AGENDA

FREDERICK COUNTY BOARD OF SUPERVISORS
Code & Ordinance Committee
THURSDAY, MAY 9, 2019
4:00 P.M.
FIRST FLOOR CONFERENCE ROOM, COUNTY ADMINISTRATION BUILDING
107 NORTH KENT STREET, WINCHESTER, VIRGINIA

1. Call to Order

2. Amendments to Chapter 118 (Noise) of the County Code, to adopt a "plainly audible"standard with respect to certain prohibited noise.

3. Amendment to Section 48-3 (Dogs running at large unlawful) of Article I (Dog Licensing; Rabies Control) of Chapter 48 (Animals and Fowl) of the County Code, to conform with changes to Virginia Code§ 3.2-6538, effective July 1, 2019.

4. Adjourn

Item # 2

Board of Supervisors - Code & Ordinance Committee

Agenda Item Detail

Meeting Date: May 9, 2019

Submitted by:

Item Type:

Item Title: Amendments to Chapter 118 (Noise) of the County Code, to adopt a "plainly audible" standard with respect to certain prohibited noise.

COUNTY OF FREDERICK

Roderick B. Williams
County Attorney

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rwillia@fcva.us

MEMORANDUM

TO: Code & Ordinance Committee

FROM: Roderick B. Williams
County Attorney

DATE: April 11, 2019

RE: Frederick County Code – Noise Ordinance – draft revisions

At its meeting on April 10, 2019, the Board of Supervisors asked the Code & Ordinance Committee to consider again the proposed revisions to Chapter 118 of the County Code that the Committee forwarded to the Board last year, for the Committee again to make a recommendation to the Board. The revisions would for the objective of restoring the enforceability of the noise ordinance, in light of the Supreme Court of Virginia's 2009 decision in Tanner vs. City of Virginia Beach, 277 Va. 432.

To refresh the Committee on this item, the County adopted its current noise ordinance in 1993. The ordinance uses, as its standard for whether noise is unlawful, whether a person is "annoyed, disturbed or vexed by unnecessary and unreasonable noise." The Virginia Supreme Court, in the Tanner case, held that a noise ordinance containing similar "unreasonableness" language was unconstitutionally vague and therefore unenforceable. In light of the decision in Tanner, the County's prohibitions against noise may be subject to similar challenge.

The draft revisions adopt as the standard for prohibited noise whether the noise is "plainly audible" at certain points beyond its source. With respect to the meaning and sufficiency of the term "plainly audible", Attorney General Cuccinelli, in a 2011 Opinion, concluded that an ordinance that included that term "states in precise terms what is forbidden" and that "persons 'of common intelligence' are not required to 'necessarily guess at [the] meaning [of the language] and differ as to its application.'" 2011 Va. Att'y Gen'l Opin. 39, 41-42 (citing Tanner). In an abundance of caution, the draft revisions do also include a definition, taken from the Blacksburg Town Ordinance, adopted in response to Tanner, and cited by an ad hoc committee of the Local Government Attorneys of Virginia, Inc. to provide guidance to localities in response to Tanner.

The draft revisions otherwise generally do not deviate from the principles in the current ordinance; the draft revisions keep the noise prohibition limited to the RP, R4, R5, and MH zoning districts, with the prohibition being applicable only between 9:00 p.m. and 6:00 a.m. The draft revisions also expressly provide that the prohibition does not apply to bona fide agricultural activity and further contain a list of other specific activities that are not subject to the prohibition.

In summary, the draft revisions are appropriate for consideration because (i) **the draft revisions would provide the County with an enforceable noise ordinance, as the current noise ordinance is likely constitutionally unenforceable**, and (ii) **the draft revisions contain several appropriate exceptions that are not contained in the current ordinance, such that the draft revised noise ordinance is actually less restrictive than the current noise ordinance**.

The draft revisions are attached, along with copies of Tanner and the referenced Attorney General Opinion.

