

ORANGE COUNTY BOARD OF ZONING ADJUSTMENT

DAVID AND JENNIFER
FOLEY

1015 N. SOLANDRA DR
ORLANDO, FL 32807

DISTRICT 3

Ref No. _____

APPEAL OF ZONING
MANAGER'S DETERMINATION

LETTER OF REBUTTAL

*Aviaries and Aviculture in R-1A
Zoning Districts*

SUMMARY

The Zoning Manager's Determination concludes that *aviaries*¹ and *aviculture*² are entirely prohibited in R-1A zoning districts.

The Determination errs in at least two respects – both the definition of *accessory structure and use*³ and *home occupation*⁴ permit *aviaries* and *aviculture*.

Moreover, Orange County cannot prohibit *aviaries* or *aviculture* anywhere. That authority lies exclusively with the Florida Fish and Wildlife Conservation Commission.⁵

The Determination also requires any accessory structure conform to §38-77 (114) [sic]. It is assumed the intended citation is §38-79 (114)⁶.

While requiring conformance is not an error, §38-79 (114) (i), is interpreted erroneous by Zoning Staff to prohibit galvanized sheet metal siding.

DISCUSSION

1. Orange County cannot prohibit *aviaries* or *aviculture*.

A county cannot directly regulate birds. This has been settled by Florida's courts, Florida's Attorney General, and Florida's Fish and Wildlife Conservation Commission [See: *City of Miramar v. Bain*, 429 So.2d 40 (Fla.4th DCA); AGO 2002-23 (March 15, 2002); and FWC Memorandum (May 17, 2007) – Attached].

Any ordinance that directly regulates birds violates the state constitution. Nevertheless, Orange County has an ordinance that does exactly that – § 38-77, Use Table, page 2835, row 21, “Commercial aviculture, aviaries”.

This Board can't overturn that ordinance; it doesn't have the authority. But it can reverse a Zoning Manager's Determination, and should, when, as in this case, that Determination misinterprets the general and permissive definitions of *accessory structure and use* and *home occupation* in a way that unnecessarily violates Florida's Constitution by directly regulating *aviaries* and *aviculture*.

Additionally, the constitutional question is raised here to give Orange County an opportunity to correct a facially unconstitutional ordinance without further litigation.

2. *Aviaries* and *aviculture* are permitted as *accessory structure and use*.

The Determination concludes that *aviaries* and *aviculture* are entirely prohibited in R-1A zoning districts. It relies upon the Use Table's regulation of “Commercial aviculture, aviaries”, and the conditions and definitions governing that use. It says nothing of *accessory structure and use*.

The Determination errs generally in making no allowance for *aviaries* and

aviculture as accessory structure and use, and it errs specifically in permitting only “an accessory structure to house a pet bird”, a statement that has moved Zoning staff to the startling conclusion that only one pet bird is permitted in a backyard birdcage.

The Code permits *accessory structure and use* in R-1A zoning districts (§38-77, Use Table, page 2833, row 2). The Code defines *accessory structure and use* as a subordinate structure, or subordinate use, customarily incidental to and typically found in association with such principal building or use.

Certainly, *aviaries* and *aviculture* fit as easily now within the limits of this definition as they did in 1995 when “hobby aviculture”⁷ was specifically permitted.

The definition of *accessory structure and use* makes no reference to the Use Table. It does not, for instance, define *accessory structure and use* as structures and uses permitted by the Use Table. In other words, the Use Table doesn’t define *accessory structure and use*, as the Determination suggests; the definition of *accessory structure and use* defines itself. If a structure or use satisfies the definition, it is a permitted *accessory structure and use*.

Aviaries and *aviculture* satisfy the definition when subordinate to residential use, because having a pet, having a pet bird, having more than one pet bird, having an outdoor enclosure for all those birds, making a hobby or *home occupation* of breeding those birds –is customary, incidental, and typical in R-1A zoning districts.

The Determination errs in not saying so. The Board should reverse the Determination and issue a decision stating *aviaries* and *aviculture* do qualify as *accessory structure and use* in R-1A zoning districts.

3. *Aviculture is permitted as home occupation.*

The Determination concludes that *aviculture* is not a *home occupation*. It gives only two reasons for this conclusion:

- 1) “I find that this activity is not a home occupation, as a home occupation allows for commodities made on premises, such as fabrication of arts and crafts”;
- 2) “The fact that the definition of home occupation specifically excludes commercial kennels, is a clear indication that commercial aviculture is not permitted as a home occupation.”

