

OPINION NO. 90-107**Syllabus:**

1. The county dog warden, pursuant to R.C. 955.16 and subject to the statutory constraints therein, has authority to determine when and if impounded dogs should be destroyed.
2. In the absence of a contract between the board of county commissioners and the local humane society for the humane destruction of dogs, the county commissioners are required by R.C. 955.15 to provide humane devices and methods for the destruction of dogs that the dog warden has determined, in the exercise of his discretion under R.C. 955.16 and subject to the constraints therein, should be destroyed.
3. If a contract exists between the board of county commissioners and the local humane society for the shelter, care and feeding of impounded dogs, the county dog warden is required by the provisions of R.C. 955.15 to deliver all dogs seized to the local humane society shelter for the provision of those services; the dog warden retains his authority under R.C. 955.16, however, to determine the disposition of such dogs, and in the absence of a contract between the board of county commissioners and the local humane society for the humane destruction of dogs, the dog warden may remove from the local humane society shelter such dogs as he has determined should be destroyed.
4. Pursuant to R.C. 955.221(B)(1), a board of county commissioners has authority to establish a program, to be administered through the office of the county dog warden, whereby dogs made available for adoption under R.C. 955.16 are spayed or neutered.

To: John T. Corrigan, Cuyahoga County Prosecuting Attorney, Cleveland, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 31, 1990

I have before me your request for my opinion regarding the authority of the board of county commissioners or the county dog warden with respect to dogs impounded pursuant to R.C. Chapter 955. Specifically, you ask:

1. Does a board of county commissioners, through the office of county dog warden, appointed pursuant to O.R.C. §955.12, have authority to establish and conduct a euthanasia program, whereby excessive dog population can be destroyed?
2. Does a board of county commissioners, through the office of county dog warden, have authority to establish and conduct a spay/neuter program, whereby dogs made available for adoption are spayed or neutered prior to adoption?

With respect to your first question, you note that, while R.C. 955.16 permits the humane destruction of impounded dogs under certain circumstances, R.C. 955.15 requires the dog warden to deliver all dogs seized to the shelter operated by the local humane society, in counties where such a society operates a suitable facility. You indicate that in Cuyahoga County there is such a society, but that it has "recently stated its intention to become a 'no-kill' operation and has declined an invitation from the county to contract for euthanasia services." You wish to know whether the county commissioners and/or dog warden have the authority to establish a euthanasia program or whether all dogs must be delivered to the shelter of this society, thereby becoming subject to the shelter's "no-kill" policy.

R.C. 955.15 states, *inter alia*, that:

The board of county commissioners shall...provide a suitable place for the impounding of dogs, make proper provision for feeding and caring for the same, and provide humane devices and methods for destroying dogs. In any county in which there is a society for the prevention of cruelty to children and animals, having one or more agents and maintaining an animal shelter suitable for a dog pound and devices for humanely destroying dogs, the board need not furnish a dog pound, but the county dog warden shall deliver all dogs seized by him and his deputies to such society at its animal shelter, there to be dealt with in accordance with law. The board shall provide for the payment of reasonable compensation to such society for its services so performed....

In construing the substantively identical provisions of G.C. 5652-8, one of my predecessors concluded that, although the county commissioners are required to use the humane society animal shelter in counties where such a society maintains a suitable shelter and is willing to render the required services,

if in the judgment of the county commissioners the animal shelter afforded by such humane society is not suitable for the purpose of a dog pound; or if the services rendered by such humane society are otherwise not suitable for carrying into effect the purposes of the act, I have no doubt but that in such case the county commissioners would be authorized to erect a suitable dog pound and equip and maintain same; and the same would be true in case such humane society refuses to afford to the county the use of its dog pound and services in connection therewith for a reasonable compensation.

1918 Op. Att'y Gen. No. 1123, vol. I, p. 522, 523 (emphasis added). Thus, the duty of the dog warden to deliver dogs to the humane society shelter is dependent upon the determination of the county commissioners that the shelter and related services are suitable and upon the willingness of the humane society to enter into a contract to make the shelter and services available. See 1954 Op. Att'y Gen. No. 4660, p. 683, 686 (R.C. 955.15 "authorizes the commissioners to contract with a society of the

character named, for the *sheltering* of dogs that are taken and for their *humane destruction*, and where such arrangement has been made it is the duty of the county dog warden to 'deliver all dogs seized').

