MEMORANDUM

To: New Canaan Planning & Zoning Commission
From: Amy E. Souchuns, Esq.
Attorney for Jennifer Holme & David Markatos, 1328 Smith Ridge Rd.
Date: March 20, 2017
Re: Grace Farms Foundation Special Permit Applications

In its Memorandum dated January 19, 2017, Grace Farms Foundation, Inc. ("Foundation") disputes the position espoused in the Holme/Markatos Memorandum dated December 16, 2016 ("December Memo") that New Canaan's Zoning Regulations ("Regulations") allow only one principal use on a property. Instead, to support its desire for an overly intense use of its property, the Foundation contends that the Regulations allow multiple, contemporaneous principal uses on a single property notwithstanding the Regulation's definition of principal use as "[t]he primary or predominant use of any lot or building." To reach this implausible conclusion, the Foundation ignores fundamental rules of statutory interpretation, overlooks the fact that the Regulations are permissive, rather than prohibitive, in nature, and conflates the types of uses that are subject to special permit approval under the Regulations. This Commission should flatly reject the Foundation's flawed approach.

I. Legal Analysis

A. The Regulations Do Not Support the Foundation's Interpretation

The Foundation relies upon § 2.1(B)(3)(b) of the Regulations, a provision from the "interpretation" section of the Regulations. The Foundation highlights the fact that this section states that "words in the singular include the plural and vice versa." Such a position is consistent with Conn. Gen. Stat. § 1-1(f), which also provides that "[w]ords importing the singular number may extend and be applied to several persons or things and words importing the plural may

include the singular." But the Foundation intentionally disregards the predicate to this section – "when not inconsistent with the context" – presumably because this predicate fundamentally undermines its argument.

Section 2.1(B)(3) of the Regulations makes clear that this general interpretational guidance of singular including plural must only be applied "when not inconsistent with the context." This common sense limitation accords with statutory and regulatory drafting guidelines, Conn. Gen. Stat. § 1-1(f), and countless Connecticut courts that have interpreted municipal regulations in the same manner. See, e.g., Kaeser v. Zoning Board of Appeals, 218 Conn. 438, 442 (1991) (noting that the Stratford Zoning Regulations' use of "household pets" would not only allow "two or more cats, dogs or canaries within a household" but also "a single cat, a single dog or a single canary within a household"); Stamford Ridgeway Associates v. Board of Representatives, 214 Conn. 407, 430 (1990) (interpreting Stamford charter provisions and concluding "such statutory expressions are legislative statements of a general principle of interpretation.... The principle does not require that singular and plural word forms have interchangeable effect, and discrete applications are favored except where the contrary intent or reasonable understanding is affirmatively indicated."); see also Connecticut General Assembly, Basic Considerations in Drafting Legislation (Revised October 2015) (attached as Exhibit A).

Allowing the plural usage in the context of § 3.2 of the Regulations is entirely inconsistent with the idea, espoused in the Regulations and New Canaan's Plan of Conservation and Development ("POCD"), that limitations should be placed on institutional uses in residential zones to avoid a negative impact on surrounding residential properties. Moreover, that interpretation would violate a fundamental cannon of statutory construction: namely, if the language of a statute is plain and unambiguous, it must be given effect. West Hartford Interfaith

Coalition, Inc. v. Town Council, 228 Conn. 498, 508 (Conn. 1994); see also William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy, at 909-12 (3d ed. 2001). Other Connecticut municipalities have adopted zoning regulations that expressly allow for multiple principal uses generally or in particular zones, including the Towns of Bethel, Killingworth, Old Lyme and Westbrook. See, e.g., Bethel Zoning Regulations § 5.7.D.1; Killingworth Zoning Regulations § 500-12; Old Lyme Zoning Regulations § 4.15; Westbrook Zoning Regulations §§ 4.54.01 & 4.113.04 (attached as Exhibit B). Had the Regulations been designed to permit multiple principal uses in New Canaan, there would have been no reason to include a specific definition of "mixed use development" in the Regulations, defined as "[a] development which contains more than one type of use in a building or set of buildings. These developments must include residential units and may contain multiple combinations of the allowed uses as outlined and permitted in that zone." Regulations § 2.2 (emphasis added), because such a development could simply be accomplished by requesting multiple principal uses.

