

# STAFF MEMORANDUM

Council Meeting – 06/17/2020



## **NORTH CAROLINA GENERAL STATUTES CHAPTER 160D: UPDATES TO THE LAND USE MANAGEMENT ORDINANCE, TOWN CODE, AND OTHER POLICIES**

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Over the next year, Town staff will recommend updates to the Land Use Management Ordinance (LUMO) and other sections of the Town Code to align our regulations with new State legislation commonly referred to as '160D'. These updates are necessary for the Town's development regulation functions to continue operating in compliance with State law.

### **PROJECT PURPOSE**

To bring LUMO and other Town regulations and procedures into compliance with State law, as most recently revised with the adoption of Session Law 2019-111 and establishment of Chapter 160D.

### **BACKGROUND**

'160D' refers broadly to the updating of NC General Statutes that contain the rules for how local jurisdictions (both municipalities and counties) can exercise land use authority in areas such as zoning and subdivisions. Chapter 160D and various related provisions were established under Session Law 2019-111, enacted by the General Assembly on June 28, 2019 and signed by the Governor on July 11, 2019.

Session Law 2019-111 included two parts with different effective dates. Part I, which took effect on July 11, 2019, includes miscellaneous provisions that impact local government's ability to regulate development. The Town will need to consider updates to internal- and external-facing development review procedures to comply with Part I provisions. More detail is provided in the attached **Part I Overview**.

Part II, which enacted Chapter 160D, will take effect in July 2021. In adopting Part II, the General Assembly aims to modernize State land use laws by removing obsolete terminology and clarifying some existing provisions that apply to local governments. Part II was drafted with the explicit intent to not make significant substantive changes in land use law. This modernization is what creates the need for the Town to update its own Code and LUMO through text amendments. Part II also consolidates local regulation statutes for counties and municipalities under the new 'Chapter 160D' heading (previously, statutes were divided into two chapters for different types of jurisdictions). More detail, including initial discussion of how 160D impacts Conditional Use District Zoning, is provided in the attached **Part II Overview**.

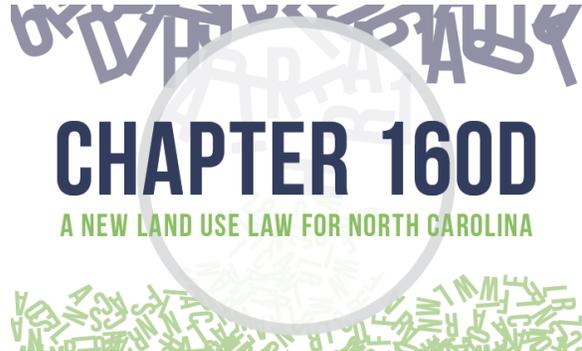
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## KEY CHANGES REQUIRED BY STATE LAW

Resources from the UNC School of Government provide an introduction to 160D and the major topics it addresses. Further information is available through their [checklist of changes](#)<sup>1</sup> and a [series of online modules](#).<sup>2</sup> The School of Government outlines the following major topic areas:

- Terminology and Definitions
- Rules for Boards and Commissions
- Substance of Development Regulations
- Comprehensive Plans
- Procedures for Land Use Decisions
  - Legislative
  - Quasi-Judicial
  - Administrative
- Vested Rights and Permit Choice
- Judicial Review of Land Use Decisions



## PROPOSED PROCESS

The steps below outline a process to evaluate the necessary changes, engage stakeholders, and provide a transparent platform for updating LUMO and the Town Code. Opportunities for Council consideration are highlighted **in blue**.

1.	Staff assesses necessary changes to Town Code	March-July 2020
2.	<b>Council introduction</b>	June 2020
3.	Public Engagement – Building Familiarity	July-September 2020
4.	<b>Council discussion of necessary changes and policy options</b>	October 2020
5.	Public Engagement – Policy Choices	October 2020 - January 2021
6.	Draft Text Amendments	February 2021
7.	Planning Commission Review	February-March 2021
8.	<b>Council Review and Adoption</b>	April-May 2021
9.	Effective Date of Part II of Chapter 160D	July 1, 2021 ( <i>anticipated</i> <sup>3</sup> )

<sup>1</sup> [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/Chapter%20160D\\_Checklist\\_A\\_2.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/Chapter%20160D_Checklist_A_2.pdf)

<sup>2</sup> <https://www.sog.unc.edu/resources/microsites/planning-and-development-regulation/online-modules>

<sup>3</sup> Session Law 2020-3, passed in response to the COVID-19 crisis, extended the effective date of Chapter 160D to August 1, 2021. Senate Bill 720 would amend the effective date to July 1, 2021. That bill is awaiting Governor signature as of the writing of this memo.

