



# COMMONWEALTH of VIRGINIA

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The Honorable Christopher K. Peace  
Member, House of Delegates  
P.O. Box 819  
Mechanicsville, Virginia 23111

Dear Delegate Peace:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You inquire whether three ordinances of Hanover County are constitutional under the constitutions of Virginia and of the United States. The first ordinance prohibits the owner of agricultural animals to run at large in the county. The second ordinance prohibits the discharge of weapons in or along roads or within one hundred yards of a building. The third ordinance is a noise control ordinance that prohibits certain animal noises at certain times.

## Response

It is my opinion that none of the ordinances suffers from constitutional infirmity.

## Applicable Law and Discussion

Before addressing the specific ordinances, I note the settled principle of law that “all statutes and ordinances are presumed to be constitutional, and that if there is any doubt such doubt should be resolved in favor of their constitutionality.”<sup>1</sup>

The first ordinance about which you inquire, Hanover County Code § 4-8 provides as follows:

It shall be unlawful for the owner of any agricultural animal to allow such agricultural animal, except for poultry, to run at large in the county. It shall be the duty of the animal control officer or other officer who finds any agricultural animal, except for poultry, running at large in violation of this section, to take the agricultural animal, except for poultry, into custody and impound same.

This ordinance regulates private property. Property rights certainly benefit from constitutional protection and constitute a cornerstone of our prosperity as a Nation. Property rights, however, are not absolute. A locality, when authorized by the legislature, can enact ordinances designed to regulate

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<sup>1</sup> *Town of Ashland v. Bd. of Spvrs.*, 202 Va. 409, 416, 117 S.E.2d 679, 684 (1961).

property to protect the health and safety of its citizens. Where, as here, a policy or regulation does not infringe upon a suspect class, such as race, or a fundamental right, such as freedom of speech, the standard of review is highly deferential toward the locality.<sup>2</sup> The courts must defer to legislative judgments “if there is any reasonably conceivable set of facts that could provide a rational basis for the” measure under review.<sup>3</sup>

Virginia has long allowed localities to enact laws requiring animals to be kept inside a fence.<sup>4</sup> Animals that are left to wander can damage or destroy property and crops belonging to others, threaten other animals or human life, and can pose a danger to traffic on the County’s roads. In 1872, the Supreme Court of Indiana bemoaned the fact that

[t]here are many persons . . . that seem to act upon the theory that their cows, and in many instances their hogs, may rightfully roam at large, and obtain a scanty subsistence upon the highways and neighboring unenclosed lands, thereby making it necessary for every one to guard his premises with much vigilance and expense, from the depredations of these marauding and vagrant animals that are thus permitted to wander in quest of food.<sup>5]</sup>

Plainly, the County has a rational basis for enacting this ordinance and, therefore, it is constitutional.

I further note that there is no plausible constitutional objection to impounding animals in these circumstances, both for the safety of others and for the protection of the animals themselves.

The second ordinance you ask about, Hanover County Code § 24-4, provides as follows:

If any person discharges or shoots any firearm or other weapon in or along any public road or street or within one hundred (100) yards thereof or within one hundred (100) yards of any building occupied or used as a dwelling or place where the public gathers, not his own dwelling or residence, except in the lawful defense of his own person or property or that of a member of his family, he shall be guilty of a Class 1 misdemeanor.

The right to bear arms is protected by the Constitutions of Virginia<sup>6</sup> and of the United States.<sup>7</sup> The United States Supreme Court has recognized that the Second Amendment of the United States protects an *individual* right to bear arms<sup>8</sup> and, further that this right operates as a restriction on the States

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<sup>2</sup> *Advanced Towing Co. v. Fairfax Cnty. Bd. of Spvsrs.*, 280 Va. 187, 191, 694 S.E.2d 621, 623 (2010).

<sup>3</sup> *Id.* at 192, 694 S.E.2d at 624.

<sup>4</sup> Under current law, localities expressly are authorized to enact ordinances governing “the running at large and the keeping of animals.” VA. CODE ANN. § 3.2-6544 (2008). *See also* *Poindexter v. May*, 98 Va. 143, 145, 34 S.E. 971, 972 (1900) (tracing the history of such regulations to the common law of England).

<sup>5</sup> *Indianapolis, Cincinnati & Lafayette R.R. Co. v. Harter*, 38 Ind. 557, 559 (1872).

<sup>6</sup> “[T]he right of the people to keep and bear arms shall not be infringed[.]” VA. CONST. art. I, § 13.

<sup>7</sup> “[T]he right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. The Second Amendment applies to the States as well as to the United States government. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (quotations and citations omitted).

<sup>8</sup> *District of Columbia v. Heller*, 554 U.S. 570, 606 (2008). *McDonald*, 130 S. Ct. at 3026 (quotations and citations omitted).

as well as the federal government.<sup>9</sup> The protections<sup>10</sup> afforded by the Virginia Constitution in this area are co-extensive with those of the Second Amendment.

