REFERENCES:

II.4.a. - Code of Ethics: *Engineers shall disclose all known or potential conflicts of interest which could influence or appear to influence their judgment or the quality of their services.*

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

CONFLICT-OF-INTEREST – REVIEWING OWN WORK -- FAILURE TO DISCLOSE PROPERTY OWNERSHIP/ RELATIONSHIP WITH DEVELOPER

FACTS:

Engineers A and B are in a joint venture in an engineering and construction management practice that provides civil and municipal engineering and construction management services for clients in a number of townships in the state. The joint venture is hired by a developer to design a 90-lot subdivision in Township A. Engineer A provides the engineering design and Engineer B provides construction management services for the project. During a review by officials in Township A, it is determined by the officials that a second road will be needed to access the subdivision. However, the second road exits into Township B, which is adjacent to Township A. Engineer A and B's joint venture owns undeveloped property in Township B, and their joint venture also serves as municipal engineer in Township B. It is clear that the property owned by Engineers A and B will be positively affected by the construction of the new road. As municipal engineer for Township B, the joint venture of Engineers A and B discloses its relationship with the Developer to Township B with regard to Township A, but does not disclose its ownership of the property in Township B. On this basis, Township B does not object to Engineers A and B making a recommendation regarding the feasibility of the construction of the proposed road. Thereafter, as municipal engineer for Township B, Engineer A and B's joint venture recommends that Township B approve construction of the proposed road.

QUESTIONS:

Question 1: Would it be ethical for Engineers A and B to serve as the engineers for the Developer and also serve as municipal engineer for Township B under the circumstance described?

Question 2: Was it ethical for Engineers A and B to recommend approval of the road under the circumstances described?

DISCUSSION:

Professional engineers are often faced with conflicts-of-interest in their professional practice. Conflicts-of-interest present some of thorniest ethical issues for engineers because the practice of engineering, by its very nature, involves relations with parties often with conflicting interests. Earlier versions of the NSPE Code of Ethics prohibited engineers from engaging in any activities that presented a conflict-of-interest. However, this approach was criticized as unworkable, and the Code was ultimately revised to reflect the basic notion that an engineer has an obligation to disclose all known or potential conflicts-of-interest to employers or clients by promptly informing them of any business association of interest, or other circumstance which could influence, or appear to influence, the engineer's judgment or the quality of services. On this basis, engineers were deemed to have met their ethical responsibility in situations involving conflicts-of-interest by providing full and timely disclosure to their employers or clients.

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Some have criticized this more modern approach because it could be interpreted as shielding serious conflicts-of-interest which could impact a client's interests or even the public safety where the client or employer either (1) is unsophisticated and has little understanding of the impact of the conflict or (2) colludes in the conflict. Under such circumstances, the Engineer could arguably defend such action by arguing that "I did what the NSPE Code of Ethics requires and informed the employer/client of the conflict-of-interest and the employer/client did not object and therefore I proceeded." Another related criticism of this approach is that it takes away responsibility for making the ethical determination from the engineer and places it with the client or the employer. Some have noted that this shift has the effect of reducing the scope of the engineer's professional judgment and autonomy.

A good example of the Board's struggle with this issue was Case No. 85-6. In that case, Engineer A 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 Engineer A's property was located. After learning of the proposed location for the spur, Engineer A disclosed to the state the fact that his residential property might be affected by the new spur and fully disclosed the potential conflict with the state. The state did not object to Engineer A performing the work and Engineer A proceeded with his feasibility study and ultimately recommended that the spur be constructed.

In reviewing the question of whether it was ethical for Engineer A to perform the feasibility study despite the fact that Engineer A's land might be affected thereby, the Board determined 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 NSPE Code would leave engineers with neither any real understanding of the ethical issues nor any guidance as to how to deal with the problem (of conflicts-of-interest). The Board noted that the purpose of a code of ethics is to provide the engineering profession with a better understanding and awareness of ethical issues that impact upon the public. Only through interacting with the public and clients will engineers be able to comprehend the true dimensions of ethical issues.

In contrast to Case No. 85-6, in Case No. 69-13, the Board, considering the facts under the earlier version of the NSPE Code of Ethics, reviewed a situation where an engineer was an officer in an incorporated engineering consulting firm that was engaged primarily 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 Board was faced with the question of whether the engineer could ethically design a water and sewer system in the general area of his land interest and concluded that the engineer could not do so ethically. The Board concluded that disclosure was not enough under the facts and the engineer could avoid such a conflict under the facts either by disposing of his land holdings prior to undertaking the commission or by declining to perform the services if it were not feasible or desirable for him to dispose of his land at the particular time. The Board added that "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 NSPE Code of Ethics. The real test of ethical conduct is not when compliance with the NSPE Code comports with the interests of those it is intended to govern, but when compliance is adverse to personal interest." (For further discussion, see BER Case No. 88-1).

Turning to the facts of Case No. 97-4, the Board, based on the reasoning of BER Case Nos. 85-6 and 69-13, believes that Engineers A and B did not meet the requirements of NSPE Code Section II.4.a. because the engineers provided only limited disclosure of their conflict or potential conflicts-of-interest. By disclosing their relationship with the Developer with regard to Township A, but failing to disclose their ownership of undeveloped property in Township B, the engineers did not provide Township B with a full range of all known or potential conflicts-of-interest or other circumstances that could influence or appear to influence their judgment or the quality of their services. It is not clear to the Board what the reasons were for the engineers' not providing full and complete disclosure, but it appears that had the engineers provided full disclosure, it is at least a possibility that Township B's decision not to object to the engineers' making a feasibility recommendation regarding the new road

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may have been different. In the interests of full and timely disclosure, Engineers A and B owed this information to Township B and their failure to provide it was a violation of the NSPE Code of Ethics.

With regard to a possible violation of NSPE Code Section II.4.d., it must be assumed from the facts that the engineers' recommendation to Township B regarding the new road was based upon a review of documents and information involving professional services solicited or provided by them in their public or private engineering practice -- the services they had provided for the Developer in connection with the subdivision project in Township A. There is nothing in the facts or circumstances of this case to indicate that Engineers A and B had solicited or reviewed any other plans, drawings, documents, reports, recommendations, or alternatives that were prepared by unrelated or disinterested parties. On that basis, there appears to be a clear violation of NSPE Section II.4.d., which prohibits engineers in public service as advisors or employees of a governmental body to participate in decisions involving such information.

CONCLUSIONS:

Question 1: It was not ethical for Engineers A and B to serve as the engineers for the Developer and also serve as municipal engineer for Township B, because there was only partial disclosure and no disclosure of the engineers' ownership of undeveloped property in Township B.

Question 2: It was not ethical for Engineers A and B to recommend approval of the road because, as employees or advisors in public service to Township B, the engineers could not participate in decisions involving professional services provided by them in their private practice.

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Each opinion is intended as guidance to individual practicing engineers, students and the public. In regard to the question of application of the NSPE Code of Ethics to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services -- which services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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