COMMONWEALTH OF KENTUCKY

EXECUTIVE BRANCH ETHICS COMMISSION

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EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 09-8

January 23, 2009

RE: May the Commissioner of the Department for Fish and Wildlife Resources also be self employed as an independent contractor with a land development company?

DECISION: Yes, as long as he does not do business with his own agency and as long as he, in his official position, has no competing interests with his private employment or with the land development company.

This opinion is issued in response to your December 10, 2008, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the January 23, 2009, meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows:

You are the Commissioner for the Kentucky Department of Fish and Wildlife Resources and KRS 150.061(4) sets forth your duties. You are responsible for the "general supervision and control of all activities, functions, appointments, and employees of the Department of Fish and Wildlife Resources" and, further, you are responsible for enforcing state laws relating to wild animals, birds, fish and amphibians. You also state that one component of your job includes overseeing the acquisition of land for public hunting and fishing and conservation.

You state in your request that you previously obtained an advisory opinion from the Commission permitting you to engage in environmental consulting. The question previously addressed by the Commission in Advisory Opinion 07-22 concerned your proposal to create a private environmental consulting business to engage in, among other activities, advising on environmental permitting and compliance, providing technical guidance and implementation, and advising in conservation real estate ventures.

In Advisory Opinion 07-22 we indicated certain limitations would be necessary to make sure your activities as an environmental consultant did not run afoul of the provisions of KRS Chapter 11A. Specifically, we advised that you could not accept clients who seek grants from your Department, who compete with your Department for grants administered privately, who seek to do business with, who are regulated by, or who have matters pending before your Department. We recognized that acceptance of these clients would create an immediate conflict of interest for you under the Ethics Code.

Your new inquiry differs from the questions addressed in the prior opinion. You have now obtained your real estate license and have contracted to work under the supervision of Greenwood Land Company ("Greenwood"), a Georgia company doing business in Georgia, Alabama, Illinois and Kentucky. You state that you are not an employee of the company, but rather are an independent contractor and as such, should be considered self employed. You state your duties would include assisting sellers in listing and selling property, including residential, commercial, and farm properties and you would assist buyers in locating and buying such properties.

Greenwood is described on its website as "the foremost authority on recreational land investment, ownership, management, and resale" offering "premier properties that represent exceptional recreational and wildlife management potential." Information on the website also confirms that Greenwood has recently announced an expansion of its land brokerage, investment, wildlife management, forestry, and conservation services to Kentucky.

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 for 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.

You state you are aware that you should not use your official position or state resources in furtherance of your self-employment, and that you should avoid transactions in which one of the parties receives grants from the Department or competes with the Department for grants or land acquisitions. Certainly, you should not use your official title to attract business, imply or give advantage to clients by virtue of your office, or use your office, or any knowledge gained by virtue of your office, to gain a competitive advantage in your private business.

It appears that Greenwood's stated business objectives are in direct competition with part of your department's mission where land conservation and the acquisition of lands for public hunting and fishing are concerned. However, you appeared at the Commission meeting and further explained that the interests of Greenwood and your department are complimentary rather than competing interests. While the Department would be interested in acquiring large tracts of land to further conserve lands for public hunting and fishing, Greenwood's interest would be in conservation projects of a much smaller scale which would be suitable for individual investors.

You further informed the Commission that you answer to an independent board that is ultimately responsible for making the final decision on whether to pursue land purchases for public purposes. Once that decision is made, the matter is referred on to the Division of Real Property in the Finance and Administration Cabinet for negotiations regarding price and other terms and the actual purchase of the land. Should it appear that a conflict exists or is likely to occur, you informed the Commission of your intention to abstain in writing and totally remove yourself and those you supervise from the process of recommending the property for the Department to purchase and from all matters related to the negotiation and purchase.

Based upon the information you provided, the Commission does not believe that a conflict exists solely because of your employment with Greenwood. In your capacity as Commissioner of the Department, however, you are considered to be directly involved in all matters coming before your agency. A conflict will immediately occur if Greenwood or your private clients become involved in any matters coming before your agency. You should, therefore, be prepared to take the steps outlined above to both prevent any potential conflict from occurring and remove yourself and those you supervise from any potential conflict that might occur. Further, to avoid any conflict or the appearance of one, you should be very careful not to use any knowledge you have gained in your public position to benefit private clients or Greenwood.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

Gwen R. Pinson

By Chair: Gwen R. Pinson