

Executive Branch Ethics Commission
ADVISORY OPINION 09-17
March 27, 2009

- RE:**
1. Does the co-ownership of real property by the Secretary of the Governor's Executive Cabinet with the Secretary of the Transportation Cabinet or his family create any issues under the Executive Branch Code of Ethics with respect to a highway project located near the real property?
 2. Does the ownership of real property by the interim Secretary of the Cabinet for Economic Development create any issues under the Executive Branch Code of Ethics with respect to infrastructure grants for an industrial property located near the real property?

- DECISION:**
1. No, assuming the Secretary abstains from any involvement in the highway project.
 2. No, assuming the interim Secretary abstains from any involvement in the grant process.

This opinion is issued in response to your March 13, 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 Governor's Executive Cabinet (the "Executive Cabinet") as well as the temporary interim Secretary of the Cabinet for Economic Development ("Economic Development"). You seek advice from the Commission regarding the impact that two parcels of land in which you have an ownership interest located near a 1550 acre industrial site that was originally purchased by the state and is now owned by Hardin County and managed by an industrial authority may have on your duties in those roles. You share ownership of these parcels with the Secretary of the Transportation Cabinet ("Transportation") or members of his family. An interchange off I-65 and a new road extending from the new interchange to the industrial site were added to Transportation's Six Year Road Plan in 2002. The interchange and new road construction are now currently Transportation's list of active design projects. The Secretary of Transportation has also requested an opinion regarding this matter.

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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:

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- (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.

As Secretary of the Executive Cabinet, you state that you do not have direct oversight or discretion with regard to the roads and industrial properties in question. Nevertheless, you ask the Commission to consider your role as Secretary when reviewing the questions posed by the Transportation Secretary in Advisory Opinion 09-16. It is the opinion of the Commission that since you are the direct line supervisor of the Transportation Secretary that the same restrictions apply to you that apply to him due to your ownership interest in the property in the vicinity of the highway project. While Advisory Opinion 09-16 provides a more detailed discussion, in summary you cannot be involved in making decisions regarding the highway project, and must abstain in writing from action on official decisions that could affect your properties in any way. KRS 11A.020 (3) requires your superior to designate an impartial third party to make decisions on the matters included in your written abstention. Thus the Governor, as your supervisor, should designate someone who does not report to you to make decisions regarding the road projects in question should the need arise.

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You also seek guidance regarding your role as interim Secretary of Economic Development. You indicate that in 2002, Economic Development provided funding for the industrial site in Hardin County located near your properties. Since you did not assume your current duties relating to Economic Development until 2008, this funding is not a concern. However, you also indicate that a budget appropriation by the Legislature passed in 2008 for Economic Development Bond (“EDB”) grants related to base realignment and closure (“BRAC”) could benefit the Hardin County industrial site. These grants are reviewed and recommended for funding by a BRAC Commission created by Executive Order of the Governor. The Commission includes a “representative” of Economic Development pursuant to Executive Order 2008-272. While you were acting as Secretary of Economic Development when the BRAC projects were approved by the BRAC Commission, Economic Development was represented by someone else at the meeting. You state that following approval by the BRAC Commission, the EDB grants must also receive approval from the Kentucky Economic Development Finance Authority (“KEDFA”), an independent committee under the authority of the Kentucky Economic Development Partnership Board (“Partnership Board”). The Partnership Board is responsible for directing and overseeing Economic Development. The Secretary of Economic Development sits on the Partnership Board ex-officio. While the Governor is chairman of the Partnership Board, KRS 154.10-020 also provides that in the Governor’s absence, the Secretary of the Governor’s Executive Cabinet serves as chairman.

In addition to KEDFA approval, you indicate that the EDB grants must also receive the approval of the State Properties and Building Commission and the Capital Projects and Bond Oversight Committee. You state that you have no direct supervisory role over the members of the BRAC Commission, the KEDFA Board, or the two other entities that must approve the EDB grants. While the standard EDB grant process usually includes a letter from the Secretary of Economic Development to the Secretary of the Finance and Administration Cabinet (“Finance”) consulting with him on the project, you indicate that the BRAC Commission has the ability to consult directly with the Secretary of Finance, thereby omitting consultation with you from the process. This would be the proper course of action.

In light of your ownership interest in the properties located near the Hardin County industrial site, which could, if not directly, certainly indirectly benefit from the successful development of the site, as long as you remain interim Secretary of Economic Development, you should abstain from any involvement in matters relating thereto just as you must do in your position as Secretary of the Executive Cabinet. The Commission again refers you to Advisory Opinion 09-16 and advises that you follow the guidance contained therein for the Secretary of Transportation. You cannot be involved in making decisions regarding the grants for infrastructure in any capacity and must abstain in writing from action on official decisions relating to the Hardin County industrial site. Where you can be bypassed without detrimental effect on your agency, as in the case described above where the BRAC Commission is able to consult directly with the Secretary of Finance, then that should be done. In matters where this cannot occur, KRS 11A.020(3) requires your superior, the Governor, to designate an impartial third party to make decisions on the matters included in your written abstention. This person

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should be someone who does not report to you in either of your capacities. As long as these protective measures are taken, your role as interim Secretary of Economic Development will not create an issue with regard to any grants for infrastructure on the property in the vicinity of the property in which you have an ownership interest.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Gwen R. Pinson

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