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To: Carl S. Burns, County Attorney
From: 09692, Assistant County Attorney
Date: July 25, 2017
Re: Complaints about the Zimmer Farm

You asked me to prepare an objective memorandum analyzing the following issues:

- 1.) Whether the Zimmers' bird rescue operation is permitted under the county zoning ordinances.
- 2.) Whether the Zimmers' festivals are permitted under the county zoning ordinances.
- 3.) Whether the Franklin Right to Farm Act (FRFA) affects the county's ability to enforce its zoning ordinance with respect to either the bird rescue operation or the festivals.

I conclude that the bird rescue operations are not permitted under the county zoning ordinance. The bird festivals, however, may be permitted, but at a reduced number. Further, the FRFA will not interfere with the county's ability to enforce the zoning ordinance and prohibit further violations.

1.) The bird rescue operation is not permitted under county zoning ordinances.

In an A-1 zoning district, the Hartford County Zoning Code permits only agricultural uses and those incidental processing, packaging, storage, transportation, distribution, sale, or agricultural accessory uses intended to add value to agricultural products produced on the premises. See *Hartford County Zoning Code*, Title 15, §22(a).

An agricultural use is defined as one conducted for the purpose of producing an income or livelihood from an agricultural product, which is a defined list that includes livestock such as cattle, swine, sheep, and goats, and poultry, such as chickens, geese, ducks, and turkeys.

The Zimmers' may claim that the rescued birds are poultry and therefore an agricultural product. Although the zoning ordinance itself does not provide further guidance, I suspect the rescued birds are not an agricultural product, as they are not domestic animals raised on the land, which seems to be the intention behind the permitted agricultural uses under

the zoning ordinance. While not directly on point for this purpose, our neighboring state, Columbia, has a Columbia Right to Farm Act, which defines a "farm product" as those plants and animals useful to human beings **produced by agriculture**. See *Koster v. Presley's Fruit* (Col. Ct. App. 2010). Production is determined by seeing whether the alleged product is grown, raised, or bred on the farm premises. If there is a similar intention in the zoning ordinance regarding agricultural products, then the rescued birds will not qualify despite some of them, such as the ducks, nominally seeming to be poultry.

Even if the rescued birds are considered poultry and an agricultural product, the bird rescue operations will not qualify as an agricultural use because it is not "one conducted for the purpose of producing an income or livelihood" in connection with the agricultural product. See *Hartford County Zoning Code*, Title 15, §22(b)(2). Edward Zimmer has even stated that he does not sell the birds, does not make any profit from the operation, and does not intend to do so. He merely loves to rescue birds.

2.) The Bird Festivals may be permitted under county zoning ordinances.

The Zimmers' have a different argument with respect to the bird festivals. They may argue that these festivals qualify as an "agricultural accessory use" as they are special events directly related to the sale or marketing of one or more agricultural products produced on the premises. See *Hartford County Zoning Code*, Title 15, §22(b)(3). The flyers for the festivals even advertise the sale of apples and recipes for baking with fruit, and Edward and John Zimmer have stated they are running the festivals as "agritourism" - public events providing entertainment and education in order to market and sell their agricultural products. At the festivals, they have vendors, musical entertainment, and cooking sessions. The Zimmers' themselves, meanwhile, sell the apples and strawberries that they grow on their farm, which are undisputedly permitted under the zoning ordinance. As an incidental agricultural accessory to add value to the agricultural products produced on the premises or ready them for the market, the Bird Festivals may be permitted.

However, there are two issues with this understanding. First, special events are permitted as an agricultural accessory use only if there are **three or fewer per year** and they are **directly related** to the sale or marketing of the agricultural products. The Zimmers held four weekend festivals at the farm in 2016 and according to neighbors' complaints, they are planning more festivals, maybe even one every month. This is clearly not allowed under the zoning ordinance, as an excessive number of events. Further, it is possible that

the sale or marketing of the apples and strawberries is only incidental, rather than directly related to the special event. This will be a fact-based inquiry, perhaps based on a balancing of the sales of the apples and strawberries with the sale of non-agricultural products and bird souvenirs to raise money to underwrite the bird rescue operations, which are indeed against the zoning ordinance.

3.) The FRFA does not affect the county's ability to enforce the zoning ordinance with respect to either the bird festivals or the bird rescue operations.

The FRFA was passed in 1983 to conserve, protect, and encourage the development and improvement of the state's agricultural land for commercial production of food and other agricultural products. See *Franklin Senate Committee on Agriculture Report*, S.B. 1198, May 3, 1983.

