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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 Riverturn Condominium Association to address some last minute issues raised on the rules pertaining to Special Exception Permits.

1. The Rules Pertaining to Special Exception Permit Applications

One theme the neighbors have been trying to convey to the Board of Representatives is that their Board – now wearing the hat of a Zoning Board – is granted much discretion at this stage to decide as a matter of good public policy – Is this Zone Language change a "good thing"? – especially if the concerns of the neighbors have not been adequately addressed by the Zoning Board. In deciding whether to "change the law", your Board is acting in a legislative capacity and thus afforded broad discretion that no court is likely to overturn. But if you decide to approve of the Zoning Board's decision and leave the new language in place, then we have argued that the *cat will be out of the bag*. Why do we say that? Because even though a Zoning Board has some discretion to deny a future Special Exception permit application for Lifetime Fitness, its discretion to issue such a denial is much more circumspect than the decision whether to change the zoning law in the first place.

The law on this is perfectly clear. A (board) generally acts in its legislative capacity (with broad discretion) when granting a zone change and acts in its administrative capacity (with limited discretion) when granting a special exception or permit. *Konigsberg v. Board of Aldermen*, 283 Conn. 553, 581, 930 A.2d 1(2007) (a "zoning change [is considered a decision] of the [board] acting in its legislative capacity"); *Irwin v. Planning & Zoning Commission*, 244 Conn. 619, 627, 711 A.2d 675 (1998) (when ruling on application for special permit, (a board) acts in administrative capacity). As our Supreme Court explained, "[i]n traditional zoning appeals, the scope of judicial review depends on whether the zoning (board) has acted in its legislative or administrative capacity. 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. *Municipal Funding, LLC v. Zoning Board of Appeals*, 270 Conn. 447, 453–54 (2004). [I]f a landowner meets the conditions set forth for a special exception, the board is bound to grant one. *MacKenzie v. P&Z Commission of Monroe*, 146 Conn. 406, 436 (2014)

As noted by Attorney Braman, once the language change the Zoning Board approved is in place, it will be a big hurdle for that Board to try and deny a future Special Permit application of Lifetime Fitness.

2. <u>The Rules Pertaining to Attaching Conditions to Special Exception Permit Applications</u>

Another argument made against the neighbor's complaints is that the Zoning Board could attach conditions to the approval of any Special Permit application. The neighbors reply that the Zoning Board failed to sit down and come up with an appropriate laundry list of conditions that might be imposed. Instead they left things very vague. One of the rules of attaching conditions to an approval is that the conditions must be found in the regulations. A condition not supported by proper authority must be invalidated. *UpJohn Co. v. Zoning Board of Appeals*, 224 Conn. 96, 101, (1992). Conditions under which a special exception is allowed must be found in the regulations and cannot be altered; and if a condition is imposed by a commission without being warranted by the regulations, it is void. *Beckish vs P&Z Commission of the Town of Columbia* 162 Conn. 11,14 (1971)

The neighbors have also argued that the few conditions the Zoning Board did add to its language change are impractical or unworkable. Take the noise issue for example. The Zoning Board language proposes to measure noise at the property line. But noise waves do not travel to a sound barrier such as a wall and just stop. There may be a temporary reduction in db levels near a sound barrier, but sound waves will travel over walls and around buildings. There is no ever-expanding "cone of silence" behind an obstruction as the developer's noise consultant suggested in their 4/9/17 and 4/11/18 reports. Noise levels should be judges from the neighbors' properties, not at the property line of the applicant. This Board also heard about the practical difficulty of enforcing "after the fact" noise violations.

It is also impractical to suggest that noise will be tested after the outdoor use is initially approved. This might be the most unworkable provision in the new zoning regulation. It is proposed under the current language that the Zoning Board might permit a use, but then deny

permanent C.O. status for it if noise problems persisted. Putting aside the impracticality of allowing a pool to be built and then telling the owner and its members they must stop using it, the Connecticut Courts have long held that a Board **cannot** retain the right to revoke an approval. The courts have stated "so much of the decision as imposed the condition and reserved the right to revoke the permission at the option of the Board is void and of no force." *Parish of St. Andrews v. Zoning Board of Appeals of Stamford*, 155 Conn. 350, 354, (1967)

