

OPINION NO. 2008-006**Syllabus:**

2008-006

1. Pursuant to Article II, §§ 1 and 26 of the Ohio Constitution, the lack of procedural due process afforded to dog owners under R.C. 955.22(D)-(F) may not be remedied without legislative action by the General Assembly.
2. Pursuant to Article XVIII, § 3 of the Ohio Constitution and R.C. 955.221, a board of county commissioners or legislative authority of a city may enact within its respective territory resolutions or ordinances that regulate the ownership and control of dogs in order to ensure the public health, safety, and welfare.
3. Article XVIII, § 3 of the Ohio Constitution and R.C. 955.221 autho-

alize a board of county commissioners or legislative authority of a city to adopt and enforce resolutions or ordinances that are identical to R.C. 955.11 and R.C. 955.22 and that afford a dog owner procedural due process when the resolutions or ordinances are enforced.

To: David L. Landefeld, Fairfield County Prosecuting Attorney, Lancaster, Ohio

By: Marc Dann, Attorney General, February 21, 2008

You have requested an opinion concerning the authority of county and city officials to enforce R.C. 955.22(D)-(F). Specifically, you wish to know:

1. May the lack of procedural due process afforded to dog owners under R.C. 955.22(D)-(F) be remedied without legislative action by the General Assembly?
2. If question one is answered in the affirmative, may the legislative authority of a city adopt an ordinance creating a dangerous and vicious dog appeals board to provide dog owners with an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of whether a dog is a "dangerous dog," as defined in R.C. 955.11(A)(1)(a), or a "vicious dog," as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii), for purposes of R.C. 955.22(D)-(F)?
3. If questions one and two are answered in the affirmative, may a board of county commissioners pass a resolution authorizing a city's dangerous and vicious dog appeals board to provide dog owners in the unincorporated area of the county with an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of whether a dog is a "dangerous dog," as defined in R.C. 955.11(A)(1)(a), or a "vicious dog," as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii), for purposes of R.C. 955.22(D)-(F)?

For the reasons discussed below, we conclude that, pursuant to Article II, §§ 1 and 26 of the Ohio Constitution, the lack of procedural due process afforded to dog owners under R.C. 955.22(D)-(F) may not be remedied without legislative action by the General Assembly. We conclude, further, that, pursuant to Article XVIII, § 3 of the Ohio Constitution and R.C. 955.221, a board of county commissioners or legislative authority of a city may enact within its respective territory resolutions or ordinances that regulate the ownership and control of dogs in order to ensure the public health, safety, and welfare. Finally, we conclude that Article XVIII, § 3 of the Ohio Constitution and R.C. 955.221 authorize a board of county commissioners or legislative authority of a city to adopt and enforce resolutions or ordinances that are identical to R.C. 955.11 and R.C. 955.22 and that afford a dog owner procedural due process when the resolutions or ordinances are enforced.

Regulation of Dangerous and Vicious Dogs under R.C. 955.22(D)-(F)

In order to address your questions we must examine R.C. 955.22(D)-(F) and the Ohio Supreme Court cases that have reviewed R.C. 955.22(D)-(F) in the context of the constitutional right to procedural due process. R.C. 955.22(D)-(F) require the owner of a dangerous or vicious dog to do the following:

(D) Except when a dangerous or vicious dog is lawfully engaged in hunting or training for the purpose of hunting and is accompanied by the owner, keeper, harbinger, or handler of the dog, no owner, keeper, or harbinger of a dangerous or vicious dog shall fail to do either of the following:

(1) While that dog is on the premises of the owner, keeper, or harbinger, securely confine it at all times in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top, except that a dangerous dog may, in the alternative, be tied with a leash or tether so that the dog is adequately restrained;

(2) While that dog is off the premises of the owner, keeper, or harbinger, keep that dog on a chain-link leash or tether that is not more than six feet in length and additionally do at least one of the following:

(a) Keep that dog in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top;

(b) Have the leash or tether controlled by a person who is of suitable age and discretion or securely attach, tie, or affix the leash or tether to the ground or a stationary object or fixture so that the dog is adequately restrained and station such a person in close enough proximity to that dog so as to prevent it from causing injury to any person;

(c) Muzzle that dog.

(E) No owner, keeper, or harbinger of a vicious dog shall fail to obtain liability insurance with an insurer authorized to write liability insurance in this state providing coverage in each occurrence, subject to a limit, exclusive of interest and costs, of not less than one hundred thousand dollars because of damage or bodily injury to or death of a person caused by the vicious dog.

(F) No person shall do any of the following:

(1) Debark or surgically silence a dog that the person knows or has reason to believe is a vicious dog;

(2) Possess a vicious dog if the person knows or has reason to believe that the dog has been debarked or surgically silenced;

(3) Falsely attest on a waiver form provided by the veterinarian under division (G) of this section that the person's dog is not a vicious dog or otherwise provide false information on that written waiver form.

