MEMORANDUM

To: Kraig Conn, General Counsel
Florida League of Cities

From: Susan L. Trevarthen

Date: June 26, 2023

RE: The League's Guide to Section 5 of the 2023 Live Local Act for Florida Municipalities

Effective July 1, 2023, the Live Local Act ("Act") allocates significant funding and incentives to affordable housing, which is something that the Florida League of Cities ("the League") strongly supports. However, Section 5 of the Act revises Section 166.04151, Florida Statutes, to create a new subsection (7) precluding local governments' ability to apply their use, height, and density restrictions and hearing processes to qualifying developments with affordable housing units.[1]

As always, the League stands against preemption of home rule. Several amendments were made to this bill in the legislative process, to refine and narrow the scope of these preemptions, but ultimately they were adopted.

Importantly, Section 5 of the Act does **not** preempt other applicable local laws and regulations. So, even if a project is entitled to excess height or density, or proposes residential use allowed in an area that would not otherwise allow residential use, the project must still comply with all of the other applicable land development regulations. Examples include landscaping, floodplain, parking, impervious surface, and design regulations. In addition, the project must otherwise be consistent with the comprehensive plan, with the exception of provisions establishing allowable densities, height, and land use.

Questions have been directed to the League regarding how to apply the Section 5 preemptions to various specific applications. As always, the League counsels its members to consult their municipal attorneys for definitive guidance on the law tied to the specific facts and circumstances of their charters, comprehensive plans, and codes of ordinances. Some communities may choose to enact code changes to specify how these preemptions will be handled; others may issue administrative guidance documents or interpretations. The key thing is to develop a strategy, and apply it consistently to those who may seek to take advantage of the Act's preemptions in a municipality.

This guide will address the most common inquiries as they are likely to affect typical municipalities. It cannot provide a definitive interpretation of how the Act may apply to specific fact patterns arising in one of the hundreds of Florida municipalities and their diverse and unique regulations, but it provides a starting point for the analysis. The guide may be supplemented, as additional inquiries are received and implementation experience with the Act progresses.

TIMING ISSUES

[1] It also modifies the terms of a preexisting option for municipalities to incentivize affordable housing in Section 163.04151(6), F.S.

Q: When does the Act become effective?

A: July 1, 2023. Section 5 of the Act expires October 1, 2033.

Q: If an application for a qualifying development was received before July 1 but it will not be approved until after July 1, is the application eligible to use the preemptions in Section 5 of the Act?

A: While the Act does not address this issue, general background principles of Florida vested rights law provide that the law that is applicable to any development application is the law in place at the time of the approval. Projects are not entitled to follow the law as it exists at the time of application; if the law changes before approval, they must meet the new standards of the law. Following this logic, one might conclude that a project under review as of July 1, 2023 must be allowed to take advantage of the Act.

Q: Does a municipality have to allow projects the benefit of the Act if it has a moratorium that was in place before July 1, 2023?

A: Not necessarily. The Act specifically addresses what rules apply to the approval of a development application. It does not contemplate deviation from other applicable laws. Moratoria may be based on the lack of sewer or water capacity or other problems that require a pause in all development approvals for planning purposes. Once the moratorium is over, the Act will apply. Some moratoria are drafted in a more targeted way so that only certain kinds of development are paused; the municipal attorney should evaluate the particular moratorium to determine whether it will apply to qualifying developments.

QUALIFYING DEVELOPMENTS

Q: What kind of development projects can take advantage of the preemptions in Section 5 of the Act?

A: A multifamily or mixed use residential development containing at least 40% affordable housing units. For purposes of this guide, we will refer to such developments as “qualifying developments.”

Q: What is “affordable” for purposes of a development qualifying for these preemptions?

A: Affordable housing units that target households making up to 120% of the area median income. The cost (including utilities) for such a unit cannot exceed 30% of the tenant’s income, and will vary based on household size. The commitment to affordability has to last for at least 30 years.

Q: Who assures that these affordability requirements remain in place for the required period of time?

