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**RECEIVED**  
AUG 08 2024  
**OPINION COMMITTEE**

JANNA IVEY LINDIG  
County Attorney

August 8, 2024

**RQ-0557-KP**

VIA EMAIL [opinion.committee@oag.texas.gov](mailto:opinion.committee@oag.texas.gov)  
The Honorable Ken Paxton  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

MODIFICATION OF REQUEST MADE VIA LETTER DATED AUGUST 2, 2024  
REQUESTING WRITTEN OPINION SENT VIA CMRR #7019 0140 0001 1283 0742 (August 2, 2024, letter)

Modification of August 2, 2024 letter to change identity of Requestor to Janna Lindig, County Attorney for Bandera County, Texas and to add matters pertinent to authority to request advice under Tex. Gov't Code §402.043.

Re: Request for Attorney General Opinion under TEX. GOV'T CODE § 402.043(1)(A) and § 402.042(b)(2).<sup>1</sup> In support of the application of § 402.042(b)(2) please see footnote 1.

**Requestor:** Janna Lindig, County Attorney for Bandera County, Texas

**Opinion Requested:** I respectfully request an Attorney General written opinion with respect to the following questions:

(1) Does the Bandera County Commissioners Court have the authority to enact an Order which penalizes a dog owner who has allowed/failed to restrain his/her dog(s) from creating a public nuisance by unreasonable barking?

**History of Request:** The substance of this request was presented in the August 2, 2024 letter. The request is modified, but continues to present the concerns of the County Judge, Richard Evans, and the Bandera County Commissioners Court because the

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<sup>1</sup>The Requestor presents that Hon Richard Evans, County Judge for Bandera County, Texas, is head of the Bandera County Commissioners Court. The Bandera County Commissioners Court is a department of state government, being a part of the Judicial department of the State of Texas. *See* Tex. Const. Art. II, § 1 which creates three departments of Texas state government *and* Tex. Const. Art. V, § 1 which names the Commissioners Courts as part of the Judicial department.

question affects the public interest in reducing the nuisance created by the barking dogs and concerns the official duties of Judge Richard Evans and the County Commissioners.

The presentation of this Request was authorized by the Bandera County Commissioners Court. This request does not include matters that fall within the jurisdiction of the District Court or any other court.

Dear Attorney General Paxton:

BRIEF PERTINENT FACTUAL BACKGROUND

The Commissioners Court of Bandera County, Texas, by order signed on April 9, 2009, adopted a Rabies and Animal Control Order (“April 9, 2009, Animal Control Order”) pursuant to the provisions of Chapter 821, 822 and 826 of the *Texas Health and Safety Code*, as currently amended. This April 9, 2009, Animal Control Order includes the following provision:

1.32 PUBLIC NUISANCE: The conduct of any owner in allowing an animal to:

- .....
- (4) Cause a disturbance by excessive barking or noise making near the private residence of another or to the extent that the barking or noise disturbs the peace or quiet of any neighborhood or can be heard from within the residence of another;
- .....

The Commissioners Court’s authority or power to adopt the April 9, 2009, Animal Control Order has not been challenged.

There was no provision in the April 9, 2009, Animal Control Order regarding possible repercussions faced by an owner who caused a public nuisance under the above 1.32(4) provision.

By “Order Modifying Rabies and Animal Control Order” signed on August 25, 2022, (“**August 25, 2022 Modification Order**”) the Commissioners Court of Bandera County, Texas Ordered that the Rabies and Animal Control Order adopted April 9<sup>th</sup>, 2009, be modified to include the following:

## SECTION 9A– Public Nuisance Dogs

A dog that causes a disturbance by excessive barking or noise making near the private residence of another or to the extent that the barking or noise disturbs the peace or quiet of any neighborhood, or can be heard from within the residence of another, is a Public Nuisance Dog.

An owner of a dog that causes a disturbance under Section 1.32(4) herein, commits a public nuisance and is in violation of this Order. In determining whether there is excessive barking or noise near the private residence of another or, whether the barking or noise disturbs the peace or quiet of any neighborhood,

the following factors may be considered:

1. The time of day the barking and/or noise is produced;
2. The proximity of the production of the noise to other premises; and
3. Whether the sound is recurrent, intermittent, or constant.

9A.01 For purposes of this Section, a person who owns or is in custody of a Public Nuisance Dog is the owner of the dog under this Section 9A.

