S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 03-120

Sale of County Hospital Assets

QUESTIONS

The chairman and four commissioners of the Sumner County Board of Commissioners all serve on the Board of Directors of Sumner Regional Health Systems, a Tennessee non-profit corporation (the "Corporation"). The Corporation pays them a monthly director's fee, and they have signed a confidentiality agreement with the Corporation, which prohibits them from disclosing facts related to the Corporation, even to other members of the Sumner County Board of Commissioners. In 1994, Sumner County and the Sumner County General Hospital District signed a forty-year lease of county-owned and improved real estate to the Corporation.

1. May these five commissioners vote on the sale of leased county assets to the Corporation, especially if the sale is for less than fair market value?

2. If the answer to Question 1 is yes, may the five commissioners vote on the sale without disclosing their conflict of interest?

OPINIONS

1. We think a court would conclude that, under Tenn. Code Ann. § 12-4-101(a), the commissioners are not prohibited from voting on a contract to sell county property to the Corporation. In addition, no statute would prevent county commissioners from disposing of real property for less than assessed fair market value, so long as, in the commissioners' judgment, the transaction as a whole is in the county's best interest. In the past, this Office has advised a county commissioner to abstain from voting on an appropriation of county funds to a non-profit corporation for which the commissioner acts as a director. But abstention is not required under the statute.

2. If the commissioners have a pecuniary interest in the sale of county assets to the Corporation, then they are indirectly interested in the contract under Tenn. Code Ann. § 12-4-101(b) and must disclose that interest. Whether the commissioners have such an interest depends on the facts and circumstances, particularly the importance of this contract to the business operations of the Corporation.

ANALYSIS

1. Voting on the Sale

This opinion concerns the proposed sale of county real estate to Sumner Regional Health Systems, a Tennessee non-profit corporation (the "Corporation"). The chairman and four members of the Sumner County Board of Commissioners are members of the board of directors of the Corporation. The Corporation pays these five members a monthly fee. These five members have also signed a confidentiality agreement with the Corporation that prohibits them from revealing facts related to the Corporation and hospital operations. The agreement prohibits these five members from disclosing these facts to the other members of the Sumner County Board of Commissioners.

In 1994, the Sumner County Board of Commissioners and the Sumner County General Hospital District, a board created by 1957 Tenn. Priv. Acts Ch. 32 to operate the Sumner County Hospital, executed a forty-year lease agreement with the Corporation. Under the lease agreement, the Corporation was leased county-owned and improved real estate. Apparently, the county is now considering selling the leased county land to the Corporation. The first question is whether the five commissioners who are also on the board of directors of the Corporation may vote on the sale of the property to the Corporation, especially if the sale is for less than fair market value.

As an initial matter, this Office has not reviewed all the documents relevant to these transactions, and is relying on the representations in the request. Other facts and circumstances could be relevant to the questions posed. For example, it is not clear how five members of the Sumner County Board of Commissioners came to be on the board of directors of a non-profit corporation to which the county has apparently leased the county hospital, and why they have signed a confidentiality agreement that prevents them from disclosing facts about the county hospital to other county commissioners. Counties have broad authority with regard to the operation and management of county-owned hospitals. Under Tenn. Code Ann. § 5-1-124, for example, any county that owns and operates a hospital is authorized to enter into any contract or agreement that any privately-owned hospital operating under Title 68 is authorized to enter into. In addition, private act hospital authorities, which may include a county commission and a hospital district created by private act, are accorded extensive powers under Tenn. Code Ann. §§ 7-57-601, *et seq.* Assuming the Corporation is independently chartered, and was not created by the county commission, it is possible that the lease of the county hospital requires several commissioners to serve as directors of the Corporation. This Office, further, is unable to provide advice to the commissioners regarding the duty they owe to the Corporation as directors. That issue should be addressed by the attorney for the Corporation.

Tenn. Code Ann. §12-4-101(a) prohibits any officer "whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any . . . county, . . . or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract." The term "directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the

controlling interest. "Controlling interest" includes the *individual* with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation. Based on the facts presented to this Office, the contract for the sale of county assets is not with any of the county commissioners personally. We are not aware of the total membership of the board of directors of the Corporation. But even if the five commissioners, as a group, make up a majority of the board of directors of the Corporation, we think a court would conclude that no individual commissioner has a controlling interest in the Corporation as that term is defined in Tenn. Code Ann. § 12-4-101(a), especially since that statute refers to actual ownership, and not merely governing authority. Since the Corporation is a non-profit corporation, it does not have shareholders — that is, owners — as such. For these reasons, we think a court would conclude that, under Tenn. Code Ann. § 12-4-101(a), the commissioners are not prohibited from voting on a contract to sell county property to the Corporation. This Office has concluded in the past that a county commission member's service on the board of a non-profit corporation that receives county funds is not a conflict of interest under Tenn. Code Ann. § 12-4-101(a) so long as the member receives no benefit from the appropriation. Op. Tenn. Atty. Gen. 88-122 (July 13, 1988). In that opinion, we advised a commissioner to abstain from voting on an appropriation of county funds to a non-profit corporation for which the commissioner served as a director. But abstention is not required by law. *See also* Op. Tenn. Atty. Gen. 98-109 (June 11, 1998) (contract between a county and a nonprofit corporation for which some county commissioners had volunteered).

The request also refers to a possibility that the sale price of the property may be less than fair market value. We know of no statutory provision that would prevent county commissioners from disposing of real property for less than assessed fair market value, so long as, in the commissioners' judgment, the transaction as a whole is in the county's best interest. Tenn. Code Ann. § 5-7-101 (county may make "any order" for the disposition of its property).

2. Disclosing the Commissioners' Status as Corporation Directors

The second question is whether the commissioners must disclose their status as directors of the Corporation before they may vote on the asset sale. Under Tenn. Code Ann. § 12-4-101(b):

> It is unlawful for any officer, . . . whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any . . . county, . . . shall or may be interested, to be indirectly interested in any such contract unless the officer publicly acknowledges such officer's interest. "Indirectly interested" means *any contract in which the officer is interested but not directly so,* but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality or county.

(Emphasis added). This Office has indicated in the past that the interest referred to under the statute is a pecuniary interest. Op. Tenn. Atty. Gen. U96-043 (June 4, 1996). Under this statute, a commissioner must disclose any indirect pecuniary interest in a contract with the county. This Office

has concluded that it is not an indirect conflict of interest under Tenn. Code Ann. § 12-4-101(b) for a county commissioner to serve on the board of directors of a non-profit corporation, so long as the commissioner receives no benefit from the appropriation of county funds to the corporation. Op. Tenn. Atty. Gen. 88-122 (July 13, 1988). The request indicates that each commissioner who serves on the board of the Corporation receives a monthly fee of five hundred dollars. The request does not indicate whether this fee would be increased or the commissioners would otherwise benefit if the county assets in question are sold to the Corporation. If the commissioners have a pecuniary interest in the sale of county assets to the Corporation, then they are indirectly interested in the contract under Tenn. Code Ann. § 12-4-101(b) and must disclose that interest. Whether the commissioners have such an interest depends on the facts and circumstances, particularly the importance of this contract to the business operations of the Corporation.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Diane Black
State Representative
107 War Memorial Building
Nashville, TN 37243-0145