

Executive Branch Ethics Commission
ADVISORY OPINION 09-16
March 27, 2009

AMENDS ADVISORY OPINION 08-11

- RE:**
1. May Transportation Cabinet officials other than the Secretary make decisions with respect to a highway project near real property owned by the Secretary?
 2. In the event that discretionary decisions regarding the highway project near real property owned by the Secretary are referred to a neutral third party, may Transportation Cabinet employees provide technical expertise to the neutral third party?
 3. May the Secretary of the Transportation Cabinet testify before Legislative committees regarding other projects named in the Six Year Road Plan?
 4. May other Transportation Cabinet employees testify before Legislative committees regarding projects named in the Six Year Road Plan if questions arise regarding the road project near real property owned by the Secretary?
 5. Is it necessary for the Secretary and other Transportation Cabinet officials to abstain from matters related to other road projects that appear in the Six Year Road Plan and are in the same county as the real property owned by the Secretary?

- DECISION:**
1. Yes.
 2. Yes.
 3. Yes.
 4. Yes.
 5. No.

This opinion is issued in response to your March 10, 2009 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). The matter was reviewed at the March 27, 2009 meeting of the Commission and the following opinion is issued. You are the Secretary of the Transportation Cabinet, and you also serve as the Commissioner of Highways. You seek advice from the Commission regarding three parcels of land that you or a family member own near a 1550 acre industrial site that was originally purchased by the state and is

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now owned by Hardin County and managed by an industrial authority. An interchange off I-65 and a new road extending from the new interchange to the industrial site were added to the Six Year Road Plan in 2002. The interchange and new road construction are now currently on the Cabinet's list of active design projects.

You also request clarification of Advisory Opinion 08-11 addressing other property that you own near a road project. The Commission advised in that opinion that you and all employees under your direct or indirect supervision should abstain from any involvement in future discretionary decisions that might affect property values. You have complied with Advisory Opinion 08-11 by abstaining from making decisions affecting the property. You state that an employee in the Governor's Office acts in your stead. However, the practical implications of precluding all Transportation Cabinet employees from being involved in the decisions affecting the project is that an employee in the Governor's Office, who is not an engineer and has no expertise in road building, is making decisions on the project without the ability to obtain technical advice from Transportation Cabinet employees.

Additionally, you seek advice on how the Department of Highways should comply with statutory mandates regarding the Six Year Road Plan considering your abstention from making decisions on two road projects.

The applicable provisions of the Executive Branch Code of Ethics (the "Code") include KRS 11A.005, KRS 11A.030, and KRS 11A.020(3). KRS 11A.005 provides:

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

- (a) A public servant be independent and impartial;
- (b) Government policy and decisions be made through the established processes of government;
- (c) A public servant not use public office to obtain private benefits; and
- (d) The public has confidence in the integrity of its government and public servants.

(2) The principles of ethical behavior for public servants shall recognize that:

- (a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;

- (b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and
- (c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

KRS 11A.030 provides:

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 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.

KRS 11A.020 (3) provides:

- (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.

KRS 11A.005 (1)(b) recognizes that the proper operation of democratic government requires that government policy and decisions must be made through the established processes of government. The Transportation Cabinet has an established process for building roads, including how decisions regarding road projects are made. The process exists to ensure that road projects built in different geographic areas meet Cabinet, state, and federal requirements. Engineers with specific training and expertise in road building recommend a course of action

on a particular road project to the State Highway Engineer. The State Highway Engineer, who pursuant to KRS 176.020(1) serves as the technical advisor to the Commissioner of Highways and supervises all construction and maintenance work of the Transportation Cabinet, recommends a course of action to the Commissioner of Highways. You are not an engineer, and in making the final decision on a road project, you rely on the State Highway Engineer for a recommendation and technical advice.

The issue before the Commission is how to manage the Secretary's conflict of interest while maintaining, to the extent possible, the Transportation Cabinet's established process for building roads. You cannot be involved in making decisions regarding the project, and you have appropriately abstained in writing from action on official decisions relating to the properties. KRS 11A.020 (3) requires your superior to designate an impartial third party to make decisions on the matters included in your written abstention. Your supervisor is the Secretary of the Governor's Cabinet, with whom you jointly own property and have other common business interests. The Governor, as supervisor of the Secretary of the Governor's Cabinet, should designate someone who does not report to you and who also does not report to the Secretary of the Cabinet to make decisions regarding the road projects included in your written abstentions.

The Commission assumes that the Governor's designee will not be an engineer skilled in building roads, since the Governor should not designate an individual who reports to you and public servants with expertise in building roads are employed by the Transportation Cabinet. In order to preserve the Transportation Cabinet's established process, and in light of the statutory duties of the State Highway Engineer, in this instance the Governor's designee is permitted to seek recommendations and technical assistance from the State Highway Engineer. Additionally, the established process of decision making may be followed for the road projects in question at all levels up to the State Highway Engineer's office. However, Transportation Cabinet employees involved in the process should be notified that the Secretary may not be involved in any discussions or decisions regarding the road projects and the Governor's designee should be provided with all relevant information regarding the State Highway Engineer's recommendations, including any impact upon the value of the Secretary's property.

You also seek the advice of the Commission regarding the Six Year Road Plan. The Transportation Cabinet, through the Department of Highways, is required by KRS 176.440 to submit to the Legislature a six year road plan listing the short-term individual transportation projects that are scheduled to be constructed in each county. The Legislature ultimately determines which projects will be included in the biennial budget. Your written abstention in making decisions regarding the specific road projects that present a conflict of interest for you should include decisions on how those projects are presented in the six year road plan. The Governor's designee should make those final decisions relating to the six year road plan, with the advice and recommendation of the State Highway Engineer. You may make decisions regarding all other road projects in the six year road plan. Likewise, you should not testify before the Legislature regarding the road projects presenting the conflict of interest for you, but you may testify about all other road projects. The State Highway Engineer may testify before the Legislature on all road projects, including those projects creating a conflict of interest for you.

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Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Gwen R. Pinson

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