

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

Case No. 5D21-0233  
L.T. 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, ASIMA AZAM, TIM BOLDIG,  
FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA,  
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,

Appellees.

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**APPELLEE, ORANGE COUNTY, FLORIDA'S  
RESPONSE TO APPELLANTS' MOTION  
FOR JUDICIAL NOTICE OF ORDINANCES**

Appellee, Orange County, Florida, pursuant to Rules 9.110(f),  
9.200, 9.210(g), and 9.300 of the Florida Rules of Appellate  
Procedure, responds to the Motion for Judicial Notice filed by  
Appellants, David W. Foley, Jr., and Jennifer T. Foley (“the Foleys”),  
on or about October 29, 2021, and states:

1. Orange County objects to the Foleys' Motion for Judicial Notice of Ordinance No. 1995-33 and Ordinance No. 2018-08 ("Foleys' Motion").

2. Motions for judicial notice should not be used as a means to raise additional, last-minute arguments on appeal after all of the deadlines to file briefs have passed.

3. The Foleys' Motion was filed on October 29, 2021, approximately a month before the oral argument scheduled for December 7, 2021.

4. All of the briefs have already been submitted. The Foleys' Initial Brief, Amended Initial Brief, and Reply Brief were filed on June 16, 2021, June 25, 2021, and August 30, 2021, respectively. Orange County's Answer Brief was filed on or about August 9, 2021.

5. Now, through the filing of a Motion for Judicial Notice, the Foleys raise new arguments that were not addressed in their Initial Brief or Reply Brief. More specifically, the Foleys' Motion seeks to "make sense of the allegation in paragraph 41" of their Amended Complaint. Motion, p. 4, ¶ 13. Paragraph 41 of the Amended Complaint alleges that "there was no ordinance . . . that . . . expressly prohibited aviaries as an accessory structure, or aviculture as an

accessory use or home occupation at the Foleys' Solandra homestead . . . .” R276.

6. It is difficult to understand how the judicial notice of a 1995 Ordinance, an ordinance which is outdated and remote in time, would make sense of the referenced allegation. The Amended Complaint cites to Ordinance No. 2016-19 (R279, Amended Complaint (“AC”) ¶55) and acknowledges that Ordinance No. 2016-19 removed the references to “aviary” and “aviculture (commercial)”. R279, AC ¶ 55. The Amended Complaint does not reference Ordinance No. 1995-33. Counts I and II of the Amended Complaint raise a facial challenge to Ordinance No. 2016-19, not Ordinance No. 1995-33. R280-282. The 1995 Ordinance is equally inapplicable to the other counts in the Amended Complaint.

7. This Court should deny the Foleys' Motion to judicially notice Ordinance No. 95-33 because the Foleys' Motion is a belated attempt to raise additional arguments on appeal after all of the briefs have been submitted.

8. Similarly, the Foleys' Motion alleges that Ordinance No. 2018-08 will “make sense of the allegation in paragraphs 58 and 60 of the Foleys' Amended Verified Complaint . . . that Orange County

continues to boldly ‘trespass [] the regulatory jurisdiction granted . . . to [the Florida Fish and Wildlife Conservation Commission] . . . .’” Motion, pp. 5-6, ¶19.

9. Yet, the Foleys’ Motion acknowledges that Ordinance 2018-08 “does not apply to the Foleys’ Solandra or Cupid properties.” Motion, p. 5, ¶ 19. Counts I and II of the Amended Complaint raise a facial challenge to Ordinance No. 2016-19, not an ordinance that does not even apply to either of the Foleys’ property.

10. Accordingly, the Foleys’ Motion for Judicial Notice of Ordinance 2018-08 should be denied. Again, judicial notice should not be used as a means to raise additional, irrelevant, and untimely arguments on appeal after all of the briefs have been submitted.

11. For the foregoing reasons, this Court should deny the Foleys’ Motion.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on November 5th, 2021, the foregoing was filed through the eDCA system and served via electronic mail to David W. Foley, Jr. at david@pocketprogram.org; Jennifer T. Foley at jtfoley60@hotmail.com; Ronald Harrop, Esquire, RHarrop@oconlaw.com, eservice@oconlaw.com,

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