

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/ SB 1608

SPONSOR: Committee on Comprehensive Planning

SUBJECT: Nuisance Abatement

DATE: February 16, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Herrin</u>	<u>Yeatman</u>	<u>CP</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The Committee Substitute (CS) clarifies the intent language of s. 893.138, F.S., to provide that a place or premises may be closed for up to 1 year to abate drug-related, prostitution-related, stolen-property-related, and street-gang-related public nuisances on the property. Specific instances of criminal activity reported by the property owner of, or the business owner of, or employee at the site of the criminal activity may not be used as the basis for a nuisance abatement board (board) to declare a property to be a public nuisance.

This CS requires a county or municipality to provide notice to a property owner of its intent to file a complaint with a nuisance abatement board (board). It requires the notice to include specific information regarding the criminal activity occurring on the property and contact information for a designated local law enforcement officer, employee, or other local government officer. The CS gives a property owner 30 days to contact the designated officer or employee to discuss corrective action before a complaint is filed. The CS provides that after 30 days following service of the notice, if the property owner fails to reach agreement with the county or municipality regarding corrective action or if criminal activities continue to occur at the property despite the corrective actions taken, the county or municipality may file a complaint with the board. Also, the CS provides notice and hearing requirements.

After the board declares a property to be a public nuisance, the CS requires the board to recommend specific procedures to abate the nuisance. The CS specifies the property owner must implement the board's recommended procedures within 30 days or the property is subject to closure for up to 1 year. The CS clarifies that certain actions of the board do not affect the availability of civil penalties under s. 893.138(13), F.S.

In addition, the CS provides that an owner who does not reside upon the property will have at least 30 days to abate the nuisance, implement the board's recommended procedures, or commence legal proceedings to abate the nuisance before the property is closed. However, if such owner abates the nuisance, implements the board's recommended procedures, or commences and diligently pursues legal proceedings to abate the nuisance, the board may not close the property under its existing order.

The CS codifies recent case law by allowing the closure of a property only if the use of the property materially contributes to the nuisance. Also, this CS provides that the closure of a property constituting an unabated public nuisance does not constitute a taking. Finally, the CS allows a board to reopen a property based upon a showing that the nuisance has been abated or the board's recommended procedures have been implemented and the proposed occupants are unlikely to maintain a public nuisance.

This CS substantially amends section 893.138 of the Florida Statutes.

II. Present Situation:

Chapter 893, F.S., relates to drug abuse prevention and control. Specifically, s. 893.138, F.S., authorizes counties and municipalities to create administrative boards to hear nuisance complaints. A place or premises may be declared a public nuisance and abated under the provisions of s. 893.138, F.S., if it has been used:

- On more than two occasions within a 6-month period, as the site of a violation of s. 796.07, F.S., relating to the prohibition of prostitution;
- On more than two occasions within a 6-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;
- On one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony and that has been previously used on more than one occasion as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;
- By a criminal street gang for the purpose of conducting a pattern of criminal street gang activity; or
- On more than two occasions within a 6-month period, as the site of a violation of s. 812.019 relating to dealing in stolen property.

If the county or municipal board, after holding a hearing, declares a place to be a public nuisance, it may require the owner to adopt a procedure to abate the nuisance or it may enter an order prohibiting the maintaining of the nuisance; the operating or maintaining of the place or premises, including closure; or the conduct, operation, or maintenance of an activity that is conducive to the nuisance.¹ An order entered by the board expires after one year or earlier as stated in the order.²

¹ S. 893.138(4), F.S.

² S. 893.138(5), F.S.