Although the FRFA preempts the ordinances and regulations of local governments that conflict and undermine the purpose of the act, the zoning ordinances at issue here do not do so. A conflict exists when the ordinance prohibits what the statute permits; this "requires a careful reading of the statute and ordinance in light of the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives." See *Shelby Township v. Beck* (Franklin Ct. App. 2005). Here, a court is likely to find there is no conflict.

Under the FRFA, a farm is defined as the land, plants, animals, buildings, structures, machinery, equipment, and other appurtenances used in the commercial production of farm products, and farm operations are only those relying to the farm or an activity connected with the farm in connection with commercial production, harvesting, and storage of farm products. See *FRFA*, Ch. 75, §2. Further, while our state does not define farm product, our neighbor Columbia has defined a farm product as the plants and animals useful to human beings produced by agricultural. *Koster v. Presley's Fruit* (Columbia Ct App 2010). In determining whether something is a farm product, the courts of that state look to see whether it originated on the property (i.e. whether it was grown, raised, or bred on the premises). *Id.* Here, neither the bird rescue operations or the bird festivals are in connection with commercial production of farm products. As discussed above, the birds are rescued, and will not qualify as commercially-produced farm products, and the special events have nothing to do with the commercial production of the apples and strawberries, which are the farm products permissible here. Despite the zoning ordinance itself allowing

agricultural accessory uses relating to sale or marketing, the FRFA does not play any role in protecting sale or marketing activities; only commercial production activities are protected.

Further, the protected farm operations are only those that "existed before a change in the land use or occupancy of the land that border the farmland, and if, before that change in land use or occupancy of the land, the farm or farm operation would not have been a nuisance." *FRFA*, Ch. 75 §3. Here, although the apple orchard and strawberry field pre-date 1951 and the Zimmers began holding apple festivals annually in 1988, the bird rescue operations did not begin until 2015. The area around them was developing into residential development in the 1990s.

Section 3(b)(i) of the FRFA does not address changes in size or nature of the farm operations. In *Wilson v. Monaco Farms*, a dairy farm that increased the number of cows from an original 40 to an eventual 200 after residential development in its surroundings was found to be under the protection of the FRFA because the cows were not a nuisance before the neighboring land changed. Franklin Ct. App 2008. Although the court in *Monaco Farms* did not address a change in nature of farm operations (only in size), the language suggests that a change in nature would not be protected. However, the court stated that its finding was based in part because the FRFA does not prohibits expansions; the farm was a dairy operation before the surrounding development and it remained a dairy farm, although larger. *Id.* Here, the bird rescue operations are entirely new; they cannot be said to be merely an enlargement of the previous apple orchard and strawberry field. Suddenly, there is a different use to the land, one that did not exist prior to the surrounding development.

Since this is not entirely clear-cut, it is helpful to look at the legislative history and the purpose behind the legislation. Courts will do so where statutory language is not clear and does not directly cover a contested point. As our neighboring state puts it, the court's role in construing a state is to "ascertain and give effect to the legislative intent." *Brady v. Roberts Electrical Mfg, Inc.* (Columbia Sup. Ct. 1999). The relevant Senate Report states that the purpose of the law is to codify the common law "coming to a nuisance" doctrine, such as where someone builds a home next to a cattle operation. *See Franklin Senate Committee Report on Agriculture, S.B. 1198.* Here, rather than the neighbors coming to eat or use their outside grills because of bird noise, offensive odors, and bugs, whereas

they were able to do so before the Zimmers began their bird rescue operations. Therefore, the bird rescue operations should not be protected under the FRFA, regardless of whether they would be considered farm operations.

However, there may be a colorable claim that the special event operations began prior to the change, despite the increase in their size and number. The annual apple festival began in the late 1980s, and although the Zimmers have changed the theme to one related to bird and increased the number, this seems more in line with the increase in *Monaco Farms*. The issue here, of course, is that the bird festivals are not a farm operation and would not be protected even if they began before the residential development.

To conclude, the FRFA will not prevent the application of the Hartford County Zoning Ordinances, which prohibit the bird rescue operations and will limit the bird festivals.

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To: Carl S. Burns, County Attorney

From: Examinee

Date: July 25, 2017

RE: Complaints about Zimmer Farm

1. The Zimmer's bird rescue operation is likely not permitted under the county zoning ordinance.

The Hartford County Zoning code defines acceptable uses in A-1 zoning districts as: "1. any agricultural use; 2. incidental processing, packaging, storage, transportation, distribution, sale, or agricultural accessory use intended to add value to agricultural products produced on the premises or to ready such products for market. The zoning code further defines agricultural use as "any activities conducted for the purpose of producing an income or livelihood from one or more of the following products...an agricultural use does not lose its character as such because it involves noise, dust, odors...."

