BER Case 89-6

APPROVED BY BER
October 17, 1989

Section II.2.b. - Code of Ethics
Section II.4.a. - Code of Ethics
Section II.4.d. - Code of Ethics
Section III.2.a. - Code of Ethics

CONFLICT OF INTEREST – CHAIRMAN OF OWNERS' ASSOCIATION

FACTS:

Engineer A is elected as the non-salaried chairman of the board of directors of an owners' association of a 5000-acre subdivision in which he resides. The subdivision contains acre lots for the development of single condominium residences. The owners' association employs a full time manager and a number of employees who maintain the common areas and roads, provide security and perform other administrative tasks associated with the association. The board of directors are elected annually by the owners and are responsible for the operation of the subdivision. The manager and employees work under the direction of the board of directors and in accordance with the policies approved by the board. There is also a design review committee selected by the chairman of the board which is responsible for review and approval of all design and construction on all parcels and common areas.

Prior to serving as chairman, Engineer A was employed by the developer of the subdivision to design roads, water resources, flood control, etc. Engineer A now works for a related company which provides land development services to the owners' association. Engineer A also provides design services to lot owners building residences on the parcels, and has indicated that he will continue to do so.

QUESTION:

Would it be unethical for Engineer A to serve as the chairman of the owners' association and provide the land development and design services in the manner described?

REFERENCES:

Section II.2.b. -Engineers shall not affix their signatures to any plans or documents dealing with subject matter in which they lack competence, nor to any plan or document not prepared under their direction and control.

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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 II.4.d. -Engineers in public service as members, advisors or employees of a governmental body or department shall not participate in decisions with respect to professional services solicited or provided by them or their organizations in private or public engineering practice.

Section III.2.a. -Engineers shall seek opportunities to be of constructive service in civic affairs and work for the advancement of the safety, health and well-being of their community.

DISCUSSION:

Because of their technical knowledge, engineers are uniquely qualified to be of constructive service within their communities. As a result, engineers are frequently called upon to provide leadership in a whole range of affairs impacting the public health and safety. Not surprisingly, these activities are encouraged by the Code that implores engineers to seek opportunities to be of constructive service in civic affairs and work for the advancement of the safety, health and well-being of their communities. Recently in Case 84-6, involving an engineer serving as a candidate for the state legislature, we noted that participation in these activities must be tempered with a sense of reason and rationality as engineers are expected to act in such matters in a responsible and prudent manner.

Clearly, the Code requires a balance to be struck between the engineer's involvement and participation in civic affairs and the need to refrain from such activities where the engineers involvement might be construed in a manner not befitting the engineering profession. This need for harmony is expressed in a number of the sections of the Code, see Section II.4.d. In fact, this section has been analyzed on several occasions by the Board. In Case 82-4, an engineer, who was in full-time practice, was retained by a county as county engineer for a stipulated monthly fee. His duties included reviewing plats and construction drawings to determine whether they met county requirements, and made recommendations to local developers, county commissions, and planning and zoning boards. In addition, the engineer was retained by a city as city engineer for a stipulated annual fee. His duties included making recommendations to the city council concerning the approval of completed engineering work. The engineer had also been retained as a consultant by several private firms to help develop city and county project proposals. The Board found that it was ethical for the engineer to provide engineering services in his private capacity to the city, county, as well as to the public boards and commissions, but that it would be unethical for the engineer to provide approval or render judgment on behalf of the city and county or other public agencies relative to projects on which the engineer had furnished services through a private client.

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We made this judgment largely on the basis of Cases 62-7 and 74-2. In Case 74-2, where a state law required every municipality to retain a municipal engineer, we reasoned that the public interest was best served by providing small municipalities the most competent engineering services that they could acquire. In Case 62-7 a private engineer was retained to perform all necessary engineering and advisory services for a county commission and also to perform design studies for a private client who sought approval of the studies from the county commission. The Board reasoned that the engineer was in a position of passing engineering judgment on behalf of the commission on work or contract arrangements that the engineer performed and in which he participated. This obviously involved the self interest of the engineer and divided his loyalties. Even if the engineer acted with the best of intentions, the engineer was put into the position of assessing his recommendations to two clients with possibly opposing interests.

It is clear that all of the cases heretofore involving Section II.4.d. of the Code of Ethics have related to situations where an engineer is performing activities in the area of public service and also in the private sphere. Under the facts of the instant case, however, the functions being performed by Engineer A are solely in the private sphere. The language in Section II.4.d. of the Code is unambiguous in expressing its intent to focus on the conduct of engineers working on behalf of government bodies.

However, we believe Section II.4.d. must be read in light of contemporary conditions and circumstances. Increasingly, within our society, as a result of changing living patterns and fiscal considerations, various governmental functions are being transferred to private groups or entities. This trend was highlighted in Case 85-2 where a county hospital board delegated authority to a private health care provider to act in a quasi-public manner. We concluded that it was unethical for an engineer in private practice, who served on the board of directors of the private health care provider, to provide engineering and surveying services to the health care provider. As we noted, there has been a dramatic shift in recent years toward the innovative concept of "privatization" among state and local governments. In order to strive toward greater efficiency and economy, many local governments have delegated the responsibility for management and administration of certain services (e.g., trash collection, prisons, sewage treatment, hospitals,etc.) to private vendors with particular expertise in those areas. We noted that this development raised an interesting question: Is an engineer who is not in public service as a member, advisor, or employee of a governmental body or department, but is "acting for" a governmental body in a "quasi-governmental capacity, covered under the language of Section II.4.d? We concluded that where an engineer is acting in a quasi-governmental capacity and performing certain functions that are normally performed by a public body, that engineer should be covered under that language.

Likewise, in the instant case, we believe that the same rule should apply. While Case 85-2 is somewhat different than the present case and while we concede that the present case does not involve the issue of privatization, we believe the rule should be extended to cover circumstances such as those present here. To do otherwise would permit engineers employed in the private sector to serve on quasi-governmental bodies and act in a manner which undermines the integrity of those bodies. For example, under the facts present here, as chairman of the board of directors of the owners' association, Engineer A has the authority to select the members of the design review committee responsible for the review and

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approval of all design and construction on all parcels and common areas. At the same time, Engineer A works for a firm which provides land development services to the owners' association and design services to owners of individual parcels of land. Engineer A's activities as chairman of the board of directors will involve him directly with matters relating to determinations made by the design review committee concerning the designs developed by him and his firm. Therefore, Engineer A, as a member (chairman) of a governing body (board of directors) is participating in decisions with respect to professional services provided by his firm in private engineering practice.

Engineer A indicated that he will continue to provide services to the owners' association and owners of residences. Had the facts suggested that Engineer A would refrain from providing those services, the Board would have reconsidered its conclusion.

CONCLUSION:

It would be unethical for Engineer A to serve as the chairman of the owners' association and provide the land development and design services in the manner described.

BOARD OF ETHICAL REVIEW

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