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STATE OF NORTH CAROLINA
COUNTY OF WATAUGA

2016 MAY -5 PM 12:50

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WATAUGA COUNTY, C.S.C.

FILE NO. 16 CVS 226

TOWN OF BOONE, a North Carolina
Municipal Corporation,

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Plaintiff,

vs.

MIKE BUDKA and CYNDI BUDKA
(a/k/a CYNTHIA HUNT), husband and
wife, and KELLER BROTHERS INC.

Defendants.

**VERIFIED COMPLAINT
and
NOTICE OF HEARINGS
and
MOTION FOR TEMPORARY AND
PRELIMINARY INJUNCTIVE RELIEF**

Plaintiff, complaining of Defendants, alleges and says:

1. Plaintiff Town of Boone ("Town") brings this suit seeking injunctive relief to stop Defendants Mike and Cyndi Budka from operating a racing speedway without a permit in violation of the Town's Unified Development Ordinance ("UDO").
2. In addition, the Town seeks a judgment to collect upon civil penalties owed jointly and severally by Defendants as a result of their continuing violations of the UDO.

The Parties

3. Plaintiff Town of Boone ("Town") is a North Carolina municipal corporation.
4. On information and belief, Defendant Mike Budka is a resident of North Carolina. His current address is unknown. His last known address was in Mooresville, Iredell County.
5. On information and belief, Defendant Cyndi Budka, a/k/a Cynthia Hunt, is a resident of North Carolina. Her current address is unknown. Her last known address was in Mooresville, Iredell County. On information and belief, she is married to Mike Budka.
6. Defendant Keller Brothers Inc. is a North Carolina corporation with a principal and registered office located in Ararat, Surry County, North Carolina.

Background

7. The Town of Boone has extraterritorial zoning jurisdiction (“ETJ”) within a defined zone outside its corporate limits pursuant to state law.¹

8. Defendants Mike and Cynthia Budka (“the Budkas”) are currently operating car races and lawnmower races at a dirt race track located on a tract of approximately 94 acres on Roby Greene Road, Watauga County. The tract is also the site of what is known as the “old fairgrounds.”

9. The fairgrounds and race track property is owned by Defendant Keller Brothers Inc.

10. The race track is located in the Town’s ETJ and is subject to the zoning regulations set forth in the Town’s duly-adopted Unified Development Ordinance (“UDO”).

11. On information and belief, the race track and fairgrounds property were annexed into the Town’s ETJ in 1998.

12. Also in 1998, on information and belief, car racing ceased at the race track and there was no car racing nor any other regular use made of the race track for the following 17 years.

13. Last year, Defendants Mike and Cyndi Budka began operating a speedway at the race track in or about April, and the racing continued until October. The Budkas began races again in April of this year. Car races are held every Saturday from approximately 5pm until 9:30 or 10:00 pm. Practice rounds are also held on some weekdays for similar hours.

¹ See N.C.G.S. § 160A-360(a). In 2014, the General Assembly enacted a “local law,” N.C. Sess. Law 2014-33, purporting to remove Boone’s zoning authority in its ETJ. A three-judge panel issued an injunction staying enforcement of that law, and subsequently entered summary judgment in favor of the Town on grounds that the law was contrary to the state constitution. (The matter is currently on appeal to the Supreme Court.) Pursuant to the lower court’s orders, the Town currently retains its zoning authority in the ETJ.

14. Because no racing or other activities had regularly been conducted at the race track for some 17 years, the Budkas' current operation is not a legal nonconforming (i.e., "grandfathered" use).

15. Other than with respect to ongoing, legally non-conforming "grandfathered" uses, Article 4 of the Town's UDO requires that the owner, occupant, or user of real property within the Town's zoning jurisdiction obtain a permit before engaging in any "use" of a property. A true and correct copy of Article 4 of the UDO is attached hereto as **Exhibit A**.

16. Specifically, pursuant to UDO section 4.01.01: "*Property may not be used, altered or changed, nor may clearing, grading, or excavation commence . . . except in accordance with and pursuant to the issuance of a valid permit.*" (Emphasis added).

17. Pursuant to UDO section 4.01.02(A): "*Permits needed to authorize a proposed development, will be issued under this Ordinance only after a review of the application submitted. . . For purposes of this Ordinance, "development" shall include the use or occupancy of any land. . .*" (Emphasis added).

18. Pursuant to UDO section 4.01.02(B): "All permits shall be issued in the name of the applicant, and shall identify the property involved, and *the proposed use*. The permit shall incorporate by reference the plans submitted and representations made, and shall recite any special conditions or requirements imposed by the permit issuing authority." (Emphasis added).

19. Per UDO section 4.03.01(A), the application for a permit "shall be made by the owner [of the property] or the agent of the owner accompanied by proof of agency."

20. In addition, the UDO prohibits the commencement of a use until a Certificate of Zoning Compliance has been issued.²

21. Neither the Budkas nor Keller Brothers Inc. nor any agent of Keller Brothers Inc. has ever applied for or obtained any permit from the Town with respect to Defendants' operations at the race track.

22. The Town issued a cease and desist letter to the Budkas that was delivered to their attorney on April 11, 2016. A true and correct copy of this letter is attached as **Exhibit B**.

23. The Budkas did not cease their racing operations, and on April 20, 2016, the Town issued a Notice of Violation and Penalty and Notice to Cure Violations ("Notice of Violation") to Defendants pursuant to Article 12 of the UDO.

24. A true and correct copy of the Notice of Violation is attached hereto as **Exhibit C**.

25. The Budkas' attorney accepted service of the Notice of Violation on their behalf as of April 22, 2016.

26. The Registered Agent and Vice President of defendant Keller Brothers Inc., Earl Keller, refused to accept the Notice of Violation when it was tendered to him by Federal Express (a designated delivery service) on or about April 21, 2016.

27. The Notice of Violation informed Defendants that they were in violation of the Town's UDO because they were using the race track as a motor vehicle speedway/race track without first obtaining the required permit(s); demanded that Defendants immediately cease

² Pursuant to UDO section 4.02(A): "*The intended use may not be commenced . . . until all of the requirements of this Ordinance and all additional requirements imposed pursuant to the issuance of a zoning, special use permit, preliminary plat or conditional zoning district approval have been complied with, and the applicant has obtained one or more of the following as required: Certificate of Compliance, Certificate of Occupancy, Certificate of Completion and Certificate of Zoning Compliance. . . . A Certificate of Zoning Compliance certifies, when neither a Certificate of Completion nor a Certificate of Occupancy is needed, compliance with all applicable requirements of the UDO and other relevant State and local laws. A Certificate of Zoning Compliance authorizes a use.*" (Emphases added).

using the property and apply for necessary permits; and informed Defendants that they were subject to a fine of \$100 per day if the violations continued, as well as such as other relief was allowed under law, including equitable relief.

28. Defendant Keller Brothers Inc. is hereby given notice of the Notice of Violation, attached hereto as Exhibit C, which shall be considered served upon it upon service of this Complaint.

29. Despite receiving the Notice of Violation, the Budkas have continued to operate racing activities at the race track, and they and their attorney have publicly communicated the Budkas' intent to continue their activities despite the Notice of Violation.

30. As of the date of this filing, none of the Defendants have filed an appeal of the Notice of Violation to the Town's Board of Adjustment pursuant to the appeal rights provided to them at Article 6 of the UDO.

COUNT ONE

(as to Mike and Cyndi Budka)

Request for Temporary, Preliminary, and Permanent Equitable Relief to Enforce the Town's UDO

31. The Town incorporates the foregoing allegations as if fully set forth herein.

32. The Budkas are in violation of Article 4 of the UDO because they are using the race track for car racing and other activities without having obtained a valid permit and a Certificate of Zoning Compliance as required under the UDO.

33. Pursuant to UDO section 12.06.01(C): "[a]ny violation of this Ordinance . . . may be restrained, corrected, abated, mandated, or enjoined by other appropriate proceeding pursuant to State law. . ."

34. Pursuant to UDO section 12.07.05: “[w]hen authorized by the Town Council, this Ordinance [the UDO] may . . . be enforced by any available equitable action or proceeding(s) instituted by the Administrator or Town to prevent, restrain, correct or abate a violation of this Ordinance.” A true and correct copy of Article 12 of the UDO is attached hereto as **Exhibit D**.

35. At its regular meeting held on April 21, 2016, the Boone Town Council authorized the Town Attorney to take any action allowed by the UDO and/or state law to enforce the UDO with respect to the violations at the race track.

36. Equitable relief is also authorized by N.C.G.S. §§ 160A-75, 365, and 389.

37. Immediate equitable relief is proper in this case because use violations – and in particular violations involving the development or other use of a property without a permit – are transitory in nature and, in the absence of immediately-available equitable relief, could make a mockery of zoning regulation enforcement. Without immediate injunctive relief, land owners and users could thumb their noses at the UDO and proceed with unlawful uses for so long as it took the Town to obtain a permanent injunction. Likewise, violators could continue their unlawful uses merely by changing the legal entity through which they conducted their operations, thus avoiding the effect of enforcement measures taken against one operating legal entity while the Town sought relief against the new entity.

38. Immediate equitable relief is also proper to maintain the status quo that existed before the Budkas began their racing operations. For the prior 17 years, residents who lived in or chose to move to the residential neighborhoods adjacent to the race track had not experienced disturbance from the race track, and they had reasonable expectations to believe that that would never change. Since motor racing had not been conducted there for some 17 years, it clearly was not “grandfathered,” and it would not be expected to be allowed in what was now zoned as a

“Residential/Agricultural” district.³ Equity requires that the status quo enjoyed and relied upon by these residents be protected against disturbances arising from Defendants’ unlawful use of the race track unless and until Defendants apply for and obtain a valid permit.

39. Attached as **Exhibit E** are true and correct copies of sworn affidavits of several residents of the residential neighborhoods adjacent to the race track describing the ways in which the car racing has disturbed, intruded upon, and upset their lives and reasonable expectations.

