

4/23/07

David Foley
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Orlando FL 32807-1931

Mitch Gordon, Manager
Orange County Zoning Division
201 S. Rosalind Ave.
Orlando FL 32801

RE: Request for Determination – aviary as accessory building, aviculture as accessory use and home occupation.

Mr. Gordon:

Your official determination is requested regarding our Code's treatment of: aviaries as accessory buildings; and, aviculture as accessory use and home occupation.

Your determination is made necessary, not because the Code is unclear or requires interpretation, but because you are in a unique position: to settle conflicting readings offered by the Zoning Division and Code Enforcement Division; and to familiarize those Divisions, the Board of Zoning Adjustment, and the County Commission with the limits placed on our Code by the laws and Constitution of our State.

Question for Zoning Manager determination:

Within the framework of Art. IV, Sec. 9, Fla. Const.¹, or within its own four corners, to what extent does our Orange County Code, and in particular the general and permissive definitions of *accessory structure or use* and *home occupation*, permit or prohibit *aviaries*² as accessory structures and *aviculture*³ as accessory use and home occupation⁴ in R1A zones?

Objections to aviaries and aviculture by Zoning Division and Code Enforcement

There have been occasions when the Zoning Division front desk and Code Enforcement Division have voiced the following erroneous objections to *aviaries* and *aviculture* in R1A zones:

1. Because Orange County is a charter county with home rule authority, Orange County can directly regulate *aviaries* and *aviculture* as land use, despite the exclusive “regulatory and executive powers” over wildlife granted by the state constitution to the Florida Fish and Wildlife Conservation Commission (FWC);
2. Because § 38-74 & 77 prohibits *commercial aviculture* (SIC 0279)⁵ and associated *aviaries* everywhere, and permits them only by Special Exception in agricultural zones, then in residential zones *aviaries* and *aviculture* in any form are prohibited;
3. Because the definition of *home occupation* has been gutted by § 38-79 (8)⁶ – Condition 8 – nothing more than “paperwork and phonerwork” are permitted as *home occupation*, and certainly not *aviculture*;
4. Because the definition of *home occupation* does not specifically permit *aviaries* or *aviculture*, then both are prohibited as *home occupation* in residential zones;
5. Because the definition of *home occupation* specifically prohibits *kennels*, then *aviaries* or *aviculture* are also prohibited as *home occupation* in residential zones;
6. Because the definition of *home occupation* prohibits “outdoor display of merchandise or products”, *aviculture* involving outdoor open-air *aviaries* is prohibited as *home occupation* in residential zones;

Response to objections of Zoning Division and Code Enforcement

1. Does home rule trump the authority of the FWC? *No.*

Florida’s Attorney General answered this question in AGO 80-04 (attached): “Any contention that the home rule powers ... authorize a [county] to enact or enforce legislation which regulates or prohibits the possession of wildlife within its municipal boundaries must fall.”

Orange County is a charter county and does have home rule authority in the area of land use regulation. And, as the Florida Attorney General stated in AGO 2002-23 (attached), “land use regulations may indirectly affect the possession of

wildlife.” However, it is the FWC which has exclusive authority to directly regulate wildlife⁷, including the regulation of all birds, both native and non-native. In the area of wildlife regulation, the County may provide a floor, but the FWC establishes the ceiling.

In AGO 2002-23 the Attorney General states that, “a county may adopt general zoning and land use regulations that apply equally to those possessing permitted wildlife and other property owners.” As an example, if the County wished to prohibit *aviaries* as accessory structures, it could do so by prohibiting all accessory structures, or by prohibiting some general characteristic of accessory structures essential to *aviaries*. However, it can not single out *aviaries* as a prohibited accessory structure. Similarly, if the County wished to prohibit *aviculture* as an accessory use, or a *home occupation*, it could do so by prohibiting all accessory uses, by prohibiting all *home occupations*, or by prohibiting some general characteristic of accessory uses or *home occupations* essential to *aviculture*. However, it can not single out *aviculture* as a prohibited accessory use or *home occupation*.

