Ct. at 1109.

Under principles of federalism, "the States possess a significant measure of sovereignty." *N.C. Dental*, 135 S. Ct. at 1110 (*quoting Community Communications Co. v. Boulder*, 455 U.S. 40, 53 (1982)). In enacting the antitrust laws, Congress did not intend to prevent the States from limiting competition in order to promote other goals that are valued by their citizens. Thus, the Supreme Court has concluded that the federal antitrust laws do not reach anticompetitive conduct engaged in by a State that is acting in its sovereign capacity. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). For example, a state legislature may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. Dental*, 135 S. Ct. at 1109.

Are the actions of a state regulatory board, like the actions of a state legislature, exempt from the application of the federal antitrust laws? In *North Carolina State Board of Dental Examiners*, the Supreme Court reaffirmed that a state regulatory board is not the sovereign. Accordingly, a state regulatory board is not necessarily exempt from federal antitrust liability.

More specifically, the Court determined that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates" may invoke the state action defense only when two requirements are satisfied: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. *N.C. Dental*, 135 S. Ct. at 1114.

- The Supreme Court addressed the clear articulation requirement most recently in *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). The clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id*. at 1013.

- The State's clear articulation of the intent to displace competition is not alone sufficient to trigger the state action exemption. The state legislature's clearly-articulated delegation of authority to a state regulatory board to displace competition may be "defined at so high a level of generality as to leave open critical questions about how

and to what extent the market should be regulated." There is then a danger that this delegated discretion will be used by active market participants to pursue private interests in restraining trade, in lieu of implementing the State's policy goals. *N.C. Dental*, 135 S. Ct. at 1112.

- The active supervision requirement "seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming [antitrust] immunity." *Id.*

Where the state action defense does not apply, the actions of a state regulatory board controlled by active market participants may be subject to antitrust scrutiny. Antitrust issues may arise where an unsupervised board takes actions that restrict market entry or restrain rivalry. The following are some scenarios that have raised antitrust concerns:

- A regulatory board controlled by dentists excludes non-dentists from competing with dentists in the provision of teeth whitening services. *Cf. N.C. Dental,* 135 S. Ct. 1101.

- A regulatory board controlled by accountants determines that only a small and fixed number of new licenses to practice the profession shall be issued by the state each year. *Cf. Hoover v. Ronwin*, 466 U.S. 558 (1984).

- A regulatory board controlled by attorneys adopts a regulation (or a code of ethics) that prohibits attorney advertising, or that deters attorneys from engaging in price competition. *Cf. Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

# III. Scope of FTC Staff Guidance

A. This Staff guidance addresses the applicability of the state action defense under the federal antitrust laws. Concluding that the state action defense is inapplicable does not mean that the conduct of the regulatory board necessarily violates the federal antitrust laws. A regulatory board may assert defenses ordinarily available to an antitrust defendant.

1. **Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.**

Example 1: A regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without raising antitrust concerns. A regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Example 2: Suppose a market with several hundred licensed electricians. If a regulatory board suspends the license of one electrician for substandard work, such action likely does not unreasonably harm competition. *Cf. Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc).

2. **The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344 n. 6 (1987).**

Example 3: A state statute requires that an applicant for a chauffeur's license submit to the regulatory board, among other things, a copy of the applicant's diploma and a certified check for $500. An applicant fails to submit the required materials. If for this reason the regulatory board declines to issue a chauffeur's license to the applicant, such action would not be considered an unreasonable restraint. In the circumstances described, the denial of a license is a ministerial or non-discretionary act of the regulatory board.

3. **In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the "sham exception." Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).**

Example 4: A state statute authorizes the state's dental board to maintain an action in state court to enjoin an unlicensed person from practicing dentistry. The members of the dental board have a basis to believe that a particular individual is practicing dentistry but does not hold a valid license. If the dental board files a lawsuit against that individual, such action would not constitute a violation of the federal antitrust laws.

B. Below, FTC Staff describes when active supervision of a state regulatory board is required in order successfully to invoke the state action defense, and what factors are relevant to determining whether the active supervision requirement has been satisfied.

### 1. When is active state supervision of a state regulatory board required in order to invoke the state action defense?

***General Standard***: "[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

***Active Market Participants***: A member of a state regulatory board will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.

- If a board member participates in any professional or occupational sub-specialty that is regulated by the board, then that board member is an active market participant for purposes of evaluating the active supervision requirement.

- It is no defense to antitrust scrutiny, therefore, that the board members themselves are not directly or personally affected by the challenged restraint. For example, even if the members of the NC Dental Board were orthodontists who do not perform teeth whitening services (as a matter of law or fact or tradition), their control of the dental board would nevertheless trigger the requirement for active state supervision. This is because these orthodontists are licensed by, and their services regulated by, the NC Dental Board.

- A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant.

***Method of Selection***: The method by which a person is selected to serve on a state regulatory board is not determinative of whether that person is an active market participant in the occupation that the board regulates. For example, a licensed dentist is deemed to be an active market participant regardless of whether the dentist (i) is appointed to the state dental board by the governor or (ii) is elected to the state dental board by the state's licensed dentists.

***A Controlling Number, Not Necessarily a Majority, of Actual Decisionmakers*:**

- Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (*e.g.*, through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.

- Whether a particular restraint has been imposed by a "controlling number of decisionmakers [who] are active market participants" is a fact-bound inquiry that must be made on a case-by-case basis. FTC Staff will evaluate a number of factors, including:

  - ✓ The structure of the regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board's authority.

  - ✓ Whether the board members who are active market participants have veto power over the board's regulatory decisions.

Example 5: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of five board members. Thus, no regulation may become effective without the assent of at least one electrician member of the board. In this scenario, the active market participants effectively have veto power over the board's regulatory authority. The active supervision requirement is therefore applicable.

  - ✓ The level of participation, engagement, and authority of the non-market participant members in the business of the board – generally and with regard to the particular restraint at issue.

  - ✓ Whether the participation, engagement, and authority of the non-market participant board members in the business of the board differs from that of board members who are active market participants – generally and with regard to the particular restraint at issue.

