Report on a Case by the Board of Ethical Review

Case No. 88-1

Conflict of Interest—Feasibility Study

Facts:
Engineer A is retained by the county to perform a feasibility study and make recommendations concerning location of a new power facility in the county. Two parcels of land located on a river have been identified by the county as the "candidates" for facility sites. The first parcel is undeveloped and owned by an individual who plans to build a recreational home for his family. The second parcel, owned by Engineer A, is developed. Engineer A discloses that he is the owner of the second parcel of land and recommends that the county build the facility on the undeveloped parcel of land because (1) it is 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.

Question:
Was it ethical for Engineer A to perform a feasibility study and make recommendations concerning the location of a new power facility in the county?

References:
Code of Ethics - Section II.4.a. - "Engineers shall disclose all known or potential conflicts of interest to their employers or clients by promptly informing them of any business association, interest, or other circumstances which could influence or appear to influence their judgment or the quality of their services."

Section III.1.b. - "Engineers shall advise their clients or employers when they believe a project will not be successful."

Discussion:
The issue of conflict of interest is one of the most widely discussed and debated in engineering ethics. As a customary proposition, it is generally recognized as good practice for engineers to endeavor to avoid conflicts of interest. However, the language in the NSPE Code of Ethics relating to conflicts of interest has been significantly modified over the years. For many years, the NSPE Code contained strict proscriptions against engineers engaging in conflicts of interest and admonished engineers, in strong language, to avoid such conflicts. While the current language still maintains a strong tone, it is more general than in the past, requiring the disclosure of conflicts rather than complete avoidance.

The Board has had various occasions to interpret the language of the Code of Ethics addressing the subject of conflict of interest. For example, in Case 69-13, the Board reviewed a situation where an engineer was an officer in an incorporated consulting

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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 that might cause 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 Code. 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 of Ethics. 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."

More recently in Case 85-6, the Board reviewed similar facts and circumstances and came to a different result. There, 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 that was 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 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 of Ethics, said the Board, would leave engineers without any real understanding of the ethical issues nor any guidance as to how to deal with the problem. We 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 impact upon 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.

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While one can read Case 85-6 and possibly draw the conclusion that in the instant case Engineer A's conduct was ethically proper, we do not reach that conclusion. It is our view that the two cases should be distinguished. In Case 85-6, the benefit to be derived by the engineer from the construction of the spur in question was far more remote than the benefit in the case at hand. The construction of the highway spur presumably would add to the value of the engineer's residential property, but it would not impact upon his ownership of the property. In the instant case, Engineer A is being placed in a position whereby he is making a recommendation that could directly affect his and his neighbor's ownership in property. It is one thing for an engineer to participate in decisions that will have a tangential impact upon his interests as was the case in 85-6. It is quite another matter for the engineer to act in his professional capacity to advise a governmental entity on policy matters where his economic interests are directly at issue. We find ourselves in agreement with the reasoning contained in Case 69-13 which we believe is more applicable to the facts present here.

We are reminded that Engineer A's professional opinion was supported by two important public policy considerations. First, it was noted by Engineer A that the undeveloped parcel was a better location for a power facility from an engineering standpoint. Second, it was indicated that the cost to the county of acquiring the developed property would be higher than the cost of acquiring the undeveloped tract of land. While these two considerations are important ones from a public policy standpoint, and may even be rationalized by a perfunctory reading of Section III.1.b. of the Code of Ethics, they are not sufficient to justify Engineer A's decision to perform the feasibility study for the county. Public perceptions play an important role in engineering ethics. The facts and circumstances of Engineer A's study may appear to suggest a benefit to the "common good" if his recommended course of action is followed. That notwithstanding, a loss of public confidence may cause a damage that cannot be easily repaired due to the appearance of impropriety.

The far simpler and more ethical approach which we believe should have been followed by Engineer A, under the circumstances in this case, was recommended in Case 69-13 which states: "(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."

Conclusion: It was unethical for Engineer A to perform a feasibility study and make recommendations concerning the location of a new power facility in the county.

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