

Executive Branch Ethics Commission
ADVISORY OPINION 08-11
May 9, 2008

RE: Is there an ethical concern for the Transportation Cabinet Secretary to have an ownership interest in property adjacent or near to a priority road project?

DECISION: No, not when the ownership interest predates the identification of the road project as a priority and the Secretary abstains, in writing, from any decision that could affect that property.

This opinion is issued in response to your April 16, 2008 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 9, 2008 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Ft. Knox area is currently undergoing revitalization due to BRAC, the Base Realignment and Closure mission authorized by Congress. BRAC has changed the overall mission of Ft. Knox and it is estimated that the area may receive an influx of 4500 military personnel and their families, possibly as many as 12,000 people. During the previous administration, a BRAC task force was created by Governor Fletcher, and a Transportation Cabinet (the "Cabinet") subcommittee was created to analyze any major transportation concerns for BRAC. At an August 16, 2007, meeting, this subcommittee of Cabinet officials designated a list of seven priority road projects. In a letter to Major General Tindall (a copy of which you have provided to the Commission), Marc Williams, then Commissioner of Highways, and Harry Berry, Hardin County Judge Executive, listed the seven road projects at an estimated cost of \$185 million. According to the letter, these projects would be funded in addition to the normal level of transportation funding authorized for the region through federal and state sources.

You note that number three on the list of projects from the September 10th letter is a connector road of which the potential location is within, or immediately south of, 97 acres purchased in two parcels in January and March, 2006, by a properties limited liability corporation ("LLC"). You indicate that LLC has been in existence since April 14, 2003, and that you own 1% of the LLC, your son owns 49%, a third owners owns 50%, and you all three are managing members of the LLC. The LLC's initial plan for the 97 acres was to develop the frontage commercially and place a subdivision in the back portion. You state that at this time,

**EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 08-11**

May 9, 2008

Page Two

the Cabinet does not have a plan in place to locate the proposed road through the LLC's acreage. However, it does appear possible to you that even if the proposed road is not placed directly through the property, it may be located to the south of the property. Either location, you indicate, could increase the value of the LLC's holdings.

Since both you and your son are managing members of the LLC's properties, you are concerned with any possible ethical implications. You therefore request an opinion from the Commission regarding the matter.

Pursuant to KRS 11A.020:

- (1) No public servant, by himself or through others, shall knowingly:
 - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
 - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.
- ...
- (3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

Further, KRS 11A.030 states:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

- (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
- (2) The effect of his participation on public confidence in the integrity of the executive branch;
- (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
- (4) The need for his particular contribution, such as special knowledge of the

**EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 08-11**

May 9, 2008

Page Three

subject matter, to the effective functioning of the executive branch; or
(5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

It is the opinion of the Commission that since the LLC purchased the property in question before the connector road project was identified as a priority road project, as well as before you became, or could have known you would become, Secretary of the Transportation Cabinet, your ownership interest in the property in and of itself posed no ethical dilemma for you. However, since you, and your son, do have ownership interests in the property in question, and decisions made by the Cabinet could affect the value of your property, any discretionary decisions made the Cabinet on the connector road since your employment as Secretary could present a potential conflict of interest for you, and thus you are commended for seeking guidance in this matter.

In order to avoid any actual conflicts of interest, you should not be involved in your official capacity in any decision relating to that property, no matter how indirect that involvement may be. Further, no one under your supervision within the Cabinet (essentially all employees) should be involved in future discretionary decisions needed to complete the project if such decisions affect the LLC's property or property value, since knowledge by employees of your ownership in the property could affect the employees' decisions. This does not prohibit employees from completing the project as currently planned, but just requires that both you and employees of the Cabinet should abstain from any future decisions that could affect the property in question that have not been previously addressed in the six year plan and are needed to change the connector road project. You should disclose your intention to abstain from any involvement in writing to your superior, presumably the Governor or the Secretary of the Governor's Executive Cabinet, who should cause any such decisions on the matter to be made by an impartial third party.

If you adhere to this guidance, then no potential for a conflict will exist for you, even having an ownership interest in the property. Failure to adhere to this guidance could create ethical concerns correlative to the extent of your involvement in said decisions.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb