

HEALTH, BOARD OF: ) Prosecuting Attorneys have authority to  
PROSECUTING ATTORNEYS: ) apply for an injunction for the abatement  
of public nuisances at their own relation.

October 24, 1942.



James Stewart, M. D.  
State Health Commissioner  
Jefferson City, Missouri

Dear Dr. Stewart:

Your letter of October 22, 1942, asking this Department for an opinion, has been referred to me. Your request, omitting caption and signature, is as follows:

"Our attention has recently been called to a situation involving the use of an open ditch to dispose of domestic sewage wastes in an unincorporated community located in St. Louis County. This situation has become somewhat critical and is a menace to public health as well as a nuisance to those residing in that area. On two occasions in the last few years the citizens of this community have defeated an election for the purpose of organizing a sanitary sewer district and voting bonds to finance the construction of a sewerage system to correct this condition. Since these elections to organize a sanitary sewer district have been defeated it seems obvious that it will be necessary for some agency to take legal action against the offenders if the situation is to be remedied. This particular situation is farther complicated by the fact that the area involved is not incorporated.

"In view of the above situation I would greatly appreciate your supplying this Board with an opinion concerning the following points:

"1. What is the duty and power of the State Board of Health in eliminating a public health hazard created by the discharging of untreated sewage wastes into streams of the state or over the grounds of the state by (a) an incorporated municipality, and (b) an unincorporated community?

"2. If it is the duty of the State Board of Health to take action in an attempt to correct such conditions what should be the correct legal procedure in either case?

"3. If it is the duty of the State Board of Health to take such legal action must the action be taken through the local county prosecuting attorney or may such action be instituted by your office as attorney for the State Board of Health?

"4. If a municipality or an unincorporated area refuses to vote bonds necessary to defray the cost of the construction of adequate sewage disposal facilities would it be possible for your office, acting as attorney for the State Board of Health, to obtain a court order compelling the abatement of the nuisance involved? If so, how would such an order be enforced?"

We note that there are four separate questions asked by you in this request, but in view of the fact that they are so closely related we will not take these questions up separately but will attempt to answer them collectively.

As to the duties and powers of the Board of Health with relation to public nuisances, we will first cite you to Section 9735, R. S. Mo. 1939, which provides as follows:

"It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities,

villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of health."

Under the provisions of the above section it is clearly within the power and duties of the Board of Health to safeguard the people of the State of Missouri and the counties, cities, villages and towns therein, to institute proceedings for the abatement of public nuisances.

In the case of State ex rel. Shartel v. Humphreys, 93 S. W. (2d) 924, there was a situation such as the present one in which an attempt was made by the Board of Health to compel Maplewood and Richmond Heights, Missouri, and their officers, to do certain things respecting sewer outlet and connection, all for the purpose of abating a public nuisance. In that case it was alleged that the relator, the State Board of Health, had endeavored to persuade officers of the aforesaid cities to come to an agreement or a plan to abate the nuisance and that several conferences were held by said officers but that nothing was done. Consequently, the action was brought at the relation of the Attorney-General and the State Board of Health as Relators, to compel the aforesaid cities to abate the nuisance. In affirming the judgment for the relators in that case, the court held that the Attorney-General could have properly proceeded with or without joining as relators with the State Board of Health. In such opinion the court called attention to the statute, set out above, giving the Board of Health the right "to safeguard the health of the people in the state, counties, cities, villages and towns."

So it would appear from the decision in the above cited case that the State Board of Health has the power to join as relator in an action to abate a public nuisance. In that

particular case the Board of Health joined with the Attorney-General in abating the nuisance aforesaid. However, it is also within the power of the Prosecuting Attorneys of this State to bring actions of this kind for the abatement of public nuisances at their own relation. As authority for this statement I will cite you to Section 12942, R. S. Mo. 1939, which provides as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

As can be seen from the above section of the statute it is the duty of the Prosecuting Attorneys to prosecute all

civil and criminal actions in their respective counties, in which the county or State may be concerned.

As can be noted from your request, the particular nuisances complained of are in St. Louis County, Missouri. In view of the fact that St. Louis County has a population of over 100,000 inhabitants, there is a special article of the statute relating to "county counselors" for such counties. Section 12990, R. S. Mo. 1939, in speaking of county counselors, provides as follows:

"The county courts of all counties in this state containing one hundred thousand inhabitants or more, according to the last decennial census of the United States, and of all such counties as may hereafter contain one hundred thousand inhabitants or more, may, in their discretion, appoint and commission as other officers are commissioned by the county court a county counselor, who shall be a person learned in the law, at least twenty-five years of age, and who shall hold his office for two years, and until his successor is appointed, commissioned and qualified; Provided, that in all counties containing less than one hundred thousand inhabitants the office of county counselor is hereby abolished."