ORDINANCE
___ _, 2019

The Board of Supervisors of Frederick County, Virginia hereby ordains that Sections 118-1 (Unreasonable noise unlawful) and 118-2 (Enforcement) and new Sections 118-4 (Specific prohibitions) and 118-5 (Exceptions) of Chapter 118 (Noise) of the Code of Frederick County, Virginia be, and the same hereby are, amended by enacting amended Sections 118-1 (Specified noise unlawful) and 118-2 (Enforcement) and new Sections 118-4 (Specific prohibitions) and 118-5 (Exceptions) of Chapter 118 (Noise) of the Code of Frederick County, Virginia, as follows (deletions are shown in ~~**strikethrough**~~ and additions are shown in **underline**):

CHAPTER 118 NOISE

§ 118-1 ~~Unreasonable~~ Specified noise unlawful.

A. ~~**It shall be unlawful, after complaint from any person annoyed, disturbed or vexed by unnecessary and unreasonable noise and after notice by the Sheriff to the person creating such noise or to the owner, custodian or person in control or possession of the property from which such noise emanates or arises, for such person to suffer or allow such unnecessary and unreasonable noise to continue.**~~ **At certain levels, noise can be detrimental to the health, safety, welfare, and quality of life of inhabitants of the county, and, in the public interest, such noise should be restricted. It is, therefore, the policy of the County to reduce, and eliminate where possible, excessive noise and related adverse conditions in the community, and to prohibit unnecessary, excessive, harmful, and annoying noises from all sources.**

B. This chapter shall be applicable from 9:00 p.m. to 6:00 a.m., inclusive, each day, to **noise emanating from property located within** the following zoning ~~**classifications**~~ **districts** as indicated on the Frederick County Zoning Map:

RP Residential Performance District
R4 Residential Planned Community District
R5 Residential Recreational Community District
MH1 Mobile Home Community District

C. No person shall be charged with a violation of this section unless that person has received verbal, electronic, or written notice from a law enforcement officer of Frederick County that he is violating or has violated the provisions of this chapter and has thereafter had the opportunity to abate the noise disturbance.

§ 118-2 Enforcement.

Enforcement of this chapter shall be by the Sheriff of Frederick County **or his designee**.

§ 118-3 Violations and penalties. [Ed. note: No change is proposed to this section]

A violation of this chapter shall be punishable by a fine of not more than $100 for the first offense and a fine of not more than $1,000 for each subsequent offense. Each such occurrence shall constitute a separate offense.

§ 118-4 Specific prohibitions.

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 may constitute noise disturbances and that an act not listed below may nevertheless constitute a violation of this chapter:

A. Prohibited Noise Generally. Operating, playing or permitting the operation or playing of any radio, television, computer, recording, musical instrument, amplifier, or similar device, or yelling, shouting, whistling, or singing, or operating or permitting the operation of any mechanical equipment:

1. **In such a manner as to be plainly audible across a residential real property boundary or through partitions common to two or more (2) dwelling units within a building; or**
2. **In such a manner as to be plainly audible at a distance of fifty (50) feet or more from the building in which it is located, provided that the sound is audible on another's property; or**
3. **In such a manner as to be plainly audible at a distance of fifty (50) feet or more from its source, provided that the sound is audible on another's property.**

B. Schools, public buildings, places of worship, and hospitals. The creation of any noise on or near the grounds of any school, court, public building, place of worship, or hospital in a manner that is plainly audible within such school, court, public building, place of worship, or hospital, and which noise interferes with the operation of the institution.

C. **The term "plainly audible" shall mean any sound that can be heard clearly by a person using his or her unaided hearing faculties. When music is involved, the detection of rhythmic bass tones shall be sufficient to be considered plainly audible sound.**

§ 118-5 Exceptions.

