

Rockville Town Council
Special Meeting
February 24, 2021
Via Zoom Virtual Meeting

1. **CALL TO ORDER - ROLL CALL:** Mayor Leach called the meeting to order at 6:00 p.m. Terry Bell, Jeff Ballard, M. Honer-Orton, and Mayor Leach were present. David Firmage was excused. Town Clerk, Vicki S. Bell, recorded the meeting.
2. **APPEAL OF THE ROCKVILLE PLANNING COMMISSION'S DECISION OF NOVEMBER 10, 2020 ON AN APPLICATION FOR DETERMINATION OF LEGAL NON-CONFORMING USE FOR TRACY L. COX, SUCCESSOR TRUSTEE, ALLEN B. LEE AND CLAYTON D. LEE.**
APPLICANTS - Mayor Leach reported that on November 10, 2020, the Planning Commission took the following actions in connection with the application for determination of legal non-conforming use. Firstly, the application was approved as to the Lee parcel R-1280-A-1-A-SA. Secondly, the application was denied as to Lee parcel R-1280-A-1-B which was verbally withdrawn at the October 13, 2020 meeting but not in writing. Thirdly, they denied the application as to the Cox parcel R-1280-A-2-A. Before Mr. Snow presented his arguments, Mayor Leach asked the Council members to ask questions of the speaker but requested that they listen to the complete argument prior to asking. She asked Mr. Snow to present his argument within a fifteen-minute period. Mr. Snow said he will keep his presentation as short as possible.

Mr. Snow introduced himself to the Council and explained that he represents Tracy Cox as the successor trustee of the Alma and Angeletta Cox Family Trust. As was explained by the Mayor this appeal relates only to the parcel of property that is owned by the Cox Trust; it is the parcel that ends in A-2-A. As had been explained in the fall of last year, we submitted an application for determination of legal non-conforming use as to two parcels; erroneously a third parcel was added. When it was brought to our attention we withdrew it at the very first Planning Commission meeting that occurred, I believe, on October 13, 2020. Essentially what we were attempting to do – we wanted through a formal process an actual determination whether or not the two parcels in question had been historically used and could continue to be used for the removal of gravel and sand and boulders for off-site use. We presented evidence as you can see in our appeal documents; we've attempted to create the record in a sense that we have Bates numbered everything that was submitted to the Planning Commission. I don't know if all of the Council members have copies of these documents, but they will have at the very bottom right BSC, several zeros and a number. Our main request in the formal written submittal begins with BSC000001 through zero five. And then we attached several other pieces of evidence in support of importance to the Council to understand that there were written statements found in the documents that end in 008 and 009 from Allen Lee and Tracy Cox. And then there was a series of aerial photography that was submitted. At the conclusion of the October 13 hearing, the Planning Commission wanted to take the matter under further consideration and reconvene. They did indicate that they would allow additional presentation to be provided at the follow-up meeting. In the interim, we had submitted a GRAMA request to the Town and received a significant amount of documents which at the second or follow-up meeting of November 10 we submitted them wholesale as we had received them just that day or the day before, I believe. And that is what we refer to in our appeal as the second submittal or supplemental submittal it is exhibit three to our appeal. There are a lot of documents in there but essentially we asked for any evidence or documentation that the Town had with regards to these parcels over the years, their interaction. We received additional aerial photography that the city had engaged the firm to provide to them – it was different than what you can obtain off of the Washington County interactive mapping and the photography that they provide or allow for this parcel. So, it was helpful as well. But what I want to make clear that during these Planning Commission meetings not only did we have the written statements of my clients, but they were both present; Mr. Cox and Mr. Lee at the hearing they were asked questions, they articulated and gave additional information, background and they discussed the properties in question.

