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July 12, 2024

The Honorable Vicki L. Lopez
House of Representatives, District 113
2100 Coral Way, Ste. 702
Miami, FL 33145

Dear Representative Lopez:

As a legislator interested in section 166.04151, Florida Statutes (the "Live Local Act," or "Act"), you seek clarification regarding the phrase "area zoned for commercial, industrial, or mixed use" contained in subsection (7) of that statute. Your question arises in light of an earlier opinion of this office, Informal Opinion to Eve Boutsis, dated July 20, 2023. There, we stated: "Given the Staff Analysis, judicial interpretations, and examples from other statutes, we conclude that the Legislature, in amending section 166.04151, specified zoning classifications of commercial, industrial, or mixed use districts." You indicate that some jurisdictions are utilizing that informal opinion to attempt to limit the applicability of the Act. Initially, I note that any opinion issued by the Office of Attorney General is confined to the specific facts and circumstances presented and not meant to be utilized by any party in any other factual or legal context. Informal opinions are given in matters of limited application either because the specific, particularized facts presented in the request will not likely occur elsewhere or the law itself applies to only a few individual entities or persons. In addition, all Attorney General opinions are persuasive and do not decide or declare definitively any parties' rights.

You seek clarification of what, as relevant to the Act, constitutes a mixed use zoning district. In particular, you request a determination of whether the Orlando "MXD-2 Mixed Residential-Office District" zoning category, as set forth in the Orlando Zoning Code, chapter 58 of the Code of Ordinances of the City of Orlando, constitutes a "mixed use" zoning classification under section 166.04151(7). You opine that "[a] jurisdiction cannot be allowed to create mixed-use zoning districts which are specified as such in legislative intent, uses permitted, and even the title of the district itself, yet define the district as something other than what it clearly is to avoid the application of the Act."

Responding to a specific inquiry concerning a discrete provision of any local code or ordinance is generally not a matter squarely within the purview of the Attorney General's role in providing opinions.[1] Your question, however, is appropriate for our office's review to the extent that you seek clarity on discerning the meaning of specific phrases in section 166.04151(7)(a). As such, we consider your inquiry to consist of the following:

> In using the phrase "area zoned for . . . mixed use" in section 166.04151(7)(a), has the Legislature dictated either the characteristics to be attributed to, or the nomenclature to be used in designating, mixed use zoning districts subject to the Act? How might a person determine whether an area maintains a zoning classification of mixed use?

In sum:

Unless and until legislatively or judicially determined otherwise, it is my opinion that while the particular name given by a municipality or County to a zoning classification is potentially helpful for determining whether a classification is a "mixed use" zoning classification, it is just one of several aspects worthy of consideration in determining whether a classification is a "mixed use" under the Act. A court reviewing the applicability of the Act would likely look beyond a title of a zoning classification and focus on whether the particular classification is similar to what has been historically and is normally understood to be a mixed use zoning classification specific to the area at issue.

Background

Your question arises from a prior informal opinion, in which we concluded that in section 166.04151(7)(a), the phrase "area zoned for . . . mixed use" referred only to land located in zoning districts having a mixed use classification, rather than encompassing land in any zoning district in which various land uses might occur. In that opinion, the City of Dania Beach asked whether section 166.04151(7) applied to zoning classifications that were commercial, industrial, or mixed use or to land located in any zoning district where some commercial, industrial, or mixed use land uses might be permitted. We concluded that section 166.04151(7) applied to commercial, industrial, or mixed use zoning classifications because the Legislature used the words "zoned for," which multiple Florida courts have interpreted to mean a zoning classification.

[1] *See generally* § 16.01(3), Fla. Stat. (2023) (providing, in pertinent part, that the Attorney General "may, upon the written requisition of a member of the Legislature . . . give an official opinion and legal advice in writing on any question of law relating to the official duties of the requesting officer."); *see also* Requesting an Attorney General Opinion, https://www.myfloridalegal.com/attorney-general-opinions/frequently-asked-questions-about-attorney-general-opinions (last visited July 11, 2024) (reflecting that requests arising from uncertainty regarding the correct interpretation of local law "will usually be referred to the attorney for the local government in question").