40. Immediate equitable relief is also proper because the Budkas have not proceeded with their racing operations in good faith or with a reasonable expectation that their operations were lawful and could continue indefinitely. The Budkas proceeded without ever inquiring about, applying for, or acquiring a permit as required by the UDO. In addition, residents of the neighborhoods near the track have been questioning and protesting the legality of the racing operations – both directly to Mike Budka and publicly – since shortly after racing began, and no later than June of last year.

41. Based on the foregoing, the Town prays that the Court grant it temporary, preliminary, and permanent equitable relief, and enjoin the Budkas from operating a speedway or making any other use of the racetrack property unless and until a permit is applied for and issued consistent with the Town’s UDO.

³ Pursuant to UDO section 14.01.08:

The RA Residential/Agricultural District is established is established in the UDO “as a district in which the principal use of the land is for low density residential and agricultural purposes. Low-density commercial and service uses which serve the day to day convenience needs of the surrounding area are permissible so long as the uses are of such nature as to minimize conflicts with the area they serve . . . The regulations for this district are designed and intended to create a comfortable, healthy, safe, aesthetically pleasing, and pleasant environment for all appropriate uses.

COUNT TWO
(as to all Defendants)
Civil Penalties

42. The Town incorporates the foregoing allegations as if fully set forth herein.

43. Pursuant to UDO section 12.07, Defendants are jointly and severally liable for a civil penalty of \$100 per day that they remain in violation of the UDO as set forth in the Notice of Violation.

44. The Town is entitled to and prays for a judgment against Defendants in the amount of all accrued civil penalties from service of the Notice of Violation until Defendants' violations cease.

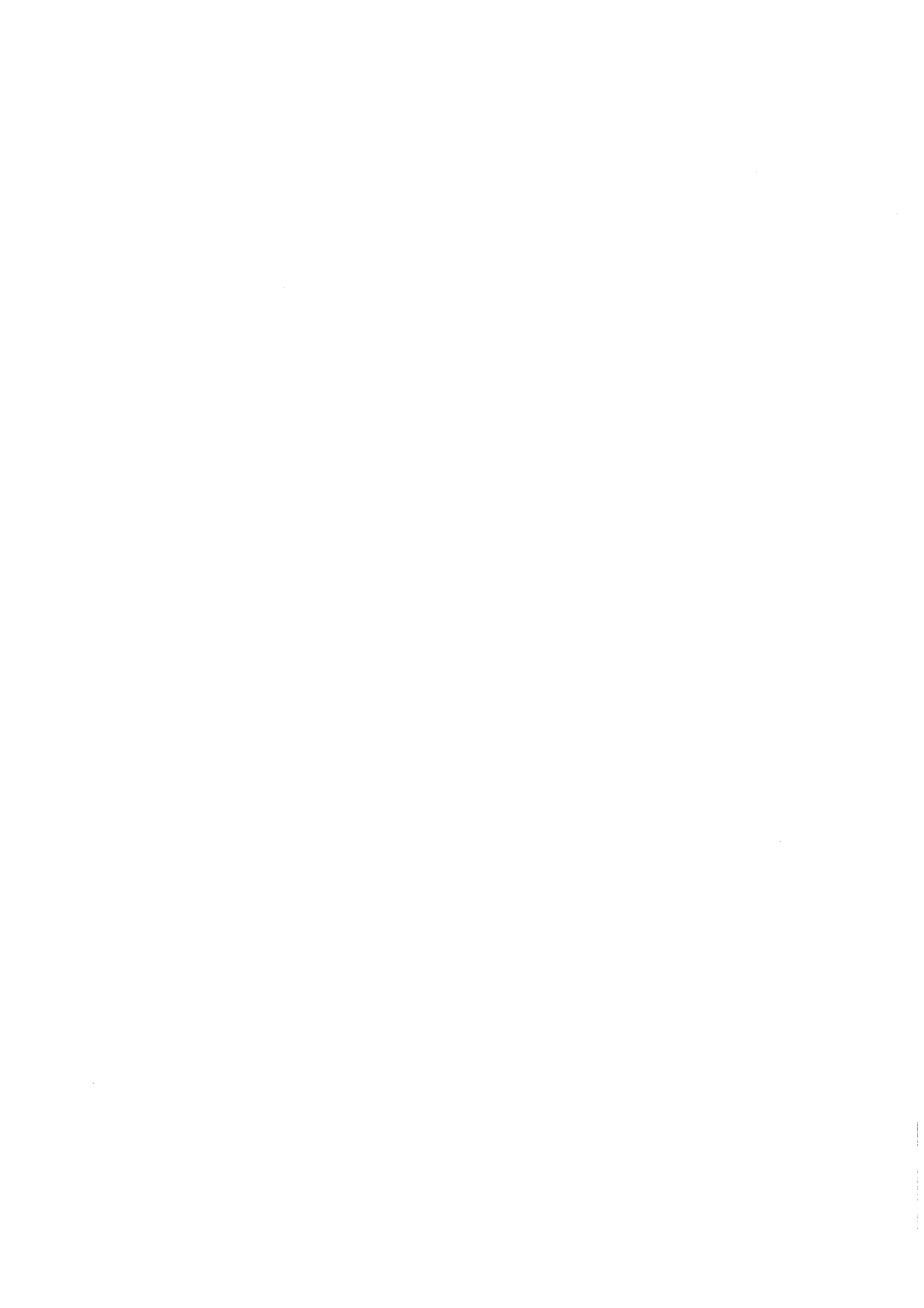
WHEREFORE, Plaintiff Town of Boone prays that it be granted temporary, preliminary, and permanent injunctive relief as specified herein, and that judgment be entered in favor of Plaintiff and against Defendants for civil penalties accrued against Defendants to the date that Defendants cease their violation of the UDO; and for such other and further relief as the Court deems just and proper.

THIS the 5th day of May, 2016.

BY:



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Town of Boone, North Carolina



Article 4 PERMITS

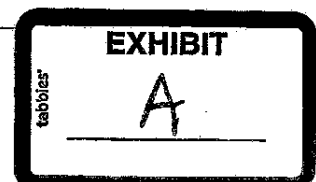
4.01 Permits

4.01.01 Permits Required

- A. Property may not be used, altered or changed, nor may clearing, grading, or excavation commence, nor signs, buildings or other structures be constructed, erected, moved or altered except in accordance with and pursuant to the issuance of a valid permit.
- B. Physical improvements to land to be subdivided may commence upon preliminary plat approval and the issuance of a valid zoning permit authorizing such work.
- C. No development permit shall be issued within:
 - 1. Three years after the completion of a timber harvest if the harvest results in the removal of all or substantially all of the trees that were protected under Town regulations governing development from the tract of land for which the permit or approval is sought; or
 - 2. Five years after the completion of a timber harvest if the harvest results in the removal of all or substantially all of the trees that were protected under Town regulations governing development from the tract of land for which the permit or approval is sought and the harvest was a willful violation of the Town regulations.

4.01.02 Process Overview:

- A. Permits needed to authorize a proposed development, will be issued under this Ordinance only after a review of the application submitted, including the plans contained therein, indicates that the development will comply with the provisions of this Ordinance if completed as proposed. Plans and applications which are approved are incorporated into any permit issued, as are representations made by the applicant, and except as otherwise provided in Section 4.16, all development shall occur strictly in accordance with such approved plans applications, and representations.
 - 1. For purposes of this Ordinance, "development" shall include the use or occupancy of any land or structure, the construction, erection, alteration or moving of any structure and land disturbing activity.
 - 2. Revisions which affect the intent of the design or the capacity of the system shall require prior written approval by the Town.
 - 3. Plans shall be submitted in accordance with the requirements listed in Appendix A.
- B. All permits shall be issued in the name of the applicant, and shall identify the property involved, and the proposed use. The permit shall incorporate by reference the plans



submitted and representations made, and shall recite any special conditions or requirements imposed by the permit issuing authority.

4.02 No Occupancy, Use, or Sale of Lots Until Requirements Fulfilled

4.02.01 Issuance of a zoning permit authorizes the recipient to commence work designed to use, alter, change, clear, grade, excavate, construct, erect, move, or alter signs, buildings or other structures or to make necessary improvements to a subdivision.

- A.** The intended use may not be commenced, no building may be occupied, no structure may be used, and in the case of subdivisions, no lot may be sold until all of the requirements of this Ordinance and all additional requirements imposed pursuant to the issuance of a zoning, special use permit, preliminary plat or conditional zoning district approval have been complied with, and the applicant has obtained one or more of the following as required: Certificate of Compliance, Certificate of Occupancy, Certificate of Completion and Certificate of Zoning Compliance.
1. **Certificate of Compliance:** A Certificate of Compliance certifies compliance with applicable building, mechanical, plumbing, electrical, fire protection or gas codes. It does not alone authorize occupancy or use of any building, structure or land.
 2. **Certificate of Occupancy:** A Certificate of Occupancy may only be issued following issuance of Certificates of Compliance when necessary. A Certificate of Occupancy certifies compliance of a building with all applicable requirements of the UDO and other relevant State and local laws. No building may be occupied or used until a Certificate of Occupancy is issued. A Certificate of Occupancy is inclusive of a Certificate of Zoning Compliance and a Certificate of Compliance.
 3. **Certificate of Completion:** A Certificate of Completion may only be issued following issuance of Certificates of Compliance when necessary. A Certificate of Completion certifies compliance of a structure other than a building with all applicable requirements of the UDO and other relevant State and local laws. A structure which requires a Certificate of Completion may not be used until the certificate is issued. A Certificate of Completion is inclusive of a Certificate of Zoning Compliance.
 4. **Certificate of Zoning Compliance:** A Certificate of Zoning Compliance certifies, when neither a Certificate of Completion nor a Certificate of Occupancy is needed, compliance with all applicable requirements of the UDO and other relevant State and local laws. A Certificate of Zoning Compliance authorizes a use.
- B.** The Administrator shall retain the authority to withhold building or zoning permits and withhold or revoke any Certificate of Compliance, Certificate of Occupancy, Certificate of Completion or Certificate of Zoning Compliance which has been improvidently issued until all relevant requirements of State law and this Ordinance have been met.

