

Conflict of Interest – Accepting Real Estate as Payment for Services

Case No. 06-7

Facts:

Engineer A provides professional services to Client B, a land developer to perform subdivision work on a specified property, including the placement of septic systems. Engineer A is a friend and business partner of Landowner C, also a land developer, who owns property immediately adjacent to Client B's subdivision. Client B is unaware of Engineer A's relationship with Landowner C. The contract between Engineer A and Client B indicates that the engineering services would be billable on an hourly basis based on Engineer A's hourly fee. However, with 85% of the work performed, the fees are more than two times the original estimate discussed between Engineer A and Client B, largely because the county health department approved the original subdivision design but the county building department did not give its approval. To secure county building department approval, Engineer A was required to perform significant redesign, resulting in the additional cost. Because of the uncertainty involved in the project, Engineer A is reluctant to agree to Client B's request that Engineer A complete the remainder of the engineering services on a lump sum basis. Following a discussion of the matter, Engineer A offers to purchase the property from Client B for a reduced price that would satisfy and include the outstanding fees owed to Engineer A.

Question:

Was it ethical for Engineer A offer to purchase the property from Client B for a reduced price that would satisfy and include the outstanding fees owed to Engineer A under the circumstances?

References:

- Section II.4.* - *NSPE Code of Ethics:* *Engineers shall act for each employer or client as faithful agents or trustees.*
- Section II.4.a.* - *NSPE Code of Ethics:* *Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.*
- Section III.1.e.* - *NSPE Code of Ethics:* *Engineers shall not promote their own interest at the expense of the dignity and integrity of the profession.*
- 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:

Issues involving engineers performing professional services and the effect that such services could have in connection with their ownership or personal interest in real property can sometimes raise difficult ethical issues. A review of previous NSPE Board of Ethical Review cases indicates that no board opinion has ever addressed a situation involving facts similar to the present case. However, the board has considered several cases where engineering services were tied to the ownership or personal interest in real

property and related issues. Those cases can help to provide some guidance and some context in the board's consideration of the present case.

In BER Case No. 69-13, the board reviewed a situation in which an engineer was an officer in an incorporated consulting engineering firm that was primarily engaged in civil engineering projects for clients. Early in the engineer's life, he had acquired a tract of land by inheritance, which was in an area being developed for residential and industrial use. The engineer's firm had been retained to study and recommend a water and sewer system in the general area of his land interest. The question faced by the board under those facts was, "May the engineer ethically design a water and sewer system in the general area of his land interest?" The board ruled that the engineer could not ethically design the system under those circumstances. The board recognized that the issue was a difficult one to resolve, pointing to the fact that there was no conflict of interest when the engineer entered his practice. The conflict developed in the normal course of his practice when it became apparent that his study and recommendation could lead to the location of a water and sewer system near his land. This could bring a considerable appreciation in the value of his land, depending upon the exact location of certain system elements in proximity to his land. The board stated that while the engineer must make full disclosure of his personal interest to his client before proceeding with the project, such disclosure was not enough under the NSPE Code of Ethics. The board concluded by saying, "This is a harsh result, but so long as men are in their motivations somewhat 'lower than angels,' it is a necessary conclusion to achieve compliance with both the letter and the spirit of the Code. The real test of ethical conduct is not when compliance with the Code comports with the interest of those it is intended to govern, but when compliance is adverse to personal interest."

In BER Case No. 85-6, an engineer was retained by the state to perform certain feasibility studies relating to a possible highway spur. The state was considering the possibility of constructing the highway spur through an area adjacent to a residential community in which the engineer's residence was located. After learning of the proposed location of the spur, the engineer disclosed to the state the fact that his residential property might be affected and fully disclosed the potential conflict with the state. The state did not object to the engineer performing the work. Engineer A proceeded with his feasibility study and ultimately recommended that the spur be constructed. In ruling that it was not unethical for the engineer to perform the feasibility study, despite the fact that his land might be affected thereby, the board noted that the ethical obligations contained in NSPE Code Section II.4.a. do not require the engineer to "avoid" any and all situations that may or may not raise the specter of a conflict of interest. Such an interpretation of the Code, the board said, would leave engineers without any real understanding of the ethical issues nor any guidance as to how to deal with the problem. The board noted that the basic purpose of a code of ethics is to provide the engineering profession with a better awareness and understanding of the ethical issues that effect the public. The board concluded that only through interacting

with the public and clients will engineers be able to comprehend the true dimensions of ethical issues.