A: The Act is silent on this issue, but the municipality should include a mechanism for reporting and monitoring within its approval documents, to assure that this requirement is satisfied. A qualifying development under the Act will be allowed to build to a higher density or height than would otherwise be allowed under local laws, and will be able to develop residential use in zoning districts that do not otherwise allow such use. It will likely be difficult to convert a qualifying development to a conforming development in the event that it fails to continue to qualify under the Act. It would thus be wise for the applicant and the municipality to take all steps necessary to make sure that the development continues to qualify for the Section 5 preemptions throughout its life.

Q: What is a “mixed use development” that may qualify for the Section 5 preemptions?

A: A development with at least 65% of the total square footage devoted to residential purposes. No maximum amount of residential is listed in the Act, but there clearly needs to be some nonresidential use for the project to fairly be described as mixed use and qualify for the preemptions.

Q: Do special rules apply if the qualifying development is transit-oriented?

A: Qualifying developments that are located within a half-mile of a major transit stop must be considered for parking reductions if the major transit stop is accessible from the proposed development. “Major transit stop” is as defined in the municipality’s land development code.

USE PREEMPTION

Q: What is the impact of allowing qualifying developments in commercial, industrial, and mixed use zoning districts?

A: The Act preempts municipal use regulation by allowing affordable residential units to be located in zoning districts where they would otherwise be prohibited. It is important to note that development within residential districts is unaffected by the Act.

Q: What are “commercial” and “industrial” zoning districts?

A: These terms are not defined in the Act, but have a commonly understood meaning that can be the starting point for determining how the Act applies in your community. You should start with an examination of your comprehensive plan and zoning code, and follow whatever definitions they include, along with any statements of purpose or intent as to the various types of zoning districts.

Commercial zoning districts typically allow various forms of retail and business uses: uses that involve the sale and purchase of goods and services.

Industrial zoning districts typically allow various forms of light or heavy manufacturing, warehousing, and assembly uses.

Q: Are temporary uses relevant to determining these categories?

A: No, temporary uses such as construction staging or special events should not be considered as part of this analysis.

Q: If the qualifying development seeks to locate in a zoning district that has no regulations for residential development, how does the municipality review the project’s compliance for matters other than height, density, and use?

A: The Act requires the municipality to apply its regulations for multifamily development from the zoning district(s) where it is allowed to the qualifying development. Municipalities will need to determine how to apply this provision if they have multiple multifamily districts.

Q: In the process of determining what regulations apply to the qualifying development, if it is possible that more than one development standard may apply, must the municipality apply the most liberal standard?

A: No. The Act specifically preempts and guarantees these projects greater rights as to height, density and use. It does not preempt, and specifically requires qualifying developments to follow, other applicable laws. Outside of the specific preemptions of Section 5, the municipality should interpret and apply its code as it normally would, using accepted standards of interpretation and professional judgment and applying its interpretations even-handedly to similarly situated applicants.

Q: How does Section 5 of the Act affect a municipality that has adopted form-based districts rather than use-based zoning?

A: To the extent that a municipality’s form-based districts are purely form-based and do not incorporate elements of use regulation, all districts would allow all uses. So residential use would be allowed in all

districts, and there are no “industrial, commercial, or mixed use” zoning districts within which to apply the Section 5 preemptions.

However, most form-based codes are hybrid, and retain certain use-based regulations and districts. A careful analysis of each particular code may be necessary to determine how the Act applies to development in a given municipality with a form-based code.

Q: Must a municipality always allow a pure residential project in commercial and industrial districts?

A: No. If a municipality[2] designates less than 20% of its land area as commercial or industrial, then a multifamily project seeking to use the Act must be mixed-use residential, with at least 65% residential square footage. Another difference with these municipalities is that the project can only locate in a commercial or industrial zoning district.

The Act does not specify how the 20% threshold is measured, so a reasonable methodology should be developed by the municipality.

Q: Are there any areas in which a development project cannot take advantage of the Act?