9A.02 If a person submits a sworn statement reporting a public nuisance described by Section 1.32(4) to the Animal Control Authority or any Deputy of the Bandera County Sheriff's Department, such Animal Control Authority and/or Deputy may investigate the public nuisance. If, the Animal Control Authority or Deputy determines that a public nuisance has occurred, he/she shall notify the owner of that fact and file a citation with the Justice Court that the owner has committed a public nuisance. However, the failure of the Animal Control Authority or Deputy to so file a citation and notify the owner will not affect the enforcement of this provision if it is shown that the owner otherwise had written notice of the public nuisance.

1. An owner of a dog knows he/she/it has committed a Public Nuisance when:
  - a. The owner receives written notice from a witness that the owner is responsible for a public nuisance under Section 1.32(4) quoted above; or
  - b. The owner receives a citation from the Animal Control Authority and/or a Deputy that the owner has committed a public nuisance under Section 1.32(4).

For purposes of Section 9A.02(1)(a) it will be presumed that the owner receives the written notice on the date such notice is delivered to the address/house where the Public Nuisance Dog is located.

9A.03 Requirements for owner of a Public Nuisance Dog.

1. Not later than the tenth (10<sup>th</sup>) day after the date a notice described above is given to the owner of a Public Nuisance Dog, such owner shall:

- a. Abate the nuisance that served as the basis for the notice that a public nuisance was committed under Section 1.32(4); or
- b. Request a hearing in the applicable Justice Court to contest the notice that the owner has committed a public nuisance under Section 1.32(4.)

9A.04 Penalty for committing a public nuisance under Section 1.32(4)

1. A person who commits a public nuisance under Section 1.32(4) and fails to abate the public nuisance as required by 9A.03(1)(a), commits a misdemeanor and shall be charged a fine not to exceed \$100.00 a day for each day the nuisance continues.
2. If, after a hearing under Section 9A.03(1)(b), the Justice Court finds that the person has committed a public nuisance under Section 1.32(4), the person shall abate the nuisance and be charged with a fine not to exceed \$100.00. If the person fails [to] abate the nuisance, the person shall be charged a fine not to exceed \$100.00 a day for each day the nuisance continues.

The above modification is an addition to the existing Rabies and Animal Control Order and no provision of such Order is modified herein and such Order shall continue in full force and effect except as modified by a Commissioners Court order.

A challenge has been made regarding the authority of the Commissioners Court to adopt the **August 25, 2022, Modification Order**.<sup>2</sup> This challenge includes threatened suit in district court, in which suit the state will have an interest. (See attachment to this brief labeled Exhibit A.)

### AUTHORITY AND ARGUMENT

The Requestor responds to the challenge with the following.

The matter addressed by the **August 25, 2022, Modification Order** is one affecting the public interest, i.e, the public nuisance created by “[a] dog that causes a disturbance by excessive barking or noise making near the private residence of another or to the extent that the barking or noise disturbs the peace or quiet of any neighborhood, or can be heard from within the residence of another”.

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<sup>2</sup> The challenger also raised other issues; however such issues do not fall within the questions upon which the Attorney General is compelled to provide a written opinion.

Texas Constitution Art. V, §18 provides that “The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which **shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.**”

Texas counties are governed by commissioners courts. “The powers and duties of the commissioners courts include aspects of legislative, executive, administrative, and judicial functions.” See *Henry v. Cox*, 520 S.W.3d 28, 36 (Tex. 2017) “The Texas commissioners courts are assigned some tasks which would normally be thought of as “legislative,” others typically assigned to “executive” or “administrative” department, and still other which are “judicial.”” See also *Avery v. Midland County*, 390 U.S. 474, 488, 20 L. Ed. 2d 45, 82, 88 S. Ct. 1114, 1119 (1968)<sup>3</sup> “. . . [T]his body has the power to make a large number of decisions having a broad impact on all the citizens of the county.” *Id* 390 U.S. 474, 482-483, 20 L. Ed. 2d 45, 82, 88 S. Ct. 1114, 1114 (1968).

These cases address the general power and duties of the commissioners courts in regard to a number of its functions. While none of the cases concerns a public nuisance caused by barking dogs, given the breadth of the powers and duties recognized by the courts, certainly a commissioners court should be able to adopt an Order such as the **August 25, 2022, Modification Order**. Municipalities are given the power to adopt such rules/orders

In addition, the County would present that the **Texas Health and Safety Code** supports the position that the Commissioners Court more specifically has authority to adopt such rule or Order. **Texas Health and Safety Code Sec. 826.033** provides that: (a) The governing body of a municipality and the commissioners court of a county may adopt ordinances or rules under **Section 826.014** or **826.015** to require that: “(1) each dog or cat be restrained by its owner. . . .”