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## PROPOSED PUBLIC ENGAGEMENT STRATEGY

While many of the '160D' changes are necessary due to revised State law, staff is committed to an open process that engages the public on the changes. Education is an important first phase of the project, laying a foundation for input on policy changes by building familiarity around topics that are technical in nature. As currently outlined, the proposed public engagement strategy includes four phases:

<b>I. Building Familiarity</b>	
Introduce the public to the key elements of Chapter 160D and how it intersects with current Chapel Hill approaches to land use regulation. Educate the public on planning and zoning concepts that relate to the provisions of Chapter 160D.	
<a href="#">IAP2 Spectrum Level<sup>4</sup>:</a>	Inform
Input Type:	Online, mostly web-based information Public can ask questions and seek clarification from staff
Timing:	July - September 2020

<b>II. Policy Choices</b>	
Seek stakeholder feedback on implementing the provisions of Chapter 160D, where Council identifies alternatives to discuss with the community. Gather concerns about proposed changes.	
IAP2 Spectrum Level:	Consult
Input Type:	Public meetings (possible mix of in-person and virtual), Online survey Public can respond to survey, share feedback with staff, and ask questions
Timing:	October 2020 - January 2021

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<sup>4</sup> <https://iap2usa.org/resources/Documents/Core%20Values%20Awards/IAP2%20-%20Spectrum%20-%20stand%20alone%20document.pdf>

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<b>III. Draft Text Amendments</b>	
Share draft Code language with the public. Determine support and ongoing concerns.	
IAP2 Spectrum Level:	Consult
Input Type:	Public meetings (possible mix of in-person and virtual), Online comment form Public can comment on draft materials, share feedback with staff, and ask questions
Timing:	February - May 2021

<b>IV. Implementation Resources</b>	
Educate the development community and others who interact with our development regulations about the adopted changes.	
IAP2 Spectrum Level:	Inform
Input Type:	Users can ask questions and seek clarification from staff
Timing:	Following Council adoption



## PART I OVERVIEW (Provisions Already in Effect)

### CHAPTER 160D: DETERMINING UPDATES TO THE LAND USE MANAGEMENT ORDINANCE, TOWN CODE, AND OTHER POLICIES

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Part I of Session Law 2019-111 went into effect on July 11, 2019. The Town needs to consider internal and external-facing development review procedures to ensure compliance with this portion of the Law. Specifically, the Town Council should be aware of the following provisions:

1. **Special Use Permit (SUP)**

Part I includes two noteworthy changes regarding Special Use Permits:

a. **Placing conditions on a SUP** - Part I states regarding the Town's ability to place conditions on a SUP:

Conditions and safeguards imposed under this subsection shall not include requirements for which the city does not have authority under statute to regulate nor requirements for which the courts have held to be unenforceable if imposed directly by the city including, without limitation, taxes, impact fees, building design elements within the scope of subsection (h) of this section, driveway-related improvements in excess of those allowed in G.S. 136-18(29) and G.S. 160A-307, or other unauthorized limitations on the development or use of land.

**What does this provision mean for Chapel Hill?** Proposed SUP conditions must continue to be scrutinized to ensure that the desired conditions have been specifically permitted by state statute and not precluded by the courts. This scrutiny is especially important given the new provisions regarding the awarding of attorney's fees, which is discussed below.

b. **Consent to Conditions** - Any conditions placed on a SUP must be consented to, in writing, by the applicant/landowner in order to ensure enforceability.

**What does this provision mean for Chapel Hill?** Best practice moving forward would be, in advance of the final decision by Council, to have the applicant/property owner sign a document agreeing to any proposed conditions. Because conditions are often placed and/or modified as Council is acting on the application, the School of Government has advised that the approval "may have a condition that the approval is not effective until the petitioner provides written consent and [mandating] a specified time for that consent to be provided."

