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March 19, 2021

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VIA HAND DELIVERY

Hon. Paul Schwartz, Chairman
Hon. Members of the Town Planning Board
Town of Washington
10 Reservoir Dr.
Millbrook, NY 12545

Re: Five-Acre Farm Academy, Inc.
Application for Special Use Permit Approval
Our File Number: 6136.0001

Dear Chairman Schwartz and Members of the Town Planning Board:

On behalf of our clients, Marcia DeVoe and Eric Alexander and Five-Acre Farm Academy, Inc., the following responds to the questions raised at the February 2, 2021 meeting of the Planning Board.

The following is offered in response to comments raised at the Planning Board meeting of February 2, 2021.

In order to grant special use permit approval, the Planning Board must consider whether the proposed use meets the criteria set forth in §473 of the Town Zoning Code ("TZC"). As set forth below the proposed Five-Acre Farm Academy ("FAFA") meets or exceeds each of the criteria for an "Educational Institution" set forth in §473:

Reply to:

✶ 3208 Franklin Avenue
Millbrook, NY 12545
P 845.677.6700
F 845.677.2202

□ 319 Mill Street
Poughkeepsie, NY 12601
P 845.452.4000
F 845.454.4966

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Section 473. STANDARDS

- 1. The use is a permitted special use as set forth in the Schedule of District Use Regulations (Appendix A).*

Response: The property address is 48 Shunpike in the Town of Washington, tax parcel number 6666-00-289635. The site is located in the RL-5 District, which

allows an “Educational Institution” subject to special permit approval. The Town Zoning Code (TZC) defines an Educational Institution as follows:

“EDUCATIONAL INSTITUTION: A private school, college, university, or research institute giving general academic instruction including adult education, or providing research facilities to scholars or scientists, with structures used for administration, classrooms, student housing, faculty housing, dining, laboratories, faculty and staff offices, libraries, field study purposes, social and athletic activities, as well as accessory needs.” [Emphasis added]

The Five-Acre Farm Academy (“FAFA”) would provide daily instruction to select 7th and 8th grade honor students from the City of Poughkeepsie School District (“School District”) during the regular academic school year. This may include summer school classes. Classwork would concentrate on liberal arts and natural sciences in the rural farm setting provided by FAFA that the students would otherwise experience in the School District’s urban locale. Instruction would be provided both indoors and out of doors depending on the type and nature of the lesson for that session with due consideration for weather conditions.

Although FAFA is working with the School District to provide this additional academic instruction it is not otherwise affiliated with or a part of the School District. The School District is not an owner, lessee, or licensee of the real property on which the after-school program would be located and has no participation in or management of FAFA business affairs or the operation of the after-school program. FAFA is considered by the School District to be a community partner offering a desirable after-school educational service. There is no contract between FAFA and the School District for the FAFA after-school program, and there is no exchange of money for services between the School District and FAFA. The School District has no direct or indirect investment in FAFA or the programs it offers, and its’ primary role is to provide transportation to and from the FAFA property. FAFA will select the students, with input from School District teaching staff, and FAFA will have access to students and families to promote its program

and recruit students through the School District. Fafa is a standalone private entity, organized under the laws of New York State as a not-for-profit corporation. (See Attachment A). Fafa is organized as a private school offering after-school programs, and because it does not charge students tuition or fees to attend Fafa, and does not receive state aid or collect tax dollars, it is not required to be licensed or otherwise registered as a “school” or “educational institution” by the State of New York. (See generally Article 6, §§81-105 of the Education Law). (Also see Attachment B). The fees for Fafa services are paid for by grants and private donations.