This chapter shall have no application to any sound generated by any of the following:

A. **Sound which is necessary for the protection or preservation of property or the health, safety, life, or limb of any person.**
B. **Public speaking and public assembly activities conducted on any public right-of-way or public property.**
C. **Radios, sirens, horns, and bells on police, fire, or other emergency response vehicles.**
D. **Parades, lawful fireworks displays, school-related activities, and other such public special events or public activities.**
E. **Activities on or in municipal, county, state, United States, or school athletic facilities, or on or in publicly owned property and facilities.**
F. **Fire alarms and burglar alarms, prior to the giving of notice and a reasonable opportunity for the owner or person in possession of the premises served by any such alarm to turn off the alarm.**
G. **Religious services, religious events, or religious activities or expressions, including, but not limited to music, singing, bells, chimes, and organs which are a part of such service, event, activity, or expression.**
H. **Locomotives and other railroad equipment, and aircraft.**
I. **The striking of clocks.**
J. **Military activities of the Commonwealth of Virginia or of the United States of America.**
K. **Agricultural activities.**
L. **Lawful discharge of firearms.**
M. **Motor vehicles.**
N. **Construction equipment.**

Enacted this ___ day of ___, 2019.

Charles S. DeHaven, Jr., Chairman	____	Gary A. Lofton	____
J. Douglas McCarthy	____	Robert W. Wells	____
Blaine P. Dunn	____	Shannon G. Trout	____
Judith McCann-Slaughter	____		

A COPY ATTEST

_____
Kris C. Tierney
Interim Frederick County Administrator

PRESENT: All the Justices

BRADLEY S. TANNER, ET AL.

v. Record No. 080998

OPINION BY
JUSTICE BARBARA MILANO KEENAN
April 17, 2009

CITY OF VIRGINIA BEACH

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
A. Joseph Canada, Jr., Judge

In this appeal, we consider whether the circuit court erred in rejecting a constitutional challenge to a municipal noise control ordinance.

Bradley S. Tanner and Eric A. Williams (collectively, the owners) own and operate BAE Ventures, Inc., t/a The Peppermint Beach Club (the club), a licensed restaurant and entertainment venue located in the 1800 block of Atlantic Avenue in the City of Virginia Beach (City). The club is located in a part of the City commonly referred to as the "oceanfront," which includes restaurants, bars, hotels, and outdoor entertainment venues.

The club, which is on the ground floor of the Howard Johnson Hotel, hosts disc jockeys and occasional "live" entertainment groups that play various types of music including "hip-hop," "punk rock," "emo," and "indie" music. The owners repeatedly have been warned by City police officers about music sound levels, and have received citations for violations of

Virginia Beach City Code § 23-47 (the ordinance). The ordinance states:

> It shall be unlawful for any person to create, or allow to be created any unreasonably loud, disturbing and unnecessary noise in the city or any noise of such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity or to disturb or annoy the quiet, comfort or repose of reasonable persons. The following acts, among others, are declared to be loud, disturbing and unnecessary noise in violation of this section, but such enumeration shall not be deemed to be exclusive:
>
> (1) The playing of any television set, radio, tape player, phonograph or any musical instrument in such a manner or with such volume as to annoy or disturb the quiet, comfort or repose of reasonable persons.
>
> (2) The keeping of any animal which, by causing frequent or long-continued noise, shall disturb the quiet, comfort or repose of the neighborhood to such an extent as to constitute a nuisance.
>
> (3) The creation of any excessive noise on any street adjacent to any school, institution of learning or court, while the same is in session, or adjacent to any building used as a place of public worship, while being so used or adjacent to any hospital, which unreasonably interferes with the workings of such school, institution or court or the services being conducted in such place of public worship or which disturbs or unduly annoys patients in such hospital.
>
> (4) The shouting and crying of peddlers, hawkers and vendors which disturbs the peace and quiet of the neighborhood.
>
> (5) The use of any drum, loudspeaker or other instrument or device for the purpose of attracting attention, by creation of noise, to any performance, show or sale or display of merchandise.

Virginia Beach City Code § 23-47. Any violation of the ordinance constitutes a class 4 misdemeanor. Id.

In June 2007, the owners filed a complaint seeking a declaratory judgment that the ordinance is unconstitutional on its face because it is vague, and that it is unconstitutional as applied to the club. The owners alleged that the ordinance is vague because it fails to provide citizens with "fair notice" regarding what conduct is unlawful, and because the ordinance language invites selective prosecution by granting law enforcement officials the "unfettered individual discretion" to make enforcement decisions. The owners separately alleged that City police officers have applied and enforced the ordinance against the owners "in a subjective and selective manner."

