

GAME, INLAND FISHERIES AND BOATING: WILDLIFE AND FISH LAWS - HUNTING AND TRAPPING.

AGRICULTURE, HORTICULTURE AND FOOD: COMPREHENSIVE ANIMAL LAWS - AUTHORITY OF LOCAL GOVERNING BODIES AND LICENSING OF DOGS.

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PROPERTY - TRESPASS TO REALTY.

Ordinance that prohibits dogs running at large does not prohibit person's right to hunt foxes with dogs on any land with landowner's consent. Fox hunters engaged in chase originating on permitted land may follow their dogs onto prohibited land to retrieve dogs, but not to continue chase. If fox hunters fail to retrieve their dogs from prohibited land, dogs may be deemed to be running at large. Whether particular set of facts would constitute violation of local ordinance prohibiting dogs running at large on prohibited land is issue for determination by local Commonwealth's attorney and trier of fact.

The Honorable Patricia D. Scales

Commonwealth's Attorney for Cumberland County

February 9, 1999

You ask whether turning hunting dogs loose while fox hunting violates a county ordinance that prohibits the running at large of dogs during certain months of the year.

The Office of the Attorney General historically has declined to render official opinions on whether particular facts constitute a violation of a statute or opinions interpreting local ordinances.¹ The basis for this policy is that the application of the law to a specific set of facts is reserved to the Commonwealth's attorney, the grand jury, or the trier of fact and that the interpretation of an ordinance is a matter of local concern for determination by local government officials.² One issue presented in your request, however, is whether an ordinance enacted in accordance with the authority granted localities pursuant to § 3.1-796.93 of the *Code of Virginia* and which tracks the language of that section is preempted by § 29.1-516. Because this issue involves a potential conflict between two state statutes, it is an appropriate issue for a legal opinion of the Attorney General.

Section 3.1-796.93 provides:

The governing bodies of the counties, cities and towns of this Commonwealth are hereby authorized to prohibit the running at large of all or any category of dogs in all or any designated portion of such county, city or town during such months as they may designate. Governing bodies may also require that dogs be confined, restricted or penned up during such periods. For the purpose of this section, a dog shall be deemed to run at large while roaming, running or self-hunting off the property of its owner or custodian and not under its owner's or custodian's immediate control. Any person who permits his dog to run at large, or remain unconfined, unrestricted or not penned up shall be deemed to have violated the provisions of this section.

Pursuant to this authority, Cumberland County has adopted an ordinance prohibiting the running at large of all dogs throughout the county "during the period of March 1 to November 1 inclusive of each year."³ The ordinance contains the identical language set out in § 3.1-796.93 as to when a dog shall be deemed to run at large. You ask whether the ordinance is enforceable if it restricts a person's right under § 29.1-516 to fox hunt with dogs.

Section 29.1-516 contains provisions regarding the killing and hunting of the game animals listed. As to the hunting of foxes, § 29.1-516 provides:

There shall be a continuous open season for hunting with dogs only. The hunting or pursuit of foxes shall mean the actual following of the dogs while in pursuit of a fox or foxes or managing the dog or dogs while the fox or foxes are being hunted or pursued.^[4]

A 1993 opinion of the Attorney General, which considers both the language of Title 29.1 and prior Attorney General opinions, recognizes that the intent of the Title is to establish a statewide system of game management with the hunting of game regulated at the state, rather than local, level.⁵ The opinion thus concludes that a locality may not adopt ordinances that alter the state-established game management practices.⁶ The 1993 opinion also recognizes, however, that the exclusive state authority over hunting and game management must be interpreted consistently with express powers granted localities in other provisions of the Code.⁷

In accordance with the reasoning of the 1993 opinion, the continuous open season on hunting foxes with dogs established in § 29.1-516 must be interpreted in light of the clear statutory authority granted localities in § 3.1-796.93 to adopt ordinances prohibiting the running at large of dogs. Although the ordinance may not conflict with the state law embodied in Title 29.1 or other provisions of the Code, the ordinance and the statutes must be harmonized if possible.⁸