As noted above, Fafa is a private not-for-profit corporation that was organized for the express purpose of providing “general academic education” and instruction. It is therefore a “private school” within the meaning of the definition of “educational institution” of the TZC. As a preamble to TZC §610, “Definitions”, §600, “Use of Words”, of the TZC states, in relevant part, “*Except where specifically defined herein, all words used in this Local Law shall carry their customary meanings.*” Because the TZC does not provide a separate definition of “school”, the customary meaning of the word “school” would take precedence over any other interpretation. Among others, Merriam Webster (online edition) defines “school” as, “*an organization that provides instruction such as an institution for the teaching of children*”. Additionally, Dictionary.com defines “school” as, “*an institution where instruction is given, especially to persons under college age*”, while the Cambridge Dictionary defines “school” as, “*a place where children go to be educated*”. The TZC definition does include additional terms that serve to help narrow and specify the types of things that might be included as part of an educational use, such as housing for faculty, structures for administration and classrooms, field work and athletic activities, all of which are part of the Fafa after-school program. The applicants (i.e. “faculty”) intend to live on-site in the residence that they have occupied for several years, and the studio and portions of the residence will serve as classrooms and offices, while the abundant outdoor area will provide room for field studies, and social and athletic activities. Based on a simple, plain language

reading of the TZC it is clear that FAFA's proposed use meets the definition of "educational institution" in the TZC, and that no additional terms are required, or permitted, to be read into that definition in order to determine whether the use is permitted in the RL-5 District in which the FAFA property is located. The language of the definition is concise and is not capable of being read so as to exclude FAFA's proposed use. (See *Raritan Development Corp. v. Silva*, 667 N.Y.S.2d 327, 91 N.Y.2d 98, 689 N.E.2d 1373 (N.Y. 1997); and *Saratoga County Economic Opportunity Council, Inc. v. Village of Ballston Spa Zoning Board of Appeals*, 2013 NY Slip Op 8177, 112 A.D.3d 1035, 977 N.Y.S.2d 419 (N.Y. App. Div. 2013); and *Winterton Props., LLC v. Town of Mamakating Zoning Board of Appeals*, 2015 NY Slip Op 7734, 132 A.D.3d 1141, 18 N.Y.S.3d 743 (N.Y. App. Div. 2015)).

Further, there is no requirement under the TZC rules or definition that an "educational institution" be licensed or certified by the State of New York in order to qualify for special use permit approval. In the case of FAFA such licensure or certification by the state is not required since FAFA does not seek to offer diplomas or certifications that attendees have successfully completed a specific course of instruction. FAFA also does not offer a course of instruction that would be construed as the equivalent of that offered by a public or private school chartered or registered by the State that might allow students to take tests sanctioned by State Regents. FAFA only offers an after-school program of instruction as an enhancement to the regular course of instruction provided by the City School District.

In summary, FAFA is a private school providing general academic instruction to select school age children within a rural farm setting and is therefore an "educational institution" within the meaning of the TZC, and the proposed use is permitted in the RL-5 District.

2. *The use is so designed, located, and proposed to be operated that the public health, safety, welfare, and convenience will be protected.*

Response: The property is 5 acres in size and was acquired by Marcia DeVoe and Eric Alexander in February 2009. They have used the property as their full-time residence since early 2014.

The lot was created by subdivision approved by the Planning Board in December 1976. As noted on the Site Plan included with the original application for Special Permit Approval improvements include a one and one-half story house constructed circa 1920 and a shed that is currently used as a studio. Water is supplied by private well and sewage is handled by a private septic system.

School operations would follow a typical academic year of 180 days, and likely include summer school for two weeks during the summer. Instruction would be after-school from the hours of 3:00 pm to 7:00 pm, Monday – Friday, with separate cohorts of the children attending on a Monday-Wednesday, Tuesday-Thursday, and Friday schedules by year 5. Up to 15 students could be on-site receiving instruction at any one time. Instruction would occur within the main house, the studio, and the grounds of the property depending on weather conditions and the type of lesson(s) being taught. No additional construction or property improvements would be required for the educational institution use. The existing improvements would be used “as is” without expansion or modification of any of the principal or accessory structures located on the site. Changes, if any, would involve interior changes of either the principal or the accessory structure to accommodate the new use subject to obtaining a building permit. Students would arrive via a school bus provided by the School District and would be picked up and dropped off by that same school bus. The bus would not be a full-size bus but would be one of the smaller vehicles such as a conversion van or a short bus of about 20-25 feet in length. The use would be a part-year, part-time Monday-Friday use occurring during the later afternoons of an academic school year, and mornings and afternoons during summer school.

