Exhibit #3

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James A. Dumont, Esq. Caroline Engvall, Legal Assistant

November 30, 2015

By hand delivery to:

Ms. Jane Woodruff, Esq.
Chair
Development Review Board
Town of Greensboro
PO Box 119
Greensboro, VT 05841

Re: Greensboro Arts Alliance and Residency Project, the Mirror Theater, 2583 Hardwick Street, Greensboro

Dear Jane:

I write to you and the Greensboro Development Review Board on behalf of Christine Armstrong and on behalf of the many persons who have signed petitions under 24 V.S.A. § 4465 challenging the GAAR/Mirror Theater project and designating Ms. Armstrong as their representative.

Unfortunately, I am in the midst of a trial Monday through Wednesday of this week and cannot attend the DRB hearing this evening. I am writing to briefly place in legal context the petitions Ms. Armstrong is filing with you, and to object to the granting of any amended, substantially changed or new permit.

The starting point for our objections is the permit issued last year. The permit was issued under the town's conditional use ordinance and the enabling statute which authorizes conditional use review. Our Supreme Court has held that regardless of the shortcomings of any town's conditional use ordinance, conditional use approval must apply at least the criteria found in the conditional use statute, now codified at 24 V.S.A. § 4414.

> Moreover, the town has zoning authority only in accordance with, and subject to, the terms and conditions imposed by the state when granting the power to zone. *Flanders Lumber & Building Supply Co. v. Town of Milton*, 128 Vt. 38, 45, 258 A.2d 804, 808 (1969). Thus, once a municipality adopts conditional-use zoning, its decisions must conform to the statutory general standards…
>
> The plain meaning of the statute is that, in order to do conditional use zoning, the town must use the enumerated general standards: they are the floor below which no town can go if it wants to do conditional use

> zoning. The legislature has found these general standards to be so essential that, if a town engages in conditional use zoning, its use of these standards is the fulfillment of a purely administrative duty for which an ordinance is unnecessary. 5 E. McQuillin, Municipal Corporations § 15.03, at 63 (3d ed. 1989)

In re White, 155 Vt. 612, 618-20, 587 A.2d, 928, 931-933 (1991).

The general conditional use standards are set forth in section 4414 (emphasis added):

> (3) Conditional uses.
> (A) In any district, certain uses may be allowed only by approval of the appropriate municipal panel, if general and specific standards to which each allowed use must conform are prescribed in the appropriate bylaws and if the appropriate municipal panel, under the procedures in subchapter 10 of this chapter, *determines that the proposed use* will conform to those standards. These general standards shall require that *the proposed conditional use* shall not result in an undue adverse effect on any of the following:
> (i) The capacity of existing or planned community facilities.
> (ii) The character of the area affected, as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.
> (iii) Traffic on roads and highways in the vicinity.
> (iv) Bylaws and ordinances then in effect.
> (v) Utilization of renewable energy resources.

Countless cases have been decided by the Environmental Court and the Supreme Court under this statute. Each and every one has examined the particular details of the proposed use, as set forth in the applicant's evidence, in order to determine if the proposed use as described by the applicant, satisfies these criteria. For example, in In re Appeal of Bartlett, # 153-7-00 Vtec, Decision issued March 22, 2001, the applicant described the details of its proposed automotive business. The Environmental Court did *not* find that automotive businesses generically were allowed and therefore a permit should issue. The Court found that *this* business, as described by this applicant, would produce visual impacts and noise impacts that would not adversely affect the character of the area. As to noise, the Court wrote:

> The noise from the proposed business will be characteristic of a vehicle-oriented business, including the coming and going of customers' cars, the movement of equipment on the site with a forklift or by operating the equipment to move it, and the unloading of delivery vehicles on average once per week from May to November. This level of vehicle-oriented noise … is compatible…

The conditional use that was issued was for the project as described, and for no other project. An automotive service business that unloaded delivery vehicles once a day, rather than once a week, for example, was not approved. It is just as unlawful to proceed with land development for a significantly revised project, without a revised permit, as it is to proceed with land development with no permit at all.

