

STAFF MEMORANDUM

Council Work Session – 02/17/2021



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

In the summer of 2020, the Town of Chapel Hill began evaluating updates to the Land Use Management Ordinance (LUMO) and other sections of the Town Code that would 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 [Chapter 160D](#)³.

BACKGROUND

Chapter 160D of the NC General Statutes contains the revised 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.

COUNCIL ENGAGEMENT OVERVIEW

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

Staff introduced Part II topics at Council Work Sessions on [September 16, 2020](#)⁶ and [October 21, 2020](#)⁷. This month, staff is providing follow up information and seeking additional Council feedback on several previously discussed topics, as summarized below.

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

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

³ https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_160D.html

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>

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

⁷ <https://chapelhill.legistar.com/LegislationDetail.aspx?ID=4671429&GUID=0ACB18C0-C5F2-493B-9314-9174C436C4EF>

STAFF MEMORANDUM

Council Work Session – 02/17/2021

TOPICS FOR FEBRUARY 17, 2021 WORK SESSION

1. Text Amendment Adoption Process
2. Advisory Board Review of Special Use Permits
3. Appeal of Historic District Commission Decisions
4. Conditional Zoning District 2021 Conversion
5. Development Agreement Options

1. Text Amendment Adoption Process

To comply with the deadlines set by the establishment 160D, LUMO text amendments must be enacted by July 1, 2021. The proposed adoption schedule is as follows:

Dates	Milestones
March 24, 2021	Town Council calls the Legislative Public Hearing
April 2021	Planning Commission consideration
April 21, 2021	Town Council conducts Legislative Public Hearing
May 19, 2021	Town Council considers adopting 160D LUMO text amendments

This proposed schedule allows for additional consideration time, if needed, while still ensuring enactment ahead of the required deadline.

2. Advisory Board Review of Special Use Permits

Based on Council feedback at previous Work Sessions, staff studied options for including Advisory Board recommendations in the Special Use Permit (SUP) review process. Staff then presented those options to Advisory Board members at a special meeting on December 7, 2020. There were 34 attendees at the special meeting, representing all seven development review Advisory Boards.

Advisory Boards, including the Planning Commission, do have the ability to review SUPs under Chapter 160D. However, their recommendations **may NOT** be used as the basis for a Council decision. The Council decision must be made based on evidence presented at the quasi-judicial, evidentiary hearing. Therefore, Advisory Board recommendations on SUP applications will no longer be transmitted to Council. However, Council members have stated that Advisory Boards could still add value to the SUP review process by identifying issues that may have been overlooked.

- ❖ **Staff is seeking Council member feedback on the preferred direction for updating the SUP review process.** Three options are currently under consideration:
 - A. **Discontinue Review:** Planning Commission and other Advisory Boards no longer review Special Use Permit applications at their meetings.

STAFF MEMORANDUM

Council Work Session – 02/17/2021

- B. **Preliminary Forum:** Planning Commission and other Advisory Boards review SUP applications and provide input for the applicant's consideration. No recommendations are transmitted to Council, and Council does not base their decisions on Advisory Board input. Council may review Advisory Board minutes for context. Members of the public can comment on applications during Board meetings.
- C. **Vetted Input:** Same elements as Preliminary Forum. In addition, Planning staff conduct an evaluation of Advisory Board input when determining what conditions would support the necessary [SUP Findings of Fact](#)⁸. Conditions of the SUP approval are added or updated to reflect input, where appropriate⁹. Input that does not contribute to supporting one of the Findings of Fact would not be included.

At the October Work Session, Council members expressed general support for continuing to include Advisory Boards in the SUP process. The closest substitute for the existing practice with Advisory Boards is the 'Vetted Input' option. It provides opportunities for Board members to have some influence over the conditions of a development approval. By contrast, the effectiveness of the 'Preliminary Forum' option would largely depend on voluntary agreement by applicants to incorporate Advisory Board and public input.

