that incurred extra costs because they relied on defective plans have been barred under the economic loss rule from recovering against a negligent design professional.[395] The rule has specifically applied in cases barring negligence claims against landscape architects.[396]

However, courts have recognized that public policy places some limit on the application of the economic loss rule. Discussing a malpractice claim against an engineer in the case of *Moransis v. Heathman,*[397] the Florida Supreme Court noted that "because action against professionals often involves purely economic loss without any accompanying personal injury or property damage, extending the economic loss rule to those cases would effectively extinguish such causes of action." The Florida court held that the economic loss rule is not a bar to negligence claims against a licensed engineer, particularly because a licensed profession is by statute obligated to act in accordance with specific duties.[398]

In New York State, where landscape architects have for over 40 years been regarded in the eyes of the law as design professionals akin to architects and engineers, a court expressly repudiated the applicability of the economic loss rule in a $1,000,000 malpractice suit against a landscape architect.[399]

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395 *Bersthauer/Phillips v. Seattle School,* 881 P.2d 986 (Wash. 1994); *accord National Steel Erection Co. v. J. A. Jones Construction Co.,* 899 F.Supp 268 (N.D.W.Va. 1995).

396 *Widett v. U.S. Fidelity & Guarantee Co.,* 815 F.2d 885 (2nd Cir. 1987) (economic loss rule applies to negligence claim against landscape architect).

397 *Moransis v. Heathman,* 744 So.2d 973, 983 (Fla. 1999).

398 *Id.,* at 977 ("the [court below] held that there was no obligation or duty owed by the individual professional to the company's client for the client's economic damages. We disagree. In this regard, we find our [prior] decision, as well as the statutory scheme regulating professionals in general, and engineers in particular, to be controlling and instructive.").

399 *Robinson Development Co. v. Anderson,* 547 N.Y.S.2d 458 (N.Y. App. 1989) ("Most malpractice claims against professionals regularly arise out of a contractual relationship and involve injury to property or pecuniary interests only. To hold otherwise would eliminate the availability of malpractice claims against professionals such as architects where the damages are essentially pecuniary in nature.").

authority.[409] Therefore, an act delegating to a private board the jurisdiction of the state over a profession may not provide the necessary authority to achieve the desired protection of the public interest. At a minimum, this strategy may be subject to litigation under federal antitrust law.

Regardless of the availability of regulatory authority, private boards are impractical and similarly prone to poor performance as regulators of the public interest. For example, a private board is incapable of compelling membership or preventing any given individual from engaging in lawful work. This is especially true of private professional associations, such as the American Society of Landscape Architects (ASLA). As mentioned in this document previously, membership in ASLA imposes a code of ethics on members, but that code is not intended to assess technical skills or hold members to any particular standard of technical competence. And even if the ASLA code of ethics is used to exclude unethical landscape architects from ASLA membership, this is unlikely to have any significant effect on consumer safety, since that unethical landscape architect can simply continue to practice without being a member of the private association. Moreover, since landscape architects must pay several hundred dollars in annual dues to avail themselves of the ASLA code of ethics, it is more than likely that an unethical landscape architect would simply elect not to join the association.

In general, a voluntary private organization is not responsive to public needs. For example, landscape architecture in the state of Oregon was in fact briefly "regulated" by a nonprofit corporation, after the sunset of the State Board of Landscape Architects. However, it soon became clear that the nonprofit corporation could not maintain the functions of the former state board, and lawmakers in Oregon determined that public health, safety, and welfare would be best served by reenacting legislation to create a state board.[410] The state of Pennsylvania also considered transitioning to a private board during one cycle of sunset review, but opted to retain its state board in part due to concern that "there would be loss of legislative controls and less consumer involvement in a profession that is intimately tied to the public health, safety, and welfare."[411] Therefore,

409 See Phillip Areeda, *Antitrust Law: An Analysis of Antitrust Principles & Their Application,* Aspen Law and Business Publishing, 2000, at 482-485.

410 *Response to Act 142, supra* note 162, at 22.

411 *Id.,* at 25.

while private boards are an option, and were temporarily implemented in one state, drawbacks of such a system quickly emerged and the state board regulation was quickly reinstituted.

6.4 Bonding

To the extent that poor landscape architecture practices can have a major negative impact on property and financial interests, it has been suggested that state and local law could remedy such impacts by requiring a bond. This mechanism would emulate a common safeguard in the construction industry, the performance bond. Such a bond would provide a surety for any entity harmed by the negligent performance of landscape architecture services. So, an individual or entity who suffers such harm would be able to make a claim to the surety company that issues the bond, and if the claim was deemed legitimate, the surety would then pay out an agreed upon sum.

