

STAFF MEMORANDUM

Council Work Session – 10/21/2020



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

In 2020 and 2021, the Town of Chapel Hill Planning Department will be recommending 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 into compliance with State law, as most recently revised with the adoption of [Session Law 2019-111](#)¹ and [Session Law 2020-25](#)² and the establishment of NC General Statutes [Chapter 160D](#)³.

BACKGROUND

'160D' refers to the new section of the NC General Statutes that contains the rules for how local jurisdictions can exercise land use authority in areas such as zoning and subdivisions. Chapter 160D was established under Session Law 2019-111 (with later technical corrections under Session Law 2020-25), and was signed into law in the summer of 2019. Part I of the Session Law went into effect at that time. Part II, which clarifies, consolidates, and reorganizes land-use regulatory laws, will go into effect on or before July 1, 2021 (the effective date varies based on when jurisdictions adopt amendments to implement 160D).

Further information on the State's enactment of Session Laws and Chapter 160D is available at the [Town's project webpage](#)⁴.

PART I PROVISIONS

Council received an introduction to 160D updates at the [June 17, 2020 Special Meeting](#)⁵. The focus of that item was on Part I topics. Council members met in small groups following the June 17th meeting to further discuss the implications of Part I. This fall, staff moved into discussion of Part II topics.

¹ <https://www.ncleg.gov/BillLookup/2019/S355>

² <https://www.ncleg.gov/BillLookup/2019/S720>

³ <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/160D%20with%202020%20legislative%20corrections.pdf>

⁴ <https://www.townofchapelhill.org/government/departments-services/planning/plans-and-ordinances/160d-updates-4113>

⁵ <https://chapelhill.legistar.com/LegislationDetail.aspx?ID=4569906&GUID=0CE76AA5-06B3-4421-8884-D0D1FBD81E30>

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PART II PROVISIONS FOR DISCUSSION

The Land Use Management Ordinance and Town Code will need various updates to maintain compliance with State law, as revised by the adoption of Part II of Session Law 2019-111 and the establishment of Chapter 160D.

Staff introduced several Part II topics at the [September 16, 2020 Work Session](#)⁶. This month, staff is seeking additional Council feedback on a previous topic and is introducing two new topics, as summarized below.

Topics for October Work Session:

- 1. Advisory Board Review of Special Use Permits**
- 2. Approvals with Vested Rights**
- 3. Bona Fide Farms**

1. Advisory Board Review of Special Use Permits

Based on Council feedback at the September 16 Work Session, staff reviewed options for including Advisory Board input in the Special Use Permit (SUP) review process. Advisory Boards, including the Planning Commission, do have the ability to review SUPs. However, their recommendations **may NOT** be used as the basis for a Council decision. The Council decision must be made based on competent evidence presented at the quasi-judicial, evidentiary hearing.

One question from Council was whether members of an Advisory Board could be considered 'expert witnesses' who had standing to speak at a quasi-judicial, evidentiary hearing. The Town Attorney has advised that Advisory Board Chairs and other members **are NOT** qualified to serve as expert witnesses merely because they serve on the Advisory Boards.

Regarding Town staff's role at a quasi-judicial, evidentiary hearing, generally speaking, the role of Town staff is for the staff person who prepared the material in the agenda packet to be sworn in as a witness, state for the record that they compiled and drafted the agenda materials, provide specifics on when and how the materials were distributed, and offer to answer questions.

Council members also asked whether Advisory Board input could be transmitted to Planning staff instead of Council, and whether staff could then consider that input when writing staff reports and drafting conditions of approval. The Town Attorney advised that this approach is workable, but with the following caveats:

- This approach would allow the same Advisory Boards currently reviewing SUPs to bring unconsidered issues to staff's attention. It must be clearly communicated, however, that Advisory Board meetings are "a preliminary forum for review of quasi-judicial decisions" and that "no part of the forum or recommendation may be used as a basis for the deciding board" (i.e. Council).

⁶ <https://chapelhill.legistar.com/LegislationDetail.aspx?ID=4640115&GUID=B6921C68-D711-4649-A7AC-E69FC5474889>

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- Staff would need to carefully evaluate Advisory Board input based on available data from reliable, expert sources and other unbiased information. While staff already provides a cursory review of recommended conditions, currently all Advisory Board recommendations are forwarded to Council. With this new approach, the determination that a recommended condition should or should not be included in a resolution of SUP approval must include documented, fact-based reasoning and must relate back to whether the condition is warranted to support the four SUP Findings of Fact and is permissible under State law.
- To implement the staff evaluation of recommended conditions, Planning staff will need to build additional time into the SUP review process between Advisory Board meetings and the Council evidentiary hearing. Staff estimates that this approach would extend the typical process timeline by a month, including for those projects on an expedited track. The staff reports on SUP projects would also be lengthier.

