

Illegal Dumping Enforcement

Officer's Guide

Texas 2022 Edition

Reading for class:
TIDRC007 Enforcing
Public Health Nuisance Laws

Chapter 8: Public Health Nuisance
Enforcement

(Pages 130 – 156)

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Chapter 8: Public Health Nuisance Enforcement

THSC Chapter 341 is the easiest law to use to address the Public Health Nuisance frequently caused by illegal dumping.

This and the next several chapters describe the primary Texas laws that a local community can use to control illegal dumping and other forms of polluting. Many cities have good local ordinances that are effectively used to control dumping. The 84th State Legislature (2017) made changes to Local Government Code Sec. 54.001 that allows cities to increase the penalties for dumping in violation of municipal codes to \$4,000, regardless of the amount of waste involved. Note that most illegal dumping municipal code violations are for such things as “having refuse on a lot,” and are enforced with no regard for the volumes of waste involved. Under the primary illegal dumping criminal law – THSC Chapter 365 – a fine of \$4,000 would only be available for someone convicted at the Class A Misdemeanor level. But with this change from the State Legislature, a municipal code illegal dumping violator can also face fairly significant fines, although no jail time is possible. This penalty can be applied in Municipal Court.

Controlling illegal dumping through municipal ordinances inside cities may work fine when the violator is a homeowner or renter who is dumping on the property he occupies or nearby. But if the dumping is by a third party, effective enforcement against this “moving target” will require the intervention of local police. If the dumping is outside the city limit – or takes place in a smaller city not having code officers, but that is relying on county sheriff deputies for law enforcement – the starting place for county officers are these criminal laws discussed in this chapter. Dealing with the *results* of the dumping can often be quicker.

Enforcing Public Health Law is Important

Messes – public health nuisances – usually are great breeding grounds for mosquitoes, rats, and other disease-carrying vectors. Such diseases as West Nile Virus, Zika, Dengue Fever, Malaria, Encephalitis, and Yellow Fever – and others – can be transmitted to humans by mosquitoes. Texas is “Ground Zero” for many of these diseases, as

are several of the states in Mexico just across our southern border. The Texas legislature has given local governments a great deal of power and autonomy to act to protect the health of their citizens, which certainly includes enforcing these public health nuisance criminal laws.

The State Legislature's guiding policy statement concerning public health is found at Section 121.003 of THSC Chapter 121 (Local Public Health Reorganization Act):

Sec. 121.003. POWERS OF MUNICIPALITIES AND COUNTIES.

(a) The governing body of a municipality or the commissioners' court of a county may enforce any law that is reasonably necessary to protect the public health.

Sec. 121.003. POWERS OF MUNICIPALITIES AND COUNTIES.

(b) The governing bodies of municipalities and the commissioners' courts of counties may cooperate with one another in making necessary improvements and providing services to promote the public health in accordance with The Interlocal Cooperation Act (Article 4413(32c), Vernon's Texas Civil Statutes).

Sec. 121.003. POWERS OF MUNICIPALITIES AND COUNTIES.

*(c) The commissioners' court of a county may grant authority under this subsection to a county employee who is trained by a health authority appointed by the county under Section 121.021, by a local health department established under Section 121.031, or by a public health district established under Section 121.041 and who is not a peace officer. **The court may grant to the employee the power to issue a citation in an unincorporated area of the county to enforce any law or order of the commissioners' court that is reasonably necessary to protect the public health.** A citation issued under this subsection must state the name of the person cited, the violation charged, and the time and place the person is required to appear in court. If a person who receives a citation under this subsection fails to appear on the return date of the citation, the court may issue a warrant for the person's arrest for the violation described in the citation.*

Cities and counties can use THSC Chapter 121 to establish local health *departments* and (with or without establishing a formal health department) to appoint local public health *authorities* – physicians who are responsible for protecting the public health in the county and serving as liaison on health issues affecting the community with outside agencies. Not too many cities and counties have acted to create health departments: around 150 formally organized full-service local health departments currently exist in the state. But most counties have acted under THSC Chapter 121 to appoint a local physician as the local health authority.

One way to distinguish between a *health department* and a *health authority* is that a *health authority* is an individual physician and a *health department* is a formal administrative structure that some cities and counties have created to support that physician.

Local health authorities have responsibilities in enforcing THSC Section 341.012, which deals with abatement of public health nuisances. Unfortunately, this is a widely ignored section of state law; for many reasons – from ignorance to limited manpower – few local health authorities follow its provisions as mandated by the State Legislature. If a formally organized local health department is not using this provision to force abatement of public health nuisances, why not?

Only a local health authority (acting directly or through a trained county employee) can direct the abatement of a health nuisance under THSC Chapter 341. However, local police and county deputies can use other sections of THSC Chapter 341 to issue citations and cause suspected polluters to appear before a judge, which may be helpful in getting a mess abated. The basic concepts concerning a local health authority are in these several sections:

Sec. 121.021. HEALTH AUTHORITY. A health authority is a physician appointed under the provisions of this chapter to administer state and local laws relating to public health within the appointing body's jurisdiction.

Sec. 121.031. ESTABLISHMENT. The governing body of a municipality or the commissioners' court of a county may establish a local health department by majority vote.

Sec. 121.032. POWERS AND DUTIES. A local health department may perform all public health functions that the municipality or county that establishes the local health department may perform.