Unfortunately, the facts upon which a bond would be payable, and to whom, for negligence and incompetence are fundamentally different and substantially more complex than default on a performance bond. As a result, the legal costs and legal burdens upon a consumer to recover on a bond would be significant, and bonding companies, with the advantage of (and incentive of) large amassed financial resources, tend to strongly defend against consumer claims. In other words, not surprisingly, bonding companies typically try to avoid paying. As a result, bonding provides uncertain consumer protection, and regulators in most states have abandoned or ceased relying on bonding programs to remedy professional negligence, incompetence, and unethical behavior. Furthermore, bonding is poorly adapted to address physical injuries, where many incidents cause irreparable harm and monetary recoveries are difficult to predict.

6.5 Registration and Certification

Two other forms of regulation are that of "registration" and "certification." Before analyzing these two options, it is necessary to clarify a confusing array of terms that are used in the field of occupational regulation. For example, the stamp of a professional engineer is in many states specified to read "Registered Professional Engineer," and the stamps of architects and landscape architects likewise employ the term "registered" to denote a professional status with the state. In most cases where the "registered" stamp of a design professional is exhibited, the underlying statute grants a "license" to practice the specific profession. The terms "license," "certification," and "registration" are also used interchangeably in common parlance. Following a general convention among regulatory authorities, this report distinguishes a license from certification and registration as follows:

- "License." A license grants an individual[412] the ability to engage in the practice of a profession; this form of regulation prohibits unqualified individuals from engaging in the practice of certain professional services. Licensing is also known as "practice" regulation.

- "Registration" and "Certification." Registration and certification, as the terms are used in this report, refer to a form of regulation where the state reserves the use of a professional title or titles for those who satisfy certain standards of qualification. Registration and certification are also known as "title" regulation.[413]

- In some contexts, the term "certification" is used to denote a credential issued by a private organization; this form of regulation is disused under the heading of "Private Boards." Some regulatory authorities further distinguish "registration" as regulation requiring an individual or firm to be listed on a roster with the state, but without requiring any evidence of qualification.[414] Given the historical use of "registration" in the design professions to mean either state licensing or state certification, distinctions in usage between registration and certification are not observed in this report.

[412] Corporations and other business entities may also be granted licenses if business practice provisions are included in the enabling legislation.

[413] In some contexts, the term "certification" is also used to denote a credential issued by a private organization.

[414] This form of regulation is appropriate where disclosure is of primary concern. For example, professional lobbyists are often required to register with the state but are typically not required to pass a test or demonstrate knowledge of any particular subject matter.

Consumers of professional services typically lack the expertise or resources, or both, to verify the qualifications of competing individuals and firms in the marketplace. In an unregulated landscape architecture market, nonpractitioner clients have no reliable source of information addressing practitioner knowledge of health and safety issues, regulatory compliance, avoidance of property damage, or other skills generally expected of a design professional. So, registration and certification statutes provide consumers with a meaningful credential upon which to assess minimum competency.

In either of these frameworks, there is still a necessity for state examination of landscape architects. Among the public policy reasons why landscape architecture should be a regulated profession alongside architects and engineers is that some form of state certification of minimum competence is essential to allow consumers, government, and the general public to benefit from standards of professional competence. State certification is an economical mechanism for various public and private entities to guard the safety and overall impact of landscape improvements, streetscape, and other development. For example, to avoid waste, allocation of water supply for irrigation within a Colorado special district is delegated to landscape architects, who are best qualified to analyze the water budget and irrigation system requirements for landscape materials.[415] As another example, a court may require adversarial parties to rely on the professional opinion of a landscape architect to resolve a property dispute.[416]

The merit of state certification is also underscored by the significance of a design professional's stamp. The International Building Code, widely being implemented as the next generation of the Uniform Building Code, generally requires the imprint of a stamp of a registered design professional on all appropriate drawings.[417] Such a stamp is an objective symbol of public protection. As stated in a letter from the chief engineer for the Virginia Department of Transportation, supporting landscape architecture regulation:

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[415] The Meridian Metropolitan District requires submittal of a Landscape Irrigation Demand Certification by a "licensed landscape architect" to protect its water supply from waste in landscape applications.

[416] *Baillargeon v. A.G. Press,* 521 P.2d 746, 748 (Wash. App. 1974) (landscape architects are in a better position than the courts to resolve certain types of boundary disputes based on views, trees, "spite fences," etc.).