Yet, Zoning Division and Code Enforcement have at times construed the Orange County Code to specifically prohibit both *aviaries* and *aviculture* everywhere – a clear violation of Art. IV, § 9, Fla. Const. as illuminated by AGO 2002-23.

Only by the costly procedure of petitioning the Board of Zoning Adjustment (BZA) for a Special Exception⁸ are *aviaries* and *aviculture* even considered, and then *only* in agricultural zones. It is hard to imagine any regulation that more directly targets birds, or is in greater conflict with the opinion of the Attorney General.

Orange County either does not understand the limits of its authority or disputes those limits.

If Orange County does not intend to challenge the opinion of the Attorney General, it should be possible to end analysis here, and agree that *aviaries* are permitted accessory structures, and *aviculture* is a permitted accessory use and *home occupation*.

Nevertheless, it is also possible to show that within the four corners of the Code itself there is conclusive support for the proposition that *aviaries* are permitted accessory structures, and *aviculture* is a permitted accessory use and *home occupation*.

2. Does the Use Table prohibit *aviaries* and *aviculture* in R1A zones? No.

The Use Table permits accessory structures and uses in R1A zones. The definition of accessory structures and uses⁹ fits both *aviaries* and *aviculture*: they are subordinate, customary, incidental, and typical in R1A zones.

A stricter construction of § 38-74 & 77 that prohibited *aviaries* and *aviculture* would be laughable. To presume our Use Table prohibits them in all but agricultural zones would mean every resident of Orange County is likewise prohibited from growing their own orange trees!

The Use Table, § 38-77, lists a use described as *Citrus and fruit crops cultivation (SIC 0174) Citrus fruits*. This use is identified as permitted only in agricultural zones. But no sober, right-minded resident of Orange County would imagine this prohibited them from juicing the oranges from trees *cultivated* in their own front yard! Similarly, it makes no sense to imagine or suggest § 38-74 & 77 prohibit as accessory use all primary uses listed in the Use Table; § 38-74 & 77 must give way to the controlling definition of accessory use at § 38-1.

There is nothing in the definition of accessory use that would prohibit a resident of Orange County from *cultivating* a few orange trees on their property. Likewise, and on a similarly residential scale, the definition of accessory use embraces *aviaries* and *aviculture*. Our Code embraces *birds*, those creatures that others like Emily Dickenson liken to *hope* – “hope is the thing with feathers”.

Indeed, until 1995 our Code specifically permitted “hobby aviculture”¹⁰ as a use that still remains subordinate, customary, incidental, and typical in residential zones.

3. Does Condition 8 gut the definition of home occupation? No.

Section 38-79, (8) – Condition 8 – states: “Such retail sales shall be a permitted use, provided as follows: only paperwork and phone work, no merchandise on site, drop-shipment only, home occupations only.”

In contrast, the definition of *home occupation* provides that “commodities as are made on the premises may be sold on the premises.”

Both these provisions must be given effect.

One way of doing so is to permit, at the very least, *wholesale* commodities to be made and sold on the premises. This certainly permits *aviculture*. The definition of wholesale is all that must be determined. A definition based on price is sufficient. There is no need for it to require all buyers be sales tax exempt.

It would be more appropriate, however, to subject only one category of retail sales to the limitations of Condition 8, that category of retail sales specifically associated with *home occupation* on page 2850 of our Use Table – *Non-store retailers (SIC 596) Retail sale of products by TV, catalog, mail order, telephone, vending machines, or from other temporary locations.*

The definition of *home occupation* was written thirty years before Condition 8. At that time what was made at home could be sold at home – period. It didn't matter whether that commodity was priced at wholesale or retail, whether it was sold to an end-user or a reseller. Thirty years later, however, the advent of television, telemarketing, and the internet, made high-volume, non-store retail sales possible – from home. Condition 8 was then written to specifically address non-store retailers. A close look at Condition 8 reveals it to be the quintessential definition of the non-store retail sales method – the middle-man enterprise of non-store retail sales reduces sales to paperwork and phonework, no inventory, and drop-shipment. Condition 8 was written to address this modern sales technique and should not be applied indiscriminately to traditional retail sales of *home occupations*.