According to Investigator Judy Abernathy's report, the Zimmer's farm is zone A-1 within Hartford County, thus the A-1 Zoning code language applies here. Under the plain language of the statute the Zimmer's bird rescue operation is not an "agricultural use." Part a(2) clearly is inapplicable here: the bird operation has nothing to do with processing, packing or anything of the sort. Thus only 22(a)(1) is at issue. The zoning code specifies that an agricultural use is for "the purpose of producing an income or livelihood." It is clear from the facts that the bird rescue operation is not for the purpose of producing an income or livelihood. The birds are not sold and no profit is made from the operation, and the Zimmers do not plan to profit from them. The Zimmers continue to make their money and income from their apple orchard and strawberry field.

The Zimmers will likely argue, however, that the birds do produce an income, albeit indirectly. The presence of the bird rescue operation has increased the local exposure of the farm and brings more people to it than before, and the birds are a critical part of the festivals the Zimmer's host (which are likely legal, see below), which in turn increases their income and profits. Further Edward Zimmer sells bird-related souvenirs at these festivals.

This counter argument is unpersuasive, however, under the plain language of the statute. The plain language of the code states that the operation must be "for the purpose" of producing an income. Even if the presence of the birds indirectly aids the Zimmers' farm earn money, there is no evidence that the underlying purpose of the bird rescue operation is to raise money; all evidence seems to point to it being purely an altruistic hobby for the Zimmers. Furthermore, the money raised from the bird related souvenirs goes directly to further fund the bird operation, it is not income or profits for the farm. Thus the bird operation does not fit the definition of "agricultural use" under the zoning code and is therefore not permitted.

There are policy and other concerns regarding this angle of attack, however (i.e. forbidding an activity done for charity that would be allowed if done for profit), but that is beyond the scope of this memo.

2. The Zimmer's festivals are permitted three festivals a year under the county zoning ordinance.

The Hartford County Zoning Code allows "agricultural accessory use" for districts zoned A-1. §22(a)(2). The definition of "agricultural accessory use" includes "special events, provided that they are three or fewer per year and are directly related to the sale or marketing of one or more agricultural products produced on the premises." §22(b)(3).

The plain language of the statute clearly allows the Zimmers to host up to three festivals at their farm. Though the latest festival was called the "Fall Bird Festival" the report from the investigator shows that a stated purpose of the festival, according to a flyer, was for people to "buy apples and discover the best recipes for baking with fruit." (See Judy Abernathy Memorandum). The Zimmers sold apples and strawberries at these festivals. Even if the underlying purpose of the festivals was to raise money for the bird rescue operation, the festivals are still "directly related to the sale or marketing of one or more agricultural products produced on the premises" i.e. apples and strawberries. Because the Zimmers' festivals meet this statutory definition under the plain language of the statute, the festivals are legal under the zoning laws. However, the Zimmers are limited to three of these festivals a year, and may be sanctioned for having more than that. Last year they had four, so the fourth one was illegal under Hartford zoning laws.

3. The FRFA does not affect the county's ability to enforce its zoning ordinance with respect to the bird rescue or the festivals.

The first issue is whether the FRFA would serve to preempt the Hartford County Zoning law. A county zoning ordinance can be preempted by state law either by: 1) if the state law completely occupies the field or 2) if a conflict exists when the ordinance permits what the state statute prohibits or vice versa. *Shelby Township v. Beck*. The FRFA does not completely occupy the field of local zoning laws. *Id.* Thus it preempts only if the state law allows what the zoning ordinance forbids. Therefore, whether the FRFA preempts the applicable zoning laws here depends entirely on if the FRFA applies to the activities here.

This is a much more complex issue that leaves much more room for argument than those listed above. The FRFA defines "farm" to be "the land, plants, animals, buildings, structures...machinery, equipment, and other appurtenances used in the commercial production of farm products. (b) 'Farm operation' means the operation and management of a farm or an activity that occurs on a farm in connection with the commercial production, harvesting, and storage of farm products." Ch. 75 FRFA §2. Under the FRFA a farm or farm activity is not a private or public nuisance if the farm or farm operation existed "before a change in the land use or occupancy of land that borders the farmland, and if, before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance." FRFA §3(a).