As to land located within the county that is either owned by the Board of Game and Inland Fisheries or owned by others but controlled by the Board, § 29.1-508 authorizes the Board to regulate the methods of taking game on such lands.⁹ No provision of Title 29.1, however, permits hunters to go onto private land to hunt foxes with dogs. In fact, § 18.2-132 provides that going onto the land of another to hunt without the landowner's consent constitutes a Class 3 misdemeanor. Section 18.2-136 does permit fox hunters to follow their dogs onto prohibited land to retrieve the dogs when a chase begins on other land. With the exception of land owned or controlled by the Board and the exception provided in § 18.2-136, it is my view that an ordinance enacted under § 3.1-796.93 is not incompatible with § 29.1-516.

The definition of "running at large" in § 3.1-796.93 does not prohibit dogs from running, roaming or self-hunting on the property of their owner or custodian or from running, roaming or self-hunting off the property of their owner if the dogs are under their owner's or custodian's immediate control.¹⁰ Moreover, the statute expressly uses the term "self-hunting," as opposed to hunting under the direction of a person. In contrast, hunting foxes with dogs under § 29.1-516 is defined as "the actual following of the dogs while in pursuit of a fox or foxes or managing the dog or dogs while the fox or foxes are being hunted or pursued." These two definitions indicate a legislative intent to encompass different situations, one in which a dog is freely roaming outside of its custodian's control and one in which the animal is engaged in conduct directed by and under the control or management of its custodian. The statutes, therefore, are not inconsistent but may be harmonized.

Accordingly, it is my opinion that an ordinance prohibiting dogs running at large, as defined in § 3.1-796.93, does not prohibit fox hunting with dogs, as defined in § 29.1-516, on any land with the landowner's consent. Section 29.1-516 does not operate to permit fox hunting with dogs on prohibited land, although § 18.2-136 provides that fox hunters engaged in a chase that originated on permitted land may follow their dogs onto prohibited land. They may do so only for the purpose of retrieving their dogs, not for the purpose of crossing over prohibited land to continue the chase. If fox hunters fail to retrieve their dogs from the prohibited land, the dogs may be deemed to be running at large. Whether a particular set of facts would constitute a violation of a local ordinance prohibiting dogs running at large, in light of § 18.2-136, is an issue for determination by the local Commonwealth's attorney and the trier of fact.

¹See Op. Va. Att'y Gen.: 1993 at 151, 153 n.1; 1987-1988 at 69, 72; 1986-1987 at 347, 348; 1976-1977 at 17, 17.

²See 1991 Op. Va. Att'y Gen. 122, 124.

³Cumberland County, Va., Code art. 2, § 3-10 (1996). While the ordinance states that permitting a dog to "remain unconfined, unrestricted or not penned up" during the specified period constitutes a violation of the ordinance, the body of the ordinance contains no language, consistent with the second sentence of § 3.1-796.93, requiring that dogs be confined, restricted or penned up. Accordingly, this opinion considers only the prohibition against dogs "running at large." I note also that an ordinance prohibiting dogs from running at large is different from an ordinance adopted by a city pursuant to § 3.1-796.95 requiring that dogs be kept on leashes or otherwise restrained within the confines of the city.

⁴The open season for hunting foxes with guns is from November 1 through January 31. See 4 VAC 15-110-20 (Law. Co-op. 1996).

⁵See 1993 Op. Va. Att'y Gen. 157, 159-60, and opinions cited at 160 n.1.

⁶*Id.* at 159.

⁷*Id.*

⁸See § 1-13.17; Loudoun County v. Pumphrey, 221 Va. 205, 269 S.E.2d 361 (1980).

⁹Section 29.1-508 authorizes the Board of Game and Inland Fisheries "to adopt rules and regulations to prescribe and enforce the seasons, bag limits and methods of taking fish and game on lands and waters owned by the Board and on lands owned by others but controlled by the Board."

¹⁰Section 3.1-796.66 broadly defines "owner" to include "any person who: (i) has a right of property in an animal, (ii) keeps or harbors an animal, (iii) has an animal in his care, or (iv) acts as a custodian of an animal."