

Kenyon Law Associates, LLP
Attorneys at Law
133 Old Tower Hill Road Suite 1
Wakefield, RI 02879

Stephen B. Kenyon
John F. Kenyon
Robert J. Donnelly
Kelly Kenyon LeValley

Phone (401) 789-0217
Fax (401) 789-3584

Archibald B. Kenyon, Jr. (1968 - 2016)

July 7, 2020

Wayne Pimental, CBO/CFM
Building Official & Zoning Enforcement Officer
South Kingstown Building Inspection & Zoning
180 High Street
Wakefield, RI 02879
Sent via email to: wpimental@southkingstownri.com

Dear Wayne:

INTRODUCTION

I am writing to you on behalf of our client, Daniel J. Cunningham, regarding his property located at 35 Fire Lane 2 in South Kingstown. We have filed an application with the Zoning Board on behalf of my client, requesting relief to demolish the existing residence on the property and construct a new, larger residence.

My client's house is located on Tax Assessor's Plat 82-1, Lot 1-1 which is owned by The Jerry Brown Farm Homeowners Association. The property contains more than one, single-family residence and is considered nonconforming. Therefore, the demolition and reconstruction require a Special Use Permit to alter an existing, nonconforming property. The issue that has arisen is whether §203 of the Zoning Ordinance limits my client to an expansion of 50% of the existing home. If §203 does limit the expansion, how is it calculated.

HISTORY OF JERRY BROWN FARM

On May 10, 1794, the Jerry Brown Farm property was conveyed to Jeremiah Brown. Many years later, it was conveyed to Sarah and Anna Peckham. Over the years, the property owners rented portions of the property to people who constructed summer cottages. The people who constructed the cottages and rented the land, later formed the Jerry Brown Farm Association. The Association was incorporated and eventually purchased the property on August 31, 1946 from the Peckham sisters.

The original shareholders received one share of stock in the corporation and a camp site agreement, permitting them to keep their cottage on the property. There were a total of 36 shareholders who owned the 36 homes on the property.

According to the town records, the property is approximately 70 acres in size and in an R-80 Zoning District. Over the years, property owners conveyed their ownership in the property with a Bill of Sale for the home, an assignment of the campsite agreement, and the share of stock in the corporation. The property is accessed by Jerry Brown Farm Road. The cottages are accessed by private roads located on the property.

In order for a cottage owner to improve their structure, they must obtain written approval from the Association. More recently, they were required to also obtain a Special Use Permit from the South Kingstown Zoning Board of Review. In reviewing the past decisions, it does not appear that the Zoning Board applied any limitation on the amount or size of improvements.

THE SOUTH KINGSTOWN ZONING ORDINANCE

The homes in Jerry Brown Farm pre-dated zoning in South Kingstown. Once zoning was enacted, they became nonconforming as the Zoning Ordinance only permitted one, single-family residence on a lot. I do not have a copy of the original, South Kingstown Zoning Ordinance. The 1966 Zoning Ordinance included Article VII, entitled "Nonconforming Uses and Structures" That section stated, in part, that

"the lawful use a structure or of land in a manner not conforming to the provisions of this ordinance, existing at the time of its passage or its subsequent amendment, shall constitute a nonconforming use and shall be permitted to continue. A structure not otherwise conforming to the provisions of this ordinance, lawfully existing at the time of its passage or its subsequent amendment, shall be considered a nonconforming structure; and it shall be permitted to continue in existence."

That section later provided that:

"a nonconforming use may be extend or enlarged only as a special exception in accordance with Articles VIII and IX."

That ordinance did not limit the amount of extension, addition or enlargement of a non-conforming use. In reviewing the subsequent Zoning Ordinances, it does not appear that a limitation on the expansion of a non-conforming use existed until the current Zoning Ordinance was enacted in May of 1999. The current Zoning Ordinance provides for two types of nonconformity. It defines nonconforming use as:

"Any use of land or of a structure which was lawfully in existence at the time of the adoption of this Ordinance or any amendments thereto shall be nonconforming by use, notwithstanding that such a use is not permitted by the district regulations of this Ordinance, or any amendments thereto, for the zoning district in which such use is located. A lawfully existing use which is permitted by special

use permit, but which has never received such special use permit shall also be nonconforming by use. A building or structure containing more dwelling units than are permitted by the use regulations of this Ordinance shall be nonconforming by use. An Extractive Industry use shall be nonconforming by use only to the extent of its horizontal (parallel to the ground) excavated limits and the precise nature of the operation, as they existed upon the enactment of this Ordinance. The nature of the operation includes, but is not limited to, the use of specific extractive techniques, such as blasting, and specific accessory uses, such as the washing, treating or storing of the extracted material.”