4.03 Who May Submit Permit Applications

4.03.01 An application will be accepted only from a person having the legal authority to take action in accordance with the permit or the subdivision plat approval.

- A. An application shall be made by the owner or the agent of the owner accompanied by proof of agency.
- B. When a person other than the owner of the property applies for a permit or approval including a lessee or a person who has contracted to purchase the property, the application must be accompanied by the written approval of the property owner or other proof of authority.
- C. No application may be accepted on behalf of a non-human entity unless it is registered and in good standing with the North Carolina Secretary of State, or such other authority as legally mandated.
- D. When an application involves development on multiple properties owned by multiple owners, it must be accompanied by proof of authority or permission of all owners.
- E. Property owners, or their agents or assigns, are responsible for ensuring that provisions of this UDO are adhered to; including activities contracted for, or performed by those under their employ.

4.03.02 The Administrator shall require an applicant to submit evidence of his authority to submit the application in accordance with Subsection 4.03.01.

4.04 Staff Consultation Before Formal Application

4.04.01 Even if not required, to minimize development planning costs, avoid misunderstandings or misinterpretations, and ensure compliance with the requirements of this Ordinance, a pre-application consultation between the applicant and Staff is strongly encouraged.

4.04.02 Upon request or as mandated, the Administrator shall meet with the applicant as soon as feasible to review the proposed application.

4.05 Applications

4.05.01 Application Submittals: An application is considered submitted when the:

- A. An application form provided by the Administrator is fully completed with information included or attached which enables the Administrator to discern what approval is being sought, and
- B. The application is signed by a person with lawful and established authority to submit the application, and
- C. all required fees are paid, and
- D. The application is delivered to the Administrator.

4.05.02 Incomplete Applications: An application must be completed to the satisfaction of the Administrator and all requested supplemental documentation provided in accordance

with this Section before the permit issuing authority is required to consider the application.

- A.** An application is deemed withdrawn if the applicant does not fully respond to the Administrator's request(s) for the materials, plans, analyses, etc. (hereafter, "supplemental documentation"), needed to fully evaluate the application for its compliance with the UDO and all other pertinent adopted plans and codes of the Town, in accordance with the following schedule:
1. Within twenty (20) business days of submission of an application, the Administrator shall direct a written list of all supplemental documentation, required by the Ordinance or needed by the Administrator or the reviewer in each other pertinent department to evaluate the application for its compliance with the UDO and all other duly adopted requirements of the Town.
 - a. Said list shall be hand delivered to the applicant, mailed by first class mail or electronic mail to the name and address of the applicant, as they are stated on the application.
 - b. Receipt by the applicant shall be inferred three days after the date of mailing.
 2. Following receipt of the written list, the applicant shall have thirty (30) calendar days to provide all supplemental documentation requested by the Administrator, which shall be considered provided when actually delivered to the Administrator.
 - a. If an applicant fails to timely provide all supplemental documentation, the application shall be deemed withdrawn and no further consideration will be given to it.
 3. Following the timely provision of all supplemental documentation by the applicant, the Administrator may request additional supplemental documentation, using the same method as stated in Subsection 4.05.02(A)(1), and the applicant shall again have thirty (30) calendar days to provide all additional requested information or the application shall be deemed withdrawn.
 4. This process may be repeated until all materials needed by the Administrator or other department reviewer to evaluate the application's compliance with the requirements of the UDO and all other duly adopted requirements of the Town have been provided.
 - a. There may be no more than a total of three requests for information by the Administrator with respect to any one application;
 - b. At each stage of a series of requests by the Administrator, should an applicant fail to provide all requested information, the application shall be deemed withdrawn and no further consideration will be given to it.
 5. The burden of submitting all materials needed for a full evaluation of an application at all times nevertheless remains upon the applicant.

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- B. With respect to applications for which the Board of Adjustment is the permit issuing authority, unless the application has been deemed withdrawn pursuant to this Section, if the applicant demands that the application be scheduled for consideration before the Board, it shall be so scheduled, and the Board shall decide whether the application is complete.

- 4.05.03 Application Complete:** Subject to Subsection 4.05.02, an application is complete when it contains all of the information that is necessary for the permit issuing authority to decide whether the development, if completed as proposed, will comply with all of the requirements of this Ordinance and all other duly adopted requirements of the Town.
- A. The presumption established by this Ordinance is that all of the information set forth in Appendix A is necessary to satisfy the requirements of this Section.
1. However, it is recognized that each development is unique, and therefore the permit issuing authority may allow less information or require more information to be submitted according to the needs of the particular case.
 2. For applications submitted to the Town Council or Board of Adjustment, the applicant may rely in the first instance on the recommendations of the Administrator as to whether more or less information than that set forth in Appendix A should be submitted.
- B. In this Ordinance, detailed or technical design requirements and construction specifications relating to various types of improvements (streets, sidewalks, etc.) are set forth in one or more appendices to this Ordinance. It is not always necessary that the application contain the type of detailed construction drawings that would be necessary to determine compliance with these appendices, so long as the plans provide sufficient information, in the judgment of the Administrator, to allow the permit issuing authority to evaluate the application in the light of the substantive requirements set forth in the text of this Ordinance and all other duly adopted requirements of the Town.
1. However, whenever this Ordinance requires a certain element of a development to be constructed in accordance with the detailed requirements set forth in one or more of these appendices, then no construction work on such element may be commenced until detailed construction drawings have been submitted to and approved by the Administrator. Failure to observe this requirement may result in permit revocation, denial of final subdivision plat approval, or other penalty as provided in Article 12.
- C. **Traffic Impact Analysis:** In addition to the information included in Appendix A, certain developments may by, virtue of size, location or configuration of access points to the public road system, be required to have a traffic impact analysis performed. In those instances where a traffic impact analysis is required by the Administrator, the study must be completed and submitted in order for the application to be considered. A traffic impact analysis may be required when any of the following conditions exist:

1. The development proposes to have an access to the public road system within 100' of the STOP bar of any traffic control signal; or
2. The development proposes to have an access to the public road system within 200' of the STOP bar of any traffic control signal and based upon Institute of Transportation Engineers (ITE) trip generation rates is projected to generate eighty (80) or more exiting trips during any one (1) hour period of any day; or
3. The development proposes to have access to any public road at a location where sight distance in any direction along the road is less than 500'; or
4. The development proposes access onto a public road that does not have a paved width of at least eighteen feet (18'); or
5. The development proposes access to a public road that currently operates at a level of service of D or less and based upon ITE trip generation rates is projected to generate 1,500 weekday trips; or
6. The Administrator or Public Works Director determines that the proposed project will have a potential negative impact on the public road system due to the size of the project or existing transportation system; or determines that there are safety concerns with the driveway location and design.

If a traffic impact analysis is performed and that analysis concludes that improvements are required to the transportation system; the applicant may be required to complete those improvements in connection with the project as a condition of issuing a permit. Unless an agreement is executed by the Town in which the time for the improvement is specified the improvement shall be completed prior to issuance of a certificate of occupancy. The fact that the obligation to construct lies with the applicant does not preclude the Town from entering into an agreement to participate if that will be in the interest of the Town.

4.06 Staff Consultation After Application Submitted

4.06.01 Upon receipt of an application and all necessary supplemental documentation and materials, the Administrator shall:

- A. review the application and confer with the applicant regarding Staff's interpretation of the applicable requirements of this Ordinance, and
- B. that the applicant has submitted all of the information that the applicant intends to submit, and
- C. that the application represents precisely and completely what the applicant proposes to do.

4.06.02 Applications Requiring Hearings: The Administrator shall place an application on the agenda of the appropriate Board or Commission as soon as feasible after the applicant has provided all information requested by the Administrator or the applicant, in writing,

refuses to provide requested information and demands the application be forwarded to the appropriate Board or Commission for action.

A. If the Administrator believes that the application is incomplete, the Administrator shall recommend to the appropriate Board or commission that the application be denied on that basis, and shall provide detailed information to the appropriate Board or commission as to the elements, supplemental documentation or materials which the Administrator believes are lacking.

B. Except for an application for conditional district rezoning, if an application is submitted for zoning approval and the site specific development plan or accompanying details of the plan are materially different from the site specific development plan or accompanying details presented to Council in connection with an application for an allocation of vested rights to connect to the Town's water or sewer system, the Administrator must treat the application as an application for a special use permit.

1. A "material" difference shall consist of any "minor modification", if the modification relates to a detail or characteristic of the UDO the application which was specifically discussed in the hearing before the Council, or any "major modification."

4.07 Applications to be Processed Exeditiously

4.07.01 Recognizing that inordinate delays in acting upon applications may impose unnecessary costs on the applicant, the Town shall make reasonable efforts to process applications as expeditiously as possible, consistent with the need to ensure that all development conforms to the requirements of this Ordinance and all other duly adopted requirements of the Town.

4.08 Zoning Permits

4.08.01 Following the submission of a complete application for a zoning permit including all duly requested supplemental documentation, the Administrator shall issue the zoning permit unless the Administrator concludes that:

- A. The requested permit is not within the Administrator's jurisdiction, or
- B. If completed as proposed in the application, the development will not comply with one or more requirements of this Ordinance or any other duly adopted requirements of the Town.

4.08.02 The permit is issued when the earlier of the following takes place:

- A. A copy of the fully executed permit is delivered to the applicant; or,
- B. The applicant has been notified that the application has been approved and that all that remains before a fully executed permit can be delivered is for the applicant to take certain specified actions.

C. For purposes of this Section, delivery is accomplished when a notice or permit is hand-delivered to the applicant or his representative or three (3) days after the notice of permit is deposited in the U.S. Mail, addressed to the applicant or his representative at the address provided on the application.