The definitions of "use" in § 2.2 of the Regulations further support the limitation of one principal use on a property. "Use" is defined as "the specific purpose for which a building, structure or land is designed, arranged, intended or for which it is or may be occupied or maintained." The narrower sub-definitions distinguish between types of uses and also include the article "a" rather than the article "the" with respect to the use being defined – with the notable exception of the definition of principal use. For example, "[u]se, accessory" highlights that such a use must be accessory to the principal use and includes the clear implication that more than one accessory use may occur so long as it is accessory to: "a use which is customarily incidental and subordinate to the principal use of a lot or building and located on the same lot

therewith." The historical zoning approvals cited by the Foundation in its Memorandum of (i) the K.E. Manuel nursery school for 8 children at the Congregational Church, (ii) the Foxglove nursery school for 15 children at St. Michael's Lutheran Church, (iii) the STAR, Inc. day care center at St. Mark's Church, (iv) the water tower cellular facility at Waveny Park, and (v) the morning pre-school/day care for 2, 3, 4 and 5 year olds at the New Canaan Nature Center all represent accessory uses to the principal use on the respective property. (see permit summary attached as a cover sheet to Exhibit C). By contrast, the definition of "[u]se, principal" reads: "[t]he primary or predominant use of any lot or building."[1]

In the absence of an express provision in the Regulations authorizing multiple principal uses, this Commission cannot read one into the Residence Zone to allow multiple principal uses at Grace Farms. The Regulations are permissive, rather than prohibitive, in nature. The Foundation's own representations about visitors to Grace Farms demonstrate that each of the requested special permits – religious institution, club, and philanthropic organization – are principal uses based on the sheer intensity of impact and material encroachments. As documented by the Foundation's own traffic report and the December Memo, since opening in October, 2015 Grace Farms has been used by more than (i) 74,000 visitors for religious institution purposes, (ii) 79,000 visitors for club purposes, and (iii) 32,000 visitors for philanthropic purposes. Moreover, as discussed below, each of the Foundation's requested special permits stands alone as its own use and is not dependent on or otherwise related to any other special permit use and, therefore, constitutes a principal use.

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[1] As noted in the December Memo, "primary" is defined as "of first rank" accords with plain language interpretation. See December Memo at 4.

B. The Foundation Misinterprets Connecticut Law on Special Permit Uses

The Foundation argues that Connecticut law does not support the principal use limitation, relying on several lower court rulings to reach its conclusion that Connecticut law authorizes "contemporaneous multiple special permit uses." Foundation Memo at 2-3. That conclusion, however, conveniently conflates accessory and principal uses as a generic "special permit uses" and is fundamentally flawed. There is no dispute that in New Canaan multiple special permits may be issued for a single property. In fact, the Regulations envision a scenario in which a property containing a single family home with a "major home occupation," a "large attached garage" and an "accessory dwelling unit" would have three special permits issued in accordance with Regulations §§ 3.3.C.1, 3.3.C.3, and 3.3.C.6. However, unlike the Foundation's request, these special permit uses are solely accessory uses that are dependent upon and related to the underlying principal use, not additional principal uses. Stated differently, a single family home in a residential zone constitutes a principal use and a large attached garage supports the activities of that home as an accessory use, but that large attached garage would not exist at a property without the home itself.

The cases upon which the Foundation relies do not include references to the underlying regulations, do not contain any substantive discussion as to whether a principal use limitation existed in the relevant zoning regulations, and, similar to the historical New Canaan zoning approvals cited by the Foundation in its Memorandum, involve merely intensifying the existing principal use rather than adding new uses as the Foundation seeks. In Carlson v. Planning and Zoning Commission, 1 Conn. Super. Ct. Rpts. 715, 716 (1986), the special permit holder was seeking to expand the daycare encompassed by the special permit approval from 12 children to 45 children and double the size of the approved building; in Antonik v. Greenwich Planning and

Zoning Commission, the applicant sought to construct a new building containing 29 units of assisted living on the same property as its 217 bed nursing home. Antonik, 1999 WL 391049 (Conn. Super June 1999). In Drouin v. Planning & Zoning Commission, the applicants sought to modify their special use permit for a yacht club and marina by way of a site plan application (rather than by an amendment to its special use permit) and re-establish the restaurant use originally approved decades earlier. Drouin, 2003 WL 965142 (Conn. Super. Feb. 2003). None of these scenarios is akin to a church adding the entirely new and unrelated uses of a club and a philanthropic organization to its property. The only cited reference with remotely similar facts is Maher v. Avon Planning and Zoning Commission, in which the applicant sought special exception approval for a funeral home and single family residence. Maher, 2004 WL 2898756 (Conn. Super. Nov. 2004). However, unlike the Foundation's representations to the Commission as to the intensity of the uses at Grace Farms, the court characterized the application as one for "a single family dwelling unit in association with the funeral home use," clearly demonstrating that the residence would be used as part of the funeral home operations. The Foundation has repeatedly stated that its application is designed to specifically distinguish between the Foundation and its operations and those of Grace Community Church. Again, each of the Foundation's requested special permits seeks to stand alone as its own use and is not dependent on any other special permit use; therefore, each constitutes a principal use.

