

**MINUTES & GENERAL ACCOUNT OF CLOSED SESSION  
TRANSYLVANIA COUNTY BOARD OF COMMISSIONERS  
July 14, 2008 – REGULAR MEETING**

The Board of Commissioners of Transylvania County met in regular session on Monday, July 14, 2008 at 7:00 p.m. in the large courtroom of the Transylvania County Courthouse.

Commissioners present were Lynn Bullock, Chairman Jason Chappell, David Guice, Daryle Hogsed, and Vice-Chairman Kelvin Phillips. Also present were County Manager Artie Wilson, County Attorney Curtis Potter and Clerk to the Board Trisha McLeod.

Media: *Hendersonville Times News*: Leigh Kelley  
*Transylvania Times*: Mark Todd

There were approximately 60 people in the audience.

**CALL TO ORDER**

Chairman Jason Chappell presiding called the meeting to order at 7:05 p.m.

**WELCOME**

Chairman Chappell welcomed everyone to the meeting and thanked the members of the audience for their participation in County government.

**PUBLIC HEARING**

**SCATTERED SITE HOUSING RENOVATION PROGRAM**

The first of two required public hearings was held at the June 23, 2008 Board of Commissioners' meeting. This is the second public hearing. The purpose of the Public Hearing is to make the public aware of the County's intent to apply for \$400,000 in funding to assist in the renovation of eight to ten homes.

**Chairman Chappell declared the Public Hearing open at 7:06 p.m.** There were no comments from the public. **Chairman Chappell declared the Public Hearing closed at 7:07 p.m.**

**RURAL OPERATING ASSISTANCE PROGRAM**

The NC Department of Transportation requires a public hearing for the annual Rural Operating Assistance Program Grant (ROAP). Transylvania County plans to apply for \$95,326 in grant funding to be used as follows:

Elderly & Disabled Transportation Assistance Program (EDTAP)	\$45,438
Work First/Employment	\$ 5,983
Rural General Public	\$43,905

Transportation Director Keith McCoy noted that these programs are funded 100% by the State and requires no matching funds from the County.

**Chairman Chappell declared the Public Hearing open at 7:10 p.m.** There were no comments from the public. **Chairman Chappell declared the Public Hearing closed at 7:11 p.m.**

### **PUBLIC COMMENT**

Joey Galloway: Mr. Galloway spoke in opposition to the proposed Noise Ordinance. He distributed copies of his own version of an ordinance to Commissioners which he believes is fair and nondiscriminatory. Mr. Galloway said he believes the proposed Noise Ordinance is unnecessary.

Terry Rice: Mr. Rice spoke in opposition to the current and proposed Noise Ordinances. He said he carefully searched out unrestricted property to purchase so he could do what he wants on his own property. Mr. Rice stated there are communities in this County where people can live under such restrictions. He said the County does not have the right to restrict his behavior on his property. Mr. Rice also stated he plans to pursue legal action against the Board if they pass the proposed Noise Ordinance.

Mr. Rice referred to the bike track in the Cherryfield community noting that youth in the County has been pushed out of the community in favor of tourism.

Derrell Smith: Mr. Smith echoed Mr. Rice's comments about the youth in the community having no place to go. He encouraged the Board to do more for the youth. Mr. Smith said he is a hunter and has dogs that bark. He also said sometimes people just have to tolerate some things they may not like.

Chase Hooper: Mr. Hooper asked Commissioners to put the issue of the proposed Noise Ordinance to a vote of the public and allow them to decide what they want to do on their property.

Robert Keith Chappell: Mr. Chappell asked if the proposed Noise Ordinance would affect potential industries that may relocate to the County. He said the deed to his property indicates the property is unrestricted and he should be able to do what he wants on his property. Mr. Chappell said the Ordinance is still unclear in that it is at the discretion of the deputy whether someone is in violation of the Noise Ordinance and that noise affects different people in different ways. He asked how much the County has spent in attorney fees to draft the Noise Ordinance and also what future costs the County expects in order to enforce it.

Jean Plemmons: Ms. Plemmons referred to a Transylvania County law banning hunting from a right-of-way noting there are some exceptions to the law. She asked Commissioners to inform her of what the exceptions are.

Mr. Plemmons also commented about the number of accidents caused by faulty dryers or wiring in single wide mobile homes. She said she hopes the County can help to prevent such tragedies.

Commissioner Guice asked Ms. Plemmons to contact the County Manager to find out what the exceptions are for hunting from a right-of-way.

Mike Baxley: Mr. Baxley is the owner of the bike track in the Cherryfield community. Mr. Baxley said he owns 45 acres of land in the Cherryfield community and he opened the track originally as a school project. He said he contacted the neighbors that were in close proximity before he opened the track and they appeared to be alright with it. Mr. Baxley informed the Board that the track is only open for four hours on Saturdays and four hours on Sundays after church; however the track used to be open seven days a week without complaints from the neighbors. He said it seems to him that if there was going to be such trouble that someone would have told him he could not build the track in this community, especially since he has invested \$75,000 into the project. Mr. Baxley said he believes he has been fair to the neighbors during this process and the proposed Noise Ordinance is going to affect a lot of people.

John McCall: Mr. McCall expressed his concerns about the revisions to the Noise Ordinance saying even though he believes the revisions are ridiculous he understands the need for laws. He said it is rumored that this process began because of the complaints received about the bike track and because of Mr. Baxley's actions towards his neighbors. Mr. McCall said in listening to Mr. Baxley speak it appears he is actually doing something that is needed for the kids in this County. Mr. McCall also said the public should have more time to review the revisions and Commissioners should poll the public to find out how many would be in favor of the Noise Ordinance. Mr. McCall said he is directly affected the Noise Ordinance because he has hunting dogs and a neighbor that is threatening to sue him because of the barking, although his neighbor was aware of the dogs when he purchased the adjoining property. He asked Commissioners to take these issues into consideration and use good sense when voting on the proposed Noise Ordinance.