  - ✓ Whether the active market participants have in fact exercised, controlled, or usurped the decisionmaking power of the board.

Example 6: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of a majority of board members. When voting on proposed regulations, the non-electrician members routinely defer to the preferences of the electrician members. Minutes of

board meetings show that the non-electrician members generally are not informed or knowledgeable concerning board business – and that they were not well informed concerning the particular restraint at issue. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

Example 7: The state board of electricians consists of four non-electrician members and three practicing electricians. Documents show that the electrician members frequently meet and discuss board business separately from the non-electrician members. On one such occasion, the electrician members arranged for the issuance by the board of written orders to six construction contractors, directing such individuals to cease and desist from providing certain services. The non-electrician members of the board were not aware of the issuance of these orders and did not approve the issuance of these orders. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

### 2. What constitutes active supervision?

FTC Staff will be guided by the following principles:

- "[T]he purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control" such that the details of the regulatory scheme "have been established as a product of deliberate state intervention" and not simply by agreement among the members of the state board. "Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." The State is not obliged to "[meet] some normative standard, such as efficiency, in its regulatory practices." *Ticor*, 504 U.S. at 634-35. "The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Id*. at 635.

- It is necessary "to ensure the States accept political accountability for anticompetitive conduct they permit and control." *N.C. Dental*, 135 S. Ct. at 1111. *See also Ticor*, 504 U.S. at 636.

- "The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State.' Further, the state supervisor may not itself be an active market participant." *N.C. Dental*, 135 S. Ct. at 1116–17 (citations omitted).

- The active supervision must precede implementation of the allegedly anticompetitive restraint.

- "[T]he inquiry regarding active supervision is flexible and context-dependent." "[T]he adequacy of supervision . . . will depend on all the circumstances of a case." *N.C. Dental*, 135 S. Ct. at 1116–17. Accordingly, FTC Staff will evaluate each case in light of its own facts, and will apply the applicable case law and the principles embodied in this guidance reasonably and flexibly.

### 3. What factors are relevant to determining whether the active supervision requirement has been satisfied?

FTC Staff will consider the presence or absence of the following factors in determining whether the active supervision prong of the state action defense is satisfied.

- The supervisor has obtained the information necessary for a proper evaluation of the action recommended by the regulatory board. As applicable, the supervisor has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies, and reviewed documentary evidence.

  - ✓ The information-gathering obligations of the supervisor depend in part upon the scope of inquiry previously conducted by the regulatory board. For example, if the regulatory board has conducted a suitable public hearing and collected the relevant information and data, then it may be unnecessary for the supervisor to repeat these tasks. Instead, the supervisor may utilize the materials assembled by the regulatory board.

- The supervisor has evaluated the substantive merits of the recommended action and assessed whether the recommended action comports with the standards established by the state legislature.

- The supervisor has issued a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision.

  - ✓ A written decision serves an evidentiary function, demonstrating that the supervisor has undertaken the required meaningful review of the merits of the state board's action.

  - ✓ A written decision is also a means by which the State accepts political accountability for the restraint being authorized.

**Scenario 1: Example of satisfactory active supervision of a state board regulation designating teeth whitening as a service that may be provided only by a licensed dentist, where state policy is to protect the health and welfare of citizens and to promote competition.**

- The state legislature designated an executive agency to review regulations recommended by the state regulatory board. Recommended regulations become effective only following the approval of the agency.

- The agency provided notice of (i) the recommended regulation and (ii) an opportunity to be heard, to dentists, to non-dentist providers of teeth whitening, to the public (in a newspaper of general circulation in the affected areas), and to other interested and affected persons, including persons that have previously identified themselves to the agency as interested in, or affected by, dentist scope of practice issues.

- The agency took the steps necessary for a proper evaluation of the recommended regulation. The agency:

  - ✓ Obtained the recommendation of the state regulatory board and supporting materials, including the identity of any interested parties and the full evidentiary record compiled by the regulatory board.

  - ✓ Solicited and accepted written submissions from sources other than the regulatory board.

  - ✓ Obtained published studies addressing (i) the health and safety risks relating to teeth whitening and (ii) the training, skill, knowledge, and equipment reasonably required in order to safely and responsibly provide teeth whitening services (if not contained in submission from the regulatory board).

  - ✓ Obtained information concerning the historic and current cost, price, and availability of teeth whitening services from dentists and non-dentists (if not contained in submission from the regulatory board). Such information was verified (or audited) by the Agency as appropriate.

  - ✓ Held public hearing(s) that included testimony from interested persons (including dentists and non-dentists). The public hearing provided the agency with an opportunity (i) to hear from and to question providers, affected customers, and experts and (ii) to supplement the evidentiary record compiled by the state board. (As noted above, if the state regulatory board has previously conducted a suitable public hearing, then it may be unnecessary for the supervising agency to repeat this procedure.)

- The agency assessed all of the information to determine whether the recommended regulation comports with the State's goal to protect the health and

welfare of citizens and to promote competition.

- The agency issued a written decision accepting, rejecting, or modifying the scope of practice regulation recommended by the state regulatory board, and explaining the rationale for the agency's action.

**Scenario 2: Example of satisfactory active supervision of a state regulatory board administering a disciplinary process.**

A common function of state regulatory boards is to administer a disciplinary process for members of a regulated occupation. For example, the state regulatory board may adjudicate whether a licensee has violated standards of ethics, competency, conduct, or performance established by the state legislature.

Suppose that, acting in its adjudicatory capacity, a regulatory board controlled by active market participants determines that a licensee has violated a lawful and valid standard of ethics, competency, conduct, or performance, and for this reason, the regulatory board proposes that the licensee's license to practice in the state be revoked or suspended. In order to invoke the state action defense, the regulatory board would need to show both clear articulation and active supervision.

- In this context, active supervision may be provided by the administrator who oversees the regulatory board (*e.g.*, the secretary of health), the state attorney general, or another state official who is not an active market participant. The active supervision requirement of the state action defense will be satisfied if the supervisor: (i) reviews the evidentiary record created by the regulatory board; (ii) supplements this evidentiary record if and as appropriate; (iii) undertakes a de novo review of the substantive merits of the proposed disciplinary action, assessing whether the proposed disciplinary action comports with the policies and standards established by the state legislature; and (iv) issues a written decision that approves, modifies, or disapproves the disciplinary action proposed by the regulatory board.