Sec. 121.033. DEPARTMENT DIRECTOR.

(a) The governing body of a municipality or the commissioners' court of a county shall appoint the director of the municipality's or county's local health department.

Sec. 121.033. DEPARTMENT DIRECTOR.

(b) The director is the chief administrative officer of the local health department, and if the director is a physician, the director is the health authority in the local health department's jurisdiction.

Sec. 121.033. DEPARTMENT DIRECTOR.

*(d) A director of a local health department who is not a physician **shall appoint a physician as the health authority** in the local health department's jurisdiction, subject to the approval of the governing body or the commissioners' court, as appropriate, and the board.*

Sec. 121.028. APPOINTMENT OF HEALTH AUTHORITY.

(a) The governing body of a municipality or the commissioners' court of a county that has not established a local health department or a public health district may appoint a physician as health authority to administer state and local laws relating to public health in the municipality's or county's jurisdiction.

Thus a city or county can create a *health department*, and that *health department* will have a physician involved as the local *health authority*. If a city or county decides not to create a health department, it may appoint (it's optional, but why wouldn't you appoint one?) a physician as the local *health authority*, and that physician can train a county employee to serve as the field agent in the unincorporated areas.

Since Local Emergency Planning Annex H (Health and Medical Services) has a role for the local health authority, virtually all emergency planning entities have identified the physician who performs this function. If you are having trouble locating your local health authority, the Emergency Management Coordinator for your city or county can probably help you.

We think it's extremely important for every county to have and use a local health authority (with or without forming a health department), especially given the authority's powers to force health nuisance abatement under THSC Sec. 341.012. In our opinion, this is the most unused, but highly valuable, area of Texas anti-pollution law.

If it were always the case that a person possessing a place with a health nuisance would simply clean it up when he became aware of it [as required under THSC Sec. 341.012(a)], then the health authority and local prosecutor wouldn't need to follow [b] through [d] of the same section forcing him to do so.

However, there are plenty of Texans who apparently don't believe in germs, so having public health nuisances out back for the kids to play in is just fine with them. They think nothing of the health of themselves, their children, or their neighbors, and tolerate the presence of some disease-breeding mess on their property. Perhaps they don't yet understand that one's health is related to the cleanliness of one's surroundings. Or perhaps they haven't yet learned that insects carry bacteria and viruses. Or maybe they are attempting to make the point that "one can do anything one wants to do with his property" – which has never been true in any civilization, including ours. For example, one of the things I cannot do with my property is use it as a "safe" place to commit a crime. If you come to visit me and I steal your money, I can't use the defense that the robbery laws don't apply to acts I do on my own property. Nor can I use "it's my property!" to justify maintaining a condition that is a *"possible and probable medium of disease transmission to or between humans,"* as one of the public health nuisance provisions prohibits. I have absolutely no right under state law to keep a pile of used tires on my property that have trapped water where mos-

quitoes are breeding. We should never forget that mosquitoes are generally acknowledged to be the world's most dangerous animal, given the diseases they spread, including right here in Texas.

If a man wants to maintain a health nuisance on a place he possesses, and won't clean it up, the local health authority can use THSC Sec. 341.012 to help him see the error of his ways. The State Legislature has directed local health authorities to undertake a process that could wind-up with a violator standing before a judge, finding himself under a court order to clean up his mess. We'll discuss this mandatory abatement process in our discussion below.

THSC Chapter 341 Minimum Standards of Sanitation and Health Protection Measures

This is the primary state law that prohibits the maintenance of public health nuisances anywhere in the state. Before we begin, there are a few points to make about the section of this law that is in the Appendix.

THSC Chapter 341 is a fairly long law, and it deals with a wide range of health-related topics. In addition to defining and prohibiting public health nuisances, which is our interest, this law also covers topics such as Sanitary Standards of Drinking Water; Protection of Public Water Supplies and Bodies of Water; Standards for Graywater and Alternative Onsite Water; Sanitation and Safety of Facilities Used by Public, and other topics. So there are a number of sanitation-related topics in this statute, but those topics are not always immediately related to each other.

Since we're focusing on public health nuisances, the copy of the law in the Appendix has all the details on that particular subject. However, in the Appendix we've just shown the section number and title for topics we're not discussing fully here, such as Sanitary Standards of Drinking Water. If one of the other topics in THSC Chapter 341 interests you, you'll need to access the full law online.

The primary sections of chapter 341 we'll focus on are those concerning public health nuisances:

Section 341.011 Nuisance;
Section 341.012 Abatement of Nuisance;
Section 341.013 Garbage, Refuse, and Other Waste;
Section 341.014 Disposal of Human Excreta;
Section 341.019 Mosquito Control On Uninhabited Residential Property; and,
Sections 341.091 and 341.092 detailing criminal and civil penalties.

There are three things blocking local law enforcement from using THSC Chapter 341; all of these are easily overcome:

- (1) Not knowing the law's content;
- (2) The persistent wrong idea that local police don't enforce the Health & Safety Code (of course they do: that's where all the anti-drug laws are located); and,
- (3) Fear of getting things wrong (which they won't with a little reading and doing a few cases).

