TOWN OF SOUTH KINGSTOWN
ZONING BOARD OF REVIEW

RE: APPEAL OF DANIEL J. CUNNINGHAM

Petition of Daniel J. Cunningham, 3986 B1 Tower Hill Road, Wakefield, RI, for an Appeal of a Decision of the Zoning Enforcement Officer (ZEO) in a letter dated August 14, 2020. Premises located at 35 Fire Lane Two, South Kingstown, RI, Assessor's Map 82-1, Lot 1-1 and is zoned R-80. This appeal centers on the ZEO's interpretation of Sections 203 and 905 of the Zoning Ordinance as they relate to the premises. Owner of land is Jerry Brown Farm Association, Inc., and the owner of the dwelling is Daniel J. Cunningham for premises located at 35 Fire Lane Two, South Kingstown, RI, Assessor's Map 82-1, Lot 1-1 and is zoned R-80.

MEMORANDUM OF LAW FROM SPECIAL LEGAL COUNSEL TO ZONING BOARD

The question for the Board is whether Sec. 203(A), and specifically the 50 percent limit on expansion of a nonconforming use of a building, structure, or land, applies to the Cunningham zoning application. This requires the Board to first answer the question of whether there is a nonconforming use, and then, if the answer is yes, to consider whether Cunningham's application proposes an addition, enlargement, expansion, or intensification of that use. If the answer to both of those questions is 'yes,' then the Zoning Board should uphold the determination of the Zoning Official. This memo will explain why the Board should answer both questions in the affirmative and dismiss Cunningham's appeal.

I. Jerry Brown Farm is nonconforming by use.

Section 45-24-31(52) of the Zoning Enabling Act provides a definition for "nonconformance" and explains the difference between a building/structure/land that is nonconforming by use and one that is nonconforming by dimension, as follows:

> *Nonconformance.* A building, structure, or parcel of land, or use thereof, lawfully existing at the time of the adoption or amendment of a zoning ordinance and not in conformity with the provisions of that ordinance or amendment. Nonconformance is of only two (2) types:
>
> (i) Nonconforming by use: a lawfully established use of land, building, or structure that is not a permitted use in that zoning district. A building or structure containing more dwelling units than are permitted by the use regulations of a zoning ordinance is nonconformity by use; or
>
> (ii) Nonconforming by dimension: a building, structure, or parcel of land not in compliance with the dimensional regulations of the zoning ordinance. Dimensional regulations include all regulations of the zoning ordinance, other than those pertaining to the permitted uses. A building or structure containing more dwelling units than are permitted by the use regulations of a zoning ordinance is nonconforming by use; a building or structure containing a permitted

number of dwelling units by the use regulations of the zoning ordinance, but not meeting the lot area per dwelling unit regulations, is nonconforming by dimension.

Cunningham's dwelling is located on a parcel of land with multiple dwellings on one lot, known as Jerry Brown Farm. Because Jerry Brown Farm is in the R-80 zone, in which multi-family dwellings are not permitted, the land is nonconforming by use, as it contains multiple dwelling units on a single parcel of land. (Note that the land is not considered nonconforming by dimension, because the Zoning Enabling Act, cited above, provides that dimensional nonconformities do not pertain to permitted uses. The land may be nonconforming by dimension for other reasons not relevant to this appeal.)

II. Sec. 203 limits the expansion or intensification of nonconforming uses of land, which is what Cunningham's application proposes.

Jerry Brown Farm is a nonconforming use of land because there are multiple dwellings on one lot, which constitute a multi-household land development project that is not permitted in the R-80 zone under the Zoning Ordinance in effect at this time. How can that nonconformity be expanded and/or intensified? In at least two ways: first, more dwellings could be constructed on the lot; and second, the dwelling units already existing on the lot can be expanded. Think of it like this: if there is one lot with three dwellings, in a zone where only single-family dwellings are permitted, what would be considered more nonconforming: (A) three dwellings of 1,500 sf each, or (B) three dwellings of 2,500 sf each? In either case, you have three dwellings, but because of the size, the nonconformity is exacerbated. That is exactly why the Town Council, in adopting the Zoning Ordinance, decided to allow nonconforming uses of land to expand, but adopted a 50% cap on their expansion.