Under the plain language of the FRFA the Zimmer's farm is clearly a farm. Further, the Zimmers farm clearly predates the local housing units, the farm being bought in 1951 and the subdivisions not being built until the 1990s. However, the bird rescue operation is not a "farm operation" because it is not connected to the "commercial production" of any farm products. As shown above, though the bird festivals might incidentally increase the income from the Zimmers' farm operation, the activity itself of the bird operation is not intended to make money, it is purely for nonprofit. This is reinforced by the Report from the Franklin Senate Committee on Agriculture pertaining to the FRFA. The report stated that the policy underlying the FRFA was "to conserve, protect and encourage the development and improvement of its agricultural land for the commercial production of food and other agricultural products." The bird sanctuary is not a development or improvement of the land, and it does not serve to promote the commercial production of the apples and strawberries on the land. For all of these reasons the FRFA does not

apply to the bird rescue operation and the FRFA does not preempt the local zoning ordinance, which forbids it.

The Zimmers could argue that the presence of the bird rescue operation, and the festivals that accompany it, are related to their commercial farming operations to a sufficient degree to meet the "in connection with" standard set by the FRFA statutory language. Even conceding this, however, the bird operation still is not covered by the FRFA.

The FRFA specifically states that it applies regardless of certain changes in the farm, such as the adoption of new technology or the temporary cessation or interruption of farming. FRFA §3(b). The Franklin Court of Appeals has held that an substantial increase in the size and scope of a farming operation does not end the FRFA's protections. See *Wilson v. Monaco Farms* (an increase in farming operations from 60 cows to 200 cows, after subdivisions had grown around the farm, did not render the FRFA inapplicable.) No Franklin court has addressed a change in the nature of the farming operations, but the Columbia Court of Appeals did so in a case analyzing the applicability of the Columbia Right to Farm Act, the law similar in scope and purpose to the FRFA. In *Koster v. Presley's Fruit* the Columbia Court of Appeals held that the production of wooden pallets for shipment of peaches on a farm, after local residences were bought and built around the farm, were not covered by the CRFA, because the CRFA only applied to "those plants and animals useful to human beings produced by agriculture..." In denying the applicability of the CRFA, the court noted that "The products, therefore, are not grown, raised, or bred on the farm premises..." *Koster v. Presley's fruit*.

Here there is no doubt that the bird rescue operation began after the residential subdivisions were built. The subdivisions were built in the 1990s, the bird operation did not begin until 2015. The bird operation is something completely new and different from the purpose and operation of the farm prior to that, unlike the farm in Monaco Farms, which merely increased its cattle presence. The Zimmers changed the nature of their farming operation from one that purely grew apples and strawberries to a major bird sanctuary, one that came with numerous problems and nuisances previously absent from the apple and farming operation. (See Nina Ortiz Email). The change here is more similar to that in *Koster*. Even though the birds here are animals, not man made pallets, they are nevertheless not produced by agriculture, and not grown, raised or bred on the farm itself, they are brought in to be rehabilitated. Thus, even if the Zimmers are successful in

arguing that the bird operation is sufficiently connected to their farming operations as to fall under the FRFA, the change in the nature of the farming operation by the operation of the bird sanctuary means the FRFA protections were lost nevertheless. Therefore the FRFA still does not preempt the local zoning statute forbidding the sanctuary.

The FRFA does not forbid the type of festivals the Zimmers hold, and therefore the FRFA cannot preempt the local zoning law regarding these festivals. As such the FRFA does not apply here and the only applicable law is the local county zoning ordinance, which as stated above, allows for three of such festivals a year.

I hope this memo has addressed the issues you needed, please let me know if anything was unclear or if deeper research into any of these matters needs to be done.

Sincerely,
Examinee

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MEMORANDUM

To: Carl S. Burn, County Attorney

From: Examinee

Date: July 25, 2017

RE: Complaints about Zimmer Farm

- The Zimmers' bird rescue operation is probably not permitted under the county zoning ordinance.

The Zimmers' farm is zoned Agricultural A-1, which allows any agricultural use and some types of incidental use which adds value to the agricultural use. An agricultural use is defined in Title 15 section 22 of the Hartford County Zoning Code to include "any activities conducted for the purpose of producing an income or livelihood from ...poultry (such as chickens, geese, ducks, and turkeys)." (Title 15 § 22(b)(2)(d)).

Here, the Zimmermans' farm contains a bird rescue operation. They rescue a variety of birds - some falling expressly in the definition of poultry above, such as ducks and geese, and some falling clearly outside the definition of poultry, such as owls and hawks. With regards to the birds that may be considered poultry, to determine if the zoning ordinance covers the operation, the issue is whether or not the bird rescue operation is conducted "for the purpose of producing an income." Here, the Zimmermans' farm in question makes its money selling apples and strawberries locally. With regard to the bird rescue operation, the letter from County Attorney Burns states that "Edward [Zimmerman] does not sell the birds, does not make any profit from the operation, and does not intend to do so." Indeed, according to Mr. Burns, "Edward's goal is to care for the birds" - there is no mention of "producing an income" as the zoning ordinance would require.