The nearest residential structures are located on the opposite side of the Shunpike approximately 220 feet from the nearest property line. (See Attachment C). The

use would not generate excessive noise above the ambient background noise of the farm and its rural setting near State Route 82 and County Route 57 (i.e. the Shunpike). With the exception of scheduled off-site field trips, all educational activities would be conducted within the confines of the property. The bus would arrive and depart via the Shunpike to State Route 82 and would have no impact on the use of the public roads or result in any inconvenience to abutting and nearby neighboring properties.

3. *The use will not diminish groundwater or surface water quality.*

Response: There are no surface water bodies located on or near the proposed site, and sewage treatment would be accommodated by the existing on-site septic systems. It should be noted that the accessory studio has been fitted with its own septic system, and that the systems for both the principal structure and the accessory structure are more than adequate to accommodate the additional sewage flows attributable to the part-time academic school year usage. Because the use would not require new construction there would be no land disturbance likely to cause runoff and siltation of waterways. Additionally, the use is not one that requires the storage or use of hazardous or toxic materials likely to have an adverse impact on surface or ground water supplies.

4. *The use will not cause substantial injury to the value of other property in the neighborhood where it is to be located.*

Response: The proposed use would be a part-time academic year (i.e. ±180 day) operation that would be largely unnoticeable to surrounding and neighboring properties, with the exception of school bus arrivals and departures. No new construction to accommodate the educational use is required and there would be no outward physical change to the site. There is nothing in the proposed use of the site as an educational institution in the manner proposed that suggests that the use would have any adverse impact on the value of abutting or nearby properties.

5. *The lot size and lot coverage are appropriate to the use.*

Response: As previously noted no new construction of improvements is proposed or required for the educational use. The existing principal and accessory structures are appropriately sized and located on the site to allow for private instruction of gifted 7th and 8th grade students in small groups. Additionally, the 5-acre site contains areas of woods and open land that are ideal for instruction of small groups of students.

6. *The location and size of the use, the nature and intensity of the operations involved in or conducted in connection with it, the size of the site in relation to it, and the location of the site with respect to streets giving access to it, are such that it will be in harmony with the appropriate and orderly development of the district in which it is located.*

Response: As previously noted, the site is accessible via the Shunpike (CR57) with the intersection at State Route 82 being located approximately 1200 feet from the site driveway. Students would arrive and depart via a school bus provided by the City of Poughkeepsie School District during the 180 days of a regular school year (and including summer school sessions during June and July) Monday-Friday, 3:00 pm to 7:00 pm. FAFA staffing involves one and perhaps two non-resident instructors. This level of traffic arriving and departing the site is not significant when considered against the average daily traffic on this segment of Route 82 of 2,837 vehicles (2019 NYSDOT data).

7. *The location, nature, and height of buildings, walls, and fences, and the nature and extent of the landscaping on the site, are such that the use will not hinder or discourage the appropriate development and use of adjacent land buildings.*

Response: As previously noted, no additional improvements are proposed for the educational use. The existing principal and accessory structures would be utilized for indoor classroom space, while the five acres of the existing property would

provide plenty of space for outdoor instructions and experimentation. The existing property is wooded along the westerly and easterly edges of the property near other residential structures and will provide a visual buffer for Fafa activities while the distance (± 270 -400 feet) between the outdoor areas of the site to the nearest residential structures would attenuate any verbal noise during student-teacher interactions and instruction. The property owners and Fafa officers, Marcia DeVoe and Eric Alexander, will continue to reside in the existing residence as their principal domicile. They may, in the future, choose to relocate their personal residence to a different property, in which case they may continue to maintain the residential occupancy by an on-site caretaker who would maintain the property for the Fafa use. This arrangement is no different than many private schools which provide housing for headmasters and caretaker staff. In this case, because Fafa will not offer overnight accommodations for students and will operate on a part-time basis in accordance with the typical 180 school year, maintaining an on-site permanent residence is important for site maintenance and to discourage theft and vandalism.