It is worth noting that two uses are specifically permitted as *home occupations* which exceed its conditions and those of Condition 8: *Day care home, adult or child*¹¹, *Limousine service, home-based*¹². The fact that both these *home occupations* have been added to our Code in the last few years urges for a generous construction of both the definition of *home occupation* and Condition 8.

In any case, neither the definition of *home occupation* or Condition 8 can be read to completely prohibit *aviculture* as a permissible *home occupation*.

4. Does omission mean prohibition? No

The definition of *home occupation* does not specifically permit *aviaries* or *aviculture*. But they are not prohibited by their omission. The notion that they are prohibited by omission is silly. If a use had to be specified, to be permitted as *home occupation* then the definition guts itself; no use but "arts and handicrafts" is specifically permitted by the definition of *home occupation*.

Instead of listing all the many occupations that can be conducted in a home, the definition of *home occupation* declares first that "ANY USE" is permitted as long as it is basically *invisible*, and then it lists the only uses specifically prohibited – barber shops, beauty parlors, plant nurseries, tearooms, food processing, restaurants, sale of antiques, commercial kennels, real estate offices, or insurance offices.

Certainly, *aviaries* and *aviculture* each qualify as “ANY USE”. It is simply disingenuous to suggest otherwise.

5. Does prohibition of kennels prohibit *aviaries* and *aviculture*? No.

It is only slightly less disingenuous to suggest that *home occupation*’s prohibition of *kennels* also prohibits as-similar *aviaries* and *aviculture*; the Code’s original definition of *kennel*¹³ solely concerned “mammals”, and the current definition of *kennel*¹⁴ specifically excludes “exotic animals regulated by the Florida Game and Freshwater Fish Commission”. The prohibition of *kennels* does not prohibit as-similar *aviaries*; the Code does not consider them similar.

There are a number of animal related activities the Code has never considered similar to *kennel*. Pet shops have never been considered to be similar to a *kennel*. Pet hospitals have never been considered to be similar to a *kennel*. Pet beauty parlors have never been considered to be similar to a *kennel*. Hobby kennels have never been considered to be similar to a *kennel*.

It makes more sense to say that *aviculture* – the breeding and selling of birds – is permitted to at least the same extent as *hobby kennels* – breeding of two litters per year, provided never more than twenty animals are at the residence.

6. Is an *aviary* an “outdoor display of merchandise or products”? No.

There is a difference between an outdoor, open-air *aviary* and the prohibited “outdoor display of merchandise or products”. A *display* is designed to be public, to attract attention, to advertise, and to sell merchandise or products. A private outdoor, open-air *aviary* isn’t. An *aviary* is outside simply to provide birds the health advantages of fresh air and sunlight. Any public exposure of an *aviary* to a right of way or to a neighbor is easily remedied with a fence or hedge.