A couple of points that I want to quickly point out is that there was a discussion with regards to Mr. Lee and the document that is marked BSC000010 which was an aerial photograph received

from Washington County that has a historical date of sometime between 1974 and 1976. In talking to Mr. Lee, in the presentation of testimony, indicated that it is a picture of the Cox property in question. The outline is the outer boundaries of the Cox parcel which is the parcel that we are here tonight to talk about. We didn't appeal part of the decision that the Planning Commission made obviously we were fine with the determination of legal non-conforming use as to the Lee Parcel. Our objection and our appeal has to do with the Cox property. But on that aerial photography that has a time frame of 1974-1976, you can see some roads that have been cleared down there in the very far bottom left corner of that photograph there is a cleared area. There is what appears to be some fixed things Mr. Lee indicated that would have either been their original crusher or their [inaudible] and the testimony that Mr. Lee went into in more depth was that originally the extraction of sand and gravel from the Cox property was not commenced by the Cox's themselves, it was commenced by the Lee's with permission from the Cox's. And that was where they originally had their initial pit which happened sometime in the early 70's. It was more of Allen Lee's father with his assistance who did that. Their testimony is that they later moved the pit and the crushing equipment, sifting equipment up onto Dr. Stout's property which is not depicted in this picture. And then it was later moved to their parcel, the one that was granted the determination of legal non-conforming use. But there was more testimony that was given by Mr. Lee and Mr. Cox that even after the Cox's had moved their plant that Steve Cox, Tracy Cox's brother continued to remove gravel and sand from their property. They continued to allow consistently to have the Lee's come onto the property and remove gravel and sand. They talked about locations where some of those occurred and referenced the different pictures that we submitted to it. If I can draw your attention to the aerial photographs that we received from the Town, they appear to be slightly more clear - those are the photographs that end in 094 through 097. What is interesting if I could draw the Council's attention to the photograph that is numbered 097 - that is a photograph from 1973. It does not necessarily have the Cox property outlined; it was done for the purpose of looking at the Lee property which is outlined up above along the highway. But if you look down to the Cox property, in 1973, you don't see very much or any clearing down there closer by the river. But then you flip back and look to the photograph from 1977 which is 096 and you can start to clearly see that there is clearing occurring on that property, that the roads have been improved and that there are spots along that road where there has been some excavation. Then it just continues. You can flip to 095, 094, you're looking at 1981 very clear that whole area down there is cleared and 1985 is even more detailed - you can still see what appears to be some sort of structure or manmade thing. I recognize that it is rather small, and I apologize for that. But clearly these things were provided.

Another thing that was relevant, we submitted to be part of the record all of the documents that we received from the Town. There were a couple of things that were very interesting; there were copies of records from the Town's financial ledgers showing that they had made purchases from the Lee's of gravel and sand - the Town had. There were some communications between Mr. Lee and different prior Town officials; there were copies of business licenses that were obtained by Mr. Lee, not Mr. Cox. I want to make it clear that the testimony that was given by my clients was that during the latter years, when the Town was incorporated after 1987, at that point in time, most of the removal and use of gravel and sand and boulders off-site from the Cox property was being caused by the Lees; they were removing them. Mr. Cox's statement was very clear that they allowed this to happen and there was compensation given and the compensation was primarily in the form of reciprocal work being done by Budd Lee and Sons Construction. Simply the removal. And they did allow with permission, others to remove and there were as common practice there was bartered some types of consideration. The reason for our appeal is that the written decision of the Planning Commission that can be found as exhibit four also we have it Bates Numbered as ending in 104, that the reasoning articulated in the decision was that the Planning Commission found that the statements of Allen Lee and Tracy Cox were not sufficient evidence of continuous use. And the aerial images of the Cox property do not substantiate the written statements as to continuous use. That is an interesting reasoning and finding for the decision because in one hand they find that these statements and this aerial photography is sufficient evidence to grant a determination of legal non-conforming use as to the Lee's property. But in the same hand they say that it is insufficient as to the Cox property; there is no difference, it's the same evidence. The Town's counsel sited to a section of the Rockville Land Use Ordinance regarding what types of evidence can be submitted to prove or carry the burden of

showing continuous use. We in our brief talk about that. It is section 6.2(b) in the LUC it says, "documentation provided by the property owner to establish the legal existence of a non-conforming use must be factual and substantiated by documentation such as tax records, plat maps, old zoning codes, minutes, meetings, copies of Town findings, permits, affidavits from current or previous Town Officials, receipts, telephone, sewer, power bills, payments of services and a series of dated photos" and so forth. That is not...is says maybe established, it is not intended to be an exhaustive list. I heard from the Town's counsel at the Planning Commission's hearings that other people's request had been denied based on the premise that these statements or affidavits given by property owners was not held to be creditable or sufficient because it was more of a self-serving nature. We have provided to the Town Council in our hearing brief case law in Utah that says in these instances that witness testimony regardless of whether it is the property owner or not is sufficient. We refer specifically to a couple of difference cases one of them being the Caster case which came down from the Utah Court of Appeals. It had to do with an issue over whether or not the storage of wrecked or inoperable vehicles on property was a permissible or grandfathered or a legal non-conforming use. West Valley City had said that the evidence from the property owner and witnesses was not substantial or sufficient to carry that burden. The Utah Court of Appeals said differently and remanded. They found that the uncontradicted witness testimony was sufficient to carry their burden to establish legal use.

