Report on a Case by the Board of Ethical Review

Case No. 68-12

Sales Of Plans To Conflicting Party In Interest

Facts:
An engineer entered into an agreement with a developer to provide the surveying, engineering plans, and inspection of construction for a housing development. The plans were completed and the engineer was paid for a portion of the services rendered. The developer no longer intends to complete the development and has refused to pay the balance of the fee, although he acknowledges the debt. The owner of the land contacted the engineer and sought to purchase the plans so the project could proceed with another developer. The engineer contacted the first proposed developer, who told the engineer that he should not sell the plans to the owner of the land or the second developer because of pending litigation involving alleged breach of contract between the first developer and the land owner.

Question:
May the engineer ethically sell the plans to the land owner under these circumstances?

References:
Code of Ethics-Section 8- "The Engineer will endeavor to avoid a conflict of interest with his employer or client, but when unavoidable, the Engineer shall fully disclose the circumstances to his employer or client."

Section 10-"The Engineer will not accept compensation, financial or otherwise, from more than one interested party for the same service, or for services pertaining to the same work, unless there is full disclosure to and consent of all interested parties."

Discussion:
We first dispose of Section 8 by noting that in this case there is an obvious conflict of interest between the land owner and the first developer, in which the engineer has inadvertently become entangled. The only duty of the engineer, under Section 8, how ever, is to fully disclose the circumstances to his client when the conflict is unavoidable, as in this case.

The more difficult aspect raises a somewhat similar issue we discussed at some length in Case 68-3 and which resulted in a divided opinion. The majority view of Section 10 was that services pertaining to the same work could not be performed without the consent of all interested parties and that the claim that the engineer had not been paid for his services was immaterial inasmuch as the reference to "compensation" in Section 10 means "payment which has been paid to an engineer or which is legally due him." In the instant case, it is clear that the engineer had not been fully paid, but the first developer acknowledges that the balance of the fee is due him.

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The minority view in Case 68-3 was that the engineer could perform work for an interested party in conflict with another interested party for whom services had been performed, because in that case the issue pertained to a specific phase of the project rather than the project as a whole. That distinction does not apply in this case. Further, the minority held that the engineer could perform work on an ethical basis under similar circumstances when his work for the first party in interest had been completed but had been rejected, and he had no further responsibility to that party.

We can not read Section 10 in any way to avoid the conclusion that there are two parties in interest, in addition to the engineer that consent of all interested par ties has not been given, and that the sale of the plans to the land owner would be for services pertaining to the same work. It might be argued that there is no "work" involved in the sale of the plans to the land owner, that the "work" had been completed. But we think this type of reasoning would be an evasion of the intent and purpose of Section 10, which is to avoid placing the engineer m a conflicting position between interested parties to the same project. We, therefore, must conclude that the engineer's only recourse is to refuse to sell the plans to the land owner and pursue appropriate remedies against the first developer to collect the fee due him.

Conclusion:*
The engineer may not ethically sell the plans to the land owner.

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