4.08.03 A proposed development which otherwise is allowable by right but has extraordinary impacts as defined herein shall require a special use permit and shall be processed accordingly.

4.08.04 A proposed development has an extraordinary impact if the Administrator determines:

A. Applicable firefighting or law enforcement capabilities are inadequate to serve the development as proposed, or

B. The proposed development will have a substantial, negative impact on an environmentally sensitive area as defined by the U.S. Environmental Protection Agency or the N.C. Department of Natural Resources.

C. The proposed development will have a substantial, negative impact on adjacent properties and the provisions of the Ordinance designed to address those impacts are clearly inadequate.

4.08.05 Should the Administrator exercise his authority pursuant to this Section, the Board shall not deny the permit unless it cannot craft conditions which satisfactorily mitigate the substantial, negative impacts, or it determines that the plan as proposed does not have a substantial negative impact.

4.08.06 No person shall willfully resist, delay, or obstruct the Planning and Inspections Department, or its duly appointed agent, attempting to inspect a development that has made application for a development permit.

4.08.07 A condition of approval will be the right to physical inspection of the development. In the enforcement of this Ordinance, Staff may perform random independent inspections of the development to ensure compliance with the approved plan.

4.08.08 It shall be unlawful to deviate from the approved Zoning Permit unless the Administrator has provided written approval for the requested modification.

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4.08.09 **Permit Extension**

A. Unless expressly prohibited, the Administrator may extend a zoning permit for a period up to six (6) months if the Administrator concludes that:

1. The permit has not yet expired, and
2. The permit recipient has proceeded with due diligence and in good faith, and
3. Applicable regulations have not changed so substantially as to warrant a new application.

- B. Permit extensions are not allowed for temporary zoning permits unless explicitly authorized.
- C. Successive extensions may be granted for periods up to six (6) months upon the same findings.

4.08.10 Expiration of Zoning Permits

- A. Zoning permits shall expire automatically if, within one (1) year after the issuance of such permits:
 - 1. The use authorized by such permits has not commenced, or
 - 2. Less than ten percent (10%) of the total cost of all clearing, grading, excavation, construction, erection or alteration authorized by such permits has been completed on the site.
- B. If, after some physical alteration to land or structures begins to take place, such work is discontinued for a period of one (1) year, then the permit authorizing such work shall immediately expire. However, expiration of the permit shall not affect the provisions of Section 4.15.

4.09 Special Use Permits and Major Subdivision Preliminary Plat Approval

4.09.01 Special Use Permit: A special use permit must be approved by the Board of Adjustment according to the procedures set forth in Article 6 and the standards set forth in Section 6.02.

4.09.02 Major Subdivision Preliminary Plat Approval: A major subdivision preliminary plat must be approved by the Board of Adjustment according to the procedures set forth in Article 6 and the standards set forth in Section 6.02.

4.10 Uses Previously Approved by Conditional Use Permit

4.10.01 Amendments and modifications to uses currently subject to the terms and conditions of a previously approved conditional use permit, except those issued with conditional use zoning approvals, will be processed subject to the provisions of Section 4.16 dealing amendments and modifications to special use permits or major subdivision preliminary plat approvals.

4.11 Variance

4.11.01 A variance must be approved by the Board of Adjustment according to the procedures set forth in Article 6.

4.12 Authorizing Use, Occupancy, or Sale Before Completion or Dedication of Development

4.12.01 Before Completion: In cases when, because of weather conditions or other factors beyond the control of the permit recipient or applicant for subdivision, exclusive of financial hardship, it would be unreasonable to require the permit recipient to comply with all of the requirements of this Ordinance before commencing the intended use of

the property or occupying any buildings or selling any lots in a subdivision, the Administrator may authorize the commencement of the intended use or the occupancy of buildings or the sale of subdivision lots (insofar as the requirements of this Ordinance are concerned) subject to the following:

- A. For a subdivision, the applicant must provide a surety bond, irrevocable letter of credit or cash (hereafter, the "performance guarantee"), at the choice of the applicant, in an amount which ensures compliance with all Ordinance requirements.
- B. For all zoning permits, the applicant must provide an irrevocable letter of credit or cash, at the choice of the applicant, in an amount which ensures compliance with all Ordinance requirements.
- C. The outstanding requirements to be bonded may not be related to conditions affecting safety; and
- D. All of these outstanding requirements will be fulfilled within a reasonable period not to exceed twelve (12) months.

4.12.02 Before Dedication, Protection Against Defects

- A. Whenever occupancy, use or sale is allowed before the completion of all facilities or improvements intended for dedication, then the performance guarantee that is posted shall guarantee that any defects in such improvements or facilities that appear within one (1) year after the dedication of such facilities or improvements is accepted shall be corrected.
- B. Whenever all public facilities or improvements intended for dedication are installed before occupancy, use, or sale is authorized, then a performance guarantee shall be posted to guarantee to ensure that all defects in such utilities or improvements that occur within one (1) year after the offer of dedication of such facilities or improvements are corrected.
- C. An engineer shall certify to the Town that all facilities and improvements to be dedicated to the Town have been constructed in accordance with the requirements of this Ordinance. This certification shall be a condition precedent to acceptance by the Town of the offer of dedication of such facilities or improvements.

4.13 Completing Developments in Phases

- 4.13.01** If a permit authorizes a development to be constructed in phases, the provisions of Sections 4.02 and 4.12 shall apply to each phase as if it were the entire development.
- 4.13.02** No phasing shall be approved unless the applicant submits plans that clearly show the various phases of the proposed development and the requirements of this Ordinance that will be satisfied with respect to each phase.
- 4.13.03** If a development that is to be built in phases includes improvements that are designed to relate to, benefit, or be used by the entire development (such as a swimming pool or

tennis courts in a residential development) then, as part of his application for development approval:

- A. the applicant shall submit a proposed schedule for completion of such improvements; and
- B. Once a schedule has been approved and made part of the permit by the permit issuing authority, no land may be used, no buildings may be occupied, and no subdivision lots may be sold except in accordance with the schedule approved as part of the permit.

(20140384-08212014)

4.14 Vested Rights

4.14.01 A vested right shall be deemed established upon the valid approval of a site specific development plan, following notice and public hearing.

4.14.02 For purposes of these regulations, a site specific development plan shall constitute any one of the following approvals:

- A. A special use permit or major subdivision preliminary plat approval granted by the Board, or
- B. A conditional district rezoning granted by Council.

4.14.03 **Duration:** Except as provided for in Subsection 4.14.03(C), a right that has been vested as provided for in this Ordinance shall remain vested for a period of two years.

- A. This vesting shall not be extended by any amendments or modifications to a site specific development plan unless expressly provided by the approval authority at the time the amendment or modification is approved.
- B. A site specific development plan shall be deemed approved upon the effective date of the approval authority's action or Ordinance relating thereto.
- C. The permit issuing authority may provide that rights vest for a period of time exceeding two (2) years but not exceeding five (5) years, inclusive of all amendments, modifications and phasing, where warranted in light of all relevant circumstances, including but not limited to, the size and phasing of the development, the level of investment, the need for the development, economic cycles, and market conditions. These determinations shall be in the sound discretion of the approval authority at the time the site specific development plan is approved or modified.

4.14.04 The establishment of a vested right shall not preclude the application of overlay zoning that imposes additional requirements but does not affect the allowable type and intensity of use, or Ordinances or regulations that are general in nature and are applicable to all property subject to regulation by the Town, including, but not limited to building, fire, plumbing, electrical and mechanical codes.

A. Applicable new or amended regulations shall only become effective with respect to property that is subject to a site specific development plan upon the expiration or termination of the vested right in accordance with this Ordinance.

4.14.05 A vested right is not a personal right, but shall be attached to and run with the applicable property. After approval of a site specific development plan, all successors to the original landowner shall be entitled to exercise such rights while applicable.

4.14.06 **Termination:** A right that has been vested as provided for in this Ordinance shall terminate:

A. At the end of the applicable vesting period with respect to buildings and uses for which no valid building permit applications have been filed, or

B. With written consent of the affected landowner, or

C. Upon findings by the permit issuing authority, by Ordinance after notice and public hearing, that natural or man-made hazards on or in the immediate vicinity of the property, if uncorrected, would pose a serious threat to the public health, safety, and welfare if the project were to proceed as contemplated in the site specific development plan, or

D. Upon payment to the affected landowner of compensation for all costs, expenses, and other losses incurred by the landowner including, but not limited to, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consultant's fees incurred after approval by the Town, together with interest thereon at the legal rate until paid. Compensation shall not include any diminution in the value of the property which is caused by such action, or

E. Upon findings by the permit issuing authority, by Ordinance after notice and a public hearing, that the landowner or his representative intentionally supplied inaccurate information or made material misrepresentations which made a difference in the approval by the approval authority of the site specific development plan, or

F. Upon enactment or promulgation of a State or federal law or regulation that precludes development as contemplated in the site specific development plan, in which case the approval authority modify the affected provisions, upon finding that the change in state or federal law has a fundamental effect on the plan, by Ordinance after notice and a public hearing.

G. Upon a failure by the permit holder to abide such terms and conditions as have been attached to the approval or otherwise required by this Ordinance.

4.14.07 Nothing in this Section is intended or shall be deemed to create any vested right other than those established pursuant to N.C. Gen. Stat. § 160A-385.1.

4.14.08 Any petition for voluntary annexation filed with the Town under G.S. 160A-31 or G.S. 160A-58.1 shall contain a signed statement declaring whether or not any vested right with respect to the property subject to the petition has been established under G.S. 160A-

385.1 or G.S. 153A-344.1. A statement that declares that no vested right has been established, or the failure to sign a statement declaring whether or not a vested right has been established, shall be binding on the landowner and any such vested right shall be terminated.

