

## Chapter 3: Paying for the Cleanup

The more dumping has been tolerated in the past, the bigger the abatement problem. Not only are there more messes and public health nuisances existing, but also citizen attitudes may inadvertently support illegal dumping. Generally, the newer the dumping, the more tools local government has to get the problem abated. Old dumps may be on property where the original owners have died and ownership has passed to distant, non-responsive heirs. In some cases, all that may be left for a city or county to do is to sue the current owners for running an unpermitted landfill, for allowing tires to be disposed or stored in violation of Rule 328, or for some other administrative rule violation related to THSC Chapter 361. If a property is the site of public health nuisances (anywhere), public nuisances (in unincorporated areas), or illegal dumping (anywhere), and if that property is owned by an older person, doing nothing while the person eventually dies seems like a poor plan. Why wait to act until the property either has no effective owner or the new owner resides elsewhere? The quicker you act, the easier the cleanup will probably be.

The easiest way to abate a nuisance or cleanup a dumpsite is to work against its being created in the first place. This can be done through public education that helps individuals and families self-police. If the value of anti-dumping can be instilled early enough, and reinforced by schools and parents, surely this can be helpful to solving the dumping problem.

If there is to be dumping, however, there must be effective local enforcement that (1) educates the dumper to stop doing it; and, (2)

forces the person economically benefiting from dumping to pay the cost of the cleanup. If this fails to happen then the city or county is faced with a series of increasingly bad choices.

Bad Choice #1: Force the owner or possessor of property that has been dumped on to pay for the cleanup. If the owner or possessor is himself the source of the dumping, then having them pay for the cleanup is simply a matter of justice. The person benefiting from a bad act should bear the costs of fixing the problem rather than passing the cost on to the rest of us. But if the property owner or possessor is truly a victim, having him pay the cost of the cleanup is simply unjust. However, that is the starting position of most municipal code enforcement in Texas: regardless of how the refuse arrived on your property, you are responsible for keeping that property free of refuse. Cities that fail to develop good anti-dumping public education programs and who fail to use police powers to catch illegal dumpers are faced with enforcing what amount to being simply unfair policies that economically punish the wrong person. Still, since we are in the realm of “bad choices,” this one may be better than the ones that follow, primarily because (1) we know exactly who the property owner is; and, (2) local municipal codes place cleanup responsibility on that property owner. Where the owners live elsewhere or deceased and in situations where municipal codes are selectively enforced – that is, where a property owner who is a friend of the mayor can avoid code enforcement altogether – then this particular “bad choice” falls apart and something else has to be tried.

Bad Choice #2: Cleanup using somebody else’s money. Some Councils of Governments channel funds from the state to be used in local environmental projects, although the level of funding has steadily

decreased over the years. One suitable use of these funds is in cleaning dumpsites, provided that the regional decision-makers think this is the best use of this money. But if a community is not trying to solve this problem itself – through public education, enforcement, and aggressive abatement policies under THSC Sec. 341.012 – why should other cities and counties in the region approve such cleanup projects? Another underused source of funding for cleanups are Supplemental Environmental Projects, as authorized at TWC Sec. 7.067. Under this TCEQ-administered program local governments can channel administrative penalties and fines levied against polluters into local environmental projects. See page 5 for more discussion of this underused option. Private sources of cleanup grants may also exist for a particular community. The only downside in using someone else's money to cleanup messes is that it involves work: searching for the funds, managing the process of accessing and accounting for the money, and making sure the actual project takes place take effort. All of this is additional work for someone, often to be done for no additional pay, and staff may not accept this. A good example of problems faced by adding new work is that encountered when a city decides to undertake a project of "Compassionate Code Enforcement." It makes good sense to link churches, sororities/fraternities, and civic groups with aging and poorer property owners. Sometimes finding a church group cleanup a lot or cut an elder's grass is a perfect situation for everybody. Issues of supposed liability can be identified and worked through. The block to establishing these neighbor-to-neighbor links is, I suspect, often administrative. These programs take full-time management by people skilled in working with volunteers, and this skill is seldom available among existing code enforcement staff. But if there

is a way of using someone else's money – and time – to abate the problem, this is better than the next bad choice.

