New Haven City Plan Department

165 Church Street, New Haven, CT 06510

InterOffice Memo

To: City Plan Commission

From: Thomas Talbot, Deputy Director, New Haven City Plan Department

Date: June 6, 2017

Subject: CPC 1530-13 High Impact Special Exceptions

Commissioners:

Staff has reviewed the proposed zoning ordinance amendment language concerning "High Impact Special Exceptions and at this time would like to submit comments addressing what it believes are the main issues related to this proposal.

1. The need for the proposed amendment:

   Simply put, the need for amended language concerning university use (along with other non-religious institutional uses) in the New Haven Zoning Ordinance is rather self-evident. There is, in the view of staff, no doubt that these uses generally involve a level of impact that is not sufficiently addressed when subject to City review as a "by right" use, particularly when viewed in relationship to uses of relatively minimal impact that currently require Special Exceptions or Special Permits. It is clear to staff that university uses, among others, should be re-categorized from by-right to conditionally permitted uses requiring either a Special Exception, or more appropriately, a Special Permit.

   The reason for recommending a Special Permit as opposed to a Special Exception is due largely to the way in which staff is currently attempting to provide some order to the manner in which they are both applied in the Ordinance.

   In the law they are actually the same thing. They are uses that are generally permitted within a district but due to their particular nature and possible impact may or may not be appropriate on a particular property within that district. They are handled differently in communities across the State. Some only permit such uses to be heard by either a BZA or CPC equivalent while others such as New Haven allow them to be heard by both a Board of Appeals and a City Plan Commission equivalent. Those communities do what New Haven does, which is to indicate which board hears such an application by applying one term for BZA conditionally permitted uses (Special Exception) and the other to applications heard by the CPC (Special Permits).

   In conventional practice the reason for the division is based primarily upon probable impact. Conditionally permitted uses of relatively lesser impact are heard as Special Exceptions by the BZA while those of greater impact are heard as Special Permits by the CPC. This is due to the nature of the two boards. A board of appeals is generally charged with set of highly specialized responsibilities such as variances, which by themselves do not have broad impact upon a surrounding area. The CPC has a much broader charge in terms of land use regulation.

2. The proposed amendment:

The proposed amendment is problematic on many levels, beginning with the fact that it is proposes university use as a Special Exception, then inserts it into the Ordinance in a list that includes a variety of uses, nearly none of which rises to the level of impact of a university use. It proceeds to label all of these uses as "High Impact Special Exceptions" in apparent disregard of their limited impact as well as in apparent disregard of the dozens of other Special Exception and Special Permit uses that by definition alone are of greater impact. It then subjects them to a set of requirements that are not at all reflective of their actual likely impact.

These requirements (*in italics*) along with staff comments are as follows:

b) Any application for a High-Impact Special Exception shall follow these procedures:

i. The Community Impact Statement shall include, but not be limited to, the following:

A. *Inducements to reduce the number of single occupancy vehicles travelling to the site, such as public transit subsidies, off-site satellite parking at a reduced cost, bus or shuttle services, and connection of the site to a network of bike or pedestrian paths;* Already referred to in Special Exception findings section. Could be amended to include some of this language

B. Number and percentage of employees who live within one mile and who live within three miles; Absolutely unenforceable or within purview of City to regulate through zoning power, regardless of by Special Act or Statutes, particularly when only applied to one class of use and no less so when it is clear that the intent is only to apply to one particular use within that class of use. Is anybody expected to believe that the City has authority or legitimate interest in regulating the living distances of employees of a convenience store or a parking lot in a residence district but not for an office, retail store, or any of the other dozens of currently permitted uses of demonstrably greater impact in this City that would not be subject to this standard?

C. Any provisions to enhance local hiring and reduce impacts of employees' commutes on area traffic; As in B. above

D. A proposed amendment or update of an Overall Parking Plan, if applicable, I believe that this is already the case.

E. *An account of any lots or parcels that have the same use and are located within a half-mile of the site at issue;* To what specific purpose? Could possibly be incorporated in the Special Permit finding requirements except that one half –mile is almost certainly arbitrary and not easily defensible, particularly in an urban environment.

F. *Projected demand by the project for city services and amenities, including but not limited to trash collection, fire and emergency services, police protection, snow removal, and street maintenance;* Neither the Special Act nor CGS contain language that would provide language that would allow for zoning regulation of only certain uses based on this set of proposed set of standards.