There was one valuable change to this law by the 84th Legislature several years ago: the kind of mosquito that is defined in Sec. 341.011(7) became less specific. The law as amended now reads (*a public health nuisance includes*):

Sec. 341.011(7) a collection of water in which mosquitoes are breeding in the limits of a municipality or a collection of water that is a breeding area for mosquitoes that can transmit diseases regardless of the collection's location other than a location or property where activities meeting the definition of Section 11.002(12)(A), Water Code, occur;

Section 341.011(7) thus covers two locations: (1) inside a municipality and (2) everywhere else in Texas (both inside and outside a municipality). Until this change, the sort of mosquitoes in (2) was limited to *Culex quinquefasciatus* mosquitoes (commonly known as the southern house mosquito). Now any kind of disease-carrying mosquito will do, and the section now reads as shown above.

This particular nuisance continues to exclude *location or property where activities meeting the definition of Section 11.002(12)(A), Water Code, occur*. That section of TWC Chapter 11 WATER RIGHTS reads:

- (12) "Agriculture" means any of the following activities:
 (A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers.

Water involved in agriculture as defined here can breed as many mosquitoes as it likes without that water coming under the definition of a public health nuisance provided at Section 341.011(7).

Section 341.011 Nuisance

The initial section of interest is Sec. 341.011, which defines twelve common public health nuisances that this law specifically prohibits. Notice, for instance, nuisance (3) in Sec. 341.011 below; this is the provision used by health departments as their statutory basis for inspecting restaurants and other places where food is prepared and sold.

Some of these provisions are better used by local law enforcement to focus on the health impact of the waste dumped than others. Also, notice nuisance (12), which is the catch-all. You could cite this particular violation to deal with the effects of dumped materials, but there's an even better way described below at Sec. 341.013(c).

- THSC Sec. 341.011. NUISANCE.*
Each of the following is a public health nuisance:
- (1) a condition or place that is a breeding place for flies and that is in a populous area;
 - (2) spoiled or diseased meats intended for human consumption;
 - (3) a restaurant, food market, bakery, other place of business, or vehicle in which food is prepared, packed, stored, transported, sold, or served to the public and that is not constantly maintained in a sanitary condition;
 - (4) a place, condition, or building controlled or operated by a state or local government agency that is not maintained in a sanitary condition;

(5) sewage, human excreta, wastewater, garbage, or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission to a person or between persons;

(6) a vehicle or container that is used to transport garbage, human excreta, or other organic material and that is defective and allows leakage or spilling of contents;

(7) a collection of water in which mosquitoes are breeding in the limits of a municipality or a collection of water that is a breeding area for mosquitoes that can transmit diseases regardless of the collection's location other than a location or property where activities meeting the definition of Section 11.002(12)(A), Water Code, occur;

(8) a condition that may be proven to injuriously affect the public health and that may directly or indirectly result from the operations of a bone boiling or fat rendering plant, tallow or soap works, or other similar establishment;

(9) a place or condition harboring rats in a populous area;

(10) the presence of ectoparasites, including bedbugs, lice, and mites, suspected to be disease carriers in a place in which sleeping accommodations are offered to the public;

(11) the maintenance of an open surface privy or an overflowing septic tank so that the contents may be accessible to flies; and,

(12) an object, place, or condition that is a possible and probable medium of disease transmission to or between humans.

Section 341.012 Abatement of Nuisance

If a person possesses a property having a public health nuisance, he or she is directed to abate that nuisance as soon as he or she becomes aware of its existence. This is the basic policy of the State of Texas. This is expressed in (a) of this section.

The rest of Sec. 341.012 describes the steps for a health authority to force the property possessor to deal with the health nuisance in those cases where the possessor has not already acted. "Notice" in (a)

does not have to come from the city or county; the legislature takes the position that the possessor of property should take the lead in keeping it clean. Men often receive “notice” that they must cleanup messes in their backyard from their wife.

Sec. 341.012. ABATEMENT OF NUISANCE.

(a) A person shall abate a public health nuisance existing in or on a place the person possesses as soon as the person knows that the nuisance exists.

(b) A local health authority who receives information and proof that a public health nuisance exists in the local health authority's jurisdiction shall issue a written notice ordering the abatement of the nuisance to any person responsible for the nuisance. The local health authority shall at the same time send a copy of the notice to the local municipal, county, or district attorney.

(c) The notice must specify the nature of the public health nuisance and designate a reasonable time within which the nuisance must be abated.

(d) If the public health nuisance is not abated within the time specified by the notice, the local health authority shall notify the prosecuting attorney who received the copy of the original notice. The prosecuting attorney:

- (1) shall immediately institute proceedings to abate the public health nuisance; or*
- (2) request the attorney general to institute the proceedings or provide assistance in the prosecution of the proceedings, including participation as an assistant prosecutor when appointed by the prosecuting attorney.*

The Five “Shalls” of Nuisance Abatement

Notice the mandatory language used by the State Legislature in establishing these procedures:

- (1) A person possessing a place with a health nuisance **shall abate** the nuisance as soon as he or she discovers it exists – not when eventually ordered to do so by the government;

- (2) When the local health authority becomes aware of the presence of a nuisance, the health authority **shall notify** the possessor of the property in writing of the existence of the health nuisance on the property and set a time period to abate the nuisance;
- (3) The local health authority **shall at the same time send a copy** of the notice to the jurisdiction's prosecuting attorney;
- (4) If the health nuisance is not abated within the time period specified, the local health authority **shall notify the prosecuting attorney** who had received notice; and,
- (5) The prosecuting attorney **shall take the offender to court and seek a court order** forcing abatement.