What is important for the Council to understand is that the Town produced absolutely zero evidence to contradict the statements that was made by Mr. Lee and Mr. Cox, both the written statement and the oral testimony that was given to the Planning Commission. There was not any other witnesses that came and gave testimony. There was reference to certain documents that were made. We had to make a GRAMA request to even get some of the documents. And there seemingly was a confusion between the Planning Commission about whether or not a business license should have been obtained by the Cox's. Our point was the use is what is important in this and whether the use existed at the time when it was legal and it continued on. Again, having the Lee's come on to the Cox's property and remove stuff, process it on their property and sell it; otherwise does that require a business license. In our argument, is no it doesn't. But it is not really relevant in this whole inquiry, but it seemed to be a fixated point by the Planning Commission. The bottom line is that the Planning Commission relied upon the testimony of witnesses and the other documentation that was provided by us in finding that that evidence was sufficient to grant a determination of legal non-conforming use on Lee's property; but then in the same breath they said that evidence is insufficient as to the Cox's. Well, if it is sufficient for one, why is it insufficient for the other one? That is our main key argument. That is where it is a fundamental flaw or error on the part of the Planning Commission. It strikes us as being arbitrary especially in light of the fact that in our opinion there was absolutely no evidence produced by the Town to contradict the evidence that was before the Planning Commission. I am happy to answer any specific questions that Council members or the Mayor have. And I have Mr. Cox here with me and I have Mr. Lee who was a witness before the Planning Commission also present.

Mayor Leach asked if anyone would like to ask a question of Mr. Snow or Mr. Cox at this time. Give everyone a moment in case they can't find their unmute button. Alright, thank you Mr. Snow it looks like at the moment we are good. Now I would invite Kimball Forbes to make argument or comment as the Town's counsel.

Mr. Forbes thanked the Mayor and the members of the Town Council. The threshold issue in this matter can be decided on this one point. The fact that there is no evidence that whatever mining occurred on the Cox property was legal at the time the Rockville Town Land Use Code was enacted and made it illegal. The statements and testimony of Mr. Lee and Mr. Cox never provided any evidence that it was a legal use at the time. So, what do I mean by a legal use? A legal use can be shown in two ways; not necessarily both but at least one of them, is that gravel and sand mining—by the way the appeal brief mentions boulders, that is the first time of boulders in this appeal—but anyway, gravel and sand mining was under the Washington County. Actually, let me back up a little, some of you may know or all of you may know that the Town was established in 1987 and the Land Use Code was enacted in 1990. Before that the property was subject to the Washington County Code. The petitioner in this case would have the burden to

show that at that time under Washington County code sand or gravel extraction was legal under that code at the time. A second way could be showing that there was a business license at the time. What is notable is that the petitioners has not provided any copies of Washington County code in effect in 1990's to show that mining was allowed on the property. There was discussion at the Planning Commission meetings and in the initial application that mining was allowed on the property under the Washington County code with approval but there was no evidence, there was nothing, no versions of the County code provided that showed that could have been approved at the time. Approval meaning a conditional use as know it now today. As to the business license, a person cannot legally operate a business on their property without a business license. The lack of evidence of a business license is evidence that the Cox property is not being legally used in 1990. There was statements from one or both of the applicants that they had sold gravel from that property. That would require a business license. The fact underlying all this is there is actually zero evidence offered that the use of the property when the Land Use Code was enacted was legal at that time. That is as simple as it is. The evidence that was presented were statements from Mr. Cox and Mr. Lee, and I guess, their supporting statements at the meetings but none of that spoke to whether the use was legal at the time it became illegal by the Land Use Code. The aerial images could show that mining may have been occurring on the property but that doesn't mean that it was legal mining.

