

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

February 5, 2004

Opinion No. 04-016

Conflict of Interest: Sale of County Commissioner's Property

QUESTIONS

1. May a county commissioner legally sell land to the county highway department, which will not purchase such land without county commission approval, provided he abstains from voting on the transaction and states his interest, or would the transaction violate a criminal law?
2. Would the transaction be excluded from Tenn. Code Ann. § 12-4-101 because it concerns a single sale of real property?
3. Would the sale of the property be voidable or subject to rescission upon application of any party, person, or entity?
4. Would the county commissioner be disqualified from voting on a budget funding the purchase?
5. Would the county commissioner be disqualified or rendered ineligible to continue to serve as a county commissioner?

OPINIONS

1. The proposed transaction is prohibited under Tenn. Code Ann. § 12-4-101(a)(1), but violation of the statute is not a crime.
2. No.
3. Under Tenn. Code Ann. § 12-4-102, an officer who enters into a contract in violation of Tenn. Code Ann. § 12-4-101 must forfeit compensation under the contract. A suit to enforce this provision is a *quo warranto* action that ordinarily must be brought by the District Attorney General.
4. Because the proposed transaction is entirely prohibited, this question is moot.
5. Under Tenn. Code Ann. § 12-4-102, an officer who is directly interested in a contract in violation of Tenn. Code Ann. § 12-4-101(a)(1) is to be dismissed from office and is ineligible to serve in the same or similar position for ten years.

ANALYSIS

1. Sale of Property to County

This request concerns a possible sale of land owned by a county commissioner. The land adjoins property owned by the county highway department and, because of its location, is uniquely suitable for highway department purposes. Before entering into the purchase, the highway department would require a resolution from the county commission to approve the purchase. On any vote before the county commission relating to the property, the county commissioner would state his interest in the transaction and abstain from participating in the vote. The purchase price of the property would be reasonable.

The first question is whether this transaction would violate any criminal laws. Tenn. Code Ann. § 12-4-101(a) provides in relevant part:

(a) (1) 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 any 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. The provisions of this subdivision shall not be construed to prohibit any officer, committee person, 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.*

(Emphasis added). Under this provision, a county commissioner may not be directly interested in a contract that he or she has a duty to vote for or supervise in any manner. A county commissioner is directly interested in a contract for the sale of his or her land. The opinion request states that the county highway department will not purchase the land without the county commission’s approval. Thus, under the proposed transaction, the county commissioner would have a duty to vote for or superintend in some manner the contract. Accordingly, the contract is prohibited under Tenn. Code Ann. § 12-4-101(a)(1). A violation of the statute carries the penalties set forth in Tenn. Code Ann.

§ 12-4-102. A suit to enforce these penalties is in the nature of a *quo warranto* proceeding brought through the District Attorney General. *State ex rel. Odom v. Ridley*, 730 S.W.2d 318 (Tenn. 1987); *State ex rel. Abernathy v. Anthony*, 206 Tenn. 597, 335 S.W.2d 832 (Tenn. 1960). But violation of the statute is not a criminal offense.

2. Exceptions from the Statute

The second question is whether Tenn. Code Ann. § 12-4-101 would prohibit a one-time sale of real estate from a county commissioner to the county or the county highway department. As set forth above, Tenn. Code Ann. § 12-4-101(a)(1) prohibits an official from being directly interested in “any contract” that he or she has a duty to vote on or supervise.

An exception appears in Tenn. Code Ann. § 12-4-101(b). That statute provides:

(b) 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.*

(Emphasis added). Under the last sentence in this provision, an officer may be directly interested in a contract that he or she votes on or supervises, so long as the officer is the “sole supplier of goods or services” in a municipality or county. The statute contains no exception for land sales. Tenn. Code Ann. § 12-4-101(a)(1), therefore, prohibits a county commissioner from voting on or supervising a contract for the sale of his or her land.

3. Enforceability of Contract Entered into in Violation of Tenn. Code Ann. § 12-4-101

The next question is whether a sale that violates the conflict of interest provisions would be voidable or subject to rescission upon application of any party, person, or entity. Under Tenn. Code Ann. § 12-4-102, an official who enters into a contract in violation of Tenn. Code Ann. § 12-4-101 must forfeit compensation received, be removed from office, and barred from holding similar office for ten years. These penalties have been a part of the statute since it was first enacted in 1870. 1869-70 Tenn.Pub.Acts Ch. 92 (XCII). A suit to enforce these penalties is in the nature of a *quo warranto* proceeding brought through the District Attorney General. *State ex rel. Odom v. Ridley*, 730 S.W.2d 318 (Tenn. 1987); *State ex rel. Abernathy v. Anthony*, 206 Tenn. 597, 335 S.W.2d 832 (Tenn. 1960).

Tennessee courts have found that an official who makes a contract in violation of earlier versions of the statute may not recover payment under the contract and is liable to pay back any compensation he or she received under the contract. *Crass v. Walls*, 36 Tenn. App. 546, 259 S.W.2d 670 (Tenn. Ct. App. 1953) (services for street repair and garbage pickup by partnership of which the mayor was one of two partners); *State ex rel. Kirkpatrick v. Tipton*, 670 S.W.2d 224 (Tenn. Ct. App. 1984) (mayor was required to pay back the salary the mayor's construction company paid mayor attributable to construction contract with the city). The Tennessee Supreme Court has also implied that a sale of land by a city commissioner to the city could be declared void just like a service contract. *State ex rel. v. Perkinson*, 159 Tenn. 442, 19 S.W.2d 254 (Tenn. 1929). Since that was an ouster action, however, the Court did not directly rule on the issue.

4. Authority to Vote on Budget

The next question is whether the county commissioner would be prohibited from voting on the budget funding the purchase. Because the proposed transaction is entirely prohibited as discussed above, this question is moot.

5. Disqualification from Office

The last question is whether the county commissioner would be disqualified or rendered ineligible to continue to serve as a county commissioner if the transaction is completed. Tenn. Code Ann. § 12-4-102 states:

Should any person, acting as such officer, committee member, director, or other person referred to in § 12-4-101, be or become directly or unlawfully indirectly interested in any such contract, such person shall forfeit all pay and compensation therefor. *Such officer shall be dismissed from such office the officer then occupies, and be ineligible for the same or a similar position for ten (10) years.*

(Emphasis added). An officer who is directly interested in a contract in violation of Tenn. Code Ann. § 12-4-101(a)(1), therefore, is to be dismissed from office and is ineligible to serve in the same or similar position for ten years.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Garry Brown
District Attorney General
113 West Eaton Street, P.O. Box 145
Trenton, TN 38381