In response to the owners' complaint, the City filed a demurrer, which the circuit court sustained in part based on its previous determination that the ordinance was constitutional on its face. Relying on that prior decision, the circuit court held, among other things, that the ordinance is not vague, and dismissed the owners' facial constitutional challenge with prejudice.

The case proceeded to trial on the issue of the City's application of the ordinance to the sound levels generated by the club's music. Certain City police officers testified that the City used two enforcement standards in evaluating noise

emanating from oceanfront business establishments. The first standard used was the "reasonable person" standard provided for by the ordinance. The second standard employed was an "across the street" assessment established by Police Captain Anthony F. Zucaro.

Addressing the "reasonable person" standard, Captain Zucaro testified that police officers determine whether noise is "unreasonably loud, disturbing and unnecessary" by employing the officers' "[b]ackground, experience, knowledge of the dynamics of the moment, listening, [and] witnessing." Officers Albert L. Mills, Christopher D. D'Orio, and Steven J. Kennedy testified that officers usually exercise their discretion whether to issue a citation for violation of the ordinance. These officers generally conceded that "reasonableness" is a standard that depends on an individual officer's assessment and on environmental factors such as the weather, the volume of ambient noise, and the time of day.

In 2007, Zucaro issued a letter that was distributed to oceanfront business owners in an effort to achieve voluntary compliance with the ordinance. The letter informed the business owners that police officers would take enforcement action if "[t]he intensity of the noise emanating from an establishment is at such a level it can be definitively linked to that particular

establishment from across the street or a distance equal to that measurement despite the presence of other ambient noise levels."

Several police officers testified regarding incidents in which noise emanating from the club resulted in the issuance of citations to the owners. Relying on this and other evidence, the circuit court determined that the evidence "unequivocally establishe[d] that the enforcement of the noise ordinance is selective and uneven." However, the circuit court held that because the owners failed to prove that this selective enforcement was motivated by a discriminatory purpose, the club's constitutional challenge to the City's application of the ordinance failed. The owners appealed from the circuit court's judgment.

On appeal, the owners first argue that the circuit court erred in rejecting their facial constitutional challenge to the ordinance. They contend that the ordinance is vague and, thus, is unconstitutional on its face because business owners must engage in guesswork to determine whether certain sound levels violate the ordinance. The owners further assert that several terms in the ordinance, including the terms "unnecessary," "loud," "disturbing," "character," and "intensity," are purely subjective and do not establish clear standards that permit uniform enforcement.

In response, the City argues that the ordinance clearly articulates an objective, "reasonable person" standard that is well established and is sufficiently definite to permit persons to conform their conduct to the law. The City concedes that the terms of the ordinance are not quantitatively precise, but argues that such a level of precision is not required to survive a vagueness challenge. The City contends that only a flexible standard such as the one prescribed by the ordinance can fairly define criminal conduct related to the "wide swath of settings and circumstances" involved when assessing noise levels.

The City further argues that the term "unnecessary" does not render the ordinance vague because the ordinance requires that noise be unreasonably loud, disturbing, and unnecessary before a criminal citation can issue. The City contends that instead of rendering the ordinance vague, the term "unnecessary" narrows the category of noise that constitutes a criminal violation and provides added protection to potential offenders. However, the City further maintains that if this Court disagrees, it should sever any offending language rather than invalidate the entire ordinance. We disagree with the City's arguments.