Summary

1. **Orange County can not prohibit *aviaries* or *aviculture*.** Because all executive and regulatory authority over birds is granted by Art. IV, § 9, Fla. Const., to Florida Fish and Wildlife Conservation Commission, Orange County can not prohibit *aviaries* as accessory structures in residential zones, while it permits other accessory structures in those zones; Orange County can not prohibit *aviculture* as home occupation in residential zones, while it permits limited business use as home occupation in those zones.
2. ***Aviaries* and *aviculture* qualify as accessory structure and use.** No structure or activity permitted by the retired definition of “hobby aviculture” conflicts with the current definition of residentially permitted accessory structure and use¹⁵. Moreover, the fact that any definition for “hobby aviculture” appeared in our Code, and was there for many years, supports the argument that it is an accessory use “customarily” and “typically” associated with residential zones.
3. **Condition 8 does not “gut” the definition of *home occupation*.** Condition 8 can not be read to negate the definition of *home occupation*. Condition 8 was written specifically for non-store retail sales (SIC 596) and applies to them exclusively. At a minimum, Condition 8 would permit wholesale *aviculture* as a *home occupation*.
4. ***Aviculture* is a *home occupation*.** Aviculture, whether hobby or commercial, is unreservedly embraced by the long-standing definition for residentially permitted *home occupation*, a definition that is both generous and protective, permitting the individual, *any use*, and protecting neighbors by requiring that use remain *invisible* – “*any use* conducted entirely *within* a dwelling or accessory building”. The ten exceptions to “*any use*” in no way touch upon, nor suggest any prohibition of *aviaries* or *aviculture*.
5. ***Kennels* are not *aviaries* or *aviculture*.** A prohibition of *kennels* does not prohibit *aviaries* or *aviculture*. In fact, the Code’s long-standing distinction between *kennels* and *aviaries* and *aviculture* suggests the opposite – *aviaries* and *aviculture* are permitted as accessory structure, use, and *home occupation*. At the very least, *hobby aviculture* is – or must be – permitted to the same extent as *hobby kennels*.
6. ***Aviaries* are not an “outdoor display of merchandise or products”.** Even if an individual outdoor, open-air *aviary* were found to violate the prohibition of “outdoor display of merchandise or products”, that violation would not be fatal to the *aviary* because it could be remedied by removing the *aviary* from the public eye with a fence or hedge.

Conclusion

The State Constitution prevents the County from directly regulating *aviaries* or *aviculture*. Any ordinance in our Code which does so is invalid. There are no general ordinances which would have the effect of prohibiting *aviaries* or *aviculture*.

Our Code permits *aviaries* as accessory buildings. It permits *hobby aviculture* as accessory use. It even permits *commercial aviculture* as *home occupation*. Our Code permits all this in residential areas.

Please, help me to resolve this in the easiest way possible. Please issue a determination, consistent with Art. IV, § 9, Fla. Const., AGO 2002-23, and the valid, relevant portions of our Orange County Code, which will clarify for Zoning Division, Code Enforcement Division, the Board of Zoning Adjustment, and the County Commission, the extent to which *aviaries* and *aviculture* are permitted as accessory structure and use and *home occupation* in R1A zones.

If you would like to discuss this personally before making your determination, let me know.

Sincerely,

David Foley
407 658-4520

ENDNOTES

¹ **Art, IV, § 9, Fla. Const., Fish and Wildlife Conservation Commission.-** -There shall be a fish and wildlife conservation commission, composed of seven members appointed by the governor, subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law. The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section, except that there shall be no special law or general law of local application pertaining to hunting or fishing. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from license fees for the taking of wild animal life and fresh water aquatic life shall be appropriated to the commission by the legislature for the purposes of management, protection, and conservation of wild animal life and fresh water aquatic life. Revenue derived from license fees relating to marine life shall be appropriated by the legislature for the purposes of management, protection, and conservation of marine life as provided by law. The commission shall not be a unit of any other state agency and shall have its own staff, which includes management, research, and enforcement. Unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution. **History.**--Am. C.S. for H.J.R. 637, 1973; adopted 1974; Am. proposed by Constitution Revision Commission, Revision No. 5, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

² **§ 38-1. Definitions.** *Aviary* shall mean an enclosure for holding birds, excluding poultry, in confinement.

³ **§ 38-1. Definitions.** *Aviculture (commercial)* shall mean the raising, breeding and/or selling of exotic birds, excluding poultry, for commercial purposes. Any one (1) or more of the following shall be used to determine whether a commercial operation exists:

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- (1) The operation exists with the intent and for the purpose of financial gain;
 - (2) Statements of income or deductions relating to the operation are included with routine income tax reporting to the Internal Revenue Service;
 - (3) A state sales tax identification number is used to obtain feed, supplies or birds;
 - (4) An occupational license has been obtained for the operation;
 - (5) Sales are conducted at the subject location;
 - (6) The operation involves birds or supplies which were purchased or traded for the purpose of resale;
 - (7) The operation involves a flea market or commercial auction, excluding auctions conducted by not-for-profit private clubs;
 - (8) The operation or activities related thereto are advertised, including, but not limited to, newspaper advertisements or signs; or
 - (9) The operation has directly or indirectly created traffic.