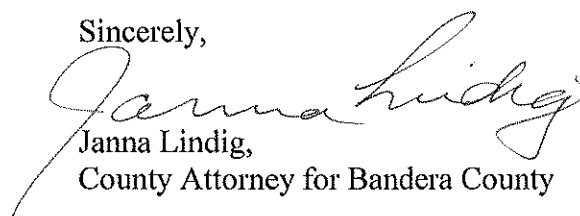
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<sup>3</sup>Pagination given in cite is dependant upon Lexis and I cannot attest to its accuracy.

An ordinary meaning of “restrained” could perhaps be restricted to mean, leashed, penned, confined, etc., however, the Requestor would argue that it can also be interpreted to support the position that the County has the authority to adopt an order or rule that an owner restrain his/her dog from causing a public nuisance through excessive barking. **Texas Health and Safety Code Sec. 826.034** states: “(a) A person commits an offense if: (1) the person fails or refuses to restrain a dog or cat owned by the person; and (2) the animal is required to be restrained under the ordinances or rules adopted under this chapter by a county or municipality within whose jurisdiction the act occurs. (b) An offense under this section is a Class C misdemeanor.” The **August 25, 2022, Modification Order** sets forth the requirement and the penalty, which requirement and penalty are in line with **Texas Health and Safety Code Sec. 826.033 and Sec. 826.034**. The Requestor would urge that the Health and Safety Code gives the County the authority to enact an order to address a disturbance caused by barking dogs at the same location, which disturbance, over a period of months, results in numerous calls to the County Sheriff by different individuals and numerous requests and notices to the dog owner regarding the nuisance created by the owner’s dog(s).

The **August 25, 2022, Modification Order** is an effort on the part of a Commissioners Court to remedy a public nuisance. As stated above, the Texas Constitution, case law, and the Texas Health and Safety Code provisions support the argument that the Commissioners Court has authority to adopt a rule or order providing for relief from this public nuisance. A written opinion from the Attorney General is requested as to whether the Commissioners Court has the authority under its official duties and powers to enter the **August 25, 2022, Modification Order**.

Sincerely,



Janna Lindig,  
County Attorney for Bandera County

**GENDRY & SPRAGUE, P.C.**  
ATTORNEYS AT LAW

RON A. SPRAGUE  
BOARD CERTIFIED CIVIL TRIAL LAW  
TEXAS BOARD OF LEGAL SPECIALIZATION

SENDER'S E-MAIL ADDRESS  
[rsprague@gendrysprague.com](mailto:rsprague@gendrysprague.com)

13423 BLANCO ROAD, # 352  
SAN ANTONIO, TEXAS 78216-2187  
TELEPHONE 210-349-0511

NEIL H. STONE

June 17, 2024

EMAIL TO: [Marcias@banderacounty.org](mailto:Marcias@banderacounty.org)

Honorable Richard Evans  
County Judge  
Bandera County Commissioners Court  
500 Main Street  
P.O. Box 877  
Bandera, TX 78003

Re: *Sprague v. Evans, et al.*  
Repeal of para. 1.32 and Section 9A of Bandera Rabies and Animal Control Order

Dear Judge Evans:

Back in January, I wrote you a letter about the Bandera Rabies and Animal Control Order promulgated by the Bandera County Commissioners. In that letter, and since then, I pointed out that the order was unconstitutional and issued without authority under Texas law. I asked to meet with you and the commissioners to discuss repealing the order. I proposed an alternative whereby you would request an opinion from the Texas Attorney General about the validity of the order. I attempted to negotiate with your County Attorney about the validity and vagueness of the Order and pointed out to you that Ms. Lindig had refused to provide any authority supporting the commissioner's actions. She also chose to ignore the plain language of the Order regarding the exception granted to veterinarians. I repeatedly asked that the issue be placed on the Commissioner's Court agenda. While your office initially seemed like it was going to put the issue on the agenda, it has not done so and now no longer responds to my communications. In short, you have ignored us.

I am once again requesting that the issue of repealing paragraph 1.32 of the 2009 Rabies and Animal Control Order and the entire 2022 Amendment to said Order on the County Commissioners Court agenda at the July 25, 2024 meeting. If you do not do so, or agree to some acceptable alternative course of action with me before then, I will file the lawsuit attached hereto.

