Chapter 160D Question & Answer

Adam Lovelady, David Owens, and Ben Hitchings
UNC School of Government

April 7, 2020

This Chapter 160D Question & Answer provides clarifications and answers to supplement other resources on Chapter 160D provided by the UNC School of Government. Visit nc160D.sog.unc.edu to view explainer videos, order the Chapter 160D book, and access additional resources.

The content is organized as follows:

I. Technical Corrections and Legislation Updates

As required when Chapter 160D was enacted, Part I of S.L. 2019-111 and all other legislation enacted in 2019 is to be incorporated into Chapter 160D before it becomes effective. The General Statutes Commission is to study how this is be done and is to recommend implementing legislation to the 2020 session of the General Assembly.

The Commission is at work on this report and expects to approve its report and recommended legislation in May 2020. In addition to some clean-up of minor clerical errors, the following technical corrections have been discussed and may be incorporated into Chapter 160D by the General Statutes Commission during the legislative session in spring 2020.

- Accelerate the effective date of Chapter 160D to allow options authorized under Chapter 160D to be effective when local governments update ordinances in 2020, while extending the deadline for adoption of conforming local ordinances until July 1, 2021
- Incorporate Part I provisions including vested rights, permit choice, and judicial review
- Allow "land-use plan" to suffice for requirement to have a comprehensive plan
- Delete "development agreements entered into," from definition of "development approvals" as it is not an administrative or quasi-judicial approval in 160D-102(13)
- Add subsection to clarify city zoning and subdivision must be applied jurisdiction-wide while county zoning and subdivision regulation can be applied to only part of its jurisdiction. 160D-201
- Fix provision re appointment of ETJ members to delete reference to hearing that is no longer required in 160D-307(b)
- Clarify that 15-day time for initial review applies to building permits, not entire Ch. 160D, in 160D-1110(b)
- Add inadvertently omitted 160A-439.1 re vacant building receivership as 160D-1130

II. Implementation and Context

A. In General

What's the deal with the numbering? It used to be G.S. 160D-1-1 and now it is 160D-101.

The original numbering of Chapter 160D was altered to comply with the standard numbering conventions of the North Carolina General Statutes, but the order is the same and the numbering is still essentially the same. As adopted, each section of Chapter 160D used this numbering convention: chapter number-article number-section number. For example, the first statutory section in Article 7 on zoning regulations was G.S. 160D-7-1. When codified, a similar but slightly different numbering convention was used, adapting the Chapter 160D numbering to the convention used in other chapters of the General Statutes. Instead of a three-part number, there is a two-part number using this numbering convention: chapter number-section number. For Chapter 160D, each section number will start with the relevant article number. The result is essentially a fusing of the old article number and section number, often with a zero in between. For example, the first section in Article 7 on zoning regulations will be G.S. 160D-701, while the first section in Article 10 on development agreements will be G.S. 160D-1001, thus retaining to the extent possible the clarification to the law's organizational structure.

How quickly do local governments need to update ordinances? Which part should we amend first, Part I or Part II (Ch. 160D)?

There is not a prescribed timeline, but given the breadth of the changes, local governments would be wise to begin the process of updating ordinances sooner rather than later. The changes in Part I of Session Law 2019-111 were effective upon adoption (they are already law). Chapter 160D becomes effective on January 1, 2021. It will take some time for local governments to review ordinances and propose amendments, seek review from the planning board, and seek adoption from the governing board.

If a local government adopted language to incorporate changes before 2021, do changes go into effect when adopted or must they wait until Jan 2021 to go into effect?

Many changes in Chapter 160D can be made immediately. Local governments, for example, can amend ordinance to change the terminology from "conditional use permit" to "special use permit" right away. But, as noted in the 160D Checklist, there are some things for which local governments will not have authority until January 1, 2021. For those items, local governments may go through the process of adopting the amendment during 2020, but have an effective date of January 1, 2021. Note that the technical corrections adopted by the General Assembly in the 2020 legislative session may allow for an earlier effective date so that local governments can make 160D changes effective at the time of adoption.

Can consistency statement changes be implemented immediately or do communities need to wait until 2021?

Prior rules for consistency statements, outlined at G.S. 160A-383 and 153A-341, remain in effect. Chapter 160D provides new flexibility for consistency statements, but that change is not effective until January 1, 2021, unless additional legislation authorizes earlier effectiveness.

If a local government has local, special legislation or charter provisions, will it remain or do they have to go back to the legislature?

Local legislation and charter provisions remain unless there is clear intent in Chapter 160D to supersede that local authorization. G.S. 160D-111(b) provides that "[n]othing in this Chapter repeals or amends a charter or local act in effect as of the effective date of this Chapter unless this Chapter or a subsequent enactment of the General Assembly clearly shows a legislative intent to repeal or supersede that charter or local act."

Are the changes to voting (160A-75, not requiring super majority on first consideration) in effect now?

No. But again, additional legislation could authorize an earlier effective date.

Did 160A and 153A go away? Or just get modified?

Chapter 160A (municipal authority) and Chapter 153A (county authority) still exist. The statutes authorizing broad local government authority, including form of government, general ordinance power, taxation, law enforcement, utilities, and more are still outlined in those chapters of the North Carolina General Statutes.

The old development regulation statutes were codified as articles within those chapters (Article 19 in Chapter 160A and Article 18 in Chapter 153A). Those specific articles are pulled out to create the new Chapter 160D and those specific articles are repealed once Chapter 160D becomes effective. The broad authorities for local governments are still outlined in Chapter 160A and Chapter 153A.

What happens if a local government does nothing?

While there is not a state agency looking over the shoulders of local governments to demand compliance with Chapter 160D, if a local government did nothing to bring ordinances and policies in line with Chapter 160D, there could be practical and legal problems. Some changes in Chapter 160D will trump local ordinances. The broadened conflict of interest standard, for example, will apply whether or not the local government adopts it. Additionally, the rights of property owners outlined in Chapter 160D and Part I of S.L. 2019-111 will exist regardless of local action. Failure on the part of a local government to recognize such rights could result in legal challenge and, potentially, attorneys' fees for the challenger.

One notable item is the comprehensive plan requirement. If a local government with zoning fails to adopt a comprehensive plan by July 1, 2022, then the local zoning regulations will be inapplicable and unenforceable until such a plan is in place. If a local government already has a comprehensive plan, there is no need to re-adopt it, but it does need to be reasonably maintained with occasional updates. When updating a plan, a local government will need to follow the standards and procedures outlined for comprehensive plans.

A. Types of Decisions

What's the deal with special use permits and conditional use permits and conditional use district zoning and such?

The terminology of zoning decisions has caused great confusion and Chapter 160D seeks to align terminology and clarify applicable procedures. Here is a quick rundown of decision terms (and the impact of Chapter 160D).

- Conditional Use Permit (CUP): a quasi-judicial, site-specific development approval with conditions commonly used in North Carolina communities. Under 160D, *conditional use permits* are re-named *special use permits*.
- Special Use Permit (SUP): synonymous with conditional use permit—a quasi-judicial, site-specific development approval with conditions commonly used in North Carolina communities.

Under chapter 160D, all quasi-judicial, site specific zoning approvals are referred to as *special use permits*.

- Conditional District Zoning (or Conditional Zoning): a legislative, site-specific zoning approval with conditions. *Conditional zoning* was added to the statutes in 2005 and remains authorized under Chapter 160D.
- Conditional Use District Zoning (also called Special Use District Zoning): a combined process of a legislative rezoning with a quasi-judicial conditional use permit (or special use permit). This process was a creative procedural tool that arose in the 1980s and used to impose conditions on rezoning decisions. Now that legislative zoning with conditions (conditional zoning) is clearly authorized in North Carolina, *conditional use district zoning* is unnecessary and unauthorized.

With regard to current approvals, must a town that has been doing special use permit zoning also transition all the existing, valid SUPs to something else & rezone all of those properties by the January 1 deadline? Do we need to convert our old CUPs to SUPs?

No. Prior-approved projects continue as approved and the decision types are automatically converted to the proper type under Chapter 160D. Conditional use permits become special use permits. Conditional use districts become conditional districts.

Section 2.9(b) of S.L. 2019-111 provides that "[a]ny special use district or conditional use district zoning district . . . shall be deemed a conditional zoning district consistent with the terms of this act, and the special or conditional use permits issued concurrently with establishment of those districts shall be valid. . . Any valid 'conditional use permit' issued prior to January 1, 2021, shall be deemed a 'special use permit' consistent with the provisions of this act."

When 160D comes into effect, do we need to change the zoning map to reflect the change to conditional use districts, special use districts, and such?

There is no requirement to update the map, but it may be prudent for administration, record keeping, and public information.

What if you have conditional district rezoning but the new district requires a special use permit for building height? Still allowed?

If the approvals and processes are handled separately, that would be allowed. Chapter 160D gets rid of the combined legislative AND quasi-judicial process of conditional use district zoning. But, Chapter 160D preserves the authority for legislative conditional zoning AND SEPARATELY the authority for the quasi-judicial special use permits. So, presumably, an ordinance could call for conditional zoning for the base approval and quasi-judicial permits for special allowances. The local government, though, should be mindful of meshing those processes together. With the changes of Chapter 160D, a local government should avoid having a district where any and all uses require a special use permit (no permitted uses). The authority for such a district is questionable and it would be prudent to eliminate it.

B. Terminology

How important is it to mirror the exact language of overlapping definitions that appear at the beginning 160D? (i.e. "dwelling" "landowner or owner") Do you think these definitions should be adopted in local codes?

For some terms, the statutes require that the local ordinance terminology match the statutory terminology. For other terms, it will be helpful for interpretation and clarity to have matching terminology. So in general, it is prudent to match the ordinance terminology with the statutory terminology.

Currently, when we publish "Public Hearing" notices, whether it be legislative or Conditional Use, we use the heading of "Notice of Public Hearing by City Council." To be compliant with 160D, must we change title currently in use for these hearings? Will these terms be compliant with 160D?

The procedures and purpose of general public hearings are very different from those for quasi-judicial evidentiary hearings. In order to distinguish between those different hearings, Chapter 160D uses the terms *legislative hearings* for legislative matters and *evidentiary hearings* for quasi-judicial matters. While not explicitly required by Chapter 160D, it would be prudent and advisable to use the same terminology in local ordinances and notices.

III. Jurisdiction and Boards

A. Jurisdiction

When a property is split between two jurisdictions, what is the process for mutual agreement on split jurisdiction properties? Who approves it? What is the form of the agreement for single regulation? Is the agreement in writing for each instance or just in a generic interlocal agreement?

G.S. 160D-203 authorizes mutual agreement for exclusive regulation of split parcels. The agreement takes the form of a mutual agreement under Article 20 of Chapter 160A (Interlocal Cooperation). Additionally, there must be written consent from the landowner. The mutual agreement must be evidenced by a resolution formally adopted by each governing board and recorded with the register of deeds in the county where the property is located within 14 days of the adoption of the last of the required resolutions.

Is there any change in extraterritorial jurisdiction to allow a municipality to enforce nuisance regulation in the ETJ?

No. Just as was the case under Chapter 160A, ETJ authority under Chapter 160D is authority to exercise development regulations (not general police power ordinances) in the ETJ area.

For county zoning, what about the old requirement that partial county zoning had to cover at least 640 acres?

G.S. 153A-342(d) previously allowed a county to zone less than its entire jurisdiction but required each zoned area to have at least 640 acres, at least 10 parcels, and at least 10 separate landowners. G.S. 160D-201(b) authorizes county planning and development regulations in any area not subject to municipal jurisdiction and does not carry forward the minimum size of areas subject to county zoning regulations. This provides additional flexibility to counties with partial-county zoning coverage. While formerly common, only twelve counties had partial-county zoning as of January 2019.

What is the process for a Town to relinquish control of its ETJ back to the county?

G.S. 160D-202(h) describes the process by which a municipality may relinquish its authority to enforce development regulations in some or all of its extraterritorial jurisdiction. As under prior law, there is not much detail on the procedure, so it is prudent to follow the notice and hearing procedures applicable to extension of extraterritorial jurisdictions. The municipal development regulations remain in effect until the county has adopted development standards or 60 days have elapsed. 160D clarifies that a county may adopt standards concurrently with its assumption of jurisdiction. Additionally, note that if a county and municipality have an agreement concerning ETJ, G.S. 160D-202(i) allows that such agreement may be rescinded with two years' written notice.

B. Boards

Can the planning board serve as the board of adjustment?

Yes. As was the case under prior law, G.S. 160D-302 allows that "[t]he ordinance may designate a planning board or governing board to perform any of the duties of a board of adjustment in addition to its other duties." Additionally, a local government "may create and designate specialized boards to hear technical appeals."

Is there an example oath for board members?

G.S. 11-7 provides a standard form for an oath of office. That oath is as follows: "I, _____, do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God."

If the jurisdiction already has a Historic Preservation Commission established via special legislation, do we need to include the verbiage from 160D-303 in our revised ordinance?

Pursuant to G.S. 160D-111(b) local legislation and charter provisions remain unless there is clear intent in Chapter 160D to supersede that local authorization. The language now codified at 160D-303 for the composition and forms of historic preservation commissions is essentially identical to the provisions at 160A-400.7 under prior law. It would appear there is not clear legislative intent to supersede local legislation concerning the composition and form of a preservation commission.

Are there any special considerations to be aware of in 160D for bodies created using Part/Art. 7 - Community Appearance Commissions in 160A (i.e. 160A-451 through 160A-455)?

Chapter 160D made no substantive changes to the provisions regarding Community Appearance Commissions. This statutory language is now found in G.S. 160D-960 through 160D-963.

IV. Administration

A. In General

Is the requirement to preserve prior zoning maps retroactive? Where in 160D-105 is the requirement that prior zoning maps must be saved and made available?

G.S. 160D-105 provides, among other things, that "[z]oning district maps that are so adopted shall be maintained for public inspection in the office of the local government clerk or such other office as specified in the development regulation. The maps may be in paper or a digital format approved by the local government." This new map recordkeeping provision aligns with similar requirements for county and municipal clerks to maintain township and municipal maps and to maintain incorporated technical codes, as required at G.S. 153A-47, 160A-76.

With regard to zoning maps and ordinances, caselaw has established that local governments have an obligation to maintain prior maps and ordinances. *Shearl v. Town of Highlands*, 236 N.C. App. 113, 762 S.E.2d 877 (2014).

For revocation of a development approval, the checklist says the same process must be followed as the approval. In a community that has the governing board (Council) issue special use permits, does that mean it would take Council action to revoke the special use permit?

Yes, in order to revoke a special use permit, it would need to go back to the board that issued the permit. Other enforcement options would be available, however. The local government could issue notices of violation, charge civil penalties, and bring legal action for court ordered enforcement even if the local government does not seek to revoke the permit.

Do the statutes of limitations on court actions apply only to zoning violations? Or to minimum housing cases, as well?

G.S. 1-49 and 1-51 establish a statute of limitations for enforcing a "violation of a land-use statute, ordinance, or permit or any other official action concerning land use carrying the effect of law." Given that phrasing, it is reasonable to interpret the statute of limitations to apply to enforcement of ordinances adopted and permits issued under Chapter 160D, including zoning, subdivision, minimum housing, and other development regulations. That said, the statute of limitations "does not limit the remedy of injunction for conditions that are actually injurious or dangerous to the public health or safety." In the case of minimum housing, a local government may still seek a court-ordered injunction if the case involves clear risk to public health or safety.

What's the deal with minor modifications?

See the discussion below under Administrative Decisions.

B. Conflicts of Interest

For staff conflicts of interest, the statute refers to conflicts in the case of an "administrative decision." What about for an administrative recommendation like for a rezoning staff report?

Chapter 160D does not directly address this, but it is prudent to treat staff recommendations the same as staff administrative decisions. Chapter 160D applies the same standard to appointed boards making advisory decisions, so it is reasonable and appropriate for that to extend to staff advisory decisions.

The conflict of interest section cites "associational relationship" as a conflict. Who is this intended to include? Does this mean that a planner could not issue a permit for a neighbor, doctor, pastor, auto mechanic, etc.?

Conflict of interest questions are always fact-specific and depend upon the particular context. Notably the G.S. 160D-109(c) refers to "a close familial, business, or other associational relationship" (emphasis added). A staff person could issue permits to an acquaintance or a general service provider. A staff person could not issue a permit to a close friend. Of course, there are many shades of grey between conflict and no-conflict. The details matter.

It is worth noting that, as specified at G.S. 160D-109(f), "[f]or purposes of this section, a 'close familial relationship' means a spouse, parent, child, brother, sister, grandparent, or grandchild. The term includes the step, half, and in-law relationships."

For staff conflicts of interest, what can be done if there is only one decision maker and they have a direct or familial tie with the applicant?

160D-109(c) provides that "[i]f a staff member has a conflict of interest under this section, the decision shall be assigned to the supervisor of the staff person or such other staff person as may be designated by the development regulation or other ordinance." In a jurisdiction with limited staff, that may be

difficult or impossible. Such small jurisdictions could contract for staff from another jurisdiction to handle such matters or arrange for another authorized official to handle the permitting.

V. Substance of Development Regulations

A. In General

How does 160D coordinate other development regulations like stormwater and watershed with zoning and subdivision regulations and process?

With regard to stormwater control and water supply watershed management, Chapter 160D maintains that authority previously outlined in 160A and 153A. Section 160D-925 continues the authority for local stormwater control regulations with reference to related state and federal regulations. Similarly, Section 160D-926 maintains authority local authority for watershed regulations pursuant to G.S. 143-214.5, noting that the requirements of this statute take precedence, and that the provisions of Chapter 160D are applicable to the extent they are not inconsistent with that statute. Chapter 160D also clarifies that local governments can include watershed maps by reference.

Notably, Article 6 of Chapter 160D applies to the adoption and amendment of all development regulations. So, the adoption or amendment of a stormwater ordinance or watershed ordinance will need to follow the procedures for legislative decisions as outlined in Article 6, unless another statute provides otherwise.

With regard to zoning exactions, does this mean sidewalk fee in lieu is now legit outside of subdivisions?

Probably yes, but there is some ambiguity.

G.S. 160D-702 provides that "[w]here appropriate, a zoning regulation may include requirements that street and utility rights-of-way be dedicated to the public, that provision be made of recreational space and facilities, and that performance guarantees be provided, all to the same extent and with the same limitations as provided for in G.S. 160D-804." The intent appears to be to provide uniformity of exactions for subdivision and various zoning decision. That said, this language for the zoning authority does not match precisely with the language for the subdivision authority.

With form-based codes being authorized by 160D, will local governments be able to regulate the physical design of single-family homes?

No. Chapter 160D confirms the authority for form-based codes and preserves the limits on regulating "building design elements" for certain residential structures.

G.S. 160D-703(a)(3) authorizes use of form-based zoning districts that "address the physical form, mass, and density of structures, public spaces, and streetscapes."

Even though this provision clarifies that use of form-based standards in a zoning regulation is permissible, Chapter 160D does not remove the statutory limits adopted in 2015 that limit regulation of "building design elements" for structures subject to the one-and two-family residential building code. Those limits, which are relocated to G.S. 160D-702(b), prohibit zoning regulation of exterior building color, type or style of exterior cladding material, and other design elements for these residential structures. Chapter 160D continues to provide exceptions if the design standards are consented to as part of a zoning approval.

With regard to development agreements does the local ordinance have to include provisions on development agreements?

In order to enter into a development agreement, the local government must follow the procedures outlined in Article 10 of Chapter 160D. G.S. 160D-1003 allows the local government to establish local procedures and requirements to consider and enter into development agreements, but there is no requirement for such local rules.

Since the "periodic inspection" procedures were moved from the building code statutes into the housing code statutes, does that mean a local government must adopt a minimum housing code to perform periodic inspections?

No. A general provision allowing periodic inspection of all buildings, not just residential ones, for unsafe, unsanitary, or hazardous conditions, remains in the building code article as G.S. 160D-1117.

G.S.160D-1129 authorizes local regulations for nonresidential buildings within an entire planning and zoning area. But many cities have unsafe nonresidential buildings ordinances, like their minimum housing ordinances, that apply within the corporate limits. Is this OK?

No. Prior law limited such nonresidential building ordinances to apply only in the corporate limits. Chapter 160D revises that language to align with the geographic scope of other development regulations. G.S. 160D-1129(a) reads that such regulations for nonresidential buildings or structures "shall be applicable within the local government's entire planning and development regulation jurisdiction, or, limited to one or more designated zoning districts or municipal service districts." Such ordinances must follow one of these delineations. The General Statutes Commission is also considering modest potential additional delineations.

B. Subdivision

What will subdivision performance guarantees in conformity with SL 2019-79 contain in terms of actual language?

Those details are outlined in the bulletin 2019 North Carolina Legislation Related to Planning and Development Regulation available at https://www.sog.unc.edu/publications/bulletins/2019-north-carolina-legislation-related-planning-and-development-regulation.

Was there any clarification in 160D about the authority to allow fee-in-lieu for sidewalks?

Chapter 160D does not alter the authority under the subdivision statutes for requiring improvements and dedications.

C. Historic Preservation

Does 160D-947(c) mean that we re-title historic district design guidelines to historic district standards, or does it mean that we are to have specific standards in the ordinance for setbacks, building footprint, or stay of demolition?

In G.S. 160D-947(c), the term "guidelines" is replaced with the term "standards." Documents that have been titled guidelines will need to be titled standards. While some guidelines may need to be tightened up and clarified to serve as standards, there is not necessarily a need to adopt new standards. The intent is to clarify that the design criteria outlined in local design documents are not suggestions or advice but binding, mandatory standards for preservation decisions.

As with all quasi-judicial decisions, decisions for certificates of appropriateness must be based on adequate guiding standards. Architectural congruence demands some amount of judgment by the decision-makers, but COAs must not be based on the gut feelings or whims of the board members. Standards must be in place to guide the evaluation of whether a change is incongruous with character of the district.

160D provides that Preservation Commission decisions may now be appealed directly to Superior Court rather than going to Board of Adjustment first. We plan to consider this, but what are the pros/cons?

Under prior law, preservation commission decisions were appealed to the board of adjustment prior to appeal to superior court. Appeal to the board of adjustment allows for a somewhat less formal appeal (and potentially quicker and less expensive appeal). But, it asks the board of adjustment to act in an unfamiliar way. Boards of adjustment typically are acting like a trial court—holding an evidentiary hearing and making determinations on variances and appeals of staff decisions. When they review preservation commission decisions, boards of adjustment must act like an appeals court—reviewing the evidence from below and evaluating the decision-making process. This is not a familiar role for boards of adjustment and it is easy to mess up (seeking new evidence, applying the wrong standards, etc.).

Under Chapter 160D, the default rule is that preservation commission decisions will go to superior court just like any other quasi-judicial decision.

D. Manufactured Housing and Small Houses

We can no longer exclude manufactured homes based on their age, but can we continue to exclude bringing pre-HUD models? Can we require that HUD models only be located along certain corridors? Can we require appearance criteria of pitched roof?

Chapter 160D does not alter the law concerning local government regulations of manufactured homes. G.S. 160D-910 preserves the allowance to regulate appearance and dimensional criteria for manufactured homes. Additionally, as under prior law, local governments must not prohibit manufactured homes altogether, but they may limit manufactured homes to certain zoning districts.

G.S. 160D-910 confirms the caselaw rule that local governments may not exclude manufactured homes based solely on the age of the home (*Five C's, Inc. v. Pasquotank County*, 195 N.C. App. 410, 672 S.E.2d 737 (2009)). In that case, an ordinance prohibiting manufactured homes more than ten years old was struck down as beyond the statutory authority.

It is worth noting that G.S. 160D-910 continues to reference G.S. 143-145 for the definition of "manufactured home." It is unclear if that definition may provide some limitations as to HUD labeling.

With the new law in July 2019 prohibiting zoning regulations from establishing minimum dwelling square footage requirements/standards, can "tiny homes" be regulated through zoning as to restricting where such dwellings are allowed?

No. S.L. 2019-174 (H.B. 675) amends the basic zoning authority and will be incorporated into Chapter 160D. Specifically it provides that "[a] zoning ordinance shall not set a minimum square footage of any structures subject to regulation under the North Carolina Residential Code for One-and Two-Family Dwellings." With that, a zoning ordinance could not limit residential structures based on minimum square footages. The ordinance can still regulate density, location, setbacks, and other development standards for residential structures generally.

VI. Comprehensive Plans

Is there a definition of a comprehensive plan? How substantial a plan will now be required?

Note that technical corrections to Chapter 160D likely will allow a land-use plan to suffice for the requirement to adopt a comprehensive plan.

As adopted, G.S. 160D-102 defined "comprehensive plan" as follows: "The comprehensive plan, land-use plan, small area plans, neighborhood plans, transportation plan, capital improvement plan, and any other plans regarding land use and development that have been officially adopted by the governing board." G.S. 160D-501 calls for "a comprehensive plan that sets forth goals, policies, and programs intended to guide the present and future physical, social, and economic development of the jurisdiction." Additionally, the statute states that "[a] comprehensive plan is intended to guide

coordinated, efficient, and orderly development within the planning and development regulation jurisdiction based on an analysis of present and future needs. Planning analysis may address inventories of existing conditions and assess future trends regarding demographics and economic, environmental, and cultural factors." G.S. 160D-501 suggests elements that may be included in a comprehensive plan, but does not require them. The statute does require that the planning process must include "opportunities for citizen engagement in plan preparation and adoption."

Will adoptions of Comprehensive Plans require advertisements of public hearing?

Yes. At the time of plan adoption, the local government follows the same process as a legislative zoning decision outlined at G.S. 160D-601, including recommendation from the planning board, public notice, and a public hearing.

How old can the comp plan be?

Chapter 160D does not set a specific time frame for updating the comprehensive plan, but it does call for plans to be "reasonably maintained." Factors determining reasonableness would include rate of growth and change as well as physical, economic, and social conditions. Notably, the requirement is for reasonable maintenance; there is no mandate for a complete rewrite of the comprehensive plan. In general, professional practice calls for comp plans to be updated every 5-10 years. If the community has experienced limited change, then a plan that was adopted more than 10 years ago may still be applicable. If the community has experienced rapid change, then an update every five years may be more defensible. If the plan has been in place for several decades, it is probably time to update it. As a point of reference, under prior law CAMA land use plans were required to be updated every five years.

For CAMA communities, how does this legislation work, in reference to comprehensive plans, with the state statutes for CAMA land use plans? And, does the local governing body need to take special action to make the CAMA land use plan, the town's comprehensive plan?

A community may use one plan to meet the requirements for a comprehensive plan and for a CAMA land use plan. As provided by G.S. 160D-501(c), "[p]lans adopted under this Chapter may be undertaken and adopted as part of or in conjunction with plans required under other statutes, including, but not limited to, the plans required by G.S. 113A-110 [CAMA land use plans]." A local government would need to take action to adopt a plan, but that one action could be to adopt the plan as a land use plan under CAMA and a comprehensive plan under Chapter 160D. With regard to plan amendments, G.S. 160D-501(c) clarifies that for plans that serve as CAMA land use plans, amendments are not effective until appropriate CAMA review and approval is completed.

Are flood ordinances (or other single-purpose ordinances) considered zoning for the comp plan requirement?

It depends. If a community has a single-purpose, land use-related ordinance adopted under the general police powers authority, there likely is no requirement for a comprehensive plan. If, however, a community has an ordinance that substantially affects land use, or if a community has a set of ordinances that addresses a range of land uses, those ordinances may be treated as zoning. The community would need to adopt a comprehensive plan to continue those regulations.

VII. Legislative Decisions

A. Notice and Hearings

Does 160D alter any established public hearing requirements?

G.S. 160D-601 makes clear that a legislative hearing (commonly called public hearing) before the governing board must be held prior to the decision to adopt, amend, or repeal *any* development regulation. This applies to all development regulations, not just zoning.

With regard to notice for zoning map amendments, 160D-602 clarifies what constitutes an abutting property that must be provided a mailed notice. This includes not only property that actually touches the property being rezoned but also property separated from the rezoned property by a street, railroad, or other transportation corridor.

With regard to posted notice, G.S. 160D-602(c) adds a provision to require that the posting be made in the same time period as the mailing of the notice—at least ten but not more than twenty-five days prior to the date of the hearing.

G.S. 160D-602(e) explicitly allows a city or county to require that someone proposing a rezoning communicate with the neighbors prior to submitting a rezoning petition. Rather than specify that the communication come in the form of a neighborhood meeting, the authorization is written broadly to encompass requirements for a mailing, a meeting, or some other means of engaging the neighbors. The ordinance may also require that the rezoning application include a report on the neighborhood communication.

Is there an official definition for "down zoning"?

Part I of S.L. 2019-111 amends the zoning authority to say that except for actions initiated by the local government, "[n]o amendment to zoning regulations or a zoning map that down-zones property shall be initiated nor shall it be enforceable without the written consent of all property owners whose property is the subject of the down-zoning amendment." *Down-zoning* is defined to be a zoning ordinance that affects property 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.

The training module states that the statutes now explicitly say that rezoning notification letters must be mailed to owners of properties across the street from subject properties proposed for rezoning. Does this include notifying owners of properties across limited access freeways?

Probably yes. G.S. 160D-602 addresses notice of hearings for map amendments and it provides that "[f]or the purpose of this section, properties are 'abutting' even if separated by a street, railroad, or other transportation corridor." A limited access freeway is a transportation corridor, so it appears that notice would be appropriate.

Notice across streets is now required, but what about bodies of water? Creeks/streams/lakes?

G.S. 160D-602 states that for purposes of notice for a legislative map amendment "properties are 'abutting' even if separated by a street, railroad, or other transportation corridor." There is no mention of bodies of water. Of course, local governments can choose to provide such additional notice. The statute sets the minimum notice. Local ordinances and policies can require additional notice.

It is worth noting that for creeks and small steams, the property actually runs to the center line of the water body, making the two properties on opposite sides adjoining. It is prudent to mail notice if the county property tax maps show the properties as abutting.

B. Plan Consistency

How do the plan consistency statement requirements change?

G.S. 160D-605 simplifies the plan consistency statement that must be approved when the governing board adopts a zoning ordinance amendment. As explained in more detail in other resources, Chapter 160D clarifies that the consistency statement does not have to be adopted as a separate motion, allows that a board can meet the spirit of the requirement even if they don't meet the technical provisions, and simplifies the format for statements.

Should the statement of zoning consistency or inconsistency be signed by Mayor and/or Clerk after it is adopted? Or is a motion sufficient?

G.S. 160D-605 states that the "governing board shall approve a brief statement describing whether its action is consistent or inconsistent with an adopted comprehensive plan." There is no need for a signature.

Can consistency statement changes be implemented immediately or do communities need to wait until 2021?

The basic expectations for consistency statements—review of applicable plans and formal adoption by the governing board of a statement—remain the same and are already in place. But, the specific ways in which Chapter 160D simplifies the process are not effective until 2021 unless authorized by specific legislation.

Can a plan consistency statement be incorporated into the body of the rezoning amendment ordinance?

Yes.

Does the consistency statement and statement of reasonableness law apply the same to text amendments as map amendments?

A consistency statement is required for an amendment to the zoning ordinance text *or* map. A reasonableness statement is required for an amendment to the zoning map. A local government may choose to include a reasonableness statement for an amendment to the zoning ordinance text.

For a future land use map amendment, is it parcel specific or will it impact similarly situated properties?

G.S. 160D-605 provides that "[i]f a zoning map amendment is adopted and the action was deemed inconsistent with the adopted plan, the zoning amendment shall have the effect of also amending any future land-use map in the approved plan, and no additional request or application for a plan amendment shall be required." The intent of this automatic future land use map amendment is to reduce the discrepancy between the future land use map and the approved zoning for the site and to streamline the process for obtaining the rezoning. The implication is that such automatic future land use map amendments are site-specific and not applicable across the entire map.

For rezoning requests that are approved, but inconsistent with the future land use map (FLUM), are we required to physically change the map? Or simply denote the change in records as an alteration to the map?

The plan itself needs to be updated. G.S. 160D-501(c) says that if the plan is deemed amended by adoption of a rezoning that is inconsistent with the plan, "that amendment shall be noted in the plan." Exactly how that is accomplished, whether it is updating the FLUM, including a running list of amendments, or some other mean, is up to the local government. It is certainly prudent to occasionally update the FLUM for clarity and future reference.

G.S. 160D-605 provides that "[i]f a zoning map amendment is adopted and the action was deemed inconsistent with the adopted plan, the zoning amendment shall have the effect of also amending any

future land-use map in the approved plan, and no additional request or application for a plan amendment shall be required." The future land use map is deemed amended with the adoption of the inconsistent rezoning, regardless of whether the map is formally updated or not. For clarity and record keeping, it would be prudent for the local government to take action to change the future land use map at the time of the rezoning. This likely can be handled administratively as a clerical correction. Or, the local government could include the FLUM update with other comprehensive plan clean-up on some regular schedule (annually, bi-annually, etc.)

C. Conditional Zoning

1. In General

The 160D checklist states that per S.L. 2019-111, conditional zoning conditions can "go beyond the basic zoning authority to address additional fees, design requirements and other development considerations." Does this broaden authority for conditions?

Part I of S.L. 2019-111 clarifies that a local government must have written consent from the petitioner in order to apply to a conditional rezoning conditions "not authorized by otherwise applicable law, including, without limitation, taxes, impact fees, building design elements within the scope of G.S. 160A-381(h), 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." This provision contrasts with the limitation on special use permits.

2. Consent

When conditions are amended during a hearing with the final vote, how do you satisfy the written signed consent? Can a petitioner consent "verbally" at a public hearing? Can conditions go in the minutes?

In order to ensure that conditions are enforceable, the local government should get written consent from the petitioner. There is not a required form, so the written consent could take multiple forms: a signature on a decision document listing the conditions, a signature block on the site plan listing conditions, an affidavit from the petition consenting to the agreed upon conditions as reflected in the specific decision, or otherwise.

Does the written agreement of conditions need to be in place prior to the hearing or can their signature be obtained post-hearing/approval?

Depending on the nature of the project and the local practice, conditions may be identified and consented to in advance of the final decision. Commonly, though, conditions are altered at the hearing. In such case the local government will want to secure written consent from the petitioner. Such consent could be at the conclusion of the hearing or within a few days after. One option is to condition the approval upon the petitioner providing written consent in the form required. In other words, the approval may have a condition that the approval is not effective until the petitioner provides written consent and providing a specified time for that consent to be provided.

VIII. Quasi-Judicial Decisions

Should the planner be sworn in during a quasi-judicial hearing if his/her packet can be entered as evidence?

Yes. It is good practice for the person who prepared the information in the packet to appear as a witness and state for the record that they prepared the material, state when and how it was distributed, offer it as an exhibit to be entered into the hearing record, and offer to answer any questions about it that the board may have.

Since some cases that go before the Planning Board are quasi-judicial in nature, what should be included or excluded from the agenda pack so we do not violate the* ex parte *communication rule?

Under 160D-406(c) planning staff must provide to the decision-making board all applications, reports, and written materials relevant to the matter being considered. Those materials may be distributed to the board prior to the hearing so long as they are provided to the interested parties at the same time. It is prudent to make such materials available to the public as well (posted to the website or otherwise available for public inspection). When the materials are shared with the parties, that resolves the underlying concerns of *ex parte* communication.

A. Variances

As reasonable accommodation variances are now allowed, is there more specific guidance on what criteria must be met by the applicant?

