



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

July 12, 2013

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

Douglas W. Napier, Esquire
Town Attorney
Town of Front Royal
Post Office Box 1560
Front Royal, Virginia 22630-2612

Dear Mr. Napier:

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 generally whether a town and county legally may operate a Trap-Neuter-Release (“TNR”) program, and specifically as to:

1. Whether it is legal to trap feral cats in a humane fashion;
2. Whether such trapped cats may be neutered by a licensed veterinarian and released back to the location from which they were trapped; and
3. Whether persons who trap feral cats in accordance with a locality’s TNR program become the *de facto* or *de jure* owners of such cats.

Response

It is my opinion that a locality lawfully may operate a capture and sterilization program for the purpose of controlling a population of feral cats. The feral cats may be captured in a humane fashion, and such captured cats may be sterilized by a licensed veterinarian. The feral cats, however, may not be released by the locality back to the location from whence they came or some other location in the wild. Finally, it is my opinion that persons who capture feral cats while acting as agents of or in conjunction with a locality as part of its trap and sterilize program are companion animal finders and do not become the *de facto* or *de jure* owners of such cats.

Background

You indicate that TNR programs seek to trap feral cats humanely, neuter or spay them, and return them to the place from which they were trapped or “some other more suitable place in the wild.” The proposed program would involve the participation of the Warren County Animal Control and the Humane Society of Warren County.

Applicable Law and Discussion

You first inquire whether a Virginia locality lawfully may implement a program to trap feral cats.

Both feral and domestic cats are “companion animals” as defined by statute.¹ The term “trap” is not used in Title 3.2 of the *Code of Virginia* in connection with feral cats or other companion animals.² Rather, it is used in connection with “trapping” of wildlife as regulated under other titles.³

Although the term “trapping” is not used for the companion animals included in Title 3.2, certain local officials may capture feral cats. In fact, § 3.2-6562 provides that it is the duty of animal control officers “to *capture and confine* any companion animal of unknown ownership found running at large on which the license fee has not been paid.”⁴ Similarly:

Any humane investigator, law-enforcement officer or animal control officer may lawfully *seize and impound* any animal that has been abandoned, has been cruelly treated, or is suffering from an apparent violation of this chapter that has rendered the animal in such a condition as to constitute a direct and immediate threat to its life, safety or health.⁵

Section 3.2-6543 provides that a local governing body may adopt and “make more stringent” ordinances that parallel many sections of Title 3.2.⁶ Thus, it is my opinion that a locality could adopt ordinances that would allow for the capture and confinement of feral cats, because they would parallel § 3.2-6562.⁷

Turning to your inquiry regarding sterilization, a locality has the authority to adopt local ordinances for animal control programs so long as they will “conform to and not be in conflict with the public policy of the State as embodied in its statutes.”⁸ Section 3.2-6574(A) provides, in part, that “[e]very new owner of a . . . cat adopted from a releasing agency shall cause to be sterilized the . . . cat.” Section 3.2-6548(E) transfers the responsibility for documenting such sterilization from an animal shelter to any other “releasing agency.”⁹ Further, § 3.2-6534 requires that a locality’s proceeds from dog and cat license taxes be spent on six specified purposes, one of which is “[e]fforts to promote sterilization of dogs

¹ VA. CODE ANN. § 3.2-6500 (Supp. 2013).

² An implied authority to trap companion animals was recognized in a previous opinion of the Attorney General, which concluded that Virginia Code §§ 15.1-510 and 29-196 allowed for a county to order and arrange for the trapping of wild dogs. 1968-69 Op. Va. Att’y Gen. 10A. These sections have been repealed and replaced in part by Title 3.2.

³ See § 3.2-6570(D) (Supp. 2013) (“This section shall not prohibit authorized wildlife management activities or hunting, fishing or trapping as regulated under other titles of the Code of Virginia, including Title 29.1 . . .”); and § 3.2-6571 (2008).

⁴ Section 3.2-6562 (2008) (emphasis added).

⁵ Section 3.2-6569(A) (Supp. 2013) (emphasis added).

⁶ Section 3.2-6543 (Supp. 2013).

⁷ See also VA. CODE ANN. §§ 15.2-1102 (2012) (towns and cities) and 15.2-1200 (2012) (counties) (granting, among other powers, general powers relating to securing and promoting the health, safety and general welfare of such jurisdictions’ inhabitants).

⁸ *King v. Arlington Cnty.*, 195 Va. 1084, 1090, 81 S.E.2d 587, 591 (1954).