3. Attaching Conditions For Potential Traffic Impact Problems

Your Board heard conflicting positions on whether the Zoning Board could mandate off-site traffic improvements. We do not deny that a Zoning Board may deny a Special Permit Application due to concerns over off-site traffic problems the proposed use would generate. Nor do we challenge the right of the Zoning Board to attach on-site traffic conditions. A zoning (board) "is required to judge whether any concerns, such as .....traffic congestion, would adversely impact the surrounding neighborhood." *Barberino Realty & Development Corp. v. Planning & Zoning Commission*, 222 Conn. 607, 613 (1992); *Cambodia Buddist Society of Connecticut v. P&Z Commission of Newtown*, 285 Conn 381, 432 (2008)

But can we really expect the Zoning Board to now deny an application based on traffic concerns when they have already given preliminarily approval to the concept of a Lifetime Fitness facility? We would request that the Board of Representatives remember that there is only one way in and out for this project and it funnels all the traffic to the points of ingress and egress to the neighboring condominiums. Further, it should be noted that when the developer refers to *No Net Increase in Traffic* – they are not saying there will not be any increase, but rather no noticeable increase during the peak 9 AM and 5 PM commuting hours. They are also not saying that the increase won't make life miserable for the homeowners in the immediate vicinity of the already congested Buxton Farms Road / Turn of River Road intersection, rather, they are saying it won't overburden the road to the point of gridlock. Is it fair to put the neighbors to that grief? We do not see how any "traffic conditions" attached to an approval of a Special Permit will do anything to prevent a bad traffic situation frombecoming worse.

4. The Rules Pertaining to Site Plans

In addition to obtaining a Special Exception Permit, a developer must also submit a proposed Site Plan to the Board for approval. A Site Plan is more of a formality to show the proposed design and layout of the improvements so the Board can visualize the proposal, and so that land use staff may ascertain compliance with existing regulations. "[A] **site plan** is an administrative review procedure that assists in determining compliance of an underlying development proposal with zoning regulations." T. Tondro, supra, at p. 184; see also *SSM Associates Ltd. Partnership v. Plan & Zoning Commission,* 15 Conn.App. 561, 566, 545 A.2d 602 (1988), aff'd, 211 Conn. 331, 559 A.2d 196 (1989) A Board may approve a special permit application and yet deny the specific site plan attached with the application. *Smith Groh Inc. v. P&Z Commission Greenwich*, 78 Conn. App 216,223 (2003) "A **site plan** (application) may be (modified by the Board) or denied only if it fails to comply with the requirements already set forth in the zoning .....

regulations...." General Statutes § 8–3(g); see also *Friedman v. Planning & Zoning Commission*, 222 Conn. 262, 267–68, 608 A.2d 1178 (1992); *SSM Associates Ltd. Partnership v. Plan & Zoning Commission*, 15 Conn.App. 561, 566–68, 545 A.2d 602, aff'd, 211 Conn. 331, 559 A.2d 196 (1989). If the **application** conforms to the zoning regulations, the Board cannot deny the **application** for subjective reasons that bear no relationship to zoning regulations. *Kosinski v. Lawlor,* 177 Conn. 420, 423–24, 418 A.2d 66 (1979); see also *Allied Plywood, Inc. v. Planning & Zoning Commission*, 2 Conn.App. 506, 511–12, 480 A.2d 584, cert. denied, 194 Conn. 808, 483 A.2d 612 (1984). If the **site plan** is either denied or modified, the Board is required under § 8–3(g) to set forth the reasons for its decision. *R and R Pool and Patio v. Ridgefield* 257 Conn. 456, 469 (2001)

In conclusion, the Site Plan is merely a tool to show the proposed development complies with the approvals already granted. It is the approval of the Special Exception Permit and any conditions attached to the Special Permit that are important. Site Plans merely implement the approvals granted to the use by Special Permit even though the applications are sometimes filed simultaneously. An approved development is almost never held up by a deficient site plan application because the developer only has to tweak it to comply.

5. <u>Conclusion</u>

The Petitioners urge the Board of Representatives to reject this proposed change to Stamford's Zoning regulations. There has not been enough consideration on how such an intense use will impact the surrounding neighborhood. The whole purpose of allowing a Special Permit is to allow a use that the regulations would not normally allow but which will not jeopardize the health, safety, welfare, and property values of the surrounding residential neighborhood. This Zone change is meant for one site and the proposed use will have those negative impacts on the residential uses around it.

Very truly yours,

Edward P. McCreery III

EPM:csg

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