I note, further, that the first sentence of R.C. 955.15 requires the county commissioners to provide a suitable place, provisions for feeding and care, and humane devices and methods for destruction. A contract with the local humane society serves only to relieve the county commissioners of the obligation to provide these services directly. 1938 Op. Att'y Gen. No. 2614, vol. II, p. 1234, 1240. Thus, it appears that if a local humane society is unwilling to make humane devices and methods for the destruction of dogs available to the county, the county commissioners have not only the authority, but a statutory obligation, to provide such devices and methods themselves, if dogs are to be destroyed.

This brings me to an examination of the related question of who holds the authority to determine whether a dog should be destroyed. The actual disposition of impounded dogs, whether accomplished through contract services of the local humane society or through facilities and equipment provided directly by the county commissioners, is governed by R.C. 955.16. R.C. 955.16(A)(1) provides for the immediate humane destruction of a dog if "necessary because of obvious disease or injury," as certified by a qualified professional, in the case of registered dogs, or as determined by the dog warden, in the case of unregistered dogs. Absent a need for immediate destruction, R.C. 955.16(A) provides for minimum holding periods to allow time for owner redemption pursuant to R.C. 955.18. If the dog is not redeemed within the applicable holding period, the dog must be donated to a requesting special agency that trains dogs to assist persons with handicaps. R.C. 955.16(A) next provides that, if the applicable holding period has expired and no special training agency has requested a dog, the dog "may" be sold to a person or to a certified teaching or research facility. If the dog is offered to a certified teaching or research facility, R.C. 955.16(C) imposes an additional twenty-four hour holding period. See 1990 Op. Att'y Gen. No. 90-031. As a final dispositional option, R.C. 955.16(C) states that "[a]ny dog that the dog warden or poundkeeper is unable to dispose of, in the manner provided by this section and section 955.18 [owner redemption] of the Revised Code, may be humanely destroyed...." (Emphasis added.) Thus, absent a need for immediate destruction, the destruction of impounded dogs is clearly discretionary. See generally *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1) (statutory use of the word "may" indicates a grant of discretionary authority unless the context of the statute clearly requires a different meaning).

R.C. 955.16(A) expressly vests the authority to determine the need for immediate destruction of a dog in either the county dog warden or a qualified professional. The remaining dispositional options are phrased in the passive voice, and thus do not clearly indicate who is responsible for implementation. Pursuant to R.C. 955.12, however, the county dog warden, who is appointed or employed by the county board of commissioners, is charged with the enforcement of R.C. 955.16. Thus, by virtue of his appointment, the dog warden is vested with the discretionary authority granted in R.C. 955.16 to determine if and when any dog, that he or the poundkeeper has been "unable to dispose of, in the manner provided" by statute, should be destroyed.

The existence of a contract between the county commissioners and the local humane society pursuant to R.C. 955.15 for some or all of the services related to the impoundment of dogs does not serve to vest any authority for the enforcement of the dog laws in the local humane society. 1954 Op. No. 4660 at 687;¹ 1938 Op. No.

¹ 1954 Op. Att'y Gen. No. 4660, p. 683, 687 states that the commissioners lack statutory authority to turn over to the local humane society "the duties of the commissioners, and their *control over* the dog warden...." (Emphasis added.) I note that, in the context of 1954 Op. No. 4660, the control of the commissioners over the dog warden refers to their authority under R.C. 955.15 to appoint or employ and to fix the

2614 at 1240. While the existence of such a contract imposes a duty, under R.C. 955.15, on the dog warden to deliver dogs to the local humane society shelter for the services to be provided thereunder, the determination of actual disposition of the dogs affected remains the duty of the dog warden under R.C. 955.16. Thus, although the "no-kill" policy of the local humane society may affect that society's willingness to contract with the county commissioners for the provision of euthanasia services or for the provision of any services with respect to dogs impounded pursuant to R.C. Chapter 955, the policy is not binding on the dog warden, who retains the authority to destroy dogs under R.C. 955.16, subject to the statutory constraints therein.

In the situation you have described in your request, therefore, if the county commissioners have contracted with the local humane society for the shelter, care and feeding of impounded dogs, R.C. 955.15 requires the county dog warden to deliver dogs seized to the shelter of the local humane society for the provision of those services. Pursuant to R.C. 955.16, however, and subject to the statutory constraints therein, the county dog warden retains the authority, to determine when and if such dogs should be destroyed. Absent a contract, pursuant to R.C. 955.15, with the local humane society for the humane destruction of such animals, the county commissioners are required by R.C. 955.15 to provide the dog warden with humane devices and methods for the destruction of dogs that the warden has determined should be destroyed. If, however, the county commissioners are unable to contract with the local humane society for any services related to dogs impounded pursuant to R.C. Chapter 955, even though the society maintains facilities and services which are suitable but for the lack of euthanasia services, the county dog warden is not required by R.C. 955.15 to deliver any seized dogs to the shelter of such society. Rather, the county commissioners are required by R.C. 955.15 to provide a facility, equipment, and services suitable to the needs of the dog warden in performing his duties with respect to the disposition of dogs pursuant to R.C. 955.16.