Section 893.138, F.S., may be supplemented by a county or municipal ordinance that establishes additional penalties for public nuisances. These penalties may include fines that do not exceed \$250 per day, the payment of reasonable costs associated with the investigation of and hearings on public nuisances, continued jurisdiction for a one-year period over a place or premises that is declared a public nuisance, fines not to exceed \$500 per day for recurring nuisances, recorded orders on public nuisances to become a lien against real property that is not a homestead under s. 4, Art. X of the State Constitution, and foreclosure of property subject to a lien.³ Total fines imposed under the section may not exceed \$15,000.⁴

A nuisance abatement board is authorized to file a complaint under s. 60.05, F.S. and seek temporary and injunctive relief against a property owner for any activity that may be declared a nuisance as described in s. 893.138(2), F.S.⁵ Also, the provision of law authorizing the creation of an administrative board to address public nuisances does not restrict the right of any person to proceed under s. 60.05, F.S., against a public nuisance.⁶

The Second District Court of Appeal recently addressed the issue of what constitutes sufficient opportunity to abate a public nuisance prior to a nuisance abatement board imposing sanctions in *Powell v. City of Sarasota*.⁷ The petitioners in this case, owners of a residential rental property, appealed an order by the city's nuisance abatement board imposing administrative and investigative costs. The city presented evidence to the board during a hearing that a confidential informant had purchased drugs on three occasions on the petitioner's property from their tenant. However, the city's testimony before the board demonstrated that the city's commencement of the nuisance abatement action occurred after the tenant had already moved out.

The board in the *Powell* case did not declare the property a public nuisance, but did impose costs on the petitioners and maintained continuing jurisdiction over the property as part of the board's order. The Second District Court of Appeal quashed the board's order, holding the petitioners were not given an adequate opportunity to abate the nuisance. The court stated adequate notice consists of notice that a nuisance is occurring and a reasonable period of time to eliminate the illegal activity.⁸

The subject of nuisance abatement was the topic for a 2003-04 interim project by the Committee on Comprehensive Planning. Staff consulted with local government staff responsible for assisting nuisance abatement boards and other interested parties, including the representatives of property owner associations. In addition, staff surveyed Florida's municipalities and counties regarding their use of nuisance abatement boards and received a 25% response rate.

Thirty-three of the local governments that responded to the survey had established a nuisance abatement board. Most of these boards had not closed a property. However, 1 local government reported that its board had temporarily closed 22 properties since its inception in 1989. The period of time that a property remained closed as the result of a board order varied from 10 days

³ S. 893.138(10), F.S.

⁴ S. 893.138(10), F.S.

⁵ S. 893.138(7), F.S.

⁶ S. 893.138(8), F.S.

⁷ No. 2D03-33 (Fla. 2d DCA Oct. 15, 2003).

⁸ See *id.* at 2, citing *Maple Manor, Inc. v. City of Sarasota*, 813 So. 2d. 204, 207 (Fla. 2d DCA 2002).

to 365 days. The majority of the local governments that responded to the survey indicated their boards' actions had not been the subject of takings litigation. However, the City of St. Petersburg has been a party in two appellate cases involving the temporary closure of a property by the city's nuisance abatement board. In both instances, the Second District Court of Appeal found the closure constituted a compensable taking and required compensation.

In general, the survey respondents indicated their boards had been successful in abating public nuisances. However, one local government contends its board is not able to effectively abate a public nuisance because of concerns over liability following *Keshbro, Inc. v. City of Miami*⁹ in which the Florida Supreme Court held that the temporary closure of a property by a board may constitute a compensable taking under certain circumstances. This respondent does not believe the *Keshbro* decision provides adequate guidance on whether a particular closure would constitute a taking. A number of other respondents indicate that their boards have been successful by reaching agreements that require property owners to take additional steps, such as providing private security or installation of lighting, rather than ordering a property closed.

III. Effect of Proposed Changes:

Section 1 amends s. 893.138, F.S., to clarify legislative intent that a nuisance abatement board may impose noncriminal penalties including, but not limited to, the power to close a property for up to 1 year to abate drug-related, prostitution-related, stolen-property-related, and street-gang-related public nuisances on the property. It also provides that specific instances of criminal activity reported to a law enforcement agency by the property owner of, the business owner of, or an employee at the site of the criminal activity does not constitute illegal conduct for the purpose of the board to declare a property to be a public nuisance.