Going specifically to Mr. Snow's arguments, first his argument is that the evidence of whatever evidence the Planning Commission relied on to grant the application for non-conforming use as to the Lee property is somehow automatically evidence that the Cox property was a legal non-conforming use. But he doesn't go into any detail as to how that evidence of one parcel makes another parcel a legal non-conforming use. What is more, something that was in the conclusion of law from the Planning Commission was the first, rather the second conclusion of law, the Planning Commission concluded that the legal doctrine of zoning estoppel applies to the Lee property because in 2017 the city's counsel wrote letters to Mr. Lee saying that it appears that mining on the Lee property was approved at some point. And the fact that the Town has allowed the gravel pit on the Lee property to continue. Now zoning estoppel, what I am getting at here is, the Planning Commission never disputed that the Lee property was a legal non-conforming use and it actually didn't go into any evidence as to that. But even assuming, zoning estoppel was the reason the Planning Commission made their decision. But assuming that there was evidence specifically to the Planning Commission considered as to the Lee property, once again, it doesn't equate automatically to evidence that property next to the Lee property was being legally used in 1990.

The petitioner's second argument is about he refers to 9.2 or 6.2.b, the current code is 9.2.b, that somehow the Planning Commission did not consider all the evidence appropriately as his argument in the appeal brief that the Planning Commission ignored evidence and by putting a list of type of documents that the Planning Commission would like to have seen as evidence is somehow evidence that they didn't consider all the evidence which isn't true. The Planning Commission's conclusion of law, number 8 the one Mr. Snow pointed out, is that the applicants have also not provided any additional factual documents to substantiate its continuous use such as, for example, and then it lists some of the documents that had the Planning Commission not even put that in, the decision was correct. The same goes for...no where does the Planning Commission indicate that it was refusing to consider any evidence or that the applicants had to provide a specific document of evidence to succeed in the application. Section 9.2(b) is fairly clear that and 9.2(c) is the Planning Commission decides based on the documentation provided by property owner whether the .. determining the non-conforming status of the properties. That is not to say the Planning Commission ever discounted the oral testimony of the applicants at the Planning Commission meetings.

The next argument was about the Caster case and the argument was that in the Caster case uncontradicted testimony was enough to win the day. I did look at the Caster case and the issue was about whether the non-conforming use had been continuously utilized. Even assuming that the Planning Commission was wrong and that there was sufficient evidence that the use of the Cox property had been continuous, that still doesn't get around the fact that there is no evidence at all that the property in 1990 was not a legal use. In the Caster case, I noted that the Board received uncontradicted documentary and testimonial evidence that a business license for the

non-conforming use had been obtained every year and that a few cars would continuously stored or kept on the property. The case was not just a matter of uncontradicted testimony but even if this case is a matter of uncontradicted testimony that only applies to the continuousness of the use and to the legalities use. The case that I had cited at the Planning Commission meetings, case called L J Mescaro, Inc. in Herriman City, in that case, like in this case, there was no documentary evidence that the use was legal, there was a legal non-conforming use and the court held that despite the testimony of the applicants there needed to be something substantiating that testimony. That is what 9.2(b) essentially says, you got to have substantiating documentation in addition to pure testimony. But even if, it was just pure testimony, and that was enough evidence, the quality of the evidence, once again, is not enough to show a legal non-conforming use.

The next argument that the petitioner makes is the Town produced no evidence. Now we need to be clear that the statute or the codes clearly states that the property owner bears the burden of establishing that any non-conforming use lawfully exists. The Planning Commission did not have any duty to put forth any type of evidence to contradict or to try to contradict anything that the petitioner or the applicants put forth. That tied back into was there enough uncontradicted evidence and the Planning Commission decided that there wasn't. I believe that addresses everything that Mr. Snow said, so just to reiterate there is no evidence, zero evidence, that in 1990 when the Land Use Code for the Town of Rockville was enacted that mining gravel or sand on the Cox property was allowed under the Washington County Code. And that is all there is to it. Any questions.

Mayor Leach asked the Council members if they had any questions for Mr. Forbes. I'm seeing shaking heads. Alright, Mr. Snow if you have some comments or remarks to Mr. Forbes information, please go ahead.