Letter to Judge Evans  
re: *Sprague v. Evans, et al*

Page 2 of 2

At the meeting, I will ask that the unconstitutional portions of the Order (i.e. paragraph 1.32 and Section 9A) be repealed to avoid the need for legal action challenging them in District Court. I see no reason to renew the previous offer to abate filing the lawsuit while you seek an opinion from the Attorney General since you have had six months to do so already and apparently chose not to.

I trust you will understand our frustration. As mentioned, I have tried to work this out with the County Attorney and with your office. The law is actually quite clear on the subject. Your non-responsiveness will not prevent our obtaining relief on this issue. The only real question is whether the County wants to incur the thousands of dollars in attorneys fees to defend a lawsuit it can easily avoid and then pay my fees and expenses when we win the Declaratory Judgment. The one thing everyone agrees the County Commissioners are supposed to do is look out for the Bander County taxpayers' money. Forcing this lawsuit is the opposite of that.

I remain happy to discuss this matter with you and/or with the Commissioners if you like, recognizing that no decision can be made or action taken on behalf of the Commissioners Court without a valid meeting. Looking forward to hearing from you and resolving this matter, I remain

Very truly yours,



Ron A. Sprague

Attachment: Proposed Lawsuit  
*Sprague v. Evans, et al*

cc. Dr. Jennifer Sprague  
VIA EMAIL: [jennyspraguedvm@gmail.com](mailto:jennyspraguedvm@gmail.com)

Ms. Janna Lindig  
VIA EMAIL: [jlindig@banderacounty.org](mailto:jlindig@banderacounty.org)



Cause Number: \_\_\_\_\_

Dr. JENNIFER SPRAGUE,	)	IN THE DISTRICT COURT
Plaintiff	)	
	)	
v.	)	
	)	
RICHARD EVANS, individually and as	)	
Bandera County Judge; H. BRUCE ELIKER,	)	198 <sup>th</sup> JUDICIAL DISTRICT
ROBERT HARRIS, JACK MOSELEY, and	)	
JORDAN RUTHERFORD, individually and	)	
as Bandera County Commissioners; THE	)	
COUNTY COMMISSIONERS COURT OF	)	
BANDERA COUNTY; JANNA IVEY	)	
LINDIG, individually and as Bandera	)	
County Attorney; BANDERA COUNTY	)	
ATTORNEYS OFFICE; Dan Butts,	)	
individually and as Bandera County Sheriff;	)	
BANDERA COUNTY SHERIFF'S OFFICE)	)	
Defendants	)	BANDERA COUNTY, TEXAS

**ORIGINAL PETITION FOR INJUNCTIVE RELIEF**  
**AND**  
**DECLARATORY JUDGMENT**

COMES NOW DR. JENNIFER SPRAGUE, DVM, Plaintiff in the above styled and number cause, and files this her ORIGINAL PETITION FOR INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT. In support thereof, Dr. Sprague will show the Court as follows:

**I. Discovery Level**

1. This case shall proceed under Level 3 discovery procedures.

## II. Parties and Service of Citation

2. Plaintiff, DR. JENNIFER. SPRAGUE, DVM, is an individual citizen and resident of Bandera County, Texas, residing at 155 Betty Drive, Bandera County, Texas. She is a licensed doctor of veterinary medicine and owner operator of the Pipe Creek Animal Hospital in Bandera County. She can be served by any party to this case by service on her counsel.

3. Defendant RICHARD EVANS is an individual citizen and resident of Bandera County, Texas. He is the County Judge of Bandera County. His regular place of business is at the Bandera County Courthouse, 500 Main Street, Bandera Texas 78003. He may be served there in person or at any other place in this state where he can be located, or he may be served by mailing to him by registered or certified mail, return receipt requested, a copy of the citation and of the petition at said address.

4. Defendant H. BRUCE ELIKER is an individual citizen and resident of Bandera County, Texas. He is the County Commissioner for Precinct 1 of Bandera County. His regular place of business is at the Bandera County Courthouse, 500 Main Street, Bandera Texas. He may be served there in person or at any other place in this state where he can be located, or he may be served by mailing to him by registered or certified mail, return receipt requested, a copy of the citation and of the petition at said address.

5. Defendant GREG P. GROTHUES is an individual citizen and resident of Bandera County, Texas. He is the County Commissioner for Precinct 2 of Bandera County. His regular place of business is at 9155 FM 1283 Lakehills, Texas 78063. He may be served there in person or at any other place in this state where he can be located, or he may be served by mailing to him by registered or certified mail, return receipt requested, a copy of the citation and of the petition.