### **AGENDA MODIFICATIONS**

The Manager reported on the Agenda modifications. He requested to add Item XII-A Closed Session per N.C.G.S. 143-318.11 (a) (3) to consult with any attorney reference the lawsuit Thomas Joseph Stetz versus Vickie Lynn Guy.

**Commissioner Hogsed moved to approve the revised Agenda, seconded by Commissioner Phillips and unanimously approved.**

### **CONSENT AGENDA**

**Commissioner Guice moved to approve the Consent Agenda as submitted, seconded by Commissioner Bullock and unanimously approved.**

The following items were approved.

#### MINUTES

The Minutes of the 2008 Budget Workshops, the June 23, 2008 Regular Meeting, and the June 30, 2008 Special Meeting were approved.

#### FACILITIES USE REQUESTS

The use of Silvermont by the Transylvania County Democrat Party for a political rally on Saturday, September 6, 2008 from 11:00 a.m. to 4:00 p.m. was approved.

### **PRESENTATIONS/RECOGNITIONS**

#### RESOLUTION 24-08 IN RECOGNITION OF JOSEPH F. FARINA

Effective July 1, 2008, Joe Farina retired from Transylvania County where he has been employed by the Sheriff's Department. Chairman Chappell read Resolution 24-08 In Recognition of Joseph F. Farina.

**Commissioner Guice moved to approve Resolution 24-08 In Recognition of Joseph F. Farina, seconded by Commissioner Hogsed and unanimously approved.**

Sheriff David Mahoney thanked Mr. Farina for his work with the County and wished him luck upon his retirement. Mr. Farina thanked the Sheriff for putting up with him all these years. Commissioners thanked Mr. Farina for his service to the County and presented him with the resolution.

(Resolution 24-08 In Recognition of Joseph F. Farina incorporated as part of these Minutes.)

### **APPOINTMENTS**

#### PARKS COMMISSION

**Commissioner Hogsed moved to reappoint Debi Whitmire, seconded by Commissioner Guice and unanimously approved.**

**Commissioner Phillips nominated and moved to appoint Roger Eades and Steven Eubanks, seconded by Commissioner Bullock and unanimously approved.**

**Chairman Chappell moved to appoint Edward Marchini as Chairman, seconded by Commissioner Guice and unanimously approved.**

#### HUMAN RELATIONS COUNCIL

**Commissioner Phillips moved to reappoint Kit Borden and Jon Wesley and appoint Russell D'Hondt to fill a vacant term, seconded by Commissioner Guice and unanimously approved.**

## OLD BUSINESS

### PROPOSED REVISIONS TO THE NOISE ORDINANCE

On May 27, 2008 the Board of Commissioners held a Public Hearing on the proposed changes to the Noise Ordinance. As a result of such great opposition to the proposal from citizens, the Board asked Staff to revisit the current Noise Ordinance for possible revisions. Staff revised the current Noise Ordinance adding a civil remedy as an additional punishment for violation of the Ordinance.

County Attorney Curtis Potter reviewed the revisions to the current Noise Ordinance.

1. Article V Section 1 – “Noise of such character, intensity and duration as to be detrimental to the health, safety or welfare of any reasonable person of ordinary firmness and sensibilities in the vicinity is prohibited.” This was added to help define what constitutes a violation of the ordinance for enforcement purposes.
2. Article V Section 1.1 – Defines the terms “unreasonably loud” and “disturbing”.
3. Article V Section 1.2 – Added “based on the totality of circumstances surrounding a particular determination”. This allows for a more completed consideration of potential noise violation based on a wider variety of circumstances.
4. Article V Section 2.2 – Changed time from 7:00 a.m. to 6:00 a.m. per the comments about construction and Daylight Savings Time.
5. Article V Deleted old Section 2.6 – “All noises coming from motor vehicles properly equipped with the manufacturer’s standard mufflers and noise reducing equipment”. This section was a gray area used by many regarding what constitutes a motor vehicle.
6. Article V Section 2.7 – Added more descriptive detail of what type of yard maintenance equipment would be considered as yard maintenance equipment. Included “lawnmowers, weed trimmers, edging machines, or other similar small-engine yard maintenance equipment, properly equipped according to the manufacturer’s specifications, and used between 6:00 a.m. and 9:00 p.m.”
7. Article V Section 3.4 – Added specifically to mention dirt bikes and automobiles which create unreasonably loud or disturbing noise so as to disturb the comfort or repose of any person of normal sensibilities in the vicinity. Mr. Potter and others believes this will greatly strengthen the Ordinance and makes it clear what is a violation.
8. Article V Section 3.5 – Added that property owners who knowingly allow a noise violation to occur by someone else is in violation of the Ordinance.
9. Article VI and VII – These Articles were rewritten to define the procedure and define the Civil Penalties which allow the County to have measures available to them including an injunction or abatement in accordance with N.C.G.S. 153A-123.
10. Article VIII – This Article was rewritten simply to bring it up to date.

Commissioner Bullock referred to Article V Section 3.3 reference to habitually barking or howling dogs. He asked Mr. Potter to define habitual. Mr. Potter said the determination would have to be made by the deputy on the scene and whether or not law

enforcement was continually called out to the same residence. Commissioner Guice noted that this same provision is in the current Noise Ordinance and only the time changed from 7:00 a.m. to 6:00 a.m.