The law is not settled at this time with respect to how strictly courts will evaluate restrictions on the use of firearms. We know that the right to bear arms is “not unlimited, just as the First Amendment’s right of free speech was not.”<sup>11</sup> Although the right is broader than merely protection of the home, at its core the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>12</sup>

Here in the Fourth Circuit, federal courts will apply a two part test to evaluate the validity of restrictions on bearing or using firearms. The first question is “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”<sup>13</sup> This is a “historical inquiry,” which “seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid.”<sup>14</sup> If the law at issue burdens conduct that was within the scope of the Second Amendment as historically understood, then the court will apply “an appropriate form of means ends scrutiny.”<sup>15</sup> “[U]nless the conduct at issue is not protected by the Second Amendment, the Government bears the burden of justifying the constitutional validity of the law.”<sup>16</sup>

In conducting this review, the United States Court of Appeals for the Fourth Circuit has noted that

[t]he Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden on Second Amendment rights, and individual assertions of the right will come in many forms. A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.<sup>17</sup>

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<sup>9</sup> *McDonald*, 130 S. Ct. at 3026 (quotations and citations omitted).

<sup>10</sup> *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 133-34, 704 S.E.2d 365, 368-69 (2010).

<sup>11</sup> *Heller*, 554 U.S. at 595.

<sup>12</sup> *Id.* at 635. In addition to self-defense, an armed citizenry serves as a check upon tyranny. See JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450, p. 246 (1840) (“One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offense to keep arms.”). An armed citizenry also will serve as a deterrent to foreign invasion – a less likely prospect in modern times, but one that has occurred repeatedly throughout our history. As the Continental Congress noted, “Men trained to Arms from their Infancy, and animated by the Love of Liberty, will afford neither a cheap or easy Conquest.” Journals of the Continental Congress, Petition to the King (July 8, 1775), available at [http://avalon.law.yale.edu/18th\\_century/contcong\\_07-08-75.asp](http://avalon.law.yale.edu/18th_century/contcong_07-08-75.asp).

<sup>13</sup> *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 682 (quoting *United States v. Skoien*, 587 F.3d 803, 813-14 (7th Cir. 2009), vacated, 614 F.3d 638 (7th Cir. 2010) (en banc)).

In light of these principles, I conclude that the ordinance does not violate the constitutional right to bear arms.<sup>18</sup> First, it specifically exempts from its scope actions taken in defense of self, others or property. Therefore, it does not implicate one of the core concerns of the right to bear arms. Second, it does not preclude anyone from carrying a firearm. Instead, it simply prohibits certain *uses* of a firearm. Moreover, the ordinance serves a proper purpose, to protect the public safety, by prohibiting firearm discharges on roads or near occupied buildings.

In addition, this ordinance does not violate any property rights. Under a highly deferential “rational basis” review, courts easily would sustain this ordinance against a challenge that it infringed on property rights.

The final ordinance about which you inquire is a component of a noise control ordinance, Hanover County Code § 16-8(8). It provides in relevant part that

The following acts are declared to be noise disturbances in violation of this chapter, provided that this list shall not be deemed to be an exclusive enumeration of those acts which any constitute noise disturbances and that an act not listed below may nevertheless constitute a violation of section 16-7.

(8) Allowing an animal to create howling, barking, whining, meowing, squawking or other such noises which are plainly audible across a property boundary or through partitions common to two (2) residences within a building and that take place continuously or repeatedly (k) during a period of at least fifteen (15) minutes in duration between 7:00 a.m. until 10:00 p.m. or (ii) during a period of at least 10 minutes in duration between 10:00 p.m. and 7:00 a.m., provided, however, that animal noises on property subject to a special exception for a commercial kennel or conditional use permit for a public animal shelter shall be governed exclusively by the conditions of the special exception or conditional use permit.

Noise control ordinances have been invalidated when they are unconstitutionally vague, or when they unduly restrict protected constitutional rights like freedom of speech.<sup>19</sup> The ordinance above does not suffer from either defect. It states in precise terms what is forbidden. Therefore, persons “of common intelligence” are not required to “necessarily guess at [the] meaning [of the language] and differ as to its application.”<sup>20</sup> In addition, animal noises are not constitutionally protected speech, so there is no free speech issue with this subpart of the ordinance.

Finally, I again note that under the “rational basis” test detailed above, courts would sustain this ordinance against any challenge that it unconstitutionally interferes with property rights. For good or for ill, courts in recent decades have been highly deferential toward legislatures and governing bodies in

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<sup>18</sup> I note parenthetically that VA. CODE ANN. § 15.2-915(A) (Supp. 2010) does not apply to this ordinance. That statute prohibits a locality from adopting ordinances governing the “purchase, possession, transfer, ownership, carrying, storage or transporting of firearms. . . .” The County ordinance prohibits, in limited fashion, the discharge of a firearm, but it does not prohibit the purchase, possession, transfer, ownership, carrying or transporting of a firearm.

<sup>19</sup> *Tanner v. City of Virginia Beach*, 277 Va. 432, 674 S.E.2d 848 (2009) (invalidating a noise control ordinance as unconstitutionally vague); *U.S. Labor Party v. Pomerleau*, 557 F.2d 410 (4th Cir. 1977) (invalidating a noise-ordinance as unconstitutional because of its impact on free speech).

<sup>20</sup> *Tanner*, 277 Va. at 439, 674 S.E.2d at 852 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

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reviewing ordinances and statutes that to some degree or another restrict the use of property. I am duty bound to provide advice based on the law as it presently exists.

**Conclusion**

Accordingly, it is my opinion that none of the ordinances about which you inquire suffers from constitutional infirmity.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II  
Attorney General