

**MINUTES – REGULAR MEETING
BOONE TOWN COUNCIL
SEPTEMBER 17, 2013**

A regular meeting of the Boone Town Council was called to order at 6:30 p.m., Tuesday, September 17, 2013, in the Council Chambers, 1500 Blowing Rock Road. Mayor Loretta Clawson presided. Council members present were Mayor Pro-Tem Jamie Leigh, Lynne Mason, Rennie Brantz, Andy Ball, and Allan Scherlen. Town Attorney Sam Furgiuele was also present. Staff members present were Town Manager Greg Young, Town Clerk Kimberly Brown, Assistant to the Manager Jim Byrne, Finance Director Amy Davis, Police Lieutenant Danny Houck, Fire Chief Jimmy Isaacs, Public Utilities Director Rick Miller, Public Works Director Blake Brown, Planning Director Bill Bailey, Human Resources Director Peri Moretz, Cultural Resources Director Pilar Fotta, and Downtown Coordinator Virginia Falck.

ANNOUNCEMENTS

Mayor Clawson called the meeting to order and welcomed all in attendance. She noted that anyone wanting to sign up to speak during the public comment session would need to sign the public comment sign-up sheet.

TENTATIVE AGENDA ADOPTION

Town Manager Greg Young announced the following changes to the agenda:

1. Addition of Item 7.L. – Approval of Budget Amendments.
2. Addition of Item 7.M. – Adoption of Ordinance – Code Amendments.
3. Addition of Item 7.N. – Discussion of Parking Management Options for Downtown Boone.

Upon a motion by Council Member Brantz, seconded by Council Member Scherlen, Council moved to adopt the agenda, as amended.

VOTE: Aye – All
 Nay – None

CONSENT AGENDA ADOPTION

Minutes: August 5, 2013 – Special Meeting.
 August 20 & 22, 2013 – Regular Meetings.

Upon a motion by Council Member Ball, seconded by Council Member Mason, Council moved to approve the consent agenda, as presented.

VOTE: Aye – All
 Nay – None

PUBLIC HEARING – CONNIE KELLER ANNEXATION

Mayor Clawson opened a public hearing at 6:32 p.m. to receive public comment on the request for voluntary contiguous annexation by Connie Keller. Planning Director Bill Bailey stated that the public hearing and adoption of ordinance for annexation is the final step in the annexation process. With no public input, Mayor Clawson closed the public hearing at 6:33 p.m.

PUBLIC COMMENT

Jeffrey Wakeman, of Stonegate Developers, appeared during public comment to discuss the redevelopment of the old Scottish Inn and Red Carpet Inn properties. Town Attorney Sam Furguele stated that any information regarding this project should be presented at the quasi-judicial hearing which has been advertised for Thursday, September 19th. Mr. Wakeman agreed to wait until that time to make a presentation on his proposed project.

Rio Tazewell and Max Wlodarczak appeared before Council to ask for the agenda to be amended so that they could request an additional date in October to host another Howard Street Exchange event. Mayor Clawson advised that Mr. Tazewell contact the Clerk to make the appropriate application and to be scheduled on the October regular meeting agenda.

DISCUSSION OF INTERGOVERNMENTAL RETREATS – PRESENTATION FROM PHIL TREW OF THE HIGH COUNTRY COG

Phil Trew, Director of Planning and Development of the High Country Council of Governments, appeared before Council to solicit topics to be discussed at the next intergovernmental retreat. He indicated that he has received feedback regarding the retreats and noted that responses include that the retreats have not focused on issues of significance and have not resulted in achievements. Mr. Trew stated that, based on recent discussions, it has been suggested that each local government or entity appoint two members to serve on a committee which will discuss potential changes to the intergovernmental retreat process. It was the consensus of the Council to support this idea but to wait until after the upcoming election to appoint members to a temporary committee.

UPDATE ON POST OFFICE RENOVATION AND GRAND OPENING

Randy Jones, architect for the project, stated that the majority of the work has been completed. Upon a motion by Council Member Ball, seconded by Council Member Mason, Council moved to hold a “Grand Opening” for the downtown Post Office on Sunday, October 27, 2013, from 3-6 p.m. and to invite local officials, congress members, and postal officials.

VOTE: Aye – All
 Nay – None

PRESENTATION OF DRAFT LICENSE FOR SAHA

Town Attorney Sam Furguele presented the following draft license for the use of the Horn in the West property:

DRAFT - NOT FOR ADOPTION

STATE OF NORTH CAROLINA

LICENSE

COUNTY OF WATAUGA

THIS LICENSE is granted this ____ day of _____, 20____, by the Town of Boone, a North Carolina Municipal Corporation, hereinafter referred to as “Licensor,” to the Southern Appalachian Historical Association, Inc., a North Carolina non-profit corporation, hereinafter referred to as “Licensee,” collectively referred to as the “parties.” Licensee has signed this License to signify that it understands and agrees to its limitations and requirements.

1. **License Area:** As detailed on Attachment “A,” attached hereto and incorporated by reference herein, Licensee shall be entitled to the use of the described portions of “Horn in the West,” that certain piece, parcel or lot of land situated, lying and being in Boone Township, Watauga County, North Carolina, and the described improvements thereto, hereinafter referred to as “the license area,” during the times described therein, for the purposes provided herein.
2. **Term:** This License authorizes the described uses by Licensee, its officers, agents,

employees and invitees for the period commencing and including January 1, 2014 and ending and including December 31, 2014. Subsequent licenses may be issued for additional periods of time and upon such terms as may be provided.

3. **Scope of License:**

A. The license area may be used by Licensee for the primary purposes of:

i. Operating an outdoor theater for the preparation and presentation of the outdoor drama, "Horn in the West;"

ii. Displaying and maintaining the cabins, contents of the cabins and related surroundings constituting the "Hickory Ridge Living History Museum," the parties stipulating that the historical buildings comprising this facility and the personal property contained in the buildings are the property of Licensee; and

iii. For the conduct of the festivals/celebrations specified on Attachment "A."

B. This license includes and authorizes other and secondary activities conducted in association with the allowed uses so long as they are integral to the approved uses or constitute only an incidental and insubstantial part of the total activity, as long as they are commonly associated with the use; as well as the use of such other and secondary facilities which are integral and necessary to support the authorized uses. Associated support activities shall include use of the parking lot in appropriate locations during appropriate times, use of the bathrooms, operation of concession stands during performances, and storage of Licensee's personal property in the locations described.

C. Any specific uses beyond the primary ones listed are permitted only with the advance approval of Licensor, following approval by the Town of Boone Cultural Resources Board (hereafter "CRAB").

D. When not in use, Licensor shall properly:

i. Clean and make safe all structures to which it is entitled to only non-exclusive use;

ii. Secure and make safe all structures to which it is entitled to exclusive use; and

iii. Remove, or secure and make safe so long as they do not interfere with potential use by other licensees, any portable structures.

E. The Licensee shall not use or knowingly permit any part of the license area to be used for any purpose which violates any law, and Licensee shall familiarize itself and comply with all Town ordinances.

F. Licensee acknowledges that Licensor may authorize other Licensees to use portions of the license area in ways which do not unduly interfere with Licensee's licensed use and that Licensor shall be the sole arbiter of what constitutes undue interference.

G. During an emergency, as determined by Licensor, Licensor may utilize the license area to its full extent even if it substantially interferes with this license.

H. Licensee will take no action(s) which are in any way inconsistent with Licensor's ownership interest in the property.

I. Licensee will take no action(s) which are not undertaken in accordance with the procedures mandated by its duly adopted by-laws.

4. **Rules for Operation:** In addition to any rules adopted by Licensor for the use of the license area, which rules shall be effective when adopted even if they are adopted during the term, Licensee shall have the right to promulgate such rules and regulations as it may deem appropriate for the behavior of patrons and its invitees during its authorized use of the license area so long as they are not inconsistent with any rules promulgated by Licensor and are otherwise consistent with this license. Licensee shall provide Licensor with a copy of its rules and regulations, if any, sufficiently prior to their effective date to allow review by CRAB and the Boone Town Council prior to their implementation.

5. **Licensing Fee:** The fee for this license is one dollar (\$1.00), due and payable in full upon the effective date of the license.