Commissioner Hogsted referred to Article V Section 3.5 and asked for clarification on who would be in violation of the Noise Ordinance if a person was making noise unauthorized on another person's property. Mr. Potter responded that both people could potentially be in violation of the Noise Ordinance. If it happens unknowingly or if someone trespasses on another's property to ride a dirt bike or shoot a firearm, and if someone complains about the noise, the property owner would not be in violation.

For clarification purposes, Commissioner Guice asked if the District Attorney and Sheriff are supportive of the proposed revisions. Mr. Potter said he met with the Assistant District Attorney and the Sheriff and they are both supportive of the revised Noise Ordinance. Commissioner Guice further asked if the Institute of Government was contacted with regard to this matter. Mr. Potter said the Institute believes the revised Noise Ordinance is better than the current one. Commissioner Guice also said there has been some question about the ex post facto defense to the new Ordinance. Mr. Potter stated that ex post facto is a concept where if a law is changed today where a person would not have broken that law yesterday by committing some act but today would be in violation and whether not a person can be prosecuted for his action even though at the time of the action the law in effect at that time was not violated. The consensus from the Institute of Government was that the proposed Noise Ordinance would not be subject to an ex post facto claim because one would only be found in violation of the Ordinance after it goes into effect and the action or violation would have to occur after it had passed.

Commissioner Guice asked the Manager if other County ordinances have been modified or changed over the years and for what reason have they been changed. The Manager replied yes and that mostly ordinances are changed because citizens may request Commissioners to consider other factors. Other changes may occur because information may come to light that was not prevalent at the time that the original ordinance was enacted. Commissioner Guice further asked if the enactment of this Noise Ordinance is going to require additional staff for any County department. The Manager responded that there has been no indication that additional personnel will be needed. Commissioner Guice asked if additional taxpayer dollars have been spent on legal fees concerning this issue. The Manager said yes. The County asked the Attorney to do research on this subject and the County pays for the associated legal fees. All ordinances are reviewed by the County Attorneys and therefore incur legal fees. The County pays the Attorneys a retainer fee and in addition the County is charged \$115 per hour. Staff has not yet received a bill for services for the month of June.

Commissioner Phillips stated there is varying legal opinions about the affect of an ex post facto claim. He said it does not seem reasonable that the County can choose which actions or laws are subject to the ex post facto claim. He has spoken with other municipal attorneys that believe this does apply. Commissioner Phillips said to take the ex post facto rule at face value would mean that the new Noise Ordinance would not have

an affect on something that exists today. He said this factor is a major concern to him and believes staff should look into it further.

Chairman Chappell referred to Article V Section 1 where it states “Noise of such character, intensity and duration as to be detrimental to the health, safety or welfare of any reasonable person of ordinary firmness and sensibilities in the vicinity is prohibited”. He asked who determines if a person is reasonable and of ordinary firmness, noting that people are bothered differently by certain noises. Mr. Potter responded that would be determined by a fact finder, such as a deputy or jury. Chairman Chappell further asked Mr. Potter to define the term vicinity. Mr. Potter responded the vicinity would also have to be determined by the fact finder; however practically speaking, if one is bothered by the noise to the extent that a complaint is filed, he would say that a person would then be in the vicinity. Mr. Potter further stated that if a deputy responds to a noise violation call in reference to barking dogs and upon his investigation he does not find or hear barking dogs then the deputy has no cause to issue a citation.

Chairman Chappell referred to Article V Section 3.4 Noises Prohibited. He stated that because of the conditions of some roads and driveways around the County, some vehicles may sound overloaded or out of repair when that is really not the case. Mr. Potter said this is also determined by the fact finder. He said he understood that this may be a gray area, but said it would be extremely difficult to determine the number of pounds a pickup truck or dump truck should carry.

Commissioner Phillips commented that there are two issues at hand. One being the dirt bike track and the other is the Noise Ordinance that everyone in the County will be affected by if adopted. The gray areas, which are subject to be determined by a fact finder, are difficult for people to live by because they may not know what the gray areas are until they are cited for violating the Ordinance. Commissioner Phillips said this also puts a burden on the deputy to make the decision. He also referred to Section 3.4 about recreation vehicles. He said he does not see any exempted noises that would allow a person to have these vehicles on their own property. Mr. Potter said there are no specific exemptions in the Ordinance other than to consider all the individual factors under the totality of circumstances. He said he understands the difficulty in evaluating whether or not a violation has occurred based on some of the terms that are in the Ordinance but he noted that the current Ordinance also has some vague and ambiguous provisions within in that may present a greater problem as opposed to one section being picked out by a Judge. There are going to be gray areas because theoretically every situation that may occur can not be included in the Ordinance. Commissioner Phillips referred to Section 2.7 under Exempted Noises saying that it does not include equipment such as wood chippers, making the use of them a violation if a neighbor chose to complain about it. He said there are too many gray areas; however he understands the difficulty in trying to address every situation that may occur in this Ordinance.

Chairman Chappell noted that other Commissioners and some members of the audience have stated they are not opposed to the operation of the bike track but rather the location of the bike track; however the proposed Ordinance would effectively prohibit the

operation of any bike track in the County. Mr. Potter said that is a practical assumption. Commissioner Hogsed added that Chairman Chappell would be correct if people complained about a bike track.