Analysis

The prior opinion concluded that the Legislature's use of the phrase "zoned for" means section 166.04151(7) applies to areas classified as industrial, commercial, or mixed use. That conclusion is supported by Florida law and nothing contained in your letter leads us to a different conclusion. Florida courts have determined that a description of the use a parcel is "zoned for" is helpful to consider when determining the area's "zoning classification."[2] In other statutes in which the Legislature specified permitted uses within specified areas, it did not utilize "zoned for," but included other language.[3] Likewise, our view of the limitation created by use of "zoned for" was buttressed by Staff Analysis commenting on an earlier version of the bill (dated February 24, 2023), where staff observed:

> With regards to local governments, the bill:
>
> • Preempts local governments' requirements regarding zoning, density, and height to allow for streamlined development of affordable housing in commercial and mixed-use zoned areas under certain circumstances. Developments that meet the requirements may not require a zoning change or comprehensive plan amendment.[4]

The Staff Analysis supports this conclusion that "mixed use" characterization in the phrase "zoned for commercial, industrial, or mixed use" in section 166.04151(7)(a) describes a zoning classification, rather than a permitted use. In short, judicial review of the phrase, prior legislative use of it, and Staff Analysis including it, all support our conclusion regarding the reach of section 166.04151(7) to areas that maintain the zoning classification of commercial, industrial, or mixed use. We have no reason to reach a different opinion on that issue.

That leads us to next your question as we have reinterpreted it, which is how a person might discern whether an area exists in a "mixed use" zoning classification and whether section 166.04151(7) applies to a circumstance in which a local government titles or re-titles a zoning classification in an attempt to evade applicability of the Live Local Act. The Legislature, in the Live Local Act, did not indicate what it meant by its use of "mixed use" in its listing of zoning classifications in section 166.04151(7)(a). We note that there "is no universally accepted definition of mixed-use

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[2] *See, e.g.*, *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 998, 1002 (Fla. 2d DCA 1993) (stating, when property owner sought to prompt re-zoning to enable construction of a commercial or office development in an area zoned for agricultural use, that review of the County's comprehensive plan was worthwhile in determining whether the suggested use of land in the pertinent category was inconsistent with the plan).

[3] *See* § 163.3205(3), Fla. Stat. (2023) ("A solar facility shall be a permitted use in all agricultural land use categories . . . and all agricultural zoning districts within an unincorporated area . . . ."); § 163.3208(4), Fla. Stat. (2023) ("New and existing electric substations shall be a permitted use in all land use categories . . . within a utility's service territory except those designated as preservation, conservation, or historic preservation on the future land use map or duly adopted ordinance.").

[4] Florida Staff Analysis, S.B. 102 at 2, 26 (February 24, 2023).

development. The definition differs depending on how land-use categories are defined, how a functional measurement of land use mix is selected, and the scale of geographic analysis . . . ."[5]

Although the exact parameters of defining what constitutes a mixed use zoning classification in every possible circumstance is beyond the scope of this opinion, the context and objective of the Live Local Act indicate that mixed use refers to a zoning classification that allows for either commercial or industrial development alongside residential development. In both sections 125.01055(7)(a) (as applicable to counties) and 166.04151(7)(a) (as applicable to municipalities), the Legislature utilized "zoned for ... mixed use" near "mixed-use residential" when discussing authorization of certain developments within an area that maintains a commercial, industrial, or mixed use zoning classification. In various other contexts, the Legislature has defined mixed use as a development concept that allows industrial or commercial development adjacent to or alongside residential development.[6]

In practice, a person might discern whether an area exists in a "mixed use" zoning classification by considering the title and described locations of an area, as depicted in a local government's plans. In particular, provisions in comprehensive plans and in local government land development and use regulations would be relevant in determining whether specific areas are in districts that are classified as mixed use. If a municipality or county attempts to evade applicability of the Live Local Act by titling or styling a zoning category such that it does not contain one of the labels, "commercial, industrial, or mixed use," such an effort would likely be readily apparent and rendered disingenuous upon review of prior zoning classification schemes and the content of the particular zoning classification and by comparing the new zoning scheme to historical land development and use regulations, provisions in comprehensive plans, or other applicable sources that apply to land development in the area at issue.