6. **Utilities:** Licensee shall be responsible for paying or reimbursing Licensor all utility costs incurred in connection with its use of the license area. If more than one licensee is authorized to

use all or a portion of the license area concurrently, Licensor may apportion these costs in an equitable way in proportion to the relative use of the license area by different licensees, and Licensee shall promptly reimburse Licensor for its share of these costs. Should Licensee fail to pay its share of utility costs within the time set by Licensor, this license shall terminate. To the extent Licensee's use of the licensed area is exclusive and the utilities used relative to that exclusive use can be placed in an account in Licensee's name by the relevant utility company, Licensor may require that Licensee obtain such utility service in its own name. If Licensee obtains utility service in its name, it must keep its account in good standing and notify Licensor immediately if it receives any notice of the possible disconnection of service.

7. **Maintenance:** Licensee shall provide all maintenance necessary to keep and restore the license area to a good and sanitary condition as the result of its use of the license area. Such maintenance shall be performed as often as necessary to insure that any other licensee authorized to use the license area will find the license area in a sanitary and orderly state.
8. **Repairs:** Licensee must notify Licensor, in writing, of any and all conditions in need of correction or repair which it discovers, whatever the origin of the conditions (caused by Licensee, its employees, contractors, invitees, or others). Licensee shall make no repairs, and no person or entity will be hired to undertake any repairs without first notifying Licensor in writing, at least ten days in advance, of Licensee's intention to undertake or make such repairs, or in the event of an emergency, without first notifying Licensor by telephone at (828) 262-4530 of the condition and repairs contemplated. Any repairs made to the license area shall be done in a workmanlike manner and shall become the property of Licensor. In making any authorized repairs, Licensee shall comply with the North Carolina State Building Code, as applicable, all ordinances of the Town of Boone and Watauga County, as pertinent, and all relevant federal and state laws relating to its operation of a facility and enterprise open to the public, and to its use of paid employees therein.
9. **Alterations:** Licensee agrees to neither make nor arrange for any alterations to the license area without the advance written approval of Licensor. Should any alterations be approved by Licensor, they shall be done in a workmanlike manner, and they shall become the property of Licensor. In making any alterations, Licensee shall comply with the North Carolina State Building Code, as applicable, all ordinances of the Town of Boone and Watauga County, as pertinent, and all other relevant federal and State laws.
10. **Compliance with Laws:** In particular, and not by way of exclusion, in any and all its actions and activities, Licensee will comply and hereby certifies its compliance with the Americans with Disabilities Act, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Fair Labor Standards Act, as amended, the Occupational and Health Safety Act, as amended, the North Carolina Employment Security Act, as amended, and the North Carolina Worker's Compensation Act, as amended, to the extent each such law applies to Licensee or any of its activities. Should Licensee's corporate status be revoked by the North Carolina Secretary of State, or should the Licensee's non-profit status be revoked by the United States Internal Revenue Service or otherwise, this license shall immediately terminate. Licensee commits that it will act in accordance with all laws related to its status as a non-profit North Carolina Corporation.
11. **Keys and Locks:** Should Licensee change any of the locks or add any locks to any of the doors, windows or other locked feature of the license area, Licensee shall, at its own expense, immediately provide duplicate keys to all such locks to Licensor. At the end of the license, Licensee shall return or turn over all keys which relate to the license area to Licensor.
12. **Information Required to be Furnished:** Licensee shall provide Licensor with its current by-laws at any time requested. Within ten days of any change, Licensee shall provide to Licensor any change to its by-laws, shall notify Licensor of any change to its management staff, and at the execution of this license and any time such composition changes, shall advise Licensor of the names and addresses of each member of its board of directors.
13. **Termination or Expiration:** This license is terminable at will by either party. Upon termination or expiration of this license, Licensee shall remove its personal property from the license area and shall surrender the license area to Licensor in good order and repair, reasonable wear and tear excepted.
14. **Abandoned Property:** Following the termination or expiration of this license, any property left by Licensee on the license area shall be considered abandoned and may be retained by or disposed of by Licensor as it sees fit. However, Licensee shall have a sixty day period following the termination of this lease to remove any historical building(s) designated in accordance with attachment "B" of this license. Thereafter, such building(s) will be deemed donated to Licensor. Licensee shall not leave, place, or store any personal property unrelated to the scope of the license in the license area, and any such property shall be considered abandoned and may be disposed of by Licensor.
15. **Waiver and Exculpation. Indemnification:** Licensor shall not be liable for, and Licensee hereby waives all claims against Licensor for damage to its property, or for injury, illness or death of any person in, upon or about the license area arising from any act or neglect of Licensee or caused to any person using the license area pursuant to Licensee's authority. Licensee shall indemnify, defend, protect and hold harmless Licensor from and against any and all claims,

actions, loss, cost, damage, expense, and liability associated with personal injury, damage to property, or any other matter arising out of any occurrence in, upon or at the license area, or associated with any act or omission of the Licensee, its agents, employees or invitees, or associated with Licensee's use, occupancy or activities in the license area or access thereto by Licensee, Licensee's agents, contractors, employees, or invitees; provided, however, that the foregoing indemnity shall not be applicable to claims arising by reason of the gross negligence or willful misconduct of Licensors. In the event that the Licensors is made a party to any litigation brought against the Licensee or by reason of the Licensee's use or occupancy of the license area, the Licensee shall defend, protect and hold harmless the Licensors from any and all liability that may result therefrom, including Licensors's costs in defending itself against any claim, action, litigation or other assertion of liability.

16. **Insurance:** Licensee shall provide and maintain insurance coverage against loss, destruction, or other damage to its property located on the license area, as well as against all risks for which Licensee is required to indemnify and hold Licensors harmless. Licensee's liability insurance coverage shall provide coverage for personal injury or bodily harm occurring during the term of the license, whenever the claim is made, in an amount no less than two million dollars (\$2,000,000.00) per occurrence, and shall insure against injuries or damages which occur as a result of Licensee's operations. Certificates of insurance for each policy required to be obtained by Licensee in compliance with this paragraph shall be filed and maintained with Licensors. Licensee shall immediately advise Licensors of any injury, damage, or assertion of claim or litigation that may result in a claim of liability against Licensors.
17. **Modification of License:** There shall be no modification of this license unless the modification is in writing and signed by both parties.
18. **Assignments:** This license may not be assigned.
19. **Not a Lease or Estate:** The parties agree and acknowledge that in no event shall this license constitute a lease or grant or create any leasehold estate or other estate in the license area. This license is intended and shall be construed as granting a license or right of use in the License area, and Licensee's use and occupancy of the license area shall not be deemed to be a tenancy under the laws of North Carolina, and Licensee shall not enjoy, and hereby waives, any protections afforded tenants under federal, state, or local laws or regulations.
20. **Governing Law:** This license shall be governed by and construed in accordance with the laws of the State of North Carolina. Venue concerning any dispute regarding this license shall be in Watauga County, North Carolina.
21. **Severability:** If any provision of this license or the application thereof to any person or circumstance shall, for any reason and to any extent, be held invalid or unenforceable, that provision shall be severed herefrom, and the remainder of this license and the application of that provision to other persons or circumstances shall not be affected, but rather shall be enforced to the extent permitted by law.
22. **Parties' Relationship:** Nothing contained in this License shall be deemed or construed by the parties or by any third party to create the relationship of principal and agent, employer and employee, or of partnership or joint venture or of any association whatsoever between Licensors and Licensee other than as is contained herein, it being expressly understood and agreed that none of the provisions contained in this license nor any act or acts of the parties hereto shall be deemed to create any relationship between Licensors and Licensee other than the relationship of a Licensors and Licensee.
23. **Waiver:** Licensors's failure to strictly enforce its rights under this license shall not constitute a waiver of such rights.
24. **Entire Agreement:** This License contains all of the terms and conditions concerning the licensing and use of the license area by Licensee. There are no oral terms or conditions agreed to by the parties which are not contained in this license. Licensors has not made and is not making, and Licensee, in executing and delivering this License, is not relying upon any warranties, representations, promises or statements, except those that are expressly set forth in this license. All prior verbal agreements previously made by and/or between the parties, if not contained herein, are hereby expressly null and void, and insofar as such prior agreements and understandings between the parties are included herein, the same have merged into this license, which alone fully and completely expresses the current agreement of the parties.
25. **Execution:** Licensors and Licensee each represent and warrant to the other that all necessary authorizations and approvals required for execution and performance of this Lease have been given and that the undersigned individual is duly authorized to execute this Lease and bind the party for which it signs.
26. **Notices:** All notices, requests, demands, and other communications hereunder shall be in writing and shall be deemed given if personally delivered or mailed, certified mail, return receipt requested, to the following addresses:

If to Licensors, to: Greg Young
 Town Manager

Town of Boone
P.O. Drawer 192
Boone, NC 28607

If to **Licensee**, to: Chair, Board of Directors
Southern Appalachian Historical Association
P.O. Box 295
Boone, NC 28607

IN WITNESS WHEREOF, the **Licensor** and **Licensee** have executed this Lease Agreement in duplicate originals, and agree to all of the terms and conditions set forth above, the day and year first above written.