⁴ **§ 38-1. Definitions.** *Home occupation* shall mean any use conducted entirely within a dwelling or accessory building and carried on by an occupant thereof, which use is clearly incidental and secondary to the use of the dwelling for dwelling purposes and does not change the character thereof; and provided, that all of the following conditions are met:

Only such commodities as are made on the premises may be sold on the premises. However, all such sales of home occupation work or products shall be conducted within a building and there shall be no outdoor display of merchandise or products, nor shall there be any display visible from the outside of the building. No person shall be engaged in any such home occupation other than two (2) members of the immediate family residing on the premises. No mechanical equipment shall be used or stored on the premises in connection with the home occupation, except such that is normally used for purely domestic or household purposes. Not over twenty-five (25) percent of the floor area of any one (1) story shall be used for home occupation purposes. Fabrication of articles such as commonly classified under the terms "arts and handicrafts" may be deemed a home occupation, subject to the other terms and conditions of this definition. Home occupations shall not be construed to include barber shops, beauty parlors, plant nurseries, tearooms, food processing, restaurants, sale of antiques, commercial kennels, real estate offices, or insurance offices.

⁵*Standard Industrial Classification Manual, 1987, Industry Group 027: Animal Specialties; 0279 Animal Specialties, Not Elsewhere Classified.* Establishments primarily engaged in the production of animal specialties, not elsewhere classified, such as pets, bees, worms, and laboratory animals. This industry also includes establishments deriving 50 percent or more of their total value of sales of agricultural products from animal specialties (Industry Group 027), but less than 50 percent from products of any single industry.

- . Alligator farms
- . Apiaries
- . Aviaries (e.g., parakeet, canary, lovebirds)
- . Bee farms
- . Cat farms
- . Dog farms
- . Earthworm hatcheries
- . Frog farms
- . Honey production
- . Kennels, breeding and raising own stock
- . Laboratory animal farms (e.g., rats, mice, guinea pigs)
- . Rattlesnake farms
- . Silk (raw) production and silkworm farms
- . Worm farms

⁶ § 38-79, (8) Such retail sales shall be a permitted use, provided as follows: only paperwork and phone work, no merchandise on site, drop-shipment only, home occupations only.

⁷ **68A-1.004. Definitions.** (89) Wildlife – All wild or non-domestic birds, mammals, fur-bearing animals, reptiles and amphibians. **Fla. Adm. Code, Fish And Wildlife Conservation Commission**

⁸ § 38-79, (48) Commercial aviculture or any aviary shall be as defined in section 38-1 of this chapter and may be permitted as a special exception subject to the following requirements. Each application shall include a site plan and corresponding narrative which shall contain the following information: a. A dimensionalized site plan (drawn to scale) indicating the location, height and intended use of all existing and proposed structures. b. The location, nature and height of proposed security fences, berms,

landscaping and other security and noise alleviation structures. c. A description of the facility outlining the intended method of operation, including the number, types and characteristics of the birds. (Ord. No. 97-05, § 5f, 4-29-97)

⁹ **§ 38-1. Definitions.** *Accessory structure or use* shall mean a subordinate building or structure situated on the same lot or parcel as the principal building or structure, or a subordinate use of land, and which building, structure or use is customarily incidental to and typically found in association with such principal building or use. Factors to be considered in determining whether a building, structure or use is "subordinate" and "customarily incidental" include the size of the lot or parcel, the uses of adjacent lots or parcels, and the size, shape, height, and roof type (if any) of the building or structure. (Ord. No. 2004-01, § 2, 2-10-04)

¹⁰ Until June 27, 1995, § 38-1 of our Code contained the following definition: *Aviculture (hobbyist)* shall mean an ancillary use of residentially zoned properties which use is composed of the keeping, raising and/or breeding of exotic birds, excluding poultry, for personal enjoyment or for conservation efforts. (This definition is intended to encompass aviculture activities which result in an occasional sale and/or exchange of birds. All structures erected for the foregoing use must comply with article IX of chapter 38 of the County Code.)