Commissioner Guice said Commissioners are having this discussion because of the bike track situation. There have been barking dog cases in the County for years and very few cases have come to Court. Commissioners are having this discussion because of a problem in the community that affects the entire County. Commissioner Guice referred to a comment made earlier from someone in the audience indicating that the only people making complaints are people that have moved into the County. He said there are residents and families that have lived in the Cherryfield community for some 80 to 100 years. They lived in a peaceful farming community that has been disrupted so Commissioners have to address this issue. Commissioner Guice also referred to earlier comments that Commissioners ought to let the people vote on this issue. He said this is a republic form of government in which people elect representatives to make decisions for them and the general public then has an opportunity to elect or not elect those representatives in the future. He said he has some difficulty with this because Commissioners and staff have studied this issue and have received good sound legal advice. He further stated that the proposed Noise Ordinance is not perfect and may be revised in the future to deal with other issues that may arise and it also may be challenged in court. He urged Commissioners to make a decision on what is best for the citizens of the County. Commissioner Guice said Commissioners and staff have received numerous letters of concern about this issue and he requested that those letters and correspondence be included as part of this record.

Chairman Chappell said there have been complaints about barking dogs and other issues and the District Attorney has chosen not to pursue those cases under the current Noise Ordinance. He asked if those same cases could be prosecuted under the proposed Noise Ordinance. Mr. Potter replied that he can not speak for the District Attorney but under the new Noise Ordinance he may be more likely to prosecute those cases.

Commissioner Bullock posed a question to Sheriff Mahoney. He said there is some controversy over barking dogs. He asked the Sheriff if he plans to instruct his staff about whether the problem is habitual and is a legitimate complaint. Sheriff Mahoney said his office answers a tremendous amount of noise complaints in a year and he does not like any of them because it is incredibly difficult to determine exactly what is going on. His office may respond to a number of calls in which the barking is out of the property owner's control because a deer or another dog has crossed onto the property. He said there has been a lot of discussion about why this issue is on the table, but it really became an issue long before the bike track. There was an issue in a community over barking dogs that ended in bloodshed. The case came to Court and the District Attorney chose not to prosecute the case. As a result, a fight occurred between neighbors that put one of them in the hospital. There has to be a law to prevent actions like this from occurring. Sheriff Mahoney said he was not in favor of the first revision. The revised Noise Ordinance before the Commissioners is much better. He said he feels his office should not be handling noise complaints about barking dogs and would rather be catching drunk



drivers and drug dealers; however he does realize that that this is a bothersome issue for those people on the receiving end. The Sheriff said he supports the bike track yet understands the opposition to it because of the noise. It may only operate for four hours at a time but it is a horrible four hours for those people in that community. He said he and his office will enforce whatever laws and ordinances are on the books; however it is always difficult to enforce a law or ordinance that requires the judgment of one person or a number of people to determine whether that law has been broken. What is noise to one person may not be noise to another person. He does not take lightly taking away people's freedoms. Sheriff Mahoney said he will support the Commissioners' decision.

Commissioner Guice said the Sheriff's staff makes decisions and judgment calls on a daily basis and he sees enforcing the Noise Ordinance as no different. The Sheriff said overall the Ordinance is fair and there is not a great deal of change in the revision from the current Ordinance. The revised Ordinance includes some additional remedies the County could pursue if someone refuses to conform to the law. Commissioner Guice said many of the concerns expressed at the Public Hearing concerning firearms and barking dogs have been removed from the proposed Noise Ordinance and they do not impact this any more today versus the current Noise Ordinance that is on file. The Sheriff added that he is pleased to see the shooting of firearms removed from the Ordinance because he likes to shoot on most Saturday afternoons. He further added that he has dogs and ATV's and he would like to continue to use them. Sheriff Mahoney commented that he has confidence in his staff to make good judgment calls and enforce the laws or ordinances that is on the books. He said he personally does not agree with his office answering to noise violations and would better be served doing other things. Commissioner Guice said he has two ATV's, he is a hunter and shoots guns on a regular basis, and he owns and raises blood hounds. He does not feel the Noise Ordinance will affect him. He said it is a respect for one's neighbor and the community as a whole and he sees that is the problem here with the bike track situation. Sheriff Mahoney added that this is not something new to his office. They have been handling calls of this nature for several years. He explained that just because a deputy answers a possible noise violation call, does mean that a citation will be issued to anyone. His staff will investigate and make the determination.

Commissioner Bullock asked the Sheriff if he would prefer that there were no provisions about dog barking. The Sheriff said he understands why the noise is bothersome but the issue for him boils down to property rights. Commissioner Bullock said he feels deputies will use good sound judgment before issuing a citation.

Commissioner Phillips asked the Sheriff how he would differentiate between noises coming from different properties and determining who is in violation. The Sheriff responded that it would depend upon whom the complaint was made against. He said his office would use the "totality of circumstances" which is referred to in the Ordinance. Commissioner Phillips pointed out that a Noise Ordinance can not dictate one's moral or immoral behavior. He said this is a difficult decision to make because he understands both sides.

Chairman Chappell said this Noise Ordinance is going to affect all citizens and visitors in Transylvania County. He said this is a difficult decision to make and for him it boils down to a property rights issue. Chairman Chappell stated that creating a policy to legislate what it means to be a good neighbor is not right.

Commissioner Hogsed said he thinks it is extremely shortsighted to apply the Noise Ordinance directly and only to the motor bike track in the Cherryfield community. The reason this issue is before the Board is because the County has an unenforceable Noise Ordinance. There have been other cases before the bike track issue that could not be prosecuted. The revised Ordinance is simply the same as the current Ordinance with more clarification and detail and it is enforceable. He said there is not going to be a happy medium and no law is perfect; however the proposed Noise Ordinance is enforceable and gives law enforcement officials a tool to prosecute law breakers in the County. Commissioner Hogsed stressed he is a strong proponent of property rights; however he believes his rights end where another's begins and vice versa. No one should be allowed to violate his property rights nor should he be allowed to violate someone else's property rights. This decision will affect all people in Transylvania County and decisions should not be made based on knee-jerk reactions to situations in one community. Commissioner Hogsed said this Ordinance needs to work for the entire community. The current Ordinance was working fine but as of late has become unenforceable so after listening to the concerns of citizens, Commissioners have made changes to the current Ordinance so law enforcement can do their jobs. He commented that Commissioners need to give them something they can work with or take it off the books all together.