Town of Boone, Licensor

Loretta Clawson, Mayor

Attest: _____(Seal)
Town Clerk, Town of Boone

Southern Appalachian Historical Association, Inc. , Licensee, by

President

Attest: _____(Seal)
Secretary, Southern Appalachian Historical Association, Inc.

ATTACHMENT “A”

1. Use of the amphitheater, including seating area, stage, “Principal Men’s” dressing room, ladies and men’s dressing rooms, “can,” light booth, sound booth, “pyro rooms,” “prop room,” “scene room,” “old PMS booth,” and concession stand from May31, 2014 through August 15, 2014, excluding Mondays, 7:00 a.m. through 2:00 p.m. on Wednesdays, and 2:00 a.m. through 2:00 p.m. on Saturdays, with non-exclusive use of all available parking beginning one hour before performances until one hour after performances, and associated parking for 22 cars for performers and staff during rehearsal times and up to three hours before and two hours after performances.
2. Exclusive use of Hickory Ridge Living History Museum and museum store for license term, with parking for up to two buses and five cars, and associated use of Horn in the West rest rooms during May and June, and associated use of concession stand and dining tent during once monthly fundraisers in May, June, August, September and October on the _____ of each month from ____ p.m. to ____ p.m. (e.g. “Third Saturday from 2 p.m. to 5:30 p.m.”)
3. Exclusive use of “main office” for license term with parking available for six cars.
4. Use of non-leased areas of Horn in the West park on April 26 and 27, 2014 for the Shakespeare’s birthday Ren Faire, with non-exclusive use of all available parking.
5. Exclusive use of ticket office for license term.
6. Exclusive storage use of the “Principal Men’s Dressing Room, “pyro rooms,” “prop room,” “scene room,” “old PMS booth,” light booth, and sound booth from January 1, 2014 to May 31, 2014, and August 15, 2014 through December 31, 2014.
7. Exclusive storage use of “Small Pox,” and “old PMS Booth” for license term.

It was the consensus of the Council to direct the Cultural Resources Advisory Board to review the draft license and make a recommendation to the Council. Additionally, the CRaB should consider such issues as parking management, creation of a calendar for scheduling uses of the property. Council also asked that feedback from SAHA be considered.

PRESENTATION OF RECENT STATUTORY CHANGES – OPERATION OF BOARD OF ADJUSTMENT

Town Attorney Sam Furgiuele summarized the recent changes in law enacted by the General Assembly and the impact on the operation of the Board of Adjustment:



MEMORANDUM

To: Managers, Administrators, Clerks, Planners and Attorneys

From: Gregg F. Schwitzgebel III, NCLM Senior Assistant General Counsel

Re: Legislative Changes to Board of Adjustment Statutes
Zoning/Board of Adjustment Changes– HB 276 (SL 2013-126)

Date: September 12,
2013

The 2013 General Assembly enacted legislation, House Bill 276 (Session Law 2013-126), to modernize the statutes pertaining to zoning boards of adjustment and to clarify some of the issues that have arisen through the years. These changes will become effective October 1, 2013, and apply to actions taken on or after that date by the board of adjustment.

The legislation amends the primary board of adjustment statute (G.S. 160A-388), including provisions regarding voting, decisions, hearing notices, appeals, and variances. Among other things, the long-standing body of case law regarding the need to follow quasi-judicial procedures is now codified in G.S. 160A-388(a1), which provides, “The zoning or unified development ordinance may provide that the board of adjustment hear and decide special and conditional use permits, requests for variances, and appeals of decisions of administrative officials charged with enforcement of the ordinance. As used in this section, the term ‘decision’ includes any final and binding order, requirement, or determination. The board of adjustment shall follow quasi-judicial procedures when deciding appeals and requests for variances and special and conditional use permits.”

Some of the more significant changes under the legislation are:

Voting

The long-standing requirement that the grant of a variance requires a four-fifths supermajority of the board of adjustment remains unchanged. G.S. 160A-388(e)(1). However, the legislation now amends the statute to provide that only “[a] majority of the members” shall be required to decide any other quasi-judicial matter or to determine an appeal made in the nature of certiorari. Accordingly, a supermajority is not required for the issuance of special and conditional use permits or for appeals pertaining to the administrative interpretation of the ordinance.

Quasi-Judicial Decisions

Regarding quasi-judicial decisions, the legislation states that “the board shall determine contested facts and make its decision within a reasonable time.” G.S. 160A-388(e2)(1). The legislation further specifies that a quasi-judicial decision:

- 1) shall be based upon competent, material, and substantial evidence in the record.

- 2) shall be reduced to writing (signed by the chair or other duly authorized member of the board), reflecting the board's determination of contested facts and their application to the applicable standards.
- 3) is *effective* upon filing the written decision with the clerk to the board (or such other office or official as specified in the ordinance). Note that the legislation further specifies that the board's decision "shall be delivered by personal delivery, electronic mail, or by first-class mail to the applicant, property owner, and to any person who has submitted a written request for a copy, prior to the date the decision becomes effective. The person required to provide notice shall certify that proper notice has been made." G.S. 160A-388(e2)(1).

Hearing Notices

The legislation establishes a uniform requirement for notice of hearings for quasi-judicial matters. G.S. 160A-388(a2). The timing requirements for mailed and posted notice--at least 10 but not more than 25 days prior to the date of the hearing--are consistent with the requirements for rezonings in G.S. 160A-384(a). Notice of the hearing must be mailed to:

- 1) the person or entity whose appeal, application, or request is the subject of the hearing;
- 2) the owner of the property that is the subject of the hearing if the owner did not initiate the hearing;
- 3) the owners of all parcels of land abutting the parcel of land that is the subject of the hearing; and
- 4) any other persons entitled to receive notice as provided by the zoning or Unified development ordinance. G.S. 160A-388(a2). In determining owners of property entitled to mailed notice, the municipality may rely on the county tax listing (in the absence of evidence to the contrary). The legislation clarifies that these same hearing notice provisions are applicable to other boards that are authorized to issue special and conditional use permits. G.S. 160A-381(c).

Appeals

The legislation provides that the board of adjustment shall decide appeals from the final decisions of administrative officials charged with enforcing the zoning or unified development ordinance. G.S. 160A-388(b1). The legislation also authorizes the board to hear appeals arising out of other ordinances regulating land use and development.

Notice of Appeal filed with City Clerk; Standing— The legislation incorporates the standing requirements from 2009 legislation (SL 2009-421) by providing that any person with standing under G.S. 160A-393(d) or the municipality may appeal a decision to the board of adjustment. The notice of appeal, stating the grounds for the appeal, is filed with the city clerk. G.S. 160A-388(b1)(1).

Duties of Administrative Official; Deadlines for Appeal— The administrative official who made the decision shall give written notice (by personal delivery, electronic mail, or first-class mail) to the owner of the property that is the subject of the decision and to the party that sought the decision (if different from the owner); they have 30 days from receipt of the written notice to file an appeal. G.S. 160A-388(b1)(2) & (3). There are also provisions regarding the administrative official's duties regarding transmittal of the record to the board and the provision of copies of the record to the appellant and owner. G.S. 160A-388(b1)(5). The legislation further provides that the administrative official shall be present at the hearing as a witness. G.S. 160A-388(b1)(8).) Anyone else having standing to appeal has 30 days "from receipt of any source of actual or constructive notice of the decision within which to file

an appeal.” (There is a detailed provision regarding how constructive notice can be presumed from the posting of a sign on the property for at least 10 days. Note that this is not the only form of constructive notice. Unless the ordinance provides otherwise, there is no duty to post a sign; rather it is the option of the owner or applicant. Verification of the posting must be provided to the administrative official. G.S. 160A-388(b1)(4)).