For purposes of R.C. 955.22(D)-(F), the terms “dangerous dog” and “vicious dog” are defined as follows:

(1)(a) “Dangerous dog” means a dog that, without provocation, and subject to [R.C. 955.11(A)(1)(b)], has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person, while that dog is off the premises of its owner, keeper, or harbinger and not under the reasonable control of its owner, keeper, harbinger, or some other responsible person, or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top.

(b) “Dangerous dog” does not include a police dog that has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person while the police dog is being used to assist one or more law enforcement officers in the performance of their official duties.

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(4)(a) “Vicious dog” means a dog that, without provocation and subject to [R.C. 955.11(A)(4)(b)], meets any of the following:

- (i) Has killed or caused serious injury to any person;
- (ii) Has caused injury, other than killing or serious injury, to any person, or has killed another dog.
- (iii) Belongs to a breed that is commonly known as a pit bull dog. The ownership, keeping, or harboring of such a breed of dog shall be prima-facie evidence of the ownership, keeping, or harboring of a vicious dog.

(b) “Vicious dog” does not include either of the following:

- (i) A police dog that has killed or caused serious injury to any person or that has caused injury, other than killing or serious injury, to any person while the police dog is being used to assist one or more law enforcement officers in the performance of their official duties;
- (ii) A dog that has killed or caused serious injury to any person while a person was committing or attempting to commit a trespass or other criminal offense on the property of the owner, keeper, or harbinger of the dog.

R.C. 955.11(A). *See generally* R.C. 955.22(A) (as used in R.C. 955.22, “‘dangerous dog’ and ‘vicious dog’ have the same meanings as in [R.C. 955.11]”).

The owner of a dangerous dog or vicious dog, as defined in R.C. 955.11(A)(1) or R.C. 955.11(A)(4), respectively, who pleads guilty to, or is convicted of, a violation of R.C. 955.22(D)-(F) is subject to the penalties set out in

R.C. 955.99.¹ This means that a person who owns a dangerous dog or vicious dog, as defined in R.C. 955.11(A)(1) or R.C. 955.11(A)(4), respectively, is required to comply with the applicable provisions of R.C. 955.22(D)-(F) or face criminal prosecution for failing to do so.

R.C. 955.22(D)-(F) and the Constitutional Right to Procedural Due Process

The enforcement of R.C. 955.22(D)-(F) may not, however, impinge on a dog owner's constitutional right to procedural due process. This right, which is guaranteed by the Fourteenth Amendment to the United States Constitution and

¹ R.C. 955.99 provides, in part:

(F) If a violation of [R.C. 955.22(D)] involves a dangerous dog, whoever violates that division is guilty of a misdemeanor of the fourth degree on a first offense and of a misdemeanor of the third degree on each subsequent offense. Additionally, the court may order the offender to personally supervise the dangerous dog that the offender owns, keeps, or harbors, to cause that dog to complete dog obedience training, or to do both, and the court may order the offender to obtain liability insurance pursuant to [R.C. 955.22(E)]. The court, in the alternative, may order the dangerous dog to be humanely destroyed by a licensed veterinarian, the county dog warden, or the county humane society.

(G) If a violation of [R.C. 955.22(D)] involves a vicious dog, whoever violates that division is guilty of one of the following:

(1) A felony of the fourth degree on a first or subsequent offense if the dog kills or seriously injures a person. Additionally, the court shall order that the vicious dog be humanely destroyed by a licensed veterinarian, the county dog warden, or the county humane society.

(2) A misdemeanor of the first degree on a first offense and a felony of the fourth degree on each subsequent offense. Additionally, the court may order the vicious dog to be humanely destroyed by a licensed veterinarian, the county dog warden, or the county humane society.

(3) A misdemeanor of the first degree if the dog causes injury, other than killing or serious injury, to any person.

(H) Whoever violates . . . [R.C. 955.22(E)] is guilty of a misdemeanor of the first degree.

. . . .

(J) Whoever violates [R.C. 955.22(F)(1), (2), or (3)] is guilty of a felony of the fourth degree. Additionally, the court shall order that the vicious dog be humanely destroyed by a licensed veterinarian, the county dog warden, or the county humane society.

Article I, § 16 of the Ohio Constitution,² requires, at a minimum, an opportunity to be heard at a meaningful time and in a meaningful manner when the state seeks to infringe a protected liberty or property right. *State v. Cowan*, 103 Ohio St. 3d 144, 2004-Ohio-4777, 814 N.E.2d 846, at ¶8 (2004); *State v. Hochhausler*, 76 Ohio St. 3d 455, 459, 668 N.E.2d 457 (1996). Moreover, because the right to procedural due process is conferred by the United States and Ohio Constitutions, the General Assembly “may not constitutionally authorize the deprivation of a property interest, once conferred, without appropriate procedural safeguards.” *Cowan*, at ¶8.