Commissioner Guice noted that he has received several letters from those citizens affected by the bike track in the Cherryfield community. Most of the letters are from life long residents and others are letters from visitors to the community who have witnessed and experience the noise from the bike track. He said he also received letters from individuals who have recently purchased property in this area and from folks that live in other areas of the County who feel they will be affected if this type of activity is allowed in the Cherryfield community because then it will be allowed in other areas of the County. These people have encouraged Commissioners to stand firm, to study and research the issue, to talk with legal council and School of Government, and prepare an ordinance that will be effective throughout the community. Commissioner Guice said he believes the proposed Ordinance is affective and will have an impact on some of the concerns that have been expressed by many of these folks. He said he wondered what he might think if he had to listen to the constant noise from the bike track every weekend. The issue at hand is what is best for the entire community. Commissioner Guice said this issue has arisen over one person who decided to build a bike track on his property which now affects the well being and tranquility of the entire community. He noted that some people who sent letters are not only up in age but are also in poor health. He said Commissioners are elected to help address this issue. He said this issue should have been worked out amongst the people in the community and should have never reached this point to come before an elected Board to make the decision. He said he cares a great deal about the young people in the community and what is available for them but this type of

activity in a community such as Cherryfield is not the answer. He encouraged the Board to consider the information they have received and do what is right for the entire community. Commissioner Guice again asked for these letters to be considered as part of the official record.

(Letters and emails incorporated as part of these Minutes.)

Commissioner Bullock said there are those who would prefer that the County did not have a Noise Ordinance, but everyone is not a good neighbor. He asked what relief there would be from certain things without a Noise Ordinance noting that this issue would not have come before the Board if the people in this community were trying to be good neighbors. Commissioner Bullock said there are people who try to be good neighbors but may have dogs that bark which can be annoying and disturbing to others. There may also be some people that will take advantage of the Noise Ordinance which is why the County depends on law enforcement officers to make good sound judgment calls. Commissioner Bullock said the County has to protect the majority of the people the majority of the time.

Commissioner Phillips said there are a lot of gray areas in the Ordinance especially those that have to be determined by a deputy or a fact finder. He pointed out that in Article V, Section 3.3, it can be interpreted that loose dogs can bark all they want but any dogs that are constrained are not allowed to bark. He said this is indicative of the substance of the whole ordinance and there is no way one can dictate to people how their animals behave. He commented that this section is not gray but is surely ridiculous.

Mr. Potter responded that any noise that is created that is not specifically exempted could be found to be a violation of the Noise Ordinance based on a totality of circumstances, including dogs that are not constrained. The Noise Ordinance includes examples that are indicative of common noise complaints that have occurred in the past and gives additional guidance to people that will be enforcing this ordinance. By no means is this exhaustive or by no means could it be black and white to predict every circumstance that may arise. The basic premise of the Ordinance is that a totality of circumstances will determine whether a noise is a violation of this Ordinance, except specific things are going to be allowed and specific things are going to be presumed to be violations.

Commissioner Phillips referred to a statement made by Mr. Potter earlier that Article V, Section 3.4 was added to the Ordinance to address specifically the bike track. He said to him the Ordinance is specific in some areas and gray in others.

Commissioner Guice said the Noise Ordinance is specific to the bike track issue because it is the third time the Board has had to deal with the issue. The Noise Ordinance should therefore clarify and address bike tracks and he said he feels the proposed Noise Ordinance does so. Commissioner Guice said Commissioners are at this point because of an issue in a specific area of the County. There have been other issues in the past but the bike track issue brought this to the forefront; however the Noise Ordinance affects the entire community.

Chairman Chappell commented that the current Ordinance is unenforceable and has been revised to make it enforceable. In essence, the County is going from having no ordinance to an actual Noise Ordinance.

Commissioner Guice responded that he believes Chairman Chappell is correct in that the Ordinance that is in place is not prosecutable by the District Attorney. Staff has made changes that can be defined as major changes or not, but clearly some things have been added. The School of Government, the Sheriff and the District Attorney believe the revised Ordinance is enforceable.

Commissioner Hogsed said he disagreed with Chairman Chappell's point that the County is essentially moving from nothing to something because that negates the fact that in the past the current Noise Ordinance has been used to prosecute violators. As of late it has become unenforceable in the opinion of the District Attorney.

Commissioner Bullock asked how the District Attorney's opinion means anything because law is law. Mr. Potter said from a general standpoint just because a citation is received it does not obligate the District Attorney to move forward and prosecute the case. The District Attorney will look at the laws that are on the books, the evidence that is collected, the facts and circumstances surrounding the citation, and evaluate whether or not there is reasonable likelihood that he could proceed. There is also the resource standpoint in that they have to manage their limited resources and pursue cases that are more serious crimes and that are more likely to be convicted as opposed to what may be considered a less serious crime and less likely to get a conviction. Commissioner Guice added that North Carolina General Statutes define the position of District Attorney and his responsibilities. It is his responsibility to make those decisions, which he does on a daily basis. He may decide to reduce a case from a felony to a misdemeanor or he may decide to dismiss the case altogether, but it is his responsibility.

Commissioner Guice said the current Ordinance was signed October 22, 2001. He asked if there was an Ordinance in effect before that date. The Manager responded that the original Ordinance was created in 1983 and was revised in 2001 to remove the decibel level reading. At that time, staff also worked with the School of Government, the Planning Board, the Sheriff and the District Attorney to create an ordinance that was enforceable.