Note that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.

**The following do <u>not</u> constitute active supervision of a state regulatory board that is controlled by active market participants:**

- The entity responsible for supervising the regulatory board is itself controlled by active market participants in the occupation that the board regulates. *See N.C. Dental*, 135 S. Ct. at 1113-14.

- A state official monitors the actions of the regulatory board and participates in deliberations, but lacks the authority to disapprove anticompetitive acts that fail to accord with state policy. *See Patrick v. Burget*, 486 U.S. 94, 101 (1988).

- A state official (*e.g.*, the secretary of health) serves ex officio as a member of the regulatory board with full voting rights. However, this state official is one of several members of the regulatory board and lacks the authority to disapprove anticompetitive acts that fail to accord with state policy.

- The state attorney general or another state official provides advice to the regulatory board on an ongoing basis.

- An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency. The independent state agency perfunctorily approves the recommendations of the regulatory board. *See Ticor*, 504 U.S. at 638.

- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board. *See Patrick*, 486 U.S. at 104-05.

# North Carolina State Board of Dental Examiners v. Federal Trade Commission

## What Happened and What Does it Mean?

Randy Weatherly, ASLA
President-elect
CLARB

Joel Albizo, Hon. ASLA
Chief Executive Officer
CLARB

# Discussion Outline

- Antitrust laws 101
- Background/facts of case
- Overview of SCOTUS opinion
- Initial response
- Case study
- What does all this mean?
- Q&A

# Antitrust Laws 101

# Federal Statutes

| Law | Purpose |
| --- | --- |
| FTC Act | Prevent unfair/deceptive practices |
| Sherman Act | Prohibits agreements that restrain trade or create monopolies |
| Clayton Act | Prohibits price discrimination through business arrangements, acquisitions or mergers |

Violations can create criminal and civil liability

# State Action Doctrine

- Established by SCOTUS in 1943
- State actions not subject to antitrust laws
- Sub-state government entities are immune if acting within "clearly articulated policy"
- Private entities may be protected if "actively supervised" by the state

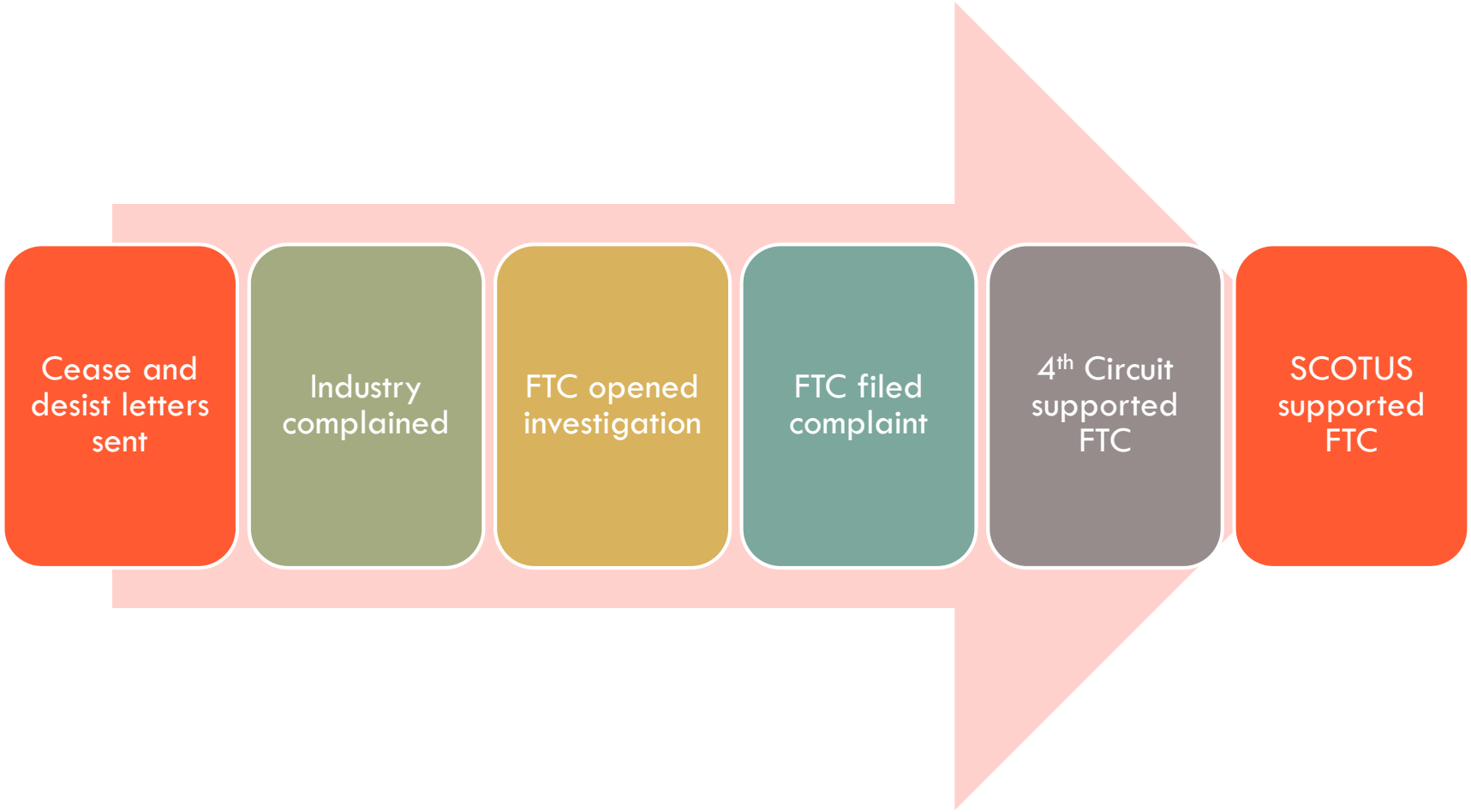
# Federal Trade Commission

- Established in 1914
- Promotes consumer protection and prevention/ elimination of anti-competitive business practices
- Five commissioners, nominated by President and confirmed by Senate
- Enforces anti-trust laws, reviews proposed mergers and investigates business practices

# Background/Facts of the Case

# The Issue: Who Can Whiten Teeth?

# The Path to Resolution



# Overview of Opinion

# Majority Opinion (6-3)

Because a CONTROLLING NUMBER of the Board's decision makers are ACTIVE MARKET PARTICIPANTS in the occupation the Board regulates, the Board is treated as a PRIVATE ACTOR, and must show ACTIVE SUPERVISION by the State.