The current Zoning Ordinance defines nonconforming by dimension as follows:

“A building, structure, or parcel of land not in compliance with the dimensional regulations of this Ordinance shall be nonconforming by dimension. Dimensional regulations include all regulations of this Ordinance, other than those pertaining to the permitted uses. A building or structure containing a permitted number of dwelling units by the use regulations of this Ordinance, but not meeting the lot area per dwelling unit regulations, shall be nonconforming by dimension. Specific entities nonconforming by dimension include, but are not limited to:

1. Nonconforming structure. Any structure which was lawfully in existence at the time of the adoption of this Ordinance or any amendments thereto, but which does not comply with the dimensional regulations or the supplementary regulations or any other regulations concerning structures set forth in this Ordinance or any amendment thereto for the zoning district in which such structure is located.

2. Nonconforming lot of record. A lot of record which, when recorded, was in full compliance with the Zoning Ordinance in effect at the time of recording or which was legally recorded prior to January 15, 1951, and which cannot conform to the area and dimensional regulations of this Ordinance.”

The first determination that must be made is whether the Applicant’s property is nonconforming by use or by dimension. The property is located in an R-80 Zoning District which permits single-family residences. However, the R-80 Zoning District does not permit multi-household uses.

Jerry Brown Farm consists of 36, single-family residences on 70 acres of land. The property actually meets the density requirements under the Zoning Ordinance as there is over 80,000 sq. ft. of land per dwelling unit.

If it is determined that the Applicant’s property is nonconforming by dimension, then §204 of the Zoning Ordinance would apply. That section permits the addition and enlargement of a building or structure nonconforming by dimension as follows: “A building or structure

nonconforming by dimension may be added to or enlarged, including vertically, only if both the building footprint and the building envelope of such addition or enlargement conform to all of the dimensional regulations of the zone in which the building or structure is located.”

In the present case, the Applicant’s property meets all the setback requirements under the R-80 Zoning District and the proposed addition and enlargement would conform to all the dimensional regulations. Furthermore, they would not be increasing the amount of nonconformity as the number of houses on one lot would stay the same.

If the Applicant’s property is considered nonconforming by use, then §203 of the Zoning Ordinance would apply. That section states as follows:

“As a special use in compliance with the provisions of Article 9 of this Ordinance, the lawful nonconforming use of a building, structure, or land may be added to, enlarged, expanded, or intensified provided that such addition, enlargement, expansion or intensification shall not exceed 50 percent in excess of the existing floor area, land or intensity used for the nonconforming use at the time the use became lawfully nonconforming. Said increased use shall comply with all other dimensional and area requirements of this Ordinance. In granting such a special use permit, the Zoning Board may place such restrictions on such increase as it may deem necessary to minimize its effect upon neighboring property and uses. Additional special use permits may be granted provided that the cumulative effect is not more than 50 percent.”

That section limits expansion of a nonconforming *use* of a building, structure or land. The Applicant, in this case, is not enlarging, expanding or intensifying a nonconforming use. His use of the property as a single-family residence is permitted. The nonconformity is that there are more single-family residences on a lot than permitted. §203 would apply if the Association was looking to increase the number of houses on the lot. In that case, they would be limited to 50% of the existing houses. Per that section of the Zoning Ordinance, the increase would need to comply with all the dimensional requirements, including the area requirements.

South Kingstown includes several former summer cottage colonies that have more than the allowed single-family residences on a lot. Almost all of those properties far exceed the permitted density under the Zoning Ordinance. Therefore, any expansion would be impossible under §203. Jerry Brown Farm is most likely the only such development that, in theory, could expand the number of dwelling units under §203 as they could meet all dimensional and area requirements of the Ordinance.

