

EXECUTIVE BRANCH ETHICS COMMISSIONS
ADVISORY OPINION 92-3

October 26, 1992

RE: Encroachment on right of way

In response to a request dated September 9, 1992, the Executive Branch Ethics Commission ("the Commission") hereby issues the following advisory opinion regarding an encroachment on the right of way.

The relevant facts pertaining to your request are as follows. In 1970 the Department of Highways acquired 21.18 acres (more or less) of land, from a man and his wife, for right of way for the Daniel Boone Parkway ("DBP"), for which the couple were paid a total of \$4,050 or \$191.22 per acre. During the intervening years, their son became the owner of the couple's remaining property adjacent to the previously conveyed DBP right of way. The son built a house on his land. In 1991, while surveying right of way for a nearby highway project, the Transportation Cabinet determined that the son's house encroached upon a portion of the DBP right of way acquired from his parents.

The encroachment impacts 0.5790 acres of the DBP right of way, but because it does not affect the maintenance of or otherwise create a problem with respect to the DBP, the encroachment had not been previously noticed by the Transportation Cabinet. The Transportation Cabinet has determined that the fair cash value of the encroached property is \$500, and has recommended that the encroachment be resolved by conveying the property to the son for a consideration equal to its fair cash value. The proposed conveyance will be by Deed of Conveyance that by law must be executed for the Commonwealth by the Secretary of the Finance and Administration Cabinet and approved by the Governor pursuant to KRS 45A.045(3).

However, the son is a state employee in the Cabinet for Workforce Development, and KRS 11A.040(4)/SB 63, Section 6(4) states:

No public servant shall knowingly . . . undertake, execute, hold or enjoy, in whole or in part, any contract, agreement, lease, sale . . . awarded or granted by any state agency.

The Commission notes that the Transportation Cabinet appears to have undertaken the proposed sale in good faith, using the established appraisal and review process and arriving at a sale price which on its face seems fair to both parties.

However, the statute as currently written does not appear to leave room for such a transaction. Accordingly, the Commission is of the opinion that as a state employee, the son is prohibited from enjoying or executing such a sale awarded by a state agency.

The Commission notes that a legislative task force is currently drafting a broad

revision of state ethics laws, and that those involved in this proposed transaction might seek a remedy from the legislature, or from the courts.