

Unsealed by Board of Commissioners 05/29/2012.

SEALED MINUTES
TRANSYLVANIA COUNTY BOARD OF COMMISSIONERS
January 11, 2010 – CLOSED SESSION

Closed Session #1 Baxley Case

Pursuant to NCGS 143-318.11 (a) (3) to consult with an attorney reference Transylvania County versus Michael and Charlotte Baxley, closed session was entered into at 9:23 p.m. Present were Chairman Chappell, Commissioners Bullock, Hawkins, Hogsed and Phillips, County Manager Artie Wilson, County Attorney Curtis Potter, Attorney Sean Perrin, and Clerk to the Board Trisha Hogan.

Attorney Sean Perrin updated the Board of Commissioners on the counter claims filed by Mr. Baxley and discussed the pros and cons of moving the case to Federal Court.

Mr. Perrin informed the Board that on December 2, 2009 Mr. Baxley fired his attorney Ed Bleyнат and hired local attorney Don Barton to represent him. On December 3, 2009, Mr. Barton filed a motion to amend his defenses to include two counter claims. The first counter claim is inverse condemnation against the County and the second claim is civil conspiracy against Commissioners Bullock and Hogsed and Representative David Guice (former County Commissioner). On December 14, 2009 the motion to amend was heard before Judge Bridges and she granted the counter claims. The order was signed on December 23, 2009. The County has until January 25, 2010 to respond.

On the claim of inverse condemnation, Mr. Barton has claimed that because of the Noise Ordinance Mr. Baxley has lost about \$14,000 per month in revenue from the motorcycle track and his property value has decreased by approximately \$200,000. Mr. Perrin said he does not think the claim has any merit because under the law for inverse condemnation there has to be a “taking” which means to effectively deprive someone of all their property, not just a portion of it. He said Mr. Baxley can still use his property for whatever he wants, even a motor bike facility, but he still has to comply with the Noise Ordinance.

Mr. Perrin said the second claim of civil conspiracy has less merit than the first. The theory behind this claim is that Commissioners Hogsed and Bullock and Representative Guice secretly met and decided they wanted to put Mr. Baxley out of business. Then they voted for the Noise Ordinance and as a result of that vote Mr. Baxley has lost a lot of money. Mr. Perrin pointed out there is a doctrine in North Carolina called legislative immunity. The Board of Commissioners, State legislators, and other elected officials can not be sued for how they vote. Sedgewick CMS, the County’s insurance company, has agreed to cover the attorney fees for Commissioners Bullock and Hogsed and Representative Guice, other than the County’s \$5,000 deductible, and will cover the fees until the claim is disposed.

Mr. Perrin noted that Mr. Baxley was recently found not guilty of the criminal violations of the Noise Ordinance; however he does not think that will affect the civil case. There are different standards of proof in criminal and civil courts. In criminal court, one has to prove guilt or innocence beyond a reasonable doubt. In civil court, one has to present preponderance of the evidence. Also the parties are different, the first being the State of North Carolina and the other being Transylvania County versus Mr. Baxley.

Mr. Perrin asked for guidance on how to address the counter claims. The State court hearing is scheduled for May 24, 2010. In his counter claims, Mr. Baxley has alleged with the inverse condemnation claim that the County has violated his federal due process rights (14th amendment rights). As a result of that allegation the County now has the option and opportunity to move that case to federal court or remain in State court. The advantage of remaining in State court is that the case could probably be disposed of by May. The advantage of moving to federal court is the likelihood that the County will prevail is greater, judges are elected for life and immune from political pressure, and Mr. Baxley's attorney may not be as familiar with federal court. Mr. Perrin recommended moving the case to federal court because it provides a better venue to defend the counter claims. If the County prevails on the counter claims, the civil case should be remanded back to State court.

In response to questions from Commissioners, Mr. Perrin said he is confident the counter claims have no merit and would prefer to move the case to federal court. The western district court tries to resolve cases within a year. After the hearing and dismissal, the federal court should remand the case back to State court. They could keep the case in federal court, but it is highly unlikely. Moving the case to federal court will likely add six to eight months to the length of the case. Mr. Perrin said he intends to depose Mr. Baxley at some point and the insurance company will cover those costs.

Commissioners agreed that the County needs to aggressively defend itself against the counter claims since they have no merit and they will rely on Mr. Perrin's advice and expertise.

Mr. Perrin also noted that Commissioners are protected by legislative deliberator privilege, meaning a person can not question their vote on a matter. He said it is easier in federal court to prevent Mr. Baxley from asking Commissioners and Representative Guice those questions than it would be in State court. If the Board directs him to move the case to federal court, he would file a notice of removal from State court prior to January 25, 2010. A response to the complaint must then be filed in federal court within five days. Motions in federal court are reviewed and heard via written motion. They are not heard orally. Mr. Barton would then have two weeks to respond to the County's motion to dismiss. In turn, Mr. Perrin has seven days to respond to Mr. Barton. Mr. Perrin said the court should take two to three months to decide the case.

By consensus, Commissioners directed Mr. Perrin to move the case to federal court. Mr. Perrin said he would follow up with the Board via a memo to the County Manager.

Commissioner Phillips moved to leave Closed Session, seconded by Commissioner Bullock and unanimously approved.

Mike Hawkins, Chair
Transylvania County Board of Commissioners

ATTEST:

Trisha M. Hogan, Clerk to the Board