

Cherokee County Board of Commissioners
June 6, 2022 Meeting Minutes

Board members present: Dr. Dan Eichenbaum, Gary Westmoreland, Jan Griggs, Randy Phillips (participated remotely), and Cal Stiles.

Others present: Randy Wiggins, County Manager; Maria Hass, Asst. County Manager/Clerk to Board; Candy Anderson, Finance Director; and, Darryl Brown, County Attorney.

Time: 6:30 P.M.

Location: Cherokee County Courthouse, Room 342.

Call to Order and Ethics Statement

Members were advised of their duty under the Local Government Ethics Act.

Invocation

Invocation given by Randy Wiggins.

Pledge of Allegiance

Led by Chairman Eichenbaum.

Modification of Agenda

Motion made by Commissioner Griggs and seconded by Commissioner Stiles to add the following items to the agenda: 1) County Manager update on EMS Station 2 Site Plan; and 2) Move 911 Dispatch as a stand-alone department and out from under the Sheriff. Motion passed unanimously.

Agenda Adoption

Motion made by Commissioner Stiles and seconded by Commissioner Westmoreland to approve the agenda, as modified. Motion passed unanimously.

Public Hearing on FY 22-23 Budget

Motion made by Commissioner Westmoreland and seconded by Commissioner Stiles to open the floor for public comments. Motion passed unanimously.

County resident Margaret Ackiss shared her concern of a potential tax increase, as well as concern for the proposed ambulance fee increase.

Motion made by Commissioner Westmoreland and seconded by Commissioner Griggs to close the public hearing. Motion passed unanimously.

Public Forum

During public forum, several people shared concerns about the crypto mine on Harshaw Road.

Old Business

After discussion, a Motion was made by Commissioner Griggs and seconded by Commissioner Stiles to remove 911 Dispatch from the Office of the Cherokee County Sheriff, and to make it a stand-alone county department, effectively immediately. The 911 Dispatch Center will be moved to the new backup location and serve as the official 911 Dispatch Center, and the 911 Dispatch center at the sheriff's office will become the official backup center. The department is already a separate department for budgetary purposes, so there will be no interruption of operations and services. The 911 Dispatch Supervisor, Theresa Creasman, will become the 911 Dispatch Director and the office will work under the direction of the County Manager. Voting in favor of the Motion was Commissioners Griggs, Stiles and Westmoreland. Voting against the Motion was Commissioners Phillips and Eichenbaum. Motion passed 3-2. NOTE: There is a follow-up to this item in the 6-6-2022 Budget Worksession Minutes.

The Clerk read a statement from Exponential Digital, regarding updates to their noise mitigation strategy.

The county attorney read a statement concerning a proposed noise ordinance draft. The statement is attached to these minutes as Appendix A.

Motion made by Commissioner Stiles and seconded by Commissioner Griggs to allow the county attorney to work with the environmental attorney, John Noor, to develop a narrowly focused land-use plan/ordinance specifically related to crypto mines. Voting in favor of the Motion was Commissioners Stiles, Griggs, Eichenbaum and Phillips. Voting against the Motion was Commissioner Westmoreland. Motion passed 4-1.

The County Manager gave an update on the EMS Station 2 Site Plan and geotechnical work.

Commissioner Items

Commissioner Griggs presented her planning committee draft. Motion made by Commissioner Griggs and seconded by Commissioner Stiles to implement a planning committee, consisting of nine (9) members, and for the first matter of business be to study parks and recreation needs. Voting against the Motion was Commissioners Eichenbaum, Phillips and Westmoreland. Motion failed 2-3.

Adjourn

Motion made by Commissioner Westmoreland and seconded by Commissioner Griggs to adjourn. Motion passed unanimously.

APPENDIX A

As requested by the Board, last week I tendered a draft of a possible noise ordinance for the Board's consideration. It is just a rough draft and is far from complete. Environmental attorney John Noor was sent a draft on May 5 for his input and revision. The ordinance regulations that I gave you is more the product of Mr. Noor than mine. It is based on Cumberland County's ordinance. Please do not ask me to explain the sound tables and the differences in octaves at distances. I do not know. It is complicated and requires folks with training in the field to make sense of it. Before getting into the weeds of an ordinance of any kind, the Board must consider what direction it wants to go.