# Key Majority Points

- There are limits on immunity
- Board is not sovereign
- Active supervision is required
- State supervision must be meaningful
- Citizens need not be discouraged from serving

# How Much Supervision is Required?

- Four requirements:
  1. Must review substance not just procedures
  2. Must have veto/modify power
  3. Must have more than "potential" for supervision
  4. Supervisor can't be an active market participant

Flexible and context-dependent

Micromanagement not required

# Key Dissenting Points

- Misunderstands state-action immunity
- Leaves many unanswered questions:
  - What's a controlling number?
  - Who is an active market participant?

# Initial Response

University of San Diego
SCHOOL OF LAW
Center for Public Interest Law

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

May 4, 2015

The Honorable Kamala Harris
Attorney General of the State of California
1300 I St., Ste. 1740
Sacramento, CA 95814

Letter to all 50 Attorneys Generals to "alert" them of the "critical significance of the decision and request a response as well as public documents…

University of San Diego
SCHOOL OF LAW
Center for Public Interest Law

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

May 4, 2015

The Honorable Kamala Harris
Attorney General of the State of California
1300 I St., Ste. 1740
Sacramento, CA 95814

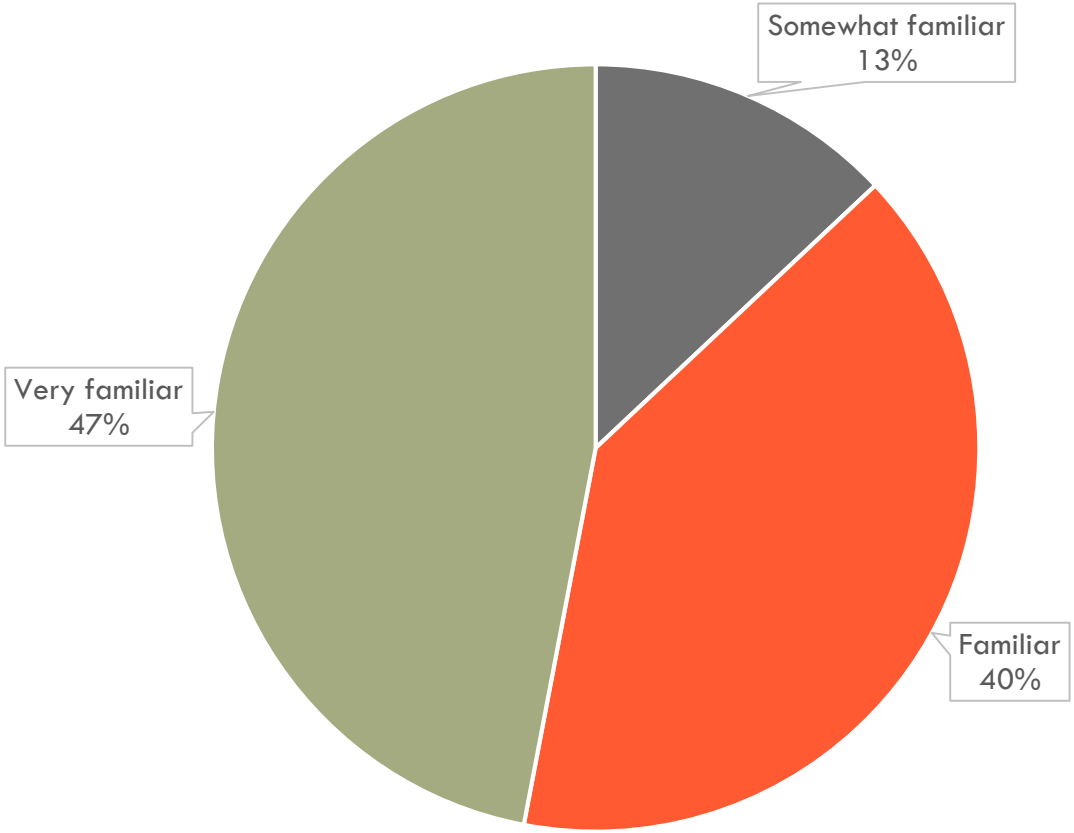
"How many members of these boards and commissions…have been notified of their potential criminal and civil liability if they make decisions that would constitute a violation of federal antitrust law?"

"Please produce copies of your notification…"