EFFECTS OF NEW STATE LAW
A. <i>On or before July 1, 2021</i> , the Council may no longer make decisions on SUP applications that are based, in any part, on recommendations of the Planning Commission or other Advisory Boards. B. Council may continue to consider such recommendations when making decisions on Conditional Zonings, Concept Plans, and other non-quasi-judicial applications.
IMPLEMENTATION ACTIONS
A. Council members must ensure that they are applying proper decision-making criteria. B. Update SUP procedures in LUMO so that Planning Commission recommendations are not transmitted to Council.
POLICY CHOICES – UPDATED since 9/16/2020
Council may choose to pursue one of the following options: A. (<i>NEW Option</i>) Advisory Boards continue to review SUP applications, with input transmitted to staff. Council will no longer receive Advisory Board recommendations. Staff would then carefully evaluate all Advisory Board input/recommendations to determine what is legal, reasonable, and warranted to include as a condition of approval. B. Discontinue review by Planning Commission and other Advisory Boards during the Special Use Permit review process. C. Advisory Boards continue to review SUP applications, with the understanding that it is an informal, preliminary discussion that will NOT be used by the Council when making a decision. Recommendations would not be transmitted.

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2. **Approvals with Vested Rights**

Part II of Chapter 160D addresses how vested rights are assigned to development approvals. Council should consider what types of development approvals in Chapel Hill are appropriate to vest for two years or more.

What is a vested right? Chapter 160D provides the following guidance:

A vested right, once established as provided for in [160D] or by common law, precludes any action by a local government that would change, alter, impair, prevent, diminish, or otherwise delay the development or use of the property allowed by the applicable land development regulation or regulations...

Why does 160D include vesting provisions? These provisions limit local government's ability to make changes in land development regulations that would impact an approved development. For example, a LUMO text amendment cannot retroactively prohibit a use, or limit the floor area of a project, if a development approval with vested rights has already been granted.

As 160D is implemented, the Town needs to decide which, if any, development approvals should constitute *Site-Specific Vesting Plans*. This is the term used for development approvals that are vested for at least two years.

Based on the provisions of 160D, Council may identify any number of the following approval types as *Site-Specific Vesting Plans*:

- Conditional Zonings
- Special Use Permits
- Master Land Use Plans
- Site Plans
- Form District Permits
- Major Subdivisions
- Minor Subdivisions

Absent a decision to identify specific approval types, 160D states that all types listed above are considered *Site-Specific Vesting Plans* and WILL be vested for two years from the date of approval. If the Town does expressly identify *Site-Specific Vesting Plans*, then the rule by default for all other development approvals is that they are vested for one year.

There is a defined exception for multi-phase developments. If the project has at least 25 acres and is divided into multiple phases, then by default the development is vested for seven years following site plan approval of the initial phase.

Previous State statute had an equivalent term for development approvals with vested rights: *Site-specific development plan*. Accordingly, LUMO currently identifies Special Use Permits and Form District Permits as vested approvals using the previous term.

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Would any approvals merit a longer vesting period? Chapter 160D does provide the opportunity for a *Site-Specific Vesting Plan* to grant vested rights for up to five years. This may be done by definition in LUMO, or on an individual project basis. Generally speaking, a project with detailed plans and a lengthy development review process merits an extended vesting term.

While Council may specify the length of vesting terms by approval type, staff cautions against this approach because it would be difficult to administer. Instead, staff recommends:

1. Defining which development approval are considered *Site-Specific Vesting Plans*; and
2. Determining the appropriate standard vesting term for such approvals.