¹¹ **§ 38-1. Definitions.** *Day care home, adult or child*, shall mean a structure in which the owner and/or resident of the structure resides in that structure and, as a home occupation for compensation, provides supervision and temporary care for ten (10) persons or less, including those who are related by blood, marriage or are the legal wards or foster children of the owner/resident. (Ord. No. 2004-01, § 2, 2-10-04)

¹² **§ 38-79, (146)** Except as set forth in subsection (146)h. of this section, a home-based limousine service or business shall be a permitted use, subject to the following:

- a. A vehicle for hire shall be parked inside the property lines of the lot or parcel where the home or residence is located. Specifically, it shall be parked inside a garage, within a carport, or on a paved driveway. It shall not be parked within the right-of-way, on or over a sidewalk, or on an unimproved surface.

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- b. Only sedans, vans and limousines may be permitted to serve as vehicles for hire.
 - c. A van shall not exceed twenty (20) feet in length. A sedan or limousine shall not exceed twenty (20) feet in length, unless a survey of the property submitted with the application for the occupational license to engage in such a business demonstrates that the paved driveway is of sufficient length to park the vehicle outdoors without encroaching within the right-of-way or on an unimproved surface. Under no circumstances may a sedan or limousine exceed twenty-eight (28) feet in length.
 - d. Only one (1) vehicle for hire may be parked at the residential location, except that two (2) such vehicles may be parked there when at least one (1) of the vehicles is able to fit completely inside a garage (not a carport), and such vehicle is stored inside the garage whenever it is parked at the residential location. A survey of the property shall be submitted with the application for the occupational license demonstrating that the garage is adequately sized to store the extra vehicle.
 - e. A vehicle for hire with permanent commercial markings (excluding a vehicle with just company name plates on the bumpers, bumper stickers, and/or window decals) shall be stored in the garage (not a carport) whenever it is parked at the residential location.
 - f. Employees and customers of the home-based limousine service, excluding the homeowner, shall not be permitted at the residential location for the purpose of operating or assisting in the operation of the service.
 - g. The repair of a vehicle for hire shall not be permitted at the residential location, except for a flat tire change or battery charge (jump start).
 - h. If more than two (2) vehicles for hire are proposed to be used for the service or business, a special exception shall be required to commence the service or business. (Ord. No. 2000-21, § 3, 8-29-00)

¹³ **§ 38-1 Definitions.** *Kennel* shall mean any building, lot, structure or premises where any combination of four (4) or more of the following which are over six (6) months of age are kept for any purpose: (a) dogs, (b) cats, and/or (c) other domesticated species of smaller mammalian animals having a full grown adult weight of more than one (1) pound and less than one hundred (100) pounds. The following are specifically excluded from this definition of kennel: pet shops, pet hospitals, pet beauty parlors, hobby kennels, horses, cows, goats, swine and other hooved animals when and as

those particular uses and/or animals are regulated by other provisions of the County Code.

¹⁴ **§ 38-1. Definitions.** *Kennel* shall mean any building, lot, structure or premises wherein animals, excluding livestock and exotic animals regulated by the Florida Game and Freshwater Fish Commission, are kept for sale, breeding, boarding, buying, letting for hire, or training for a fee. The following are specifically excluded from this definition of kennel:

- (1) Pet shops,
- (2) Animal or pet hospitals,
- (3) Pet beauty parlors,
- (4) Breeding at a residence of two (2) or less litters per calendar year, provided that no more than twenty (20) animals are kept/housed/confined at the residence at any one time,
- (5) Veterinarian facilities,
- (6) Keeping/housing/confining of twenty (20) or fewer animals at a residence at any one time for noncommercial purposes only. (Ord. No. 95-33, § 2, 10-10-95)