

## Failure to Disclose Full Impact of Development

### Case No. 05-4

#### Facts:

Engineer A is retained by Developer F for a major waterfront development project in City X. As part of the process for approving Developer X's project, Engineer A is required to attend a public hearing and present the proposed design for the City X waterfront to the City Planning Board. Engineer A makes a presentation and responds to questions by members of the City Planning Board. Engineer A highlights the improved environmental effect of converting the waterfront from an industrial facility to a parkland. Engineer A is aware of these factors, but was not specifically questioned on these factors and does not volunteer this fact. This anticipated commercial development could increase traffic, as well as air and noise pollution. Had Engineer A been questioned by the City Planning Board, Engineer A would have provided testimony concerning these issues. Later, other witnesses attending the public hearing (including other engineers) testify about the increased traffic, noise, and air pollution issues.

#### Question:

Was it ethical for Engineer A to fail to volunteer the fact that the anticipated commercial development could significantly increase traffic, as well as air and noise pollution?

#### References:

- Section II.3.a. - NSPE Code of Ethics: *Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.*
- Section II.3.b. - NSPE Code of Ethics: *Engineers may express publicly technical opinions that are founded upon knowledge of the facts and competence in the subject matter.*
- Section II.3.c. - NSPE Code of Ethics: *Engineers shall issue no statements, criticisms, or arguments on technical matters that are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters.*
- Section II.4. - NSPE Code of Ethics: *Engineers shall act for each employer or client as faithful agents or trustees.*
- Section III.3.a. - NSPE Code of Ethics: *Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.*

#### Discussion:

Engineers play an important role when testifying before public bodies on technical and other matters affecting the public health, safety, and welfare. Engineers bring an important perspective to such discussions, offering technical insights into issues that have a significant effect upon people's lives. Because of the effect that their testimony may have on public policy discussions of this type, engineers who are involved in such activities should perform their obligations in a manner that is consistent with the NSPE Code of Ethics.

The NSPE Board of Ethical Review has had occasion to consider earlier cases relating to the role and obligation of engineers testifying before public agencies or making public statements affecting public policy issues. One early example is BER Case No. 65-9. In that case, a state highway department had prepared engineering data on alternate routes for a bypass of part of the interstate highway system in the state, including cost estimates for three possible routes. The highway department indicated that it favored route "B." An official of a city located close to the proposed route publicly criticized the proposed route "B" because he felt it would endanger the city's water supply and be a detriment to the development of a lake

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as a proposed recreation area. A principal of a consulting engineering firm, which had performed the engineering work on a portion of the interstate highway to which the bypass would connect, issued a public letter, "To Whom Concerned," which was published in the local press, discussing the alternative routes. His letter stated disagreement with the cost estimates of the highway department and pointed out alleged disadvantages of the proposed route. The letter then suggested a fourth route ("D") which, it was claimed, would be superior to those previously suggested. The newspaper story containing the full text of the letter from the consulting engineer also quoted the city official as favoring route "D," proposed by the consulting engineer. In determining it was ethical for the principal of a consulting firm to publicly express criticism of proposed highway routes prepared by engineers of the state highway department, and to propose an alternative route, the Board noted that the fact that the consulting engineer's letter disagreed with the cost estimates of the highway department engineers is, in and of itself, not objectionable from an ethical standpoint. Citing earlier BER Case No. 63-6, the Board noted that "Some aspects of an engineering problem will admit of only one conclusion, such as a mathematical equation, but it is a fallacy to carry this statement to the ultimate conclusion that all engineering problems admit of only one correct answer.... There may also be honest differences of opinion among equally qualified engineers on the interpretation of the known physical facts. Assuming complete factual agreement ... engineers can and do arrive at different conclusions based on their best understanding of the application of those facts."

Later in BER Case No. 79-2, the Board considered a case involving Engineer A, a town engineer, and Engineer B, a consulting engineer, retained by the town council, who collaborated on an assignment to make studies and determine final contours for an existing sanitary landfill. They took into account final land use, environmental concerns, surrounding land use, and topography. Engineers A and B jointly determined that the existing landfill space would be exhausted at the present rate of use in three years, or soon thereafter. The town council had sought an alternate disposal location, but had not been able to locate one. It then requested Engineers A and B to submit new designs for the existing site at higher final contours in accordance with state environmental laws. After several redesigns were not accepted, the town council requested Engineers A and B to prepare a new design, which resulted in an acceptable solution, incorporating minimum setbacks and maximum allowable slopes. This design would provide for a hill more than 100 feet higher than originally proposed. Engineer C, a resident of the town, publicly contended that the higher level design concept would be environmentally unsound because methane gas from the landfill would move into adjacent private property and that it would pollute the nearby ground water. The issue stirred up considerable local publicity and controversy. Engineer C then publicly questioned whether Engineers A and B should have agreed to the higher intensity use of the site. In determining that (1) Engineer A and Engineer B had acted ethically by participating in the design approach requested by the town council and (2) Engineer C had acted ethically in publicly challenging the design approach adopted by Engineers A and B, the Board noted that "there is no finite answer to the balance or 'trade-off' which is involved in the overall concerns about environmental dangers for particular projects." The Board said, "professional judgment will be the final arbiter of the best balance between society's needs for certain facilities and the level of environmental degradation which may be unavoidable in filling those basic needs." It concluded that while certainly Engineers A and B should consider the technical data each project requires a case-by-case analysis and judgment. With regard to Engineer C's actions, the Board found that "these decisions in the public arena are subject to open public debate and resolution by appropriate public authority. Engineer C was acting within the intent of the code in raising his concern. However, in such a matter of important public policy, if, after due consideration of his views and those of others, the decision should be to proceed with the proposed design of the expanded landfill, all involved should accept that each engineer had acted in conformance with the code. That there are conflicting public views between engineers in this case should be of no concern."

Turning to the facts in the present case, the Board used the two earlier cases to show that engineers can ethically reach different conclusions when looking at the same set of facts. In Case No. 79-2, the Board concluded, “[t]hat ... conflicting public views between engineers in this case should be of no concern.” While the previous cases involved the differences between engineers over the same set of facts, the present case involves the potential obligation of a single engineer to disclose the fact that an anticipated commercial development will significantly increase traffic, as well as noise and air pollution.

Although the facts in Case Nos. 65-9 and 79-2 are different than those in the present case, the Board believes the discussion in both cases are instructive in its review of the facts here. Both Case Nos. 65-9 and 79-2 acknowledge that environmental considerations are often subject to varying arguments, reflecting differing considerations and interests. While it might be easier if environmental issues could be resolved in a clear and objective manner, in fact, many of these important public policy questions are the result of subjective and sometimes difficult policy considerations.

In the present case, the question is whether the traffic, noise, and air pollution issues are “relevant and pertinent information.” If they are “relevant and pertinent,” the engineer has an obligation to disclose the information in any presentation made on the project. As the previous cases demonstrated engineers can reach different conclusions when looking at the same set of facts. Engineer A’s ethical obligation does not require him to disclose such information if, in his professional judgment, it is not “relevant and pertinent.”

**Conclusion:**

It was not unethical for Engineer X to fail to volunteer the fact that the anticipated commercial development could increase traffic, as well as noise and air pollution.

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