## 2. **Legislative Decisions**

Part I includes additional requirements regarding Legislative Decisions including:

- a. **Down-zoning** – All parcels subject to a down-zoning must have the written consent of all property owners unless the down-zoning is initiated by the Town. The statute defines down-zoning as follows:

[D]own-zoning means a zoning ordinance that affects an area of land in one of the following ways:

- 1) By decreasing the development density of the land to be less dense than was allowed under its previous usage.
- 2) By reducing the permitted uses of the land that are specified in a zoning ordinance or land development regulation to fewer uses than were allowed under its previous usage.

**What does this provision mean for Chapel Hill?** Currently, the Town does not accept applications for down-zonings from third parties. Therefore, this change has no impact.

- b. **Consent to Conditions for Conditional Zoning Applications** – Like Special Use Permits, any conditions placed on a conditional zoning approval must be consented to in writing by the applicant/landowner. The previous statute required that property owners consent to conditions, and this requirement adds the requirement that the conditions be consented to in writing.

**What does this provision mean for Chapel Hill?** Please see the discussion in Special Use Permit in 1.b, Consent to Conditions. Institutionalizing obtaining a statement of signed consent, especially when conditions change during Council consideration and approval, will be necessary.

- c. **Placing conditions on Conditional Zoning applications** – If an applicant/property owner agrees, in writing, conditional zoning conditions that go beyond the Town’s legally established zoning authority may be placed on the application. Part I specifically mentions impact fees, taxes, and design requirements as examples of conditions that may be levied on a conditional zoning application. What is noteworthy is the contrast with Special Use Permits, which specifically prohibits the placing of conditions that exceed the Town’s basic zoning authority.

**What does this provision mean for Chapel Hill?** This change may influence which path applicants wish to take through the Town’s development review processes. Staff should be transparent about the difference between the types of conditions that may be placed on Special Use Permits versus Conditional Zonings, when speaking with prospective applicants about development review options.

As we move through the rewrite of the Land Use Management Ordinance, this change should be considered as the existing development review processes are evaluated.

### 3. **Attorney's Fees Generally**

As explained by the UNC School of Government:<sup>i</sup>

The new rule on attorneys' fees...requires that the court must award attorneys' fees if the local government "violated a statute or case law setting forth unambiguous limits on its authority." Notably, unambiguous is defined to mean "that the limits of authority are not reasonably susceptible to multiple constructions." If there are conflicting opinions from the Court of Appeals, there would be ambiguity in the case law. As such, there would not be mandatory attorneys' fees. If, however, the Court of Appeals or Supreme Court has issued a clear decision squarely deciding a point of law, if a local government acts in direct contradiction to that clear decision, the local government would risk paying attorneys' fees to an individual challenging that rule.

**What does this provision mean for Chapel Hill?** In general, when writing, interpreting, and applying Land Use Management Ordinance (LUMO) standards as well as generally administering the LUMO, the Town must be mindful of whether or not the Town has the express authority to regulate in that manner.

Failing to recognize this limitation on the Town's authority could result in the Town being mandated to pay attorney's fees, which could have detrimental fiscal impacts.

### 4. **Permit Choice**

Permit choice allows an applicant to choose which regulations apply if the regulations change after a complete application is filed.

- a. **Expansion of Permit Choice** – Permit choice now includes any and all rules and regulations that regulate a development application, such as stormwater regulations and engineering specifications. That choice is applicable for 18 months after approval of an initial application. In addition, an applicant can "mix and match" old and new regulations, such as deciding to use the zoning standards that were in place when the application was deemed complete, but utilize the new stormwater regulations if those change before the application is approved. During the 18 months following a site plan approval, an applicant can decide which development rules to follow for any subsequent approvals that are necessary, such as a Zoning Compliance Permit.

**What does this provision mean for Chapel Hill?** For the most part, the Town's Technical Review staff need to be mindful of these new broadened permit choice provisions and remember that these provisions will apply to regulations outside of the LUMO, like the Engineering Design Manual and any other regulations that impact development approvals which may reside in the General Code of Ordinances.

Given these expanded Permit Choice provisions, when the rewritten LUMO is effective, staff must proactively plan for how best to administer applications during the 18 months following adoption of the rewritten LUMO.