Mr. Snow thanked the Mayor. In response, I would draw the Council's attention to a couple of documents that were received by us subject to our GRAMA request and then produced and submitted as part of the record as evidence. The first document would be document ending 085. This is an email string. It is between..it appears to be between Joyce Hamilton, Deputy Town Clerk in October 2020, and Ericka Hernandez. It also includes a response from Gaylene Hansen. It says "Hello Ericka, thank you for passing my request along to someone who could help. We have a property owner claiming that he has been mining on a parcel of land since 1970's. Do you have any business licenses or mining permits for either parcel", one of them being one ending in A-2-A which is the Cox parcel here in question, "in the name of either Alma, Steve or Tracy Cox or Steve Cox Construction?" At the very top, Gaylene Hansen, the records officer for Washington County says, "We don't have any business licenses between 1933 and 1983." They don't have records that go back that far. But it says, "I have attached copies of 1984 through 1987 business licenses for Steve Cox Construction." That is relating.. the inquiry was relating to this parcel in particular. "I don't know how many years you wanted so I stopped looking in 1987." Arguably because that is the year the Town became incorporated. So, there were business licenses for this property by the Cox's.

Next I would flip you to – Mr. Forbes interrupted, sorry to interrupt but I never received a stamped, numbered copy of the record from Mr. Snow. What was the date of that email? Mr. Snow responded that the date.. the response from Gaylene Hansen was October 28, 2020. Mr. Snow continued..the next one is going to be document ending in 083. This is a letter written in 2011 written by Deon Goehm, Deon Goehm was the planning director for Washington County for long as I can remember. For a good 20 plus years. At that point in time, she is responding to an inquiry from the Town. This is a document that was in the Town's records. And she says, "To whom it may concern, Memory of this old site is that gravel was taken out preceding the County's zoning ordinance." The County's zoning ordinance. "For state use on SR-9". She goes on to talk about the different parcels including the Bud Lee parcel and the Cox parcel, okay. Some of the things that have come..that came to as far as the form of applicants, like there had been an application for an RV park possibly on this property. But I would indicate to you also that you can see in every one of these aerial pictures the sewer lagoons that were built. Much of that was lined with material that was excavated from the Cox's property by the County. If it was not authorized for legal, how could the County remove gravel and material from this property and use it off-site on SR-9 or on the sewer lagoons. Yet it would be not legal or permitted for them to do

it. That seems to me like a taking if it wasn't permitted. It was done consensually by my client. I think those two documents, in and of themselves, clearly show that this use was permitted back then. And this use was occurring, that there was business licenses that happened on this. So, to say there was no evidence in inaccurate.

Mayor Leach asked if she could ask a question Mr. Snow. Because I didn't see the email on October 20 with Joyce and Erica Hernandez and then the answer. She said that there were business licenses for Steve Cox Construction. I haven't seen those business licenses; do they actually reference the parcel or was it just Steve Cox's business name that was...? Mr. Snow responded, they were not produced as part of the GRAMA request, so we don't have copies of them either. All I know they were in response to the inquiry about any business licenses as to one of those two parcels. And only one of them was owned by the Cox's in 2020 and it was the one that ends in A-2-A. And it says that Steve Cox Construction had a business license when she checked from 1984 to 1987. They didn't have business licenses records earlier than '84 and I assume she cut it off at '87 because that is when the Town incorporated. Mr. Forbes interjected that that would have been the applicant's duty to provide those licenses, but they did not. Mr. Snow stated they provided documentation or evidence in the form of an email that the records custodian in Washington County indicated that they existed. Mr. Forbes responded that the best evidence of those documents is the documents, not what the County said. Mr. Snow responded, can't we supplement the record.