A county or municipality must give a property owner notice, by hand delivery or certified mail, not less than 30 days prior to bringing a complaint to the board. The notice must describe the criminal activities occurring at the property that constitute a public nuisance, including specific instances and dates on which the criminal activity occurred. Also, the notice must contain contact information for a designated law enforcement officer, employee, or other officer of the county or municipality to discuss corrective action that may abate the nuisance.

After 30 days following service of the notice, if the owner fails to contact the designated officer or employee or the criminal activities continue to occur on the property despite actions that have been taken by the owner, the county or municipality may file a complaint with the board. The complaint may name the owner, tenant, subtenant, or other person having operational control of the premises as a respondent. The CS requires the board to hear the complaint not less than 7 calendar days after service of the notice and complaint to the owner.

If the board declares a property to be a public nuisance, the CS requires a nuisance abatement board to recommend specific procedures to abate the nuisance. If the owner does not implement the board's recommended procedures within 30 days, or a longer period as determined by the board, the property is subject to closure for up to 1 year. Also, the CS clarifies that the actions of

⁹ 801 So. 2d 864 (Fla. 2001). This case is discussed in greater detail in IV.D. of this analysis.

the board under s. 893.138(4), F.S., does not affect the availability of civil penalties under s. 893.138(13), F.S.

The owner of a place or premises who does not reside upon the property must be given at least 30 days to abate the nuisance, implement the board's recommended procedures, or take legal action to abate the nuisance. If the owner abates the nuisance, implements the board's recommended procedures, or commences and diligently pursues legal action within the prescribed time period, the board may not close the property under its existing order.

A place or premises may be closed only if the use of the property materially contributes to the nuisance. In addition, the CS provides that the closure of a property constituting an unabated nuisance does not constitute a taking.

Finally, the CS allows a board, at its discretion, to reopen a property based upon a showing that the nuisance has been abated or the board's recommended procedures have been implemented and the proposed occupants are unlikely to maintain a public nuisance.

Section 2 provides the act shall take effect October 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This CS provides that closing a property constituting an unabated public nuisance does not constitute a taking. The Fifth Amendment to the United States Constitution guarantees that citizens' private property shall not be taken for public use without just compensation. The "takings" clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Article I, s. 2 of the State Constitution also guarantees all natural persons the right to Acquire, possess and protect property and further provides that no person will be deprived of property without due process of law. Article X, s. 6 of the State Constitution is complimentary to the Fifth and Fourteenth Amendments to the United States

Constitution. It provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . ."

Where a governmental regulation results in permanent physical occupation of the property or deprives the owner of "all economically productive or beneficial uses" of the property, a "per se" taking is deemed to have occurred, thereby requiring full compensation for the property.¹⁰ Additionally, where the regulation does not substantially advance a legitimate state interest, it is invalid¹¹ and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property.¹²

In *Lucas*, the United States Supreme Court discussed the limitations on the state's ability to deprive a landowner of economically beneficial uses of land. The *Lucas* court stated that a regulation "must . . . do no more than duplicate the result that could have been achieved in the courts by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."¹³ The Florida Supreme Court, in *Keshbro*, held the *Lucas* analysis applied to nuisance abatement actions under s. 893.138, F.S.¹⁴ Accordingly, a temporary closure under s. 893.138, F.S., can be a taking and require compensation if the closure orders do not "mirror the relief" that could have been obtained "by adjacent landowners . . . or by the State under its complementary power to abate nuisances . . ."¹⁵

The *Keshbro* case consolidated *Keshbro, Inc. v. City of Miami*¹⁶ and *City of St. Petersburg v. Kablinger*,¹⁷ for purposes of review. In *Keshbro, Inc. v. City of Miami*, the petitioner owned and operated a 57-unit motel. The property was closed for 1 year in 1992 based on drug use- and prostitution-related violations. Petitioner reopened the property in 1993 and the same illegal activities began to occur. The property was again declared a public nuisance based on at least 8 arrests involving those same illegal activities. Petitioner agreed to a partial closure of the motel. Four months later, an additional 7 rooms were ordered closed. Finally, the board closed the entire motel for 6 months following 3 more arrests for the sale of drugs on the premises.

