

STORAGE NAME: h0381s1.ca

DATE: March 21, 1997

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
COMMUNITY AFFAIRS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 381

RELATING TO: Public Nuisances

SPONSOR(S): Committee on Real Property & Probate and Representative Carlton and others

STATUTE(S) AFFECTED: Section 893.138, Florida Statutes, 1996 Supp.

COMPANION BILL(S): SB 190(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY & PROBATE YEAS 5 NAYS 0
- (2) COMMUNITY AFFAIRS
- (3) FINANCE & TAXATION
- (4) CRIMINAL JUSTICE APPROPRIATIONS
- (5)

I. SUMMARY:

CS/HB 381 provides that counties and municipalities may impose additional penalties by ordinance on the owner of real property declared to be a public nuisance in an order to abate drug-related, prostitution-related or street gang related public nuisances. The bill provides for continuing jurisdiction for a period of 1 year over any place or premises that has been or is declared to be a public nuisance, provides for recording of orders on public nuisances, and provides that recorded orders on public nuisances may become liens against the real property subject to the order.

This bill may have a fiscal impact on local governments who choose to implement this law.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

PUBLIC NUISANCE

Statutory Authority:

Section 893.138, Florida Statutes, 1996 Supp., permits the following:

- Places or premises to be declared public nuisances when they have been used, **on more than two occasions within a six-month period**, in the following ways:
 - As the site of **prostitution**, in violation of **section 796.07, Florida Statutes**;
 - As the site of **the unlawful sale, delivery, manufacture, or cultivation of any controlled substance**;
 - As a place or building **used by a youth or street gang for the purpose of conducting a pattern of youth and street gang activity**;
- Places or premises to be declared public nuisances when they have been use, **on one occasion**, as the site of the **unlawful possession of a controlled substance, where such possession constitutes a felony and where the place or premises has been previously used on more than one occasion as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance.**
- Counties or municipalities may create, by ordinance, an administrative board to hear complaints regarding the above-listed nuisances using the following procedures:
 - **After an owner of the premises has been given at least 3 days' written notice**, a resident, employee, or officer of the county or municipality may **file a complaint with the administrative board**;
 - The board may **conduct a hearing** regarding the nuisance complaint to **consider the evidence** and the **owner** of the place or premises **must be provided an opportunity to present evidence** in his or her defense;
 - After the hearing, **if the board declares the place or premises to be a public nuisance**, it may immediately **enter an order** prohibiting the following:
 - The maintaining of the nuisance;
 - The operating or maintaining of the place or premises (including the closure of the place or premises or any part thereof), or;

- The conduct, operation, or maintenance of any business activity on the premises which is conducive to such nuisance.
- Administrative board orders expire one year after the order is entered or at an earlier date as determined by the order.

Subsection 120.69, Florida Statutes, 1996 Supp., permits an agency to seek enforcement of an agency action by filing a petition for enforcement in the circuit court. A petition for enforcement may request declaratory relief; temporary or permanent equitable relief; any fine, forfeiture, penalty, or other remedy provided by statute; any combination of the foregoing; or in the absence of any other specific statutory authority, a fine not to exceed \$1000.

Section 60.05, Florida Statutes, 1996 Supp., provides for abatement of nuisances as defined in section 823.05, Florida Statutes. Section 60.05(1), Florida Statutes, provides that the Attorney General, state attorney, city attorney, county attorney, or any citizen of the county may sue in the name of the state to enjoin the nuisance, the person or persons maintaining it, and the owner or agent of the building or ground on which the nuisance exists.

Case Law:

In, **City of St. Petersburg v. Bowen, 675 So. 2d 626 (Fla. App. 2 Dist. 1996), cert.denied, 680 So.2d 421 (Fla.1996)**, the City of St. Petersburg Nuisance Abatement Board (NAB) declared an apartment complex a nuisance, pursuant to section 893.138, Florida Statutes, under the City's nuisance ordinance. The NAB ordered the closing of the complex for one year, thus depriving the property owner of **all economic beneficial use of his property**. The Second District Court of Appeal upheld the trial court's decision that the NAB's action constituted a compensable temporary taking of a private property by the City. The Florida State Supreme Court denied certiorari.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 381 provides that counties or municipalities may enact ordinances to establish additional penalties for public nuisances as defined in section 893.138, Florida Statutes, 1996 Supp. An ordinance may include, but is not limited to, provisions that:

- Establish additional penalties for public nuisances, including fines;
- Provide for the payment of reasonable costs, including reasonable attorney fees associated with investigations of and hearings on public nuisances;
- Provide for continuing jurisdiction for a period of 1 year over any place or premises that has been or is declared to be a public nuisance;
- Establish penalties, including fines, for recurring public nuisances;
- Provide for the recording of orders on public nuisances so that notice must be given to subsequent purchasers, successors in interest or assigns of the real property that is the subject of the order;

- Provide that recorded orders on public nuisances may become liens against the real property that is the subject of the order; and
- Provide for the foreclosure of property subject to a lien and the recovery of all costs, including reasonable attorney fees, associated with the recording of orders and foreclosure. No lien created pursuant to this section may be foreclosed on real property which is a homestead.