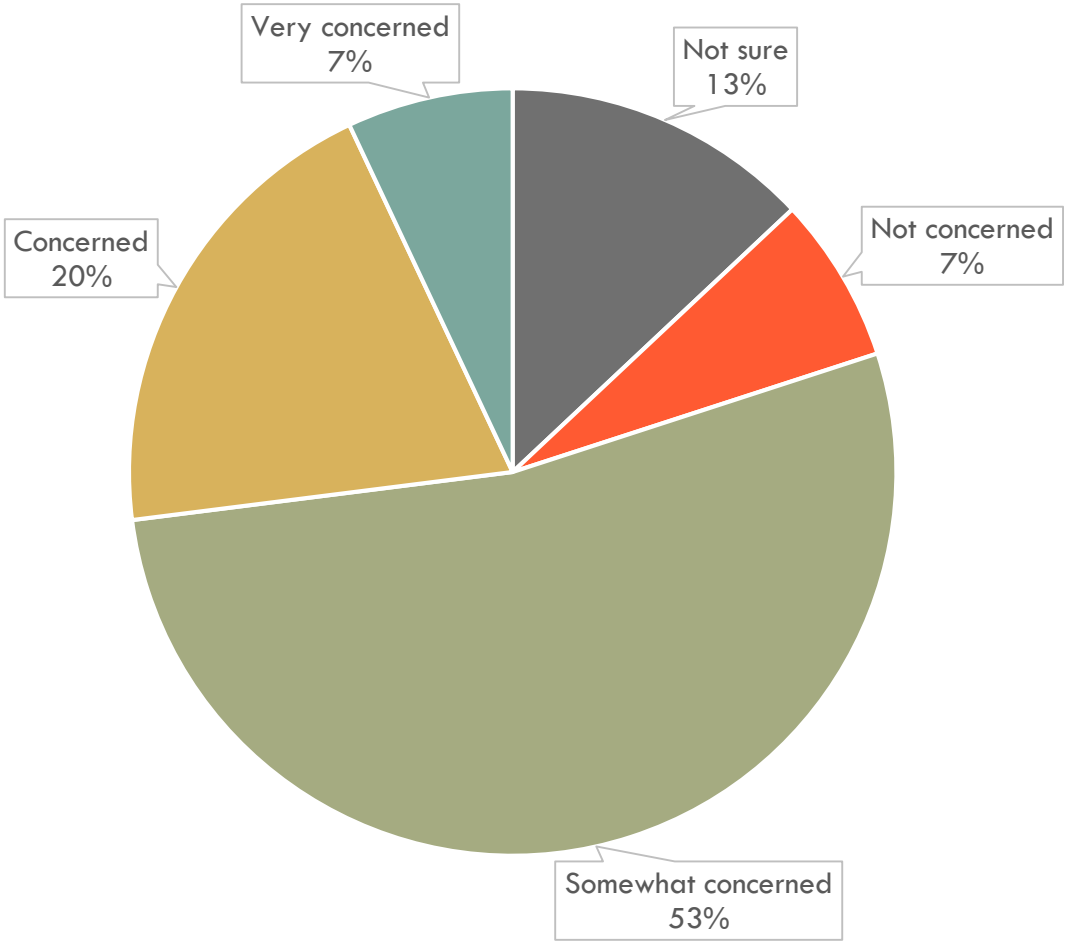
# What Do Regulators Think?

Federation of Associations of Regulatory Boards
National Policy Summit on Professional Regulation
July 2015

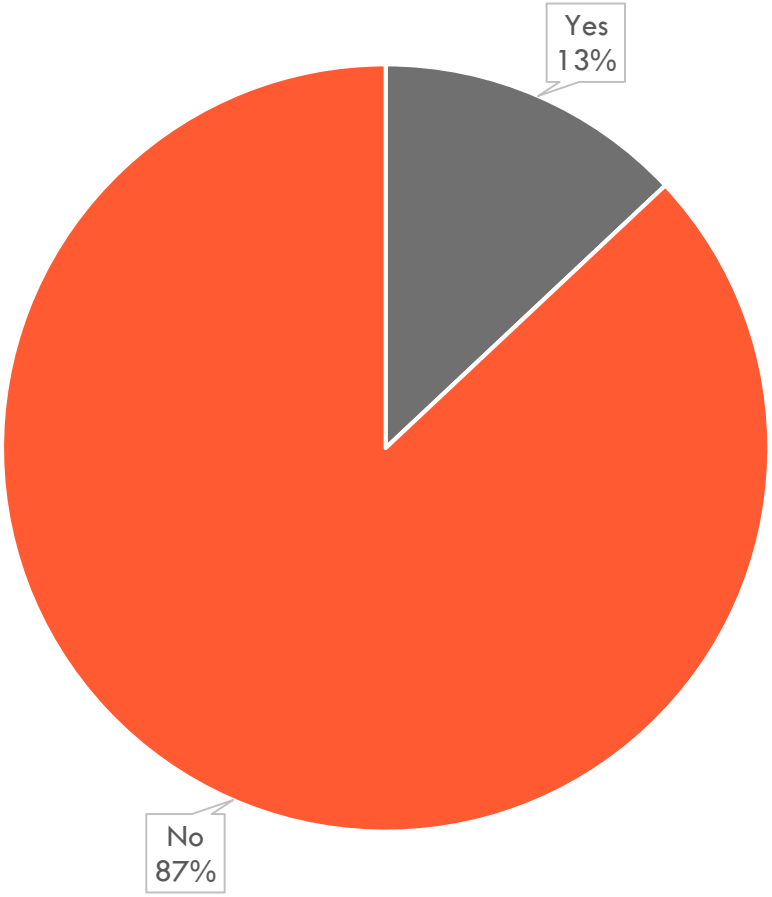
# How Familiar Are CLARB Boards?



# How Concerned Are CLARB Boards



# How Concerned Are AGs?




Majority reporting not concerned

# CLARB Approach

- Keep members informed
- Establish baseline for awareness and concern
- Feature regulatory law expert at Annual Meeting
- Partner with FARB members to take appropriate action in support of reasonable regulation

# Case Study

Randy Weatherly, ASLA

Chair, Oklahoma Board of Architects, Landscape Architects and Interior Designers

President-elect, CLARB

# What Does All This Mean?

TWENTY QUESTIONS
DICK
HERB
VAN
FLORENCE
ALDO RAY

**Contact: Barbara Arango**
**Phone: (847) 559-3272**
**Email: FARB@FARB.org**
**Website: www.FARB.org**

**FOR IMMEDIATE RELEASE**
**October 16, 2015**

# *The Federation of Associations of Regulatory Boards Responds to FTC Staff Guidance on Active Supervision*

Northbrook, IL - On October 14, 2015, the Staff of the Bureau of Competition of the Federal Trade Commission (FTC) issued its **Guidance on Active Supervision of State Regulatory Boards Controlled by Active Market Participants**. The views of the Staff do not constitute regulations and they are not legally binding on the FTC. This Guidance document is subject to continued interpretation and modification; however, this Guidance document will likely be afforded weight in interpreting the requirements imposed by the recent United States Supreme Court case of ***North Carolina State Board of Dental Examiners v. FTC***, 135 S. Ct. 1101 (2015).

