

**SEALED MINUTES  
TRANSYLVANIA COUNTY BOARD OF COMMISSIONERS  
CLOSED SESSION – June 22, 2009**

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 9:25 p.m. Present were Chairman Chappell, Commissioners Bullock, Hawkins, Hogsed and Phillips, County Attorney Curtis Potter, County Manager Artie Wilson, and Clerk to the Board Trisha McLeod.

County Attorney Curtis Potter discussed the report submitted by the evaluator, Mr. Crawford. The report indicates there were no more than 19 bikes operating on the track during his visit. The age of the riders did not exceed 18 years of age and most of the riders were kids. The most crucial information was not obtained, that being the size of the bikes operating on the track. To a large extent the report does not put the County in a position any different that it in was before the trial period occurred.

Mr. Potter offered Commissioners the following options in moving forward:

- Continue with mediation which could take different forms
- Agree that the County attempted to mediate and Mr. Baxley did not comply with what he agreed he would do by putting larger bikes on the track in larger numbers in order to determine which bikes cause the most noise; move to trial

Ceasing mediation does not mean a settlement could not be reached before trial. Mr. Potter said if Commissioners decide not to move forward in the mediation process, it may be a good idea to put forth the Board's initial position of working with Mr. Baxley on the size of the bikes, etc.

Commissioner Bullock pointed out the report indicates most of the riders were children. Mr. Potter said the report can not be used in court; however it is further evidence for the parties involved that when the riders are youth the noise is not at a level that violates the Noise Ordinance. This evidence will be presented at trial if the case should go to trial.

Mr. Potter reported that staff received a number of complaints from the Sheriff that provided good documentation as to the nature of the complaints. The complaints were reported to the Sheriff's Department on the weekend of June 7. He said most of these can be used as evidence; however they do not indicate the size and number of bikes on the track at the time of the complaints.

Commissioner Hogsed said the report indicates the evaluator spent time at the track but no time at the homes of individuals making the complaints. He said the noise carries through the valley to the homes in the area. Commissioner Hogsed said he feels the method the deputies are using is inefficient. A better approach would be to have a deputy on site when an event is taking place. The Manager said the Sheriff does not have the manpower to place a deputy on site or in the area to respond any quicker than they do now. Mr. Potter said the Sheriff understands the importance of this case to the County and he has done a tremendous job in working with the County on this matter. Chairman Chappell said the Noise Ordinance applies countywide and Commissioner Hogsed's comment implies there will be an anticipated violation.

Mr. Potter asked Commissioners if they want to continue in mediation or move past mediation and proceed to trial and in the mean time the County can continue to work on a settlement with Mr. Baxley. The only feasible settlement he can see is a settlement with Mr. Baxley as to the operation of the track. He said the mediator needs to be informed of how the County intends to move forward.

Commissioner Bullock said he feels mediation has not been helpful. Mr. Potter said the County has exercised good faith in attempting to resolve this matter, although he is not sure what Mr. Baxley's intent is with the track. During mediation it was determined that Mr. Baxley intends to use the facility fairly heavily and hold a several races throughout the year. Mr. Potter said a few races a year would have been more reasonable.

The Manager suggested informing the mediator that the County's position on this matter is that Mr. Baxley not violate the Noise Ordinance and limit the riders to the younger kids. If Mr. Baxley is not willing to comply then the County should proceed to trial. The court date is scheduled for the week of August 3.

Mr. Potter reminded Commissioners that all discussions while the County remains in mediation should remain confidential. He also noted that the District Attorney has decided to move forward with the criminal citations regardless of the County's lawsuit. The DA had been waiting on the County to resolve its case before moving forward.

Chairman Chappell pointed out the County has spent over \$40,000 on this matter so far and will incur significant additional costs if the case goes to trial.

Commissioners further discussed the report from the evaluator and asked Mr. Potter to find out if more detail can be provided as to what the evaluator experienced at the track. Mr. Potter inquired as to what parameters Commissioners would like to offer in mediation. Commissioners asked for clarification on the report first before continuing mediation. Mr. Potter suggested in the mean time, for the mediator's purpose, to inform the mediator that the County is willing to move forward with some kind of mediation but the report was not satisfactory in allowing the County to completely evaluate a possible agreement which might be possible with some clarification on the report.