Section 12991, R. S. Mo. 1939, provides that the county counselor in such counties shall perform all the duties in civil matters that have heretofore been required by law of the Prosecuting Attorneys of such counties. Said section prescribes as follows:

"The county counselor shall attend each and every sitting of the county court, and be present during the sitting of the same, and give his advice upon all legal questions that may arise, and assist the court in all such matters as may be referred to him; commence, prosecute or defend, as the case may require, all civil suits or actions

in which the county is interested, represent the county generally in all matters of civil law, draw all contracts relating to the business of the county, examine all abstracts for the loan of school moneys, and examine all mortgages in relation to the same, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing, when demanded, to the county court or any judge thereof, and shall perform all the duties in civil matters that have heretofore been required by law of the prosecuting attorney of such counties."

Section 12992, R. S. Mo. 1939, provides that the Prosecuting Attorneys in such counties are to be relieved from all civil actions. Said section is as follows:

"Upon and after the appointment of such county counselor, the prosecuting attorney of such counties shall not be required to represent said counties in any civil action or business, but nothing herein contained shall be construed to limit, qualify, or in any manner affect the duties of said prosecuting attorney in any criminal actions or business, and said prosecuting attorneys shall continue to discharge such duties in all criminal matters as they are now required by law to do."

Therefore, it appears that in a matter of the kind in question, that if the county is to be represented by its own attorney that the County Counselor of St. Louis County must entertain this action.

That brings us to the question of whether or not the county attorney has a right to institute suits for the abatement of public nuisances at his own relation, with or without the State Board of Health joining as relator. In answering this question I will cite you to the case of State ex rel. W. A.

Thrash et al. v. Fred Lamb, 141 S. W. 665, 237 Mo. 437, in which it was held that under a statute practically identical with Section 12942, R. S. Mo. 1939, the Prosecuting Attorney of a county is made the legal representative of the State to institute a suit in behalf of the State to abate a public nuisance such as we have under consideration in this case. The above case has been cited and approved in 131 A. L. R. 1210, Note "b."

Therefore, it would appear that the County Counselor of St. Louis County, having under the law the same duties as the Prosecuting Attorneys of the various counties with respect to civil actions, is empowered to institute actions for the abatement of public nuisances. It is further apparent that the Attorney-General of the State also has the power to file actions of this kind in a effort to protect the health of the State by the abatement of such nuisances.

You further wish to know how an order of the court in a matter of this kind could be enforced. In answer to such query we will cite you to Section 1677, R. S. Mo. 1939, which provides as follows:

"If any person disobey or violate an injunction after it is served on him, the circuit court to which it is returned, or any judge thereof in vacation, shall issue an attachment against him for a contempt; and unless he shall disprove or purge the contempt, if in vacation, the judge may commit him to jail until the sitting of the court in which the injunction is pending, or take bail for his appearance in said court at the next term thereof, to answer for the contempt, and abide the order of the court, and in the meantime to observe and obey the injunction."

After reading such section of the statute, it is apparent that if the court issues an injunction in pursuance to an application filed therefor by the Prosecuting Attorney in circumstances of this kind, and a person or persons against whom the injunction is issued violate such injunction, that he

shall be held by the court in contempt and punished in pursuance to the statute cited above.

Conclusion

Therefore, it would appear that the proper procedure for your Board would be to make an effort through agreement, if possible, to have such public nuisance abated by the voluntary action of the parties responsible for such condition. If it is impossible to reach an agreement, as was the case in State ex rel. Shartel v. Humphreys, cited above, the State Board of Health should notify the County Counselor of St. Louis County of the conditions present with relation to this nuisance and ask that he apply for an injunction to abate such condition. The State Board of Health, being under the statute a board which is to safeguard the health of the people of the State, should join as relator in such request for injunctive relief.

The County Counselor of St. Louis County would be the logical one to join with the State Board of Health in filing this action in view of the fact that he is close to the conditions existing and would be in a better position to take care of such action. If the said County Counselor should refuse to join with the State Board of Health in the filing of such action, then the State Board of Health could request that the Attorney-General join with him as relators in such action for injunctive relief, since under the laws of the State the Attorney-General has the power to file such actions.

Respectfully submitted,

JOHN S. PHILLIPS  
Assistant Attorney-General

APPROVED:

---

ROY McKITTRICK  
Attorney-General

JSP:EG