The Ohio Supreme Court has twice addressed the procedural due process to be afforded an owner of a dog before the owner may be charged with violating R.C. 955.22(D)-(F). In *Cowan* a dog owner was “charged with two counts of failing to confine a vicious dog, violations of R.C. 955.22(D)(1), misdemeanors of the first degree; one count of failing to obtain the required liability insurance for a vicious dog, a violation of R.C. 955.22(E), a misdemeanor of the first degree; and one count of failing to restrain a dangerous dog, a violation of R.C. 955.22(D)(2)(b), a misdemeanor of the fourth degree.” *Cowan*, at ¶3. The dog owner argued that R.C. 955.22 could not be enforced because it violates a dog owner’s constitutional right to “procedural due process as there is no opportunity for a [dog owner] to be heard with respect to the labeling of a dog as either vicious or dangerous.” *Id.* at ¶11.

In its opinion the *Cowan* court first observed that a dog is the property of its owner. *Id.* at ¶9. The court next acknowledged that dogs, as property, “are subject to the state’s police power” and the state may use that power to regulate the ownership and control of dogs so as to protect its citizenry. *Id.*; accord *State v. Anderson*, 57 Ohio St. 3d 168, 169-70, 566 N.E.2d 1224 (1991);³ see *City of Toledo v. Tell-*

² The Fourteenth Amendment to the United States Constitution prohibits the state of Ohio from depriving any person of property without due process of law. Article I, § 16 of the Ohio Constitution proclaims that “every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”

³ As summarized in *State v. Anderson*, 57 Ohio St. 3d 168, 169-70, 566 N.E.2d 1224 (1991):

It is well-established that private property is held subject to the general police power of a state and may be regulated pursuant to that power. *Porter v. Oberlin* (1965), 1 Ohio St. 2d 143, 30 O.O. 2d 491, 205 N.E.2d 363. As the court noted in *Vanater v. South Point* (S.D. Ohio 1989), 717 F. Supp. 1236, 1241, Section 19, Article I of the Ohio Constitution specifically recognizes the subordination of private property to the general welfare. As a result of this subordination, police power regulations are upheld although they may interfere with the enjoyment of liberty or the acquisition, possession and production of private property. As we recognized in *Benjamin v. Columbus* (1957), 167 Ohio St. 103, 4 O.O. 2d 113, 146 N.E.2d 854, paragraph five of the syllabus, any exercise of the police power will be valid “if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.”

ings, 114 Ohio St. 3d 278, 2007-Ohio-3724, 871 N.E.2d 1152, at ¶23-24 (2007), *cert. denied*, 2008 U.S. LEXIS 2006 (Feb. 19, 2008). *See generally* Ohio Const. art. I, § 19 (“[p]rivate property shall ever be held inviolate, but subservient to the public welfare”).

The court then stated that the General Assembly has, in accordance with its police power, enacted R.C. 955.22 to regulate the ownership and control of dogs:

One way for the state to regulate dogs is found in R.C. 955.22. R.C. 955.22(D)(1) requires owners of a dangerous or vicious dog, as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a), to confine the dog in a certain manner. R.C. 955.22(E) requires the owner of a vicious dog to obtain a certain amount of liability insurance. Any owner who fails to comply with these requirements is guilty of a misdemeanor of the first or fourth degree. R.C. 955.99(F) and (G)(2). (Footnote omitted.)

Cowan, at ¶10. The *Cowan* court thus found that while the General Assembly may use its police power to regulate the possession of dogs through R.C. 955.22(D)-(F), the General Assembly may not, in derogation of the United States and Ohio Constitutions, deprive a dog owner of his property interest in a dog without procedural due process. *Id.* at ¶8-9.

The *Cowan* court then considered whether R.C. 955.22(D)-(F) afford a dog owner procedural due process before labeling the owner’s dog as a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a), and placing substantial regulatory burdens upon the dog owner’s property interest in the dog. *Id.* at ¶11. In concluding that R.C. 955.22(D)-(F) violate a dog owner’s constitutional right to procedural due process, the *Cowan* court declared:

Once the dog warden made the unilateral decision to classify appellee’s dogs as vicious, R.C. 955.22 was put into effect and restrictions were placed upon appellee and her dogs. No safeguards, such as a right to appeal or an administrative hearing, were triggered by this determination to challenge the viciousness label or its ramifications. In fact, it was not until appellee was formally charged as a criminal defendant that she could conceivably challenge the viciousness designation under R.C. 955.22. We find it inherently unfair that a dog owner must defy the statutory regulations and become a criminal defendant, thereby risking going to jail and losing her property, in order to challenge a dog warden’s unilateral decision to classify her property. The statute does not provide appellee a right to be heard in a meaningful time and in a meaningful manner on the issue of whether her dogs were vicious or dangerous. Accordingly, we find that R.C. 955.22 violates procedural due process insofar as it fails to provide dog owners a meaningful opportunity to be heard on the issue

Among the regulations which have been upheld as legitimate exercises of police power are those regulations addressing the ownership and control of dogs.

of whether a dog is “vicious” or “dangerous” as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a).

Id. at ¶13.

The *Cowan* court therefore held that R.C. 955.22(D)-(F) violate the constitutional right to procedural due process because they fail to provide dog owners a meaningful opportunity to be heard on the issue of whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i)-(ii).

