

**IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA**

Case No. 5D21-0233

Lower Case No. 2016-CA-007634-O

DAVID W. FOLEY, JR., and JENNIFER T. FOLEY,

Appellants,

v.

ORANGE COUNTY,

a political subdivision of the State of Florida, and,
ASIMA AZAM, TIM BOLDIG, FRED BRUMMER,
RICHARD CROTTY, FRANK DETOMA, MILDRED
FERNANDEZ, MITCH GORDON,
TARA GOULD, CAROL HOSSFELD, TERESA
JACOBS, RODERICK LOVE, ROCCO RELVINI,
SCOTT RICHMAN, JOE ROBERTS,
MARCUS ROBINSON, TIFFANY RUSSELL, BILL
SEGAL, PHIL SMITH, *and* LINDA STEWART,
*individually and together, in their personal
capacities,*

Appellees.

_____ /

MOTION FOR JUDICIAL NOTICE

APPELLANTS DAVID AND JENNIFER FOLEY, pursuant Rule 9.300, Florida Rules of Appellate Procedure, and Sections 90.202 (10) and 90.203, Florida Statutes, move the Court to take judicial notice of the provisions of two ordinances: (1) the continuing exclusion of “animals regulated by the Florida Game and Freshwater Fish Commission” from Orange County’s definition of “kennel” in Section 38-1, Orange County Code, originally codified by Ordinance 1995-33, *Appendix pages 3-5*; and,

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(2) the continuing prohibition of “Commercial aviculture, aviaries – SIC 0279” in Section 38-77.1, Orange County Code, re-codified by Ordinance 2018-08, *Appendix pages 6-103*.

SUMMARY

Ordinance 1995-33, will provide the Court with historical insight into the legislative intent behind the defendants’ decision to break from the exclusion of “animals regulated by the Florida Game and Freshwater Fish Commission” in the 1995 definition of “kennel” and to add regulation of such animals (birds) to the County’s new prohibition of “aviculture” as a “home occupation” in the Foleys’ case.

Ordinance 2018-08, will provide the Court with historical insight into the legislative intent behind the defendants’ decision to further broaden the County’s regulation of all animal husbandry, not only by its new challenged prohibition of “commercial retail sale of animals” in the current definition of “home occupation,” but also by its continuing express prohibition of “aviculture commercial” in Horizon West, re-codified by Orange County, April 19, 2018, just four months after oral argument on the County’s motion to dismiss, December 11, 2017.

PROCEDURAL BACKGROUND

1. No party made Ordinance 1995-33 or Ordinance 2018-08 a part of the Record.
2. No party presented Judge Higbee with Ordinance 1995-33, or its definition of “kennel” in Section 38-1, Orange County Code, before or after oral argument on Orange County’s motion to dismiss December 11, 2017.
3. The Record does, nevertheless, reference “kennel.” See *pages 76* (“commercial kennel” stricken from definition of “home occupation” in Ordinance 2016-19), **114** (“commercial kennel” added to condition 101(i) applicable to “home occupation” in Ordinance 2016-19), **192** (“Commercial kennel” retained in Use Table of Ordinance 2016-19), **218** (duplicate of page 76), **533** (duplicate of page 76), **571** (duplicate of page 114), **649** (duplicate of page 192), **667-668** (“commercial kennel” retained in definition of “home occupation” amended by Ordinance 2008-06), **1333** (Transcript, lines 19-22), **1338** (Transcript lines 2-14).
4. Orange County did not inform Judge Higbee of its intent to re-codify the prohibition of “aviculture commercial” in Ordinance 2018-08, before, during, or after oral argument on its motion to dismiss December 11, 2017.
5. No party presented Judge Higbee with Ordinance 2018-08 prior to her decision on Orange County’s motion to dismiss, November 10, 2020.

6. The Record does, nevertheless, make pervasive reference to “aviculture” and “aviary.”

ORDINANCE 1995-33

7. Ordinance 1995-33, is provided to the Court in a “printed copy,” as required by Section 90.202(10), Florida Statutes, *Appendix pages 3-5*.

8. Ordinance 1995-33, was enacted October 18, 1995.

9. Ordinance 1995-33, amended the definition of “kennel” in Section 38-1, *Definitions*, Chapter 38, *Zoning*, Orange County Code.

10. The amended definition specifically references the Florida Game and Freshwater Fish Commission – the predecessor of the Florida Fish and Wildlife Conservation Commission, a focal point of this appeal.

11. The amended definition expressly excludes “structures or premises wherein ... 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.”

12. The current definition of “kennel” in Section 38-1, Orange County Code, retains this exclusion verbatim.

13. Ordinance 1995-33, will provide the Court with insight into the legislative history and statutory definitions that make sense of the allegation in paragraph 41 of the Foleys’ Amended Verified Complaint, *Record page*

276, that “there was no ordinance ... that ... expressly prohibited ... *aviculture* as [a] ... *home occupation* at the Foleys’ Solandra homestead.”

ORDINANCE 2018-08

14. Ordinance 2018-08, is provided to the Court in a “printed copy,” as required by Section 90.202(10), Florida Statutes, *Appendix pages 6-103*.

15. Ordinance 2018-08, was enacted April 19, 2018, four months after oral argument on Orange County’s motion to dismiss, December 11, 2017.

16. Ordinance 2018-08, amended the “Horizon West Town Center Planned Development Code,” first added to the Orange County Code by Ordinance 2013-02, February 7, 2013.

17. It retained and amended Section 38-77.1, the “Horizon West Town Center PD Code Land Use Table” (Use Table).

18. The Use Table specifically prohibits “Commercial aviculture, aviaries – SIC 0279 – Commercial aviculture.”

19. Though Ordinance 2018-08, does not apply to the Foleys’ Solandra or Cupid properties, its recodification of the express regulation of “Commercial aviculture, aviaries – SIC 0279” in Horizon West, after oral argument on Orange County’s motion to dismiss, will provide the Court with insight into the legislative history and intent that make sense of the allegation in paragraphs 58 and 60 of the Foleys’ Amended Verified

Complaint, *Record pages 281 and 282*, that Orange County continues to boldly “trespass [] the regulatory jurisdiction granted exclusively to [the Florida Fish and Wildlife Conservation Commission] by Art. IV, §9, Fla.Const.”

ARGUMENT

Section 90.202(10), Florida Statutes, grants the Court discretion to take judicial notice of “[d]uly enacted ordinances ... of ... counties located in Florida, provided such ordinances ... are available in printed copies ...”

Section 90.203, Florida Statutes, makes judicial notice of ordinances compulsory when the movant provides (1) the adverse party with “timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request,” and (2) the court “with sufficient information to enable it to take judicial notice of the matter.”

The Foleys, by this motion, its appendix, and their service, have met the above statutory requisites of mandatory judicial notice of Orange County Ordinance 1995-33 and Ordinance 2018-08.

CONCLUSION

WHEREFORE DAVID AND JENNIFER FOLEY MOVE THE COURT to take judicial notice of (1) the continuing exclusion of “animals regulated by the Florida Game and Freshwater Fish Commission” from Orange

County's definition of "kennel" in Section 38-1, Orange County Code, originally codified by Ordinance 1995-33, and (2) the continuing prohibition of "Commercial aviculture, aviaries – SIC 0279" in Section 38-77.1, Orange County Code, amended by Ordinance 2018-08.

CERTIFICATE OF SERVICE

Appellants certify that on October 29, 2021, the foregoing was electronically filed with the Clerk of the Court using the e-Filing Portal, and electronically served to the following:

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David W. Foley, Jr.



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Date: October 29, 2021

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