G. *Provisions to enclose, screen or otherwise control any noise, odors, lights, smoke, dirt, electrical disturbance, radioactive particles and rays and all other possible disturbing aspects connected with the operation of the proposed use; and* Already in Special Permit findings section

H. *Other benefits to the community resulting from the project, such as agreements with neighborhood organizations, agreements to permit public access to community*

space, and community benefits agreements, if any. Once again, as in B. except that this section is a classic "pay to play" standard that is clearly illegal and difficult to not view as implicitly coercive in nature.

ii. *The Board of Alders may by resolution support or oppose an application for a High-Impact Special Exception. Nothing herein shall prohibit such resolution from passage by Unanimous Consent. Passage of a resolution of support for a High-Impact Special Exception shall waive the requirement for an Overall Parking Plan amendment for such project.* Board has the authority to regulate, i.e., create and amend the City Zoning Map and Zoning Ordinance; it does not, to the knowledge of staff, have any direct or indirect authority in respect to the administration of their regulations. They simply do not have the authority to waive standards for any application subject to approval by either the BZA or the CPC whether by resolution, edict, or any other form of legislative action. Also there is no specific mention of the standards by which they would make a recommendation.

iii. *If the Board of Alders has passed a resolution of support, a High-Impact Special Exception may be authorized by an affirmative vote of three members of the Board of Zoning Appeals* All Special Exceptions currently require 3 affirmative votes

iv. *If the Board of Alders has not passed a resolution of support, or if the Board of Alders has passed a resolution in opposition to the application for a High-Impact Special Exception, then the High-Impact Special Exception may only be authorized upon an affirmative vote by four members of the Board of Zoning Appeals.* This requirement completely undermines any assertion that the Board of Alders' role in the proposed amendment would be strictly advisory.

v. *The Board of Zoning Appeals shall not vote on the High Impact Special Exception until (a) passage of a resolution by the Board of Alders, or (b) 35 days following the communication of the High-Impact Special Exception application to the Board of Alders, whichever is earlier.*

Again staff does not believe that under the Special Act that the Board of Alders has the authority to directly insert itself into the administrative operations of either the BZA or the CPC

c) Any use on land owned by a college or university shall be presumptively considered a university use, unless the applicant certifies that the land will be fully leased to unrelated third-parties for an unrelated use. Such certification shall be in a form to the satisfaction of the Board of Zoning Appeals, and shall be recorded on the land records of the city, with a stamped copy provided to the Board of Zoning Appeals as part of the original application. Any variation in use shall be deemed a violation under the Ordinance, in addition to all other remedies available at law.

It is possibly the most fundamental principle of land use regulation anywhere in this country that it is the use that is regulated rather than the user/owner of a property. While recognizing that it may sometimes be difficult to distinguish between a university or non-university use on a property, the City has absolutely no right to the level of presumption found in this section. Determination of use is a matter of actual fact.

SECTION TWO: The text of Section 12(b) 1(g) shall be renumbered as a new Section 12(b) 2(f), and the Use Table of this Zoning Code shall be updated such that university and college uses shall only be approved by Special Exception

Staff is not clear as to which Use Table this Section refers. There are three tables in the Ordinance; two of them are use tables.

3. Role of the Board of Alders in the land use regulation process:

Much of the previous review has concerned itself with the shortcomings of the existing proposal. From the imposition of legally dubious requirements to the creation of procedures that are arbitrary and clearly problematic in respect to issues of fairness and due process, staff believes that it has provided more than adequate evidence for a negative recommendation to both the Commission and the Board. What is of most concern however, is the regulatory overreach that this proposed legislation represents.

Whether by Special Act or by General Statutes, in the State of Connecticut the authority to regulate land use at the local level comes directly from the State Legislature. The manner in which this authority is passed down may vary somewhat between the General Statutes and the various Special Acts, but the basic form (as well as the rationale for that form) is consistent.

In the City of New Haven the Special Act gives the Board of Alders the specific legislative authority to create and maintain both a Zoning Map and a Zoning Ordinance for the City of New Haven. It does not confer upon that Board, however, the power to administer those regulations and map boundaries. In fact it directs the creation of a Board of Zoning Appeals and City Plan Commission to do those very things.

This arrangement is not accidental; the entire rationale for regulating land use as special form of law is based upon the desire of the State Legislature to ensure that land use would be administered in its most immediate form in a fair and consistent manner apart from and independent of all other areas of general government. Currently the Board of Zoning Appeals and City Plan Commission are required to make their decisions based entirely upon explicit standards found in the New Haven Zoning Ordinance. The proposal at hand does not appear to extend that requirement to an Aldermanic recommendation. How a decision would be made or by what standards no recommendation at all would be made is not specified; it implies a great deal of discretion on the part of the Board of Alders.

This lack of regulatory restraint is problematic in at least two ways. First it fails to provide applicants with any real assurance of equal treatment and provides them with little recourse in terms of appeal. Most importantly, however is the idea that when the legislative body takes unto itself the administration of land use regulation (even in an indirect fashion) it is almost inevitable that those administrative determinations will be improperly impacted by other political considerations not directly related to land use.

Finally, there is the conflict of interest issue. While some may say that proposing regulatory measures in the form of Zoning Map and Zoning Ordinance amendments that impact one’s employer may not rise to the level of a conflict of interest, it is almost certain that any vote regarding administrative action upon an individual application would.