Mayor Leach asked Mr. Snow about his comment that gravel was taken from the Steve Cox property was used on the sewer pits or ponds. And if the County was taking gravel, did they pay the Cox's for that gravel. Mr. Snow responded, that is a great question, maybe Tracy might know. I am going to have him turn on his microphone and I am going to silence my speaker so that...actually you just turn on your microphone and it should be fine. Tracy stated that he knew his dad did receive some compensation for that. That was back in the early, I had graduated and left town at that point. I'm not really that familiar with how much money he got or anything else in regard to that. But I know they did set the pit up there to do those lagoons. At a later date, my brother Steve was asked to raise the levy about two feet on each of those lagoons. And I know that gravel also came out of that pit. I know that..I am sure that there is records in the County that was done by Steve Cox Construction. I don't have that with me. Mr. Snow remarked that Allen Lee also indicated that he had some [inaudible] on that. Allen stated when they made gravel for the actual road base for the tops of the dikes and stuff, they contacted us to make that gravel with our crusher that was in the Cox pit at that time. We furnished all the gravel that went around the top for the road base and stuff. All the raw materials came out of the pit, you know, without having to be crushed or I think they probably screened a little of it. Most of it just came out of the pit [inaudible] run and went into the dikes on those sewer lagoons. But we were set up there with my crusher and we crushed the road base around the tops of all those sewer pits. Mr. Snow stated that some of this same testimony or questions was asked and discussed at the Planning Commission level if you were to review the record or the recording of the Planning Commission. This was things that were discussed, maybe not quite to that depth we did just now.

Mayor Leach asked in the records it was stated that the County gave approval, the mining was given..allowed with approval by the County's zoning at that time before Rockville incorporated. Mr. Snow apologized that he had muted the speaker so that we wouldn't get a second feedback. Can you ask that question one...? Mayor Leach stated that in the records it was stated that the mining on the properties prior to Rockville incorporating was done with approval by the County. Is there a record? I know that they didn't do licenses supposedly it was something along the lines of a conditional use, but they didn't actually issue permits is what I read. Were there minutes in a meeting or anything how that approval was given at that time? Mr. Snow answered they don't have records or meeting minutes back in the 70's, so no, we do not have that. But we do have, as we have indicated, both the County was utilizing materials from this property during that time too. I don't know, the testimony at the Planning Commission was from Mr. Lee and from what we submitted was his father...that this mining occurred with the consent and knowledge and understanding. It would be pretty hard to have...maybe further down from the Cox property but to have an operation like this and have the County not know about it. And if they knew...well, they

did know about it because they were using material from but yet not issuing or telling Allen's father that they couldn't.

3. **DISCUSSION AND POSSIBLE ACTION ON APPEAL:** Mayor Leach asked if there were any other questions anyone would like to ask at this time.

Mayor Leach **MOVED** that we take our decision under advisement and present our final written decision at our Town Council meeting on March 10th. Megan Honer-Orton **SECONDED** the motion.

Mayor Leach asked Council members to raise their hand if they were in favor of the motion.

Vote on motion:

Terry Bell – Aye
Pam Leach – Aye
Jeff Ballard – Aye
Megan Honer-Orton – Aye

The motion passed unanimously.

Mayor Leach stated that the Council will take the information that we have heard and arguments this evening and take them under advisement. We will have our written decision in our March 10th meeting which is just a little less than two weeks away.

Mr. Snow thanked the Mayor and Council members for hearing this and your thoughtful consideration.

Mayor Leach thanked them for coming and wished them a good evening.

4. **ADJOURNMENT:** Terry Bell **MOVED** to adjourn the meeting. Jeff Ballard **SECONDED** the motion.

Vote on motion:

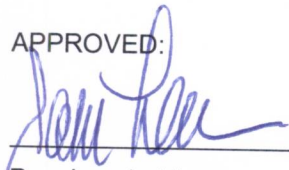
Terry Bell – Aye
Pam Leach – Aye
Jeff Ballard – Aye
Megan Honer-Orton – Aye

The motion passed unanimously.

The meeting adjourned at 6:50 p.m.

Minutes Prepared by:
Pearl Meadows, Deputy Town Clerk
Town of Rockville

APPROVED:



Pam Leach, Mayor

The foregoing minutes were posted in the cabinet of the Rockville Town Office by Vicki S. Bell at approximately 12:00 AM/PM on 11 MARCH 2021 and on the Rockville website.

Vicki S. Bell



**Rockville Town Council
Special Meeting
February 24, 2021 6:00 p.m.
Via Zoom Virtual Meeting**

PLEASE SIGN YOUR NAME AND PLACE OF RESIDENCE FOR THE RECORD

NAME

ADDRESS

Jane Brennan

Tracy Cox or Allen Lee

Heath Snow

Joe Motter

Kimball Forbes

Jacob Anderson

Robert Snyder

Ken Rybkiewicz