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[5] Daniel R. Mandelker, Zoning for Mixed-Use Development, 46 No. 9 Zoning and Planning Law Reports NL 1 (October 2023).

[6] *See* § 163.2517(3), Fla. Stat. (2023) (directing local governments seeking to designate an area as an urban infill or redevelopment area to prepare a plan that considers, among other aspects, "mixed-use planning to promote multifunctional redevelopment to improve both the residential and commercial quality of life in the area"); § 163.3162(4), Fla. Stat. (2023) (stating that a potential amendment to a local government comprehensive plan is "presumed not to be urban sprawl . . . if it includes land uses and intensities of use that are consistent with the uses and intensities of use of the industrial, commercial, or residential areas that surround the parcel" and stating, in part, that each application for a plan amendment under the subsection must "appropriate new urbanism concepts such as clustering, mixed-use development, the creation of rural village and city centers, and the transfer of development rights in order to discourage urban sprawl while protecting landowner rights"); § 163.3246(2)(e)10., Fla. Stat. (2023) (discussing local planning certification that required "[e]ncourag[ing] clustered, mixed-use development that incorporates greenspace and residential development within walking distance of commercial development"); § 190.003(7), Fla. Stat. (2023) (defining "compact, urban, mixed-use district" as "a district located within a municipality and within a community redevelopment area created pursuant to s. 163.356, that consists of a maximum of 75 acres, and has development entitlements of at least 400,000 square feet of retail development and 500 residential units.").

As an illustrative example of how we expect a court would analyze the applicability of the Live Local Act, the zoning classification that you describe in your request, MXD-2 in the City of Orlando, would, in our estimation, likely be found to be an area having a mixed use zoning classification within the meaning of the Live Local Act. The title itself in that instance, "MXD," seems to denote a district that a court could conclude is categorized as mixed use insofar as zoning classification. Putting that aside, a court would also likely review the particular provision of the land development code related to that classification. That specific section, codified at Section 58.260, ("Relationship to Growth Management Plan") states, in part, "[t]he MXD-2 district implements the Residential-High Intensity and Mixed Use Corridor-High Intensity categories of the Future Land Use Map Series." This language or similar language would likely lead a court to conclude that such a zoning classification is a mixed use classification pursuant to how the Act uses that term.[7] Even putting aside that language, a court would also likely observe that a zoning classification allowing the type of development that the MXD-2 classification allows, permitting residential and office space to exist together, is consistent with historical understandings of a mixed use classification. Nothing in this opinion forecloses the City of Orlando from pointing to other land development documents that could be used to support a contrary conclusion. The point of the above illustrative analysis is to demonstrate how we believe a court would likely review an area to determine whether it is an area zoned for mixed use, as described in the Act.

Conclusion

Unless and until legislatively or judicially determined otherwise, it is my opinion that the particular name given by a municipality or County to a zoning classification, while potentially helpful for determining whether an area is in a "mixed use" zoning category, is merely one aspect worthy of consideration. A court reviewing the applicability of the Act would likely look beyond a title and focus on whether the particular classification is similar to what has been historically and is normally understood to be a mixed use zoning classification. Local government land development and use regulations, along with other sources such as provisions in comprehensive plans or reviews of past practices, will be relevant in determining which specific areas are within mixed use zoning district classifications. Disagreements arising in that regard may, as appropriate, be settled by recourse to existing legal remedies available to resolve land use development disputes.

Sincerely,

Kathryn P. Inman
General Counsel

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[7] Orlando, Fla. Code § 58.260 (2024); *see also* § 163.3177(1), Fla. Stat. (2023) (stating, in subsection (1), that a local government's comprehensive "plan shall establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations" and requiring, in subsection (6)(a)10.b.(IV), that, "[t]he following areas shall … be shown on the future land use map or map series, if applicable … mixed-use categories").