However, the Applicant is not proposing to increase the nonconforming use. He is looking to enlarge and expand the permitted residential use of a building that would meet all the dimensional and area requirements of the Ordinance. §203 does not require a Special Use Permit for the expansion of the building but, instead, for the expansion of the nonconforming use. Therefore, §203 should not apply.

If it is determined that §203 does apply to this situation, then the next issue is how the 50% limitation is to be applied. The Applicant, in this case, is proposing an expansion of the existing floor area of his cottage to more than 50% of the existing floor area. However, the

nonconformity is due to the total residential dwellings on the property. Therefore, if §203 does apply, then the 50% limitation should be on the total floor area, land or intensity used for all the buildings and not just the Applicant's building.

In reviewing the South Kingstown Tax Assessor's information for the 36 homes on the property, most of them appear to be the same size as was existing at the time of the first Zoning Ordinance enactment. The South Kingstown Tax Assessor's records show a building date for 20 out of the 36 houses prior to the enactment of the first Zoning Ordinance. A total of 16 houses have been enlarged or rebuilt since the enactment of the first Zoning Ordinance. Since the enactment of the 1999 Zoning Ordinance, there have been 7 houses that were added on to or reconstructed.

Attached is a spreadsheet showing all 36 properties along with their total living area, including decks, porches and garages. The notes include the areas for utility, storage, crawl spaces, slabs, piers, and cathedral ceilings. The total square footage of all 36 homes, including living area, decks, porches, and garages is 91,009 square feet.

The Town should have information in the Building Permit records regarding the expansion since the 1999 Zoning Ordinance. Therefore, those expansions could be subtracted from the total square footage to come up with a base line number for the existing floor area, land, or intensity used. The building owners in Jerry Brown Farm should be able to expand their homes to 50% of whatever the baseline number was as of the enactment of the 1999 zoning Ordinance.

As previously stated, the property in this case actually meets the Zoning Ordinance requirements for density. The property is not designated as beyond carrying capacity by CRMC. The R-80 Zoning District permits a lot building coverage of 20%. The existing building coverage for the Jerry Brown Farm lot is less than 2%. The Applicant's building is one of the smallest in the Jerry Brown Farm community. The existing house is uninhabitable and needs to be demolished and rebuilt. The proposed use as a single-family residence is permitted in the zoning district. The proposed expansion will comply with all the dimensional regulations of the Zoning Ordinance. There does not appear to be any rational reason to limit the Applicant's expansion to a total of 50% of the existing building. A more reasonable interpretation of the Zoning Ordinance would be to limit the total floor area of all the buildings in Jerry Brown Farm to 50% of the existing at the time of the most recent Zoning Ordinance.

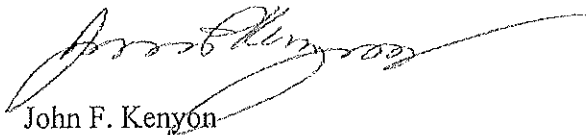
If it is determined that §203 does apply to the Applicant's property, individually, there must be a determination as to how the 50% is calculated. That section states that the expansion will not "exceed 50 percent in excess of the existing floor area, land or intensity used for the nonconforming use". Is the expansion limited to 50% of the floor area, footprint or something else?

CONCLUSION

If the Jerry Brown Farm property is considered nonconforming by dimension, then there is no limitation on the amount of expansion of the individual buildings. If it is considered a nonconforming use, then the Applicant's expansion should not be limited to 50% as he is not expanding the nonconforming *use* of a building, structure or land. He is not proposing expansion of a conforming use as he is not proposing to increase the number of houses on one lot. If it is determined that §203 does apply to the Applicant, then the 50% limitation should be applied to

the total, existing floor area, land or intensity of all the buildings in Jerry Brown Farm, as they are collectively nonconforming.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John F. Kenyon", written in black ink.

John F. Kenyon
JFK/pas

Encl.