The 'Vetted Input' option has potential challenges, which Council and staff also discussed at the October Work Session. Challenges include:

- Board members frustration if their recommendations are not reflected in SUP resolutions. This may contribute to existing uncertainty around what happens to their input.
- Staff being put in an uncomfortable role as an intermediary between Boards and Council.
- Time added to the SUP review process – sufficient for staff to compile and evaluate all input following the last Advisory Board meeting, write up the evaluation in the report to Council, and incorporate appropriate conditions into the SUP resolution. These additional tasks could add about one month to the SUP review timeline.

Advisory Board members submitted their feedback on these options following the special meeting. Many expressed a preference for the Vetted Input option and are also supportive of the Preliminary Forum option. No Board members were in favor of the Discontinue Review option. A summary of Advisory Board feedback is provided on the following page.

⁸https://library.municode.com/nc/chapel_hill/codes/code_of_ordinances?nodeId=CO_APXALOUSMA_ART4PR_4.5_SPUSPE (see LUMO section 4.5.2(a))

⁹ Appropriate additions or updates to SUP conditions, under the Vetted Input option, would need to meet **all of** the following criteria:

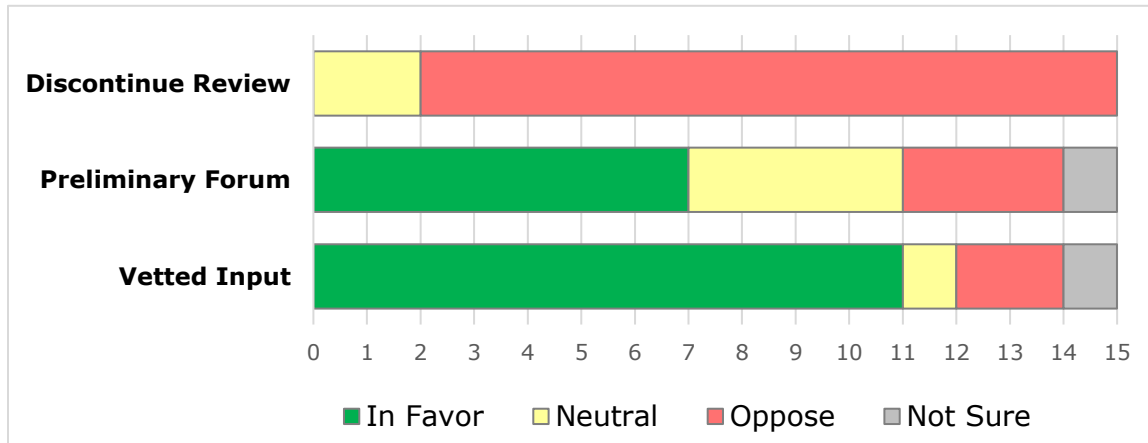
- Available data or other unbiased information demonstrates that the recommended change contributes to how the project meets the Four findings of Fact
- The condition is allowable under State law and within the Town's [basic zoning authority](#)
- The requirements imposed are reasonable and in proportion to the scope of the project
- The applicant and landowner consent to including the condition

STAFF MEMORANDUM

Council Work Session – 02/17/2021

Advisory Board Feedback on SUP Review Options

SUMMARY OF OPTIONS PREFERRED



(based on 15 responses to the 160D Advisory Board Survey, Dec 2020-Jan 2021)

ADDITIONAL IDEAS FROM BOARD MEMBERS

- A balance/combination of Preliminary Forum and Vetted Input options
- Improve LUMO regulations and long-range plans, to reduce the need for SUPs
- Review more applications as Conditional Zonings instead of SUPs
- Expand Concept Plan review to allow more feedback to the applicant early in the process