Commissioner Hawkins said he would be in favor of the Board coming up with some specific criteria, such as age of the riders, hours of operation, etc. He would like to see the County come to a resolution. Commissioner Bullock said the County is only asking Mr. Baxley to run his track without violating the Noise Ordinance. Commissioner Hawkins further commented that the process should not be derailed because of one citation. The Noise Ordinance does not prevent anyone from making noise, there is just a price to pay if someone complains about it. A zero tolerance policy will never work and the approach should be to apply parameters to which he should comply. If complaints are filed, the County could impose a fine that may motivate Mr. Baxley to compromise with his neighbors or vice versa. Commissioner Hawkins said he is beginning to question if the County will ever get to a point where no one is inconvenienced by the operation of the track and maybe the County's definition of success should be 98% but should continue to work with others to reach a compromise.

Commissioner Bullock said the mediation process has proved that the noise level is reduced when there are younger riders on the track. Mr. Potter responded that this provides confirmation of what the County has suspected all along. Commissioner Bullock said if Mr. Baxley realizes these measures will work but he is unwilling to compromise, these facts should bear weight in court. Mr. Potter pointed out that anything determined or agreed to in mediation is not admissible in court. With that said, Commissioner Bullock said he would rather move forward to trial, noting that too much money is being wasted on this case. He said the County has mediated with Mr. Baxley and has received a report that indicates how the track should be operated in order to reduce the noise. He is not sure what else will work.

Commissioner Hogsed said, if feasible, the County should offer the parameters it had originally offered. Mr. Potter said Commissioners can declare the mediation unsuccessful and still offer the parameters as a solution.

Commissioner Bullock said he would agree to the attorney drawing up an agreement indicating the report proves the use of the track by younger riders reduces the noise level and therefore the County feels these measures would put him in compliance with the Noise Ordinance. Otherwise, Commissioner Bullock said the County should continue to cite him for noise violations and move forward to the trial date.

Mr. Potter said the first decision the Board should make collectively is whether or not to continue mediation. If the Board agrees not to continue mediation, the next step would be to ask Mr. Baxley to reconsider his position and restrict the track to youth AMA classes, etc. which are the parameters the Board offered before mediation.

Commissioner Hawkins said the Board should place an emphasis on trying to come to an agreement. Mr. Potter said both parties can still attempt to settle up to the trial date without mediation; however mediation helps to facilitate the process.

Commissioner Bullock said the County should make one last effort to convey its message through mediation, and, if not, should move forward. Commissioner Hawkins said the Board needs to come to an agreement because going to trial could potentially be a lose-lose situation for both parties. In his opinion, he would have a real sense of urgency about coming to an agreement that that Commissioners can all live with because he is not convinced this case will make it to trial. Mr. Potter said he has always advocated for settlement. Commissioner Hawkins said it is important that both parties meet at a point at which they are both comfortable.

Commissioners concluded their closed session by instructing Mr. Potter to obtain clarification on the report from the evaluator. Based on the information, Mr. Potter will formulate a letter to Mr. Baxley's attorney indicating the Commissioners' position on the original parameters that were offered which they believe will reduce the noise level at the track.

Commissioner Hogsed suggested moving forward with an additional motion of contempt against Mr. Baxley for continued violations of the Noise Ordinance. Mr. Potter said the contempt motion may impair any ability to reach a compromise. Commissioner Hogsed suggested only moving forward with a contempt motion if mediation and compromise fails. Mr. Potter preferred that the trial attorney brief Commissioners on the contempt hearing.

Chairman Chappell asked staff to determine if any citations were issued during the trial period.

Mr. Potter informed the Board that the trial attorney will begin working on the depositions in preparation for the trial date.

**Chairman Chappell moved to leave Closed Session, seconded by Commissioner Bullock and unanimously carried.**

ATTEST:

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Mike Hawkins, Chair  
Transylvania County Board of Commissioners

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Trisha M. Hogan  
Clerk to the Board