Because the Zimmermans' bird rescue operation includes birds outside the definition of poultry, and because the purpose of the operation is not to produce an income or livelihood, the rescue operation is not an agricultural use under Title 15 § 22.

- The Zimmers' festivals are probably permitted under the county zoning ordinance, but only in a limited number.
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Land zoned Agricultural A-1 may also be used for an "Agricultural accessory use," which is defined in Title 15 §22(b)(3) to include "special events, provided that they are three or fewer per year and are directly related to the sale or marketing of one or more agricultural products produced on the premises."

Here, the Zimmers' festivals are directly related to the sale or marketing of one or more agricultural products produced on the premises. At the festivals, the Zimmers sell their apples and strawberries (which they still raise on their farm), and they have chefs come and perform cooking demonstrations with the produce. Although the festival that Mr. Burns investigated was called the "Fall Bird Festival" and included many activities relating to the birds, the flyer for the festival specifically advertised that visitors could "Buy apples and discover the best recipes for baking with fruit." It is clear that the festival is directly related to the sale and marketing of apples and strawberries, which the Zimmers produce on their farm. However, as stated above, Title 15 §22(b)(3) expressly limits the number of such events to "three or fewer per year." Here, the Zimmers held four festivals on their land in 2016.

Because the Zimmers' festivals meet the definition of a permitted "Agricultural accessory use," they are likely permitted under the county zoning ordinance. However, per the zoning ordinance, there can be no more than three such festivals per year, so the Zimmers will be limited in the number that they can host.

- The FRFA act will likely not impact the county's ability to enforce its zoning ordinance with respect to the bird rescue operation, but it probably will impact the county's ability to enforce its zoning ordinance with respect to the festivals.

The first issue is whether the FRFA completely preempts local zoning ordinances regarding agricultural properties. In the case of *Shelby Township v. Beck*, the Franklin Court of Appeal examined the issue and determined that because the "FRFA does not 'occupy the field'" it does not serve as a blanket preemption for zoning ordinances. However, the court also explains that where a zoning ordinance does not conflict with the FRFA, there is no preemption.

Edward Zimmer has argued that the Right to Farm Act applies, citing that the complaining residents "knew they were moving to a farm area - what did they expect?" This argument

likely is invalid. Zimmer is correct that the RTFA codifies the doctrine of "coming to the nuisance." However, per the Franklin Senate Committee on Agriculture, the act protects those who farm for a living. In fact, the RTFA only protects farms or farming operations that "existed before a change in the land use or occupancy." Here, the land bordering the Zimmers' farm was developed in the 1990s. The Zimmers' farm has been around since the 1950's, but the bird rescue operation began in 2015. Additionally, the festivals began in 2016.

In interpreting this, it depends on whether or not a change or expansion in use will waive the protection of the RTFA. In *Wilson v. Monaco Farms*, the Franklin Court of Appeals held that "nothing in FRFA prohibits expansion of farming operations." however, in that case, the "expansion" being discussed was an increase in the number of cattle raised on the land - not an entirely new and unrelated operation. Additionally, a persuasive case from the state of Columbia held that their state's equivalent of the RTFA does not apply to new activities that are not deemed farm operations.

An important sub issue is whether the bird rescue operation is a "farm operation." The RTFA defines a "farm operation" to include operations and management of a farm or an activity that occurs on a farm in connection with the commercial production, harvesting, and storage of farm products. Here, as discussed above, the bird rescue operation is not a commercial activity. Therefore, it is not a "farm operation," and even if it was, it would be considered a new farm operation rather than an expansion of an existing one, and the RTFA would likely not apply

A second important sub issue is whether the bird festivals are "farm operations." As discussed above, the RTFA defines such an operation to include activities for the commercial production, harvesting, and storage of farm products. However, it does not include marketing and sales of such farm products. Because, as discussed above, the bird festivals are not related to production but rather to marketing and sales, the bird festival likely is not a farming operation covered by the RTFA. However, this is not as certain as it is for the bird rescue operation.

- Conclusion

The Zimmers' bird rescue operation is likely not permitted by the county ordinance, but the

The RTFA, which does not completely preempt zoning, probably does not limit county enforcement of the zoning with regard to the Zimmers' bird rescue operation or their bird festivals - these probably are not farming operations, and even if they are, they are not preexisting farming operations which would be protected. However, the bird festivals are more likely to receive protection under the RTFA than the bird rescue operations, even if that possibility is very small.