6. Defendant JACK MOSELEY is an individual citizen and resident of Bandera County, Texas. He is the County Commissioner for Precinct 3 of Bandera County. His regular place of business is at 161 E. Parker Street, Medina, Texas 78055. He may be served there in person or at any other place in this state where he can be located, or he may be served by mailing to him by registered or certified mail, return receipt requested, a copy of the citation and of the petition.

7. Defendant JORDAN RUTHERFORD is an individual citizen and resident of Bandera County, Texas. He is the County Commissioner for Precinct 4 of Bandera County. His regular place of business is at the Bandera County Courthouse, 500 Main Street, Medina, Texas 78003. He may be served there in person or at any other place in this state where he can be located, or he may be served by mailing to him by registered or certified mail, return receipt requested, a copy of the citation and of the petition.

8. Defendant JANNA IVEY LINDIG is an individual citizen and resident of Bandera County, Texas. She is the Bandera County Attorney. Her regular place of business is at 502 11th Street, Bandera, Texas 78003. She may be served there in person or at any other place in this state where she can be located, or she may be served by mailing to her by registered or certified mail, return receipt requested, a copy of the citation and of the petition.

9. Defendant DAN BUTTS is an individual citizen and resident of Bandera County, Texas. He is the County Sheriff of Bandera County. His regular place of business is 3360 State Hwy. 173 North, Bandera, Texas 78003. He may be served there in person or at any other place in this state where he can be located, or he may be served by mailing to him by registered or certified mail, return receipt requested, a copy of the citation and of the petition.

10. Defendant BANDERA COMMISSIONER'S COURT can be served by service on the County Judge, RICHARD EVANS as set forth in paragraph 4 herein above.

11. Defendant BANDERA COUNTY ATTORNEY'S OFFICE can be served by service on JANNA IVEY LINDIG as set forth in paragraph 8 herein above.

12. Defendant BANDERA COUNTY SHERIFF'S OFFICE can be served by service on DAN BUTTS as set forth in paragraph 9 herein above.

### III. Jurisdiction and Venue

13. This court has jurisdiction to hear and adjudicate this suit pursuant to its general jurisdiction and its general supervisory control over the Bandera County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law under Article 5, Section 8 of the Texas Constitution. All parties are citizens of Texas and residents of Bandera County. All acts complained of were committed in Bandera County, Texas. Venue is mandatory in Bandera County in the case of the Bandera County government entities and proper in Bandera County as to all Defendants.

### IV. Background

14. On April 9, 2009, the Bandera County Commissioners Court adopted the Rabies and Animal Control Order, a copy of which is attached hereto as Exhibit A. (See Exhibit A - 2009 Rabies and Animal Control Order, hereafter "2009 Order".) The 2009 Order claimed it was enacted in accordance with Chapters 821, 822 and 826, of the Texas Health and Safety Code (10 V.T.C.A. §§ 821, 822 and 826, and the Texas Transportation Code. As enacted the 2009 Order, included a paragraph in Section 1 - Definitions " which defined "Public Nuisance" relating to the conduct of an owner in allowing an animal to do, cause or create any of a list of things and

conditions. (See 2009 Order, par. 1.32 (1- 7.) Specifically, paragraph 1.32(4) of the 2009

Order reads as follows:

4) Cause a disturbance by excessive barking or noise making near the private residence of another or to the extent that the barking or noise disturbs the peace or quiet of any neighborhood or can be heard from within the residence of another;

A thorough review of Chapters 821, 822 and 826, of the Texas Health and Safety Code and the Texas Transportation Code reveals no statutory grant of authority to Bandera County to define a “Public Nuisance” or , specifically, to regulate the barking of dogs in Bandera County.

15. On August 25, 2022, The Bandera Commissioners Court purported to amend its Rabies and Animal Control Order August 25, 2022 and further regulate barking dogs as a nuisance by imposing criminal liability on the owners of a “Public Nuisance Dog”. (See Exhibit B - 2022 Amendment.) The 2022 Amendment defines a “Public Nuisance Dog”, declares that the owner of a Public Nuisance Dog commits a “public nuisance” and states that a person who commits such a public nuisance and fails to abate it “commits a misdemeanor and shall be charged a fine not to exceed \$100.00 a day for each day the nuisance continues.” 2022 Amendment, paragraph 9A.04.