[417] See discussion of UBC and IBC stamped drawings on page 52.

> ***The landscape architecture profession, like the engineering and architecture professions, generates designs that could have a dramatic effect on the safety of the public. All of these professions develop plans which must meet specific criteria from a design standpoint. Likewise, these designs must be certified to ensure the public's safety.***[418]

Registration and certification statutes empower a board of landscape architects to authorize stamps, through which practitioners are able to convey that plans conform to professional standards. While state registration or certification cannot on its own prevent negligent or incompetent landscape architecture practice (as is intended by a licensing statute), the availability of a state credential does mitigate some modicum of harm for the many consumers and government agencies that seek out or require the stamp of a design professional. As consumers and agencies that rely on stamped plans are aware, technical documentation produced by inadequately trained design practitioners is time-consuming to review, inefficient to build, and potentially a source of serious harm and serious liability. State certification and registration are of significant value to consumers and users.

6.6 LICENSURE

The ideal option for balancing the competing interests at play in a design and construction project is professional licensing. Licensing statutes have developed with the specific intent of preventing malpractice. Public policy favors licensing for professions that encompass a potential for irreparable harm, including instances of wrongful death, permanent injury, property damage, and serious financial losses.

Licensing is part of a comprehensive approach to reducing harm. Through licensing, incidents of irreparable harm are prevented and the social costs of negligence (reflected in premiums for liability insurance and legal fees) are reduced. The necessity of litigation, including the cases discussed in this report, to redress harmful landscape architecture highlights the importance of regulation. Where it is appropriate, the foremost advantage of licensing is that it functions as a prior restraint, largely preventing incompetent practitioners from offering services that expose consumers

[418] Letter from J. S. Hodge, *supra* note 368.

and the public to unacceptable levels of risk and irreparable harm. The many serious cases of harm recounted in this report demonstrate that licensing landscape architects is the logical mechanism to mitigate the most harmful impacts of negligence and incompetence.[419]

Typically, a licensing statute also creates and permits a state licensing board to administer the state's licensure program. State professional licensing boards are typically composed of in part by members of the profession to develop, promulgate, and enforce regulations that establish the standards of the profession. Typically, the enabling legislation will grant a professional board authority to broadly enforce the standards of the profession. Through subsequent actions of the board, including promulgation of regulations and disciplinary cases, a professional duty of care is defined. Because members of a given profession are best able to define standards of competence and recognize violations of professional standards, self-regulating professions provide an efficient mechanism for the state to investigate malpractice and revoke privileges to prevent further harm. In other words, "self-regulation" should not be misinterpreted to imply that private action on the part of landscape architects is sufficient to achieve the protection of public health, safety, and welfare; this term refers to the composition and authority of a state board.

Where courts become mired in legal technicalities, licensing boards also have the power to quickly assess incompetence and rehabilitate, reprimand, or revoke the right to practice, preventing further harm and making key factual findings in the active case. In contrast, alternatives to licensing have no effect on the right to practice and provide relatively weak ability to enforce professional standards (through rehabilitation, reprimand, revocation, and especially preliminary testing). Yet a professional board with expertise in the standards of landscape architectural practice is most often an efficient and responsive forum

[419] Colorado Department of Regulatory Agencies, *Sunrise Review of Investment Advisors,* 1997, at 7-8, 15 ("Colorado is one of four states that does not require state regulation of investment advisers…. [A] survey revealed that states took very few disciplinary actions against investment advisers, but all believed that the initial screening of applicants is very effective as a proactive regulatory step of keeping bad actors out of the industry…. Additionally, states felt an examination also ensured up-front competency…. Through a [recommended] state regulatory program, Colorado is also gaining regulatory assistance from a national network of state agencies that perform similar functions. In today's mobile workforce, this network will proactively assist Colorado in keeping individuals and firms with prior disciplinary actions out of the industry and out of Colorado.").

to hear complaints and halt unprofessional activities. From a practical standpoint, administration of a registration board and administration of a licensing board are virtually identical, with the licensing board offering a greater level of public protection through its authority.

Licensing is generally opposed by a segment of commentators that believes the regulatory process is used surreptitiously to avoid competition. From an analytical point of view, regulatory arguments "based on either a desire to avoid competition or a wish to preserve interests inadvertently created by regulation itself deserve short shrift."[420] Further, some uses of prior restraint with little rational basis are cited in support of the theory that professional regulation exists only to create barriers to entry that will limit competition in the market. For example, the United States Court of Appeals for the Sixth Circuit found that allowing only licensed funeral directors to sell caskets is far more likely a measure to prevent competition than it is a protective measure for public health, safety, and welfare.[421] In contrast, the argument that landscape architecture regulation will act as a form of marketplace protectionism is contradicted by data regarding the economic effects of regulation on the design professions,[422] as well as the fact that, by placing landscape architecture on equal footing with the other design professions, regulation enhances competition in the market for design services. Landscape architecture services must compete in a general market for design services, and regulation has been found to have minimal effects on the cost of service to the public.[423]

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420 Roger G. Noll, *The Political Economy of Deregulation, American Enterprise Institute,* 1983, at 161.