Both statements are incorrect: *home occupation* isn’t limited to the fabrication of arts and crafts; and, as a matter of law, the uses specifically excluded from a definition are the *only* uses excluded.⁸

Most anything can be a *home occupation*. The first six words of its definition make that clear: *Home occupation shall mean any use.* That means exactly what it says – a *home occupation* can be **anything**.

The only uses that can’t be a *home occupation* are either specifically prohibited or do not qualify.

Only ten things are specifically prohibited as *home occupation*. They’re listed at the end of its definition. That list is exclusive; only the uses listed are completely prohibited. The list is not, as the Determination suggests, a general, representative list of examples of other unnamed prohibited uses. Only the uses in the list are prohibited.

Otherwise, any use can be a *home occupation*, if it meets the criteria restricting

home occupation. Aviculture easily meets that criteria.

Below is a checklist of those limitations. If *aviculture* checks out, it's a *home occupation*.

- It is conducted entirely within a dwelling or accessory building;
- It is carried on by an occupant thereof;
- It is clearly incidental and secondary to the use of the dwelling as a dwelling;
- It avoids changing the character of the dwelling as a dwelling;
- Only commodities made on premises are sold on premises;
- All sales are conducted within a building;
- There is no outdoor display of merchandise or products;
- No display is visible outside the building;
- Only two family members residing on premises participate;
- Only mechanical equipment normal for household purposes is used;
- No more than 25% of the home is used.

In sum, *aviculture* satisfies the criteria for *home occupation*, and is neither specifically prohibited, nor prohibited by implication as a *home occupation*.

The Determination errs in not saying so. The Board should reverse the Determination and issue a decision stating *aviculture* qualifies as a *home occupation* because, as stated, it satisfies the criteria for *home occupation*, and is neither specifically, or by implication, prohibited as *home occupation*.

4. Galvanized sheet metal siding is not prohibited by §38-78 (114) (i).

The Determination does not err in requiring conformance with §38-79 (114). However, paragraph (i) of that section is interpreted erroneously by Zoning Staff to prohibit galvanized sheet metal siding.

Paragraph (i) requires that the exterior and roof of an accessory structure be made of “materials commonly used throughout Orange County in single family residential construction, such as stucco, brick, vinyl, aluminum or wood for the siding or walls, and shingles, tiles or corrugated metal for the roof.”

Zoning Staff concludes the materials listed are the only materials permitted. This is incorrect.

The materials permitted are any “commonly used throughout Orange County in single family construction.” That very lenient requirement introduces a list of possible materials. That list is preceded by the words “such as” to alert the careful reader that what follows is simply an open ended list of examples, and not a finite, exhaustive list.

Galvanized sheet metal is commonly used throughout Orange County in single family construction. It is used in exterior flashing, exhaust vents, compressor casings, steel studs, even *siding*. Architecturally it is equivalent to specifically listed materials like aluminum and corrugated metal. Twenty-two neighbors on North Solandra Drive agree (See attached letters of no objection). The Code, therefore, permits it.

Zoning Division errs in not doing so. The Board should reverse the conclusion of Zoning Division and issue a decision stating galvanized sheet metal is permitted by § 38-79 (114) (i).

CONCLUSION

The first riddle of this appeal is straightforward – How to give effect to three provisions of the Code?

- *accessory structure and use* – a permitted use;
- *home occupation* – a permitted use;
- *Commercial aviculture, aviaries* – a prohibited primary use.

A plain reading of the Code answers the riddle – *Aviaries* and *aviculture* are permitted in R-1A zoning districts when they meet the requirements of *accessory structure and use* and *home occupation*.

The second riddle of the appeal is no riddle at all – clearly, galvanized sheet metal is a common building material, and is therefore permitted.

For the reasons offered in this appeal, Appellants request the Board reverse the Zoning Manager’s Determination and issue a decision stating:

1. *Aviaries* and *aviculture* qualify as *accessory structure and use* in R-1A zoning districts when subordinate to residential use, and because they are customarily incidental to and typically associated with that use;
2. *Aviculture* qualifies as a *home occupation* because it satisfies the requisite criteria, and is neither specifically or by implication prohibited as a *home occupation*.
3. Galvanized sheet metal is permitted as accessory structure siding because it is a common building material.

With respect,

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

² **§ 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:

- (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.