Scope of Hearing; Continuances— While the appellant is not limited at the hearing to matters stated in the notice of appeal, the legislation specifies that if any party or the municipality would be unduly prejudiced by the presentation of such matters (i.e., those not presented in the notice of appeal), the board shall continue the hearing. G.S. 160A-388(b1)(8).

Disposition; Board has all Powers of Administrative Official— The legislation clarifies that “[t]he board of adjustment may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made. The board shall have all the powers of the official who made the decision.” G.S. 160A-388(b1)(8).

Alternative Dispute Resolution— The legislation further specifies that the parties to an appeal may agree to mediation or other forms of alternative dispute resolution, and accordingly that the ordinance may set standards and procedures to facilitate and manage such voluntary alternative dispute resolution. G.S. 160A-388(b1)(10).

Notice of Appeal from Enforcement Orders Triggers a Stay; Exception to Stay by Affidavit of Administrative Official; Subsequent Request for Expedited Hearing— Finally, please note that there is a specific provision, G.S. 160A-388(b1)(6), regarding appeals from an *enforcement order* (such as a notice of violation), which sets forth the following (emphasis added):

An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from *unless* the official who made the decision certifies to the board of adjustment after notice of appeal has been filed that because of the facts stated in an affidavit, a stay would cause imminent peril to life or property or because the violation is transitory in nature, a stay would seriously interfere with enforcement of the ordinance. In that case, enforcement proceedings shall *not* be stayed except by a restraining order, which may be granted by a court. If enforcement proceedings *are not stayed*, the appellant may file with the official a request for an expedited hearing of the appeal, and the board of adjustment shall meet to hear the appeal within 15 days after such a request is filed.

Note further that the final sentence of G.S. 160A-388(b1)(6) provides, “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.” G.S. 160A-388(b1)(6).

Variance Standard Clarified

It was noted above that the supermajority vote of four-fifths required for the granting of a variance from a zoning ordinance remains in place. Regarding the standard for granting variances, the previous “practical difficulties” language is deleted, although the “unnecessary hardship” language remains. G.S. 160A-388(d). The granting of a variance is now determined upon a requisite showing of each of several enumerated factors:

- 1) Unnecessary hardship would result from the strict application of the ordinance. (The legislation clarifies that “[i]t shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.”)

- 2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. (The legislation clarifies that “[h]ardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.”)
- 3) The hardship did not result from actions taken by the applicant or the property owner. (The legislation clarifies that “[t]he act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.”); and
- 4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

G.S. 160A-388(d). The legislation also provides that appropriate conditions (reasonably related to the variance) may be imposed on the variance so as to mitigate its impact.

The prohibition on use variances remains in the statute. The legislation clarifies that other ordinances regulating land use or development can provide for variances.

Other Provisions

Other features of the legislation include:

Oaths- Clerks to the board of adjustment are now authorized to administer oaths to witnesses, in addition to the chair or a member serving as chair. G.S. 160A-388(f).

Subpoenas- The manner in which parties may request, and object to, a subpoena is clarified, as decisions regarding subpoenas are made by the chair of the board of adjustment, subject to appeal to the full board of adjustment. The statute provides that “[t]he chair shall issue requested subpoenas he or she determines to be relevant, reasonable in nature and scope, and not oppressive. The chair shall rule on any motion to quash or modify a subpoena.” G.S. 160A-388(g).

Judicial Review of Quasi-Judicial Proceedings- The legislation creates uniformity with previous changes made in 2009 to the statute (G.S. 160A-393) governing appeals to superior court in the nature of certiorari. G.S. 160A-388(e2)(2).

Effective date

The legislation is effective October 1, 2013, and applies to actions taken on or after that date by the board of adjustment.

Additional Information/Resources

Background on the developments leading to the changes in the law are found in an excellent *Coates Canons NC Local Government Law Blog* post (“BOA Changes are Coming”) by David W. Owens: <http://canons.sog.unc.edu/?p=7155>. It is our understanding that the School of Government is in the process of developing a checklist for changes that will need to be made to zoning ordinances to bring them into conformance with the new law.

Mayor Clawson declared a break at 8:06 p.m. Council reconvened at 8:17 p.m.

TRANSFER OF SERVICE AGREEMENT – JANITORIAL SERVICES

Town Manager Greg Young informed the Council that Amanda Hayes of Calloways Janitorial Services, which provides janitorial services for the Town of Boone, has requested that the service agreement between the Town and Calloways Janitorial Services be transferred to FSBO Publications, Inc. He noted that she has indicated that the change in agreement will be a name change only, and that all the requirements such as insurance, bonds, and the number of employees will remain the same. Upon a motion by Council Member Mason, seconded by Council Member Brantz, Council moved to approve the transfer of service agreement as long as it complies with the conditions contained in the previous agreement approved by the Council.

VOTE: Aye – All
 Nay – None

PRESENTATION OF P&I MONTHLY REPORT

Planning Director Bill Bailey presented the P & I Monthly report. **(Permanently on file in the September 2013 Town Council packet.)**

ADOPTION OF ORDINANCE – CONNIE KELLER VOLUNTARY CONTIGUOUS ANNEXATION

Upon a motion by Council Member Ball, seconded by Council Member Mason, Council moved to adopt the following ordinance:

Ordinance #13-04

AN ORDINANCE TO EXTEND THE CORPORATE LIMITS OF THE TOWN OF BOONE, NORTH CAROLINA (*Connie Keller Voluntary Annexation*)

WHEREAS, the Town Council has been petitioned under G.S. 160A-31 to annex the area described below; and

WHEREAS, the Town Council has by resolution directed the Town Clerk to investigate the sufficiency of the petition; and

WHEREAS, the Town Clerk has certified the sufficiency of the petition and a public hearing on the question of this annexation was held at Council Chambers at 1500 Blowing Rock Road at 6:30 p.m. on September 17, 2013, after due notice by Watauga Democrat on September 6, 2013; and

WHEREAS, the Town Council finds that the petition meets the requirements of G.S. 160A-31;

NOW, THEREFORE, BE IT RESOLVED by the Town Council of the Town of Boone, North Carolina, that:

Section 1. By virtue of the authority granted by G.S. 160A-31, the following described territory is hereby annexed and made part of the Town of Boone as of September 17, 2013:

The area proposed for annexation is described as follows: A parcel of land lying on the southeast side of the intersection of Betsy's Drive with Bamboo Road and being the

lands described in deed recorded in Book of Records 277 at page 400, bounded on the south by Lot 23, on the west by Betsy’s Drive and Lot 1, on the north by Bamboo Road and Deer Valley Development Corp., and on the east by Lot 26 as surveyed by Frank Lee Hayes, P.L.S., L-1488, Job No. 88214 & 13122, dated January 02, 1989 as BEGINNING on a 5/8 inch rebar in the northern line of Lot 23 as conveyed to Gerry W. Keller Living Trust by deed recorded in Book of Records 1576 at page 730, said rebar being located North 46 degrees 05 minutes 55 seconds West 45.99 feet from a control monument at the common corner of Lots 19, 23 & 26; thence with the northern line of Lot 23, North 46 Degrees 05 minutes 55 seconds West, passing a 5/8 rebar on line at 201.44 feet, a total of 228.83 feet to a point in the center of Betsy’s Drive, a common corner to Lots 1 & 2; thence with the center line of Betsy’s Drive and the eastern line of Lot 1 as conveyed to James Joseph Brown III and the City Limits in line, North 18 degrees 51 minutes 55 seconds East 208.25 feet to a point in the center line intersection of Betsy’s Drive and Bamboo Road; thence with the center line of Bamboo Road and the southern line of the lands conveyed to Deer Valley Development Corp. (P. B. 10 pg.395) and the City Limits Line, with a curve to the left having a radius of 350.00 feet, and arc length of 86.43 (chord: South 45 degrees 45 minutes 25 seconds East 86.21 feet to a point of tangency; thence South 52 degrees 49 minutes 50 seconds East 78.22 feet to a point in the center line of Bamboo Road, said point being the northwest corner of Lot 26; thence leaving the road and with the western line of Lot 26, South 06 degrees 06minutes 05 seconds West, passing a 5/8 inch rebar on line at 34.60 feet, a total distance of 249.75 feet to the BEGINNING and covering an area of 0.869 acres as calculated by the coordinate geometry method and having bearings relative to Plat Book 11 at page 68 and all distances being horizontal measurements as computed by coordinate geometry according to a survey performed by Appalachian Professional Land Surveyors & Consultants, in June 2013 under the direct supervision of Frank L. Hayes, PLS, L-1488, Drawing Dated 14 June 2013, Job No. 13122.