Commissioner Bullock asked if there was no Noise Ordinance on file could a person make all the noise he wanted. Mr. Potter responded that any person could potentially have a civil action against another person for a violation. For instance, he said he believes some of the neighbors are moving forward with a nuisance lawsuit against this particular issue whether the Noise Ordinance gets passed or not. From the options of the government's standpoint, it would lose its ability for the District Attorney to move forward with a criminal process as well for the County to move forward with a civil standpoint and seek an injunction or try to prevent continuing violations of the Noise Ordinance.

Commissioner Guice said over the years there have been a number of difficult decisions that have been made and he has always addressed them with much thought and consideration. He offered the following motion:

**In order to protect the citizens of Transylvania County and preserve their quality of life, Commissioner Guice moved to approve the proposed revisions to the Noise Ordinance which includes the new civil penalties, seconded by Commissioner Hogsed. The motion passed 3 to 2, with Chairman Chappell and Commissioner Phillips voting no.**

Chairman Chappell called for a 10 minute recess at 9:05 p.m. The meeting reconvened at 9:20 p.m.

### **NEW BUSINESS**

#### RURAL OPERATING ASSISTANCE PROGRAM

A Public Hearing was held earlier in the meeting at which there were no comments from the public. Transportation Director Keith McCoy requested that Commissioners approve the ROAP grant application in the amount of \$95,326.

**Commissioner Guice moved to approve the Rural Operating Transportation Assistance Program Grant Application, seconded by Commissioner Phillips.**

Commissioner Guice thanked Mr. McCoy and his staff for the job they do and for the positive impact the services they provide have on people in the community. Chairman Chappell echoed Commissioner Guice's comments and thanked Mr. McCoy for seeking grant funding. **The motion passed unanimously.**

#### REQUEST FROM LAKE TOXAWAY FIRE DEPARTMENT

Chief Duane Allen announced that the Lake Toxaway Fire Department is in the process of planning for renovation and construction work on their main fire station. They have held two public meetings on this matter. They are seeking County approval for a tax exempt loan in the amount of \$712,000 for the renovation and construction of the fire station. Approval of the resolution in no way obligates the County for repayment of the loan if something should happen to the fire department.

Commissioner Guice noted that Commissioners had received a letter from Emergency Services Director David McNeill recommending the approval of the tax exempt loan. Commissioner Bullock asked Chief Duane Allen if the loan would affect their fire tax rate. Mr. Allen responded no and explained that they will be paying off a truck loan and a substation loan in the near future. The payments they were making on those loans will be used to pay off the construction loan, therefore keeping their fire tax rate the same.

Commissioners thanked the members of the Lake Toxaway Fire Department for the work they do and for the leadership they have shown over the years.

**Commissioner Hogsed moved to approve Resolution 28-08 Approving a Tax Exempt Loan to the Lake Toxaway Fire Rescue, Inc. from First Citizens Bank and Trust Company, seconded by Commissioner Bullock and unanimously approved.**

**Commissioner Guice moved to approve Resolution 29-08 Approving a Tax Exempt Loan and Written Agreement to the Lake Toxaway Volunteer Fire Rescue, Inc. from First Citizens Bank and Trust Company, seconded by Commissioner Hogsed and unanimously approved.**

(Resolutions 28-08 and 29-08 incorporated as part of these Minutes.)

#### VOTING DELEGATE TO NCACC ANNUAL CONFERENCE

The 101<sup>st</sup> Annual Conference of the North Carolina Association of County Commissioners will be held in Craven County August 21-24, 2008. Each county shall be entitled to one vote. The Board of Commissioners has been asked to appoint a Commissioner as a voting delegate.

**Commissioner Hogsed moved to appoint Commissioner Bullock as a voting delegate, seconded by Commissioner Guice and unanimously approved.**

#### EROSION CONTROL AMENDMENTS TO SUBDIVISION AND BUILDING REGULATIONS

Planning and Economic Development Director Mark Burrows explained that the County Comprehensive Plan deals with the issue of environmental health characteristics. One of those looks at how to control erosion which has been identified by a number of people as a significant concern for the County's waterways. In addition, the Subdivision Ordinance already has a purpose statement that deals with the issues of erosion, air and water pollution, and sedimentation control. Approximately one year ago, the Planning Board began working on an erosion control ordinance that would work for Transylvania County. The State rejected the draft ordinance. Mr. Burrows explained that currently if there is a disturbance of land greater than one acre the State of North Carolina is responsible for enforcing erosion control. The problem that the County has is with small subdivisions and residential development. When the State rejected the County's proposed erosion control ordinance, the Planning Board began looking at other ways to address these issues by reviewing the existing subdivision control ordinance and the building regulations ordinance. This would allow the County to have some say in how waterways, etc. are treated.

Mr. Burrows explained that there is a new section (Section 12) in the Subdivision Ordinance that discusses preventing erosion, permit requirements, sketch plans and preventative measures. He noted that with these changes there will be no need for additional staff. They will not go out looking for problems in the County but rather their intent with this ordinance is to help correct problems that may be identified by a building inspector. The Planning Board has requested to hold a public hearing on August 11, 2008 to seek public input on the proposed changes.

Commissioner Guice commented that there are a number of communities dealing with these same issues. Many counties are struggling with the ability to enforce regulations due to being short staffed. Mr. Burrows stated that he believes the State does not have the resources to adequately enforce erosion control measures above one acre. The State will normally respond to situations if notified but it takes effort and time. They do not have the resources available to cover all the counties that they should. He noted that the State would like to see all counties take over a full sedimentation control ordinance, including all of the site review, which would require additional staff.