4.15 Effect of Permit on Successors

4.15.01 Permits authorize the applicant to develop and use land and structures in a particular way. Such permits are transferable. However, so long as the land or structures or any portion thereof authorized by a permit continues to be used for the purposes for which the permit was granted, then:

- A. No person (including successors and assigns of the person who obtained the permit) may make use of the land or structures except in accordance with all the terms and requirements of that permit, and
- B. The terms and requirements of the permit run with the land and are binding on successors in interest.

4.16 Modification of Permits

4.16.01 A permit with vested rights pursuant to NC Gen. Stat. 160A-385.1 may be modified pursuant to the following Sections until such times as a Certificate of Occupancy is issued. Thereafter, any change to a completed development or phase of a development may only be considered on a new application. A new application shall always be determined by the permit issuing authority which approved the site specific development plan.

4.16.02 Insignificant modifications from zoning, major subdivision preliminary plat approval or special use permits are permissible and the Administrator may authorize such insignificant modifications subject to the following:

- A. A modification is insignificant if it has no discernible impact on neighboring properties, the general public, or those intended to occupy or use the proposed development; and
- B. Insignificant modifications may not:
 - 1. Exceed ten percent (10%) of any measurable standard; or
 - 2. Change the approved use(s); or
 - 3. Modify a feature of an application which was central to the deliberations of the permit issuing authority; or
 - 4. Modify an express condition of the permit issuing authority.

4.16.03 Minor modifications to zoning, major subdivision preliminary plat approval or special use permits are permissible with the approval of the permit issuing authority subject to the following:

- A. Minor modifications are those that do not significantly change the essential character of the use(s) or activity that has been previously authorized; and

B. If a minor modification is approved, new conditions may be imposed in accordance with Section 4.09.

1. The applicant retains the right to reject such additional conditions by withdrawing his request for a modification and may then proceed in accordance with the previously issued permit.
2. An applicant who elects to withdraw an application for modification must do so prior before the final decision of the permit issuing authority.

4.16.04 Major modifications to zoning, major subdivision preliminary plat approval or special use permits will be processed as new applications.

A. Major modifications are those that change the essential character of the use or activity that has been previously authorized or proposes changes which exceed the limits for minor modifications.

B. A proposed change in use, a change in intensity or density exceeding ten percent (10%) of any measurable standard, or a modification to a feature of an application which was central to the approval by the permit issuing authority shall always be considered a major modification.

4.16.05 The Administrator shall determine whether modifications of permits fall within the categories set forth above in Subsections 4.16.02, 4.16.03, and 4.16.04.

A. The determination of the Administrator shall constitute the final decision of the Town and is not appealable.

4.16.06 An applicant requesting approval of changes shall submit a written request for such approval to the Administrator.

- A.** The request shall identify the proposed changes.
- B.** The request shall be processed in accordance with Section 4.05.
- C.** Approval of all changes shall be in writing.

4.17 Maintenance of Common Areas, Improvements, and Facilities

4.17.01 The recipient of any zoning, special use permit, preliminary or final plat approval, his successors and assigns, shall be responsible for maintaining all common areas, improvements, or facilities required by this Ordinance or any permit issued in accordance with its provisions, except and until those common areas, improvements, or facilities with respect to which an offer of dedication to the public has been accepted by the appropriate public authority.

A. As illustration, private roads and parking areas, water and sewer lines, and recreational facilities must be properly maintained so that they can be used in the manner intended in accordance with Town Codes, and required vegetation and trees used for screening, landscaping, or shading must be properly maintained or replaced if they die or are destroyed.

- 4.17.02** A permit holder may create a property owners association or similar legal entity (association) to succeed to its responsibilities under this Section, so long as such association is established in accordance with Appendix A.
- 4.18 Design and Other Professionals**
- 4.18.01** All professionals associated with an application shall be competent for the task undertaken, and licensed by and in good standing with the appropriate licensing Board in the State of North Carolina.
- A.** If problems with the project are encountered that result from the failure by a design professional to properly discharge his responsibilities, the Town may initiate appropriate action(s) including filing a complaint with the appropriate licensing Board and refusing to accept certifications regarding analysis of design or construction from the individual or firm.
- 4.18.02** If a geotechnical engineer performs a subsurface investigation, that engineer shall review the plans and specifications prior to submittal to the Town. A report of this review shall be submitted to the Town along with the permit application.
- 4.18.03** If retaining walls are required, and a geotechnical engineer has performed a subsurface investigation, the design professional shall provide a statement that the report on the subsurface investigation was reviewed and recommendations incorporated into the design.
- A.** The design professional shall also require the geotechnical engineer to prepare a global slope stability analysis of the retaining walls.
- B.** The global slope stability analysis shall be submitted with the plans for the retaining walls.
- 4.18.04** Whenever the Administrator is considering and reviewing an application which involves data or representations within the exclusive purview of a professional in a particular field, the Administrator may demand a certified statement from an appropriate professional confirming that the data or representations are accurate and meet the requirements of this Ordinance.
- 4.18.05** Whenever the Administrator considered and reviewed an application which involved data or representations within the exclusive purview of a professional in a particular field, the Administrator shall require a certified statement from an appropriate professional confirming that the work was completed in compliance with the approved plans.
- 4.18.06** The Administrator shall require verification that plant material was installed by a landscape contractor registered in the State of North Carolina.
- 4.19 Project Manager**
- 4.19.01** In order to provide adequate coordination of the various design professionals on all development projects, every project shall designate and identify a project manager.

- A. Single family and two family projects involving less than ½ acre of land disturbing activity or commercial site improvements that involve no more than 2,500 square feet of land disturbing activity are exempt from this requirement.

4.19.02 The project manager shall be responsible for coordination of all design and construction monitoring activities related to the project. This shall include, but not be limited to:

- A. Coordination of design, including ensuring that adequate consideration is given in the design of recommendations made by professionals who performed preliminary exploration of site conditions, and
- B. Monitoring of construction, and
- C. Ensuring all final certifications indicating that the project was constructed in compliance with the approved design documents are completed.

4.19.03 Prior to issuance of a Certificate of Occupancy the project manager shall submit a certification that the project was constructed in accordance with the approved plans and specifications.

- A. Attached to the project manager's final certification shall be all the certifications required from the design and other professionals as described in Section 4.18.





ALLISON M. MEADE, Attorney and Counselor at Law & NCDRC Certified Superior Court Mediator

April 11, 2016

Via Email and Hand Delivery

Nathan A. Miller, Esquire
766 W King St.
Boone, NC 28607

Dear Mr. Miller,

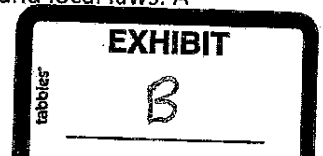
This is to advise that your clients, Mike and Cyndi Budka, are to cease and desist from operating a speedway at the race track located at 748 Roby Greene Road in Boone. As has become clear from the evidence and legal analyses offered at the most recent Board of Adjustment hearing concerning the race track, the Budkas are not lawfully entitled to engage in car racing or to operate a speedway at the race track.

Prior to the re-opening of the speedway last year, the race track had not been used for car racing for approximately 17 years. Accordingly, operation of the speedway is not a legally nonconforming (i.e., "grandfathered" use), and instead constitutes a new use under the Town's Unified Development Ordinance ("UDO").¹ Pursuant to the UDO, a new use of land requires that the applicant **apply for and be issued a valid zoning permit.**² In addition, the UDO prohibits the commencement of a new use until a Certificate of Zoning Compliance has been issued.³

¹ "Use" is defined at Article 34 (Definitions) as the "activity or function that actually takes place or is intended to take place" on a property.

² Pursuant to UDO section 4.01.01: "**Property may not be used**, altered or changed, nor may clearing, grading, or excavation commence . . . **except in accordance with and pursuant to the issuance of a valid permit.**" Pursuant to UDO section 4.01.02(A): "**Permits needed to authorize a proposed development, will be issued under this Ordinance only after a review of the application submitted.** . . . For purposes of this Ordinance, "**development**" shall include the use or occupancy of any land. . ." Pursuant to UDO section 4.01.02(B): "All permits shall be issued in the name of the applicant, and shall identify the property involved, and **the proposed use.** The permit shall incorporate by reference the plans submitted and representations made, and shall recite any special conditions or requirements imposed by the permit issuing authority."

³ Pursuant to UDO section 4.02(A): "**The intended use may not be commenced** . . . until all of the requirements of this Ordinance and all additional requirements imposed pursuant to the issuance of a zoning, special use permit, preliminary plat or conditional zoning district approval have been complied with, **and the applicant has obtained one or more of the following as required:** Certificate of Compliance, Certificate of Occupancy, Certificate of Completion and Certificate of Zoning Compliance. . . . A Certificate of Zoning Compliance certifies, when neither a Certificate of Completion nor a Certificate of Occupancy is needed, compliance with all applicable requirements of the UDO and other relevant State and local laws. A Certificate of Zoning Compliance **authorizes a use.**"



Neither the Budkas nor any other person acting on behalf of the speedway, nor any person purporting to act on behalf of the property owner, has ever applied for a permit authorizing car racing at the race track. The Town of Boone has not issued any permit approving car racing at the race track; nor has it issued a Certificate of Zoning Compliance allowing such use to commence.

We are aware that last year a Mr. Charles Flay emailed the Town's Planning Administrator, Bill Bailey, inquiring whether the race track could be re-opened as a "speedway." Mr. Flay did not explain who he represented or provide any further specifics as to the intended use of the race track. Mr. Bailey responded by email that "the fairgrounds and the race track are legal uses under the Town's UDO . . ." However, neither Mr. Flay nor the Budkas, nor any other representative of the speedway or the property owner, subsequently applied for or obtained a permit or a Certificate of Zoning Compliance as required under the UDO. Accordingly, continued use of the property for car racing without the issuance of a valid permit is not lawful.⁴

Please be aware that if the Budkas do not immediately cease car racing at the race track, the Town will issue a Notice of Violation consistent with its enforcement authority under UDO Article 12. Upon issuance of a Notice of Violation, civil penalties will begin to accrue at the rate of \$100.00 per day and, if the Town must file a lawsuit to collect civil penalties, it also will be entitled to recover its reasonable attorneys' fees and costs. In the event unlawful use of the race track continues, the Town may authorize the filing of a lawsuit for injunctive relief to enforce the UDO.

