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MEMORANDUM

TO: Commissioner Mildred Fernandez

THROUGH: Joel D. Prinsell, Deputy County Attorney *JDP*

FROM: Tara L. Gould, Assistant County Attorney *TG*

RE: Aviaries and Aviculture within the R-1A Zoning District

DATE: May 21, 2007

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INTRODUCTION

Pursuant to your request, I have researched whether aviaries and commercial aviculture operations are permitted uses within the R-1A zoning district. Specifically, you have requested the review of a request for determination presented to Mitch Gordon, Orange County Zoning Manager, requesting "a determination, consistent with Art. IV, § 9, Fla. Cons., 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."

SUMMARY

Commercial aviculture and aviaries are not permitted uses within the R-1A zoning district. However, pursuant to Chapter 38 of the Orange County Code, non-commercial aviaries are not specifically identified or prohibited, and *may* be permitted as an accessory building, use or structure within the R-1A zoning district, *if* it is determined by the Zoning Manager that the aviary is customarily incidental to and typically found in association with the principal building or use.

DISCUSSION

Set forth below is a brief explanation of (1) the Orange County zoning regulations as they relate to commercial aviculture operations and aviaries; (2) the Orange County zoning regulations as they relate to accessory buildings, uses or structures; and (3) whether Article IV, Section 9 of the Florida Constitution, preempts the authority of Orange County to enact reasonable land development regulations which may indirectly impact the possession of wildlife.

1. COMMERCIAL AVICULTURE, AVIARIES

An "aviary," as defined in Section 38-1 of the County Code, is "an enclosure for holding birds, excluding poultry, in confinement." "Aviculture (commercial)" is defined as, "the raising, breeding and/or selling of exotic birds, excluding poultry, for commercial purposes." Section 38-1 provides that any one or more of the following shall be used to determine whether a commercial aviculture operation exists:

- (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.

Section 38-77 of the County Code does not allow commercial aviculture or aviaries within the R-1A zoning district as permitted uses or as special exceptions. Furthermore, although home occupations, as defined in Section 38-1, are permitted within the R-1A zoning district, any reading of the Code which would allow commercial aviculture and aviaries as a home occupation within the R-1A zoning district would contradict the provisions of Section 38-77 specifically relating to commercial aviculture. That misinterpretation would, in theory, subject to other limiting criteria, allow commercial aviculture and aviaries as permitted home occupations within the A-1, A-2, A-R, RCE-5, RCE-2, RCE, R-1AAAA, R-1AAA, R-1AA, R-1A, R-1, R-2, R-3, Cluster, RT, RT-1, RT-2, U-V, R-L-D, NC, NAC, and NR zoning districts.

1. NON-COMMERCIAL AVIARIES

Chapter 38 of the Orange County Code does not specifically identify or define "non-commercial" or "hobby" aviaries. In accordance with Section 38-77, "non-commercial" aviaries may be permitted as an accessory building, use or structure within the R-1A zoning district, if it is determined by the Zoning Manager that the aviary is customarily incidental to and typically found in association with the principal building or use.

Accessory buildings, uses and structures are permitted uses within the R-1A zoning district, subject to compliance with all applicable regulations. An accessory structure or use, as defined in Section 38-1, is 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." The determination of whether a building, structure or use is "subordinate" and

"customarily incidental" includes an analysis of 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.

2. PREEMPTION

Article IV, Section 9, of the Florida Constitution, provides that the Florida Fish and Wildlife Conservation Commission (the "Commission") has the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life. The County has no authority to prohibit the possession, breeding or sale of wildlife. However, based on the Florida Constitution, applicable state statutes and case law, the County is not preempted from adopting reasonable land development regulations which may have the effect of limiting wildlife to suitable neighborhoods so long as those regulations are not in conflict with the authority of the Commission. In Attorney General Opinion 2002-23, it was opined that Columbia County had no "authority to prohibit the possession of wildlife but, to the extent that its land use ordinances have the effect of restricting wildlife possession to locations of suitable acreage or where fencing is permissible, for example, such ordinances would not conflict with the authority of the Florida Fish and Wildlife Conservation Association."

Please note, through my research I have found little guidance on the extent to which land use regulations adopted by local governments may indirectly impact the possession of wildlife.

CONCLUSION

In sum, Orange County has the authority to adopt reasonable land development regulations, which may have the effect of limiting wildlife to specific neighborhoods, so long as those regulations are not in conflict with the authority of the Commission. Accordingly, pursuant to Orange County Code, commercial aviculture and aviaries are not permitted uses within the R-1A zoning district. Commercial aviculture and aviaries *are* permitted as special exceptions only within A-1, A-2 and A-R zoning districts. "Non-commercial" aviaries or "hobby aviaries" are not specifically defined or prohibited, and *may* be permitted as an accessory building, use or structure within the R-1A zoning district, if it is determined that the aviary is customarily incidental to and typically found in association with the principal building or use.

Section 38-74 vests the Zoning Manager with the authority and responsibility of interpreting the provisions of Chapter 38 of the Orange County Code. The decision of whether a specific aviary constitutes a commercial aviculture operation is a factual determination to be made by the Zoning Manager upon review of the above-referenced criteria. Furthermore, if it is determined that a specific aviary does not constitute a commercial aviculture operation, it is the responsibility of the Zoning Manager to determine whether that aviary may be permitted as an accessory building, use or structure within a particular zoning district.

Please let us know if you have any additional questions.

c: David Heath, Deputy County Administrator
Mitch Gordon, Zoning Manager