In *Tellings* the Ohio Supreme Court declined to extend its holding in *Cowan* to situations involving a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(iii). In *Tellings* the court addressed, *inter alia*, whether R.C. 955.11(A)(4)(a)(iii) and R.C. 955.22(D)-(F) violate a dog owner’s constitutional right to procedural due process because the statutes fail to provide a dog owner with an opportunity under R.C. 955.22(D)-(F) to offer evidence that his pit bull dog is not vicious.

In concluding that these statutes do not violate the right of pit bull owners to procedural due process, the *Tellings* court first determined that R.C. 955.11(A)(4)(a)(iii) and R.C. 955.22(D)-(F) are rationally related to the state’s interest in protecting citizens from the dangers associated with pit bull dogs:

The evidence presented in the trial court supports the conclusion that pit bulls pose a serious danger to the safety of citizens. The state and the city have a legitimate interest in protecting citizens from the danger posed by this breed of domestic dogs.

[R.C. 955.11(A)(4)(a)(iii) and R.C. 955.22(D)-(F)] . . . are rationally related to serve the legitimate interests of protecting Ohio and Toledo citizens. R.C. 955.11(A)(4)(a)(iii) states that “vicious dog” includes a dog that “[b]elongs to a breed that is commonly known as a pit bull dog” and that owning, keeping, or harboring a pit bull dog is prima facie evidence of owning, keeping, or harboring a vicious dog. In view of the unique problems posed by pit bulls in this state, the General Assembly requires owners of pit bulls, like owners of vicious dogs, to meet certain statutory requirements. In R.C. 955.22(E), all persons having vicious dogs are required to obtain liability insurance, and under R.C. 955.22(F), vicious dogs cannot be surgically silenced. These requirements are rationally related to the state’s interest in protecting its citizens from pit bulls and in assuring those who are injured by a pit bull that they will be compensated for their injuries.

Tellings, at ¶27-28.

The court then distinguished the procedural due process to be afforded to dog owners when the enforcement of R.C. 955.22(D)-(F) turns on whether a dog is a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(iii), from that to be afforded to dog owners when the enforcement of R.C. 955.22(D)-(F) turns on whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as

defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii), and determined as follows:

[T]he court of appeals declared that the laws violated procedural due process pursuant to *State v. Cowan*, 103 Ohio St. 3d 144, 2004 Ohio 4777, 814 N.E.2d 846. In *Cowan*, a Portage County deputy dog warden determined two dogs to be vicious following a complaint that the dogs had attacked a woman. *Id.* at ¶1. The dogs were determined to be vicious because of the alleged attack, not because they were pit bulls. We held that when a dog is determined to be “vicious” under R.C. 955.11(A)(4)(a), procedural due process requires that the owner have notice and an opportunity to be heard before the owner is charged with a crime. *Id.* at ¶13.

In *Cowan*, the dogs were determined to be vicious under the first two subsections of R.C. 955.11(A)(4)(a) because they had caused injury to a person. Thus, the case concerned the dog warden’s unilateral classification of the dogs as vicious. However, in this case, the “vicious dogs” at issue are those classified as pit bulls under the third subsection of R.C. 955.11(A)(4)(a). Unlike the situation in *Cowan*, the General Assembly has classified pit bulls generally as vicious; there is no concern about unilateral administrative decision-making on a case-by-case basis. The clear statutory language alerts all owners of pit bulls that failure to abide by the laws related to vicious dogs and pit bulls is a crime. Therefore, the laws do not violate the rights of pit bull owners to procedural due process.

Id. at ¶31-32; accord *State v. Williams*, 2007-Ohio-4023, 2007 Ohio App. LEXIS 3642, at ¶20 (Coshocton County Aug. 1, 2007).

A review of the foregoing discloses that, under *Cowan* and *Tellings*, the Ohio Supreme Court has held that R.C. 955.22(D)-(F) violate the constitutional right to procedural due process because they fail to provide a dog owner with a meaningful opportunity to be heard on the issue of whether his dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii). R.C. 955.22(D)-(F) do not, however, violate a dog owner’s constitutional right to procedural due process when the owner’s dog is included within the definition of “vicious dog” set forth in R.C. 955.11(A)(4)(a)(iii).

R.C. 955.22(D)-(F) on Their Face Violate the Constitutional Right to Procedural Due Process When Their Enforcement Turns on Whether a Dog Is a “Dangerous Dog,” as Defined in R.C. 955.11(A)(1)(a), or a “Vicious Dog,” as Defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii)

Let us now consider your first question, which asks whether the lack of procedural due process afforded to dog owners under R.C. 955.22(D)-(F) may be

remedied without legislative action by the General Assembly. Under constitutional jurisprudence, a court may declare “a statute unconstitutional either because it is invalid ‘on its face’ or because it is unconstitutional ‘as applied’ to a particular set of circumstances.” *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997); accord *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944) (syllabus, paragraph four). When a court determines that a statute is unconstitutional as applied, “the State may continue to enforce the statute in different circumstances where it is not unconstitutional.” *Women’s Med. Prof’l Corp. v. Voinovich*, at 193; accord *McKinley v. Ohio Bur. of Workers’ Compensation*, 170 Ohio App. 3d 161, 2006-Ohio-5271, 866 N.E.2d 527, at ¶9 (Washington County 2006), *appeal allowed*, 112 Ohio St. 3d 1489, 2007-Ohio-724, 862 N.E.2d 116 (2007). However, “if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances.” *Women’s Med. Prof’l Corp. v. Voinovich*, at 193; accord *McKinley*, at ¶9.

