

Analysis of the Office of Attorney General Advisory Opinion relating to Trap-Neuter-Return (TNR) programs fully operated by a locality

The recent Virginia Attorney General Advisory Opinion (Va. Att'y Gen. Op. No. 12-100 (June 12, 2013), “Advisory Opinion”) endorses status-quo Trap-Neuter-Return programs in Virginia by giving strong support to locality-sponsored sterilization programs for feral cats. The Advisory Opinion confirms the general understanding that, under current Virginia law, feral cats captured by animal control officers and confined in a pound cannot be returned by the locality to their colonies. The Advisory Opinion also makes clear that a person humanely trapping a feral cat for sterilization is the finder—not the owner—of that cat.

The Opinion’s conclusion that localities may not return a captured and sterilized feral cat does not impact currently operating locality Trap-Neuter-Return programs

The type of TNR program analyzed by the Advisory Opinion is not one that most, if any, localities in Virginia operate. The Advisory Opinion addressed the permissibility of locality-sponsored TNR, where the locality itself, through its animal control officers or other government personnel, engages in every aspect of TNR: the capture of outdoor feral cats, the neutering and vaccination, and the return to their outdoor home.

But locality TNR programs in existence today do not operate in the fashion described by the Advisory Opinion. Virginia localities that have TNR programs operate where the locality’s contribution, by and large, is merely to provide or coordinate sterilization services. Private citizens, not animal control officers, conduct the actual trapping of cats for TNR.

This distinction is important because the Advisory Opinion’s conclusion that a locality TNR program may not return feral cats after sterilization stems from requirements placed on animal control officers who capture feral cats (or indeed, any companion animal) outdoors. The Advisory Opinion states that any authority a law enforcement officer would have to trap a feral cat stems from statutes that authorize an officer to “capture and confine” or “seize and impound” an animal. *See* Va. Code Ann. § 3.2-6562 and § 3.2-6569. Those terms must be read together as a phrase: “capture *and* confine;” “seize *and* impound.” As such, if an animal control officer is to capture a feral cat, the cat must be confined in a pound. Confinement in a pound triggers the restricted disposition options of § 3.2-6546, which include return-to-owner, adoption, euthanasia and transfer to another facility, but does not include return to a feral cat colony.

It is important to note that private citizens do not face the same prohibition on return-to-colony for cats they humanely trap. Unlike an animal control officer, a private citizen has no duty to confine or impound a cat after humanely trapping the cat. Thus a cat trapped by a private citizen need not be placed in a pound and be subject to the restricted disposition framework of § 3.2-6546. The Advisory Opinion’s conclusion that feral cats may not be released “*by the locality* back to the location from whence they came” (Advisory Opinion, 5 (emphasis added)) does not hold that similar restrictions follow for private citizens when the cat was not captured by an animal control officer. Private citizens who find a cat are under no requirement—unlike a locality—to confine the animal in a pound or animal shelter.

The Advisory Opinion additionally notes that, for cats trapped by an animal control officer, there is another method of disposition: under § 3.2-6562, an animal control officer may deliver the cat to any person who will pay the license fee on that animal. (Many Virginia localities have no license fee for cats). This method of disposition is in addition to the disposition options identified in § 3.2-6546. An officer delivering a cat to a person who would pay the license fee would otherwise need to comply with § 3.2-6546.

The Advisory Opinion makes clear that localities have substantial leeway in how they conduct sterilization programs for cats and dogs

Virginia law grants localities substantial authority to conduct sterilization programs for cats and dogs. Indeed, the Advisory Opinion states that localities may “establish a program for and provide funding to have feral cats sterilized by a licensed veterinarian.” Advisory Opinion, 3.

As mentioned above, Virginia localities that currently have programs for feral cats, even if they are colloquially called “TNR programs,” are far less comprehensive than full Trap-Neuter-Return programs explained in the Advisory Opinion. In existing programs, localities provide sterilization services for cats brought to them by members of the public. They do not neuter and return cats captured by animal control officers. From the locality’s point of view, the program is less “Trap-Neuter-Return” and more “Accept-Neuter-Give Back.” Essentially, the locality runs (or coordinates) a sterilization clinic for feral cats. This sort of program is well within the authority granted to localities by the Virginia code.

A locality’s authority to *sterilize* feral cats is wholly separate from its authority to *capture* feral cats. The authority to sterilize derives from different sections of code than the authority to capture. A locality’s authority to sterilize derives from §§ 3.2-6529, 3.2-6534 and 3.2-6543; the authority to capture derives from §§ 3.2-6562 and 3.2-6569.

Moreover, unlike the authority to capture, the Virginia code does not specifically attach the authority to sterilize to any other duty in the code. The authority to capture is followed by a duty to confine. (For example, § 3.2-6562 uses the phrase “capture and confine.”). But the authority to sterilize stands by itself as an authority independent of other duties. For example, § 3.2-6534 identifies “[e]fforts to promote sterilization of dogs and cats” as separate from the “care and maintenance of a pound.”

So not only is the authority to sterilize *separate* from the authority to capture, it is *not attached in any way* to the duty to confine in a pound. Just as a locality need not operate a sterilization program just because animals are “capture[d] and confine[d],” a locality need not “capture and confine” feral cats in order to have a sterilization program for feral cats.

A member of the general public who traps a feral cat for sterilization is the “finder,” not the “owner,” of the cat

The Advisory Opinion is quite clear that a private citizen who humanely traps a feral cat for the purpose of sterilization is not automatically the owner of the cat. The Advisory Opinion notes that the “law makes a distinction between an owner ... and someone who temporarily takes custody of and cares for and/or shelters such an animal” and concludes that a person trapping a cat would not 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.” (Advisory Opinion, 5). That same logic regarding ownership should also apply to a person returning a cat after sterilization. Indeed, there is nothing in the Advisory Opinion to suggest ownership would attach after a private citizen returns a feral cat.

Conclusion

The Advisory Opinion makes a distinction between a locality-operated “capture and sterilize” program, where return back to an outdoor colony is not allowed under § 3.2-6546, and a locality-operated sterilization program, where no code sections prohibit the locality to accept cats from a private citizen and give them back to the citizen at the conclusion of the sterilization procedure. A sterilization program, where feral cats humanely trapped by private citizens are given back to members of the public following sterilization, is clearly permissible.

Although currently-operating locality TNR programs comply with the conclusions of the Advisory Opinion, there are obvious benefits to amending the Virginia code to allow for full locality-operated capture-sterilize-return programs. Programs where the locality is engaged in all aspects of the TNR process allow for synergies not possible under the current system. These sorts of programs hold the promise of proactively neutering the highest number of animals and being one of the most effective methods of reducing euthanasia in animal shelters. Animal control officers in jurisdictions such as Spartanburg, South Carolina, who have adopted TNR programs have reported overwhelmingly positive outcomes. Certainly, there are animal control officers in Virginia who would like to become more directly involved in TNR. Amendments to the Virginia code to authorize full locality-operated TNR would not undermine protections currently afforded companion animals under the comprehensive animal care laws.

But even though the Virginia code does not permit full locality-sponsored capture-sterilize-return programs, it does not follow that localities should not continue—or put in place—sterilization programs for feral cats. As a policy matter, those programs are effective to provide humane care to feral cats and to reduce the population of feral cats over time. Sterilization-alone programs can provide significant benefits to communities and can leverage the efforts of volunteers in a locality willing to provide assistance to cats.