Bad Choice #3: Use taxpayer funds to clean dumpsites. If there is dumping on public properties and there is no effective illegal dumping enforcement, the next bad choice is to use taxpayer funds to clean messes. The use of taxpayer funds may extend to private property in cases where the owner or possessor cannot be located or is actually unable to pay for the cleanup (as opposed to claiming to be unable to pay). Some cities budget funds to abate problems on public and selected private properties. Unfortunately, there are always more messes than money, and the city is constantly faced with deciding how to allocate scarce abatement funds. Most dumping generates public health nuisances, and caretakers of taxpayer funds will often be faced with using these scarce resources to deal with the worst of these problems. This will be especially true in cities and counties where the local health authority and prosecutors begins to actually follow the processes to abate public health nuisances established by the State Legislature at THSC Sec. 341.012.

Bad Choice #4: Do nothing – live with the mess. Cities and counties have an enormous capacity to look the other way when faced with the necessity of making changes. For instance, in some cities it seems like two sets of codes are in place: one for the rich part of town and a second, more relaxed code, for the poorer sections. Code enforcement officers are often put in the difficult situation of insisting on certain levels of enforcement in situations where there is legitimately not enough money for compliance. They are also put into situations where local slumlords are able to avoid bringing their properties up to required standards through political manipulation. So there can be

considerable support for ignoring some categories of problems in some parts of a community. Developing effective programs of public education, implementing effective anti-dumping criminal enforcement programs, forcing property possessors to keep their properties in compliance with public health laws, and allocating increasing amounts of taxpayer funds to cleanup – all of these are usually big changes for local governments, and inertia is always powerful. Of course, the problem with “Doing nothing” is that things happen anyway. Unattended dumping can pollute water resources, lower property values, create breeding places for insects carrying disease, and – probably the worst thing of all – help wreck the character of neighborhood kids by sending them the wrong message: “Adults don’t care; you shouldn’t either.” So by doing nothing about dumping, the presence of public health nuisances, and other forms of pollution, civil leaders actually assure that the whole community pays and that the moral basis of the community is shredded.

Let’s look at some of these options in closer detail.

**Public Education under THSC Sec. 341.012(a)**

*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.*

By this provision, the State Legislature established state policy that a person possessing property – through owning, leasing, renting, etc. – has a responsibility to keep that property clear of public health nuisances, beginning just as soon as the person realizes that the nuisance exists. There is no requirement that the person wait until he or she has received formal notice of the existence of the nuisance from local government. It doesn’t really matter what the source of the

person's knowledge is, and knowledge obtained by the individual's direct observation is certainly sufficient. If the person is a married man, his wife has probably already directed his attention to the public health nuisance in the backyard. Certainly – and I am completely serious about this – as soon as more women understand that dumping and other forms of pollution are not only ugly but also constitute public health nuisances and risks to family health, Texas will become a much cleaner state. If the person is a company, an association, or a government, knowledge might come about by an employee or officer of the organization becoming aware of the existence of the problem.

Knowing what defines a public health nuisance can be easily accomplished by reading the twelve listed health nuisances in THSC Sec. 341.011 or, as a beginning point, by making the provisions of THSC Sec. 341.013(c) widely known:

*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.*

Posting this as a public information notice in every beauty shop in Texas under the heading "Protect Your Family; Make Your Man Do Right!" would be a great thing to do. This first abatement approach amounts to informing all property possessors in the city and county that (1) it's a crime to allow a public health nuisance to exist on a property a person possesses; and, (2) the policy of the State of Texas is that a person is expected to keep any property he or she possesses free from public health nuisances. There are three basic reasons a property possessor should respond by voluntarily keeping his or her property

free of public health nuisances: (1) it make sense to reduce the potential sources of health problems before anybody gets sick; (2) keeping one's property clean is one of the general responsibilities of property possession, according to state policy; and, (3) failure to one's property clean of keep public health nuisances can result in a criminal penalty and a trip to see a judge.

A simple brochure, public service advertising, utility bill insert, city/county social media announcement, or other communication of this message is a good starting point to having a cleaner city or county. Most property possessors, if they know that a public health nuisance on their property is actually a criminal violation, will probably voluntarily abate the problem without local government ever having become aware of the existence of the public health nuisance.

Since this approach will also generate a spike in violations being reported by the public, local governments using this public education approach should (1) carefully educate its own employees and officials on these provisions (since they will be receiving questions from citizens), (2) assure that the local government itself is not violating THSC Chapter 341 or Chapter 343 (especially at commissioners' precinct barns and waste transfer stations); (3) encourage its officials and employees to assure their own properties are free of public health nuisances; and, (4) decide what it is going to do about virtuous property possessors turning in their sinful neighbors. An amnesty period is suggested.