The petitioner in this case responded to the closure by filing for injunctive and declaratory relief and inverse condemnation. The circuit court granted the petitioner's motion for summary judgment on the inverse condemnation claim. Following the city's appeal, the Third District Court of Appeal reversed the summary judgment on the authority of *Lucas*. The court held the nuisance abatement board's order did deprive

¹⁰ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

¹¹ See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

¹² See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

¹³ See *Lucas*, 505 U.S. at 1029.

¹⁴ See *Keshbro*, 801 So. 2d at 869.

¹⁵ See *Keshbro*, 801 So. 2d at 875-76.

¹⁶ 717 So. 2d 601 (Fla. 3d DCA 1998).

¹⁷ 730 So. 2d 409 (Fla. 2d DCA 1999).

petitioner of all economically beneficial uses of the property, but the uses prohibited by the board's order, such as prostitution and drug use, are not entitled to protection at common law and are not part of the bundle of rights acquired with title.

In *City of St. Petersburg v. Kablinger*, the city's nuisance abatement board ordered an apartment closed in 1993 based on at least 2 occurrences of the sale of cocaine within a 6-month period. The corporation that owned the apartment complex assigned its interest in 1995 to Kablinger, the petitioner. In 1997, the petitioner sued the city for inverse condemnation based on the 1993 closure. The trial court granted petitioner's motion for summary judgment and the city appealed. The Second District Court of Appeal affirmed the trial court's granting of summary judgment and certified conflict with *Keshbro, Inc. v. City of Miami*. The Florida Supreme Court accepted the cases based on conflict jurisdiction.

The Florida Supreme Court stated in *Keshbro* that actions to abate public nuisances in Florida "must be specifically tailored to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise."¹⁸ In *Keshbro, Inc. v. City of Miami*, the Court affirmed that closure was appropriate because extensive and persistent drug use and prostitution had become "inextricably intertwined" with the operation of a motel. However, the Court held that record in *City of St. Petersburg v. Kablinger*, did not support closure with only two occurrences of illegal activities on the premises.¹⁹ Because the record did not adequately demonstrate that the repeated drug activity was an inseparable part of the operation of an apartment complex, the Court affirmed the Second District Court of Appeal's award of compensation.²⁰

The CS provides that a property may not be closed unless the occupancy of the property "materially contributes to the nuisance." This language is similar to the court's holding in *Keshbro* that where activities like drug use and prostitution are "inextricably intertwined" with the operation of a business, closure is appropriate and the property owner is not entitled to compensation under takings law. However, the *Keshbro* decision is based on the Fifth Amendment to the United States Constitution and Art. X, s. 6 of the State Constitution rather than an interpretation of state statute. Therefore, it could be argued that the Legislature lacks the authority to provide such a closure is not a taking.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Surrounding property owners may benefit from the closure of nuisance properties that have a negative economic impact on the area.

¹⁸ See *Keshbro, Inc.*, 801 So. 2d at 876.

¹⁹ See *Keshbro, Inc.*, 801 So. 2d at 875-76.

²⁰ See *id.*

The CS gives property owners 30 days notice of a county or municipality's intent to file a claim with the board. A property owner has an opportunity during that 30-day period to discuss corrective action with a designated officer or employee and avoid having a complaint brought to the board.

The nonresident property owner of a site that is the subject of a complaint may benefit from language in the CS that provides a reasonable period of time to abate the nuisance or to comply with the board's recommendations to abate the nuisance and avoid closure of the property.

C. Government Sector Impact:

A local government may see a reduction in costs associated with bringing a complaint to the board if the property owner takes advantage of the 30-day period in this CS to discuss corrective action and those actions result in the abatement of the nuisance.

The CS may benefit local governments by codifying case law that provides a property may be closed only if occupancy of the property materially contributes to the nuisance and, thus, reducing potential liability for the governmental entity.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.