EVALUATION OF OPTONS BY BOARD MEMBERS

	Pros	Cons
Discontinue	<p>Less work for staff</p> <p>Boards could focus more on policy and program development, instead of application review</p>	<p>Less community involvement</p> <p>Loss of Board input and expertise, for both applicant and Council</p> <p>Critical issues may go unidentified. Projects generally benefit from more review, not less</p> <p>Possibly less interest in serving on Boards</p>
Prelim Forum	<p>Identifies key issues and gives ideas to applicant before the Council hearing</p> <p>Allows community involvement, even if Council cannot directly use it</p> <p>Could occur earlier in SUP review process – when project design is less set in stone</p> <p>Residents can learn about upcoming development</p>	<p>Wasted time if Board input goes nowhere</p> <p>Council won't benefit from community input and Board expertise</p> <p>'Suggestions only' gives applicants unclear path forward</p>
Vetted Input	<p>Makes better use of input and expertise provided by Boards</p> <p>Encourages developers to think critically about how to meet Four Findings</p> <p>Identifies key issues and gives ideas to applicant before the Council hearing</p>	<p>Wasted time if Board input isn't reflected in SUP resolution</p> <p>Time burden for staff</p> <p>Another layer in the SUP process</p> <p>Not wanting staff to be the 'arbiter' of which Board input Council receives</p>

STAFF MEMORANDUM

Council Work Session – 02/17/2021

Another area of Council and Board member feedback is an interest in limiting the number of Special Use Permit applications, given the process changes required by State law. More projects could instead be directed towards the Conditional Zoning process. The most obvious way to institute this change would be to modify the footnote language of [LUMO Table 3.7-1: Use Matrix](#)¹⁰ – commonly known as the 20/40 rule. Under this rule, larger projects in Chapel Hill (exceeding 20,000 sq ft of building floor area or 40,000 sq ft of disturbed area) currently require either a Special Use Permit or Conditional Zoning. The LUMO language could be modified so that Conditional Zoning was the only available path for these larger projects.

If Council is interested in this type of approach, the next consideration is timing. Stakeholders should have sufficient opportunity to comment on potential changes to the 20/40 rule. This change would **not** be necessary to establish compliance with Chapter 160D. Because the deadline to adopt text amendments for 160D compliance is July 1, 2021, the most practical path may be to consider changes to the 20/40 rule as a follow-up effort beginning in Fall 2021, or as part of the LUMO Rewrite.

EFFECTS OF NEW STATE LAW
<ul style="list-style-type: none">A. <i>Starting 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
<ul style="list-style-type: none">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
<p>Council may choose to pursue one of the following options:</p> <ul style="list-style-type: none">A. Discontinue: Planning Commission and other Advisory Boards no longer conduct review during the Special Use Permit review process.B. Preliminary Forum: 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.C. Vetted Input: Same as Preliminary Forum, except recommendations and input are transmitted to staff. Staff would then carefully evaluate all recommendations to determine what is reasonable and warranted to include as a condition of approval in the SUP resolution. <p>In addition, Council could reduce the number of SUP applications by reevaluating the 20/40 threshold that currently triggers a Special Use Permit requirement. LUMO changes could be made as part of 160D updates, or could be considered in the future.</p> <ul style="list-style-type: none">D. Projects exceeding 20,000 sq ft of built area or 40,000 sq ft of disturbed area could instead require a Conditional Zoning.

¹⁰https://library.municode.com/nc/chapel_hill/codes/code_of_ordinances?nodetid=CO_APXALAUSMA_ART3ZODIU_SDIST_3.7USRE (see footnote below LUMO Table 3.7-1)

STAFF MEMORANDUM

Council Work Session – 02/17/2021

3. Appeal of Historic District Commission Decisions

Chapter 160D provides two different paths for appeals resulting from Historic District Commission (HDC) decisions on Certificates of Appropriateness (COA). Such appeals may proceed to Superior Court or be first heard by the Board of Adjustment (BOA) before going to Superior Court, if necessary. It should be noted that 160D does not give an applicant the option of deciding which appeal path to take. Under 160D, either the local code specifies COA appeals go first to the Board of Adjustment or such appeals go directly to Superior Court.

❖ Staff is seeking Council member feedback on the preferred process for HDC appeals.

Since 2007, the BOA has heard 14 appeals of HDC decisions. In five of these cases, the HDC decision was overturned. In two of the 14 cases, the proceedings continued to Superior Court. Each Board hears many cases every year. Appealed HDC decisions therefore represent just a small percentage of the total number of decisions made by HDC and BOA.