**Commissioner Guice made a motion to schedule a public hearing on the proposed changes for Monday, August 11, 2008, seconded by Commissioner Hogsed.**

Commissioner Bullock agreed with scheduling a public hearing on this matter. He suggested getting input from the local contractors. Mr. Burrows noted that he is meeting with the Homebuilders Association and he will make them aware of the Public Hearing and potential changes. Chairman Chappell asked that the Public Hearing be posted in the Building Permitting and Planning Offices, as well as on the website. **The motion was unanimously approved.**

ENGINEERING FIRM FOR ONGOING WATER RESOURCES PROJECT

The Soil and Water Board is in the process of sending out Requests for Proposals for an engineering firm to help with nine projects for which they have received grant funds. The grants include monies for engineering expenses so no County funds will be required. In order to move quickly after receiving the RFP's back, the Soil and Water Board is requesting permission to select the engineering firm without having to get approval from the Board of Commissioners. In many counties the Soil and Water Board handles these activities without seeking County approval. There are sufficient funds available to hire an engineering firm to help with the projects.

**Commissioner Phillips moved to allow the Soil and Water Board to select an engineering firm without approval by the Board of Commissioners, seconded by Commissioner Guice and unanimously approved.**

REQUEST FOR FUNDING OF VETERANS HONOR GUARD

The Veterans Honor Guard provides Military Funeral Honors to approximately 40 eligible Transylvania County Veterans per year. They also participate in parades, memorial services and other activities in the County. Over the years funding for the Veterans Honor Guard came solely from the American Legion Post 88 and Veterans of War Post 4309; however they can no longer rely on these organizations for sole funding. The Veterans Honor Guard receives private donations and \$50 per funeral from the North Carolina National Guard.

The Veterans Honor Guard is requesting that the County reimburse them in the amount of \$60 each time they provide Military Funeral per year this amounts to \$2,400. The Manager suggested rather than reimbursing them on a per funeral basis, to grant the Veterans Honor Guard \$2,400. At the end of the fiscal year, they will provide Commissioners with a report of the services they provided.

**Chairman Chappell moved to authorize \$2,400 to be granted to the Veterans Honor Guard to help provide Military Funeral Honors to eligible veterans in Transylvania County with funds to come from the Contingency line item, seconded by Commissioner Hogsed.** Commissioner Hogsed commented that he is proud to be able to support this. The Veterans Honor Guard represents Transylvania County well. Commissioner Phillips said he considers supporting this cause an honor. Commissioner Guice thanked Commissioners for their comments. **The motion was unanimously approved.**

RESOLUTION 30-08 IN RECOGNITION OF THE CITY OF BREVARD'S 140<sup>TH</sup> ANNIVERSARY AS A MUNICIPALITY

On July 26, 2008 the City of Brevard will celebrate its 140<sup>th</sup> Anniversary as a municipality. The City is planning an all day festival for citizens to commemorate this important date. In May, Transylvania County contributed \$1,000 towards their event. Staff requested Commissioners to approve a resolution to honor the City's Anniversary.

**Commissioner Guice moved to approve Resolution 30-08 In Recognition of the City of Brevard's 140<sup>th</sup> Anniversary as a Municipality, seconded by Commissioner Hogsed and unanimously approved.**

(Resolution 30-08 In Recognition of the City of Brevard's 140<sup>th</sup> Anniversary as a Municipality incorporated as part of these Minutes.)

CHANGE ORDER FOR PUBLIC SAFETY FACILITY

The four detention ponds at the Public Safety Facility were designed with corrugated stand pipes. In order to make the two detention ponds along the entryway more presentable, staff has requested that these two standpipes be replaced with concrete boxes veneered with cultured stone. The other two boxes will be concrete. The cost of the change order is \$32,340. The contractor has indicated that the current design will not be warranted, thus the need for the change.

**Commissioner Guice moved to approve the change order for \$32,340, seconded by Commissioner Hogsed.** Commissioner Phillips asked if the stand pipes were designed by Moseley Architects. The Manager responded yes. Commissioner Phillips commented that it appears to him the change order is being requested for aesthetic purposes. The Manager said two of them are and that they were originally designed to just have stand pipes. Staff discussed how to redesign those so that they are presentable at the entryway. The other two were originally designed with corrugated metal which presented warranty issues. The Manager noted that all four stand pipes will be redesigned with concrete; however only the two at the entryway will be veneered with cultured stone. Commissioner Phillips said if the standpipes were improperly designed, the issue should be addressed with Moseley Architects. The Manager said the design was not an improper design but the contractor will not warranty Moseley's design. The design was bid according to the specifications. The Manager asked Project Manager Larry to comment further.



Mr. Reece stated that the contractor has experienced leaking with the original design in other projects. Changing the design to concrete stand pipes would prevent leaking from occurring over time. He reiterated that all four standpipes would be redesigned with concrete and only the two at the entryway would be veneered with cultured stone. The original design will work but will not be guaranteed by the contractor. Commissioner Phillips said the design failure is the reason for the change order and he would like for the County to pursue some relief from Moseley Architects. Mr. Reese said the original design is a typical design. The change order came about because the subcontractor has experienced issues on other jobs trying to make that design work properly. The design is also a typical design recommended by DENR. Commissioner Guice said upon hearing the reasons for the change order, he does not believe the County can hold Moseley responsible. Commissioners need to decide whether or not to approve the change order based on the information given. Mr. Reece further commented that the retention pond and bio-retention approach is a fairly new practice so time is beginning to show issues with those, such as erosion. After further discussion, **the motion was unanimously approved.**

#### CANCELLATION OF THE JULY 28, 2008 COMMISSIONERS' MEETING

In years past Commissioners have cancelled one of the regular meetings in July after the Budget Workshops are finished and the Budget has been approved.