However, what normally happens isn't what the State Legislature mandated. Section 341.012 (b) – (d) is a sound procedure, but I've never been able to find a local health authority in Texas that actually follows it ... well, I've found a few who *claim* to follow these provisions, but so far their assertions don't hold up under close questioning.

What normally happens is that the health authority officer will respond to the presence of a public health nuisance by notifying the property possessor of the violation and setting a time for the mess to be abated. This is perfectly fine, and is required in the statutory process.

But then things immediately go off-track. There will be no notice given by the health authority to the prosecutor at all, even though that is a mandatory step in the process. By failing to notify the prosecutor – even though the statute seems to give a local health authority a lot of room to work out how this notice will flow to local prosecutors – the health authority begins to follow its own ideas and ignores state law.

But no harm is actually done, one might argue, if the person with responsibility for the health nuisance simply cleans the problem properly as directed to do by the notice. Not all things work that smoothly, however; not all property possessors are immediately compliant.

In the event that the time set by the officer passes and the nuisance hasn't been abated, the officer in practice will not notify the prosecuting attorney (after all, the officer never provided the prosecutor with a copy of the original notice). At this point, the state process defined in the statute to abate the mess has simply been abandoned.

Instead, the health officer will take off her "abatement" hat and put on her "law enforcement" hat. She'll then give a citation to the property possessor and direct the violator to JP court. There, once a hearing takes place, the JP will probably find the property possessor guilty of having the violation, but will *not* generally order any abatement (since the criminal enforcement powers of the judge set forth in Sec. 341.091 don't specifically include being able to order a clean-up).

By beginning by issuing an abatement notice, seeing nothing happen, and then issuing a citation, the health authority has decided to observe the first step, and then abandon the process. The other four steps just aren't attempted. Of course, as expected, if you only do 20% of a process, you generally won't get the desired result.

Unless the violator cleans the property voluntarily, the ONLY ways that an abatement can be imposed under THSC Chapter 341 are (1) for the health authority officer and local prosecutor to actually follow the mandated (everybody follows all the "shall" words) procedure in Sec. 341.012; or, (2) for the JP or Municipal Judge to over-step his or her bounds (either intentionally or in error) and order an abatement of the nuisance.

Building an effective enforcement program on judicial error is generally a bad idea, so we're left with the local health authority doing its job as the only practical alternative. That is, if we actually want the public health nuisance abated.

If local health authorities — including formal health departments — would read, understand, and follow the mandated provisions of the abatement process designed by the State Legislature, local public health nuisances could be more readily abated. Usually a meeting with the local prosecutor is required to make sure he or she understands the process and is also willing to follow the law. The process defined

by the State Legislature is sound, and if followed it will produce the fastest abatement possible where violators won't immediately comply.

However, by immediately abandoning the process described in Sec. 341.012 and issuing a Notice of Violation or Citation as soon as the property possessor puts up a little fight by not abating the nuisance within the time set by the officer, **the non-compliant health authority assures that the health nuisance will last longer than it has to.**

I'm not sure why just about every health authority I've spoken with in Texas — and, of course, I haven't spoken to them all — ignores the process the State Legislature has established for forcing an abatement, but I suspect that part of the reason is fear of having to inform the local prosecuting attorney that he or she also faces mandatory action. I've actually had more than one health department director assure me that the local prosecutor doesn't want to be notified of public health nuisances and "doesn't care." It's much more likely that the prosecutor is simply unaware of the law. Maybe the prosecutor should be allowed to demonstrate that he or she cares or not.

Or maybe it is a staffing issue. After all, if local health authorities responded to public health nuisances as the law specifies, two things would result: (1) Texas would be a much cleaner and beautiful place; and, (2) health department staff size increases may require local tax increases. Faced with these options — cleaner, healthier surroundings or lower taxes — most places in our state have shown little willingness to pay for much cleaner and healthier surroundings. Perhaps as voters become more convinced of the relationship between public health nuisances and actual community health, this reluctance to fund cleaner surroundings will be revisited. Maybe COVID will help us remember this point.

But the State Legislature has this exactly right: when the property possessor won't keep his or her property clean AND when he or she also ignores orders to clean the property issued by the local health authority, it's time for local government to act swiftly to force abatement through the prosecutors and the courts. The health needs of the wider

community require governmental action when citizens are unresponsive.

Section 341.013 Garbage, Refuse, and Other Waste

Of course, with or without a health department or a functioning health authority handling abatement, local police and deputies can and should enforce THSC Chapter 341 to get uncooperative residents in front of a JP or municipal judge to answer for a criminal violation. In fact, in many parts of Texas if law enforcement fails to enforce this law, the harmful effects of unabated health nuisances will continue to be present for decades.

Not all “criminals” are big dudes stealing things and beating on women; some “criminals” are very, very small — mosquitoes carrying bacteria or viruses — that will put more people in the hospital than one big villain on drugs possibly could. You might also reflect on the fact that mosquitoes have the effect of making us all “blood brothers,” sharing minute amounts of each other’s blood and disease, up and down the street. The “protect and serve” motto of local police includes protecting the citizens from the effects of these “littlest criminals” too.

