

DRAFT
MINUTES

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

BOARD OF COMMISSIONERS
OCTOBER 9, 2007

The Henderson County Board of Commissioners met for a special called meeting at 7:00 p.m. in the Commissioners' Conference Room of the Henderson County Office Building.

Those present were: Chairman Bill Moyer, Vice-Chairman Charlie Messer, Commissioner Chuck McGrady, Commissioner Mark Williams, County Manager Steve Wyatt, County Attorney Russell Burrell, and Clerk to the Board Elizabeth W. Corn.

Also present were: Communications Officer Pam Brice, Deputy Clerk to the Board Terry Wilson, staff attorney for the Sheriff's Department Alan Leonard

Absent were: Commissioner Larry Young, and Assistant County Manager Selena Coffey

CALL TO ORDER/WELCOME

Chairman Moyer called the meeting to order and welcomed all in attendance, stating that the purpose of the meeting was a public hearing with respect to the Noise Ordinance Amendments.

OVERVIEW OF NOISE ORDINANCE AMENDMENTS

County Attorney Russ Burrell stated that the Board had received a draft of the new Chapter 125A and the current Chapter 125 for comparison. The primary difference between the two is how a violation is accessed. Ultimately under the current ordinance the primary way of accessing when there has been a violation is by use of a decimeter. The problem with that is the collection of evidence. The easy part of the use of a decimeter is the evidence in court. The officer who is properly trained in the use of a decimeter has to be onsite and be within the parameters of the ordinance (at least 4 feet off the ground and at least on the property line). The new Chapter 125A Ordinance changes essentially the focus from some kind of machine driven ordinance to whether or not the noise is unreasonably loud. This is a jury standard and the kind of thing that the collection of evidence is actually pretty easy. The collection of evidence is the witnesses that hear it. The proof problems in court are going to be a little more difficult because you will have to persuade a jury beyond a reasonable doubt that that noise was too loud, it was unreasonable for the community. The new draft ordinance meets the constitutional standards pretty well. It's not going to be the easiest ordinance in the world to try cases under but that's the necessity of dealing with the kind of cases that you are going to be dealing with when the proof is requiring witnesses to be in court one or more times. There are two proposed changes to the Amended Noise Ordinance.

1. Add the following underlined language to Sec. 125-3 (B) (7):

(7) The operation of any automobile, motorcycle, or other vehicle, or gas remote control model car or other vehicle, in such a manner as to create loud grating, grinding, rattling, screeching or tires, or other unreasonably loud or disturbing noise.

2. Tracking the present ordinance [Sec. 125-7(B)] ADD a paragraph (B) to Sec 125-4 of the amended ordinance:

DATE APPROVED: _____

(b) If any exceptions stated in this chapter would limit obligations limit liability or eliminate either an obligation or liability, the person who would benefit from the application of the exception shall have the burden of proving that the exception applies and that the terms of the exception have been met.

If the Board were to except this change it would put the burden on the person claiming the exception to the ordinance to show proof. This is fairly common in criminal statues that have exceptions to specified behaviors.

Alan Leonard suggested the following additional changes:

1. Sec. 125-2 (B), first sentence, place a comma (,) after the word “others.” (The following acts, among others, are declared.....)
2. Sec. 125-2 (B) (8), add the words “which create loud and disturbing noises.” (The repair, rebuilding or testing of any motor vehicle, particularly during the hours between 11:00 p.m. and 7:00 a.m. which creates unreasonably loud and disturbing noises.)
3. Sec.125-2 (B) (6), STRIKE the words “unnecessary and/or” in lines 5 and 6. That word has proven to be constitutionally troubling. (“....or the sounding of such a device for an unreasonable period of time.)

The five (5) characteristics of effective noise ordinances are:

They have to fit the location where they are enforced. They have to be constitutional. They must be enforceable. They can be enforced by Sheriff or District Attorney. Judges must be willing to uphold them in court.

The present ordinance is unenforceable; therefore no noise ordinance exists in Henderson County. Individuals who are greatly bothered by loud noise caused by their neighbors, have grounds and will continue to have grounds to bring a private legal action against a noise maker seeking an injunction and maybe money damages if the use of their property has been substantially or unreasonably interfered with by a nuisance. Citizens look to the county or local government for relief. Regardless of what we think, you shouldn't take any action on any proposed noise ordinance until and unless you have input and assurances from the District Attorney. Assurances that he buys into what we are saying and that he considers the proposal to be constitutional, and that he will go to the court and defend the constitutionality of the ordinance and that he considers the ordinance to be enforceable and will make it a priority.

Chairman Moyer stated that it was his understanding that the process in which the Board had been working for many months involved the District Attorney's office and we should know if we were going to have these cases enforced.

Russ Burrell stated that this draft originally came in front of the Board in late May. After that time several of the assistant district attorneys and folks from the legal department had been together looking at this and other ordinances and they were role play enforcing. They very much like the current noise ordinance when it comes to court as long as they have good evidence of a calibrated decimal meter which they do not often have. It is hard to prove that the decimal meter was in proper operating condition.

Chairman Moyer requested that the County Attorney get something in writing from the District Attorney's Office. He also felt due to the additional changes and additional information they have received, and Commissioner Young's absence, it would inappropriate to take action at this meeting.

Commissioner Messer made the motion for the Board to go into public hearing. All voted in favor and the motion carried.