This form of abatement should require very little resources from local government beyond the general communication to its citizens. This could be called "pre-offense voluntarily abatement."

**Paid by Property Possessor**

Another category of abatement is that paid for by the property possessor, but done a little later in the enforcement process. The assumption in this discussion is that the property owner is the violator, which, as discussed earlier in this chapter, is certainly not always the case. If the property owner has been himself dumper on, then putting pressure on him to cleanup the mess is always going to be contentious.

Here the city or county has become involved with the property possessor's failure to follow *Sec. 341.012 (a)*: the person simply is not keeping his or her property free of public health nuisances voluntarily. The local government has expended some level of enforcement effort, but has done so with an eye to making sure the possessor funds the abatement. There are four categories of this:

**A. Voluntary Cleanup**

Here local government has learned that a person is allowing a public health nuisance to exist on the possessor's property.

Perhaps a citation or notice of violation has been issued; or an officer has given a 30-day warning under THSC Chapter 343 that a citation will be forthcoming if the nuisance is still present after 30 days; or an officer has issued a warning ticket and an "I'll be back!" warning to the property possessor; or the possessor's wife has intervened in the process and informed her husband, "No, Sweetie, we're not going to hire an attorney to fight the county for your supposed right to keep the open cesspool out back. We're going to use some of that lawyer money instead to clean up your mess and get the lateral lines lengthened. I'm tired of the kids coming in with wet shoes and mosquito bites! And knock-off that little talk about

*how a man can do whatever he wants to on his own property. Any fool knows that doesn't include letting the kids get sick, and anyway I'm getting tired of hearing your little speech."* In this approach, the possessor stops resisting, decides he doesn't want to spend money fighting the city or county, and folds the hand he's holding. The mess is abated and the local government is informed that it can close the case.

### **B. Negotiated Case Settlement**

Now we're at a little later point in the process. The accused has refused to abate the nuisance as requested and a legal proceeding is underway. The possessor — and probably his attorney — are in a settlement dialog with the county or district attorney prior to the court hearing on the criminal case, and the possessor agrees as part of the settlement to abate the nuisance and provide proof to the prosecutor that the waste generating the public health nuisance has been properly disposed (and not simply illegally dumped somewhere). Here the possessor's wife failed to talk sense into the possessor before the defense attorney was paid a retainer, which will be discussed more fully later.

### **C. Forced by Health Authority**

Here the property possessor has become the subject of a formal application of THSC Sec. 341.012(b)-(d) by the local health department or county employee trained by the health authority appointed by the commissioner's court. Remember that the enforcement process (that is, the issuance of a citation by a peace officer, local health department investigator, or trained county worker) is separate from the abatement process. The State

Legislature has established duties for local health authorities and prosecutors to act to force removal public health nuisances from a community. If the local health authority followed the process stipulated any the State Legislature, it would provide the violator with a notice of the time he or she has to abate the problem, send a copy of that notice to the prosecutor, verify after the allowed time has pass that the problem has been abated, and, if it as not, notify the prosecutor of the situation. Following the provisions of this section, the prosecutor would then bring the violator into court for a hearing on the abatement order itself (not on the underlying violation). The judge could test any assertions that the violator might be making as to his financial inability to do the abatement, and, if satisfied that the violator has the financial and other capacity to act, order him to abate the nuisance by a specific date. If the violator ignores the court order, the prosecutor can request the violator be held in civil contempt until such a time he arranges for the nuisance to be abated.

However, as discussed repeatedly in this book, local health authorities statewide have pretty well ignored this process. They begin the process by issuing the abatement notice to the violator, but fail to send notice to the prosecutor that there is an active case unfolding. When the violator fails to abate the nuisance, rather than send notice to the prosecutor so that he or she can bring the violator before a judge, the local health authority abandons the attempt to have the nuisance abated. Instead, the investigator puts on his “law enforcement” hat and issues a citation for the person to appear in JP or Municipal Court. When the case is scheduled and the violator finally appears — to answer the citation he has

received for a violation of some provision of THSC Chapter 341 — he finds himself before a judge who does not have the statutory authority in THSC Chapter 341 to order the abatement. All the judge can do is fine the person as punishment for the violation (\$10 to \$200 for a first offense), and tell the violator that if he is cited again he will be back before the court for another fine, or will have the case submitted to the process of the county attorney to schedule a court hearing for a second criminal violation of the same law within one year of the first conviction. Because this law includes a possible 30 days in jail upon a second conviction, the case was removed from the initial JP or Municipal Court and sent up to the next level of court, where it will probably languish. All this time the public health nuisance is still right where it has always been, unabated.

