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Via E-Mail (vrosenson@stamfordct.gov)

Virgil de la Cruz and Charles Pia, Jr., Co-Chairs
Land Use-Urban Redevelopment Committee
Stamford Board of Representatives
888 Washington Boulevard, 4th Floor
Stamford, CT 06901

Re: Agenda Item LU30.015, Review of Text Change to Zoning Regulations Art. III, Section 9, BBB. C-D Designed Commercial District ("Lifetime Fitness"): Law on Special Exceptions

Dear Co-Chairs de la Cruz and Pia:

In response to questions raised by the Land Use Committee, I respectfully submit this letter on behalf of Petitioners to briefly address the significant legal limitations on the Zoning Board's ability to deny a special exception to the applicant under the Text Change, or to impose conditions on such a special exception.

I. The Zoning Board Has Limited Discretion to Deny a Special Exception

As Petitioners' counsel expressed at the hearings before this Committee, the only way to ensure that the community will be protected from the serious negative impacts on traffic, noise, and quality of life that the Text Change entails is to vote to reject the Text Change. If the Text Change becomes law, the special exception process before the Zoning Board would be far too little, too late to address the serious concerns raised by the public. First of all, on a special exception application, just as with a site plan application, the Zoning Board acts in its administrative capacity, and its discretion is much more narrow than the discretion it has in its legislative capacity.¹ See *MacKenzie v. Planning & Zoning Comm'n of Town of Monroe*, 146 Conn. App. 406, 436 (2013) ("The discretion of a legislative body, because of its constituted role as formulator of public policy, is much broader than that of an administrative board, which serves a quasi-judicial function."). Under well-

¹ The Zoning Board acted in its legislative capacity in considering the Text Change, and this Committee and the Board of Representatives act in that same capacity in exercising your independent judgment on whether to approve or reject the Text Change. *Stamford Ridgeway Assocs. v. Bd. of Representatives of City of Stamford*, 214 Conn. 407, 421-22 (1990).

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established case law, the Zoning Board's discretion on a special exception application is significantly limited:

Acting in this administrative capacity, the zoning commission's function is to determine whether the applicant's proposed use is expressly permitted under the regulations, and whether the standards set forth in the regulations and the statute are satisfied. **The zoning commission has no discretion to deny the special exception if the regulations and statutes are satisfied.** *Id.*

Raczkowski v. Zoning Comm'n of Town of Naugatuck, 53 Conn. App. 636, 639-40 (1999) (quoting *Connecticut Resources Recovery Authority v. Planning & Zoning Commission*, 46 Conn. App. 566, 569 (1997)) (emphasis added). "Although a zoning commission or board possesses the discretion to determine whether a proposal meets the standards established in the regulations, **it lacks the discretion to deny a special permit if a proposal satisfies the regulations and statutes....**" *Smith Bros. Woodland Mgmt., LLC v. Planning & Zoning Comm'n of Town of Monroe*, 88 Conn. App. 79, 84 (2005) (emphasis added).

Courts have applied the above legal principles to strike down decisions by zoning authorities, including the Stamford Zoning Board, that have denied special exceptions. For example, in *Procurement, LLC v. Zoning Bd. of City of Stamford*, No. LND CV116035946S, 2014 WL 1013027 (Conn. Super. Ct. Feb. 14, 2014), in reversing the Zoning Board's denial of a special exception, the Superior Court observed: "When ruling upon an application for a special permit, a planning and zoning board acts in an administrative capacity.... [Its] function...[is] to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply." *Id.* at *2 (quoting *Meriden v. Planning & Zoning Commission*, 146 Conn. App. 240, 244-47 (2013)) (emphasis added). The court went on to state that "[a] **commission cannot deny a special exception if the regulation and statutes are satisfied.**" *Procurement*, 2014 WL 1013027, at *3.

In *Procurement*, the Zoning Board denied a special exception, the applicant appealed the denial, and the court sustained the appeal and compelled the Zoning Board to grant the special exception. That case is very instructive here. In *Procurement*, as here, the applicant had first petitioned the Zoning Board for a change in the regulations (there, a zone change) that permitted by special exception the use

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that the applicant sought to build on the property (a day care center). The Zoning Board approved the zone change, but when the applicant applied for the special exception to build the day care center, the Board concluded that the proposed day care center would not be in the best interests of the community and denied the application. The Board was apparently concerned about the impact of expanding commercial uses on the surrounding residential neighborhood and the potential for adverse traffic impacts, and was troubled by the applicant's refusal to state what it intended to do with a neighboring parcel it owned that was not part of the special exception application.

The court in *Procurement* held that the Zoning Board lacked authority to deny the special exception. The court held that, because "prior to this application, the board changed the existing zone to one which would allow a day care center subject to a special exception," the Board could hardly deny the special exception on the grounds that a day care center was not appropriate in this zone. *Procurement*, 2014 WL 1013027, at *6 n.2. The court noted that **"[a special] exception allows [the applicant] to put his property to a use which the enactment expressly permits."** *Id.* (quoting *Burlington v. Jencik*, 168 Conn. 506, 509 (1975)) (emphasis added). The court also rejected traffic concerns as a basis to deny the special exception, because the applicant had a traffic expert that supported the application and "no traffic expert testified in opposition," therefore there was "no support in the record to justify the board's denial." *Id.* at *4. Lastly, the court held that the Board could not deny the special exception "based upon speculation about potential issues in the future," such as what would become of the adjoining parcel. *Id.* at *4, 7. The court emphasized that "[a] mere worry is not substantial evidence" that would justify denying a special exception. *Id.*

Likewise, in *Smith Bros. Woodland Mgmt., LLC v. Planning & Zoning Comm'n of Town of Monroe*, 88 Conn. App. 79 (2005), the Appellate Court held that the Monroe zoning board had no authority to deny a special permit application that would allow the operation of a mulch processing plant, where the town's regulations could be interpreted to allow such a plant. The court rejected the zoning board's argument that the use was not consistent with the town's master plan, because it was expressly permitted in the town's regulations. *Id.* at 88 ("We have already concluded..., however, that the plaintiff's use is permitted under the regulations... To the extent that the regulations lead to results inconsistent with the future land use plan, the regulations should be amended to bring them into conformity with the plan."). Similarly, the court rejected the board's argument that the plant would cause offensive

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odors, fumes, vermin, or disease, because “[t]here was...no evidence that, at any time...there was a problem with odor or fumes. No evidence was presented of vermin or disease, either potential or actual.” *Id.* at 89.

Here, as in *Procurement* and *Smith Bros.*, if the Text Change – which clearly is designed to allow the construction of a massive Lifetime Fitness athletic resort complex with numerous indoor and outdoor activities – becomes law, the Zoning Board could not then turn around and deny the applicant the opportunity to construct a Lifetime Fitness facility, with all that that entails. By adopting the Text Change, the Board has necessarily concluded that a Lifetime Fitness facility in a C-D zone is consistent with the Stamford Master Plan, and can no longer deny the special exception on the basis that it is not. *Smith Bros.*, 88 Conn. App. at 88. By adopting the Text Change, the Board has also necessarily concluded that locating a Lifetime Fitness facility in office parks is consistent with public welfare, and cannot later take a contrary view to deny a special exception. *See Procurement*, 2014 WL 1013027, at *6 n.2.

The Zoning Board’s discretion on a special exception application is limited to (1) determining whether the requirements in the regulations have been met; and (2) imposing conditions on the special exception that are permitted by the regulations. And since the applicant drafted the Text Change, clearly the applicant has set itself goals that it can meet in order to achieve its aim of building a Lifetime Fitness center in High Ridge Park. Nor would the applicant have advocated for a Text Change that could simply be nullified by a special exception condition that would prevent the applicant from building the facility it wishes to build. Because the special exception process would thus allow the Zoning Board only limited discretion, it does not present a meaningful opportunity to address the myriad concerns expressed by the community about the Text Change – it is not an opportunity to prevent a Lifetime Fitness Center from being built in High Ridge Park, to prevent such a facility from having outdoor activities, or to prevent it from having an outdoor pool. The only way to address those concerns is to reject the Text Change and put the burden back on the applicant to submit a land use application that is appropriate for the community.

II. The Zoning Board Has Limited Discretion to Impose Conditions on a Special Exception

Contrary to what the applicant may argue, if the Text Change is approved, the Zoning Board could not use special exception conditions to deny Lifetime the ability

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to construct a fitness complex of the type they desire in High Ridge Park. The conditions that a zoning board imposes on a special exception must be adequately justified by documented adverse impacts caused by the special exception use, and if not, they will be struck down by a court. *See, e.g., Martland v. Zoning Comm'n of Town of Woodbury*, 114 Conn. App. 655, 667 (2009) (“the evidence with respect to the berm as a noise buffer was inadequate to reach the necessary threshold to support the imposition of the [special permit] condition by the [commission]. Accordingly, the court properly determined that the requirement of the restoration condition was improper”). In *Martland*, the zoning commission imposed as a condition of a special permit for pond excavation that the applicant restore disturbed areas to a condition comparable to pre-excavation conditions. The trial court concluded that there was no evidence to show that “failure to restore the berm to its original natural contours would result in any increase in noise or that the restoration condition was necessary to provide a vegetative buffer,” and therefore struck down the condition. *Id.* at 660. The Appellate Court agreed, and affirmed. The Appellate Court noted that “[t]here was no scientific data comparing the noise levels of the area with the berm in its present and proposed conditions.” *Id.* at 666.

Here, since the Zoning Board adopted a Text Change permitting a Lifetime Fitness center that, for example, expressly allows outdoor activities, the Zoning Board could not later try to impose in the special exception process a “condition” that there be no outdoor activities. Obviously if the conditions imposed on a special exception gut, or eviscerate, what the applicant is allowed to do under the text of the regulation permitting the special exception, then they are inconsistent with the regulations and not justifiable. Also, any conditions the Zoning Board tried to impose would have to be justified by specific evidence in the record such as “scientific data” or they could very well be struck down by a court.

III. Conditions Imposed by the Zoning Board on a Special Exception Would Be Unenforceable

Even if the Zoning Board could permissibly impose special exception conditions on, for example, the decibel levels of noise that a Lifetime Fitness complex could make with its outdoor facilities, any such limitation would be impossible to enforce. Once the Lifetime Fitness center is built and begins operations, if it exceeds the noise criteria, what will be the remedy for the violation? At that point there will be no way to tear the building down, or to disallow the use in the zone. It is hard to see how the Zoning Board would even be able to effectively monitor compliance with

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the limitation, let alone enforce it. Noise limitations are notoriously hard to enforce, given the difficulty of measuring noise levels accurately and the inherent time lag between the noise violation and its enforcement. As the City Corporation Counsel's office acknowledged before this Committee, the City's ability to enforce the Noise Ordinance is limited under criminal and civil law, and can require years of costly litigation during which neighbors continue to suffer from the noise.

And of course, there could be no "conditions" imposed in the special exception process on the level of traffic generated by a Lifetime Fitness facility, which is a central concern of the opposition to the Text Change that was the subject of ample evidence before this Committee. Once the Lifetime facility is built and the memberships are sold, residents in what is already one of the most congested areas of the City will be stuck with whatever level of traffic the facility generates.

* * *

For all of the above reasons and those in the Petitioners prior submissions and argument before the Committee, Petitioners respectfully request that this Committee unanimously recommend rejection of the Text Change.

Sincerely,
Wofsey, Rosen, Kweskin & Kuriansky, LLP

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