The Guidance document reiterates the ruling of the Supreme Court, provides an overview of the state action defense and, of substance, sets forth guidance on the state oversight requirement imposed upon state boards seeking to assert a state action defense in response to claims under the antitrust laws. As a precursor to any analysis, the actions of the state board must first involve activities that initiate an application of the antitrust laws. Further, the Guidance document notes the need for a clearly articulated state policy, the first prong of an analysis of the state actor defense to antitrust allegations.

In particular, the Guidance document addresses and attempts to provide clarity as to the second prong of the state actor defense, that being the active state oversight requirement. Pursuant to the Supreme Court decision, active state oversight is required when a controlling number of decision makers on a state board are active market participants. The Guidance document concludes that active market participants are an encompassing group. All licensees serving on boards, whether currently practicing and/or participating in a sub-specialty, are deemed to be active market participants. Thus, the Guidance document does not distinguish between professionals that may or may not "compete" in the market.

The method of selection is irrelevant as to whether or not such board member is an active market participant. Gubernatorial appointment will not relieve the active oversight requirement where a board is "controlled" by active market participants. Finally, a controlling number on the state board need not be a majority of decision makers. The number of active market participants constituting a controlling number will be determined on a case by case basis and mere numbers will not be determinative.

Addressing what constitutes "active supervision", the Guidance document emphasizes the need for accountability on the part of the state. After noting the four elements to the test set forth by the Court, the Guidance document addresses presence or absence of various factors to consider when determining what constitutes active supervision. It is clear that the expected "supervisor" (person or agency) must have substantive authority to review the basis for the board decision and an obligation to issue a written decision to approve/modify/disapprove such decision. The supervisor cannot be an active market participant. The Guidance document provides examples of both acceptable and non-acceptable active supervision.

The Guidance document addresses the necessity of active supervision in individual disciplinary cases. It suggests examples of oversight include an administrator, state attorney general, or other state official who reviews the evidence, supplements as appropriate, undertakes a de novo review, and issues a

written decision that approves/modifies/disapproves the intended action. As referenced above, the proposed action of the board must first be determined to initiate an application of the antitrust laws and a single disciplinary action likely has a de minimis effect on competition.

FARB has already modified its Uniform Model Practice Act to begin to address the statutory perspective of active oversight. Further, recent and upcoming FARB conferences continue to focus on this important topic. FARB would like to emphasize that the state actor doctrine is a defense to antitrust allegations. State boards are encouraged to continue to educate their members on the important role they play as public protectors. As it becomes available, FARB will disseminate additional information to our membership.

**About FARB**

FARB is a not for profit, 501(c)(3) organization incorporated in 1974 to promote public protection and provide a forum for information exchange for associations of regulatory boards and their stakeholders with interests in professional regulation. The mission of FARB is to promote excellence in regulation for public protection by providing expertise and innovation from a multi-professional perspective.

###

**NEVADA STATE BOARD OF LANDSCAPE ARCHITECTURE**
**EXECUTIVE DIRECTOR REPORT**
**November 14, 2015**

a. Financial Update:
The current bank account balance and accounting records are detailed in the financial reports included with this report. The balance to date is $120,919.09 for all accounts. In reviewing the Profit & Loss Budget vs. Actual Report, it is apparent that the Board has received over 91.5 % of its projected income, and has spent only 45.9 % of its projected expenses. All invoices to this date have been paid.

b. Operations Update:

An announcement from Annalyn Bo Carrillo from Governor Sandoval's office indicates that Boards and Commissions Officer Nikki Haag will handle future board appointments. She can be reached at (775) 684-5670 or by email: nhaag@gov.nv.gov. It is expected that appointments for this Board will be made by the end of 2015.

Questions regarding a request to inspect or obtain copies of public records including a list all current license/permit/registration/certification holders, list of disciplined license/permit/registration/certification holders (for the last 2 years), list of persons denied license/permit/registration/certification (for the last 2 years), list of board, committee and/or commission members, and a list of employees with salary information were provided by Deputy Attorney General, Henna Rasul. Ms. Rasul recommends that the Board attend upcoming informational seminars offered by the Attorney General on this topic.

Reports to State of Nevada:

- *Executive Order 2014-20* established the requirement for a baseline report for aggregate veteran data in Nevada in 2015. This requirement was fulfilled by adding appropriate questions to the registration application and the annual renewal application. The aggregate data was sent to the Nevada Department of Veterans Services on October 23, 2015. Going forward, data from new registrants will be provided on an annual basis on November 1.

- The Board is required to submit to an *Annual Audit* which is due to be prepared and delivered to the Chief of the Budget Division of the Department of Administration before November 30 of each year. A draft of the report to be submitted before the required date follows.

- *Reports to State of Nevada LCB and AB 463 Use of Consultants* are filed July 1 and January 1 of each year. The next filing will be January 1, 2016.

- *Reports to the LCB Reports of Occupational Licensing Boards* due on the last day of each quarter will be filed following the November 14, 2015 meeting.

- *Index and List of Licensees and/or Certificate Holders* is due January 1 of each year. The next filing will be January 1, 2016.

- *SPOLR Report agencies that provide professional or occupational licenses must submit a list to the State Controller's Office (SCO) of licensees who renewed their license during* that

renewal period. The SCO will use this list to match against the list of active debtors who owe the State of Nevada money. The report is due on February 1 of each year.

c. Registration Renewal Update:
As of this date the following have been processed:

- 359 fees paid in full
- 11 still outstanding (includes 2 with returned checks)
- 8 to inactive
- 2 candidates for registration are in process
- 2 notifications from CLARB that candidates are eligible for registration/no application received.

d. Presentations and Approval of Candidates for Registration in the State of Nevada
The following have submitted an application and are seeking approval for Registration.