EFFECTS OF NEW STATE LAW
<p>A. LUMO may identify which development approvals constitute <i>Site-Specific Vesting Plans</i>. OR, if not specifically identified, any development approval that includes certain elements outlined in 160D will be considered a Site-specific vesting plan.</p> <p>B. Such approvals must provide vesting for at least two years. During that period, no change to development regulations or other zoning action may alter or diminish the approved use or intensity.</p> <p>C. Vesting of the approval may continue up to five years, subject to the discretion of Council.</p> <p>D. A multi-phase development containing 25 acres or more must be vested for seven years following site plan approval of the initial phase</p> <p>E. Building permits expire six months after issuance if work has not yet commenced.</p> <p>F. Other local development approvals, not falling under the categories listed above, expire one year after issuance if there has been no further activity.</p>
IMPLEMENTATION ACTIONS
Substitute the term <i>Site-Specific Vesting Plan</i> in place of <i>Site-specific development plan</i> wherever the prior, equivalent term appears in LUMO.
POLICY CHOICES
<p>Council may choose to pursue one of the following options for defining which development approvals constitute <i>Site-specific Vesting Plans</i>:</p> <p>A. Special Use Permits and Form District Permits, which are the only approvals that LUMO currently identifies as vested approvals.</p> <p>B. Include District-specific plans of Conditional Zoning approvals, which typically carry a vested rights condition in the rezoning action.</p> <p>C. Include other approvals allowed under Chapter 160D – any combination of Conditional Zonings, Master Land Use Plans, Site Plans, Major Subdivisions, and/or Minor Subdivisions</p>

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3. Bona Fide Farms

Under previous State law, bona fide farms have been exempt from zoning regulations when they are located in a County zoning jurisdiction (outside of town/city limits and town/city Extra-Territorial Jurisdiction). Chapter 160D goes further by stating that bona fide farms are also exempt when located within our Extra-Territorial Jurisdiction (ETJ).

A 'bona fide farm' is a property that is actively being used for agricultural, horticultural, and/or forestry purposes. Activities incidental to a farm, such as agritourism facilities and a residence for the farm operator, are considered part of the bona fide farm use. The operator must provide documentation for a property to qualify as a bona fide farm. Under Chapter 160D (and as a continuation of previous State law), any of the following forms of evidence are sufficient:

- Listing of the property in the County's Present-Use Value program
- A farm sales tax exemption certificate issued by the Department of Revenue
- Schedule F from the owner's/operator's most recent federal income tax return
- A forest management plan

Of the forms of evidence listed above, participation in the Present-Use Value (PUV) program is the easiest to track on a jurisdiction-wide basis, using publicly available data. Staff have determined that there are currently 12 parcels with PUV status located fully or partially in the Town's ETJ. The total area of these parcels is around 300 acres. These bona fide farm parcels are largely located in Chapel Hill's southern ETJ, with a few being located in the northeastern ETJ.

Other regulations, outside of zoning ordinances, are still applicable to these parcels. Chapter 160D expressly states that bona fide farms are subject to County floodplain regulations. There are also various public health and safety regulations administered by Orange County.

Zoning regulations administered by the Town are still applicable to any nonfarm activities on the same property as the bona fide farm. For example, if a minor utility station was proposed on the property, the Town would review plans to make sure it met the requirements in LUMO for a public service facility.

Bona fide farm status remains in place for a property so long as one of the four forms of evidence can be provided. If bona fide farm status ceases, then the property becomes subject to the Town's zoning regulations.

The above considerations mirror what is already in place under State law for bona fide farms in a County planning jurisdiction. The change created by Chapter 160D is to apply the same regulatory framework to bona fide farms in the ETJ.

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EFFECTS OF NEW STATE LAW
Bona fide farms located in the Chapel Hill ETJ (outside of town limits) must be exempt from zoning regulations.
IMPLEMENTATION ACTIONS
LUMO currently acknowledges that bona fide farms in the Chapel Hill Transition Area (outside the ETJ, but where we have joint review with Orange County) are exempt from land use regulations. This language needs to be expanded to exempt any bona fide farm outside of municipal limits.
POLICY CHOICES
No policy choices need to be considered, beyond the Implementation Action listed above.

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PROPOSED PROCESS

The steps below outline the process currently underway for executing 160D Updates.

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

Opportunities for Council consideration are highlighted **in blue**.

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PROPOSED PUBLIC ENGAGEMENT STRATEGY

The public engagement strategy for this project includes four phases, listed below. Following this Work Session, the project will shift into the **Policy Choices** phase of public engagement. Staff will be seeking stakeholder input on 160D updates that builds on the guidance provided by Council.

I. Building Familiarity	
Introduce the public to the key elements of Chapter 160D and how it compares 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.	
July - September 2020	Web page and Stakeholder outreach
II. Policy Choices	
Seek stakeholder feedback on implementing the provisions of Chapter 160D, once Council identifies alternatives to discuss with the community. Gather concerns about proposed changes.	
October 2020 - January 2021	Public meetings, Online survey
III. Draft Text Amendments	
Share draft Code language with the public. Determine support and ongoing concerns.	
February - May 2021	Public meetings, Online comment form
IV. Implementation Resources	
Educate the development community and others who interact with our development regulations about the adopted changes.	
Following Council adoption	Materials and methods to be determined