



PART I OVERVIEW (Provisions Already in Effect)

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

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:ⁱ

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.

ⁱ 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.