Staff discussed the possibility of COA appeals going directly to Superior Court, bypassing the BOA, with Council at the September 2020 Work Session. At that time, Council asked staff to discuss the possibility of changing the existing COA appeals process with both the HDC and the BOA.

Staff met with the Board of Adjustment in December, and most members of the BOA wished to retain the ability to hear COA appeals. These members of the BOA felt it was important to:

- a. Keep the first round of appeals within the Town due to the importance of local decision making;
- b. Critically review COA decisions prior to going to Superior Court;
- c. Give appellants a decision on the same night their appeal is heard as opposed to waiting for Superior Court to render its decision; and,
- d. Provide appellants a speedier appeal opportunity since appeals can usually be heard by the BOA before they can be considered by Superior Court.

There was one dissenting voice at the BOA that felt COA appeals bypassing the BOA had some merit for the following reasons:

- a. The BOA overturning HDC decisions may cause discord between the BOA and the HDC;
- b. Some COA appeals are ultimately heard by Superior Court; and,
- c. The BOA's ability to reverse HDC decisions could discourage some Town residents from serving on the HDC.

Staff met with the Historic District Commission in January and the HDC generally agreed that COA appeals should continue to be heard by the BOA. The HDC weighed the advantages and disadvantages of both COA appeal routes including court costs, timing, and legal/application fees. The HDC also discussed the formal nature of appeals to Superior Court and the advantages of retaining appeals with the BOA. Many commissioners expressed that it was better for appellants and the HDC to maintain the existing multi-layered appeals process that allows HDC decisions to be first heard by the BOA and then to Superior Court, if needed.

STAFF MEMORANDUM

Council Work Session – 02/17/2021

EFFECTS OF NEW STATE LAW
Appeals of HDC decisions may continue going to the BOA (current practice), or bypass the BOA and go directly to Superior Court (new option offered by State law).
IMPLEMENTATION ACTIONS
No policy change is required, but choices are available.
POLICY CHOICES
Council could choose to change the HDC Appeals process or to leave the current process in place. LUMO changes can be made now as a part of the 160D amendments, or at a later date. Stakeholders have identified the following advantages for each option: <u>Appeals to BOA</u> <ul style="list-style-type: none">- Avoids Court costs for Town and applicant- Shorter process for applicant – no long wait for a court date, and decision is made on same night as the hearing- Less workload for Town Attorney's Office- Opportunity for Town to maintain local decision-making and critical review of decisions that result in Appeals- Allows a multi-layered appeals process for cases that proceed to Superior Court <u>Appeals to Superior Court</u> <ul style="list-style-type: none">- Less workload for BOA members- Saves time and money for any Appeals that are ultimately heard by Superior Court- Avoids tension between HDC and BOA if a decision is overturned