Our review of the ordinance begins with the principle that that duly enacted laws are presumed to be constitutional. Marshall v. Northern Virginia Transp. Auth., 275 Va. 419, 427,

657 S.E.2d 71, 75 (2008); In re Phillips, 265 Va. 81, 85, 574 S.E.2d 270, 272 (2003); Yamaha Motor Corp., U.S.A. v. Quillian, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002); Finn v. Virginia Retirement System, 259 Va. 144, 153, 524 S.E.2d 125, 130 (2000). We are required to resolve any reasonable doubt concerning the constitutionality of a law in favor of its validity. In re Phillips, 256 Va. at 85-86, 574 S.E.2d at 272; Finn, 259 Va. at 153, 524 S.E.2d at 130; Walton v. Commonwealth, 255 Va. 422, 427, 497 S.E.2d 869, 872 (1998). Thus, if a statute or ordinance can be construed reasonably in a manner that will render its terms definite and sufficient, such an interpretation is required. See INS v. St. Cyr, 533 U.S. 289, 299-300 (2001); United States v. Harriss, 347 U.S. 612, 618 (1954); Pedersen v. City of Richmond, 219 Va. 1061, 1065, 254 S.E.2d 95, 98 (1979).

In this context, we consider the constitutional principles applicable to a vagueness challenge involving a penal statute or ordinance. The constitutional prohibition against vagueness derives from the requirement of fair notice embodied in the Due Process Clause. See United States v. Williams, 553 U.S. ___, ___, 128 S.Ct. 1830, 1845 (2008); City of Chicago v. Morales, 527 U.S. 41, 56 (1999); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The doctrine requires that a statute or ordinance be sufficiently precise and definite to give fair warning to an actor that contemplated conduct is criminal. See

Kolender v. Lawson, 461 U.S. 352, 357 (1983); Grayned, 408 U.S. at 108. Thus, the language of a law is unconstitutionally vague if persons of "common intelligence must necessarily guess at [the] meaning [of the language] and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926); accord Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Cameron v. Johnson, 390 U.S. 611, 616 (1968).

The constitutional prohibition against vagueness also protects citizens from the arbitrary and discriminatory enforcement of laws. A vague law invites such disparate treatment by impermissibly delegating policy considerations "to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned, 408 U.S. at 108-09; see Kolender, 461 U.S. at 357-61.

Because legislative bodies are "[c]ondemned to the use of words," courts cannot require "mathematical certainty" in the drafting of legislation. Grayned, 408 U.S. at 110. For this reason, an ordinance that lacks meticulous specificity nevertheless may survive a vagueness challenge if the ordinance as a whole makes clear what is prohibited. See id.; Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (8th Cir. 1969).

A different concern arises, however, when a vague statute implicates citizens' rights under the First Amendment. In such circumstances, vague language in a statute or ordinance may cause citizens to avoid constitutionally permissible conduct based on a fear that they may be violating an unclear law. Thus, a vague statute may inhibit the exercise of constitutionally protected activities. Grayned, 408 U.S. at 108-09.

In applying these principles, we first acknowledge that the regulation of noise by a locality creates special problems regarding the drafting and enforcement of legislation. See Nichols v. City of Gulfport, 589 So. 2d 1280, 1283 (Miss. 1991); People v. New York Trap Rock Corp., 442 N.E.2d 1222, 1226 (N.Y. 1982). These problems arise from the nature of sound, which invites the use of broadly stated definitions and prohibitions. Nichols, 589 So. 2d at 1283; Trap Rock, 442 N.E.2d at 1226.

The ordinance before us prohibits any "unreasonably loud, disturbing and unnecessary noise," noise of "such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity," or noise that "disturb[s] or annoy[s] the quiet, comfort or repose of reasonable persons." The ordinance also describes various acts that constitute per se violations.

We conclude that these provisions fail to give "fair notice" to citizens as required by the Due Process Clause, because the provisions do not contain ascertainable standards. See Thelen v. State, 526 S.E.2d 60, 62 (Ga. 2000); Nichols, 589 So. 2d at 1284. Instead, the reach of these general descriptive terms depends in each case on the subjective tolerances, perceptions, and sensibilities of the listener.

Noise that one person may consider "loud, disturbing and unnecessary" may not disturb the sensibilities of another listener. As employed in this context, such adjectives are inherently vague because they require persons of average intelligence to guess at the meaning of those words. See Thelen, 526 S.E.2d at 62; Lutz v. City of Indianapolis, 820 N.E.2d 766, 769 (Ind. Ct. App. 2005); Nichols, 589 So. 2d at 1283.