- Section 2. Upon and after September 17, 2013, the above described territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in the Town of Boone and shall be entitled to the same privileges and benefits as other parts of the Town of Boone. Said territory shall be subject to municipal taxes according to G.S. 160A-58.10.
- Section 3. The Mayor of the Town of Boone shall cause to be recorded in the office of Register of Deeds of Watauga County, and in the office of the Secretary of State at Raleigh, North Carolina, an accurate map of the annexed territory, described in Section 1 above, together with a duly certified copy of this ordinance. Such a map shall also be delivered to the Watauga County Board of Elections, as required by G.S. 163-288.1.

ATTEST:

Mayor

Town Clerk

(ORDINANCE TO BE TYPED IN BOOK 4, PAGE(S) 50-51)

VOTE: Aye – All
 Nay – None

DISCUSSION OF UTILIZATION OF POST OFFICE SPACE

Cultural Resources Director Pilar Fotta stated that due to safety and security issues, it is recommended that the empty room in the post office be used by internal town staff. She stated that she is planning to make a recommendation to the Council as to what town department would be best suited to use that room.

CRAB RECOMMENDATION – DANIEL BOONE PARK PROPERTY

Frank Mohler, chair of the Cultural Resources Advisory Board, explained that the board is recommending that an appropriate engineering or architectural firm be hired to complete an assessment of the amphitheater and related facilities at the Daniel Boone Park property, and that repairs be prioritized, presented in a phased plan for improvement, and include costs. He stated that this information is necessary if the board is to give recommendations on the potential usage of the property. Mr. Mohler noted that some concerns from previous studies of the property have been addressed by the Town. Assistant to the Manager Jim Byrne pointed out that there are infrastructural issues such as water and sewer lines underground and much of that infrastructure is over 50 years old. Town Manager Greg Young stated that the Council had authorized some work at the property to address safety issues such as electrical work and restroom facilities and that included the demolition of the Powder Horn Theater. Council requested that a short-term facilities needs list be presented by Town staff and SAHA officials at the October regular meeting.

PUBLIC WORKS REQUEST – REFURBISH TOWN’S 2004 CENTURION STREET SWEEPER

Public Works Director Blake Brown presented three quotes in regard to refurbishing the Town’s 2004 Centurion Street Sweeper:

- Wayne Sweeper - \$147,623
- NuLife Environmental - \$149,912
- Guthrie Heli-Arc, Inc. - \$150,210.

He also noted that the estimated cost for freight to ship the sweeper to the company will be approximately \$5,000. Mr. Brown stated that the department recommends that Wayne Sweeper be awarded the job at an estimated cost of \$152,623. Upon a motion by Council Member Ball, seconded by Council Member Mason, Council moved to accept the recommendation of the Public Works Department for refurbishment of the Town’s 2004 Centurion Street Sweeper to be awarded to Wayne Sweeper at an estimated cost of \$152,623.

VOTE: Aye – All
 Nay – None

MONTHLY WATER USE STATUS REPORT

Public Utilities Director Rick Miller presented the monthly water status report. **(Copy of report permanently on file in the September 2013 Town Council packet.)**

APPROVAL OF BUDGET AMENDMENTS

Upon a motion by Council Member Brantz, seconded by Council Member Scherlen, Council moved to approve the following budget amendments:

DESCRIPTION	ACCOUNT#	TO:	FROM:
BICYCLE PLANNING GRANT	010-411-000-545101	\$45,000	

NC DOT BICYCLE PLANNING GRANT	010-000-000-448031		(\$45,000)
SAHA-BOONE HERITAGE FESTIVAL	010-411-000-549122	\$3,000	
APPROPRIATED FUND BALANCE-GENERAL FUND	010-000-000-499900		(\$3,000)
CAPITAL OUTLAY-FIRE STATION #3	010-411-000-575023	\$178,500	
TRANSE TO GENERAL FUND	052-451-000-598010	\$178,500	
TRANSFER FROM RURAL FIRE CAPITAL RESERVE FUND	010-000-000-498052		(\$178,500)
APPROPRIATED FUND BALANCE (RURAL FIRE CR)	052-451-000-499900		(\$178,000)
MISCELLANEOUS SUPPLIES	012-500-303-519900	\$4,769	
APPROPRIATED FUND BALANCE (NARCOTICS FUND)	012-500-303-499900		(\$4,769)

VOTE: Aye – All
 Nay – None

ADOPTION OF ORDINANCE – CODE AMENDMENTS

Upon a motion by Council Member Mason, seconded by Council Member Brantz, Council moved to adopt the following resolution:

ORDINANCE # 13-06

WHEREAS, the Town of Boone (hereafter “the Town”) is a municipal corporation organized under the laws of North Carolina and invested with the powers enumerated in Chapter 160A of the North Carolina General Statutes; and

WHEREAS, pursuant to N.C. Gen. Stat. § 160A-351, the Town is given general authority to create, establish and operate the use of parks for the recreation and enjoyment of its citizens; and

WHEREAS, N.C. Gen. Stat. § 14-415.23 was again amended by the North Carolina General during its most recent legislative session to put further limitations on the ability of a local unit of government to prohibit the carrying of a concealed handgun in municipal parks by defining the type of recreational facilities, other than playgrounds, where prohibitions could be adopted as only including:

“(1) An athletic field, including any appurtenant facilities such as restrooms, during an organized athletic event if the field had been scheduled for use with the municipality or county office responsible for operation of the park or recreational area.

(2) A swimming pool, including any appurtenant facilities used for dressing, storage of personal items, or other uses relating to the swimming pool.

(3) A facility used for athletic events, including, but not limited to, a gymnasium.”

and by expressly excluding from the term "recreational facilities," “any greenway, designated

biking or walking path, an area that is customarily used as a walkway or bike path although not specifically designated for such use, open areas or fields where athletic events may occur unless the area qualifies as an "athletic field" pursuant to subdivision (1) of subsection (c) of this section, and any other area that is not specifically described in subsection (c) of this section;" and

WHEREAS, the Town previously promulgated rules and regulations which prohibited the possession of firearms in certain of its parks, including concealed weapons, utilizing a broader definition of recreational facilities;

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF BOONE, NORTH CAROLINA, THAT THE CODE OF BOONE IS HEREBY AMENDED, AS FOLLOWS, BY ADDING NEW SECTIONS HIGHLIGHTED IN YELLOW AND STRIKING HIGHLIGHTED LANGUAGE SHOWN WITH A STRIKE-THROUGH:

§100.01 RULES AND REGULATIONS GOVERNING THE USE OF TOWN PARKS, INCLUDING THE TOWN OF BOONE GREENWAY.

...

(B) For purposes of these rules and regulations, a "town park" includes not only the land itself, but recreational facilities and equipment, playgrounds, athletic facilities and equipment, spectator areas, greenways and walking trails, bodies of water used for sporting events, recreational activities, fitness or athletic training areas, picnic areas, shelters and parking areas, signage and all other areas, natural features, facilities, and improvements associated with the park. The following acts are prohibited in all town parks:

4. Marking, defacing, disfiguring, injuring, tampering with, displacing or removing any structure, equipment, or facilities;
5. Damaging, cutting or removing any tree, plant or flower;
6. Depositing any trash or litter, except in receptacles placed for that purpose;
7. Driving any motorized vehicle, except for motorized wheelchairs, except in areas paved for that purpose or parking areas designated for that purpose;
8. Consuming or possessing alcoholic beverages;
9. Possessing a firearm or other dangerous weapon, except by duly authorized law enforcement officers, a public safety employee of the town so authorized by the Town Manager, or an individual who has been issued a permit authorizing the legal carrying of a concealed handgun, who may carry such handgun except in the parks identified in Section 100.03 and in the case of athletic fields, except during the periods designated, but as to those parks in which possession of a duly authorized concealed handgun is prohibited, may nevertheless secure the handgun in a locked vehicle within the trunk, glove box, or other enclosed compartment or area within or on his motor vehicle even if it is parked in a designated parking area of the park;

...