I am aware of the argument raised by some that the DRB in Greensboro does not engage in design review, and therefore once a conditional use permit is granted the applicant can construct any design of a project that it desires, so long as setbacks are respected. This argument cannot be reconciled with conditional use review. If this is what the people of Greensboro want, the town needs to abolish conditional use review. Conditional use review by its nature hinges on the details of the proposed project as set forth by the applicant. Effect on the capacity of community facilities, on the character of the area and on traffic all depend on the size, shape and/or exterior appearance of the project.

The Vermont Supreme Court also has ruled that once a zoning permit has been issued, if the applicant desires approval of a changed project, the applicant must demonstrate that changed circumstances beyond its control justify amendment of the permit -- unless the permit seeks approval of a substantially changed project, in which case zoning review commences for the project as a whole as a new zoning application. In re Lathrop Limited Partnership I, 2015 VT 49 ¶ 66:

> Where there is a preexisting permit, it should not matter to applicable regulatory standards whether the applicant submits a new application or requests an amendment to an existing permit. The first step is to determine whether there is a judgment with preclusive effect. If so, the second step should be review of the proposal as a whole. If the board or court concludes that there is a substantial change from the permitted project, review should proceed as if there is no prior permit.

The "preclusive effect" of the prior judgment means that the prior permit cannot be revised without proof of changed circumstances beyond the applicant's control, changes in technology, etc. The Court in Lathrop summarized this area of law:

> ¶ 56. The first preclusion doctrine implicated in this case deals with the standards and restrictions on zoning permit amendments, which we have held are allowable under 24 V.S.A. § 4472(d). *Hildebrand,* 2007 VT 5, ¶ 12. There are no statutory standards that an amendment to a zoning permit or condition must meet; nor in this case do the Town's bylaws establish any standards. We first considered the availability of permit amendments to zoning and other land use permits in *In re Stowe Club Highlands,* 166 Vt. 33, 687 A.2d 102 (1996). In *Stowe Club Highlands,* upon review of an Act 250 proceeding, we determined "under what

> circumstances ... permit conditions may be modified." *Id.* at 37, 687 A.2d at 105. Our decision generally affirmed the reliance on factors that had been identified by the former Environmental Board: (1) whether there had been "changes in factual or regulatory circumstances beyond the control of a permittee"; (2) whether there had been "changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued"; and (3) whether there had been "changes in technology." *Id.* at 38, 687 A.2d at 105. These factors are intended to "assist in assessing the competing policies of flexibility and finality in the permitting process." *In re Nehemiah Assocs.,* 168 Vt. 288, 294, 719 A.2d 34, 37 (1998). We applied the holding of *Stowe Club Highlands* to a municipal zoning permit in *Hildebrand.* In *Hildebrand,* we affirmed the environmental court's importation of the *Stowe Club Highlands* factors on the reasoning that the competing interests in Act 250 and municipal zoning cases are so similar. *Hildebrand,* 2007 VT 5, ¶ 13.

What this means for the Mirror Theater project is that the DRB must decide whether the revisions substantially change the project. If they do not, then the criteria of Stowe Club Highlands must be considered to determine if there is a legal basis for amending the permit. If the revisions do substantially change the project, then the DRB must treat this as a new permit application and determine whether the applicant has satisfied its burden of proof for the project as a whole. We submit that under either approach, the requested permit must be denied.

There has been no showing of changes in factual or regulatory circumstances beyond the control of the applicant, or changes in the project that were not reasonably foreseeable at the time the first permit was issued, or that there have been changes in technology since the first application. On the contrary, the changes that have been submitted all were changes that are within the applicant's control and were reasonably foreseeable in 2014. On the other hand, if the project has substantially changed, the applicant has failed to submit evidence under each of the criteria, such as evidence showing the impact of the project on the character of the area, evidence addressing traffic impacts, evidence addressing the Town Plan and so on.