In light of the foregoing, at the continued hearing to be held before the Board of Adjustment on April 18th concerning the race track, the Town will move that the Board dismiss the appeal on grounds that it has been mooted.

Sincerely,



Allison M. Meade, Esq.

Town Attorney

Town of Boone, North Carolina

cc (via email): Paul A. Capua, Esq.
Bill Bailey

⁴ Obviously, Mr. Bailey's email did not constitute a validly-issued permit as required by the UDO. Nor did Mr. Bailey's email constitute any other manner of "valid governmental approval" authorizing car racing at the race track. See, e.g., *MLC Auto., LLC v. Town of S. Pines*, 207 N. C. App. 555(2010); *Browning-Ferris Indus. of South Atlantic, Inc. v. Guilford County Bd. of Adjustment*, 126 N.C. App. 168 (1997). Further, "a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past." *City of Raleigh v. Fisher*, 232 N.C. 629 (1950).





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ALLISON M. MEADE, *Attorney and Counselor at Law & NCDRC Certified Superior Court Mediator*

April 20, 2016

Via Hand Delivery

Mike & Cyndi Budka
c/o Nathan Miller, Esq.
766 W. King St.
Boone, NC 28607

Via Federal Express

Mountain View Speedway LLC
c/o Charles Flay, Registered Agent
353 Luffman Road
Ronda, NC 28670

Via Federal Express

Mike & Cyndi Budka
130 Soule Lane
Mooresville, NC 28115

Via Federal Express

Keller Brothers Inc.
c/o Earl Keller, Registered Agent
1377 Little Mountain Church Rd
Ararat, NC 27007

**Re: Notice of violation and penalty and notice to cure violations -- 467/677 Roby
Greene Rd (PIN 2921-44-8688-000), DBA: Mountain View Speedway**

Dear Sirs and Madam:

Enclosed please find a notice of violation issued by the Town of Boone Planning Administrator, Bill Bailey.

In the event you wish to communicate with the Town concerning this notice, please contact me at the phone number or email address set forth above.

Sincerely,

Allison M. Meade

*Town Attorney
Town of Boone, North Carolina*

AMM/tfg
Enclosures



Town of Boone



April 19, 2016

NOTICE OF VIOLATION AND PENALTY AND NOTICE TO CURE VIOLATIONS

Via Hand Delivery

Mike & Cyndi Budka
c/o Nathan Miller, Esq.
766 W. King St.
Boone, NC 28607

Via Federal Express

Mountain View Speedway LLC
c/o Charles Flay, Registered Agent
353 Luffman Road
Ronda, NC 28670

Via Federal Express

Mike & Cyndi Budka
130 Soule Lane
Mooresville, NC 28115

Via Federal Express

Keller Brothers Inc.
c/o Earl Keller, Registered Agent
1377 Little Mountain Church Rd
Ararat, NC 27007

**Re: Violations at 467/677 Roby Greene Rd (PIN 2921-44-8688-000)
DBA: Mountain View Speedway**

Dear Sirs and Madam:

Under the authority granted by the Town of Boone's Unified Development Ordinance (UDO) Section 12.04, staff has investigated the real property controlled by you at 467/677 Roby Greene Road, Boone, NC 28607, also known as the Mountain View Speedway, and documented the following violation:

Violation: The dirt race track is being used as a motor vehicle speedway/race track without first obtaining the required permit(s). See UDO 4.01.01(A) (Permits Required) & 12.01.01(A) and (D) (Development without a permit; Use violation).

Correction of Violation: Immediately cease using this property as a speedway; apply for necessary permit(s).

Per UDO 12.03.01: "The owner, tenant, or occupant of any land or structure, or part thereof, or other person who possesses a cognizable interest in the real or personal property in question, who

participates in, assists, directs, causes, allows, maintains, or is otherwise responsible for any situation that is contrary to the requirements of this Ordinance shall be liable for violations of this Ordinance.”

Upon consideration of the factors set forth at UDO 12.05.02, I am ordering you to cease operating the speedway at the referenced property immediately.

As detailed in UDO Subsection 12.07.01, failure to immediately cease the violation(s) described herein shall result in a fine of \$100 per day that each violation continues.

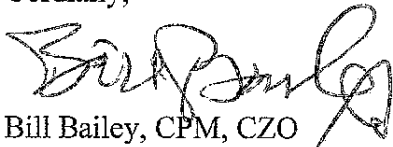
In the event you fail to cease operation of the speedway, the Town of Boone may proceed with any enforcement action authorized under the UDO, section 12.06, and/or state law, including but not limited to: filing suit to collect accrued fines, together with attorneys’ fees and costs incurred in such collection; filing criminal charges; and/or filing an action for injunctive relief.

Appeals

Per UDO Section 6.04, you have the right to appeal this Notice of Violation to the Town of Boone Board of Adjustment. The appeal should be made on a form provided by the Planning and Inspections Department and delivered to the Town Clerk within 30 days of the date of receipt of the notice of Violation. (See UDO 6.04.02(B)(1)).

The Boone Unified Development Ordinance (UDO) can be found at www.townofboone.net or by visiting our office at 680 W. King St., Suite C, Boone, NC 28607.

Cordially,



Bill Bailey, CPM, CZO
Planning Administrator/
Director of Planning and Inspections

cc: Allison Meade, Town Attorney
John Ward, Town Manager
file

3 additional copies
Please make
w/ orange dividers

-1-

Article 12 ENFORCEMENT

12.01 Violations

12.01.01 Any of the following shall constitute a violation of this Ordinance and shall be subject to the remedies and penalties provided for in this Ordinance and under State law:

- A. Development without a permit; or
- B. Development inconsistent with a permit; or
- C. Violation by act or omission; or
- D. Use violation; or
- E. Subdivision violation; or
- F. Continuance of a violation; or
- G. Violation of incorporated codes and manuals; or
- H. Violation of conditions of approval; or
- I. Occupancy violation

12.02 Complaints Regarding Violations

12.02.01 Complaints alleging a violation of this Ordinance may be received from citizens, Staff or other concerned parties by filing a written, signed complaint form as provided by the Department. A Staff member may file a written complaint based upon personal observation, a verbal complaint and even an anonymous complaint (as deemed appropriate).

12.03 Persons Liable

12.03.01 The owner, tenant, or occupant of any land or structure, or part thereof, or other person who possesses a cognizable interest in the real or personal property in question, who participates in, assists, directs, causes, allows, maintains, or is otherwise responsible for any situation that is contrary to the requirements of this Ordinance shall be liable for violations of this Ordinance.

12.03.02 No landlord may escape liability for an occupancy violation based upon a claimed lack of knowledge of the violation unless:

- A. The lease of the property includes a provision which authorizes the landlord to terminate the lease early if the tenant violates the occupancy or zoning rules of the Town; and
- B. The landlord takes prompt action to terminate the lease and/or tenancy of the tenants of the property when an occupancy violation has been confirmed by the Administrator.



12.04 Investigations

12.04.01 The Administrator may conduct investigations deemed necessary to carry out the duties prescribed in this Ordinance and, for this purpose, and enter at reasonable times upon any property, public or private, for the purpose of investigating and inspecting the sites of any complaints or alleged violations of this Ordinance.

12.04.02 The Administrator may require written statements, certificates, certifications, or the filing of reports relating to complaints or alleged violations of this Ordinance from the complainant or a person potentially liable.

- A. The failure of a complainant to provide requested information may be interpreted as an indication that the complaint is without merit.
- B. The failure of a person potentially liable to provide requested information may be interpreted as an admission of the violation.

12.05 Enforcement

12.05.01 Initial Contact: When the Administrator concludes that a violation of this Ordinance has occurred, he shall:

- A. In the case of a repeat violator issue a Notice of Violation in accordance with Subsection 12.05.02; or
- B. In the case of a sign violation involving a first time offender, serve a warning ticket on a responsible party, advising the person liable to take immediate corrective action, with the following limitations:
 - 1. The Administrator may allow up to twenty-four (24) hours to take corrective action, or
 - 2. Due to practicalities of sign removal or other circumstances beyond the control of the violator, the Administrator may afford the violator additional time, not to exceed five (5) days.

or

- C. For all other violators and violations, attempt to contact the person liable, by telephone or in person, to discuss possible remedies to correct the violation.
 - 1. In the sole judgment of the Administrator if the violation can be corrected within five (5) business days of this discussion and the person liable expresses his intent to correct the violation within that time period, the Administrator may suspend enforcement action to allow the person liable to correct the violation.

12.05.02 Notice of Violation: Following the attempted initial contact, where required, and any mandated cure period, if the violation is unresolved, the Administrator shall issue the Notice of Violation. The Notice of Violation shall:

- A. Include the nature of the violation and the articles and sections of the Ordinance which have been violated; and

B. Include the measures necessary to remedy the violation and the time period in which the violation must be corrected, if applicable;

1. The Administrator may afford the person liable a period of up to thirty (30) days from the date of the Notice of Violation to correct the violation before penalties are imposed.
2. The decision by the Administrator as to whether such periods should be allowed and the length of any cure period shall be solely within the discretion of the Administrator, but shall be based upon the Administrator's application of the following relevant considerations which are not exclusive, based on a determination of what action is in the best interests of the Town:
 - a. The seriousness of the violation; and
 - b. The damage which may occur by any delay in enforcement; and
 - c. The effect of the violation, if any, on neighboring property owners or occupants of neighboring property, or other citizens of the Town; and
 - d. Whether or not the person liable is a repeat violator; and
 - e. Whether the violation can be corrected within a period of thirty (30) days or less; and
 - f. Whether the violation is of such nature that the person liable may circumvent enforcement of the Ordinance by means of a temporary correction; and
 - g. Whether the violator is proceeding in good faith to address the violation; and
 - h. Such other factors as the Administrator determines reasonably require immediate enforcement, or conversely, allow some minimal delay in enforcement.

and

- C. Include the penalties or remedies that may be assessed, the date penalties will begin to accrue, and the amount of such penalties; and**
- D. Include the action which the Administrator intends to take if the violation is not corrected; and**
- E. Include an explanation or the right of the person liable to appeal the decision of the Administrator to the Board of Adjustment.**

12.05.03 Notwithstanding Subsections 12.05.01 and 12.05.02, when the Administrator determines that a delay in enforcement would pose a danger to the public health, safety, or welfare, the Administrator shall send a Notice of Violation as soon as practicable.

