

Unsealed by the Board of Commissioners 05/23/2011.

**SEALED MINUTES
TRANSYLVANIA COUNTY BOARD OF COMMISSIONERS
CLOSED SESSION MEETING – April 27, 2009**

Closed Session #1

Baxley Case

Pursuant to NCGS 143-318.11 (a) (3), to consult with an attorney in reference to the lawsuit Transylvania County versus Michael Baxley and Charlotte Baxley, closed session was entered into at 8:00 p.m. Present were Chairman Chappell, Commissioners Bullock, Hawkins and Hogsed, County Attorney Curtis Potter, Attorney Sean Perrin, County Manager Artie Wilson, Sheriff David Mahoney and Clerk to the Board Trisha McLeod.

Attorney Sean Perrin offered an overview of the lawsuit and a timeline of events that either have occurred or will occur.

Timeline of events:

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| 08/21/2008 | Complaint filed against Baxley's Training Facility, Michael Baxley and Charlotte Baxley (noted that the County can only enforce the Noise Ordinance; the folks who live near the Baxley Training Facility are the only ones who can sue for violations for dust, etc.) |
| 08/29/2009 | Notice of hearing for September 29 to hear motion for preliminary injunction |
| 09/29/2009 | Hearing on motion for preliminary injunction, and continued over plaintiff's objections by Judge Powell |
| 10/27/2008 | Hearing on motion for preliminary injunction (Judge Powell granted County's request for preliminary injunction requiring Mr. Baxley to adhere to the Noise Ordinance approximately 1 week after the hearing) |
| 12/05/2009 | Order signed by Judge Powell |
| 03/26/2009 | Motion to hold defendants in civil contempt filed |
| 04/13/2009 | Hearing for plaintiff's motion to hold defendants in civil contempt, and motion denied by Judge Hassell (Judge Hassell did not think Mr. Baxley willfully violated the order; Judge admonished Mr. Baxley) |
| 05/26/2009 | Mediation scheduled with Max Cogburn, Jr. |
| 08/03/2009 | If mediation fails, trial setting on this date |

Mr. Perrin asked for direction from the Board as to what options to offer in mediation. He suggested further limiting the time and operation of the bike track, limiting the number of bikes on the track at one time, and limiting the size of the bikes. Mr. Perrin noted that mediation will

not be successful if the Board's goal is to shut down the bike track. The trial date is set for August 3, 2009 and there is no guarantee the case will be heard at that time. If not, the next calendars for Transylvania County are September 28, 2009 and October 26, 2009. Mr. Perrin also commented there is a chance the County could lose at trial.

If the case goes to trial, Mr. Perrin would present evidence from the residents in the Cherryfield community and the Sheriff's Department. A jury would decide whether or not Mr. Baxley violated the Noise Ordinance. If the jury rules he did not violate the Noise Ordinance, the County loses the case. If the jury rules Mr. Baxley did violate the Noise Ordinance, the Judge will offer remedies in the case, possibly asking for a recommendation from the County. Mr. Perrin noted it will cost the County \$25,000 to \$30,000 to try the case.

Commissioners discussed the recent civil contempt hearing in which the judge ruled in favor of Mr. Baxley. A civil contempt motion was filed because Mr. Baxley violated the court order by continuing to violate the Noise Ordinance. Mr. Perrin said the County's Noise Ordinance is well written and would pass a constitutional challenge; however some judges struggle with ruling on noise violations in which the Noise Ordinance does not include decibel levels. The hearing judge, Judge Hassell, made his decision based on the fact that what may be unreasonable to one person is not unreasonable to Mr. Baxley and those riding bikes at the track. Furthermore, Mr. Baxley argued that he does not know what he does differently each weekend because sometimes he is issued a citation and other times he is not. Judge Hassell believed Mr. Baxley did not willfully and knowingly violate the court order. Mr. Perrin suggested that each time a deputy is called out for a possible noise violation; the deputy should explain why a citation is or is not being issued. In order to prevail in this case, deputies will need to continue to respond to every call and issue citations when violations occur. Mr. Perrin also suggested deputies issue a warning first, and if the noise is not reduced in a reasonable time frame a citation should be issued. It was noted that if a determination had been made on any of the criminal violations that Mr. Baxley was in violation of the Noise Ordinance, Judge Hassell may have ruled differently in the civil contempt hearing.

Commissioners had a lengthy discussion about the parameters to offer in mediation. It was noted that Commissioners do not want to shut down the bike track but rather for Mr. Baxley to comply with the Noise Ordinance. Mr. Perrin suggested limiting the number of hours, the age of the riders, etc. on a trial basis, possibly for 30 to 60 days. If the complaints cease or are reduced, the County will know the mediation and agreement were successful. If not, the County will proceed with the next step in the process. The Sheriff said he feels that residents of the Cherryfield community will continue to complain as long as the bike track remains in operation. Mr. Perrin responded that the County can only seek to enforce the Noise Ordinance; however those residents have the option of filing a civil private nuisance lawsuit against Mr. Baxley that will address the noise, dust, air quality, congestion, etc.

The Manager suggested that Mr. Perrin draft an agreement that includes the discussed parameters. Commissioners can then meet in closed session at the next meeting to discuss the draft agreement. In the mean time, Commissioners asked the Sheriff to first issue warnings to Mr. Baxley and if the noise does not desist, to issue citations.

Commissioner Hogsed said he would like Mr. Perrin to continue filing contempt motions. Mr. Perrin said he is not sure how effective that will be because of the timing of the mediation and the trial date. After discussion, Commissioners agreed to discuss this further at the next meeting, citing they do not want this case to appear to be a personal issue.

Mr. Perrin said it is important to realize that the County won the preliminary injunction hearing which means the judge believes the County has a reasonable likelihood of success at trial. Chairman Chappell asked the Manager to report on how much has been spent on the case at this point. The Manager reported that the County has paid \$23,494.09 to Mr. Perrin and \$8,014.56 to David Neumann for a total of \$31,508.65.

Mike Hawkins, Chair
Transylvania County Board of Commissioners

ATTEST:

Trisha M. Hogan
Clerk to the Board