Public health nuisance situations can become complex, and it is always good to have a trained health professional available to act on behalf of the health authority or to give advice to the peace officer. However, the point of this law is very simple: situations threatening public health can’t be tolerated. Thankfully, there is one section of THSC Chapter 341 that can be used to deal with just about *any* public health nuisance. Officers can easily learn and apply this one section, designed to eliminate the hideouts of those “littlest criminals”:

*THSC Sec. 341.013(c) Waste products, offal, polluting material, spent chemicals, liquors, brines, garbage, rubbish, refuse, used tires, or **other waste of any kind** may not be stored, deposited, or disposed of in a manner that **may** cause the pollution of the surrounding land, the contamination of groundwater or surface water, or the breeding of insects or rodents.*

This comprehensive section covers most *actual or possible* public health nuisances that might impact a community. Notice that this definition can be applied to illegally dumped materials of just about any kind; such dumping almost always actually or potentially pollutes air, land, or water resources or provides breeding places for insects or rodents. We strongly encourage local community leaders to insist on law enforcement enforcing this particular provision.

There's really no reason NOT to enforce this law in your city or county. It is already on the books in Texas (it does not have to be adopted by a local government before use); it increases officer involvement in the health of the community by ending the idea that "there is nothing we can do" in many cases; and, it will quickly become easy to use (if any pile of waste the officer sees is a "breeding place" for mosquitoes, for instance, the law is easily applied).

There are three other subsections in Sec. 341.013 of interest and use in local enforcement. The first, subsection (a), contains a general prohibition against unsanitary conditions being allowed to exist in virtually any location:

(a) Premises occupied or used as residences or for business or pleasure shall be kept in a sanitary condition.

As this statute contains a specific definition of "sanitary" at Sec. 341.001(7) – "*Sanitary*" means a condition of good order and cleanliness that precludes the probability of disease transmission – paragraph (a) could be used in the most general circumstances to issue a citation or trigger the abatement process in Sec. 341.012. We say, "could be used," simply because we've yet to encounter an officer basing a public health nuisance on such a generality.

A second paragraph in this section could be useful in many situations where the waste is in liquid form that is being allowed to discharge into a public area:

(b) Kitchen waste, laundry waste, or sewage may not be allowed to accumulate in, discharge into, or flow into a public place, gutter, street, or highway.

This would define situations such as we observed a few years ago in a county north of Dallas. The operator of a restaurant was having trouble with the sewer discharge system, so he simply ran a hose out the back door of the kitchen and discharged dirty dishwater directly into the borrow ditch that ran by the highway. Because of the public nature of the offense, many calls went to the local police. The violator could have been charged with illegal dumping under THSC Chapter 365, or misdemeanor or felony water pollution under TWC Sections 7.147 or 7.145, respectively, or with some other public health nuisance discussed above. As I recall he wasn't charged with anything. He eventually stopped when the wastewater discharge problem was solved. In spite of many complaints from passing citizens, their government did nothing. Ignorance abounds. Where kitchen, laundry, or sewer waste is being allowed to have access to public places, THSC Sec. 341.013(b) would be a good paragraph to consider using.

The third useful paragraph in Section 341.013 sets state policy on responsibility for public health nuisances at vacant or abandoned property:

(e) A person may not permit vacant or abandoned property owned or controlled by the person to be in a condition that will create a public health nuisance or other condition prejudicial to the public health.

When code violations appear at vacant or abandoned properties, officers often have a difficult time locating a responsible party. Where there is still a mortgage involved, officers often spend enormous amounts of time attempting to locate the department in the lender who currently holds the note. Because of the frequency with which mortgage loans are sold and re-sold within the financial services industry, searching for the current lender is seldom fruitful. A better way is to locate the loan servicer, which is the entity that the original lender selected to handle month-to-month cash flows on the property. Although the ownership of the loan and mortgage may be widely traded, the loan servicer is usually the company originally selected.

Under loan servicing agreements with the lenders, the servicing company handles such things as processing normal monthly cash flows and foreclosures. In fact, in some cases a loan servicer can earn more in foreclosure fees than from routine month-to-month payment collection. The loan servicer is among those parties who “control” properties, as the term is used in this paragraph. Consequently, if local officers can locate the loan servicer for a particular vacant or abandoned property, that party will often be key to getting code and public health nuisances handled. One good way to locate loan servicers is through the “Property Preservation Service Contacts” page at the Mortgage Bankers Association website. Motions filed in local court concerning the bankruptcy – especially motions concerning the appointment of a Substitute Trustee – often shows the loan servicer for the property in question.

Here are a couple of other recurring public health nuisance situations, the first of which may involve illegal dumping. In *Chapter 10: Primary Illegal Dumping Enforcement* we’ll see that the most frequently used illegal dumping law – THSC Chapter 365 – *cannot* be used to deal with human waste. It is specifically excluded from both the definitions of *litter* and *solid waste* that Chapter 365 is designed to control. So using this section from THSC Sec. 341.014 may work perfectly:

Section 341.014 Disposal of Human Excreta

(a) Human excreta in a populous area shall be disposed of through properly managed sewers, treatment tanks, chemical toilets, or privies constructed and maintained in conformity with the department's specifications, or by other methods approved by the department. The disposal system shall be sufficient to prevent the pollution of surface soil, the contamination of a drinking water supply, the infection of flies or cockroaches, or the creation of any other public health nuisance.