16. On Saturday, October 28, 2023, Plaintiff, Dr. Sprague, was hosting a Halloween party for her employees, clients and friends. During the evening, a Bandera Sheriff’s Deputy came onto her property without invitation or warrant and issued her the attached purported citation. (See Exhibit C - Citation.)

17. The purported citation notified Dr. Sprague that she was to appear before Judge Randy Boysen, J.P. District 3, “on or before 11/18/2023 at 10 am.” Dr. Sprague responded to the

purported citation by filing a Motion to Dismiss. (See Exhibit D - Def Motion to Dismiss.) Subsequently, Dr. Sprague receive a Notice of Pretrial Hearing set for December 21, 2023 at 8:30 a.m. Further, on or about November 21, 2023, Dr. Sprague received an Affidavit/Complaint filed by the Bandera County Sheriff's Office alleging a violation of the Bandera County Rabies and Animal Control Order, Section 9A.01. (See Exhibit E - Affidavit/Complaint.) On December 20, 2023, Bandera County Attorney Janna Lindig filed a Response to the Motion to Dismiss. (See Exhibit F - Resp to Mot to Dismiss.) Also on December 20, 2023, the Justice of the Peace denied the Motion to Dismiss. (See Exhibit G - Order Denying Mot to Dismiss.) A negotiation resulted in a disposition entered by the Justice Court on January 18, 2023 finding Dr. Sprague guilty of creating a nuisance, ordering her to abate the nuisance by taking specific steps to confine her dogs at certain times, and granting deferred adjudication for ninety (90) days. The deferred adjudication was completed and the case was dismissed, but the stain remains on Dr. Sprague's record and reputation.

#### V. Motion for Temporary Restraining Order and Permanent Injunction

18. Plaintiffs seek a Temporary Injunction against all Defendants abating any current or future investigations, prosecutions or other enforcement efforts relating to paragraph 1.32 of the 2009 Order and Section 9A set forth in the 2022 Amendment.

19. Grounds for Injunction: Bandera County has no authority under the Texas Constitution or Texas Statutes to define what is or is not a "Public Nuisance" as it purports to do in paragraph 1.32 of the 2009 Order. Similarly, Bandera County has no legal authority to specifically regulate and/or criminalize the ownership of barking dogs. It is well established that Texas counties lack general police power and may exercise only those powers expressly

conferred upon them by the Constitution and by the Legislature. *See Canales v. Laughlin*, 214 S.W.2d 451 (Tex 1948). The Defendant County Attorney, Jenna Lindig, concedes in her Response to the Motion to Dismiss in the Justice Court that “the county’s powers are confined to those conferred by the constitution and the laws of the State and to those powers ‘as may be hereafter be prescribed.’” (citing Texas Constitution Art. V., §18, emphasis hers.) As then Texas Attorney General Gregg Abbot wrote in 2003:

Article V, section 18(b) of the Texas Constitution provides that a commissioners court "shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State." Tex. Const. art. V, § 18(b). "This provision has been interpreted to mean that although a commissioners court may exercise broad discretion in conducting county business, the legal basis for any action taken must be grounded ultimately in the constitution or statutes." *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993) (citing *Canales v. Laughlin*, 214 S.W.2d 451, 453 (Tex. 1948); *Renfro v. Shropshire*, 566 S.W.2d 688, 690 (Tex. Civ. App.-Eastland 1978, writ ref'd n.r.e.)). AGO GA-0085 (June 30, 2003) (Texas Attorney General Opinions, 2003)

20. To date, the Legislature has not conferred upon counties the authority to regulate or to define what is or is not a “Public Nuisance” or to regulate noise in their unincorporated areas. The 2009 Order cited several sections of the Texas Health and Safety Code as authority for the ordinance, but none of those statutes apply to public nuisance, noise or the ownership of barking dogs. Indeed, the 2009 Order cited no constitutional or statutory authority for the regulation of noise created by barking dogs as a public nuisance. Based on extensive research conducted by Plaintiff’s counsel, no such authority exists.

