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Eminent Domain: Resolving Ethical Conflicts Faced by the Engineer

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Eminent Domain: Resolving Ethical Conflicts Faced by the Engineer

Professional engineers are frequently positioned to make independent decisions that not only affect themselves, but also their clients, their company, their profession, the environment, and the public as well. In some situations, he is forced to weigh conflicting responsibilities in order to act in a manner reflecting his obligations to all affected parties. One such situation may occur when the engineer is in a position to influence or exercise the governmental right of eminent domain.

This discussion is intended to provide a background of the government's power of eminent domain; describe the process of condemnation; identify several roles an engineer may have in the development process; review some of the ethical responsibilities a professional engineer has to both the private individual and society; and finally, to identify some conflicts that may exist during an engineer's involvement in an eminent domain action.

Eminent Domain

Eminent domain is the inherent power of the government to seize a citizen's private property, without the owner's consent, to provide some benefit to the public-at-large. The first such case recorded in English law, known as the "Saltpeter Case"[1], pertained to the Crown's taking of a saltpeter mine from a private citizen because the King required material to manufacture munitions. The private party sued the King and the court established the common law precedent of the sovereign's right to take private

[1] Also referred to as the "King's Prerogative Case."

property for public use. When the Colonies established themselves as an independent sovereign government, they borrowed much of the existing system of English Common Law and recognized the principle of eminent domain. The Fifth Amendment to the United States Constitution addresses this previously accepted principle by specifying that private property cannot "be taken for public use, without just compensation." The terms "public use" and "just compensation" are primarily defined by the latest U.S. Supreme Court decision and currently appear to favor the most liberal interpretation of pubic usage, leaving compensation to be determined on a case-by-case basis by a court wherein the private citizen has the burden of proof. In some states, such as Connecticut, New York, and Rhode Island, compensation is decided solely by a judge and not by a jury.

Additionally, case law has established that the sovereign's power of eminent domain may be delegated to state governments, local governments, public companies, and even privately owned companies deemed to be satisfying a public need. Such private companies have historically been utility services such as telephone, electric, water, and gas. However, a recent trend in case law recognizes that private development companies working on behalf of or in conjunction with local governments have the ability to exercise the delegated power of eminent domain or be the recipient of real property acquired by the process of condemnation.

Process of Condemnation

The legal process by which the government or entity holding governmental authority exercises its right of eminent domain is known as condemnation and is usually preceded by an offer to purchase the property without resorting to legal proceedings.

In the event that the owner refuses to sell the property and the government authority maintains that the property be acquired for public benefit, it will file a court action asserting eminent domain and requesting the court award the property for government disposal. As part of this action, a deposit will be tendered to the court for the estimated fair market value of the property being taken. The court will then notify the private property owner and determine just compensation to the individual. Except under some special circumstances, such as wartime use or actions that require expeditious completion to prevent harm to the public, a response period is given to the property owner to present an argument to the court why eminent domain does not apply or to offer evidence for the court to consider in determining fair market value.

Roles of the Engineer

It is of paramount importance that the engineer identifies what role he or she is serving in any development that may include the use of eminent domain before attempting to resolve conflicts in responsibilities. In general, the engineer will be called upon to provide services in one of four primary roles: an official of an entity having eminent domain authority, an engineer providing services in support of an entity having that same power, an engineer providing services in support of a private property owner, or an engineer exercising their rights as a private citizen to be involved with public planning and governmental decisions. For the most part, it can be argued that an engineer places herself at risk of conflict of interest if she chooses to participate in more than one of these roles simultaneously.

If an engineer is a voting official of an entity having the ability to exercise the government's right of eminent domain, such as when a practicing engineer serves as a

city commissioner, he should anticipate being tasked with determining specific properties to be acquired and should avoid rendering expert engineering opinions that may be used as part of the voting process; instead, he should solicit independent engineering advice upon which his decisions for the public good are based.

The professional engineer may be called upon to provide services or render expert opinions during several different phases of any undertaking that eventually utilizes eminent domain to obtain property. In fact, oftentimes an engineer may be unaware of what process is to be used to obtain the property for the project because the services are provided based on a hypothetical situation presented by the client. In the initial concept stages of a project, the engineer may be consulted to provide an opinion as to the general feasibility of a design given expected parameters provided by the client. As the concept develops, the engineer may be asked to provide specific technical solutions to problems posed by their client or to identify possible alternatives to the project scope while maintaining functionality. Regardless of what phase the engineer provides services to the project, he is acting in the capacity of supporting a potential entity with eminent domain authority and should abstain from participation in other roles, if possible.