PUBLIC INPUT

1. Michael Jacobs felt that the ordinance was lengthy and it took a lawyer to understand it. He stated that Easley, South Carolina had solved the noise problem. It was one sentence; if you can hear over 30 feet away, it's too loud. He proposed that if you can hear it over 50 feet away, it's too loud. The first time you give a warning. The second violation and additional violations should impose a \$50.00 fine.
2. Neal Reed stated that there were other issues beyond the barking dog issue. He felt that the exceptions to the ordinance made sense. The exceptions however needed to be defined. He proposed that amplified noises should not be accepted. The language on camp activity needs to be addressed and see that adults are not accepted under the definition of camps.
3. Brent Fender lives in North Mills River where and RC Track has been run since 2004 by Clay Harris at least three weekends per month. The noise is not tolerable. He has spoken with the owner of the property and Mr. Harris about this problem and Mr. Harris only requested money to help him clean his track up.
4. Jan Scott also lives in the area of the RC Track. It is jeopardizing the health and welfare of her and neighbors from the noise, dust and dirt. The track runs approximately 12 hours per day with loud speakers. For almost three years the hobby shop and its patrons have abused the noise ordinance. The competitions begin as early as 7:30 a.m. and continue to just before dark. Please ban the RC Cars as part of the ordinance in residential communities.
5. David Lawter lives in Etowah and the person behind him has 5 acres in which he has turned into a dirt bike track. The noise is unbearable.
6. Ken Cobb was a member of the noise ordinance task force that wrote the current ordinance. RC Cars was not included and was an oversight. There was a lot of effort put into the DB based ordinance. He felt that the concrete numbers were needed and the Sheriff's Department needed to use the tools they have. He also felt that the officers were not going to the edge of the property line as defined in the ordinance.
7. Sandra Coughenour was concerned with the dirt track and the loud noise the community was dealing with.
8. Bob Webb was in attendance to support several patients of his who have to endure the encroachment of the dirt track in Etowah. The owner of the track had been addressed as politely and respectfully as possible with no avail. Dr. Webb's patients are dealing with worsening health problems due to the noise of the RC Track.

9. William R. Gould lives in Timberlane in Etowah and has a problem with barking dogs and wants an ordinance written with teeth.
10. Phyllis Capps lives in Clairmont Subdivision and wants something done about the barking dogs. The dogs are invading her property and her time. She wanted an ordinance written that would back up the people and give them a chance to enjoy their homes. (Commissioner McGrady explained that Mrs. Capps lives in the town of Flat Rock municipality and the Henderson County ordinance would not have application in the municipalities unless the municipalities decide to adopt the ordinance themselves).
11. Marilyn Schleifer owns four dogs and lives in the Laurel Park community. Her next door neighbor's dog is a nuisance. She feels that the dogs are only a problem because the owners do not pay the dogs enough attention. Anytime she goes outside the dog will bark when it sees her. She feels that a fine should be assessed each time someone comes out to respond to a call. (Commissioner McGrady explained that Laurel Park is a municipality also and would have to adopt the ordinance in order for it to have application in Laurel Park).
12. Walter Guffy – passed and did not speak.
13. Steve Praytor lives on North Mills River Road and he also has a problem with the RC Track. As soon as it is daylight and until it is dark the noise is so disrupting to their lives.
14. Ronald Allison lives in Sweetwater Hills and has dog problems. The neighbor has two large hounds that bark continuously. He hoped the new ordinance has something in regards to barking dogs.
15. James Stutzman property borders the dirt bike property. His wife has had a condition for twenty years in which she lives with headaches 24/7. Quietness was a priority when they purchased their property. Mr. Stutzman and his wife must leave the house whenever the bikers come to ride because she can't stand the noise level even inside.
16. Scott Mullett lives behind Mr. Stutzman and deals with the same dirt bike problem. He has small children who cannot sleep when the dirt bikes are in operation.
17. Doug Coggins is a native and doesn't like to hear barking dogs and feels that the hunting dogs should not be exempted from the ordinance. Loud mufflers and amplifiers did not used to be allowed. The ordinance needs to be written with less complication.
18. Buford Adcock lives off of Jackson Loop Road and has a barking dog problem and his neighbor has no regard for other neighbors. He also has problems with a neighbor who runs a generator day and night to power his mobile home.
19. Arnie House lives in Hunters Glen and his neighbors dogs bark continually. The Sheriff's Department cannot do anything with the current ordinance.
20. Joann Turner was concerned with the barking dog problem and felt that the decimal system should be used so that the noise could be measured.

21. John Capps lives in Clairmont and deals with the neighbors dogs barking continuously. He has called the Sheriff's Department and when they came the deputy informed him if the dog was on his property and was a nuisance he had the right to kill it. (The Commissioners could not give legal advice but reminded Mr. Capps that he was in municipality of Flat Rock).

22. Kara Webb thinks that the current ordinance is fine and just needs to be enforced.

Commissioner Williams made the motion that the Board go out of public hearing. All voted in favor and the motion carried.

Chairman Moyer stated that the Board had received a lot of additional information and issues to think about. The Board needed to hear from the District Attorney's office in a very specific way with respect to the issues raised. Obviously there is more work to be done.

County Manager Steve Wyatt requested putting the noise ordinance on the agenda for an update as to where the Board is in the process.

Commissioner Messer feels there is a need to amend the noise ordinance.

Chairman Moyer stated that the issue with the municipalities is whether they will or will not adopt the ordinance. Information will be shared with the municipalities.

Commissioner Williams felt that enforcement was the key. Whatever the County puts in place needs to deal with RC tracks.

Commissioner McGrady felt the ordinance should cover RC tracks and dirt bikes. His concern regarding the draft ordinance was that he did not want to create an ordinance that allows neighbors to get inordinately picky about a dog.

ADJOURN

Commissioner Messer made the motion for the Board to adjourn at 8:30 p.m. All voted in favor and the motion carried.

Attest:

Teresa L. Wilson, Deputy Clerk to the Board

William L. Moyer, Chairman