STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 12-09

Conflicts of Interest: Joint Economic and Community Development Boards

QUESTIONS

1. Does it violate any Tennessee law for a member of the Joint Economic and Community Development Board of Lawrence County to benefit, directly or indirectly, from the Board's actions?

2. Does Tennessee law permit a member of the Joint Economic and Community Development Board of Lawrence County to sell real property to a business the Board recruited to locate in the county?

OPINIONS

1. Tennessee public policy strongly proscribes government officials from placing themselves in a position in which personal interest conflicts with public duty. This policy is reflected in the conflict of interest provisions governing the award of public contracts at Tenn. Code Ann. § 12-4-101. These provisions are applicable to members of the Lawrence County Joint Economic and Community Development Board ("the Board"). Under subsection (a)(1) of this statute, a Board member may not be a direct party to a contract that he or she has a duty as a Board member to vote for, let out, overlook, or superintend. Furthermore, any business in which the Board member has the controlling interest may not be a party to a contract that the Board member has a duty to vote for, let out, overlook, or superintend. Under subsection (b) of this statute, a Board member must publicly disclose any indirect pecuniary interest in a contract that the member has an official duty to vote for, let out, overlook, or superintend. Board members also may be subject to stricter conflict of interest standards established by the Interlocal Agreement creating the Board, any policies or bylaws governing the Board's operation or any third party contract to which the Board is a party. Accordingly, whether a conflict of interest exists and the appropriate mitigation of any such conflict of interest will necessarily depend on the specific facts and circumstances surrounding the transaction.

2. Under Tenn. Code Ann. § 12-4-101 the Board would have no duty to vote for, let out, overlook, or superintend a sale of land from a private individual to a privately owned business. Thus, Tenn. Code Ann. § 12-4-101(a) would not prohibit a Board member from entering into such a contract. The answer might be different if the Board were financing the sale, were a party to the contract, or played some other supervisory role in purchasing the land. By its terms, Tenn. Code

Ann. § 12-4-101(b) requires a Board member to disclose an indirect pecuniary interest in a contract that the Board has a duty to vote for, let out, overlook, or superintend. Such disclosure would include a Board member benefiting by the sale of real property to an entity seeking such a contract. If the Board has no such duty to vote for, let out, overlook or superintend the contract, then Tenn. Code Ann. § 12-4-101(b) would not apply. Nonetheless, given Tennessee's strong public policy disfavoring conflicts between an official's public duties and his or her personal interests, any doubt should be resolved in favor of the Board member at least making a public disclosure of his or her possible conflict of interest where the Board recruits a company to the county and the Board member may benefit from a sale of real property to the recruited company.

ANALYSIS

This opinion concerns the existence of potential conflicts of interest, and how to mitigate such conflicts, for members of the Joint Economic and Community Development Board of Lawrence County, Tennessee. Tenn. Code Ann. § 5-1-113 authorizes the county commission and legislative body of one or more cities within the county

> to enter into any such agreements, compacts or contractual relations as may be desirable or necessary for the purpose of permitting the county and the municipality or municipalities to conduct, operate or maintain, either jointly or otherwise, desirable and necessary services or functions, under such terms as may be agreed upon by the county legislative body and the chief legislative body of the municipality or the chief legislative bodies of the municipalities.

Tenn. Code Ann. § 5-1-113. Tenn. Code Ann. § 6-58-114(b) requires each county to establish a joint economic and community development board by an interlocal agreement under Tenn. Code Ann. § 5-1-113.

The Board under consideration was established by an interlocal agreement among Lawrence County, Tennessee, and the cities of Lawrenceburg, Loretto, Ethridge, and St. Joseph, in accordance with these statutes. *See* Laura J. Newcome, *Independent Auditor's Report on Joint Economic and Community Development Board of Lawrence County*, *Tennessee* (Dec. 16, 2010), at 4, http://www.comptroller1.state.tn.us/ca/index.asp. The Board is charged with fostering communication and facilitating economic and community development between and among governmental entities, industry and private citizens. *Id.*

The question posed is whether a member of the Board may personally benefit, directly or indirectly, from the Board's activities. Both Tennessee and federal law have long recognized that public officials have a responsibility to mitigate conflicts of interest between their public duties and their personal interests. The United States Supreme Court has recently articulated the history of such standards, citing among other examples Thomas Jefferson's adoption of a recusal rule when he was President of the United States Senate. This rule stated:

> Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such interest has appeared, his voice [is] disallowed, even after a division. In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own case, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to.

Nevada Commission on Ethics v. Carrigan, ___U.S.___, 131 S. Ct. 2343, 2348 (2011) (quoting *A Manual of Parliamentary Practice for the Use of the Senate of the United States* 31 (1801)). The Court further observed that a "number of States, by common-law rule, have long required recusal of public officials with a conflict." *Id*. at 2349.