A: Yes. Property defined as recreational and commercial working waterfronts in section 342.201(2)(b), F.S., located in any area zoned industrial.

MIXED USE ZONING DISTRICTS AND SECTION 5 OF THE ACT

Q: What are “mixed use” zoning districts?

A: The term is not defined in Section 5, and was not used in Section 166.04151 before the Act. “Mixed use” zoning districts, at the most basic level in zoning regulation, are districts that allow more than one type of land use. For example, a district that allows both a clothing store and a gift shop would not traditionally be seen as a mixed use district. Both of these uses are within the same type of land use: they are commercial uses traditionally found within commercial districts.

Similarly, accessory uses are allowed in all districts, and do not render the district “mixed-use.” Examples of accessory uses include parking, storage, solar panels, home occupations, a lobby store in a hotel, or a caretaker’s cottage on a large industrial site.

In contrast, districts that allows both non-residential and residential uses, or districts that allow combinations of different types of non-residential uses, are generally considered to be mixed use districts.

Another distinction between different kinds of mixed use districts is whether they allow the mixing of uses in the same building, such as a building with retail uses on the first floor and residential units above (vertically mixed uses) or they only allow the mixing of uses in a parcel side-by-side, such as a residential community with an outparcel of commercial use (horizontally mixed uses). The standards for these two kinds of development are quite different. For example, there may be a landscaping buffer or setback required between the residential and nonresidential uses in a horizontally mixed use development. It would be absurd to discuss a landscaping buffer or setback between uses when the uses are in the same building. The Act is silent on the distinction between vertical and horizontal mixed uses.

Q: What kind of “mixed use” zoning districts are affected by Section 5 of the Act?

In the absence of any definition, zoning districts that provide for a range of different types of uses.

[2] This same rule applies to a multicounty independent special district that meets certain requirements and has less than 20% of its land designated for commercial or industrial use.

Q: Does Section 5 of the Act apply to “mixed use” zoning districts that allow residential uses?

Under a plain reading of the text of this section of the Act, the answer might be no. Section 5 revises subsections (6) and (7) of Section 166.0451 to expand affordable housing by providing an option (subsection (6)) or a mandate (subsection (7)) for multifamily residential or mixed use residential development to be able to locate in zoning districts that do not already allow such uses.

Subsection (6) of Section 166.04151 already provided an option for local governments to incentivize projects with at least 10% affordable housing units in commercial and industrial – and residential - zoning districts. The Act removes the reference to residential zoning districts, so that this optional incentive only applies to commercial and industrial zoning districts going forward.

Similarly, the new subsection 166.04151(7) seeks to incentivize both multifamily use and “mixed use residential” uses that meet the more detailed requirements of subsection (7) for affordability. The “mixed use residential” uses must have at least 65% of their total square footage devoted to residential purposes. The zoning districts in which the preemptions of subsection (7) apply are “commercial, industrial, or mixed use.”

When Section 5 of the Act refers to the type of development or use that can utilize its mandates and incentives, it consistently refers to “mixed use residential”. When Section 5 of the Act refers to the zoning districts within which such development can seek to locate, it only refers to “mixed use.” Thus, a plain reading of the Act is that it incentivizes qualifying “mixed use residential” developments to locate within “mixed use” zoning districts that do not allow residential uses. The distinction in terminology makes sense given the evident purpose of Section 5 of the Act: to promote affordable housing development by allowing it to be located in areas in which it would not otherwise be allowed.

Q: Can the statute be interpreted to allow qualifying developments to be able to locate in mixed use zoning districts that allow residential uses?

A: If a court were to conclude that the use of the term “mixed use” without definition is somehow ambiguous, then other canons of statutory construction would come into play. It is possible that an interpretation that failed to apply Section 5's preemptions to mixed use residential zoning districts could undermine the legislative intent. For example, if all of a municipality’s commercial zoning districts allow residential use and the municipality has little industrially zoned land, a failure to allow the Section 5 preemptions to apply in those commercial districts might defeat the purpose of the statutory scheme to expand opportunities for affordable housing. Interpretations that defeat the statutory purpose are generally disfavored.