The references in the ordinance to "reasonable persons," and to persons of "reasonable sensitivity," do not provide a degree of definiteness sufficient to save the ordinance from the present vagueness challenge. Such terms, considered in their context, delegate to a police officer the subjective determination whether persons whom the police officer considers to be of reasonable sensitivity would find the noise detrimental to their life or health. Likewise, these terms leave to a police officer the determination whether persons the police

officer considers to be reasonable would be disturbed or annoyed in their comfort or repose by the particular noise at issue.

Determinations of this nature invite arbitrary enforcement. Police officers likely will have differing perceptions regarding what levels of sound exceed the described tolerance levels and sensitivities of reasonable persons. Because these determinations required by the ordinance can only be made by police officers on a subjective basis, we hold that the language of the ordinance is impermissibly vague. See Grayned, 408 U.S. at 108-09; U.S. Labor Party v. Pomerleau, 557 F.2d 410, 412 (4th Cir. 1977); Thelen, 526 S.E.2d at 62. The imposition of criminal penalties for the violation of an ordinance cannot rest on the use of subjective standards, nor may an ordinance consign a person to penal consequences without first providing sufficiently definite notice of prohibited activities. See Thelen, 526 S.E.2d at 62; Nichols, 589 So. 2d at 1284.

We find no merit in the City's argument that its use of the term "reasonable persons" nevertheless rescues the ordinance from the present vagueness challenge because the criminal law employs a "reasonable person" standard in various other types of determinations. Such comparisons are inapposite. Here, the City attempts to satisfy the notice requirement of the Due Process Clause by using a standard that does not notify or warn citizens in clear and definite terms what noise levels are

prohibited. In contrast, the use of a "reasonable person" standard elsewhere in the criminal law does not attempt to provide notice to citizens regarding the reach of a criminal statute or ordinance, but sets a standard for a court to use in determining police compliance with certain constitutional and other legal requirements. See, e.g., Brendlin v. California, 551 U.S. 249, ___, 127 S.Ct. 2400, 2405-06 (2007) ("seizure" within meaning of Fourth Amendment occurs when reasonable person would not feel free to leave); Buhrman v. Commonwealth, 275 Va. 501, 505, 659 S.E.2d 325, 327 (2008) (probable cause exists when facts and circumstances of which police officer has "reasonably trustworthy information . . . warrant a person of reasonable caution to believe that an offense has been or is being committed") (quoting Taylor v. Commonwealth, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981)).

In concluding that the ordinance is vague, we do not directly address the list of per se violations contained in the ordinance. Each of these per se violations is defined as constituting "loud, disturbing and unnecessary noise" and, thus, cannot be evaluated separately from those vague terms.

Finally, we hold that we are unable to sever from the ordinance the unconstitutional language that we have identified and give its remaining language a definite and permissible construction. Instead, the vague language adjudged

unconstitutional in this opinion affects the content of the entire ordinance.*

For these reasons, we will reverse the circuit court's judgment and will enter final judgment for the owners declaring that the entire ordinance is unconstitutional because it is vague.

Reversed and final judgment.

* In view of our holding that the ordinance is vague, we do not reach the owners' remaining contentions alleging that the ordinance is overbroad and has been enforced selectively by City police.

AG Op. CONSTITUTION OF THE UNITED STATES, 2011 Va. AG 39 (11-065)

CONSTITUTION OF THE UNITED STATES.

CONSTITUTION OF VIRGINIA.

Ordinance requiring Impounding of animals running at large is constitutional.

Ordinance prohibiting discharge of a firearm on roadways or near buildings is constitutional.

Ordinance restricting animal noise is constitutional.