I turn now to your second question, in which you ask, whether a board of county commissioners, through the office of county dog warden, has the authority to establish and conduct a spay/neuter program, whereby dogs made available for adoption² are spayed or neutered prior to adoption. I note first, that ordinarily both the board of county commissioners and the county dog warden may exercise only those powers conferred by statute or which may be necessarily implied therefrom. See generally *State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraph 2) (county commissioners); *Perkins v. Hattery*, 106 Ohio App. 361, 362, 155 N.E.2d 73, 75 (Hardin County 1958) (dog warden). There is no statute either expressly conferring or implying any authority for the county dog warden to establish and conduct a spay/neuter program. R.C. 955.221(B)(1), however, provides that "[a] board of county commissioners may adopt and enforce resolutions to control dogs within the unincorporated areas of the county that are not otherwise in conflict with any other provision of the Revised Code." Thus, the board of county commissioners is not bound by the above rule of construction, but is vested with the authority to adopt and enforce any resolution reasonably related to the control of dogs, so long as it is not in conflict with any statute.

The test for such conflict, as articulated in the case of *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923) (syllabus, paragraph 2), is "whether

compensation of the dog warden. Such control does not include the power to limit the authority vested in the office of dog warden by statute, see generally 1981 Op. Att'y Gen. No. 81-037 at 2-144, although the commissioners may now expand the dog warden's authority in ways not in conflict with statute, see R.C. 955.221(B)(1) and discussion, *infra*.

² R.C. 955.16(A) provides that any dog, not redeemed by its owner or required to be donated to a special training agency, may be sold to a person or to a qualified teaching or research organization. For purposes of this opinion, I assume the phrase "made available for adoption" refers to such discretionary sales of dogs.

the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." There is no statute prohibiting the establishment of a spay/neuter program such as you have described. Similarly, there is no statute prohibiting the county dog warden from administering and enforcing such a program, if the county commissioners choose to vest the warden with authority to do so. Nor would the imposition of such duties on the dog warden detract from or interfere with the statutory authority and duties of the dog warden. Accordingly, such a resolution would not be in conflict with any provision of the Revised Code.

The remaining issue is whether such a resolution can be construed as one "to control dogs," within the meaning of R.C. 955.221(B)(1). R.C. 955.221(A) states that "[f]or purposes of this section, ordinances or resolutions to control dogs, include, but are not limited to, ordinances or resolutions concerned with...dogs as public nuisances, and dogs as a threat to public health, safety, and welfare...." Thus, if, in the exercise of their sound discretion, the county commissioners determine that a spay/neuter program for dogs offered for adoption pursuant to R.C. 955.16 will alleviate a public nuisance or threat to the public health, safety and welfare, they may, pursuant to R.C. 955.221(B)(1), establish such a program and provide for its administration through the office of county dog warden.

It is therefore, my opinion, and you are hereby advised that:

1. The county dog warden, pursuant to R.C. 955.16 and subject to the statutory constraints therein, has authority to determine when and if impounded dogs should be destroyed.
2. In the absence of a contract between the board of county commissioners and the local humane society for the humane destruction of dogs, the county commissioners are required by R.C. 955.15 to provide humane devices and methods for the destruction of dogs that the dog warden has determined, in the exercise of his discretion under R.C. 955.16 and subject to the constraints therein, should be destroyed.
3. If a contract exists between the board of county commissioners and the local humane society for the shelter, care and feeding of impounded dogs, the county dog warden is required by the provisions of R.C. 955.15 to deliver all dogs seized to the local humane society shelter for the provision of those services; the dog warden retains his authority under R.C. 955.16, however, to determine the disposition of such dogs, and in the absence of a contract between the board of county commissioners and the local humane society for the humane destruction of dogs, the dog warden may remove from the local humane society shelter such dogs as he has determined should be destroyed.
4. Pursuant to R.C. 955.221(B)(1), a board of county commissioners has authority to establish a program, to be administered through the office of the county dog warden, whereby dogs made available for adoption under R.C. 955.16 are spayed or neutered.