A challenge with reading the Act differently – to allow its preemptions to be applied to development in mixed use zoning districts allowing residential uses – is that the Act directs municipalities to apply the development standards from its multifamily residential zoning districts to the review and approval of a qualifying development seeking to take advantage of the benefits of Section 5 in other districts. This provision is necessary and makes sense for zoning districts such as commercial, industrial or mixed use that do not already allow for residential uses; by definition, they will not have appropriate regulatory standards for residential development.

In contrast, mixed use zoning districts that allow residential uses already have regulatory standards for such uses. Displacing standards which are calibrated to the specific needs of mixed use residential development with standards for a straight multi-family residential development could lead to absurd results under a particular municipal code. For example, a mixed use zoning district that allows residential uses will specify the amount, location, and character of the various uses. It will recognize the different peak use times of residential and nonresidential uses in the parking standards and in the design of the traffic flow of the development. Also, the kinds of setbacks and buffers that are typical of a straight residential development may be inconsistent with the design needs of a mixed use development, particularly if it is vertically mixed. Interpretations that lead to absurd results are also generally disfavored.

The hundreds of municipalities in Florida have a wide range of different types of mixed use zoning regulations, and it is not possible to generalize as to all of the implications in this guide. In short, if a municipality has already provided appropriate standards for residential uses as a component of a mixed use zoning district where a qualifying development is proposed, the municipal attorney should evaluate whether applying the standards from the multifamily zoning district would lead to absurd results. And if the proposed interpretation of Section 5 of the Act results in no project being able to apply it in a given municipality, the municipal attorney should evaluate whether the interpretation defeats the statutory scheme. If so, in either case, the municipal attorney might consider whether a different interpretation is appropriate.

HEIGHT AND DENSITY PREEMPTIONS

Q: How are density regulations preempted by Section 5 of the Act?

A: A municipality must approve a qualifying development with a density equal to the highest residential density allowed within any of the municipality's residential zoning districts, located anywhere in its jurisdiction. Thus, identifying the density standard to apply to the qualifying development simply requires reading the municipal zoning code and determining the maximum density. There is no minimum density requirement in the Act.

Q: How are height regulations preempted by Section 5 of the Act?

A: As with density, the height preemption comparison is drawn from inside the municipality's jurisdiction, but only nearby properties are considered. A municipality may be required to allow a qualifying development to have greater height if any commercial or residential development located within a mile is allowed to be taller than development on the site of the proposed qualifying development.

There are other differences from the density preemption. First, the application of the height preemption requires an examination not just of the zoning code but also of the zoning map, to determine what zoning districts are mapped within a mile of the qualifying development and within the municipal jurisdiction. Second, the Act guarantees a minimum of three stories in height to qualifying developments, regardless of whether three stories are allowed on properties located within a mile of the site of the qualifying development.

Q: What does it mean for density or height to be "allowed"?

A: That height or density that is allowed by the currently applicable zoning codes and comprehensive plans in your community.

It does not include height or density that was never actually approved by the municipality. Illegal structures, subdivisions, or conversions may not be used to establish the permitted height or density.

It also does not include legal nonconforming height or density. So if a development was allowed and approved when built, but the regulations have changed such that it could not be built again with the same height or density, it cannot be used as the comparator to establish height or density for the qualifying development.

Developments that were approved pursuant to a height or density variance are also not proper comparators for establishing the height and density preemptions for qualifying developments. By definition, those heights and densities were not "allowed", and were only available pursuant to a site-specific determination that no alternative was available for the property.

Q: How do height or density bonuses affect this analysis?

A: Bonus density or height is not allowed as of right in the zoning district. It may only be earned through satisfaction of the criteria for the bonus program. Therefore, bonus density or height should not be considered part of the “allowed” height or density for purposes of the preemptions in Section 5 of the Act.

Alternatively, if a municipality wishes to allow consideration of bonus height or density, then a qualifying development that seeks to use that bonus height or density should be required to satisfy all of the requirements of the bonus program. Otherwise, the qualifying development may only seek to use the height or density allowed by right in those zoning districts.