Similarly Tennessee recognizes a strong common law policy that precludes public officials from placing themselves in a position where their personal interests conflict with their public duties. As this Office has observed:

> At common law, "the essence of the offense [of having a conflict of interest] was acting or appearing to act inconsistently with the best interest of the public…" Note: *Conflicts of Interests: State Government Employees*, 47 Va. L.R. at 1048. In *Anderson v City of Parsons*, 209 Kan. 337, 496 P.2d 1333 (1972), the common law principle was described as not permitting the public officer "to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public." *Id*. at 1337. This policy is not limited to a single category of officers, but applies to all public officials. *Low v. Madison*, 135 Conn. 1, 60 A.2d 774 (1948); *Housing Authority of the City of New Haven v. Dorsey*, 164 Conn. 247, 320 A.2d 820 (1973), *cert. denied* 414 U.S. 1043.
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> The common law principle has been followed in several opinions of this office. For example, this office has stated:
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> > [t]here exists a strong public policy which opposes an official placing himself in a position in which personal interest may conflict with public duty…A public office is a trust conferred by the public. The duties of that office must be exercised with fairness and impartiality. The good faith of the officer is not a consideration, for the policy exists to prevent an officer being influenced by anything other than the public good.
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> Op. Att. Gen. 83-278 (August 15, 1983). See also, Op. Att. Gen. 78-088 (May 16, 1978).

Op. Tenn. Att'y Gen. 85-036, at 2 (February 14, 1985).

Thus, a public office is a trust conferred by the public. The duties of that office must be exercised with fairness and impartiality. The good faith of the officer is not a consideration because the policy exists to prevent an officer from being influenced by anything other than the public good.

Tennessee's common law policy is reflected in the general conflict of interest standards for public officials, including members of the Board, set forth at Tenn. Code Ann. § 12-4-101. This statute addresses contracts that a State or local officer has a duty to let out or superintend. Under subsection (a) of this statute, a State or local officer may not be directly interested in any contract that he or she has an official duty to "vote for, let out, overlook, or in any manner to superintend." The statute provides in relevant part:

> It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, *or other political subdivision created by statute* shall or may be interested, to be directly interested in such contract. "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. This subdivision (a)(1) shall not be construed to prohibit any officer, committeeperson, director, or any person, other than a member of a local governing body of a county or municipality, from voting on the budget, appropriation resolution, or tax rate resolution, or amendments thereto, unless the vote is on a specific amendment to the budget or a specific appropriation or resolution in which such person is directly interested.

Tenn. Code Ann. § 12-4-101(a)(1) (emphasis added). Under this provision, a Board member may not be a direct party to a contract that he or she has a duty as a Board member to vote for, let out, overlook, or superintend. In addition, any business in which the Board member has the controlling interest may not be a party to a contract that the Board member has a duty to vote for, let out, overlook, or superintend.

Tenn. Code Ann. § 12-4-101(b) further provides that a State or local officer must publicly disclose any indirect interest in a contract that he or she has the official duty to vote for, let out, overlook, or superintend. The statute includes any contract in which the officer is interested, but not directly so. Subsection (b) provides:

> It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, *or other political subdivision created by statute* 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.

Tenn. Code Ann. § 12-4-101(b) (emphasis added). This Office has confirmed that the term "indirectly interested" refers to a pecuniary interest. Op. Tenn. Att'y Gen. 09-175, at 3 (November 6, 2009) (citing Op. Tenn. Att'y Gen. U96-043 (June 4, 1996)). Thus, a Board member must disclose any indirect interest in a contract that the member has an official duty to vote for, let out, overlook, or superintend.

In addition, Board members may be subject to stricter conflict of interest standards established by the Interlocal Agreement creating the Board, any policies or bylaws governing the Board's operation or any third party contract to which the Board is a party. This Office has obtained a copy of the Interlocal Agreement creating the Board and has observed no stricter conflict of interest standard in the Agreement itself.

In sum, the aforementioned standards govern what actions a public official must take where his or her personal interests directly or indirectly conflict with his or her public duties. Whether a conflict of interest does exist and the appropriate mitigation of any such conflict will depend on the specific facts and circumstances surrounding the transaction.

This request also asks whether Tennessee's laws would prohibit a Board member from selling real property to a business that the Board recruited to locate in the county. Again, a definitive answer to this question would depend on all the facts and circumstances of the transaction, especially the Board's exact role in the recruitment of the company and the land sale. *See* Op. Tenn. Att'y Gen. 04-016 (February 5, 2004) (sale of county commissioner's land to county). This Office assumes the Board member is selling land directly to the company. Ordinarily, the Board would have no duty to vote for, let out, overlook, or superintend a sale of land from a private individual to a privately owned business. Thus, Tenn. Code Ann. § 12-4-101(a) would not prohibit a Board member from entering into the contract. The answer might be different if the Board were financing the sale, were a party to the contract, or played some other supervisory role in purchasing the land. *See* Op. Tenn. Att'y Gen. 98-221 (November 25, 1998) (member of industrial development board owning land within industrial park); Op. Tenn. Att'y Gen. U95-061 (July 13, 1995) (conflict of interest of member of industrial development board).

This same analysis should be applied to determine whether, under Tenn. Code Ann. § 12-4-101(b), the Board member must disclose his or her sale of real property to a company the Board recruited to locate in the county. By its terms, Tenn. Code Ann. § 12-4-101(b) applies when a Board member has a pecuniary interest in a contract that the Board has a duty to vote for, let out, overlook, or superintend. Thus, if the company has a contract that the Board has a duty to vote for, let out, overlook, or superintend, the Board member selling real property to that company in connection with this contract is required to publicly disclose this interest. If the Board has no such duty with regard

to the company locating in the county, Tenn. Code Ann. § 12-4-101(b) would not apply. Nonetheless, given the strong Tennessee policy disfavoring conflicts between an official's public duties and his or her personal interests, any doubt should be resolved by the Board member at least making a public disclosure of his or her possible conflict of interest where the Board recruits a company to the county and the Board member may benefit from a sale of real property to the company recruited.

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