An old proverb implores us to "measure 7 times, cut once."

There are basically 5 alternatives:

I - I have previously told this Board, both publicly and privately, that the most effective legal method to quell the crypto mine noise is with a land use ordinance under Chapter 160D of the General Statutes. The Board has made it quite clear that this is not an option that it is willing to consider as is its right to do so. From a legal standpoint, I ask that you consider it again. Such does not have to be slippery slope to zoning. It can be very narrowly tailored, but the county will have to follow statutory guidelines.

II - The second option is an amendment to the existing noise ordinance. There is such an amendment that was previously voted on and is on the table tonight for a second authorization vote. Such ordinance was drafted in haste during a commissioners meeting and contains language that is vague and likely unenforceable. It is still only a class 3 misdemeanor that will provide an ineffective deterrent for the obvious purpose for which it was drafted.

III - The third option is for a public nuisance action. Public nuisance actions can originate with the NC legislature declaring a particular thing to be a public nuisance. Some time ago the Board passed a resolution asking our legislators to introduce a bill to have such a declaration in state statute. Such has yet to be offered to my knowledge. The second method is a public nuisance lawsuit in tort(civil harm). The public nuisance lawsuit by a local government is complex. The County must prove:

1. Interference with a public right that is common to all members of the general public.
2. Injury to the general public that involves a significant interference with public health, safety, public peace, public comfort or public convenience. Not just to a group of people, small or large, but to the general public
3. That the injury actually sustained is common to the general public.

So what does all that mean? Even to a lawyer, the issues and definitions are complex and evolving. Proving a public nuisance would require, in our context, environmental impact studies and evaluations by experts. There would be significant litigation costs to have something declared as a public nuisance. IF there is a declaration of a public nuisance approved by the Court, you have to go about the litigation to abate the nuisance. More litigation would be involved there as well. If there are appeals at either or both phases, we are talking about years

before the nuisance is removed. In the meantime, the fans keep running. Due to what the county must prove, legally this action stands little hope of success.

IV – The fourth option is a noise ordinance with civil remedies. Enforcement could be achieved through an appeals board being established (similar to our solid waste and dangerous dogs appeals boards). The draft ordinance that has given to you is one such method. Enforcement can be civil penalties and/or relief through court injunctions. The civil penalties would need to be set in the ordinance and be consistent. Mr. Noor’s draft sets up a graduated fee scale. Of course, civil penalties would have to go through collections law suits and could have to be pursued out-of-state. Injunctive relief would have to be sought in the State courts initially but could be removed to the federal courts. It would be a lawsuit seeking a cease and desist order for each violation or series of violations. Please keep in mind that any violation could be challenged by the violator through a writ of certiorari to Superior Court.

V- take no action at all.

AS YOUR COUNTY ATTORNEY, it not my function to advocate for any position or alternative and I will not do so. My function is to present alternatives and to evaluate alternatives from a legal perspective and to educate the Board on the advantages and pitfalls that the alternatives might bring, and the legal issues and the impact of legal actions the Board may want to consider in making a decision.

There are consequences for any action or lack thereof.

What I will do for you and future members of this Board is to offer some things that you may consider if the Board chooses to implement legislation about this issue:

1. The misery that the unenclosed crypto mine facilities cause to residents should be considered. I suggest to you that this level of misery by some should not be discounted. I have heard reports of the noise affecting folks as much as 6 miles away. I have visited the Harshaw site. I am not qualified to advise the Board about the impact of the constant noise except to say that it is loud out there.
2. Legally, the Board is under no obligation to adopt or modify an ordinance. The decision to adopt or modify a noise is a purely political decision.
3. Taking ANY action that is on the table will likely result in lawsuits against the county. Mr. Noor, Sean Perrin and the folks I have spoken with at the North Carolina School of Government agree with this assessment.
4. The crypto mining companies and other industries that would bring lawsuits are extremely well financed.
5. The first phase in bringing such lawsuits against the county would be to obtain a restraining order that would hold the ordinance in abeyance until the suit is heard. That could take months or years. The fans would keep running.
6. There is limited insurance that may or may not cover the costs of these suits. The county would likely foot the bill for the bulk of the litigation costs.