Jerry Brown Farm

Map	Block	LOCATION	Owner Name	Living Area, Decks, Porches, Garage	Notes
02-1	1-1	35 FIRE LANE TWO	CUNNINGHAM, DANIEL J		1014 Including Utility, Storage, unfinished (128)
02-1	1-2	31 FIRE LANE TWO	RAUCCI, MARSHALL JR &		6262 Including Cathedral ceiling (112)
02-1	1-3	27 FIRE LANE TWO	RAUCCI, MARSHALL JR &		3009 Including Cathedral ceiling (418)
02-1	1-4	27 FIRE LANE THREE	DUCKWORTH ROBERT G		3032
02-1	1-5	19 FIRE LANE THREE	SMILEY, PHILIP B JR &		4537 Including Utility, Storage, unfinished (24)
02-1	1-6	600 JERRY BROWN FARM ROAD #21	JACKSON, EDWARD J JR & JUDITH		3882 Including Crawl (112)
02-1	1-7	23 FIRE LANE FOUR	QUINN, PATRICK II & RAIDA A		1640
02-1	1-8	27 FIRE LANE FOUR	BIVONA WILLIAM J		1403
02-1	1-9	37 FIRE LANE FOUR	TOMASZEWICZ MARK O S		3009
02-1	1-10	10 FIRE LANE FOUR	PONDHOLME IRREVOCABLE		2116
02-1	1-11	16 FIRE LANE FIVE	CASEY JOHN A & SHARON F		1205
02-1	1-12	30 FIRE LANE FIVE	VALLETTE, PATRICIA B TRUSTEE		733 Including Utility, Storage, unfinished (25)
02-1	1-13	38 FIRE LANE FIVE	VALLETTE PATRICIA B		1087
02-1	1-14	21 FIRE LANE FIVE	GOLDMAN, LOUIS P & HANCY T		2037 Including Cathedral ceiling (220)
02-1	1-15	7 FIRE LANE FIVE	OSTRO, JANET R & REBECA		1280
02-1	1-16	19 FIRE LANE SEVEN	THORNTON, ERIC G & AMY K		1849 Including Slab (823)
02-1	1-17	16 FIRE LANE SEVEN	PIP TRUST AGREEMENT		2235 Including Crawl (50); Including Slab (110)
02-1	1-18	692 JERRY BROWN FARM ROAD	BURROUGHS, LAWRENCE W ET ALS		1304
02-1	1-19	600 JERRY BROWN FARM ROAD	MACWILLIAM, JAMES I (EST)		4810 Including Piers (42)
02-1	1-20	678 JERRY BROWN FARM ROAD	POWERS, DANIE D DEC OF TRUST		2436 Including Crawl (480)
02-1	1-21	650 JERRY BROWN FARM ROAD	DURSKI, MARCEL M JR ET ALS		2119
02-1	1-22	679 JERRY BROWN FARM ROAD	DMARCO, HEINRY A & CONSTANCE L		1694
02-1	1-23	659 JERRY BROWN FARM ROAD	FROST, MARTHA S & SUSAN		1532 Including Crawl (600)
02-1	1-24	22 FIRE LANE SIX	KOLB, SHEILA K LIVING TRUST		2650
02-1	1-25	62 FIRE LANE SIX	HEALY, RICHARD S FAMILY		1420
02-1	1-26	66 FIRE LANE SIX	PAGEL, GRACE		1823
02-1	1-27	21 FIRE LANE SIX	PALLOTTI, MARIANNE TRUSTEE		3564
02-1	1-28	535 JERRY BROWN FARM ROAD	MOLLOY, EDWARD J & LISA A		3000 Including Attic, Expansion, Finished (300)
02-1	1-29	617 JERRY BROWN FARM ROAD	EATON, DENISE J ETAL		1320
02-1	1-30	507 JERRY BROWN FARM ROAD	MEIKLEJOHN, MARK J & DENISE L		2205
02-1	1-31	505 JERRY BROWN FARM ROAD	KAKRES JEAN C TRUST		3363 Including Utility, Storage, unfinished (8); Including Crawl
02-1	1-32	14 FIRE LANE ONE	CROCKER, DANIEL ET UX		1683 Including Slab (48)
02-1	1-33	48 FIRE LANE ONE	SHYDEN, DAVID & COPPEY, SARA		3384
02-1	1-34	110 FIRE LANE ONE	FAIR, CHARLES II TRUST-2007		3504
02-1	1-35	126 FIRE LANE ONE	DUCKWORTH LEE A &		3497
02-1	1-36	127 FIRE LANE ONE	OSTRO JANET		2685
				TOTAL SQ.FT: 91009	TOTAL SQ.FT INCLUDING ONLY STORAGE SPACE: