

## Planning and Development Regulation Legal and Legislative Update

NCAZO Winter Workshop  
Jim Joyce & Adam Lovelady  
February 23, 2021



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## Permit Extensions

2021 NCAZO Legal and Legislative Update



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## First Extension

- May 4, 2020 – [Senate Bill 704 / Session Law 2020-3](#), sec. 4.40
- Five month extension of
- “development approvals”
- valid at some point between March 10, 2020, and April 28, 2020



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## First Extension

- “Development approval” defined broadly, to include:
  - erosion and sedimentation control plans;
  - building permits;
  - sketch plans, preliminary plats, or final plats;
  - site-specific development plans or phased development plans;
  - development permits;
  - development agreements; and
  - certificates of appropriateness



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## First Extension

- **Obligations:** To avoid termination of extension, permit holder must:
  - comply with all applicable laws, regulations, and policies in effect at time of approval;
  - maintain all performance guarantees for the duration of the extension or until affirmatively released; and
  - complete any infrastructure necessary to obtain a CO or other final development approval.
- **Exclusions and Limitations:**
  - Permit from the federal government or for which the duration is set by federal law
  - Department of Environmental Quality administrative consent orders between May 4 and September 28, 2020
  - Development Approvals can still be revoked or modified
  - Requirements necessary to retain federal delegation unchanged
  - Obligations or rights under contract, including bond obligations or rights
  - Does not authorize charging water or wastewater tap fees that have previously been paid in full.



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## Second Extension

- September 2, 2020 – [House Bill 1105 / Session Law 2020-97](#), sec. 3.21
- 120 day extension of
- development approvals
- valid at any time between September 2, 2020, and 30 days after the date that the COVID-19 declaration of a state of emergency is rescinded



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## Second Extension

- Coverage and exceptions similar to First Extension
  - Substantially same definition of “development approval” with same exceptions
  - Still must comply with laws, maintain performance guarantees, and complete infrastructure



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## Second Extension

- Gaps in coverage?
  - Permits set to expire between March 10 and April 1, 2020, may have expired before the second extension takes effect
  - 120 day extension from date of expiration, NOT from end of COVID emergency period



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## 2020 Farm Bill

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## 2020 Farm Bill

### [Session Law 2020-18](#)

- Disposal of unused utility easements
- Limit on passing farm equipment
- Outdoor advertising at farm for farm
- Ag and Forestry Awareness Study Commission Co-Chair Holdover
- Bona fide farms update
- Certification of "North Carolina sweetpotatoes" [sic]
- Staff for soil and water conservation districts



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## 2020 Farm Bill

- **Advertising** (sec. 3)
  - Expands existing produce sign exception
  - Outdoor advertising signs no more than 3' on a side may be located on the farm property
- **Catering** (sec. 5(c) and (d))
  - Catering services on bona fide farms are exempt from permitting (including in city limits) except from health department
- **Agritourism** (sec. 5(a) and (b))
  - Further expansion of zoning exemption to include hunting, fishing, and equestrian activities under "agritourism"



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## Anderson Creek v. Harnett County

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## Anderson Creek v. Harnett County

- N.C. Court of Appeals 31 Dec 2020
- Facts:
  - County charged capacity use fee per lot or unit for new water or sewer connections prior to issuing permits
- Complaint:
  - Developers asserted fees invalid because not appropriately linked to impact (no “essential nexus” or “rough proportionality”)
  - Wanted their money back, attorneys fees, etc.



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## Anderson Creek v. Harnett County

- Holding:
  - Fees “assessed on an ad hoc basis or dependent upon the landowner’s particular project” are subject to “nexus” and “proportionality” analysis
  - BUT “generally applicable fee” is not subject to that analysis
- Takeaway:
  - Uniform fees are subject to less scrutiny



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## Starlites Tech v. Rockingham County

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### Starlites v. Rockingham County

- N.C. Court of Appeals 18 Feb 2020
- Facts:
  - Zoning permit issued for sweepstakes operation prior to SUP requirement; would not have been able to obtain SUP
  - Operation and property subsequently changed hands, but same business
  - County asserted grandfathered status lost; issued NOV

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### Starlites v. Rockingham County

- Holding / Takeaway:
  - At least for purposes of nonconformities, a change in ownership is not a change in use

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- Quasi-Judicial Decisions (*PHG Asheville*)
- Admin Decisions (*Ashe County*)
- Remote Hearings
- 160D Amendments (S.L. 2020-25)



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## Permitting and Appeals

Ashe County



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### Ashe County v. Ashe County Planning Board

- Application for asphalt plant lacked state permit
- Planning director letter affirmed application met standards, but noted need for air permit
- County imposed a moratorium
- Planning director denied permit (proximity to commercial buildings, false statements, incomplete application)
- Lower courts ruled that letter was binding, at least in part



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### Ashe County v. Ashe County Planning Board

- Supreme Court
  - Letter was not final binding decision
  - Planning director stated he lacked authority to issue the permit
  - Clear that conditions for approval had not been met
  - No part of the letter was binding
- Take Aways
  - Be clear with letters and determinations
  - Have a process to determine application completeness
  - Permit choice will be tricky



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## Quasi-Judicial Special Use Permit

PHG Asheville, LLC v. City of Asheville



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## PHG Asheville, LLC v. City of Asheville



Special use permit for hotel and  
parking structure in downtown

185 rooms

200-space adjacent parking deck



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## SUP Hearing

- Evidentiary hearing included five witnesses, including three experts, who testified in support of the application
- No evidence offered in opposition
- Technical Review Committee, Downtown Commission, and Planning and Zoning Commission all recommended approval
- City council denied the CUP, finding that the developer failed to produce competent, material, and substantial evidence to meet the standards



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## Board Member Concerns

What if board members have doubts about the validity of expert testimony?

- Questions about methodology used?
- Concern about factors not addressed in study?
- Desire to see additional factors and data considered?
- Concern about credibility of expert witness?



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## PHG Asheville, LLC v. City of Asheville

- Supreme Court
  - Nature of SUPs: use is allowed upon proof that certain facts and conditions exist
  - Detailed legal considerations
    - Burden of production/ burden of persuasion
    - Standard of review on appeal
  - Council concerns: no evidence to support the opposition to expert conclusions
- Take Aways
  - Quasi-judicial cases are about the evidence presented
  - Council knowledge may be applied, but generalized concerns from council are inapplicable without evidence



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## Remote Zoning Hearings during Declared Emergency



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## Remote Zoning Hearings during Declared Emergency

- SL 2020-3 (SB 704), Section 4.31(a), creating G.S. 166A-19.24
- Public Hearings
  - Zoning Amendment
  - Rezoning
- Quasi-Judicial Evidentiary Hearings
  - Special Use Permits
  - Variances
  - Appeals of Staff Decisions
  - Certificates of Appropriateness



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## Remote Zoning Public Hearings

- must allow written comments on the subject of the public hearing to be submitted between publication of notice and 24 hours after the public hearing



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## Remote Quasi-Judicial Evidentiary Hearings

Three conditions required:

- The right of an individual to a hearing and decision occur during the emergency.
- All persons with standing have notice and consent to the remote meeting.
- All due process rights of the parties affected are protected.



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## Chapter 160D Updates

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## Deadlines

July 1, 2021	Ordinance Update
July 1, 2022	Comprehensive Plan Compliance

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## Incorporating Other 2019 Legislation

- Part I Changes
  - No third party down-zoning
  - Limits conditions on conditional zoning/SUPs
  - Permit choice amendments in GS 143-755 -- permits on hold, appeals, definitions
  - Vested rights refinements -- rewrite of 160D-108 (multiple permits, process to claim), add 160D-108.1 for site-specific vesting plans
  - Judicial review -- limit estoppel claims, attorney fees, direct appeal of some claims
- Other Changes
  - H. 675 -- No regulation of minimum house size in zoning or subdivision regs, limit on mandates for burial of existing power lines, building code amendments
  - H. 131 -- Official map act repeal
  - S. 313 -- Clarify performance guarantees relative to improvements required in plat approvals

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## Chapter 160D -- Clarifications

- Allow LUP as well as comprehensive plan to qualify for the plan required to retain zoning authority
- City zoning must be citywide, county partial zoning still allowed (but no 640-acre minimum)
- Local permit approvals may last longer than one year
- Specify type of hearings required – legislative, quasi-judicial, or administrative



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## Chapter 160D -- Clarifications

### Reinsert inadvertently omitted statutes

- County receive funds for streets in ETJ
- Receivership for dilapidated houses
- 10 year enforcement for nonconformities
- No restrictive covenants for family care homes

### Correct cross-references

### More language clean-up (less legalese)



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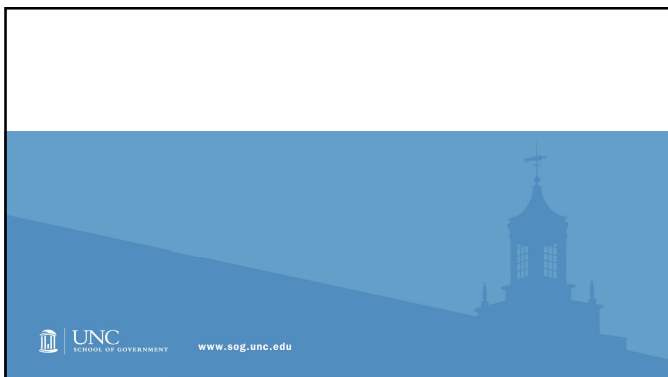
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160D Top Ten for Zoning Admin

1. Clarity of Article 4
2. Permit expiration/vested rights
3. Permit choice
4. Administrative Modification
5. Comp plan/land use plan required for zoning
6. Conflict of Interest for Staff
7. Rules for Notice of Violation
8. Map Record-Keeping
9. Consistency statement streamlined
10. Consent for conditions on SUPs and Conditional zoning

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1. Article 4 Clarifies Administration

Article 4 - Administration, Enforcement, and Appeals.	
G.S. 160D-401	§ 160D-401. Application.
G.S. 160D-402	§ 160D-402. Administrative staff.
G.S. 160D-403	§ 160D-403. Administrative development approvals and determinations.
G.S. 160D-404	§ 160D-404. Enforcement.
G.S. 160D-405	§ 160D-405. Appeals of administrative decisions.
G.S. 160D-406	§ 160D-406. Quasi-judicial procedure.

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## 2. Permit Expiration/ Vested Rights

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CHAPTER 160D  
THE PERMIT AND VESTED RIGHTS ACT

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Type of Permit/Rights	Period of Validity	Summary of Applicability
Development Permits		
Site-Specific Vesting Plan		
Multi-Phased Development		
Validity after Development Discontinuation		
Development Agreement		

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Type of Permit/Rights	Period of Validity	Summary of Applicability
Development Permits	12 months	General rule that development approvals (site plans, plats, special use permits, and more) are valid for twelve months unless altered by other statutes. Local regulations may extend the period of validity. G.S. 160D-108.
Site-Specific Vesting Plan	2 years (up to 5)	Certain approvals identified by local ordinance create extended vesting. Permit must be identified as such at the time of approval. G.S. 160D-108.1.
Multi-Phased Development	7 years from first site plan approval	Qualifying development enjoys extended vesting. Must be at least 25 acres in size, subject to a master development plan with committed elements, to be permitted and built in phases. G.S. 160D-108.
Validity after Development Discontinuation	2 years	For a development that has substantially commenced work, statutory vested rights expire after 24 consecutive months of discontinuance of the project. The discontinuance period is tolled for any litigation relating to the project or property. (Building permits limited to 12 months of discontinuation.) G.S. 160D-108.
Development Agreement	Per agreement	Negotiated agreement between developer and local government specifying a range of development topics, including period of vesting. G.S. 160D-108 & -1007.

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### 3. Permit choice

Type of Permit/Rights	Period of Validity	Summary of Applicability
Permit Choice	18 months from initial approval	Right for development applicant to choose for application to be reviewed under the regulations applicable at the time of initial application; applies to initial permit application and subsequent related development permits. G.S. 143-755 & 160D-108.

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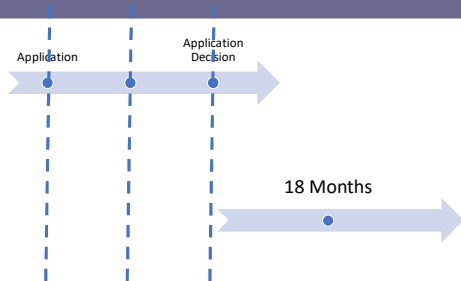
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### 3. Permit Choice



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### 4. Administrative Modifications

- Must be defined in the ordinance
- No change in use or density
- Must have
  - Qualifying criteria for modification
  - Limits on amount of modification.
- Major amendments remain

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#### 4. Administrative Modifications

- Conditional zoning districts (160D-703(b))
- Special use permits (160D-705(c))
- Development approvals (160D-403(d))
- Distinguish Site Design Modification from Dimensional Standard Modification

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#### #5: Land Use Plan Requirement

- In order to enforce zoning regulations, a local government must have a comprehensive plan by July 1, 2022
- Land use plans already required in coastal counties
- Must explicitly be considered in zoning decisions



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#### #5: Land Use Plan Requirement

##### Recommended Elements (G.S. 160D-501(b))

1. Issues and opportunities (i.e., trends, values, guiding principles)
2. Desired growth and development
3. Economic development
4. Public services and infrastructure (e.g., utilities, emergency services, transportation, education, recreation)
5. Housing goals – types and affordability
6. Recreation and open spaces
7. Mitigation of natural hazards (e.g., flooding, winds, wildfires, etc.)
8. Protection of the environment and natural resources
9. Protection of architectural, scenic, cultural, historical, or archaeological resources.
10. Analysis and evaluation of implementation measures

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## #6: Conflicts of Interest for Staff

- G.S. 160D-109(c) includes new rules for conflicts of interest of administrative staff:
  - Administrative Staff must not be the final decision-maker if
    - The outcome of that decision would have a direct, substantial, and readily identifiable financial impact on the staff member [Financial Conflict]
  - Staff has close familial, business, or other associational relationship with applicant [Relationship Conflict]



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## #6: Conflicts of Interest for Staff

- Also:
  - Staff must not have a financial or employment interest in development industry in the jurisdiction [Business Conflict]
  - Staff must not engage in any work that is inconsistent with his or her duties or with the interest of the local government, as determined by the local government. [Duty Conflict]



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## #7: Notices of Violation

- New Explicit authority in § 160D-404(a)
- Timing
  - When it is "determined" that work or activity violates local development regulation, development approval, or delegated state law, NOV *may* be issued
- How
  - Must* go to permit holder and landowner, and person providing the notice must certify to the local government that notice was provided.
  - May* go to occupant of the property or the person undertaking the work; may be posted

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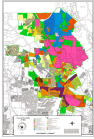
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## #8: Map Record-Keeping



- Map record-keeping provision in G.S. 160D-105
- Adopted zoning maps have to be "maintained for public inspection"
- May be in paper or digital format
- Make available in Clerk's office or office specified in development regs.
- Want continuous record of maps

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YOUR GOVERNANCE, YOUR CHOICE

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## #9: Plan Consistency Statements



- Can use single motion
- Only need brief statement
- Some analysis required
- Future Land Use Map automatically updated if rezoning is inconsistent
- Still need system for map record-keeping
- Statements of reasonableness required only for map amendments

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## #10: Consent for Conditions



As a condition of the consent to conditions, the applicant shall provide a written statement to the local government and the permit applicant, signed by the applicant, stating that the applicant and the permit applicant shall provide their consent to the conditions of the consent to conditions, and the permit applicant shall provide their consent to the conditions of the consent to conditions, and the permit applicant shall provide their consent to the conditions of the consent to conditions.

- For Conditional Zonings and Special Use Permits, signed written consent to conditions required from landowner and permit applicant
- Helps ensure that local government can enforce conditions
- One approach is to make a conditional rezoning effective upon receipt of written consent
- No required form

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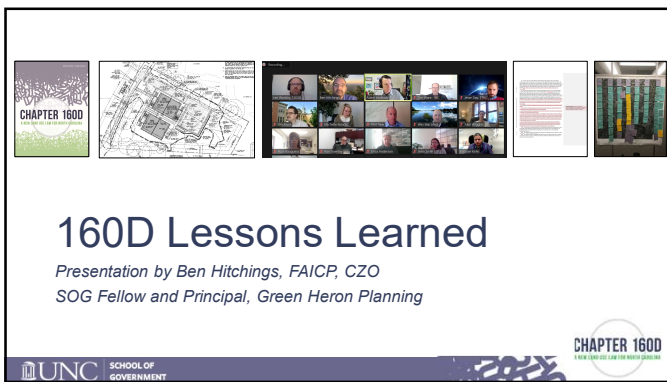
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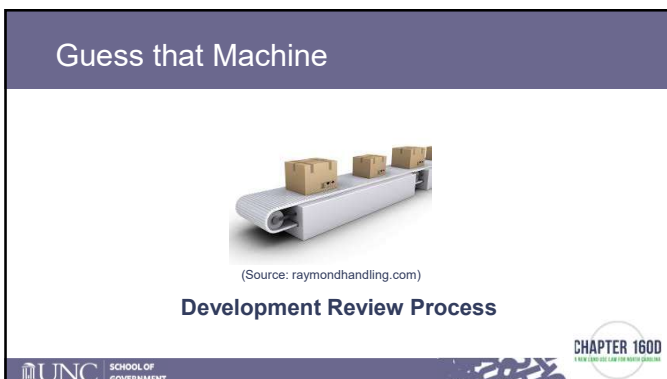
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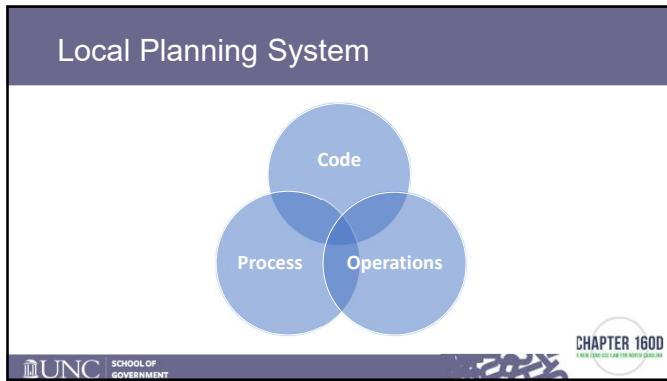
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- ### 160D Opportunities – While Making Updates
1. Customize statutory language
  2. Clean up ordinance duplication
  3. Select appropriate statutory references
    - A) Reference identifies applicable standards not in ordinance
    - B) Reference justifies standards in ordinance
    - C) Reference provides quick reference to applicable statutes
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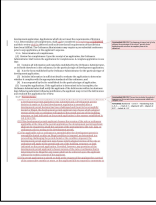
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### 160D Opportunities – While Making Updates



4. Add section on Permit Choice
  - A) Define “submitted”
5. Add administrative review for minor changes
6. Align site-specific vested rights with standard development review process
7. Define “substantially commenced”
8. Include maps by reference

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### 160D Opportunities – While Making Updates



8. Update obsolete provisions
  - A) Protest petitions
  - B) Signs (Reed vs. Gilbert; political signs in ROW)
  - C) Mobile home age requirements
  - D) Design controls

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### 160D Opportunities – After Updates Adopted




1. Train your boards
2. Create a Permit Choice tracking system
3. Create internal process checklists
4. Create cheat sheets for boards

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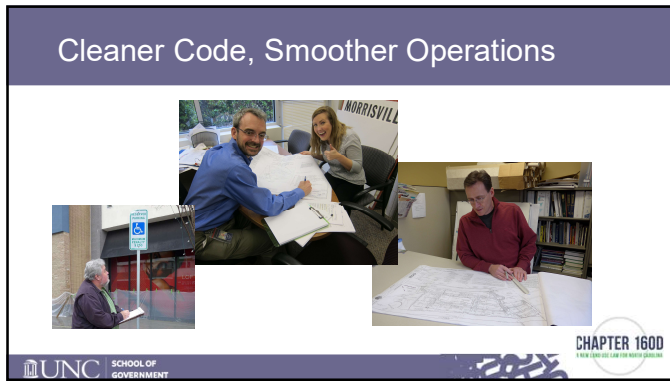
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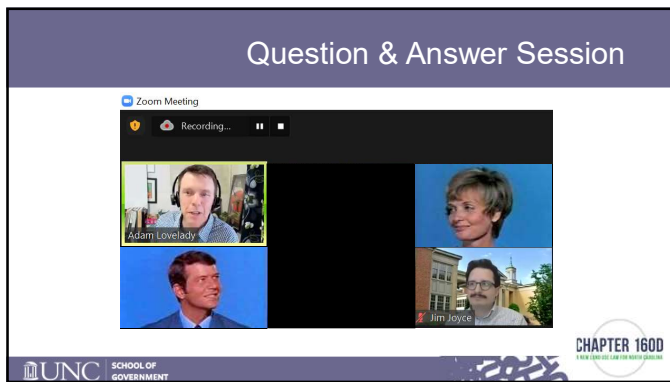
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