21. Furthermore, to the extent the prior charge against Dr. Sprague relied on the 2009 Order and the 2022 Amendment, those orders violate both the Texas Constitution and the United States Constitution because they are vague on their face or as applied to Plaintiff and fail to

provide fair warning or a reasonable description of the conduct supposedly made unlawful. In a nutshell, the orders hold a person criminally liable if his or her dog barks “excessively” or makes excessive noise “near the private residence of another” or so that “the barking or noise disturbs the peace or quiet of any neighborhood or can be heard from within the residence of another.” The orders do not define “near the private residence of another” or set a sound limit for barking that can be heard inside the residence of another. The “disturbs the peace and quiet of a neighborhood” is completely subjective and left to the individual discretion of the complaining witness, an unelected Animal Control Officer County Attorney and the Justice of the Peace. Even more troubling, it presumes the guilt of the owner if the owner receives a written complaint from a witness or a citation from the Animal Control Authority and/or Deputy. It then imposes a fine for “failing to abate” the nuisance complained of by a witness or found by the Justice Court without defining what constitutes abatement or failure to abate. In short, the orders provide no information to the owner about what he or she can do to prevent their dogs from excessively barking or making objectionable noise, in the opinion of any witness, complainant, or deputy. Likewise, it fails to state what will constitute abatement of the nuisance - if the dogs are called down by the owner when they bark, put inside a building at night, or kept hundreds of yards away from the nearest neighbor’s residence, is that sufficient abatement?

23. Since the attempt to define “Public Nuisance” exceeds any authority granted to the Bandera County Commissioners Court by the Texas Constitution or Texas statutes, paragraph 1.32(4) of the 2009 Order is invalid and unconstitutional. Similarly, the entire 2022 Amendment attempting to regulate and criminalize the ownership of barking dogs as a public nuisance is beyond any authority granted to the Bandera County Commissioners Court pursuant to the Texas



Constitution and Texas statutes, the entirety of the 2022 Amendment is invalid and unconditional. Furthermore, because Section 9A of the 2022 Amendment is unconstitutionally vague, and because Section 9A.02 is both unconstitutionally vague and establishes an unconstitutional process that initiates a criminal proceeding upon written notice by any complaining witness that subjectively believes a public nuisance exists under Section 1.32(4) of the 2009 Order.

24. Section 9A.03 sets forth an unconstitutional requirement that any owner given notice by any complaining witness that the witness believes said owner to own a “Public Nuisance Dog” to set a hearing in Justice Court without any citation or being charged by any law enforcement agency, something that the Justice Court has no jurisdiction to entertain. The Justice Court lacks any authority to issue an injunction, so such an owner would not have standing to file a suit in the Justice Court seeking an advisory opinion or Declaratory Judgment on whether or not he or she owned a Public Nuisance Dog. Similarly, the Justice Court would have no authority to determine what, if any, abatement action was appropriate or to order the owner to undertake such abatement actions.

25. Finally, Section 9A.04 is also rendered unconstitutionally vague because it incorporates the vague definition of “public nuisance” from paragraph 1.32(4) of the 2009 Order, and, accordingly, provides no reasonable notice to a person as to what actions are being defined as criminal. Stated another way, it is unconstitutional because it attempts to criminalize a person’s failure to abate the “public nuisance” without providing a reasonable definition of what conduct would constitute such an abatement.

26. Plaintiff accordingly seeks a temporary injunction, and after a hearing, a permanent injunction prohibiting any attempted prosecution under Section 9(A) - Public Nuisance Dogs, as set forth in the 2022 Amendment, or any other attempted enforcement of said order.

#### VI. Declaratory Judgment

27. The Texas Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ch. 37, provides in §37.004 that:

(A) A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status, or other legal relations there under.

Dr. Sprague is a person whose rights are affected by the orders of the Bandera Commissioners Court made the basis of this suit. She moves for a Declaratory Judgment that”

- A. The Bandera Commissioners’ Court lacked authority under the Texas Constitution or any Texas statute to define a public nuisance.
- B. The Bandera Commissioners’ Court lacked authority under the Texas Constitution or any Texas statute to regulate noise from barking dogs.
- C. Paragraph 1.32 of the Bandera Rabies and Animal Control Order of 2009 is unconstitutional, void, and unenforceable.

D. Section 9A - Public Nuisance Dogs, of the Bandera Rabies and Animal Control Order as promulgated by amendment of said Order dated August 22, 2022, is unconstitutional, void, and unenforceable.

28. In the unlikely event that this Court determines that the 2009 Order and the 2022 Amendment are valid and enforceable, there still exists between the parties a genuine controversy as to whether or not Plaintiff is entitled to a defense to the regulations set forth in the 2009 Order and the 2022 Amendment. Accordingly, if the 2009 Order and the 2022 Amendment are found valid and enforceable, Plaintiff seeks a Declaratory Judgment as to the construction of Section 9.7 of the 2009 Order.