⁹ Section 3.2-6500 defines “releasing agency” as, “a pound, animal shelter, humane society, animal welfare organization, society for the prevention of cruelty of animals, or other similar entity or home-based rescue, that releases companion animals for adoption.”

and cats.”¹⁰ Pursuant to § 3.2-6500, “sterilization” means a surgical or chemical procedure performed by a licensed veterinarian that renders a dog or cat permanently incapable of reproducing.” The General Assembly recognizes the existence of localities’ sterilization programs in two other provisions that discuss how funds and penalties collected may be spent. One requires that penalties paid by veterinarians for not providing localities with information on vaccination certificates “be placed in the locality’s general fund for the purpose of animal control activities *including spay or neuter programs.*”¹¹ The other authorizes that “[a]ny funds collected pursuant to the enforcement of ordinances adopted pursuant to the provisions of this section may be used for the purpose of defraying the costs of local animal control, *including efforts to promote sterilization of cats and dogs.*”¹² However, no statute specifies how localities should promote such sterilization.

Virginia follows the Dillon Rule of local government authority, whereby localities have only those powers expressly granted or necessarily implied by statute, as well as those powers that are essential and indispensable.¹³ Where a statute grants a power to a locality, but does not specifically direct the method of exercising that power, a local government’s choice regarding how to implement the power will be upheld “so long as the method selected is reasonable.”¹⁴ The Supreme Court of Virginia provided guidance for application of this “reasonableness” test in *City of Virginia Beach v. Hay*.¹⁵ The court stated that while the question of reasonableness is dependent on the circumstances of each case, a locality’s method is considered unreasonable only if it is “contrary to legislative intent or inappropriate for the ends sought to be accomplished by the grant of power.”¹⁶ If there is any doubt in the reasonableness of the method selected, it is “resolved in favor of the locality.”¹⁷

While §§ 3.2-6529, 3.2-6534, and 3.2-6543 provide an express grant of power for a locality to expend funds to promote the sterilization of companion animals, they are silent regarding the mode or manner of execution.¹⁸ Therefore, the “reasonable method of selection” rule applies.¹⁹ Because the statutes, by their own terms, seek to promote sterilization of companion animals and indicate that in certain circumstances an animal shelter, pound, or other receiving agency is responsible for documenting that it is done, it is reasonable for a locality to adopt an ordinance authorizing monies to be spent directly to arrange for the sterilization procedure. Thus, it is my opinion that a locality, by ordinance, may establish a program for and provide funding to have feral cats sterilized by a licensed veterinarian.

¹⁰ Section 3.2-6534 (2008) (sterilization of companion animals identified apart from “[t]he care and maintenance of a pound,” which is listed as a separate purpose). *See also* § 3.2-6535 (2008) (localities not limited to revenues derived solely from dog and cat license taxes to fund sterilization programs for dogs and cats under section which specifically authorizes localities to supplement dog and cat license funds “with other funds as they consider appropriate”).

¹¹ Section 3.2-6529 (2008) (emphasis added).

¹² Section 3.2-6543 (emphasis added).

¹³ *See, e.g.,* *Commonwealth v. County Bd.*, 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977); and *Virginia Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999).

¹⁴ *Hay*, 258 Va. at 221, 518 S.E.2d at 316.

¹⁵ *Id.*, at 222, 528 S.E.2d at 316.

¹⁶ *Id.*

¹⁷ *Id.*, at 221, 528 S.E.2d at 316.

¹⁸ *County Bd.*, 217 Va. at 574-75, 232 S.E.2d at 40-41.

¹⁹ *Id.*

Your inquiry regarding whether such captured and sterilized feral cats may be released back to the location from which they were captured turns on the construction of terms found in § 3.2-6546.²⁰ Once such animals are captured, § 3.2-6546 provides the framework for the confinement and disposition of animals.²¹ Section 3.2-6546(D) specifically provides five methods by which an animal may be released or adopted by the county or city pounds or their designees.²² Two of the five methods allow for release to any humane society, animal shelter or other releasing agency, either within the Commonwealth, or in another state; the other three provide for adoption by a resident of the county, a resident of an adjacent county or other person.²³