III. The Warwick case cited by Appellant is non-binding and involves a markedly different provision.

First, it should be noted that unlike opinions of the Rhode Island Supreme Court, which are binding, opinions of the Rhode Island Superior Court are not binding as to other parties. Thus, the Warwick case that Cunningham cites in support of his appeal (Merkle v. Clark, R.I. Super. Oct. 9, 2015) is binding only as to the Warwick Zoning Ordinance. Second, the relevant provision of Warwick Zoning Ordinance is markedly different from South Kingstown's Sec. 203, because Warwick did not address nonconforming uses of land.

Compare:

Warwick Sec. 402.5	South Kingstown Sec. 203(A)
"A **building** or **structure** containing a nonconforming use shall not be added to or enlarged in any manner, including any addition or enlargement of floor area or volume, unless the use contained within such building or structure, including such addition	. . . [T]he 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

and enlargement, is made to conform to the use regulations of the zone in which it is located."	intensity used for the nonconforming use at the time the use became lawfully nonconforming.

As you can see, Warwick's provision does not address nonconforming uses of land, whereas South Kingstown's provision does. Additionally, Warwick's provision speaks only to "addition or enlargement," whereas South Kingstown's provision is broader, covering "addition, enlargement, expansion or intensification." The broad scope of Sec. 203 and the fact that it applies to nonconforming uses of land means that it was intended to apply to the situation presented herein: the expansion of a structure on a lot where the lot in its entirety constitutes a nonconforming use of land. Because Sec. 203 has a broader scope than the Warwick provision, it should not be surprising that a different outcome would result. The Board should presume that terms in the Zoning Ordinance are not superfluous – in other words, the words are there for a reason. When there are multiple structures on one lot, and the structures are dwelling units, thereby creating a nonconforming use of land, any expansion of the structures necessarily intensifies the nonconformance.

It should also be noted that in Merkle, Judge Gallo observed that "the use of the lot is a nonconforming use" and explained that "the nonconformity . . . arises out of the presence of multiple dwelling structures on the land." So the question then becomes whether, accepting that in this case, as in Merkle, there is a nonconforming use of land, does Sec. 203 apply? The answer is yes, because even though the provision that Judge Gallo examined in Merkle does not address nonconforming uses of land, Sec. 203 does.

IV. The Board lacks the authority to base its decision on reasons of fairness.

Although it may be frustrating to the Board to learn that the Town, acting through different Zoning Officials over past decades, has apparently not applied this provision uniformly, the Zoning Board is a board of limited statutory jurisdiction. The Board's role in this appeal is limited to interpreting the Zoning Ordinance as written. Even if mistakes were made in the past, this does not preclude the Board from applying the Ordinance correctly today. See Town of Johnston v. Pezza, 723 A.2d 278 (R.I. 1999) (applicant could not rely on past mistakes of building official); Martel Investment Group, LLC v. Town of Richmond, 982 A.2d 595, 600 (R.I. 2009) ("Martel's failure to comply with the zoning ordinance is neither mitigated nor excused by the mere fact that the town building official also erred.").

V. Conclusion

If the Board accepts Cunningham's argument, this would call years' worth of its own decisions into question. Moreover, this result would allow unlimited expansion of structures at Jerry Brown Farm, and other properties with multiple dwellings on one lot, so long as the lot setbacks and height restrictions were complied with. There would be no oversight by the Board and, in the absence of special regulations such as those in the Coastal Community Overlay District, nothing except perhaps the Fire Code would prevent these buildings from becoming extremely large and close to one another. That is not the result that the Town Council intended when enacting Sec. 203. It is not consistent with the principle of limiting the expansion/enlargement/intensification

of nonconforming uses, which was the goal of Sec. 203. Keep in mind that, in allowing nonconforming uses to expand at all, South Kingstown goes beyond what state law requires, which is simply that nonconforming uses must be allowed to exist in their current form. For these reasons, the Board should deny and dismiss Cunningham's appeal, and as to the pending application for a special use permit, the Board should hold Cunningham to the 50 percent limit as set forth in Sec. 203.

Respectfully,

/s/ Amy H. Goins, Esq. (#8814)
Special Legal Counsel
URSILLO, TEITZ & RITCH, LTD.
2 Williams St.
Providence, RI 02903
amygoins@utrlaw.com
(401) 331-2222

A copy of this memorandum was sent via email to Attorney John F. Kenyon.

S:\South Kingstown\Zoning\Cunningham Appeal - Memo for SKZB.docx