951 Lindzay Green Registration by Examination-Pending Registration Fee $250
952 Nicholas Hagan Registration by Reciprocity-Pending Registration Fee $250
953 Joanne Hiromura Registration by Reciprocity-Complete
954 Timothy McQueen Registration by Reciprocity- n-Pending Registration Fee $50
955 Erin Reiswerg Registration by Examination-Complete

# Nv State Board Of Landscape Architectur

l****d@nsbla.nv.gov | Update Profile | Security Center

Business Platinum Privileges Learn more

## Your business accounts

Your accounts [a]

NSBLA CHECKING ACCOUNT - 4998 **$50,132.77**

Quick View

NSBLA SAVINGS ACCOUNT - 8524 **$37,117.05**

Quick View

## Your accounts

Your accounts [a]

Fixed Term CD - 5219 **$33,142.92**

Quick View

Investment accounts

**You have a plan for your business—but how about your retirement?**

A retirement plan can provide your business with the opportunity for valuable tax advantages, like higher contribution limits than individual IRAs, while helping you build the retirement you've earned.

Our Small Business 401(k), SEP IRA and SIMPLE IRA let you create a plan that's simple to set up and administer—and that fits your budget. Our short video can show you how.

Schedule an appointment with a Merrill Edge Financial Solutions Advisor™ to get started.

Open a new account

[a] For checking, savings, and money market accounts, the balance may reflect transactions that have not yet posted to your account. For credit card, Gold Option and Gold Reserve accounts, the balance may not reflect recent transactions or pending payments.

Last sign in 10/25/2015 at 06:42 PM ET



Investment and insurance products:

| | | |
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| **Are Not FDIC Insured** | **Are Not Bank Guaranteed** | **May Lose Value** |
| **Are Not Deposits** | **Are Not Insured By Any Federal Government Agency** | **Are Not a Condition to Any Banking Service or Activity** |

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# Nevada State Board of Landscape Architecture
## Balance Sheet
### As of November 1, 2015

| | Nov 1, 15 |
|---|---|
| **ASSETS** | |
| **Current Assets** | |
| **Checking/Savings** | |
| **CD 5219 - B of A** | 33,139.60 |
| **Checking 4998 - B of A** | 50,176.26 |
| **Petty Cash** | 487.42 |
| **Savings 8524 - B of A** | 37,115.81 |
| **Total Checking/Savings** | 120,919.09 |
| **Total Current Assets** | 120,919.09 |
| **TOTAL ASSETS** | **120,919.09** |
| **LIABILITIES & EQUITY** | |
| **Liabilities** | |
| **Current Liabilities** | |
| **Other Current Liabilities** | |
| **Payroll Liabilities** | 634.51 |
| **Total Other Current Liabilities** | 634.51 |
| **Total Current Liabilities** | 634.51 |
| **Total Liabilities** | 634.51 |
| **Equity** | |
| **Opening Bal Equity** | 32,224.00 |
| **Retained Earnings** | 50,226.41 |
| **Net Income** | 37,834.17 |
| **Total Equity** | 120,284.58 |
| **TOTAL LIABILITIES & EQUITY** | **120,919.09** |

# Nevada State Board of Landscape Architecture
## Profit & Loss Budget vs. Actual
### July 2015 through June 2016

| | Jul '15 - Jun 16 | Budget | $ Over Budget | % of Budget |
|---|---|---|---|---|
| **Income** | | | | |
| **001 · Application Fees** | | | | |
| **002 · LAIT ($100)** | 0.00 | 0.00 | 0.00 | 0.0% |
| **003 · LARE ($175)** | 175.00 | 525.00 | -350.00 | 33.3% |
| **004 · Reciprocity ($100)** | 700.00 | 1,500.00 | -800.00 | 46.7% |
| **Total 001 · Application Fees** | 875.00 | 2,025.00 | -1,150.00 | 43.2% |
| **010 · Exam Fees** | | | | |
| **015 · Nevada Specific Exam ($75)** | 825.00 | 1,350.00 | -525.00 | 61.1% |
| **Total 010 · Exam Fees** | 825.00 | 1,350.00 | -525.00 | 61.1% |
| **020 · Interest Income** | 1.26 | 25.00 | -23.74 | 5.0% |
| **030 · New Registration Fees** | | | | |
| **031 · New Certificate Fee ($25)** | 200.00 | 450.00 | -250.00 | 44.4% |
| **032 · New Licensee Fee - LARE ($200)** | 0.00 | 600.00 | -600.00 | 0.0% |
| **033 · New Licensee Fee - Recipr ($200** | 1,650.00 | 3,000.00 | -1,350.00 | 55.0% |
| **034 · New Stamp Fee ($25)** | 200.00 | 450.00 | -250.00 | 44.4% |
| **Total 030 · New Registration Fees** | 2,050.00 | 4,500.00 | -2,450.00 | 45.6% |
| **040 · Registration Renewal Fees** | | | | |
| **045 · Duplicate Renewal License ($25)** | 75.00 | 125.00 | -50.00 | 60.0% |
| **041 · Reinstatement Fee ($300)** | 300.00 | 1,500.00 | -1,200.00 | 20.0% |
| **042 · Renewal Delinquency Fee ($50)** | 900.00 | 1,000.00 | -100.00 | 90.0% |
| **043 · Renewal Fee LA ($200)** | 70,550.00 | 72,000.00 | -1,450.00 | 98.0% |
| **Total 040 · Registration Renewal Fees** | 71,825.00 | 74,625.00 | -2,800.00 | 96.2% |
| **050 · Other Income** | | | | |
| **Returned Check Fees ($25)** | 0.00 | 0.00 | 0.00 | 0.0% |
| **051 · Address Change ($10)** | 410.00 | 450.00 | -40.00 | 91.1% |
| **053 · Electronic/Replacemt Stamp $25** | 0.00 | 75.00 | -75.00 | 0.0% |
| **054 · Enforcement Revenue** | 0.00 | 0.00 | 0.00 | 0.0% |
| **Total 050 · Other Income** | 410.00 | 525.00 | -115.00 | 78.1% |
| **Total Income** | 75,986.26 | 83,050.00 | -7,063.74 | 91.5% |
| **Gross Profit** | 75,986.26 | 83,050.00 | -7,063.74 | 91.5% |
| **Expense** | | | | |
| **060 · Bank Charges** | 106.65 | 75.00 | 31.65 | 142.2% |
| **070 · Board Expenses** | | | | |
| **071 · Board Member Mtg Fee ($130)** | 520.00 | 2,600.00 | -2,080.00 | 20.0% |
| **072 · Meals - Board Meetings** | 322.54 | 1,200.00 | -877.46 | 26.9% |
| **073 · Travel - Board Meetings** | 1,531.02 | 4,500.00 | -2,968.98 | 34.0% |
| **070 · Board Expenses - Other** | 0.00 | 0.00 | 0.00 | 0.0% |
| **Total 070 · Board Expenses** | 2,373.56 | 8,300.00 | -5,926.44 | 28.6% |
| **080 · CLARB Affiliation Dues** | 5,485.00 | 5,485.00 | 0.00 | 100.0% |
| **090 · CLARB Annual Meeting Expenses** | | | | |
| **097 · Lodging** | 3,017.06 | 4,800.00 | -1,782.94 | 62.9% |
| **095 · Meals** | 370.14 | 500.00 | -129.86 | 74.0% |
| **091 · Board Member Per Diem $130** | 1,560.00 | 2,080.00 | -520.00 | 75.0% |
| **092 · CLARB Representative Expenses** | 0.00 | 0.00 | 0.00 | 0.0% |
| **093 · Annual Meeting Registration** | 4,275.00 | 5,225.00 | -950.00 | 81.8% |
| **094 · Travel** | 2,043.09 | 2,100.00 | -56.91 | 97.3% |
| **Total 090 · CLARB Annual Meeting Expenses** | 11,265.29 | 14,705.00 | -3,439.71 | 76.6% |
| **120 · NCIRC** | | | | |
| **121 · Board Member NCIRC Mtg Fee $130** | 0.00 | 0.00 | 0.00 | 0.0% |
| **122 · Miscellaneous - NCIRC** | 0.00 | 0.00 | 0.00 | 0.0% |
| **123 · Travel - NCIRC** | 0.00 | 0.00 | 0.00 | 0.0% |
| **120 · NCIRC - Other** | 0.00 | 0.00 | 0.00 | 0.0% |
| **Total 120 · NCIRC** | 0.00 | 0.00 | 0.00 | 0.0% |

# Nevada State Board of Landscape Architecture
## Profit & Loss Budget vs. Actual
### July 2015 through June 2016

| | Jul '15 - Jun 16 | Budget | $ Over Budget | % of Budget |
|---|---|---|---|---|
| **130 · Office Expenses** | | | | |
| **131 · Grasshopper Service** | 210.94 | 350.00 | -139.06 | 60.3% |
| **132 · DoIT Email & Web** | 358.14 | 1,200.00 | -841.86 | 29.8% |
| **133 · Miscellaneous Office Expense** | 0.00 | 0.00 | 0.00 | 0.0% |
| **134 · NSBLA Stamp** | 270.82 | 340.00 | -69.18 | 79.7% |
| **135 · Computer Updates & Maint** | 375.96 | 1,000.00 | -624.04 | 37.6% |
| **136 · Office Rent** | 3,600.00 | 3,600.00 | 0.00 | 100.0% |
| **137 · Office Supplies** | 252.62 | 1,000.00 | -747.38 | 25.3% |
| **138 · Post Office Box Rent** | 0.00 | 128.00 | -128.00 | 0.0% |
| **139 · Postage & Delivery** | 40.25 | 300.00 | -259.75 | 13.4% |
| **140 · Printing & Reproduction** | 0.00 | 200.00 | -200.00 | 0.0% |
| **141 · Telephone & Fax Line** | 0.00 | 0.00 | 0.00 | 0.0% |
| **Total 130 · Office Expenses** | 5,108.73 | 8,118.00 | -3,009.27 | 62.9% |
| **150 · Payroll Expenses** | | | | |
| **151 · Enforcement Officer** | 300.00 | 1,000.00 | -700.00 | 30.0% |
| **152 · Executive Director** | 10,146.68 | 30,440.00 | -20,293.32 | 33.3% |
| **153 · Executive Director - Bonus** | 0.00 | 2,000.00 | -2,000.00 | 0.0% |
| **154 · Mileage** | 138.00 | 400.00 | -262.00 | 34.5% |
| **155 · Nevada Business Tax** | 0.00 | 150.00 | -150.00 | 0.0% |
| **156 · Payroll Penalties & Interest** | 0.00 | 150.00 | -150.00 | 0.0% |
| **157 · Payroll Taxes** | 1,219.37 | 0.00 | 1,219.37 | 100.0% |
| **150 · Payroll Expenses - Other** | 6.70 | | | |
| **Total 150 · Payroll Expenses** | 11,810.75 | 34,140.00 | -22,329.25 | 34.6% |
| **160 · Professional Fees** | | | | |
| **161 · Accountant** | 0.00 | 4,200.00 | -4,200.00 | 0.0% |
| **162 · Bookkeeping** | 525.00 | 1,000.00 | -475.00 | 52.5% |
| **163 · Deputy Attorney General** | 290.72 | 5,000.00 | -4,709.28 | 5.8% |
| **164 · Legislative Bill Tracker** | 0.00 | 0.00 | 0.00 | 0.0% |
| **165 · Legislative Counsel Bureau** | 0.00 | 0.00 | 0.00 | 0.0% |
| **166 · 2017 Legislative Session** | 0.00 | 0.00 | 0.00 | 0.0% |
| **167 · Liability Insurance** | 1,186.39 | 1,388.04 | -201.65 | 85.5% |
| **168 · Temporary Office Help** | 0.00 | 238.96 | -238.96 | 0.0% |
| **Total 160 · Professional Fees** | 2,002.11 | 11,827.00 | -9,824.89 | 16.9% |
| **170 · Registration Renewal Expenses** | | | | |
| **172 · Printing Renewal Forms** | 0.00 | 150.00 | -150.00 | 0.0% |
| **171 · Mailing Renewal Forms** | 0.00 | 250.00 | -250.00 | 0.0% |
| **Total 170 · Registration Renewal Expenses** | 0.00 | 400.00 | -400.00 | 0.0% |
| **Total Expense** | 38,152.09 | 83,050.00 | -44,897.91 | 45.9% |
| **Net Income** | **37,834.17** | **0.00** | **37,834.17** | **100.0%** |