Although this provision exists and may be used when the situations it describes are present, it is more common to see public health nuisance charges for sewage use Sec. 341.011(5); Sec. 341.011(11); Sec. 341.011(12); or, Sec. 341.013(c).

Another very important section of Chapter 341 is the one passed by the 83rd State Legislature to help communities deal with swimming pools, scrap tires, and other breeding areas of mosquitoes on abandoned or property that is empty because of a foreclosure process. The law does not specify at what stage in the foreclosure that entry rights come into being. Under the most liberal, yet reasonable, interpretation one would think that if an owner vacates his property after receiving any threat of foreclosure from the loan servicer, this law would come into effect. Note that the 84th State Legislature made changes to Sec. 341.011(7) that made this section more applicable in rural areas. Entry is not restricted to local health department officers.

Section 341.019 Mosquito Control On Uninhabited Residential Property

(a) Notwithstanding any other law, a municipality, county, or other local health authority may abate, without notice, a public health nuisance under Section 341.011(7) that:

(1) is located on residential property that is reasonably presumed to be abandoned or that is uninhabited due to foreclosure; and

(2) is an immediate danger to the health, life, or safety of any person.

(b) A public official, agent, or employee charged with the enforcement of health, environmental, or safety laws may enter the premises described by Subsection (a) at a reasonable time to inspect, investigate, or abate the nuisance.

(c) In this section, abatement is limited to the treatment with a mosquito larvicide of stagnant water in which mosquitoes are breeding.

(d) The public official, agent, or employee shall post on the front door of the residence a notice stating:

(1) the identity of the treating authority;

(2) the purpose and date of the treatment;

- (3) a description of the areas of the property treated with larvicide;
- (4) the type of larvicide used; and
- (5) any known risks of the larvicide to humans or animals.

No Warning Period Required to Issue Citations for Violations

Many criminal enforcement officers use THSC Sec. 341.013(c) to issue citations and notices to appear in JP court — or a municipal court inside a city limit — to discuss the violation with a judge. Notice that no “warning” or “period to abate before citation” is required before issuing a citation under this section. ONLY the previously discussed section — THSC Sec. 341.012 — allows an employee from the local health authority to evaluate the health nuisance and give the violator some time to abate the nuisance, if that makes sense.

Deputies and police simply are not given the power under this law to authorize the violator time to clean up the mess (although this often happens and warning tickets are issued), nor can deputies and police “encourage” the violator to abate the nuisance (although this often happens too). What the police, sheriff deputies, constables and other law enforcement officers CAN do, other than issue a warning citation, is cite the possessor for having the violation described in THSC Sec. 341.013(c), send him to JP or Municipal Court for the hearing, and let the health authority know if the problem is abated before the appearance date. Officers frequently say something like, *“Here’s your ticket, but if you clean this up and bring a landfill receipt with you to court, I’ll request the judge dismiss the charges.”*

Since the judge in the citation case is not empowered under this law to order abatement either, what the judge can do is fine the violator and say, “I’ll see you tomorrow,” since each day of an ongoing violation is a separate offense (and the police or deputy would just keep on citing the person until he finally cleaned the mess).

On every THSC Sec. 341 Public Health Nuisance case where the local health authority has not acted to force abatement, the judge should be asking the local health authority why they are not following the mandatory abatement process the State Legislature provided in

THSC Sec. 341.012. Where the health authority exercises its powers under THSC Sec. 341.012, there will eventually be fewer court cases.

So you can see that where the local health authority intentionally fails to act to force an abatement using the process given by the State Legislature at THSC Sec. 341.012, about all the police and judges can legally do is keep running a violator through the process until the guy gets tired and cleans the mess. Or until a judge imposes a punishment not allowed under the statute — or until a peace officer goes beyond his or her authority and threatens the person with a larger charge — or until local policy changes and the health authority and prosecutors begin to follow state law.

Criminal Penalty for Violations

The punishments for these violations are at THSC Sec. 341.091 (criminal) and Sec. 341.092 (civil). The criminal penalty sets a fine of from \$10 to \$200 for the first offense, and a greater penalty for a subsequent conviction — as long as the second conviction happens within one year following the first. The enhanced penalty is a fine of \$10 to \$1,000 and/or up to 30 days in the county jail. The first conviction can be in JP or municipal court, but a subsequent conviction — if handled as a subsequent prosecution — must move up to the county court (since there is the possibility of jail time involved).

Options for Subsequent Offenses within One Year

Subsequent convictions within one year of the last one can result in potential jail time, and are filed through the county courts at law.

In many counties, smaller county court violations such as these can drag on and on before finally being adjudicated.

1. One technique that is followed is to just continue to regard each new charge as another “first offense” and file it in the same JP or municipal court. The judge will repeatedly fine the maximum — \$200 — and court costs. Since every day of a continuing situation is to be treated as a separate violation, the officer brings the offender back to the JP or municipal court more and more frequently until the nuisance is abated. This approach increases

the financial cost of maintaining the nuisance, although it requires closer involvement in the case by the officer.