8. *Operations in connection with the special use will not be more objectionable to nearby properties by reason of noise, fumes, noxious vibration, glare, or flashing lights, than would be the operations of any permitted use.*

Response: The part-time operation of the after-school use for instruction of a limited number of 7th and 8th grade students is not the type of use that would generate noise, fumes, vibration, glare, or flashing lights likely to be objectionable to nearby residences or adversely affect the quiet enjoyment of property. Educational uses, by their nature, are not noxious or hazardous and their functions and operations are entirely consistent with residential uses, which is why many public and private elementary and secondary schools are located in close proximity to rural, suburban, and urban residences.

9. *The use will not cause undue traffic congestion or create a traffic hazard.*

Response: As previously noted, the site is accessible via the Shunpike (CR57) with the intersection at State Route 82. Students will arrive and depart via one van type or short bus type school bus provided by the City of Poughkeepsie School District during the 180 days of a regular school year (and including summer school sessions during June and July) Monday-Friday, 3:00 pm to 7:00 pm. FAFA staffing involves one and perhaps two non-resident instructor arrivals and departures. This level of traffic is not significant when considered against the average daily traffic on this segment of Route 82 of 2,837 vehicles (2019 NYSDOT data).

10. *Parking areas will be of adequate size for the particular use, properly located and suitably screened from adjoining residential uses, and the entrance and exit drives shall be laid out so as to achieve maximum safety.*

Response: The location of the site driveway on the Shunpike has been in use since the 1920s during which time it has been used safely with no accidents reported. The low speeds typical of the Shunpike would continue to be maintained in the location of the site driveway. The site currently contains a designated gravel area for parking of 4-6 vehicles with no need for expansion to accommodate the educational use. Parking demand is expected to be 1-2 vehicles for non-resident instructors and 2 vehicles for the resident FAFA faculty since the school bus would not remain on site after dropping off students.

11. *The use is appropriately located with respect to transportation facilities, water supply, fire and police protection, waste disposal, and similar facilities.*

Response: Site access is via the Shunpike, a County Highway, and State Route 82. No changes to the location or geometry of the site driveway or the public roads would be required to accommodate the school bus traffic and additional one to two vehicles for instructors. The site includes existing provisions for sewage treatment and potable water supply that would be used without modification. Police

protection is provided by the NYS Police and the Dutchess County Sheriff's Department, and fire protection is provided by the Millbrook Fire Department.

12. *If there are phases planned, then the impact of all phases may be a factor in determining the appropriateness of the use.*

Response: The proposed use would be implemented as a single phase.

13. *The use conforms with all applicable regulations governing the district where it is located, including any overlay zones designed to protect special features of the property.*

Response: The site is located in the RL-5 Low Density Residential District and is also mapped as being located within the town's Agricultural Protection Overlay (APO) District for prime agricultural soils. The site is not located within an Agricultural District or within the town's Aquifer Overlay (AQ) District or Wetlands Map.

The proposed educational use would comply with all regular RL-5 District regulations including the regulations of the APO District. As noted in §315(1) of the TZC the APO District is established to:

- a. Preserve agricultural land for food and fiber production;*
- b. Protect agriculturally productive farms;*
- c. Maintain a viable agricultural base to support agricultural processing and service industries;*
- d. Prevent conflicts between incompatible land uses;*
- e. Reduce costs of providing public services to scattered non-farm uses;*
- f. Pace and shape the growth of the Town;*
- g. Protect agricultural land from encroachment by non-agricultural uses, structures, or activities; and*
- h. Maintain the rural, natural, and scenic qualities of the Town.*

As noted above, implementation of the educational institution use would not involve construction of new improvements or disturbance to the site. The educational use would, in fact, incorporate agricultural science and agricultural protection as part of the lesson plans. The use is therefore compatible with the requirements of §315(3) and (5) of the TZC without additional conditions.

14. *The site plan for the use satisfies the requirements of Section 485 of this Local Law, Standards for Review and Design.*

Response: The site plan that has been submitted with the application is a plan of current and future (post-approval) conditions. Inasmuch as no new structures or improvements or land disturbance are required to implement the educational use, the applicant requests information waivers from §483 items 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 as unnecessary.

The following is offered in response to comments raised by the Planning Board attorney, Jeff Battistoni, in an email dated February 10, 2021 to the attorneys for the applicant:

I am not sure whether your clients intend to rent this property to FAFA or convey it to FAFA. I am also not sure whether the property will ultimately be rented to the Poughkeepsie City School District, since students will come from Poughkeepsie High School and perhaps Poughkeepsie Middle School.