§ 100.03 PARKS IN WHICH CONCEALED HANDGUNS PROHIBITED.

(A) Other than a duly authorized law enforcement officer or a public safety employee of the town so authorized by the Town Manager, no person shall possess a concealed handgun in the following playgrounds; athletic fields, including any appurtenant facilities such as restrooms, during an organized athletic event if the field has been scheduled for use with the Town or Watauga County Parks and Recreation Department; swimming pools, including any appurtenant facilities used for dressing, storage of personal items, or other uses related to the swimming pool; and athletic facilities; although an individual who has been issued a permit authorizing the legal carrying of a concealed handgun may secure the handgun in a locked vehicle within the trunk, glove box, or other enclosed compartment or area within or on his motor vehicle even if it is parked in a designated parking area of the park. For purposes of this section, a playground is designated with a parenthetical “p” following the park name, an athletic field is designated with a parenthetical “fi” following the park name, a swimming pool is designated with a parenthetical “s” following the park name, and an athletic facility is designated with a parenthetical “fa”:

(1) Industrial fields (both Small Industrial Field and Large Industrial Field) (fi);

(2) Jaycee Park (p);

(3) Junaluska Park (portion other than area reserved for use by Watauga Post 130 of the American Legion and areas needed for access to the “Legion Hut”)(p); and

(4) North Street Park (p).

THIS AMENDMENT IS EFFECTIVE UPON ADOPTION.

Adopted this 17th day of September, 2013.

Mayor

Attest:

Town Clerk

(ORDINANCE TO BE TYPED IN BOOK 4, PAGE(S) 54-56)

VOTE: Aye – All
 Nay – None

DISCUSSION OF PARKING MANAGEMENT OPTIONS FOR DOWNTOWN BOONE

Cultural Resources Director Pilar Fotta gave a power-point presentation regarding parking management options in downtown Boone. **(Copy of power-point permanently on file at Boone Town Hall.)** After discussion, Council Member Mason moved to implement Option 1 with a two-year financing option and adding the iron casement and secured-collection option:

OPTION 1 – Smart Meter/Pay Station Hybrid – Smart Meters for on-street parking and Pay Stations for Town Hall and Depot lots.

VOTE: Aye – All
 Nay - None

RECESS MEETING

Upon a motion by Council Member Mason, seconded by Council Member Brantz, Council moved to recess the meeting at 9:50 p.m. until Thursday, September 19, 2013, at 6:30 p.m. in the Council Chambers, 1500 Blowing Rock Road.

VOTE: Aye – All
 Nay – None

CALL TO RECONVENE

A recessed meeting of the Boone Town Council was called to order at 6:30 p.m., Thursday, September 19, 2013, in the Council Chambers, 1500 Blowing Rock Road. Mayor Loretta Clawson presided. Council members present were Mayor Pro-Tem Jamie Leigh, Lynne Mason, Rennie Brantz, Allan Scherlen, and Andy Ball. Town Attorney Sam Furgiuele was also present. Staff members present were Town Manager Greg Young, Town Clerk Kimberly Brown, Assistant to the Manager Jim Byrne, Finance Director Amy Davis, Police Captain Andy LeBeau, Fire Chief Jimmy Isaacs, Public Utilities Director Rick Miller, Public Works Director Blake Brown, Planning Director Bill Bailey, Human Resources Director Peri Moretz, and Cultural Resources Director Pilar Fotta.

ANNOUNCEMENTS

Mayor Clawson called the meeting to order and welcomed all in attendance. She noted that anyone wanting to sign up to speak during the public comment session would need to sign the public comment sign-up sheet.

TENTATIVE AGENDA ADOPTION

Town Manager Greg Young presented the following changes to the agenda:

1. Addition of Item 13.C. – Approval of Encroachment Agreement – Mountaineer Mania Projecting Sign.
2. Addition of Item 13.D. – Adoption of Ordinance – Authorizing Legal Action Against Morgan Murray.
3. Addition of Item to Closed Session – Pursuant to NCGS 143-318.11(a)(3) - Legal Advice and Instructions to Town Attorney Regarding Claim – To consult with the Town Attorney in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged, to consider and give instructions concerning the handling of a claim or judicial action against the Town by Michael Vetro.
4. Addition of Item 13.E. – Extend invitation to Michael C. Hardy, Director of the Institute of Outdoor Drama and Associate Director David Weiss, to visit Boone and consult with CRaB (Cultural Resources Advisory Board) and SAHA (Southern Appalachian Historic Association) on the development of outdoor drama licensing for Boone.

Upon a motion by Council Member Brantz, seconded by Council Member Ball, Council moved to adopt the agenda, as amended.

VOTE: Aye – All
 Nay – None

PUBLIC COMMENT

There was no one present to speak during public comment.

ANNOUNCEMENT OF BOARD VACANCIES

Mayor Clawson announced that there are three positions on the Boone TDA Board with terms expiring October 31, 2013.

BOARD APPOINTMENTS

Community Appearance Commission

Two open positions.

There were no applications for this position.

Greenway, Parks & Gardens Committee

One open position.

Mayor Clawson noted that an application for this position has been received from Clark Sheets. Council Member Ball nominated Clark Sheets. With no other nominations, Mayor Clawson called for a vote:

VOTE: Aye – All
 Nay – None

Mr. Sheet's term will expire on July 31, 2016.

Outside Agency Funding Review Committee

Three open positions.

There were no applications for these positions.

Tree Board

Two open positions.

There were no applications submitted for consideration for these positions.

Water Use Committee

One open position.

There were no applications submitted for this position.

APPROVAL OF ENCROACHMENT AGREEMENT – MOUNTAINEER MANIA PROJECTING SIGN

Upon a motion by Council Member Ball, seconded by Council Member Mason, Council moved to approve the following easement for Mountaineer Mania projecting sign:

STATE OF NORTH CAROLINA
COUNTY OF WATAUGA

ENCROACHMENT AGREEMENT

THIS ENCROACHMENT AGREEMENT is made and entered into this the 19th day of September, 2013, by and between the TOWN OF BOONE, party of the first part; and Mountaineer Mania, party of the second part.

W-I-T-N-E-S-S-E-T-H

THAT WHEREAS, the party of the second part desires to encroach on public land designated as (CHOOSE ONE) a public sidewalk/public street/public park/public land (hereinafter referred to as the “public land”) located at 497 West King Street with the following: 15.93 square feet projecting sign (hereinafter referred to as “the encroaching facility”); and

WHEREAS, it is to the material advantage of the party of the second part to effect this encroachment, and the party of the first part, in the exercise of authority conferred upon it by statute and ordinance, is willing to permit the encroachment on public land, subject to the conditions of this agreement;

NOW, THEREFORE, IT IS AGREED that the party of the first part hereby grants to the party of the second part the right and privilege to make this encroachment upon the following conditions, to wit:

That the party of the second part complies with all pertinent provisions of the North Carolina State Building Code, the Town of Boone Unified Development Ordinance and Town of Boone Municipal Code, and such other laws, regulations and ordinances which might apply;

That the said party of the second part binds and obligates itself, its successors and assigns, to install and maintain the encroaching facility in such safe and proper condition that it will not interfere with or endanger travel upon said public land, nor obstruct nor interfere with the proper maintenance thereof, to reimburse the party of the first part for the costs incurred for any repairs or maintenance to its roadways, sidewalks and other structures resulting from the installation and existence of the encroaching facility of the party of the second part, and if at any time the party of the first part shall require the removal of or changes in the location of the encroaching facility, that the said party of the second part binds itself, its successors and assigns, to promptly remove or alter the said encroaching facility in order to conform to the said requirements of the party of the first part, without any cost to the party of the first part.

That the party of the second part agrees to provide during construction and any subsequent maintenance proper signs, signal lights, flagmen and/or other warning devices, as necessary or as requested by the party of the first party Director of Public Works or his designee, for the protection of the public and in the case of encroachment into a street right of way, in conformance with the latest Manual on Uniform Traffic Control Devices for Streets and Highways and amendments or supplements thereto. Information as to the above rules and regulations may be obtained from the party of the first part.

