

Unsealed by Board of Commissioners 05/29/2012.

SEALED MINUTES
TRANSYLVANIA COUNTY BOARD OF COMMISSIONERS
April 26, 2010 – CLOSED SESSION

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 9:20 p.m. Present were Chairman Chappell, Commissioners Bullock, Hawkins, Hogsed and Phillips, County Manager Artie Wilson, County Attorney David Neumann, Attorney Sean Perrin, and Clerk to the Board Trisha Hogan.

Attorney Sean Perrin updated the Board of Commissioners on the status of the counterclaims made by Mr. Baxley.

Mr. Perrin has filed a motion for summary judgment on the two counterclaims. He reported that Mr. Baxley's attorney Don Barton filed a dismissal on the date before the hearing which he is allowed to do. Mr. Barton re-filed the counterclaims as they were on Thursday of last week with one exception being that Mr. Baxley states he has ceased operations completely. Mr. Perrin said this should be taken into account and at some point Commissioners should decide whether or not to proceed with the quest for injunctive relief. The fact that the counterclaims have not been resolved is prohibiting the County from further negotiations with Mr. Baxley.

Mr. Perrin also reported that on Friday he filed a motion to request reimbursement for the cost of depositions for Commissioner Bullock, Representative Guice, and the plaintiff. The cost of the depositions was \$946.70. Mr. Barton agreed to the motion and in turn the County agreed to allow Mr. Barton to amend his counterclaims. He noted that as a practical matter, Mr. Barton's motion to amend the counterclaims would have been granted and there are no grounds for the County to object.

The trial date will likely be scheduled for August 2, 2010 or October 11, 2010 which is at the discretion of the Trial Court Administrator. The trial date was rescheduled from May 24, 2010 because the County is allowed 60 days to respond to the counterclaims. Judge Ginn from Madison County will likely be the judge. In the mean time, Mr. Perrin will seek to dismiss the counterclaims against Commissioners Bullock and Hogsed and Representative Guice. The hearing will be scheduled for May 24, 2010 or June 7, 2010 which is again at the discretion of the Trial Court Administrator. Once the counterclaims are disposed of, the County will be in a better position to negotiate with Mr. Baxley.

In response to a question from Commissioner Hawkins, Mr. Perrin said if summary judgment is not granted, the case goes to trial. He noted that under NC Law, if the County files the summary judgment based on sovereign immunity, the County can appeal directly to the NC Court of Appeals. He does not know if this is worthwhile, but it is an option for the County. Mr. Perrin does not believe the counterclaims will survive summary judgment because they have no merit.

Mr. Perrin noted that Mr. Baxley claimed in his deposition that he expected a profit of approximately \$200,000 over two years and he alleged that the County's enforcement of the Noise Ordinance prevented him from making that profit. The case law says the loss of profit does not equal a taking of property if the property can be used for other things. In his deposition, Mr. Baxley admitted he can use his property for other things. The case law also indicates it does not

matter how much the person would have to put into the property to change it from one use to another, it just matters if it can be used for something else.

Mr. Perrin again pointed out that at some point Commissioners need to determine how they want to progress with this case. He noted that the insurance company will no longer cover legal expenses once the counterclaims are disposed.

Commissioner Hawkins said he read that one allegation by Mr. Baxley is that former Commissioner Guice in an open meeting mentioned that the County has to close down the track and he assumed that is part of the support for their counterclaim. Mr. Perrin does not believe that statement was expressed in the minutes. He said his response to that claim would be that Commissioners have to make decisions when they are presented with a problem and that may have been what former Commissioner Guice was doing. Mr. Perrin pointed out that the Noise Ordinance was not directed toward Mr. Baxley directly but rather applies to the County as a whole.

Commissioners briefly discussed the reasons the County began working on revisions to the Noise Ordinance, noting it was not related to Mr. Baxley and his bike track.

This meeting was called for information purposes only and Mr. Perrin is not seeking guidance at this time. In the near future he expects to meet with the Board again about how to move forward after the summary judgment motion is heard.

Chairman Chappell moved to leave closed session, seconded by Commissioner Bullock and unanimously carried.

Mike Hawkins, Chair
Transylvania County Board of Commissioners

ATTEST:

Trisha M. Hogan, Clerk to the Board