The Federal Fair Housing Act and Americans with Disabilities Act have long required that governments must make reasonable accommodations to individuals with disabilities (this is not a new requirement). The notable change is that Chapter 160D allows such accommodation to be processed as a variance. Previous law had said the personal circumstances and condition of the applicant could not be considered.

Can granting setback variances for disabilities be administrative?

Potentially. If the standards and determination require the application of substantial judgement and discretion, then the decision is quasi-judicial and should be processed as such. Certain requests for reasonable accommodation could be framed as an administrative minor modification but only if appropriate standards and procedures are in place. As with any administrative modification, an administrative reasonable accommodation would have to be defined in the ordinance. There must be clear objective standards for when the modification is available and specific limitations on the scope of allowable modification. Reasonable accommodation may be a topic appropriate for an administrative hearing as defined by Chapter 160D. As with any staff determination, a decision is subject to appeal to the board of adjustment (or other authorized board).

B. Special Use Permits

1. In General

How do we transition from conditional use permits to special use permits?

See the questions above under Implementation and Context.

Is there any good reason to continue to have both a special use process and conditional zoning process in place? We have only a few uses that fall under SUP.

Each process—the quasi-judicial special use permit and the legislative conditional zoning—is a useful tool with pros and cons. Depending on the community goals and politics, one or the other tool may be most useful and effective. Quasi-judicial decisions are based on pre-established guiding standards, the parties must provide evidence to support the application, and the board must base its decision on evidence in the record. Public engagement is more restrained for quasi-judicial decision-making. Legislative conditional zoning has more flexibility—for adjusting standards and applying conditions. The legislative process permits greater public engagement and the decision-making board has more latitude to make decisions based on broad notions of the public interest; the board is not bound by evidence in the record.

Can special use permits be divided into minor (going to the Board of Adjustment) and major going to the governing body and be consistent with 160D?

Yes. A local government may choose to have different classes of special use permits (major/minor; class A/ class B; etc.)

Is there a specific or official way to enter the staff report into the record as evidence?

As noted above, it is good practice for the person who prepared the info in the packet to appear as a sworn witness and state for the record that they prepared the material, state when and how it was distributed, offer it as an exhibit to be entered into the hearing record, and offer to answer any questions about it that the board may have.

Is it a good idea to have a board perform advisory review of a special use permit prior to review by the final decision-maker? What board should do that?

There is no state requirement for advisory review of quasi-judicial decisions, and indeed, such review can create practical confusion and legal ambiguities (What is the nature of the review? Is is quasi-judicial? What's the status of the evidence presented?). Chapter 160D addresses these issues by allowing, but not mandating, advisory reviews. G.S. 160D-301 authorizes planning board review and comments on pending quasi-judicial matters but limits the practice. The statute clarifies that such

reviews are a "preliminary forum." A planning board making an advisory review is not conducting a formal evidentiary hearing but is allowing an informal, preliminary discussion of the application. Given this informality, the statute goes on to provide that "no part of the forum or recommendation" may be used as the basis for a decision by the board making the quasi-judicial decision. The decision must still be based on competent evidence presented at the evidentiary hearing held by the decision-making board.

Do Special Use Permits expire if unused?

Under Chapter 160D, a development approval is valid for one year and expires if the development is not substantially commenced in that time. A special use permit is a development approval, so the default rule is that it is valid for one year. That said, the terms of the SUP or the local ordinance may specify a longer term. Special use permits commonly are identified as site-specific vesting plans with validity of at least two years. The General Statutes Commission is considering a statutory amendment that would clearly allow a local government to specify that some designated local approvals may be valid for more than one year (such as allowing a two year life for an SUP or eighteen months for a site plan).

How do you void or cancel an SUP?

In the case of revocation for enforcement, G.S. 160D-403 provides that "[t]he local government shall follow the same development review and approval process required for issuance of the development approval, including any required notice or hearing, in the review and approval of any revocation of that approval." Thus, in order to revoke a special use permit, the local government would need to go through the standard notice and evidentiary hearing process for a quasi-judicial decision. Note that a stop work order, notice of violation, civil penalty, or other enforcement tool can still be used to halt unauthorized work even if the permit is not revoked or a revocation is still in process.

2. Conditions

Training materials stated that a local government "may not impose conditions on an SUP that it doesn't have statutory authority to impose." Where is that statutory language?

Limiting language was already included in 160A and 153A. Part I of S.L. 2019-111 further clarifies those limits: "Conditions and safeguards imposed [on special use permits] 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." With that, the conditions imposed through special use permit conditions must be authorized. Such conditions would include, among other things, zoning limitations that are clearly authorized (limits on use, operations, dimensional standards, etc.), authorized improvements and dedications, and other standards authorized by the statutes.

3. Consent

In a training video there is mention of a requirement that an applicant sign-off on conditions imposed as part of a special use permit or conditional district. Does that mean that developers now have to agree to conditions by a Board of Adjustment?

As discussed above for consent to Conditional Districts, it is prudent to get written consent from the petitioner to any conditions imposed for a special use permit or conditional zoning district. This arises from several changes in Part I of S.L. 2019-111 (rules for estoppel, rules for judicial remand, and rules for flexibility of conditions).

With regard to conditional zoning districts it has always been the case that the petitioner must agree to the conditions. Now it must be indicated by written consent. With regard to quasi-judicial special use permits, this is a procedural change. In order to protect the enforceability of the conditions, the local government needs to secure written consent.

Can written review of conditions take the form of a recorded special use permit for quasi-judicial cases? In what form should consent be provided for legislative decision?

While recordation generally may indicate acceptance of the approval and conditions, the new legal standards call for written consent from the petitioner. There is no prescribed form of written consent This could take multiple forms including, for example, a signature on a decision document listing the conditions, a signature block on the site plan listing conditions, an affidavit from the petitioner consenting to the agreed-upon conditions as reflected in the specific decision, or otherwise.

IX. Administrative Decisions

Minor modification cannot include a change in density. So an administrative modification cannot include any change in the number of lots or units from the plan approved by our Council? Or is there still a minor modification acceptable if specified?