Notably, while possible limitations on principal uses have not been directly addressed by Connecticut's appellate level courts, the concept is certainly supported. In a concurring opinion in Graff v. Zoning Board of Appeals, 277 Conn. 645 (2006), Connecticut Supreme Court Justice Katz agreed with the principal use interpretation my clients have espoused. In concluding that "the keeping of household pets cannot be deemed a 'principal use' of the property," she surveyed

existing case law interpreting principal uses, all of which contemplate a sole, predominant use of a property. She noted:

> Although the Killingworth zoning regulations do not define "principal use," the prevalent meaning ascribed to that term in other jurisdictions, consistent with the definition set forth under the Killingworth zoning regulations for an "accessory use," is the dominant, main or primary use of the land. See Worth v.Watson, 233 Ill. App. 3d 974, 980, 599 N.E.2d 967 (1992) ("[p]rincipal use is defined by the ordinance as the main use of the property; it is not defined as a necessary use"); Sherwood v. Kennebunkport, 589 A.2d 453, 454 (Me. 1991) ("'[p]rincipal use' is defined by the Ordinance to mean '[t]he primary use to which the premises are devoted or for which the premises are arranged, designed or intended to be used'"); Kowalski v. Lamar, 25 Md. App. 493, 499, 334 A.2d 536 (1975) ("[a] principal use is defined under this section to be a `main use of land, as distinguished from an accessory use'"); Sun Co. v. Zoning Board of Adjustment, 286 N.J. Super. 440, 444, 669 A.2d 833 (1996) ("'[P]rincipal use' means the primary or 'main use' of the property, which comports with the traditional and plain meaning of the term 'principal.' See Webster's Third New International Dictionary, Unabridged, 1802 [1971] [defining 'principal' as 'first,' 'chief,' or 'most important'] . . . ." [Citation omitted.]); Sprint Spectrum, L.P. v. Zoning Hearing Board, 823 A.2d 258, 261 (Pa. Commw. 2003) ("[p]rincipal use is defined by the Zoning Ordinance as a 'dominant use(s) or main use on a lot, as opposed to an accessory use'"); Board of Supervisors v. Zoning Hearing Board, 717 A.2d 1, 3 (Pa. Commw. 1998) ("'[p]rincipal use' is defined as the 'main use of land or structures, as distinguished from a secondary or accessory use'"); Avon v. Oliver, 253 Wis. 2d 647, 653, 644 N.W.2d 260 (App. 2002) ("[t]he ordinance defines a 'principal use' as a 'main or primary use of land . . . as distinguished from a conditional, subordinate or accessory use, as specified and permitted by the regulations of the district in which it is located'"); see also Killingworth Zoning Regs., § 20A (defining accessory use as "any use, which is attendant, subordinate and customarily incidental to the principal use on the same lot").

Graff, 277 Conn. at 676 n.1. As noted above, other municipalities in fact allow multiple principal uses on one property under certain circumstances, including the regulations at issue in the Graff decision. Finally, the type of "mix and match" scenario the Foundation espouses in which an applicant could select and the Commission could approve any number or variety of principal uses on a property would violate the uniformity requirement found in Conn. Gen. Stat. § 8-2. See Harris v. Zoning Commission, 259 Conn. 402, 429-30 (Conn. 2002). As the Harris

Court noted, the purpose of uniformity is to ensure that "a general rule requiring uniform regulations serves the interests of providing fair notice to applicants and of ensuring their equal treatment." Such clarity is intended "to avoid decisions, affecting the rights of property owners, which would otherwise be a purely arbitrary choice of the commission; such a delegation of arbitrary power is invalid." Id. That scenario of arbitrary choices is precisely what the Foundation suggests is appropriate for New Canaan's Residence zone.

C. Fuller Opinion

Attached to this Memorandum as Exhibit D is a letter prepared by former Connecticut Superior Court Judge Robert Fuller, author of Connecticut's leading treatise on land use. Upon review of the parties' relevant memoranda and the Regulations, he strongly concurs with the position that multiple principal uses are not permitted in a residential zone in New Canaan. Judge Fuller also outlines how the Foundation's requested special permits for club and philanthropic organization each constitute a principal use and are not dependent on or related to the existing religious institution.