In *Cowan* the Ohio Supreme Court held that R.C. 955.22(D)-(F) on their face violate the constitutional right to procedural due process when their enforcement turns on whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii). As explained in *Cowan*, at ¶13:

Once the dog warden made the unilateral decision to classify appellee’s dogs as vicious, R.C. 955.22 was put into effect and restrictions were placed upon appellee and her dogs. *No safeguards, such as a right to appeal or an administrative hearing, were triggered by this determination to challenge the viciousness label or its ramifications . . . [R.C. 955.22] does not provide appellee a right to be heard in a meaningful time and in a meaningful manner on the issue of whether her dogs were vicious or dangerous.* Accordingly, we find that R.C. 955.22 violates procedural due process insofar as it fails to provide dog owners a meaningful opportunity to be heard on the issue of whether a dog is “vicious” or “dangerous” as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a). (Emphasis added.)

The court thus observed that every conceivable application of R.C. 955.22(D)-(F) that turns on whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii), results in a violation of the constitutional right to procedural due process because R.C. 955.22(D)-(F) fail to provide dog owners in all instances an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of whether the dog is a dangerous or vicious dog. As a result, the *Cowan* court concluded that R.C. 955.22(D)-(F) on their face violate the constitutional right to procedural due process when their enforcement turns on whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in

R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii).⁴ See generally *Members of City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (a statute is invalid on its face when “it is unconstitutional in every conceivable application”); *McKinley*, at ¶11 (a person challenging the constitutionality of a statute on its face “must establish that no set of circumstances exists under which the statute would be valid. The fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid”).

The Constitutional Infirmity of R.C. 955.22(D)-(F) Must Be Remedied by the General Assembly

When the Ohio Supreme Court finds a statute unconstitutional on its face, the statute is void from the date of its enactment and incapable of any valid application. As explained in *City of Middletown v. Ferguson*, 25 Ohio St. 3d 71, 80, 495 N.E.2d 380 (1986):

⁴ In *State v. Cowan*, 103 Ohio St. 3d 144, 2004-Ohio-4777, 814 N.E.2d 846 (2004), the court also found that, even if it is assumed that R.C. 955.22(D)-(F) are constitutional on their face, they are unconstitutional as applied in the set of circumstances before the court:

Even assuming that R.C. 955.22 provides a meaningful opportunity to be heard on a dog’s classification, it is certainly unconstitutional as applied here. Although appellant now argues that one aspect of its case at trial was to establish that the dogs were vicious and dangerous, a reading of the transcript reveals that the state did not believe that it had this burden. It is true that the state presented evidence at trial from the victim and an eyewitness relating the dog-bite incident and identifying the dogs as belonging to appellee. However, the state also presented testimony from the deputy warden that the determination that these dogs were vicious had already been made prior to trial. Moreover, the state repeatedly told the jury that the warden had already determined that the dogs were vicious and it was not the jury’s job to decide whether it is fair for the dog warden to make this determination. Thus, although the jury was given the definition of a “vicious” or “dangerous” dog, this element of the crime was removed from their consideration.

Previously, this court has stated that “[d]ue process of law implies, in its most comprehensive sense, the right of the person affected thereby to be present before the tribunal which pronounces judgment upon a question of life, liberty or property, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, such is not due process of law.” *Williams v. Dollison* (1980), 62 Ohio St. 2d 297, 299, 16 O.O. 3d 350, 405 N.E.2d 714. *So even assuming that the statute provides a constitutionally adequate opportunity to be heard on this issue, appellee was not afforded this right.* (Emphasis added.)

Cowan, at ¶14-15.

[A]n unconstitutional law must be treated as having no effect whatsoever from the date of its enactment. This fundamental proposition has been expressed as follows:

“An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”
Norton v. Shelby County (1886), 118 U.S. 425, 442. *Accord Ex Parte Siebold* (1879), 100 U.S. 371, 376; *Chicago, I. & L. Ry. Co. v. Hackett* (1913), 228 U.S. 559, 566.