Unless a Local Health Department is willing to start following the process that the State Legislature has mandated at THSC Sec. 341.012(b)-(d), any attempt it makes to force the person to abate the nuisance — unless it is immediately successful — will probably result in the nuisance being in the environment longer than it would have been. And this is before the prosecutor is given the chance to follow his or her duties specified in THSC Sec. 341.012, which may or may not happen.

Local health authorities that think through how they are handling these cases and then refuses to change their process to comply with THSC Sec. 341.012 are puzzling to me. More inertia, I suppose.

#### D. Court Ordered

In this situation, the person possessing the property where the health nuisance exists has refused to abate the violation voluntarily and has been charged with one of several criminal violations. The prosecutor has been unsuccessful in effecting a pre-trial settlement, and the local health authority has failed to follow the provisions of THSC Sec. 341.012. The court has convicted the person of the particular environmental violation for which he was charged, and the judge is faced with deciding to order an abatement or not. Strangely, not every violation authorizes the court to order the health nuisance abated. THSC Chapter 341 itself is silent on the abatement order, which most judges I have spoken with interpreting as not giving them power to order abatement for a violation. The judge in a hearing related to a THSC Sec. 341.012 “failure to abate” issue would have the power, but not a local judge hearing a basic criminal charge made for a THSC Chapter 341 violation. On the other hand, THSC Chapter 343 specifically directs a judge to order the cleanup upon conviction of a violation. That provision is found at THSC Sec. 343.012(e).

The most commonly used law to deal with illegal dumping — THSC Chapter 365 — contains no provision for the court to order abatement, although the possibility of seeking an injunction “*to prevent or restrain a violation of this subchapter*” is granted at THSC Sec. 365.015(a). Nor does TWC Chapter 7, Subchapter E contain specific powers to the court to order abatement. However, since the penalties for both of these statutes are so much greater than those for a violation of THSC Chapters 341 and 343, it’s much more likely that a pre-trial settlement conference would have

resulted in an agreement to abate. Likewise, if the city or county is attempting to use its civil suit powers under TWC Sec. 7.351 to force a resolution to the problem through a suit, the primary focus of the process will probably be the quick cleanup of the problem.

### **Paid by Third Party**

But the violator, regardless of the charges or law being used, may legitimately not have the resources to clean the property. Often the underlying cause of the violation in fact is the poverty itself, and the junk that the violator has accumulated over the years in trying to make a living. For example, the violator may have allowed local individuals and companies to use property he possesses as a convenient solid waste dump site, and he has been making a living from the fees he has been charging. Now, through application of state criminal law, the violation has been discovered and stopped, but the mess remains. The prosecutor has been able to determine that the violator actually has no resources to use to clean the property and has also determined that doing nothing is politically a bad idea (as is the continuation of any public health nuisance), but the prosecutor is reluctant to use city or county money to pay for the cleanup. The question becomes, “Are there other sources of funds to pay for such cleanup?” The answer is, “Maybe so,” if one of the follow is in place

#### **1. Cleanup Grants**

Regional planning commissions — called “Councils of Government” or “Development Councils” — receive grant funds every two years to be used to help support local recycling, reduction of waste gluing into the landfill, and illegal

dumping enforcement. The decisions on the use of these funds is made regionally through a formal grant application process. Occasionally a COG will decide to approve a local request for funds to clean illegal dumps. There are several limitations that may not make this a good source of funds, but it never hurts to have a discussion with the Regional Solid Waste Planner at the regional planning commission serving your county about applying for a possible grant. Some of the things the committee reviewing your request will be (1) the total regional funds available for projects has steadily decreased over the years; (2) whether there is an active anti-dumping public education campaign under way in the applicant city or county; (3) whether the city or county applicant is aggressively enforcing the anti-dumping laws, thereby attempting to force the violator to pay for the abatement; (4) since the local grant process is extremely competitive, the nature and value of alternative uses of the cleanup funds. These limitations notwithstanding, getting to know the regional planner generally has value in itself and could eventually result in a successful grant. Your community might also want to become active on the advisory council that the COG maintains for solid waste project review and ranking.