In BER Case No. 88-1, Engineer A was retained by the county to perform a feasibility study and make recommendations concerning the location of a new power facility in the county. Two parcels of land located on a river had been identified by the county as the “candidates” for facility sites. The first parcel was undeveloped and owned by an individual who planned to build a recreational home for his family. The second parcel, owned by Engineer A, was a developed parcel of land. Engineer A disclosed that he was the owner of the second parcel of land and recommended that the county build the facility on the undeveloped parcel of land because (1) it was a better location for the power facility from an engineering standpoint and (2) it would be less costly for the county to acquire. The county did not object to having Engineer A perform the feasibility study. In determining that it was not ethical for Engineer A to perform a feasibility study and make recommendations concerning the location of a new power facility in the county, the board noted that although Engineer A’s professional opinion was supported by two important public policy considerations, these reasons were not sufficient to justify Engineer A’s decision to perform the feasibility study for the county. The board noted that public perceptions play an important role in engineering ethics. The facts and circumstances of Engineer A’s study may have appeared to suggest a benefit to the common good if his recommended course of action was followed, but these same facts and circumstances allow for the appearance of impropriety, and this can easily damage public confidence in the engineering profession. Clearly, there could have been public perception under the facts that Engineer A did not want to risk personal disruption of his developed property or possibly anticipated future appreciation of the value of the property. Engineer A should have followed the far simpler and more ethical approach recommended in the earlier BER Case No. 69-13 which stated, “[The engineer] can avoid such a conflict under these facts either by disposing of his land holdings prior to undertaking the commission or by declining to perform the services if it is not feasible or desirable for him to dispose of his land at the particular time.”

Turning to the facts in the present case, while as the board noted earlier that the circumstances described are somewhat different than the earlier cases considered, the board believes some of the basic principles and issues considered are useful in understanding the present case. First, it is clear from the language in the Code and its application in the earlier cases that the obligation concerning conflicts of interest is owed to an “employer” or a “client.” Therefore, under the facts presented, Engineer A has a clear obligation to disclose any potential conflict of interest Engineer A may have in connection with the decision to accept the land as payment in full for Engineer A’s services. At a minimum, this would include disclosing his personal relationship with an adjacent landowner, since this interest could have a substantial effect on Client B’s willingness to agree to sell the land to Engineer A or at least might affect the price Client B would be willing to agree to charge Engineer A for the land. The board further concurs

that this disclosure should have been made prior to accepting the job. This failure to disclose the relationship at the outset of the relationship with the adjacent property owner may have compromised the relationship in other ways that could have been cured by disclosure.

While the facts are not entirely clear, the board is a bit troubled by at least an appearance that Engineer A's actions could suggest an effort to leverage Client B by pressuring Client B to satisfy outstanding engineering fees owned to Engineer A by selling the land in question to Engineer A. Moreover, it is not entirely clear to whom the cause of the additional engineering fees—failure to obtain the requisite building department approval—was attributable. However, the board would note that standard industry practice as outlined in professional services agreements place the responsibility for obtaining required agency review and approval on the design professional. If such leverage was being applied for Engineer A to secure an advantage over Client B, such conduct would be well beyond what is acceptable under the Code.

Conclusion:

It was not ethical for Engineer A to offer to purchase the property from Client B for a price that would satisfy and include the outstanding fees owed to Engineer A under the circumstances unless Engineer A first fully discloses his personal and business relationship with Landowner C and that the agreement between Engineer A and Client B takes into account all outstanding issues and responsibilities relating to the project.

The failure by Engineer A to disclose the relationship with the adjacent property owner at the beginning of the relationship with Client B may have compromised the relationship in ways that could have been cured by disclosure.

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