- b. **Expiration of Permit Choice** – This expanded permit choice timeframe does have some limitations. If an applicant pauses the application review process for six consecutive months or more or the applicant fails to respond to comments or reasonable requests for additional information for six or more months, the regulations in effect at the time application review resumes will be applicable.

**What does this provision mean for Chapel Hill?** When rules and regulations impacting development applications are being amended, staff must clearly document:

- When an application is deemed complete so that there is a definitive time to start the permit choice clock; and
- When an applicant fails to respond to comments or provide the requested information so that staff knows when the permit choice option has expired.

- c. **Attorney's Fees** – If a court finds that the Town has acted inconsistent with or in violation of the permit choice statutes, the court shall award attorney's fees to the aggrieved party.

**What does this provision mean for Chapel Hill?** Staff needs to be cognizant of this provision whenever development rules are amended and take the needed administrative steps to document permit choice decisions and timeframes.

## 5. **Additional Judicial Rules**

Standing remains intact, if during a court appeal of a Town action, an aggrieved party loses the relevant property interest, such as an option to purchase, subject to relevant case law limitations. In other words, a person may still appeal a Town action if their option to purchase a parcel, for example, expires during the court appeal.

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<sup>i</sup> UNC School of Government Chapter 160D Question & Answer by Adam Lovelady, David Owens, & Ben Hitchings. [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/160D%20Q%26A%204\\_7.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/160D%20Q%26A%204_7.pdf).



## PART II OVERVIEW (Provisions Effective July 1, 2021)

### CHAPTER 160D: DETERMINING UPDATES TO THE LAND USE MANAGEMENT ORDINANCE, TOWN CODE, AND OTHER POLICIES

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Part II of Session Law 2019-111 establishes Chapter 160D. It will take effect in the summer of 2021.<sup>1</sup> The Land Use Management Ordinance (LUMO) and Town Code will need various updates to maintain compliance with State law, as revised by the adoption of Session Law 2019-111 and establishment of Chapter 160D.

A team of Town staff, representing multiple departments and disciplines, completed a thorough review of Part II to determine which provisions require updates in the Town Code. [More detailed information and proposed Code language for Council consideration will be provided in the coming months.](#) Below is a brief overview of the significant provisions of Part II.

#### 1. **Conditional Use District Zoning**

The most significant change, in staff's opinion, is that Part II eliminates the use of *Conditional Use District Zoning*, which is the practice of combining a quasi-judicial Special Use Permit with a legislative rezoning. This is currently the most utilized option in Chapel Hill for placing conditions on a rezoning. The Council may continue to issue Special Use Permits after the effective date of Part II, but the conditions of the Special Use Permit will no longer be linked to the rezoning of the site.

*Conditional Zoning* is a tool that can accomplish many of the same objectives as *Conditional Use District Zoning*, specifically the ability to place conditions on a rezoning. A key difference is that *Conditional Zoning* includes only a legislative process with no Special Use Permit used in combination with the rezoning.

#### 2. **Special Use Permit Review Process**

Part II clarifies the Planning Commission's role in a quasi-judicial process, which may lead to Council consideration of the Commission's involvement in Special Use Permit review. While the Commission may review Special Use Permits, their recommendation cannot be used as the basis for a Council decision on the Special Use Permit. The decision must be made based on evidence presented at the Council public hearing.

#### 3. **Development Agreement Procedures**

Part II provides increased flexibility for how Council can establish a Development Agreement and what elements it may include.

#### 4. **Appeal of Historic District Commission Decisions**

Council has the option to continue having applicants appeal HDC decisions to the Board of Adjustment, or to have direct appeal to Superior Court.

#### 5. **Miscellaneous Minor Changes**

Some 160D provisions require a technical change to the Town Code that has no policy impact. For example, the Town must add and modify various LUMO definitions to be consistent with State law.

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<sup>1</sup> Session Law 2019-111 established January 1, 2021 as the original effective date of Chapter 160D. Session Law 2020-3, passed in response to the COVID-19 crisis, extended the effective date to August 1, 2021. Senate Bill 720 would amend the effective date to July 1, 2021. That bill is awaiting Governor signature as of the writing of this memo.