29. Plaintiff would show that the 2009 Order, on its face, provides an unqualified defense to veterinarians. Specifically, Section 9.7 of the Rabies and Animal Control Order of April 9, 2009 provides, “**DEFENSES:** It is a defense to prosecution under these Regulations that a person is: 1) A veterinarian .....

30. The Defendant County Attorney has taken the position that the defense set out in paragraph 9.7 only applies to the portion of the Rabies and Animal Control Order found in Section 9 of the order and not to Section 9A set forth in the 2022 Amendment. That is, however, not what the Order says. The plain wording of paragraph 9.7 says that veterinarians have a defense to prosecution under “these Regulations.” The 2022 Amendment specifically states that it is “an addition to the existing Rabies and Animal Control Order and no provision of such Order is modified herein.” 2022 Amendment, pg. 2. Accordingly, the Amendment does not change the defenses provided by Section 9 of the 2009 Order. It must also be noted that the word

“Regulations” is capitalized on Section 9 of the 2009 Order, indicating that it is to have the same meaning throughout the document. Indeed, the same term (“these Regulations”) is used in the Order on page 1 where it states that “**these Regulations** are promulgated pursuant to and in conformity with the following statutory authority.” [emphasis added] Similarly, The Order uses the phrase “in accordance with Subsection 2 of Section 2.8 of **these Regulations**” [emphasis added] in paragraph 3.1 of the Order. In both of those instances, there can be no question that the term “these Regulations” is referring to the regulations set forth in the entire Order. Accordingly, when Section 9.7 says, “It is a defense to prosecution under these Regulations that a person is: 1) A veterinarian ....” it is clear that the defense it is referring to is to all of the regulations created in both the 2009 Order and the 2022 Amendment. Had the authors intended to restrict the defenses established in paragraph 9.7 only to Section 9, they could have easily used the wording “in this section” as they did in paragraph 9.11(3) and numerous other places. Likewise, if they did not want the defense to “these Regulations” to apply to the definition of nuisance in paragraph 1.32 of the 2009 Order or to the attempted regulation and criminalization of owning barking dogs set forth in the 2022 Amendment, they could have inserted language that simply stated that the defenses established in paragraph 9.7 of the Order did not apply to paragraph 1.32 or Section 9A. They did not. Neither the local County Attorney nor the courts can make such a change.

31. Accordingly, even if this Court should determine the 2009 Order and 2022 Amendment were issued in accordance with state law and not unconstitutionally vague, it should still declare as follows:

- A. That Section 9.7 of the 2009 Rabies and Animal Control Order promulgated by the Bandera County Commissioners Court creates an absolute defense to all

regulations set forth in the 2009 Rabies and Animal Control Order including Section 9A promulgated by amendment on August 22, 2022.

- B. That Plaintiff, Dr. Jennifer Sprague, being a veterinarian, has an absolute defense to any alleged violation or complaint brought against her alleging a violation of any of the regulations set forth in the 2009 Rabies and Animal Control Order including Section 9A promulgated by amendment on August 22, 2022, specifically including allegations of creating a public nuisance by owning a Public Nuisance Dog.

#### **V. Request for Attorney's Fees**

Plaintiff has gone to great effort to give the Bandera County officials an opportunity to review and repeal the challenged orders. They have failed to do so and have even refused to provide Plaintiff an opportunity to present her arguments to the Commissioner's Court or County Judge. Therefore, Pursuant to Section 37.009 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE, request is made for all costs and reasonable and necessary attorney's fees incurred by Plaintiff in preparing and prosecuting this Declaratory Judgment Action, including all fees necessary in the event of an appeal of this case to the Court of Appeals and/or the Supreme Court of Texas, as the Court deems equitable and just.

#### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that citation and notice issue as required by law. Plaintiff prays that the Court grant the relief requested in this Original Petition for Injunctive Relief and Declaratory Judgment, including attorney fees and costs of court in favor of Plaintiff.

Respectfully submitted:

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By: \_\_\_\_\_  
RON A. SPRAGUE  
TX Bar No 18962100

Counsel for Defendant

VERIFICATION DECLARATION

This declaration is made under penalty of perjury pursuant to Texas Civil Practice and Remedies Code Section 132.001.

My name is Dr, Jennifer M. Sprague. My date of birth is August 31, 1980. My address is 155 Betty Lane, Bandera County, Texas. I declare that the information in the foregoing Original Petition for Injunctive Relief and Declaratory Judgment is true and correct within my personal knowledge.

\_\_\_\_\_  
Jennifer Sprague, Defendant  
Declarant