Accord Rossborough Mfg. v. Trimble, 301 F.3d 482, 491 (6th Cir. 2002); *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 618 n.7 (6th Cir. 1997); see *Grieb v. Dep't of Liquor Control*, 153 Ohio St. 77, 90 N.E.2d 691 (1950) (syllabus, paragraph two) (“[G.C. 6064-28], which authorizes the Department of Liquor Control summarily to seize alcoholic beverages which are found on the premises of one whose permit to sell them has been revoked or cancelled, and that part of [G.C. 6064-40], which provides for the destruction or disposition of lawfully held alcoholic liquors, without compensation to the owner, are unconstitutional and of no effect, being violative of Sections 16 and 19, Article I of the Constitution of Ohio and Section 1 of the Fourteenth Amendment to the Constitution of the United States, relating to the taking of property without due process of law and without compensation”); *Westenberger v. Indus. Comm'n*, 135 Ohio St. 211, 213, 20 N.E.2d 252 (1939) (when the Ohio Supreme Court “declared [G.C. 1465-68] unconstitutional, the duties of the Industrial Commission ceased with reference to such partner-employee claims, and the rights of claimants likewise terminated”).

As stated earlier, the Ohio Supreme Court in *Cowan* has determined that R.C. 955.22(D)-(F) on their face violate a dog owner’s constitutional right to procedural due process when their enforcement turns on whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii). R.C. 955.22(D)-(F) thus must be treated as having no effect whatsoever when their enforcement turns on whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii). Consequently, local officials may not enforce R.C. 955.22(D)-(F) when local officials must determine whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii).⁵ See *Women’s Med. Prof’l Corp. v. Voinovich*, at 193 (“if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances”).

⁵ The enforcement of R.C. 955.22(D)-(F) is not unconstitutional when a dog is a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(iii). See *City of Toledo v. Tellings*, 114 Ohio St. 3d 278, 2007-Ohio-3724, 871 N.E.2d 1152 (2007), cert. denied, 2008 U.S. LEXIS 2006 (Feb. 19, 2008). Local officials therefore may enforce R.C. 955.22(D)-(F) when a dog “[b]elongs to a breed that is commonly known as a pit bull dog.” R.C. 955.11(A)(4)(a)(iii). See generally R.C. 1.50 (“[i]f any provisions of a section of the Revised Code or the application thereof to any person or

Moreover, under the Ohio Constitution, local officials may not enforce R.C. 955.22(D)-(F) when their enforcement turns on whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii), until the General Assembly cures the constitutional infirmity of R.C. 955.22(D)-(F) throughout the state. Section 26 of Article II of the Ohio Constitution provides that “[a]ll laws, of a general nature, shall have a uniform operation throughout the state.” This constitutional requirement of uniformity of operation is aimed at assuring that the provisions of a law of a general nature will be applicable in any area of the state where similar circumstances exist:

[E]very subject of legislation is either of a general nature on the one hand, or local or special on the other. It can not be in its nature both general and special, because the two are inconsistent. If it is of a general nature, the constitution requires that *all* laws—not *some* laws—on that subject shall have a uniform operation throughout the state.

But how are we to determine whether a given subject is of a general nature? One way is this: if the subject does or may exist in, and affect the people of, every county, in the state, it is of a general nature. On the contrary, if the subject cannot exist in, or affect the people of every county, it is local or special. A subject matter of such general nature can be regulated and legislated upon by general laws having a uniform operation throughout the state, and a subject matter which cannot exist in, or affect the people of every county, can not be regulated by general laws having a uniform operation throughout the state, because a law can not operate where there can be no subject matter to be operated upon.

So that practically this section of the constitution means that the legislation on a subject to which, in its nature, laws having a uniform operation throughout the state can be made applicable, must be by statutes having such uniform operation, and can not be by local or special acts. The subject of the statute being of a general nature, all laws without exception as to such subject, must have a uniform operation. The constitution makes no exception, and the courts can make none.

The evident intention was, to restrict local and special legislation to such subjects as are in their nature not general, so as to compel as near as possible, uniformity of laws throughout the state.

Hixson v. Burson, 54 Ohio St. 470, 481-82, 43 N.E. 1000 (1896); *accord Desenco, Inc. v. City of Akron*, 84 Ohio St. 3d 535, 541-42, 706 N.E.2d 323 (1999); *State ex rel. Zupancic v. Limbach*, 58 Ohio St. 3d 130, 137-38, 568 N.E.2d 1206 (1991).

circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable”).

Thus, for purposes of Article II, § 26 of the Ohio Constitution, if a subject does or may exist in, and affects the people of, every county in the state, the subject matter is of a general nature and, as such, must have a uniform operation throughout the state.

Dog ownership is clearly a subject that exists in and affects the people of every county of this state. In addition, R.C. 955.22(D)-(F) prescribe a rule of conduct for all dog owners in the state. *See* R.C. 955.99 (setting out criminal penalties for violations of R.C. 955.22(D)-(F)). Therefore, R.C. 955.22 is a law of a general nature that must have a uniform operation throughout the state. *See generally State v. O'Mara*, 105 Ohio St. 94, 136 N.E. 885 (1922) (syllabus, paragraph one) (“[t]he power to define and classify and prescribe punishment for felonies committed within the state is lodged in the general assembly of the state, and when so defined, classified and prescribed, such laws must have uniform operation throughout the state”), *overruled, in part, on other grounds by Steele v. State*, 121 Ohio St. 332, 168 N.E. 846 (1929).

In light of Article II, § 26 of the Ohio Constitution, the lack of procedural due process afforded to a dog owner under R.C. 955.22(D)-(F) must be remedied by the legislative body with authority to enact legislation that will be applicable throughout the state. *See generally Brinkman v. Drolesbaugh*, 97 Ohio St. 171, 183, 119 N.E. 451 (1918) (the power and duty to change the operation of a statute is with the legislature); *State v. Robinson*, 44 Ohio App. 3d 128, 130, 541 N.E.2d 1092 (Clermont County 1989) (“[a]lthough courts may liberally construe a statute to save it from constitutional infirmities, they cannot simply rewrite laws in order to render them constitutional”). Anything less will result in R.C. 955.22(D)-(F) not having uniform application throughout the state when their enforcement turns on whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii). *See generally Farmers Sav. & Trust Co. v. Ridenour*, 59 Ohio Misc. 128, 132-33, 394 N.E.2d 1039 (Crawford County Mun. Ct. 1979) (the constitutional infirmities of R.C. Chapter 2737 may not be cured by local rules of court since local rules of court cannot amend a statute).

Under Article II, § 1 of the Ohio Constitution, the General Assembly is the legislative body empowered to enact laws that operate uniformly throughout the state. This constitutional provision declares that “[t]he legislative power of the state shall be vested in a general assembly.” Thus, the General Assembly, rather than local legislative bodies, is responsible for providing dog owners throughout the state procedural due process when the enforcement of R.C. 955.22(D)-(F) turns on whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii). *See generally Welch v. City of Cleveland*, 97 Ohio St. 311, 314, 120 N.E. 206 (1917) (“[s]ection 26, Article II of the Constitution of Ohio, has no application to municipal ordinances. From their very language municipal ordinances are limited to the municipality, and those within its borders”); *Farmers Sav. & Trust Co. v. Ridenour*, at 132 (“the Ohio replevin statute fails to pass constitutional scrutiny. The fact that this court and other Ohio courts have instituted local procedures to cure the

glaring defects in R.C. Chapter 2737 cannot save the statute”). This means that the General Assembly is responsible for enacting laws whereby dog owners throughout the state are afforded an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii), for purposes of R.C. 955.22(D)-(F). Accordingly, Article II, §§ 1 and 26 of the Ohio Constitution require the General Assembly to remedy the lack of procedural due process afforded to dog owners under R.C. 955.22(D)-(F).

County and City Officials May Enact Legislation to Regulate the Ownership and Control of Dogs

While the lack of procedural due process afforded to dog owners under R.C. 955.22(D)-(F) may not be remedied without legislative action by the General Assembly, it must be noted that a board of county commissioners or legislative authority of a city may enact legislation to regulate the ownership and control of dogs that affords procedural due process to dog owners. R.C. 955.221(B) authorizes a board of county commissioners, board of township trustees,⁶ or legislative authority of a municipal corporation to adopt and enforce resolutions or ordinances to control dogs within its territory, provided the resolutions or ordinances do not otherwise conflict with any statute.⁷ For purposes of R.C. 955.221(B), resolutions and ordinances to control dogs may include, but are not limited to, the following:

[O]rdinances or resolutions concerned with the ownership, keeping, or harboring of dogs, the restraint of dogs, dogs as public nuisances, and dogs as a threat to public health, safety, and welfare, except that such ordinances or resolutions as permitted in [R.C. 955.221(B)] shall not prohibit the use of any dog which is lawfully engaged in hunting or training for the purpose of hunting while accompanied by a licensed hunter. However, such dogs at all other times and in all other respects shall be subject to the ordinance or resolution permitted by [R.C. 955.221], unless actually in the field and engaged in hunting or in legitimate training for such purpose.

R.C. 955.221(A).

⁶ A board of township trustees may adopt and enforce resolutions to control dogs within the township when the board of county commissioners has not adopted resolutions to control dogs within the unincorporated areas of the county under R.C. 955.221. R.C. 955.221(B)(2).

⁷ A dog owner who violates an ordinance or resolution adopted by a board of county commissioners, board of township trustees, or legislative authority of a municipal corporation under R.C. 955.221 is guilty of a minor misdemeanor. *See* R.C. 955.221(C) (“[n]o person shall violate any resolution or ordinance adopted under [R.C. 955.221]”); R.C. 955.99(I) (“[w]hoever violates [R.C. 955.221(C)] is guilty of a minor misdemeanor”).