4. **Conditional Zoning District 2021 Conversion**

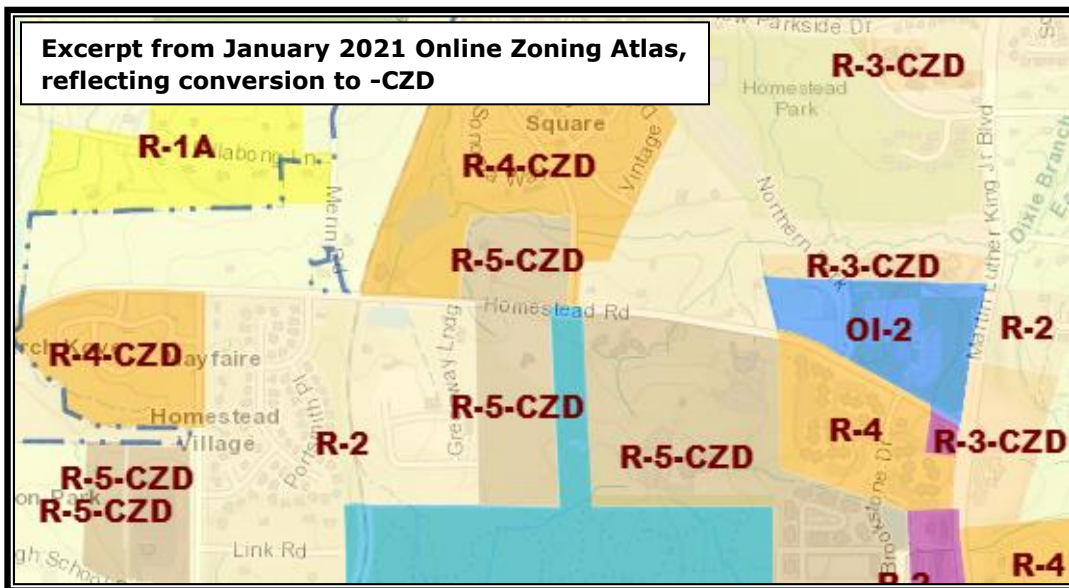
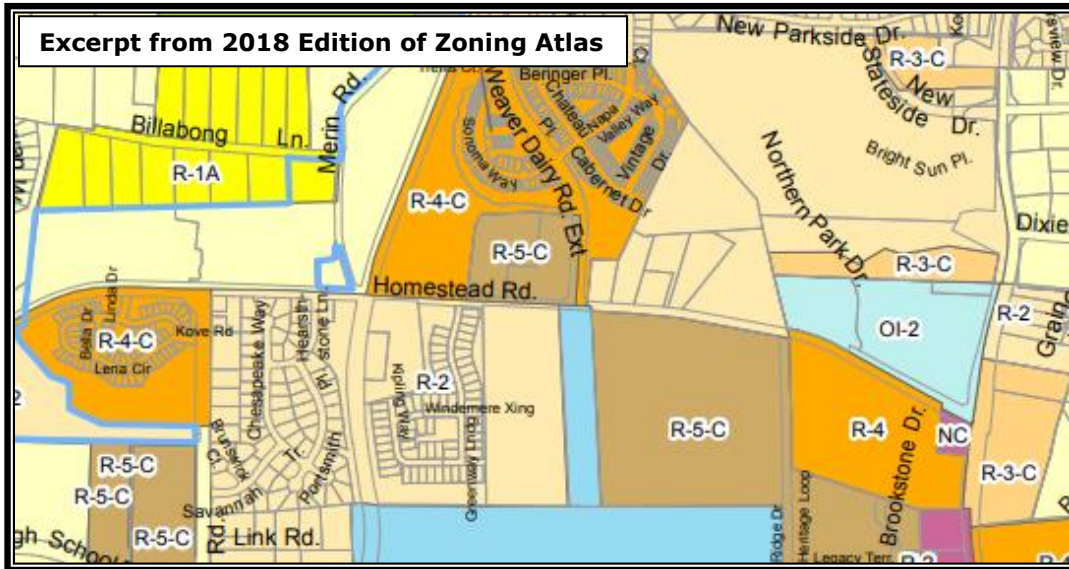
One provision of S.L. 2019-111 specifies that on January 1, 2021, all existing *Conditional Use* districts were automatically converted to *Conditional Zoning* districts. Note that this date is before the effective date of the rest of Chapter 160D. The effect of the zoning district conversion is more a matter of terminology than substance. The conditions of previously adopted Special Use Permits will continue to remain valid and in effect. Any future changes proposed to Conditional Use Districts would be considered through the Conditional Zoning process.

In early January, Town staff executed the necessary updates to reflect zoning district conversions in the Chapel Hill Zoning Atlas. All zoning district suffixes of "-C" on the Zoning Atlas were changed to "-CZD."

❖ ***No action or direction from Council is needed at this time.***

STAFF MEMORANDUM

Council Work Session – 02/17/2021



5. Development Agreement Options

Chapter 160D affirms the ability for the Town to enter into development agreements (DAs), and largely maintains the existing framework for establishing such agreements. The Chapel Hill LUMO currently supports the use of DAs through two zoning districts, U-1 (University-1) and DA-1 (Development Agreement-1).