Since an engineer cannot fully divest themselves from their obligations as a private citizen and will always occupy this role to some extent, the remaining categorical role is occupied when the engineer's services are obtained to provide expert testimony or opinion on behalf of the private property owner to support either an argument against appropriation of the property by eminent domain or appeal the initial estimate of just compensation.

Ethical Responsibilities

Engineers are generally thought to have a set of obligations to society and these may be classified as ethical or moral in nature or related to their being part of an institution recognized by the public as a profession. A full discussion of all these obligations is not necessary to demonstrate how some may apparently conflict with one another, presenting the engineer with difficult decision-making situations. Therefore, this discussion will address only a few deemed necessary to support the arguments and conclusions presented in the next topic.

It is commonly held that engineers possess a fiduciary duty to their clients because they possess an understanding of theory and principles that can not be presented in a manner that would ensure the client's ability to make a decision in his or her own best interest. Coupled with this, is a concept that the professional engineer is ethically responsible to apply his skills to benefit the welfare of society and the protection of the environment. This second concept stems from the premise that only a trained professional engineer can evaluate the impact some decisions may have on human welfare or the environment; that since engineers alone possess this ability, they are morally obligated to use this talent to ensure protection of all that humankind holds important.

Additionally, engineering is a profession that requires its practitioners to be fair, honest, impartial, and to perform all services to the highest standard obtainable to ensure continued community trust. For, if this trust is sacrificed, society may no longer act according to engineers' recommendations and the profession would be powerless to accomplish their moral obligation of protecting the health and welfare of society and the environment.

The final obligation to be discussed is that of an engineer's responsibility to respect the professional capabilities and opinions of others within the community to avoid dilution of public trust in the profession as a whole. This principle is stated in the American Society of Civil Engineers' Code of Ethics: "Engineers shall not maliciously or falsely, directly or indirectly, injure the professional reputation, prospects, practice or employment of another engineer or indiscriminately criticize another's work."

Conflicts

An engineer may be faced with providing services to a client that exercises eminent domain to procure property for project construction while the engineer believes that the present use of the property is in better public interest than the proposed development. In this situation, the engineer has a responsibility to the client to serve his client's best interests while concurrently feeling obligated to protect the public interests by advocating the property owners' rights. If the engineer appreciates the dichotomy that his client is also part of society, then any decision made that benefits society necessarily benefits his client as well. Furthermore, he can be comfortable in honestly serving his client to the best of his ability if he discloses his concerns to that client and recommends possible alternatives. At this point, the engineer's actions to educate and convince his client of a proper course of action fulfill his duty toward both the public and the client. If the client still desires to proceed with changing the character of the property, the practicing engineer may either dismiss himself from further involvement due to moral reservations or, recognizing that there is a system of checks and balances in place whereby elected or appointed officials acting in the public behalf will also weigh utilization of the property prior to approving eminent domain actions, continue to provide

expert advice to ensure engineering a serviceable and safe structure should the project continue. However, should the engineer be called upon to present expert opinion during the decision-making entity's deliberations, he should be prepared to offer the exact same opinion and advice given to his client.

Another conflict may occur when an engineer is called to analyze and provide expert opinion concerning work already performed by another practicing engineer—such would be the case when a private owner under eminent domain action retains the service of a consulting engineer to counter the government's contentions. In this situation, she can avoid the potential ethical conflict of undermining another engineer's work by focusing specifically on the facts and conclusions derived from engineering principles without attempting to determine motives or reasons for the differences in expert opinion.

The final potential conflict examined here occurs when the engineer has actual knowledge of or believes his client is exerting improper persuasion to affect the outcome of the government entity's decision to use eminent domain. The engineer may feel an obligation to maintain confidentiality of the client's business practices because he is obligated to protect the best interests of the client while concurrently feeling a moral obligation to report and prevent the dishonest, fraudulent, or unethical practices of his client to protect the public's interests. Realizing that the entire engineering community supports a zero tolerance policy toward corruption, bribery, or fraud and that these practices consistently undermine society, it is that engineer's duty to ensure these practices are identified and eliminated by removing themselves from further duties to that client and reporting suspect behavior to proper authority.

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