160D-703 and -705 allow administrative minor modification of conditional districts and special use permits, respectively. But, each section states that such administrative modifications must "not involve a change in uses permitted or the density of overall development permitted." While the presumed intent of this language is that administrative staff should not increase density, the language indicates that administrative staff cannot change density (up or down). Under Chapter 160D, it appears that a change in density will require amendment to the approval through the original approval process (legislative or quasi-judicial).

It is worth noting that a developer can, and they often do, build less than what was authorized without a formal amendment to the permit. In the case of a minor design change (a slight change to road configuration, for example) that limited the development of one lot, a reduction in density may be a side effect of the design minor modification. Note, though, that in some circumstances a particular mix of housing may be essential to an approval, and a reduction of numbers for one particular type may be viewed as a major change.

For minor modifications, can you provide some examples of modification parameters for different types of decisions? How specific do they need to be?

While there is not specific guidance in the statutes, we do have some parameters that have been cited favorably by the North Carolina courts. In the *Butterworth v. Asheville* case, the court struck down a modification that amounted to a variance (based on an "unreasonable hardship" standard) that should have gone through a quasi-judicial process. But, in the decision, the court highlighted some acceptable administrative modifications that included specific, neutral, and objective criteria "such as the limitation of a deviation not in excess of 'up to ten percent or 24 inches . . . from the approved setback,' or a reduction of no more than '25 percent in the number of parking spaces required[.]'" That case, and administrative modification in general, is discussed more in this blog: https://canons.sog.unc.edu/administrative-modifications-subdivision-zoning-ordinances/

Can a building inspector's decision be appealed to the Board of Adjustment?

No. While G.S. 160D-405 authorizes appeals of staff decisions to be made to the board of adjustment, the language explicitly states: "unless a different board is provided or authorized otherwise by statute." In Article 11 (the article for building code enforcement), G.S. 160D-1114, -1123, and -1127 provide specific guidance for appeals of building inspector decisions on stop-work orders, unsafe building determinations, and building code enforcement. Those specific building code appeal procedures will trump the general board of adjustment appeal procedures.

X. Vested Rights and Permit Choice

A. Permit Choice

In the sections on choice of permits, can a developer choose to proceed under a mix of old and new ordinances? For example, can the applicant proceed under the original stormwater ordinance, but utilize a revised zoning ordinance?

This provision is new and may be subject to future clarification by the courts or legislature, but the current language indicates that an applicant could mix and match between old rules and new rules. Part I amends G.S. 160A-385 to state that permit choice "authorizes the development permit applicant *to choose the version of each* of the local land development regulations applicable to the project upon submittal of the application for the initial development permit." That language—"the version of each"—seems to allow the applicant to choose different versions for different regulations (old stormwater and new zoning).

What constitutes a six-month delay in proceeding under a permit? If no publicly observable action is taken on a permit, but the developer's experts are working on or studying a plan, can a delay be found?

Part I amends G.S. 143-755(b1) with details about the six-month delay: "If a permit application is placed on hold at the request of the applicant for a period of six consecutive months or more, or the applicant fails to respond to comments or provide additional information reasonably requested by the local or State government for a period of six consecutive months or more, the application review shall be discontinued and the development regulations in effect at the time permit processing is resumed shall be applied to the application."

How does the permit choice change affect town policies like engineering specs vs. development ordinances?

If the engineering specifications are regulations applicable to a development permit (or development approval), then permit choice will likely apply. Part I amends G.S. 160A-385 to state that "where multiple local development permits are required to complete a development project, . . . the development permit applicant [may] choose the version of each of the local land development regulations applicable to the project upon submittal of the application for the initial development permit."

B. Vested Rights

Regarding Part I of the Session Law 2019-111, do development permits (including zoning permits) now stay in effect for 1 year?

Yes, but there may be some local adjustment to that one-year rule by state or local law. Under Part I and Chapter 160D, the default rule is that development approvals (or permits) are valid for one year. Part I amends G.S. 160A-385(d) allowing the one-year expiration to be altered by statute. Chapter 160D, at G.S. 160-108 allows the one-year expiration to be altered by statute *or local ordinance*. This difference must be resolved when Part I is incorporated into Chapter 160D.

Who can make a determination on vested rights? Staff, a board, courts, other?

All of the above. A person claiming a common law or statutory vested right may seek an administrative determination by submitting evidence to the zoning administrator or other authorized official and requesting a determination or permit to proceed. One critical question for some vesting determinations is whether work has substantially commenced. This is a fact-specific inquiry. There is no state standard for that determination, but case law concerning common law vested rights provides a useful guide. As with other determinations, the vested rights determination may be appealed to the board of adjustment and then to superior court pursuant to G.S. 160A-405. Such appeals are reviewed de novo.

In lieu of seeking an administrative determination, the person claiming vested rights may bring an original civil action under G.S. 160D-405(c).

Can an owner seek a vesting determination from staff and if they don't like the decision then seek a vesting determination from courts?

Yes. The owner could appeal the staff decision to the board of adjustment or bring an original civil action in court.

Can a preliminary subdivision plat be a site-specific vesting plan?

Yes. As outlined at G.S. 160D-108(d)(3), the local ordinance must specify what counts as a site-specific vesting plan for the jurisdiction. The statute offers the following as permits that might count as site specific vesting plans: a planned unit development plan, a subdivision plat, a site plan, a preliminary or general development plan, a special use permit, a conditional zoning, or any other development approval as may be used by a local government. If the local ordinance does not specify site specific vesting plans, then any development approval counts as such.

Are building code expiration dates changed as far as 6 months to begin work and 1 year between inspections?

No. The prior law is re-codified to G.S. 160D-1111 and maintains the prior provisions. Building permits expire after six months. After commencement of work, the permit expires after 12 months of discontinuation if work.

XI. Judicial Review

If someone files an original civil action against a jurisdiction and loses, are they responsible for the jurisdiction's attorneys' fees?

No.

In the new section providing for attorney's fees if a municipality does not follow "case law," is there additional guidance? For example, if there are differing opinions by the Court of Appeals and the Supreme Court has not weighed in, what is the risk? What about trial court opinions/decisions?

The new rule on attorneys' fees outlined in Part I 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.