Q: Must a qualifying development always be able to construct the full density or height allowed by these preemptions?

A: No. The Act is clear that other laws continue to apply, and may work to limit the development potential of a particular parcel. For example, environmental regulations, setbacks, buffer requirements, lot coverage requirements, minimum unit sizes, parking and other development standards may all prevent a particular property from achieving the theoretical maximum amount of development. In addition, the development must otherwise be consistent with the comprehensive plan, with the exception of provisions establishing allowable densities, height, and land use.

APPROVAL PROCESSES

Q: How are approval and hearing processes preempted by Section 5 of the Act?

A: If a qualifying development seeks to locate within a commercial, industrial, or mixed use zoning district, the municipality may not require rezonings, land use changes, special exception or conditional use approvals, variances, or comprehensive plan amendments in order to obtain the height, density, and use preemptions.

Q: So what process applies to these projects?

A: Municipalities must administratively approve a qualifying development without holding hearings before the governing body or other board, if it otherwise complies with all other regulations.

If the qualifying development requires a variance, special, exception, or other type of approval, unrelated to use, height, or density, those separate processes are not preempted and must be followed.

Q: What does it mean to “administratively approve” a project?

A: The project will still need to undergo the typical application processes in a municipality. It will need to submit an application with an application fee, and supporting plans and information demonstrating that it satisfies all applicable laws. For municipalities that do not already have processes for administratively approving certain kinds of development that can be adapted to this purpose, it may be beneficial to create one.

The municipal staff will still need to assess the application’s compliance with those laws before any development orders or permits can be approved. That may involve review by a staff Development Review Committee or individual review by each affected department, depending on how each municipality structures its process. It may also involve review from other agencies, such as the county or a water management district. The public may provide input into such processes by submission of written comments.

Some municipalities already have administrative hearing processes where a department head, municipal manager or hearing officer individually reviews and decides whether to approve a project. Those processes may or may not provide a mechanism for the public to be present or to be heard by that decision maker.

Q: Are there specific provisions that should be considered for inclusion in a development order approving a qualifying development?

A: As noted above, a unique aspect of development under Section 5 of the Act is that it only qualifies for the preemptions if it maintains its affordability for 30 years. It is therefore advisable to include mechanisms in the development order for monitoring and continuing to assure that these requirements are met, such as requiring that a covenant be recorded for the benefit of the approving municipality, with rights of enforcement.

Also, because the qualifying development is only eligible for approval pursuant to the Live Local Act, the municipality might want to include findings in the development order as to how the application satisfies the statutory criteria. The development order could also specifically find that the project is not otherwise "allowed" under the municipality's code and plan.

Q: Does the Act require municipalities to waive height restrictions around an airport?

A: Likely not. FAA approval is still necessary for the height of development in flight paths, and other height and density limits related to runway crash zones around civilian or military runways are usually a product of state or federal law that would not be preempted by the Act. As always, examine the specifics of your regulations with your municipal attorney to determine what the right strategy is.

POLICY IMPACT OF SECTION 5 OF THE ACT

Q: Some municipalities have too much residential development and not enough commercial/industrial development to maintain a sound fiscal basis. Is there anything municipalities can do to keep this new law from further exacerbating this problem?

A: As noted above, if a municipality designates less than 20% of its land area as commercial or industrial, then only mixed-use residential projects with at least 65% residential square footage can seek to take advantage of the Act. The remainder of Section 5 of the Act will apply.

One option to consider is amending the Code to change the existing zoning districts or create new zoning districts that are more attractive for multifamily projects to locate as of right in appropriate locations and to include nonresidential uses. That evaluation should also include consideration of whether zoning map amendments are necessary so that these districts are applied to locations that are appropriate for mixed use residential development. A municipality might even consider allowing an applicant to seek administrative approval of the application of an overlay or floating zone with appropriate standards to commercial, industrial and mixed use zoned properties.