2. Another technique that is gaining popularity in dealing with potential subsequent offenses is for the officer to tell the violator, at the time of his initial conviction, “You need to get that cleaned up, because every day it’s like that is a separate violation. But it becomes a bigger deal. So if I have to come back out there on this, next time I’ll arrest you and take you to jail.” This approach puts as much inconvenience as possible on the continuing violator by forcing him to deal with the local jail, making bail, finding an attorney, and eventually having to appear in court.

Civil Penalty for Violations

THSC Sec. 341.092 lays out a process for civil enforcement of violations of Chapter 341. Given the restrictions on this process, one would think that this approach would only be used for the largest cases, and most likely then only against violators with financial resources.

THSC Sec. 341.092

(a) A person may not cause, suffer, allow, or permit a violation of this chapter or a rule adopted under this chapter.

*(b) A person who violates this chapter or a rule adopted under this chapter **shall be assessed a civil penalty**. A person who violates a permitting or inspection requirement imposed under Section 341.064(n) or a closure order issued under Section 341.064(o) shall be assessed a civil penalty. A civil penalty under this section may not be less than \$10 or more than \$200 for each violation and for each day of a continuing violation.*

Although subparagraph (b) mandates that a civil penalty be assessed for a violation described in this law, I can’t locate any justice court in Texas that has actually assessed a civil penalty for this violation. It may be that the complexity of a locally instigated suit – including the requirement to include the state as a necessary party – simply makes civil suits in nuisance situations too much trouble to undertake.

When THSC Chapter 341 is enforced, it is usually done so through applying the criminal law as described in THSC Sec. 341.091.

The initial penalty in a civil suit is defined in subparagraph (b) as being the same as first offense criminal conviction under THSC Sec. 341.091: \$10 to \$200. Under that criminal penalty, a higher fine ranging from \$10 to \$1,000 per day of violation for subsequent convictions for violating this law is available, provided that the subsequent conviction occurs within one year following the initial conviction.

THSC Sec. 341.092

(c) If it is shown on the trial of the defendant that the defendant has previously violated this section, the defendant shall be assessed a civil penalty of not less than \$10 or more than \$1,000 for each violation and for each day of a continuing violation.

THSC Sec. 341.092 subparagraph (c), however, allows for a higher civil penalty of \$10 to \$1,000 per day for a subsequent violation at any time following the first, presumably years following the initial conviction. On the surface, using THSC Sec. 341.092 (c) for all subsequent convictions appears to make sense; however, the administrative processes involved in public health nuisance civil suits may outweigh the value of using them when good options exist.

THSC Sec. 341.092

(d) If it appears that a person has violated, is violating, or is threatening to violate this chapter, a rule adopted under this chapter, a permitting or inspection requirement imposed under Section 341.064(n), or a closure order issued under Section 341.064(o), the department, a county, a municipality, or the attorney general on request by the district attorney, criminal district attorney, county attorney, or, with the approval of the governing body of the municipality, the attorney for the municipality may institute a civil suit in a district court for:

- (1) injunctive relief to restrain the person from continuing the violation or threat of violation;*
- (2) the assessment and recovery of a civil penalty; or*

(3) both injunctive relief and a civil penalty.

Subparagraph (d) gives cities and counties – as well as state agencies – the right to seek injunctions to restrain a person from a continuing violation of THSC Chapter 341 and/or bring a civil suit for specified penalties. Notice that the approval of the city council is required before a city attorney can file suit. However, if the county is the suing body, the county or district attorney can instigate the suit without approval from the commissioners' court.

THSC Sec. 341.092

(e) The department is a necessary and indispensable party in a suit brought by a county or municipality under this section.

THSC Sec. 341.092

(f) On the department's request, or as otherwise provided by this chapter, the attorney general shall institute and conduct a suit in the name of the state for injunctive relief, to recover a civil penalty, or for both injunctive relief and civil penalty.

In subparagraph (e), “department” is defined as the “Department of Health,” which presumably is now the Department of State Health Services. If a local entity decides to bring a suit, it must include the department as a “necessary and indispensable party,” which, if nothing else, adds time-consuming case coordination between local and state governments. Local prosecutors may be more interested in some sort of injunctive relief or agreed order to clean the site, while the state may simply be looking at sharing in a civil penalty without doing much work. The addition of parties probably increases the points at which undue political influence can be applied to the case.

Regardless of who brings a suit, subparagraph (g) allows for the selection of several venues where the suit may be filed. These three possible venues – where the defendant lives, where the violation occurs, and Travis County – are commonly found in state environmental laws, both civil and criminal.

THSC Sec. 341.092

(g) The suit may be brought in Travis County, in the county in which the defendant resides, or in the county in which the violation or threat of violation occurs.

Subparagraph (h) describes the remedies available to the plaintiff in any suit, including a closure order in limited cases (i.e., Sec. 341.064 pertains to unsanitary public swimming pools, lagoons, and bathhouses).

Sec. 341.092

(h) In a suit under this section to enjoin a violation or threat of violation of this chapter, a rule adopted under this chapter, a permitting or inspection requirement imposed under Section 341.064(n), or a closure order issued under Section 341.064(o), the court shall grant the state, county, or municipality, without bond or other undertaking, any injunction that the facts may warrant, including temporary restraining orders, temporary injunctions after notice and hearing, and permanent injunctions.