## **2. Supplemental Environmental Projects**

Texas Water Code Sec. 7.067 Supplemental Environmental Projects describes a program under which administrative penalties that would otherwise be paid to the TCEQ for administrative violations can be retained locally and used for

various environmental projects. Contact the TCEQ through their website to determine if they would approve a standing "County-Wide Cleanup Fund" that could be used to receive funds from local violators under this program. Not only may your city or county be approved to implement an S.E.P. through this program to better use its own administrative penalties — thus using funds that would have been paid to the state on a local environmental project — but also you might be successful in attracting some portion of the civil penalties that would normally be paid by others. Get to know the S.E.P. Folks at the TCEQ, beginning with the information at <http://www.tceq.texas.gov/legal/sep/>.

### **3. Settlements in Other Local Cases**

S.E.P. funds are generated from the state-level administrative enforcement process. However, a similar program could be established at the local level, under local control. There's absolutely no reason that local prosecutors, as they work out settlements with violators through the local application of criminal and civil law, couldn't build-up a local "County-Wide Cleanup Fund" in the prosecutor's office. Over time, this fund will grow with increased enforcement. It could be used to abate health nuisances in situations where (1) the violator is actually unable to pay for the abatement of the underlying violation; and, (2) the violation is creating such a public health nuisance or waste-related political problem that doing nothing is simply not an option.

**Paid by County Under THSC Chapter 343 Subchapter C**

This final approach is that of using taxpayer funds abate nuisances generated by dumping and other violations. Some cities have budgeted funds for abating local nuisances. A common use of these funds is to pay for the tearing down of substandard housing where property owners are unable to provide the funds. There is seldom enough money available to cleanup all the problems in a community, but the fact that a city has recognized the need to spend money in this area reflects sound policy. Although many cities have well-used procedures to abate nuisances, few counties historically allocated funds for this process. Nor were the procedural safeguards in place to make sure the rights of owners of targeted properties were protected. Subchapter C of THSC Chapter 343 addresses this issue by providing the parameters for counties who want to have the ability to abate a nuisance in unincorporated areas when necessary.

All Texas counties are eligible to adopt the Subchapter C procedures to abate public nuisances, and perhaps fifty have done. Before commissioners adopt these procedures, they should ask a question to the sheriff, prosecutor, local health authority: Are we diligently attempting to use all other abatement enforcement techniques available to us?" Deciding to use taxpayer money to abate a specific health nuisance on a specific property always creates political pressures. Before incurring these pressures, commissioners need to assure themselves that all other approaches have been tried.

Sometimes an official will confuse the option for the county to adopt these Subchapter C county abatement procedures before

they can be used with thinking that the entire Chapter 343 has to be adopted before it can be used in the county. This is an error. THSC Chapter 343 Subchapters A and B enable the law to be used by peace officers to respond to public nuisances in the unincorporated areas. No county action is required before this law can be used for this purpose; the State Legislature has already “adopted” this law on behalf of all political subdivisions in the state, as it does with all criminal laws. The question for counties is whether county deputies and constables are going to us these provisions. Subchapter C – County Authority Relating To Nuisance – is an optional provision. Counties wanting to have this abatement power at their disposal must first adopt procedures reflecting the provisions found in Subchapter C.

Adopting abatement procedures is totally optional with each commissioners’ court, and counties are not required by the state to adopt these or any other taxpayer-funded abatement procedures. Moreover, once they have been adopted, the county is not obligated to use them to abate every public nuisance that comes along. By providing this set of requirements, the State Legislature is simply telling the county, “You don’t have to use taxpayer funds to abate every public nuisance in the county. But in the event that you DO want to use taxpayer funds to abate a particular public nuisance, your procedures must include the steps we have provide in Subchapter C.”

Also note the requirements for needing court orders before abating substandard structures as determined in the *City of Dallas v. Stewart* case. THSC Chapter 343 Subchapter C also allows the

county to place a lien on the property to recover abatement costs (THSC Sec. 343.023 Assessment Of Costs; Lien). Counties should remember that placing a lien on a property does not necessarily mean that the lien will ever be collected. Subchapter C also grants county governments entry rights to private property for some specific public nuisance related purposes:

*Sec. 343.024. AUTHORITY TO ENTER PREMISES.*

*(a) A county official, agent, or employee charged with the enforcement of health, environmental, safety, or fire laws may enter any premises in the unincorporated area of the county at a reasonable time to inspect, investigate, **or abate a nuisance** or to enforce this chapter.*

*(b) Before entering the premises, the official, agent, or employee must exhibit proper identification to the occupant, manager, or other appropriate person.*