It was unclear to me whether this intended program would be an after-school program, meaning extra-curricular, or whether it is part of the curriculum for the students. I raise that question in reference to licensing, certification and approvals which might be needed from the NYS Education Department.

At the Planning Board meeting held on February 2nd, I asked the applicants to have their attorney provide more factual background about the nature and scope of the operation proposed and to provide an opinion as to why this would fall within the Code's definition

of an "educational institution". At first glance, I do not think it does. So, please address the following:

1. *Who should the actual applicant be? Is it the two individuals, FAFA or the PCSD?*

Response: The applicants are the current property owners who also happen to be the officers of FAFA, Inc., and the application is submitted on behalf of FAFA, Inc. To the extent that a determination is made that FAFA should be the applicant, the property owners will submit a revised application substituting FAFA in place of the current property owners. In that event, the current applicants request that the Planning Board continue its processing of the application pending receipt of a revised application form.

FAFA, Inc. has been formed as a not-for-profit under the laws of the State of New York but the approval of the IRS for the 501(C)(3) status as a tax-exempt entity is pending. Copies of the incorporation papers and By-Law are attached. The City of Poughkeepsie School District has no interest in either the property or FAFA except as a provider of a unique after-school experience for select gifted 7th and 8th graders of the School District, for which the School District would provide transportation to and from FAFA for those students. Upon successfully obtaining special use permit approval the property owners will lease or license the use of their property to FAFA. An outright transfer of the property to FAFA for the educational use has not been determined.

2. *If an educational institution is involved, what institution is it? In other words, is FAFA the educational institution or is it the PCSD?*

Response: The City of Poughkeepsie School District does not have any formal contractual arrangement with FAFA under which FAFA would operate an after-school program. The School District is merely providing students and transportation for the FAFA program, but the property owners are seeking special

use permit approval to operate an educational institution on their property by FAFA.

3. *If FAFA is the educational institution, does it have any licenses, certifications or approvals from the State Ed Department to operate a program like this? Are any other licenses, certifications or approvals needed?*

Response: Aside from its incorporation under NYS law as a not-for-profit corporation, FAFA does not require licensure or certification by the New York State Education Department (“SED”) to operate an after-school program. Under SED regulations licensing and certification for a school is required when that institution wishes to issue diplomas, collect fees or tuition, etc. (See additional information from the NYSSSED Office of General Counsel attached.)

4. *If FAFA has a 501(c)(3) designation, please supply copies of the IRS Determination Letter and any supporting application which would show what it is that FAFA does or intends to do.*

Response: Copies of the incorporation papers and By-Law are attached. Additionally, copies of the materials (see Attachment B) supplied to the IRS in support of their application for 501(C)(3) status as a tax-exempt entity is attached. That approval is pending and will be provided upon receipt.

5. *Please offer an opinion as to why this program or “use” fits within the Code’s definition of “educational institution”. If there is any case law or other documentation you can provide to support your opinion, please provide it.*

See response to Special Use Permit criteria #1 above.

6. *Separately, the appropriate procedure would be to have the Zoning Administrator make an initial determination as to whether this use is specially*

permitted as an educational use. I will assist her in that regard, once I have your response to the above requests. If she determines that the proposed use does not qualify for a special permit, then perhaps an appeal to the ZBA is needed for an interpretation.

Response: The proposed use fits squarely within the plain language meaning of “educational institution” of the TZC as discussed in the response to Special Use Permit criteria #1 above. Pursuant to the cited case law no additional interpretation or request for an interpretation from the Zoning Administrator is required or will be sought by the applicant.

Additionally, Attachment D is a description of FAFAs educational activities and business as prepared by our clients at the request of the Board.

We look forward to meeting with the Board on April 6th. If you have any questions, please contact me.

Very Truly Yours,

MACKEY BUTTS & WISE, LLP

A handwritten signature in black ink, appearing to read "Joshua Mackey", written in a cursive style.

Joshua E. Mackey, Esq.

JEM/jdo

Enclosures