That to the extent permitted by law, the party of the second party shall be responsible for all liability associated with the encroachment and encroaching facility. In furtherance of such responsibility, the party of the second part agrees to indemnify and hold harmless the party of the first part from and against any claim by any third party based upon any action or omission occurring during construction and maintenance of the encroaching facility, as well as from and against any and all claims, demands, suits, causes of action, or other assertion of responsibility, however denominated, for personal injury, damage to property, losses and expenses, including court costs and attorney’s fees, arising out of or in any way related to the encroachment or encroaching facility;

That where pertinent and requested by the party of the first part, the party of the second part agrees to name the party of the first part as an additional insured on its and/or its contractor’s general liability insurance policies applicable to the encroachment or encroaching facility.

It is clearly understood by the party of the second part that the party of the first part will assume no responsibility for any damage that may be caused to such encroaching facility as the party of the first part carries out its construction and maintenance operations, and the party of the second part expressly waives all claims of liability or responsibility against the party of the first part for any damage that may be caused to the encroaching facility as the result of the Town carrying out any construction and maintenance operations. The party of the second part acknowledges that with regard to canopies, awnings, signs and similar encroachments, even where same fully comply with the Town of Boone Unified Development Ordinance, when placed less than ten feet above the surface of a public sidewalk, such obstructions are at great risk of damage by the equipment of the party of the first part during snow removal and general sidewalk construction and maintenance, and the party of the second part understands that by placing the encroaching facility less than ten feet above the surface of a public sidewalk, the party of the second part is knowingly and intentionally assuming that heightened risk of damage.

That the party of the second part agrees to be bound by such other and additional conditions as the Town Council may impose in connection with the encroaching facility.

The party of the second part agrees to restore all areas disturbed during installation and maintenance to the satisfaction of the party of the first part. The party of the second part agrees to exercise every reasonable precaution during construction and maintenance to prevent eroding of soil; silting or pollution to the rivers, streams, lakes, reservoirs, other water impoundments; ground surfaces or other property; or pollution of the air. The party of the second part shall comply with all applicable all rules and regulations of the North Carolina Sedimentation Control Commission, the Town of Boone Unified Development Ordinance and all other applicable laws and regulations relating to pollution prevention and control. When any installation or maintenance operation disturbs the ground surface and the existing ground cover, the party of the second part agrees to remove and replace the sod or otherwise reestablish the grass cover to meet the satisfaction of the party of the first part. The party of the second part shall comply with all pertinent ordinances, rule, regulations and laws, and failure to do so shall be a basis for revocation of this encroachment agreement by the party of the first part.

That the party of the second part agrees to assume the actual cost of any inspection of the work considered to be necessary by the party of the first part.

That the party of the second part agrees to have available at the encroaching site, at all times during construction, a copy of this agreement showing evidence of approval by the party of the first part. The party of the first part reserves the right to stop all work unless evidence of approval can be shown.

Provided the work referred to in this agreement is being performed on a completed public street open to traffic, the party of the second part agrees to give written notice of when work will begin to the party of the first part.

That in the case of noncompliance with the terms of this agreement by the party of the second part, the party of the first part reserves the right to stop all work until the encroaching facility has been brought into compliance or removed from the right of way at no cost to the party of the first part.

That it is agreed by both parties that this agreement shall become void if actual construction of the work contemplated herein is not begun and completed within one (1) year(s) from the date of this agreement unless written waiver is secured by the party of the second part from the party of the first part.

The party of the first part expressly reserves the unrestricted right to require the party of the second part to change the location of the encroaching facility described herein at no expense to the party of the first part.

IN WITNESS WHEREOF, each of the parties to this agreement has caused the same to be executed as of the day and year first above written.

TOWN OF BOONE

BY: _____
Mayor

ATTEST:

Town Clerk

BY: _____
President/Member-Manager/Owner

Printed Name: Party of the Second Part

ATTEST:

Secretary/Witness

VOTE: Aye – All
 Nay – None

ADOPTION OF ORDINANCE – AUTHORIZING LEGAL ACTION AGAINST MORGAN MURRAY

Upon a motion by Council Member Leigh, seconded by Council Member Mason, Council moved to adopt the following ordinance:

ORDINANCE # 13-05

WHEREAS, the Town of Boone (the “Town”) has duly adopted a Community Improvement Code, incorporated into the Town Code; and

WHEREAS, pursuant to Code §91.071, abandoned, hazardous or junked vehicles are prohibited from being left or allowed to remain on property within the town; and

WHEREAS, pursuant to Code §91.019, the accumulation of scrap materials or junk on any premises without certain safety measures being undertaken is also prohibited; and

WHEREAS, following an April 23, 2013 inspection by the Town’s Community Improvement Officer of property located within the Town’s corporate limits at 362 W. King Street, further identified by Watauga PIN # 2900-98-5587-000, owned by Morgan Murray, a resident of Asheville, North Carolina, the Community Improvement Officer observed a Subaru automobile with a license plate which had expired on September 30, 2012, a second junked car, and a collection of scrap materials around the exterior of the premises which included building materials, broken furniture, trash, bags of garbage, scrap metal, bottles and cans, and a significant amount of additional litter; and

WHEREAS, after unsuccessfully trying to reach Mr. Murray by telephone on April 23, 2013 and first allowing him an opportunity to return her call, which he did not, by letter dated May 1, 2013, the Community Improvement Officer notified Mr. Murray, by certified mail, return receipt requested, that she had received "another complaint" about his property, advising him that it involved the same matters about which she had spoken with him in May 2012; and

WHEREAS, said letter, signed for on May 4, 2013, advised Mr. Murray of the violations of the Town of Boone Code which the conditions on his property represented, included photographs and copies of relevant Code sections, and described for him the corrective actions which had to be taken for him to avoid incurring civil penalties of \$100.00 per day per violation, giving him until May 16, 2013 to complete the necessary steps; and

WHEREAS, subsequent to receiving this letter, Mr. Murray contacted the Community Improvement Officer on May 8, 2013 and requested that his time to correct the conditions be extended until May 31, 2013, in that the automobiles, scrap and other items in question were under the control of tenants who he was in the process of evicting; and

WHEREAS, the Community Improvement Officer granted this extension, but on a subsequent inspection on June 3, 2013 determined that the two junked cars were still on the property, though they had been moved to a different location, and that a portion of the junk/scrap materials had been moved, but that most if not all of it was also still on the property; and

WHEREAS, by letter dated June 3, 2013, the Community Improvement Officer imposed a \$100.00 per day penalty per violation; and

WHEREAS, on or about June 6, 2013, the two junked cars were removed from the property, but as of August 29, 2013 scrap materials and junk continued to be deposited and on display on the property; and

WHEREAS, by letter dated August 29, 2103, received by Mr. Murray on September 3, 2013, the Community Improvement Officer summarized the current penalties which had accrued as \$9,400; and

WHEREAS, Mr. Murray did not appeal any of the determinations by the Community Improvement Officer, though he had the right to do so pursuant to Code §91.091, *et seq.*, and his time to do so has now expired; and

WHEREAS, Mr. Murray finally cleaned the property as of September 11, 2013, but the Town is unsure as to which day after August 29, 2013, the cleaning was actually completed; and

WHEREAS, Mr. Murray has failed to pay any of the civil penalties which were imposed upon him; and

WHEREAS, the Town of Boone is authorized pursuant to N.C. Gen. Stat. §160-175 to initiate a civil action to collect civil penalties which have been imposed for violation of its Code; and

WHEREAS, the Code §10.99 authorizes the Town to seek its costs, including reasonable attorney's fee, should a civil action be initiated to collect accrued civil penalties;

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF BOONE, NORTH CAROLINA, AS FOLLOWS:

10. Morgan Murray is the owner of that certain property located within the corporate

limits of Boone, North Carolina and situated at 362 W. King Street, further identified by Watauga PIN # 2900-98-5587-000.