My clients will discuss the proposed changes in some detail. However, to illustrate the reasons the permit should be denied, I will address several of the changes. One is that the building as set forth in the revised plans is about 30% larger than the building as described in the plans set forth in the application in 2014. Also the original building was described by the applicant as containing 200 seats but the revised application will accommodate 260 seats, also a 30% increase. I note that the applicant informed the State of Vermont that it was seeking to install 260 seats, and the building plans submitted to you are the same as those submitted to the State. These are substantial changes. The size of the building and the number of seats

affect virtually every aspect of conditional use review – the amount of traffic the project will attract, the impact on septic disposal, the noise it will generate, the aesthetic impact on the area during daylight hours, and the visual impact of the project and its lighting during nighttime hours. These changes require review of the project as a whole as a new permit application. On the other hand, if these are treated as revisions to the existing permit, there is no evidence that the changes in size and seating arise from changes in factual or regulatory circumstances beyond the control of the applicant, or from changes in the project that were not reasonably foreseeable at the time the first permit was issued, or from changes in technology since the first application.

Another change is the parking and the parking lot lighting. The permitted application laid out the parking in multiple nodes, rather than a single large lot. The permitted application used bollard light rather than poles. The new proposal calls for a single large lot with lighting poles. Even with the best cut-off lighting, the use of lighting poles will substantially change the visual impact of the project at night. These are substantial changes, requiring that a new permit be applied for and that the conditional use criteria be satisfied. If these are revisions, again, I have yet to see any evidence that these changes arise from changes in factual or regulatory circumstances beyond the control of the applicant, or from changes in the project that were not reasonably foreseeable at the time the first permit was issued, or from changes in technology since the first application.

I understand from the application and the recent site visit that the latest application and the foundation already in place have switched the orientation of the building. The entry as approved faced northeast. The entry in the new plans and in the poured foundation faces southeast. The applicant has not submitted any evidence or argument to you that seeks to justify this change under the law of Vermont as most recently set forth in the Lathrop ruling, including the Stowe Club Highlands test. I am concerned that regardless of whether this change meets the test from Stowe Club Highlands, this change appears to have been constructed without a revised permit. And if the Stowe Club Highlands test does not apply because the project is substantially changed, I am concerned that the change was constructed without a new permit.

Also new is the building height. The height you approved last year was 35 feet. The proposed new height is 42 feet and 2 inches. Like building size, building height affects the visual impact of the project. This change requires review of the project as a whole as a new permit application. If this is treated as a revision to the existing permit, there is no evidence that the change arises from changes in factual or regulatory circumstances beyond the control of the applicant, or from changes in the project that were not reasonably foreseeable at the time the first permit was issued, or from changes in technology since the first application.

We think the building height as now proposed violates the zoning ordinance and does not fall within the "cupola" exemption. However, I emphasize that this is a different determination than whether the applicant has satisfied the Stowe Club Highlands test. If that test does not apply, it can only be inapplicable because the project is being substantially changed and therefore must be treated as a new application. In that event, there is no evidence upon which a conditional use permit could be based. A person or entity with a zoning permit cannot change the project without either meeting the Stowe Club Highlands test or submitting and proving a new permit application. Yet this applicant has done neither

In conclusion, on behalf of Ms. Armstrong and the petitioners, I ask that DRB deny the application. On behalf of Ms. Armstrong and the petitioners, based on what was seen during the site visit, I ask that the applicant refrain from engaging in any further construction work unless and until a revised permit or a new permit is granted that authorizes changes from the initial application.

Sincerely,

James A. Dumont
James A. Dumont, Esq.

cc: Robert Halpert, Esq., by email on 11/29/15
William B. Davies Esq., by email on 11/29/15
Ms. Kristen Leahy, by email on 11/29/15