³ **§ 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) (Underline emphasis added.)

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 **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.

(Underline emphasis added.)

⁶ **§ 38-79. Conditions for permitted uses and special exceptions.**

(114) Location and size requirements of accessory buildings and uses in residential and agricultural areas:

- a. When an accessory building is used solely as living space (i.e., dens, bedrooms, family rooms, studies) it may be attached to a principal structure by a passageway, provided the accessory building and the passageway comply with the following standards:
 1. A principal structure shall exist onsite;
 2. The accessory building and the passageway shall have the same architectural design as the principal structure, including the roof, exterior finish and color;
 3. Access via doorways shall be provided at both ends of the passageway;
 4. The passageway shall not exceed fifteen (15) feet in length;
 5. The accessory building and the passageway shall comply with the principal structure setbacks;
 6. Neither the height of the accessory building nor the height of the passageway shall exceed the height of the principal structure;
 7. No kitchen facilities shall be allowed in the accessory building; and
 8. The accessory building shall be heated and ventilated pursuant to all applicable building codes.
- b. If an accessory building used as living space is not attached to the principal structure, then it shall be considered a detached accessory building, and it shall be subject to the size requirements listed in sections g and h below.

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- c. An accessory building used for nonliving purposes (i.e., storage space, workshops, sheds, enclosed carports, etc.) may be attached to a principal structure by a fully-enclosed passageway, provided the accessory building and the passageway comply with the standards set forth in subsections a.1. through a.7. above and the accessory use structure does not exceed five hundred (500) square feet or twenty-five percent (25%) of the living area of the principal structure not to exceed one thousand (1,000) square feet.
 - d. A detached accessory building shall not be closer than five (5) feet to a lot line, nor closer than ten (10) feet to any other detached structure on the same lot.
 - e. No detached accessory building shall be located in front of the principal building.
 - f. No accessory building may be constructed prior to construction of the principal building.
 - g. The cumulative square footage of all detached accessory buildings shall be limited to a maximum of five hundred (500) gross square feet of floor area or to twenty-five percent (25%) of the living area of the principal residence on the property, whichever is greater, but in no event larger than one thousand (1,000) square feet. On agricultural zoned parcels (A-1, A-2, and A-R), equal to or less than one (1) acre in size, the square footage of detached accessory buildings shall be limited to one thousand (1,000) square feet or twenty-five percent (25%) of the size of the principal residence, whichever is greater. Agricultural zoned parcels and the R-CE, R-CE-2, and R-CE-5 zoned parcels greater than one (1) acre but less than or equal to five (5) acres in size may have detached accessory buildings up to two thousand (2,000) square feet or twenty-five percent (25%) of the size of the principal residence, whichever is greater. Agricultural zoned parcels and R-CE, R-CE-2, and R-CE-5 zoned parcels greater than five(5) acres in size may have detached accessory buildings up to three thousand (3,000) square feet or twenty-five percent (25%) of the size of the principal residence, whichever is greater. Accessory buildings used for agricultural purposes may be located in the front yard provided the minimum tract size is ten (10) acres or greater and the accessory building complies with the principal building setbacks. If the predominant use of the accessory building is to support the agricultural use on the property, then there is no size limitation on the accessory building. If the predominant use of the accessory building is

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- to support the residence on-site, then the size limitation set forth above shall apply. Documentation and evidence may be required to qualify the agricultural use of the accessory building. The square footages referenced herein shall be cumulative square footages.
- h. A detached accessory building shall be limited to one (1) story with a maximum overall height of fifteen (15) feet above grade.
 - i. In R-1, R-1A, R-1AA, R-1AAA, R-1AAAA, R-CE, R-CE-2, R-CE-5, R-2, R-3, R-T-1, and R-T-2 zoned districts, an accessory building or structure greater than 150 square feet or greater than ten feet (10') in height (as measured from the finished grade to the top of the structure), shall comply with the following architectural standards: the exterior and roof (if any) shall be comprised of materials commonly used throughout Orange County in single family residential construction, such as stucco, brick, vinyl, aluminum or wood for the siding or walls, and shingles, tiles or corrugated metal for the roof.
(Ord. No. 95-20, § 7, 7-25-95; Ord. No. 97-05, § 5p, 4-29-97; Ord. No. 98-37, § 7, 12-15-98; Ord. No. 2004-01, § 7, 2-10-04)

⁷ 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.)

⁸ *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 900 (Fla. 1996). Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another.