421 *Craigmiles v. Giles,* No. 00-6281 (6th Cir., Dec. 6, 2002).

422 See *Sunset Review of the Board of Architect Examiners,* 1980, *supra* note 2, at 4 ("Historically, professionals are eager for licensure to protect their professional turf in the marketplace from competition and prices are kept high since market forces are restrained. However, with architecture this traditional pattern has not held true.").

423 *A review of Chapter 481, Part II, Florida Statutes, Landscape Architecture, supra* note 67, at 53 (the Florida Auditor General's report on landscape architecture regulation "concluded that the cost of regulation of the practice of landscape architecture does not significantly increase the cost of providing services to the public").

Some sunset reviews of landscape architecture have examined the notion that the profession simply wishes to "secure for itself a guaranteed cut of local government service contracts for service which can be performed by architects, engineers, or even unlicensed personnel."[424] That notion is contradicted by the facts: Licensing does nothing more than give landscape architects marketplace parity with other design professionals. The wealth of real-world examples in this document show that the notion that landscape architecture regulation is intended to limit competition is based on speculation that directly contradicts the rational basis of many valid local ordinances, service procurement practices, and hiring policies that seek licensed landscape architects. Licensing of landscape architects has no demonstrable negative effect on competition, and the alternative is a status quo where non-landscape architects will routinely design and supervise the installation of major public improvements for which landscape architects are optimally qualified, such as bicycle and pedestrian systems, street and highway enhancements, recreational facilities, amphitheaters, plazas, and other public places. The benefits of that status quo would be drastically outweighed by the mountain of risks and negative effects that are proven to flow from that type of incompetent practice.

Accordingly, licensure is the only worthy regulatory goal in order to adequately protect the public health, safety, and welfare.

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[424] Letter regarding Sunset Review of [the California] Board of Landscape Architects, Center for Public Interest Law, Nov. 25, 1995, at 4 (emphasis added).

7. CONCLUSION

By all accounts, landscape architecture is a mature, distinct profession, closely allied with other licensed professions. Landscape architecture is a technically involved profession, affecting both basic environmental systems and complex systems in the built environment. The profession affects individual consumers, large institutional clients, and the general public that regularly use works of landscape architecture.
Just as there is a need for functional highways and buildings in the built environment, there is a growing demand and recognition of the need for a safe and functional intermodal transportation system, for safe playgrounds, for effective rehabilitation of disturbed ground, for land management that conserves water and reduces fire hazards, and an extended list of landscape architectural services affecting public safety and the security of property and financial investments. Increasingly, the profession of landscape architecture performs critical technical and management roles in the development and maintenance of the built environment.

In light of that, all 50 states currently regulate and govern how landscape architects benefit the public, with three states only protecting public health and safety to the extent possible under a state certification law. As the examples and illustrations in this document make clear, the cost of discovering substandard practitioners is a significant financial and personal risk when unwittingly imposed on individual consumers and includes the risk of serious irreparable and monetary harm to children, pedestrians, major public projects, and private property. Licensing reduces the social cost of negligence, incompetence, and unethical behavior in landscape architecture practice.

Licensing completes a program to protect public health and safety by limiting the practice of landscape architecture to competent individuals. Licensing of landscape architects will reduce, and in many cases avoid, the potential for public harm by holding practitioners accountable and prohibiting the offering of landscape architectural services without the training and experience that is required to attain minimum competence. Negligent landscape architecture has the potential to cause harm, and has caused serious harm in an extensive list of documented incidents.

Licensing of the landscape architecture profession gives states the ability to promote a safe environment, from the most remote managed wilderness to the most urban streetscape.

As documented in this report, there are compelling legal and practical reasons why landscape architecture is presently regulated in all 50 states. Regulation of the landscape architecture profession provides a broad base of protection to public health, safety, and welfare where state professional regulation is a cost-effective measure to screen out incompetents and bad actors.

The evidence and rationale supporting landscape architecture regulation are compelling, consistent, and well-precedented. Therefore, licensure should be preserved and protected.