The last two subparagraphs define how the money is divided. Subparagraph (j) makes more sense than (i); if the state wants to do all the work and keep all the money, I suppose that makes sense provided that you ignore the time and resources spent at the local level before presenting the case to the Attorney General. Subparagraph (i) – where local attorneys do the work and split any proceeds with the state – seems more of a problem. In any case, significant civil penalties will be recovered only in situations where the violator has the financial resources to pay and can be made to pay through the imposition of liens after judgments.

Sec. 341.092

(i) Civil penalties recovered in a suit brought under this section by a county or municipality through its own attorney shall be equally divided between:

- (1) the state; and*
- (2) the county or municipality that first brought the suit.*

Sec. 341.092

(j) The state is entitled to civil penalties recovered in a suit instituted by the attorney general.

Given the complexities and doubtful returns from attempting a civil suit in most public health nuisance cases, in difficult cases it's likely that local jurisdictions dealing with difficult situations will primarily use:

- (1) Repeated "first-time" criminal penalties at \$200 per day;
- (2) Occasional arrest for repeat violations within one-year of the most recent conviction and filing in county courts. Combine this with the full implementation of the *Remediation Through Enforcement* approach found on page 89; and,
- (3) Increased emphasis – at least in the worst situations – on local health authority involvement under THSC Sec. 341.012 to bring unresponsive offenders under local court orders to clean properties. This probably is much more effective than civil suits involving the state.

Special Powers of Women to Force Nuisance Abatement

This continues the reflection on this same issue in the last chapter. Perhaps I am simply a product of how I was raised, but I hold the position that women seem to be better at building and maintaining communities than men are. Neighboring men may be having a heated argument in the front yard over politics, where the fence has been built, or other pressing issues, while around back their wives are borrowing eggs and talking about their children across that same fence. Fairly or not, the preponderance of health care decisions seems to fall on women. When a kid gets a scrape in play, he usually runs to mother to be patched up and kissed rather than to dad for a lecture to "be tough." When a child is sick and has to be taken to a doctor, more times than not it's the mother who misses work to get this done. Admittedly, some of this is the sexism that is so often built into our relationships and the fact that we still don't value the work of women as highly as we do that of men. But it may also be built on what I take to be a universally proven fact, that women are simply more alert to issues of the family, especial-

ly when health and illness are involved.

As far as public health nuisances are concerned, there are several pieces of information that Texas women need to have in order to better take care of their families and to better direct the men with whom they come in contact. We suggest a public education project aimed at women with these points:

1. *Public health nuisances are widespread in Texas and are dangerous. Texas children are particularly exposed, since they generally spend more time outside than other family members.*
2. *If a place in one's back yard, in the alley, or up the street is a where water is held following rain, anywhere in Texas it is a very likely place for mosquito breeding.*
3. *Mosquitoes have been called (Time Magazine, July 6, 2015) the "world's deadliest animal." Mosquitoes spread over 700 million infections annually, causing two to three million deaths worldwide each year.*
4. *Texas is a central point for many of the diseases than these animals spread, including West Nile Virus, Zika, Dengue Fever, Malaria, Encephalitis, and Yellow Fever. The most common Texas mosquitoes are potential transmitters of these diseases. Some of these diseases have no cure and can lead to death or to lifelong lingering weaknesses.*
5. *Property possessors are expected in Texas to keep their properties clear of public health nuisances, just as soon as they realize that a nuisance exists – not when ordered to cleanup by the government. [THSC Sec. 341.012(a)].*
6. *In most residential property situations, women are usually as responsible as owners or possessors as are men.*
7. *If you see any situation described by the following, you have encountered a public health nuisance:*

*THSC Sec. 341.013(c) Waste products, offal, polluting material, spent chemicals, liquors, brines, garbage, rubbish, refuse, used tires, or **other waste of any kind** may not be stored, de-*

*posited, or disposed of in a manner that **may** cause the pollution of the surrounding land, the contamination of groundwater or surface water, **or the breeding of insects or rodents.***

8. Tolerating a public health nuisance on property one possesses, especially after having learned of its existence, is a crime in Texas, punishable by a fine of \$10 to \$200 for a first offense and a fine to \$1,000 and/or 30 days in jail for a second conviction. Courts are directed to treat each day a public health nuisance is allowed to exist as a separate offense, although a judge may not treat multiple-day offenses as the State Legislature directs. [Sec. 341.091(c)]

9. If you tolerate public health nuisances on property you possess, you risk exposing yourself and your children to disease and possible death; you also risk a substantial ongoing fine and possible jail.

10. Local health authorities, police, and deputies are working harder and harder to remove public health nuisances from their communities.

11. It will be smarter and cheaper for your family to cooperate in the effort to clean Texas than to ignore these issues. Be a leader in your neighborhood rather than just ignoring these problems and hoping the kids don't get sick and you wind up being fined or even jailed.

12. Some day the people of Texas will decide that they will no longer tolerate public health nuisances to exist in their neighborhoods. Why not make that day be today where you live?

THSC Chapter 341 is currently in force throughout Texas, and applies as much in the unincorporated areas as it does inside cities. Local governments do not have to adopt this law; the State Legislature already did that on our collective behalf. The only question is whether a local government is going to use this law or ignore it.

There is a similar, but more complex and, in my opinion, less effective law that is also in force in various parts of unincorporated areas. It is not available for use inside cities. This law is our next subject.