Moreover, § 3.2-6504 provides: “No person shall abandon or dump any animal.”²⁴ The statute criminalizes a violation of that prohibition as a Class 3 misdemeanor.²⁵ “Abandon” is defined as “desert, forsake, or absolutely give up an animal without having secured another owner or custodian for the animal or by failing to provide the elements of basic care as set forth in § 3.2-6503 for a period of five consecutive days.”²⁶ “Dump” is defined as “knowingly desert, forsake, or absolutely give up without having secured another owner or custodian any dog, cat, or other companion animal in any public place including the right-of-way of any public highway, road or street or on the property of another.”²⁷ Even a person who “finds” an animal pursuant to § 3.2-6551 has certain duties, including attempting to notify an owner and complying with the provisions of § 3.2-6503 for adequate care.²⁸

Thus, given the current statutory requirements for the disposition of companion animals, including feral cats, and the statutory prohibition upon abandoning or dumping companion animals, it is my opinion that feral cats may not be released programmatically back to the location where they were captured or other location “in the wild.”²⁹

As to your final inquiry, it is my opinion that persons who capture feral cats while acting on behalf of a town-operated capture and sterilize program do not become the *de facto* or *de jure* owners of such cats. The *Code of Virginia* defines the term “owner” as “any person who: (i) has a right of property in an animal; (ii) keeps or harbors and animal; (iii) has an animal in his care; or (iv) acts as a custodian of

²⁰ Section 3.2-6546 (2008).

²¹ *Id.* Yet, § 3.2-6562 does provide that an animal control officer may deliver a companion animal to any person who will pay the required license fee for it as an alternative to the disposition methods found under § 3.2-6546.

²² Section 3.2-6546.

²³ *Id.* See also § 3.2-6548(A) (2008) (An animal shelter or releasing agency is also required to dispose of the animals it receives pursuant to § 3.2-6546).

²⁴ Section 3.2-6504 (2008).

²⁵ *Id.*

²⁶ Section 3.2-6500.

²⁷ *Id.*

²⁸ Section 3.2-6551 (2008). See also § 3.2-6503 (Supp. 2013) (care of a companion animal includes providing adequate food, water and shelter, among other items.)

²⁹ I express no opinion regarding the policy implications this conclusion may elicit. Localities will have to weigh for themselves whether maintaining a TNR program furthers their interests and what such a program’s potential effect on population numbers and adoption rates will be. In light of the *Code of Virginia*’s requirements regarding the disposition of companion animals, a locality could logically conclude that the neutering program served a beneficial purpose by increasing the likelihood that the animal would be adopted or could conclude that the additional expense of neutering should not be incurred given the manner of disposition that the law might eventually require.

an animal.³⁰ Conversely, a person acting on behalf of a town-operated capture and sterilize program, who is not an animal control officer or other officer under § 3.2-6562, would be acting as an individual who “finds” an animal pursuant to § 3.2-6551. That Section provides that any “individual who finds a companion animal and: (i) provides care or safekeeping; or (ii) retains a companion animal in such a manner as to control its activities” has certain responsibilities, including attempting to notify the owner and the pound within 48 hours, and complying with § 3.2-6503.³¹ The law therefore makes a distinction between an owner, who has a property interest in, cares for and/or shelters a companion animal, and someone who temporarily takes custody of and cares for and/or shelters such an animal while acting consistently with the above-noted statutory requirements respecting the animal. Thus, it is my opinion that a finder acting in conjunction with the locality-operated capture and sterilize program would not have a property right in a feral cat, nor would he become a *de facto* or *de jure* owner thereof through his actions of capturing and temporarily harboring, caring for, and otherwise taking temporary custody of the animal.³²

In reaching these conclusions, I make no judgment on the wisdom of the policy decisions underlying the statutory scheme regarding the disposition of companion animals, including feral cats. This opinion only addresses the law as it exists and makes no comment on what the law could or should be. As you note in your request, local jurisdictions are free to seek a legislative change if a different result is desired.

Conclusion

It is my opinion that a locality may lawfully operate a capture and sterilization program for the purpose of controlling the population of feral cats. The feral cats may be captured in a humane fashion, and such captured cats may be sterilized by a licensed veterinarian. The feral cats may not, however, be released by the locality back to the location from whence they came or some other location in the wild. Finally, it is my opinion that persons who capture feral cats while acting as agents of or in conjunction with a locality as part of its trap and sterilize program are companion animal finders and do not become the *de facto* or *de jure* owners of such cats.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

³⁰ Section 3.2-6500.

³¹ Section 3.2-6503 lists an owner’s duties to care for a companion animal.

³² See VA. CODE ANN. § 1-200 (2011) (relating to the applicability of common law principles, “except as altered by the General Assembly.”). Here, the above-referenced statutory analysis dictates the outcome of your ownership-related inquiry.