The Honorable Christopher K. Peace
Member, House of Delegates

June 22, 2011

ISSUE 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."1

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 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.2 The courts must **[Page 40]** defer to legislative judgments "if there is any reasonably conceivable set of facts that could provide a rational basis for the" measure under review.3

Virginia has long allowed localities to enact laws requiring animals to be kept inside a fence.4 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.[5]

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 Virginia6 and of the United States.7 The United States Supreme Court has recognized that the Second Amendment of the United States protects an *individual* right to bear arms8 and, further that this right operates as a restriction on the States as well as the federal government.9 The protections afforded by the Virginia Constitution in this area are co-extensive with those of the Second Amendment.10

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."11 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."12 **[Page 41]**

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."13 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."14 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."15 "[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."16

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.[17]

In light of these principles, I conclude that the ordinance does not violate the constitutional right to bear arms.18 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 **[Page 42]** 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.19 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."20 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 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.

FOOTNOTES

1 *Town of Ashland v. Bd. of Spvsrs.*, 202 Va. 409, 416, 117 S.E.2d 679, 684 (1961).

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

3 *Id.* at 192, 694 S.E.2d at 624.

4 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).

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

6 [T]he right of the people to keep and bear arms shall not be infringed[.]" VA. CONST. art. I, § 13.

7 "[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*, 561 U.S. 742, ___, 130 S. Ct. 3020, 3026 (2010) (quotations and citations omitted).

8 *District of Columbia v. Heller*, 554 U.S. 570, 606 (2008). *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3026 (quotations and citations omitted).

9 *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3026 (quotations and citations omitted).

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

11 *Heller*, 554 U.S. at 595. **[Page 43]**

12 *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.*

* [Editor's Note: The website address(es) which appear in this case are set out as hyperlinks for your own convenience. Due to the passage of time, however, the hyperlink may no longer work and/or the content of the website may not accurately reflect the content which existed at the time this case was decided.]

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

14 *Id.*

15 *Id.*

16 *Id.*

17 *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)).

18 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.

19 *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).

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

Item # 3

Board of Supervisors - Code & Ordinance Committee
Agenda Item Detail
Meeting Date: May 9, 2019

Submitted by:

Item Type:

Item Title: Amendment to Section 48-3 (Dogs running at large unlawful) of Article I (Dog Licensing; Rabies Control) of Chapter 48 (Animals and Fowl) of the County Code, to conform with changes to Virginia Code § 3.2-6538, effective July 1, 2019.

COUNTY OF FREDERICK

Roderick B. Williams
County Attorney

540/722-8383
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MEMORANDUM

TO: Code & Ordinance Committee

FROM: Roderick B. Williams
County Attorney

DATE: April 30, 2019

RE: Frederick County Code – Dogs running at large – draft ordinance revisions

At its recently completed Session, the General Assembly enacted revisions to Virginia Code § 3.2-6538, effective July 1, 2019, as follows:

> § **3.2-6538**. Governing body of any locality may prohibit dogs from running at large; civil penalty.
>
> ~~The governing body of any~~ *Any* locality may *by ordinance* prohibit the running at large of all or any category of dogs, *except dogs used for hunting,* in all or any designated portion of such locality during such months as ~~they~~ *it* may designate. ~~Governing bodies~~ *Any such locality* 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~~,~~ *or* 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 *an ordinance adopted pursuant to* the provisions of this section. *Such ordinance shall provide that the owner or custodian of any dog found running at large in a pack shall be subject to a civil penalty in an amount established by the locality not to exceed $100 per dog so found. For the purpose of such ordinance, a dog shall be deemed to be running at large in a pack if it is running at large in the company of one or more other dogs that are also running at large. Any civil penalty collected pursuant to such ordinance shall be deposited by the treasurer of the locality pursuant to the provisions of § **3.2-6534**.*

The revised § 3.2-6538 therefore requires certain amendments to the County Code § 48-3. The current version of § 48-3 and a version showing proposed revisions are attached. The revisions, proposed to be effective July 1, 2019, are as follows:

- Inclusion in subsection A of a definition, drawn from the state code provision, of what constitutes running at large.

- Clarification in subsection A that the prohibition applies to any person permitting "a dog" to run at large, instead of saying "his dog", which in the current version could suggest the prohibition would apply only to the owner of the dog, as opposed to the owner or a custodian of the dog.