In addition, the legislative authority of a municipal corporation has the authority “to enforce police regulations” within its territory. *City of Akron v. Smith*, 82 Ohio App. 3d 57, 59, 611 N.E.2d 435 (Summit County 1992). Article XVIII, § 3 of the Ohio Constitution provides that “[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

Pursuant to the foregoing authorities, a board of county commissioners or legislative authority of a city may adopt and enforce resolutions or ordinances, respectively, to regulate the ownership and control of dogs within its territory in order to ensure the public health, safety, and welfare. *See, e.g., Tellings* (finding that a city has a legitimate interest in protecting its citizens from the dangers associated with pit bulls, and that a city ordinance that prohibits a person, organization, or corporation from owning, keeping, harboring, or providing sustenance to more than one vicious dog or a dog commonly known as a pit bull or pit bull mixed breed is constitutional). This includes resolutions or ordinances that are identical to R.C. 955.11 and R.C. 955.22.

Resolutions or ordinances adopted by a board of county commissioners or legislative authority of a city to regulate the ownership and control of dangerous or vicious dogs may set forth procedures that afford a dog owner an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of whether his dog is a dangerous or vicious dog for purposes of the resolutions or ordinances. By providing a dog owner with such procedures, a board of county commissioners or legislative authority of a city protects a dog owner’s constitutional right to procedural due process when county or city officials enforce resolutions or ordinances that regulate the ownership and control of dangerous or vicious dogs within its territory. *See generally Cowan* (the constitutional right to due process requires, at a minimum, that a dog owner be afforded an opportunity to be heard at a meaningful time and in a meaningful manner when the state seeks to place substantial regulatory burdens upon the owner’s property interest in a dog). Accordingly, Article XVIII, § 3 of the Ohio Constitution and R.C. 955.221 authorize a board of county commissioners or legislative authority of a city to adopt and enforce resolutions or ordinances that are identical to R.C. 955.11 and R.C. 955.22 and that afford a dog owner procedural due process when the resolutions or ordinances are enforced.⁸

Neither Article XVIII, § 3 of the Ohio Constitution nor R.C. 955.221, however, provides authority for a board of county commissioners or legislative authority of a city to cure the constitutional infirmity of R.C. 955.22(D)-(F)

⁸ Resolutions and ordinances that regulate the ownership and control of dangerous or vicious dogs are not subject to Article II, § 26 of the Ohio Constitution, which requires all laws of a general nature to have a uniform application throughout the state. *See generally Welch v. City of Cleveland*, 97 Ohio St. 311, 314, 120 N.E. 206 (1917) (“[s]ection 26, Article II of the Constitution of Ohio, has no application to municipal ordinances. From their very language municipal ordinances are limited to the municipality, and those within its borders”).

pinpointed in *Cowan*. For the reasons stated above, a resolution or ordinance that establishes procedures that afford a dog owner within the unincorporated area of a county or a city an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii), is not effective statewide. Consequently, such a resolution or ordinance does not provide procedural due process to dog owners throughout the state. Because Article II, § 26 of the Ohio Constitution mandates that R.C. 955.22(D)-(F) be applied uniformly throughout the state, it follows that R.C. 955.22(D)-(F) remain unconstitutional on their face even though a board of county commissioners or legislative authority of a city may adopt a resolution or ordinance that establishes procedures that afford a dog owner within its territory an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii). *See generally State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917) (syllabus, paragraph five) (“[t]he provision of an act of the general assembly purporting to confer authority upon the county auditor, or the board of county commissioners, to fix the salary of county or township officers within certain limits, without providing a uniform rule for determining such compensation in the several counties of the state, are in conflict with Section 26 of Article II of the Constitution of Ohio, and void”).

Authority of City and County Officials to Create and Use a Dangerous and Vicious Dog Appeals Board to Provide Procedural Due Process to Dog Owners

Your second and third questions ask, if the lack of procedural due process afforded to dog owners under R.C. 955.22(D)-(F) may be remedied without legislative action by the General Assembly, whether city and county officials may create and use a dangerous and vicious dog appeals board to provide dog owners with a meaningful opportunity to be heard on the issue of whether a dog is a “dangerous dog,” as defined in R.C. 955.11(A)(1)(a), or a “vicious dog,” as defined in R.C. 955.11(A)(4)(a)(i) or R.C. 955.11(A)(4)(a)(ii), for purposes of R.C. 955.22(D)-(F). In light of our response to your first question, it is not necessary to address your second and third questions.

Conclusions

Based upon the foregoing, it is my opinion, and you are hereby advised as follows:

1. Pursuant to Article II, §§ 1 and 26 of the Ohio Constitution, the lack of procedural due process afforded to dog owners under R.C. 955.22(D)-(F) may not be remedied without legislative action by the General Assembly.
2. Pursuant to Article XVIII, § 3 of the Ohio Constitution and R.C. 955.221, a board of county commissioners or legislative authority of a city may enact within its respective territory resolutions or ordi-

nances that regulate the ownership and control of dogs in order to ensure the public health, safety, and welfare.

3. Article XVIII, § 3 of the Ohio Constitution and R.C. 955.221 authorize a board of county commissioners or legislative authority of a city to adopt and enforce resolutions or ordinances that are identical to R.C. 955.11 and R.C. 955.22 and that afford a dog owner procedural due process when the resolutions or ordinances are enforced.