II. Other New Canaan Approvals

In its Memorandum, the Foundation compiles a variety of properties in New Canaan on which it suggests "the Commission has historically issued multiple Zoning Permits and, later, Special Permits, for different contemporaneous uses and improvements on single parcels." Foundation Memo at 4. Once again, the critical issue is principal use, not the issuance of multiple special permits as the Foundation asserts.

With respect to the sites referenced by the Foundation, the properties in question may have multiple special permits, but all have a sole principal use consistent with the interpretation of the Regulations my clients and Judge Fuller have espoused. The existence of other special

permit uses do not detract from this argument, as they are accessory uses, much like the accessory "large attached garage" in residential zones. Moreover, many of these uses predate the current Regulations and POCD, and the Foundation merely assumes that a special permit would have been issued for these uses.

The Foundation did not provide copies of the underlying supporting materials to this Commission, apparently because such documentation undermines its conclusions. Therefore, Exhibit C contains the source materials cited by the Foundation and are the materials from which the following conclusions can be drawn:

162 South Avenue: This property is used for multi-family residential housing for disabled adults and the elderly. The on-site daycare pre-dates existing zoning and did not receive special permit approval.

Irwin Park: All of the permanent uses on this property, except for the accessory use of the Gores Pavilion as an arts center, have received special permit approval as a "municipal facility" per Regulations § 3.2.C.10, not as individualized uses.[2] Although the Foundation chart references the Art Center use under § 3.2.C.16 or 17, the application specifically characterizes the use as an accessory use per § 3.3.C.7.

23 Park Street: Both the Congregational Church and the day care center pre-date the existing zoning framework. Thus, there are no special permits governing the property. Moreover, the minutes demonstrate that the preschool is active only 1 day a week for two hours with a very limited number of students (for example, the additional pre-school is capped at no more than 8 children) per week, clearly an accessory use to the church itself.

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[2] The Foundation Memo states that the first floor guest apartment is allowed pursuant to § 3.2.C.11, but once again, the application itself reflects a different categorization, specifically § 3.2.C.10.

144 Oenoke Ridge: As the Foundation notes, this property's principal use is a park. The preschool educational uses on the property pre-date the existing zoning framework, which does not allow any type of school use in the Park, Recreation and Open Space Zone, and thus was clearly not the subject of a special permit approval.

111 Oenoke Ridge: The religious institution on this site pre-dates existing zoning, though currently allowed as a special permit use. Like numerous churches throughout New Canaan, the day care center operates as an accessory use, as does the food pantry, a use that aligns with the religious mission of the institution.

671 South Avenue: The Waveny property operates as a public park with specific uses under the control of the Parks and Recreation Department and Board of Education. The cited telecommunications equipment clearly constitutes an accessory special permit use per § 5.1.E.2, with its location on an existing water tank.

5 Oenoke Ridge: Like other churches, this religious institution and preschool pre-date the existing zoning framework and thus are not governed by an existing special permit. The preschool itself was approved 40 years ago via Zoning Permit, with a subsequent modification for a new operator in 2014. Although current zoning was in place by that time, a new special permit pursuant to § 3.2.C.8 was not required. As with the other churches cited in the Foundation's Memo, the preschools that have historically operated at St. Michael's Lutheran Church have represented accessory uses aligned with the religious mission of the institution.

III. Conclusion

In the absence of an express provision in the Regulations authorizing multiple principal uses, this Commission cannot legally read one into the Residence Zone to allow multiple principal uses at Grace Farms. Had the Commission intended to allow multiple

contemporaneous principal uses on a single property in any New Canaan residence zone, it would have followed the precedent of other Connecticut towns, such as Bethel, Westbrook, Killingworth and Old Lyme, and explicitly stated that in the Regulations. The historical New Canaan zoning approvals cited by the Foundation in its Memorandum confirm this, as each of those approvals involved merely intensifying an existing single principal use or adding accessory uses rather than adding new principal uses.

Moreover, the interpretive approach suggested by the Foundation conveniently (i) disregards the mandatory predicate in the Regulation's interpretive guidance of singular including plural when not inconsistent with the context, and (ii) conflates accessory and principal uses into a generic "special permit uses." Such an approach is fundamentally flawed in that it would serve to collapse the framework of principal uses established in § 3.2 and thwart the manifest purpose of the Regulations to protect the public health safety, and welfare in the residential zones. To suggest, as the Foundation has, that the 22 categories of principal uses may be combined at the discretion of each applicant would not only lead to absurd results, it would also violate Conn. Gen. Stat. § 8-2 and the uniformity requirement. This Commission should flatly reject the Foundation's flawed and misguided approach.