- Clarification in subsection A as to the punishment for violating the prohibition. The reference for punishment is to County Code § 48-10, which makes a violation punishable as a Class 4 misdemeanor. The maximum penalty for a Class 4 misdemeanor is a $250 fine.

- Inclusion of a new subsection B, to comply with the new mandates of § 3.2-6538 regarding any dog(s) running at large in a pack.

- Redesignation of the last sentence of current subsection A as a standalone subsection C.

- Redesignation of former subsection B as subsection D.

- Inclusion of a new subsection E, to comply with the new mandates of § 3.2-6538.

A recommendation by the Committee to the Board of Supervisors is requested.

Attachments

Frederick County, VA
Friday, April 12, 2019

Chapter 48. Animals and Fowl

Article I. Dog Licensing; Rabies Control

§ 48-3. Dogs running at large unlawful.

A. It shall be unlawful to permit any dog to run at large within the County at any time during the year. 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 subsection. It shall be the duty of the Animal Control Officer and Deputy Animal Control Officers to cause all dogs found running at large in violation of this section to be caught and penned up in the County dog pound.

B. It shall be unlawful to permit any vicious or destructive dog to run at large within the County, and any person owning, having control or harboring any such dog is hereby required to keep the same confined within his premises.

ORDINANCE
___ _, 2019

The Board of Supervisors of Frederick County, Virginia hereby ordains that, effective July 1, 2019, Section 48-3 (Dogs running at large unlawful) of Article I (Dog Licensing; Rabies Control) of Chapter 48 (Animals and Fowl) of the Code of Frederick County, Virginia be, and the same hereby is, amended by enacting an amended Section 48-3 (Dogs running at large unlawful) of Article I (Dog Licensing; Rabies Control) of Chapter 48 (Animals and Fowl) of the Code of Frederick County, Virginia, as follows (deletion is shown in ~~strikethrough~~ and addition is shown in **bold underline**):

CHAPTER 48 ANIMALS AND FOWL

Article I Dog Licensing; Rabies Control

§ 48-3 Dogs running at large unlawful.

A. It shall be unlawful to permit any dog to run at large within the County at any time during the year. **For the purposes of this subsection, a dog shall be deemed to be running at large while roaming or running of the property of its owner or custodian and not under its owner's or custodian's immediate control. Except as provided in subsection B,** ~~**Any**~~ **any** person who permits ~~**his**~~ **a** dog to run at large or remain unconfined, unrestricted or not penned up shall be deemed to have violated the provisions of this subsection **and be subject to punishment as provided in Section 48-10**.

B. It shall also be unlawful to permit any dog to run at large in a pack within the County at any time during the year. For the purposes of this subsection, a dog shall be deemed to be running at large in a pack if it is running at large in the company of one or more other dogs that are also running at large. Any person who permits a dog to run at large in a pack shall be deemed to have violated the provisions of this subsection and, in addition to the punishment as provided in Section 48-10, be subject to a civil penalty not to exceed $100 per dog so found. Any civil penalty collected pursuant to this subsection shall be deposited by the Treasurer pursuant to the provisions of § 3.2-6534 of the

Code of Virginia (1950, as amended).

C. It shall be the duty of the Animal Control Officer and Deputy Animal Control Officers to cause all dogs found running at large in violation of this section to be caught and penned up in the County dog pound.

~~**B.**~~**D.** It shall be unlawful to permit any vicious or destructive dog to run at large within the County, and any person owning, having control or harboring any such dog is hereby required to keep the same confined within his premises.

E. The provisions of this section shall not apply with respect to dogs used for hunting.

Enacted this ___ day of ___, 2019.

Charles S. DeHaven, Jr., Chairman	_____	Gary A. Lofton	_____
J. Douglas McCarthy	_____	Robert W. Wells	_____
Blaine P. Dunn	_____	Shannon G. Trout	_____
Judith McCann-Slaughter	_____		

A COPY ATTEST

_____
Kris C. Tierney
Frederick County Administrator