11. Due to multiple violations of the Town's Community Improvement Code, Mr. Murray has accumulated penalties totaling \$9,400, as of August 29, 2013, the last day the Town's Community Improvement Officer can confirm ongoing violations.
12. Mr. Murray's has failed to pay the accrued penalties, and his time to appeal has expired.
13. The Town Attorney is authorized and ordered to initiate a legal action in the General Court of Justice in Watauga County, North Carolina, against Morgan Murray to collect the unpaid penalties for his violations of the Community Improvement Code, along with attorney's fees and costs.
14. This Ordinance shall be recorded in the registry of the Watauga County Register of Deeds under the name Morgan Murray, the owner of the property.

Adopted this 19th day of September, 2013.

Loretta Clawson, Mayor

Attest:

Kimberly Brown, Town Clerk

(ORDINANCE TO BE TYPED IN BOOK 4, PAGE(S) 52-53)

VOTE: Aye – 4 (Scherlen, Leigh, Mason, Brantz)
 Nay – 1 (Ball)

EXTEND INVITATION TO OFFICIALS OF THE INSTITUTE OF OUTDOOR DRAMA TO CONSULT ON OUTDOOR DRAMA LICENSING IN BOONE

Council Member Brantz moved to invite Michael C. Hardy, Director of the Institute of Outdoor Drama and Associate Director David Weiss, to visit Boone and consult with CRaB (Cultural Resources Advisory Board) and SAHA (Southern Appalachian Historic Association) on the development of outdoor drama licensing for Boone; to have Billy Ralph Winkler to serve as a liaison; and to have the appropriate Town Staff accompany Mr. Hardy and Mr. Weiss while on the site. Council Member Mason seconded the motion.

VOTE: Aye – All
 Nay – None

REQUESTED APPEARANCE – JOHN COOPER

Keith Martin appeared before Council, on behalf of the Appalachian Theater of the High Country, Inc., to request the Town to partner with the non-profit and the Downtown Boone Development Association (DBDA) to apply for a Mainstreet Solutions Fund grant in the amount of \$100,000 Small Business Jobs Creation grant. He noted that the grant funds are on a “first come, first serve” basis and that the money will be used to fund four new jobs. Mr. Martin indicated that the theater group already has the fund match. He stated that the Town has to be the applicant for this grant. Assistant to the Town Manager Jim Byrne stated that the Town will

have to determine if it meets the eligibility requirements and confirmation that the grant funds are available. Upon a motion by Council Member Mason, seconded by Council Member Leigh, Council moved to approve the request for the Town of Boone to apply for the Mainstreet Solutions Fund grant in the amount of \$100,000 and on behalf of the Appalachian Theater of the High Country, Inc. with the following conditions:

1. The Town's eligibility to apply for the grant must be confirmed.
2. The availability of grant funds must be confirmed.
3. Payment will be deferred until all conditions are met and there is no liability to the Town.
4. The Appalachian Theater of the High Country, Inc. must obtain the SEPA.
5. The Town will administer the grant.
6. The Town Manager will appoint the appropriate staff to review the grant application before submission.

VOTE: Aye – All
 Nay – None

Before deliberating on the quasi-judicial requests, Town Attorney Sam Furgiuele questioned the members of Council on whether or not they had contact with any of the applicants regarding the requests. All Council members stated that they had not had any significant contact with any of the applicants for any of the requests.

WATER & SEWER REQUEST – JEFFREY WAKEMAN

Town Attorney Sam Furgiuele opened a public hearing at 7:15 p.m. to hear sworn testimony for a request for water and sewer service to property located on Blowing Rock Road. Jeffrey Wakeman, applicant and representing Stonegate Developers, presented a conceptual site plan for the proposed project. **(Wakeman Service Request Exhibit A, permanently on file in the September 2013 Town Council meeting information file.)** He noted two particular issues with the property: the condemned Scottish Inn and the location of Boone Creek which run through the middle of the property. Additionally, he noted that for some distance, the creek is piped and has had issues with flooding in the past. Mr. Wakeman stated that he is proposing a mixed-use development on the property including a commercial/retail use on the first floor of the structure, a parking structure, and multi-family apartments over the retail use. Mr. Wakeman requested that the Council table consideration of his request for water and sewer connection until the October regular meeting. With no other testimony, Mr. Furgiuele closed the public hearing at 7:32p.m. Upon a motion by Council Member Leigh, seconded by Council Member Ball, Council moved to table consideration of this request until the October regular meeting.

VOTE: Aye – All
 Nay – None

WATER & SEWER REQUEST – CORNERSTONE CAMPUS COMMUNITIES

Town Attorney Sam Furgiuele opened a public hearing at 7:33 p.m. to hear sworn testimony for a request for water and sewer service to property located on Shadowline Drive. Meredith Trattler, owner of Cornerstone Campus Communities, appeared before the Council to request water and sewer service for a mixed-use multi-family and retail development. She gave a power-point presentation which explained that the project will include 13,300 square feet of retail/office space and 171 multi-family units. **(Copy of power-point presentation permanently on file in the September 2013 Town Council meeting information file.)** She pointed out that the project will include a 3.5 acre park, five-story parking garage, and will be pet-friendly. Ms. Trattler presented a site elevation depiction **(Cornerstone Service Request Exhibit A)**, a site plan **(Cornerstone Service Request Exhibit B)**, and an artistic rendering of the project **(Cornerstone Service Request Exhibit C.) (Cornerstone Service Request Exhibits A, B, and**

C are permanently on file in the September 2013 Town Council meeting information file.)

She stated the work-force housing will be encouraged by offering one bedroom/one bath, two bedroom/two bath, and three bedroom/two bath units. She indicated that 51% of the project will also include four bedroom/four bathroom units for high-income renters. She stated all units will have a master bedroom and expanded living area. Council Member Leigh asked if any portion of the project will be constructed in the viewshed. Michael Trew, project engineer and being duly sworn, stated that no portion of the structure will be located in the viewshed. Public Utilities Director Rick Miller stated that based on 490 bedrooms and a swimming pool, the project is anticipated to use 70,421 gallons per day. He stated that he could not calculate the usage for the retail portion of the property until it is known what uses will be housed in that area. Council Member Mason inquired as to the cost of the rental units. Ms. Trattler stated that she did not recall the exact numbers but that a one bedroom/one bathroom unit could be rented for approximately \$750-900 per month. She stated that this is proposed to be a gated-community with security and anticipated to have an on-site manager living on the property. Lengthy discussion ensued regarding the amount of retail space proposed for the project. Ms. Trattler contended that the amount of retail and commercial space is adequate to meet the requirements of the Town. Planning Director Bill Bailey explained that the requirement for retail is not based on proportion but that 200 feet measured from the centerline of the roadway must be retail. With no other testimony, Mr. Furgiuele closed the public hearing at 9:27 p.m. Several Council Members voiced a need for more information about this project before a decision could be made and a concern about the size of the project and the number of student-oriented apartments contained therein. Upon a motion by Council Member Ball, seconded by Council Member Leigh, Council moved to deny the request for water and sewer service by Cornerstone Campus Communities for property located on Shadowline Drive.

VOTE: Aye – 4 (Leigh, Mason, Ball, Brantz)
 Nay – 1 (Scherlen)

CLOSED SESSION

Upon a motion by Council Member Brantz, seconded by Council Member Ball, Council moved to enter Closed Session at p.m. pursuant to NCGS 143-318-11a(3) to hear the following items:

- A. Legal Advice – To consult with the Town Attorney in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged, for legal advice concerning procedural deficiencies of board appointments.
- B. Legal Advice – To consult with the Town Attorney in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged, to instruct Town staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating the price and other material terms of a contract or proposed contract for the acquisition of easements in real property and the amount of compensation and other material terms of an employment contract related to the proposed raw water intake.
- C. Addition of Item to Closed Session – Pursuant to NCGS 143-318.11(a)(3) – Legal Advice and Instructions to Town Attorney Regarding Claim – To consult with the Town Attorney in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged, to consider and give instructions concerning the handling of a claim or judicial action against the Town by Michael Vetro.

VOTE: Aye – All
 Nay – None

Upon a motion by Council Member Brantz, seconded by Council Member Mason, Council moved to exit Closed Session at 11:04 p.m.

VOTE: Aye – All
 Nay – None

ADJOURNMENT

Upon a motion by Council Member Brantz, seconded by Council Member Mason, Council moved to adjourn at 11:05 p.m.

VOTE: Aye – All
 Nay – None

Kimberly S. Brown, Town Clerk

Loretta Clawson, Mayor