- ❖ **No action or direction from Council is needed at this time.** Staff is providing this information to make Council aware of expanded opportunities to establish DAs through the development approval process, as well as additional flexibility for the components of a DA that are allowed under State law.

STAFF MEMORANDUM

Council Work Session – 02/17/2021

Changes to the LUMO provisions on development agreements are not required. However, in some cases as identified below, LUMO changes would be needed if Council wants to take advantage of Chapter 160D provisions.

Here are the provisions to be aware of:

- The Town is given the express authority to incorporate a DA as part of conditional zoning. To take advantage of this provision, it may be useful to align our existing development agreement zoning districts with our Conditional Zoning framework. In other words, LUMO **could** be updated to establish U-1-CZD and DA-1-CZD (University-1- and Development Agreement-1-Conditional Zoning District).
- Chapter 160D shortens the list of mandated topics for DAs. State law previously listed 8 topics that every development agreement needed to address. That list of topics was incorporated into Chapel Hill’s LUMO. Two of these topics are no longer mandated under 160D:
 - A DA is no longer required to describe the development permits that will be required subsequent to adoption.
 - A development schedule with a commencement date and interim completion dates is not required.

These topics are now optional. They may continue to be required by LUMO, or they may be negotiated as requirements for individual development agreements. Council **could** consider a LUMO change if there is interest in more flexibility when framing DAs. Note that aside from mandated topics, a development agreement may cover any other matter not inconsistent with State law.

- Penalties for violating the terms of a DA may be established, and may be applicable to either party (Town and developer). Council **could** incorporate such penalties into LUMO and make them broadly applicable to all development agreements. Or, penalties may be individually negotiated for each DA.
- Concurrent review of a DA and a rezoning, subdivision, and site plan is allowed. So for example, a project could be going through the site plan review process at the same time the Council is considering a development agreement for the site. *No change to LUMO is necessary.*
- Development agreements may include conditions for the developer to provide public improvements beyond typical requirements, so long as the Town and developer mutually agree to the improvements. An improvement does not have to be identified on an adopted plan, and it could exceed the Town’s basic zoning authority in areas such as affordable housing and green building features. However, the DA may not impose any tax or impact fee not otherwise authorized by law. *No change to LUMO is necessary.*

STAFF MEMORANDUM

Council Work Session – 02/17/2021

EFFECTS OF NEW STATE LAW
<p>A. Development agreements (DAs) may be negotiated concurrently with several types of development approvals (conditional zoning, other rezoning, site plan, subdivision). The DA itself must be processed as a legislative decision.</p> <p>B. Additional flexibility is offered regarding what components a DA can include.</p>
IMPLEMENTATION ACTIONS
No policy change is required, but choices are available.
POLICY CHOICES
<p>Council may choose to pursue any number of the following options, or may choose to pursue none. LUMO changes can be made now as a part of the 160D amendments, or at a later date.</p> <p>A. Establish U-1-CZD and DA-1-CZD zoning districts, to support the option for Conditional Zoning that incorporates a DA.</p> <p>B. Shorten the list in LUMO of topics that a DA is required to address. A description of subsequent development permits and/or a development schedule could be included in DAs on a case-by-case basis.</p> <p>C. Establish penalties in LUMO for violating the terms of a DA.</p>

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 2020 - February 2021
5.	Public Engagement – Policy Choices	October 2020 - January 2021
6.	Draft Text Amendments	February – March 2021
7.	Planning Commission Review	April 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**.

STAFF MEMORANDUM

Council Work Session – 02/17/2021

PROPOSED PUBLIC ENGAGEMENT STRATEGY

The public engagement strategy for this project includes four phases, listed below. This Work Session comes at the end of the **Policy Choices** phase of public engagement, where staff sought stakeholder input on 160D updates to build 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	Stakeholder meetings, Advisory Board survey
III. Draft Text Amendments	
Share draft Code language with the public on the project web page. Determine support and ongoing concerns.	
February - May 2021	Stakeholder meetings, Virtual office hours, 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