

Executive Branch Ethics Commission
ADVISORY OPINION 08-12
May 9, 2008

RE: May Transportation Cabinet staff attorney and EEO compliance officer serve as board member representatives on a non-profit community land trust?

DECISION: Yes.

This opinion is issued in response to your April 28, 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. You are a staff attorney with the Kentucky Transportation Cabinet's District 7 office (the "Cabinet") in Lexington, Kentucky. As such, you have an obligation to represent the Cabinet on issues relating to road projects, board of claims issues, and encroachment cases. To that end, you have been assisting the project team working on the Newtown Extension Project, a proposal to extend Newtown Pike through downtown Lexington, connecting it to the main entrance of the University of Kentucky. You were brought into the project team to determine how the project could fulfill its federal requirement of mitigating negative impacts the road project would have on a low-income neighborhood that abuts the proposed roadway. Through the interdisciplinary team process, the team has determined that KYTC will purchase the land where the neighborhood is located and transfer the ownership of the property to a private non-profit corporation that will serve as a community land trust. The purpose of this effort is to keep the neighborhood in tact for current residents and to permanently preserve affordable housing stock. There is the possibility that condemnation authority will need to be used to acquire this property.

The project team, in partnership with the residents of the neighborhood and other interested Fayette County citizens established a steering committee to draft the by-laws of the not-yet-created non-profit corporation. As part of that process and at the request of the Federal Highway Administration ("FHWA"), the by-laws call for FHWA, KYTC, and Lexington Fayette Urban County Government ("LFUCG") to each appoint their own representative to the board until construction of the road project is complete. Other board members will include residents from the neighborhood and interested residents from Fayette County.

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The request for agency representation on the board was made for two reasons. First, the community land trust is being created and used as a mitigation tool for the road project. The project is invested in making sure the land trust is successful over time in order that the mitigation effort fulfills its purpose for the project. Second, the project will be funding the non-profit corporation during the construction period so as to allow it time to become successfully self-sustaining. Board representatives from FHWA, KYTC, and LFUCG will be charged with making sure the public funds are spent wisely.

The project team is now selecting individuals to serve on the board of directors. Because of your involvement with drafting the bylaws and with the project, the project team has requested that you serve as the KYTC representative. In addition, FHWA has requested that a KYTC EEO Compliance Officer who is also on the project team serve as their representative. Your mission would be to ensure the long-term success of the community land trust and to facilitate the wise expenditure of funds.

The land trust initially would be involved in the building of housing units within the mitigation area and selling those units. It would not be overseeing any of the road construction.

You ask whether you may serve on the board of directors of this land trust as a KYTC representative. You also ask whether the EEO Compliance Officer may represent FHWA on the board. Neither you, nor the EEO Compliance Officer, would receive any compensation for your service on the board. You understand that should the land trust desire to use a contractor that also has a contract with the Commonwealth of Kentucky, you would need to abstain from involvement with that decision. You further understand that you should not involve yourself with the condemnation of any property in the mitigation area.

KRS 11A.020(1) and (3) provide:

- (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.

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(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.

The Commission addressed a similar situation in Advisory Opinion 00-43, in which a state employee was asked to sit on the board of a foundation that received its initial funding from a company that had a contract with the employee's agency. In that opinion, the Commission determined, in part, that because the employee did not make decisions in his official capacity regarding contracts on behalf of his agency, that it would not be a substantial conflict for him to sit on the Board.

In contrast to the situation in the above noted advisory opinion where the employee was asked to serve on the foundation as a private citizen, you are being asked to serve on the board of directors of the community land trust as a representative for the Transportation Cabinet. Since you will be serving on the board in your official capacity and representing the Cabinet's interests in overseeing the proper expenditure of land trust funds, the Commission believes such service on the board of directors is allowable and does not present a conflict for you. Further, the Commission finds no conflict with your involvement in any matters where the land trust desires to use a contractor that also may hold a contract with the Cabinet, since you will not be in a position in either situation to receive any potential benefit from the contractor.

Likewise, the same would be true of the EEO compliance officer who is being tasked by the Cabinet to represent the FHWA in her service on the board of directors of the land trust, and is not serving as a private citizen.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb

Enclosure: Advisory Opinion 00-43