12.05.04 **Appeal of a Notice of Violation**

- A. An appeal of a notice of violation under Subsection 12.01.01 stays enforcement of the decision unless the Administrator who made the decision certifies to the Board after notice of appeal has been filed:
 - 1. That because of the facts stated in an affidavit, a stay would cause imminent peril to life or property, or
 - 2. Because the violation is transitory in nature, a stay would seriously interfere with enforcement of the Ordinance.
- B. The appellant shall be notified of the Administrator's certification.
- C. Following certification, enforcement proceedings shall not be stayed except by a restraining order, which may be granted by a court.
- D. If enforcement proceedings are not stayed, the appellant may file with the Administrator a request for an expedited hearing of the appeal.
 - 1. The Board shall meet to hear the appeal within fifteen (15) days after such a request is filed.
- E. Notwithstanding the foregoing, appeals of decisions granting a permit or otherwise affirming that a proposed use of property is consistent with the Ordinance shall not stay the further review of an application for permits or permissions to use such property; in these situations the appellant may request and the board may grant a stay of a final decision of permit applications or building permits affected by the issue being appealed.
- F. The certification and stay procedures of this Section shall not apply with regard to the pursuit of criminal charges where appropriate.

12.06 Remedies

12.06.01 Available Remedies: Any or all of the following may be used to enforce the provisions of this Ordinance.

- A. **Civil Penalties:** Any person who violates any provision of this ordinance may be subject to the assessment of a civil penalty in accordance with Section 12.07.
- B. **Criminal Penalties:**
 - 1. **Assessment:**
 - a. Unless a more stringent criminal penalty is prescribed pursuant to State law for a particular violation of this Ordinance or are otherwise provided, any person who violates the UDO shall be guilty of a Class 3 misdemeanor, pursuant to N.C. Gen. Stat. § 14-4 (a), with a fine up to \$500.00.
 - b. Any person who knowingly or willfully violates any provision of Article 20 shall be guilty of a Class 2 misdemeanor with a fine up to \$5,000.00.

- c. Any person who, being the owner or agent of the owner of any land located within the planning jurisdiction of the Town, subdivides his or her land in violation of this Ordinance, or transfers or sells land by reference to, exhibition of, or by any other use of a plat showing a subdivision of the land before the plat has been properly approved and recorded in the office of the Watauga County Register of Deeds, shall be guilty of a Class 1 misdemeanor with a fine of \$1,000.00. The Town may bring an action for injunction of any illegal subdivision, transfer, conveyance, or sale of land. Building permits required pursuant to G.S. 160A-417 shall be denied for lots that have been illegally subdivided. In addition to other remedies, the Town may institute any appropriate action or proceedings to prevent the unlawful subdivision of land, to restrain, correct, or abate the violation, or to prevent any illegal act or conduct. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring land does not exempt the transaction from violation of this Ordinance.
 - d. The Administrator shall institute criminal charges only with the authorization of the Town Manager.
2. **Determination:** In determining whether criminal charges should be recommended with respect to a particular violation, the Administrator shall consider the following factors, which shall not be exclusive, and the applicability of any individual factor shall not determine the decision, which should be based on the best interests of the Town:
- a. Whether the violator is a repeat violator;
 - b. Whether the violator has acted in intentional disregard of the Ordinance;
 - c. Whether there are factors outside control of the violator which have prevented the person from expeditiously correcting the violation;
 - d. Whether the violator has stated an intention to undertake prompt correction action;
 - e. What damage has occurred as a result of the violation;
 - f. Whether the violation is capable of repetition but escaping review, or civil penalties are ineffective in ensuring enforcement of the Ordinance; and
 - g. Whether some other reason is identified which will enhance the enforcement of the Ordinance by the pursuit of criminal charges in a particular case.
- C. Injunction:** Any violation of this Ordinance or of any condition, order, requirement, or remedy adopted pursuant to this Ordinance may be restrained, corrected, abated, mandated, or enjoined by other appropriate proceeding pursuant to State law. The institution of an action for injunctive relief under this Section does not relieve any

party to such proceedings from any civil or criminal penalty prescribed for violations of this Ordinance.

- D. Revocation of Permits or Certificates:** The Administrator may revoke and require the return of a permit, a Certificate of Compliance, a Certificate of Occupancy, a Certificate of Completion, or a Certificate of Zoning Compliance pursuant to Section 12.09.
- E. Stop Work Orders:** Whenever the Administrator determines that a person is engaged in doing work without a required permit; or any building or structure or part thereof is being demolished, constructed, reconstructed, altered, or repaired in a hazardous manner, or in substantial violation of any State or local building law, or in a manner that endangers life or property, the Administrator may order the specific part of the work that is in violation or presents such a hazard to be immediately stopped pursuant to Section 12.08.
- F. State and Common Law Remedies:** In addition to other enforcement provisions contained in this Article, the Council may exercise any and all enforcement powers granted to it by State law or common law.

12.07 Civil Penalties

12.07.01 Any act constituting a violation of this Ordinance shall subject the person liable to a civil penalty per day in the amount specified below. For each day the violation is not corrected, the violator will be guilty of an additional and separate offense. Where a per day per violation and a one-time assessment are described, both apply.

Violation	Civil Penalty (per day per violation)	Civil Penalty (one-time assessment)
Sign Violation	\$100.00	
Occupancy Violation	\$200.00	
Grading in Designated Floodway	\$500.00	
Improperly pruning, removing or killing a protected tree or shrub.	\$100.00	\$100.00 per inch in diameter for each tree and \$50.00 for each shrub
Removal of Required Buffer	\$100.00	\$500.00
Soil Erosion and Sediment Control Violation	\$100.00	\$1,000.00
Illegal Subdivision	\$100.00	\$1,000.00
All other Violations	\$100.00	
Repeat Violator 1 st Time	250% of the Civil Penalty	\$1,000.00
Repeat Violator 2 nd or More	500% of the Civil Penalty	\$1,000.00

12.07.02 A penalty accrues from the date imposed until the date the violation is corrected or the date of a court's judgment, whichever is earlier.

12.07.03 The penalty may be recovered by the Town in a civil action in the nature of an action to collect a debt and may recover its court costs and attorney's fees.

- 12.07.04** The appeal of a civil penalty must be in accordance with the requirements of Article 6. The time period for appeal begins to run upon receipt of the Notice of Violation imposing the penalty.
- A.** Although a properly filed appeal stays action by the Town to collect any civil penalty assessed, the penalty continues to accrue during the pendency of the appeal, and if the decision by the Board on appeal affirms the action, order, decision or determination by the Administrator, unless the penalty is modified by the Board of Adjustment in compliance with Subsection 6.04.08(B), the amount of a penalty shall be calculated as though no appeal was filed.
- 12.07.05** When authorized by the Town Council, this Ordinance may also be enforced by any available equitable action or proceeding(s) instituted by the Administrator or Town to prevent, restrain, correct or abate a violation of this Ordinance.
- 12.07.06** **Repeat Violator:** A repeat violator is a person liable who has been determined to have violated any provision of this Ordinance within the previous thirty-six (36) months.
- 12.08** **Stop Work Orders**
- 12.08.01** Whenever the Administrator determines that a person is engaged in doing work without a required permit; or any building or structure or part thereof is being demolished, constructed, reconstructed, altered, or repaired in a hazardous manner, or in substantial violation of any State or local building law, or in a manner that endangers life or property, the Administrator may order the specific part of the work that is in violation or presents such a hazard to be immediately stopped.
- 12.08.02** The Stop Work Order shall:
- A.** be in writing, and
- B.** directed to the person doing the work and
- C.** directed to the owner of the property and
- D.** posted on the property upon which the work has been undertaken, and
- E.** The Stop Work Order shall state:
1. the work to be stopped, and
 2. the reasons for work stoppage, and
 3. the conditions under which the work may be resumed.
- 12.08.03** **Appeals to Stop Work Order:** Appeals of a Stop Work Order shall be made as follows:
- A.** An Appeal of Administrative Decision must be filed with in accordance with Article 6.

12.09 Permit and Certificate Revocation

- 12.09.01** A permit or certificate may be revoked by the permit issuing authority for:
- A. Any substantial departure from the approved application, plans, or specifications; or
 - B. Refusal or failure to comply with the requirements of state or local laws, or for false statements or misrepresentations made in securing the permit or certificate; or
 - C. Any permit or certificate mistakenly issued in violation of an applicable state or local law may also be revoked.
- 12.09.02** **Special Use Permit Revocation:** Before a special use permit may be revoked, all of the notice and hearing requirements of Article 6 shall be complied with. The notice shall inform the permit recipient of the alleged grounds for revocation. The revocation of a special use permit shall operate as a revocation of the zoning permit and any certificate issued by the Administrator.
- A. The burden of presenting evidence sufficient to authorize the permit issuing authority to conclude that a permit should be revoked for any of the reasons set forth in Subsection 12.09.01 shall be upon the party advocating that position. The burden of persuasion shall also be upon the advocating party.
 - B. A motion to revoke a permit shall include, insofar as practicable, a statement of the specific reasons or findings of fact that support the motion.
- 12.09.03** **Zoning Permit and Certificate Revocation:** Before a zoning permit or any certificate issued by the Administrator may be revoked, the Administrator shall give the permit recipient five (5) days' notice of intent to revoke the permit and shall inform the recipient of the alleged reasons for the revocation and of his right to obtain an informal hearing on the allegations.
- A. **Hearing Before Administrator:** The permit holder must request a hearing in writing within five (5) days. The Administrator or other disinterested person, as designated by the Administrator, will conduct a hearing on the request within five (5) business days of the Administrator's receipt of the request. The hearing will be held in person but at request of the permit holder may be held by telephone. At the hearing, the permit holder will be given an opportunity to present the facts and other matters which he maintains should prevent the revocation of the permit. The permit holder may be represented by an attorney, shall have the opportunity to examine any documents relied upon by the Administrator, and shall be given the opportunity to cross-examine any witnesses who testify against the permit holder. Within two (2) business days following the hearing, the Administrator or other disinterested person conducting the hearing will issue a decision. If the permit is revoked, the Administrator shall provide to the permit holder a written statement of the decision and the reasons therefore.
 - B. A decision under Subsection 12.09.03(A) may be appealed to the Board of Adjustment within the prescribed time period.

12.09.04 No person may continue to make use of land or buildings in the manner authorized by any permit after such permit has been revoked in accordance with this Section.

12.10 Enforcement by Others

12.10.01 In addition to the remedies provided to the Town hereunder, other persons who have qualified as parties pursuant to the duly enacted Rules of Procedure of the Board of Adjustment may, after the exhaustion of their available administrative remedies, seek to enforce this Ordinance by injunction, mandamus or other appropriate legal action. This provision, however, is not intended to limit the rights of others which are created by North Carolina law to take action to protect their own property interests and rights.

STATE OF NORTH CAROLINA

COUNTY OF WATAUGA

GENERAL AFFIDAVIT

Gregory A. Mecomber, a resident of Watauga County, State of North Carolina PERSONALLY came and appeared before me, the undersigned Notary, and made this his statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of his knowledge:

1. I am a resident of Watauga County and reside at 945 Seven Oaks Road,
Boone, NC 28607
2. I have lived at 945 Seven Oaks Road, Boone, NC 28607 for 3 years.
3. Since the Mountain View Racetrack started its operation last year, the noise has literally kept us from enjoying any weekend outside activity at our home.

Additionally, the noise permeates inside the house as well.

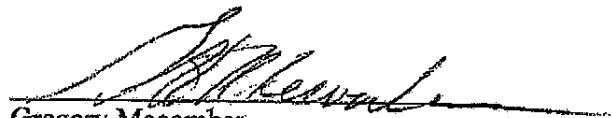
4. We purchased our home with the intention of retiring there in the near future. We travel to our home on Seven Oaks Road almost every weekend, only now we almost hope for inclement weather so we don't have to listen to the racetrack. We are almost to the point of considering selling our property and moving away from the area, however with racetrack being there we know the property value will be much less, and we could never recoup our initial investment let alone the upgrades and additions we've made to our home.



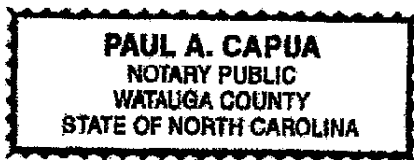
5. To me it boils down to respect. The management of the racetrack as well as the Mayor of Boone and Planning and Inspections Director failed to respect or even take into consideration the vast number of tax paying residents whose homes and properties surround the area of the racetrack. Their contribution to the community, county and city of Boone far exceeds any contribution made by the racetrack. I read a comment from the track manager that they were bringing in family oriented enjoyment and entertainment to the area. What about the enjoyment of residents. We were so looking forward to retiring to Boone and becoming active, supportive citizens of community, but this racetrack has placed a damper on our plans.

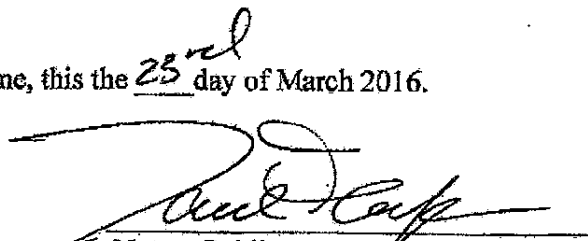
I declare and state under penalty of perjury that the foregoing is true and correct.

Executed this the 23rd day of March, 2016.


Gregory Mecomber

SWORN AND SUBSCRIBED before me, this the 23rd day of March 2016.




Notary Public

My Commission Expires:

10/15/19

Affidavit

NOW COMES Sam Vegter after being duly sworn and affirms the following:

On March 22, 2007, my wife, Kimberly, and I purchased Lot 55 on Benjamin Drive in the Hidden Hills Subdivision in Boone, North Carolina. We chose Lot 55 for many different reasons, such as the great views of both Appalachian Ski Mountain and Grandfather Mountain. The main reason, though, was the tranquility of the area. We would be far enough from Boone to avoid all the congestion, noise and crowds and close enough to enjoy all the town's perks. When we inquired about the old fair grounds we were told that it was locked into a residential/agricultural zoning designation. Our real estate agent assured us that the old fairgrounds would not be developed in any way.

Over the years we've enjoyed our property by taking trips to camp, picnic, and especially to enjoy the seasonal blackberries that grow all over our land. On rare occasions, when camping, we've been surprised with a music festival happening down in the old fairgrounds. Despite being roughly a half mile away, we could clearly hear every song as if we were down in the bottom lands as well. The land near the Hidden Hills

Development is shaped like a natural amphitheater and sound up the mountain is amplified.

Unfortunately in 2008, due to the decline in the housing market, I was forced to close my business. We lost just about everything. During this time we were able to keep two things; our home in Hickory and our lot in Boone. We simply didn't want to give up on our dream.

In the years following I was able to obtain a job as a business professor at a local community college while my wife continued to teach music in the middle schools. After our two daughters were born, traveling to Boone became harder and harder. The summer of 2014 was the last time we visited the property until October, 2015.

In 2015 my wife's parents offered to build a cabin on our Hidden Hills property for the use of our extended family. After our financial set back in 2008, my wife and I could not afford to build on our own. In the summer of 2015 we bought cabin plans and hired an architect. We hoped to eventually retire to our new mountain home.

Then we received a phone call.

On September 22, 2015 we were called and asked if we knew what was going on at the old county fairgrounds. Since we had not visited the property for over a year we had no idea and were completely caught off


guard to learn that a race track had been created in the bottom lands. We immediately cancelled plans to build a vacation home.

To determine if the noise from the race track was an issue, we took a family trip to Boone on October 17, 2015. Our sleepy little corner of Boone was lit up like a bon fire by the orange lights that illuminated the track. The road had gone from a pleasant drive to a traffic-infested nightmare. When we walked up to the site of our future cabin, we confirmed the noise from the cars racing was totally and completely out of control. Our two children, (ages two and four) constantly put their hands over their ears and were miserable. At one point, our oldest, asked "why do the monsters make so much noise?" After witnessing the events being held that day and night, and knowing that this was an every Saturday (and apparently sometimes a weekday) event, April through October, there was simply no way that we would be able to enjoy this property any longer.

It is my understanding that the old fairgrounds land is zoned agricultural/residential. A race track does not fall under either of these designations.

If the track continues to operate our only option is to sell our lot and abandon our dreams of owning a cabin in Hidden Hills. We will be forced to sell the property for far less than what we paid for it, due to the excessive

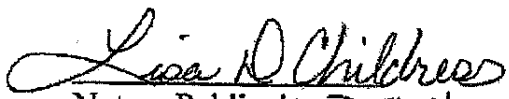
noise from the speedway. I estimate that we will lose more than thirty percent of the money we spent on the lot. We cannot afford to lose this money. Watauga County would also lose money due to the lowered tax base.

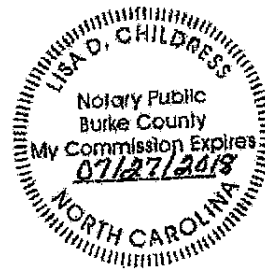
This the 17th day of November 
Sam Vegter,

Burke County, North Carolina

I certify that Sam Vegter personally appeared before me this day and acknowledged to me that he signed the foregoing document.

DATE November 17, 2015


Notary Public Lisa D. Childress
My commission expires 07/27/2018



Affidavit

NOW COMES Cathy W. Wrenn after being duly sworn and affirms the following

My name is Cathy W. Wrenn. My primary residence is 1008 Riverforest Drive Hillsborough, NC. 27278. My husband, Linwood, and I purchased a lot at 411 Locust Hill Road in Boone in 1999. We build a log cabin in 2000. My husband passed away in 2003.

Our two boys attended Appalachian State University from 1999 to 2005 and lived in our Boone property. Since they graduated from college, we have used the property as a vacation home. We plan to continue to use it as such.

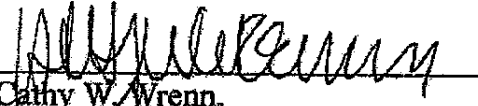
This year we did not make it to Boone as often as we would have liked. I did not hear about the racetrack until our visit the weekend of October 23rd.

The racetrack ran on October 24th. We had to use a noise machine Saturday night in order to get the grandchildren to sleep at bed time. We could hear them racing even when we were in the house rather than in the porch...it was extremely loud.

The race track is preventing my family from enjoying the property. Obviously we cannot entertain out of doors while the races are on. Indoors

the noise is still quite loud and conversation is difficult and sleep, without white noise, is not possible.

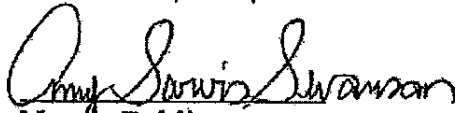
This the 27 day of
Oct. 2015


Cathy W. Wrenn,

Durham County, North Carolina

I certify that Cathy W. Wrenn personally appeared before me this day and acknowledged to me that he signed the foregoing document.

DATE 10/27/15


Notary Public
My commission expires
10/23/2020