**Commissioner Guice moved to cancel the July 28, 2008 Commissioners' meeting, seconded by Commissioner Phillips and unanimously approved.**

#### MANAGER'S REPORT

The Manager reported the following:

- There was an incident at Champion Pool this afternoon where a small child almost drowned. He praised the life guards on duty who helped save the child and followed proper protocol.
- The rock wall project at the Courthouse is near completion. After the sidewalk is complete, the City is going to put in brick pavers.
- Staff is working on a lockdown policy. Security is a major issue.
- Verizon Wireless is installing their equipment on the tower but it is not yet operational. There is a process of updating cell phones to pick up tower signals. When Verizon is operational a press release will be sent to the media.
- The Manager recently met with the Recreation Director and representatives from State and Federal parks regarding the use of ATV's and motorbikes. It is allowed in National Forests in South Carolina. The Manager will continue to pursue a location for this activity. He noted that this activity is not included in the master plan for the Pisgah National Forest.
- Appalachian Counseling will no longer provide community support services. This service will be provided by Families Together. Appalachian Counseling will continue to provide other mental health services.
- The Corridor Protection Study Committee held its first meeting. The next meeting is scheduled for Thursday, July 24, 2008. The Manager said the first meeting was successful and he is optimistic that the Committee will achieve

positive results.

Commissioner Guice said he understands how decisions are made with regard for planning for the future; however the opportunity for an area to be designated and used for motorbikes has not been brought to the table before. He said there must be a starting point and if Commissioners would like State and Federal parks or forests to consider this issue there needs to be something in writing requesting those entities to give this issue some consideration. There are bike tracks on government property. Transylvania County has much of its land under State and Federal control. At some point he would like for staff to prepare a letter or document which indicates to these entities the County's desires in regards to a bike track.

Commissioner Bullock added that other states do offer this type of activity in parks and forests and he said he believes it can be done here as well. Commissioner Hogsed agreed and said staff should continue to pursue the project. The Manager noted that there may be grant funds available but the key is finding a location. Commissioner Guice further commented that the County needs support from its local, State and Federal representatives and he suggested that Planning Staff attempt to locate large tracts of private land as well. The Manager said he will continue to pursue opportunities.

### **PUBLIC COMMENT**

Chase Hooper: Mr. Hooper said that noise associated with athletic events is exempt from the Noise Ordinance. He asked Commissioners what is considered an athletic event. County Attorney Curtis Potter said it would be subject to interpretation without some additional research. Mr. Hooper said the American Motorcycle Association considers Motocross bike racing an athletic event. He asked if he organized a race at the bike track if he would be exempt from violating the Noise Ordinance. Mr. Potter responded that under the Ordinance, as it is drafted, if a one time event was organized he may not be cited for a violation. Mr. Hooper thanked Chairman Chappell and Commissioner Phillips for voting against the Ordinance. He further commented that the new Ordinance effectively prohibits his son from riding his bike and also put him out of a job.

Keith Chappell: Mr. Chappell commented that it seems Commissioners are continually passing ordinances to meet their needs. He asked several questions about erosion control and proposed changes to the Subdivision Ordinance and Building and Permitting Regulations. Chairman Chappell recommended that he attend the Public Hearing on August 11, 2008 and pose his questions about erosion control.

### **COMMISSIONERS' COMMENTS**

Commissioner Bullock inquired about the status of the lease of the property in Rosman. The Manager said he received a letter last week from the property owners' attorneys requesting some changes to the lease. He and the County Attorneys have responded to their request. Staff will continue to move forward with a lease that is acceptable to both parties.

Commissioner Hogsed said on July 1, 2008 the County began collecting an additional \$2 per ton at the landfill per a new State mandate. He said the State has no funds invested in the landfill and the monies will not be used in the County, yet it is being collected on the backs of Transylvania County citizens. He requested that this item be added to the August 11, 2008 agenda for discussion.

Commissioner Guice commended Commissioners for their efforts concerning the bike track and Noise Ordinance. He said he hopes the County will continue to move forward and continue to address the issue of finding a location for a bike track in this County.

Chairman Chappell thanked Commissioner Hogsed for requesting that the County fly its flags at half staff for an entire week in memory of former North Carolina Senator Jesse Helms. Commissioner Hogsed thanked Commissioners for their support. He said he can not think of a more fitting day than July 4<sup>th</sup> to lose a true American patriot and that North Carolina is a better State and the United States is a better Nation having had Jesse Helms as a representative.

There being no further comments, **Commissioner Hogsed moved to enter into Closed Session per North Carolina General Statute 143-318.11 (a) (3) to consult with Attorney reference the lawsuit Thomas Joseph Stetz versus Vickie Lynn Guy, seconded by Chairman Chappell and unanimously carried.**

#### **GENERAL ACCOUNT OF CLOSED SESSION**

Pursuant to NCGS 143-318.11 (a) (3), closed session was entered into. Present were Chairman Chappell, Commissioners Bullock, Guice, Hogsed and Phillips, County Manager Artie Wilson, County Attorney Curtis Potter and Clerk to the Board Trisha McLeod.

Commissioners discussed details concerning the lawsuit Thomas Joseph Stetz versus Vickie Lynn Guy and instructed staff on how to proceed.

**Chairman Chappell moved to reenter Open Session, seconded by Commissioner Bullock and unanimously carried.**

#### **OPEN SESSION**

**Chairman Chappell moved to seal the Minutes of the Closed Session, seconded by Commissioner Hogsed and unanimously approved.**

#### **ADJOURNMENT**

There being no further business to come before the Board, **Chairman Chappell moved to adjourn the meeting, seconded by Commissioner Bullock and unanimously carried.**

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Jason R. Chappell, Chairman  
Board of County Commissioners

ATTEST:

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Trisha D. McLeod  
Clerk to the Board