7. Litigation costs for the Hogan DSS case, according to our trial counsel was \$430,000 just for the county. This is our most recent example of a long running lawsuit. Insurance covered this so far. It may not cover a noise ordinance lawsuit against the county.
8. Litigation costs, SO FAR, for the declaratory judgement actions brought by our insurance against the county is, as of 5/19/22, **\$269,633.39**. Remember that this is before any substantive hearing in that case has even been scheduled. This money is all out of the county coffers.
9. The Hogan judgement is over \$6.5 million dollars that still have to be paid.
10. There are 22 lawsuits still pending for the Cherokee County DSS CVA cases.
11. The proposed noise ordinance, even if it upheld by the courts at sometime in the future, requires litigation to enforce it by either seeking collection of fines or obtaining cease and desist orders from the Court. The county cannot recover the legal fees and court costs - and all of the fines, if collected, go to the schools.
12. Communicated with Sean Perrin. He gave me an example of doing an enforcement action in a noise ordinance in Transylvania County a few years ago. The cost to the County was \$149,000. That was for ONE enforcement action.
13. The population of Cherokee County is 28,413 per the 2020 census. These people foot the bulk of the bills for any actions the Board takes through property taxes.
14. My conversation with Mr. Noor indicated that significant training of an officer or a county employee in acoustics and measurement techniques would be required. This has costs that I do not know but they should be considered.
15. If this is to be enforced by the Sheriff, he can decide that he is not going to fool with it at any time. Enforcement, as proposed in the draft, will require devotion of resources by a constitutional officer that this Board does not control. If the Board wishes to put it under another branch of county government, it must be ready to expend resources to train and pay for an employee to do this.
16. The majority, but not all, of those affected by crypto mine noise are residents who live within 1 mile of the unenclosed crypto mine sites. There are 814 total address points within a 1 mile radius by the 2 unenclosed crypto mine facilities. Some are homes, some are businesses, some are just addressed lots. This information comes from the tax mapping office.
17. There are 65 address points within 500 yards of the 2 unenclosed crypto mine facilities. As you will see the 500 yards is a key measurement in Mr. Noor's draft ordinance.
18. There are 23,833 address points in Cherokee County.
19. Do the math- Within a one mile radius 3.4% percent of the address points in the county are affected. Within the 500 yard measurement zone three tenths of 1 percent (0.3%) are affected.
20. The possibility of other crypto mines or other noise makers moving in must be considered. This can only be stopped or controlled by a land use ordinance. A noise ordinance may deter noise makers, but it cannot stop them.
21. Proof of reasonableness of any ordinance may have to be shown in a court of law if challenged. How you come up with an ordinance plays into the reasonableness analysis. How you come up with a regulation and who you allow to be heard---it matters.
22. Any noise ordinance will affect Teem Industries, Moog Industries, the chipper mill and probably other businesses that do not involve crypto mining.

23. The County has given Core Scientific, an enclosed crypto mine, incentives to locate in this county in the amount Of \$100,000.
24. The crypto mining companies and other industries in the county should be given the opportunity to be heard by the Board
25. Paul Worley, the County economic recruiter should be consulted about the impact on bringing new industry to the county.
26. Local real estate companies should be heard on the impact on the local residential real estate market in terms of not only current sales but also of future development.
Residential & Commercial.
27. Sound engineers should present evidence to the Board regarding all facets of noise impacts including parameters of enforcement.
28. Affected residents, individually or collectively, have the remedy of private nuisance actions on their own against the crypto mining facilities or a federal suit under section 201 of the Noise Control Act of 1972.
29. There may be other unintended consequences. The broader the action, the more consequences there will be.

Founding Father Samuel Adams said, “The necessity of the times, more than ever, calls for our utmost circumspection, deliberation, fortitude, and perseverance.” I urge the Board to heed his advice.

My function in presenting you with this information is not to advocate any position. Whatever you do or do not do, I just want the Board to go into its deliberations with its eyes wide open. The old proverb says, “Measure seven times, cut once.”

Thank you.