The bill further specifies that a county or municipality is not prohibited from proceeding against a public nuisance by any other means.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill gives local governments authority to enact ordinances to provide for additional penalties for public nuisances.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Enactment of the provisions of the bill are optional for local governments. The bill would permit enhanced penalties for public nuisances.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable (N/A)

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

The bill authorizes local governments to establish additional penalties for public nuisances.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

The local administrative board which would prosecute and enforce public nuisance actions, is funded at the local level. The taxpaying citizens will benefit from the abatement of nuisances.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

Section 1: permits the provisions contained within 893.138, Florida Statutes, 1996 Supp., to be supplemented in a county or municipal ordinance. The ordinance may include, but is not limited to, the following provisions:

- Establishment of additional penalties for public nuisances, including fines;
- Provision for the recovery of reasonable costs, including reasonable attorney fees associated with investigations of and hearings on public nuisances;
- Provision for continuing jurisdiction for a period of one (1) year over any place or premise that has been or is declared to be a public nuisance;
- Establishment of penalties, including fines for recurring public nuisances;
- Provision for the recordation of orders on public nuisances to provide notice to subsequent purchasers, successors in interest, or assigns of the real property;
- Provision for the recordation of orders of public nuisances may becomes liens against the real property;
- Provision for the foreclosure of the real property subject to a lien; and
- Provision for the recovery of all costs, including reasonable attorney fees associated with the recordation of the order and foreclosure.

This section also states that **a lien created under the provisions of this section may not be foreclosed on real property which is a homestead under s.4, Art. X of the State Constitution.**

Finally, this section **does not prohibit** a county or municipality from proceeding against a public nuisance by any other means.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None anticipated.

2. Recurring Effects:

None anticipated.

3. Long Run Effects Other Than Normal Growth:

None anticipated.

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See 2 below.

2. Recurring Effects:

Local governments who exercise their option to impose additional penalties by ordinance in an effort to abate specified public nuisances may incur additional costs.

In addition, the bill provides for the recording of orders on public nuisances so that notice be given to subsequent purchasers, successors in interest, or assigns of the real property that is the subject of the order. According to the Association of Court Clerks, they do not anticipate a significant fiscal impact as a result of this bill.

3. Long Run Effects Other Than Normal Growth:

None anticipated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

The bill permits liens against real property that is subject to an order of a local administrative board. The liens could include fines, costs, and attorney's fees associated with investigations of and hearings on public nuisances. The bill also provides for the foreclosure of property subject to a lien.

2. Direct Private Sector Benefits:

The communities having heightened penalties for public nuisances, may experience a reduction in the activities governed by this law.

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3. Effects on Competition, Private Enterprise and Employment Markets:

See 1 and 2 above.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill provides local governments with the option of establishing additional penalties for public nuisances. The bill also permits the local administrative board to seek reasonable costs and attorney's fees associated with investigations of and hearings on public nuisances.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS

Fines/Delegation

The bill provides local governments with the authority to adopt ordinances for additional penalties, including the establishment of fines, for public nuisances and recurring public nuisances. **The bill does not provide a cap on the fines authorized by this amendment.** It is possible for the fines to become an undue burden on property owners, perhaps equaling or exceeding the value of the property. **This may also be a delegation problem.**

The Legislature may not delegate the power to enact a law, to declare what a law shall be, or to exercise an unrestricted discretion in applying a law. Lewis v. Florida State Bd. of Health, 143 So.2d 867, 875 (Fla. 1st DCA 1962), cert. denied, 149 So.2d 41 (Fla. 1963). Although the Legislature may authorize an administrative agency to adopt rules and regulations to enforce a particular law, **the rules must fall within fixed limits and must implement the law within its express general purpose.** Id. In determining whether a legislature has improperly delegated discretion to an agency, the court considers whether the statute establishes standards and guidelines which direct the agency in implementing the law. Solimena v. State, Dept. of Business Regulation Division of Pari-Mutuel Wagering, 402 So.2d 1240 at 1245 (Fla. 3d DCA 1981).

Although, CS/HB 381 provides a list of additional penalties which may be imposed by a county or municipal ordinance, it also states that the county or municipal government is not limited by the list. While the legislature must establish adequate standards and guidelines in delegating duties to an agency, it may not always be practical or desirable to draft detailed or specific legislation. Florida East Coast Industries, Inc. v. State, Dept. of Community Affairs, 677 So.2d 357 (Fla. 1st DCA 1996).

Section 120.69, Florida Statutes, 1996 Supp., is to be used for enforcement of orders entered pursuant to this bill. According to this section, a petition for enforcement may request declaratory relief; temporary or permanent equitable relief; any fine, forfeiture, penalty, or other remedy provided by statute, any combination of the foregoing; or, in the absence of any other specific statutory authority, a fine not to exceed \$1,000. **It is unclear whether this bill which provides local governments with the ability to impose fines, without limit, would be construed as specific statutory authority under ch. 120, or whether ch. 120 would limit the fines to \$1,000.** A possible solution to this confusion is to amend the bill is to place a cap on the leviable fines to \$1,000.

Taking:

In City of St. Petersburg v. Bowen, 675 So.2d 626 (Fla. 2nd DCA 1996), rev. den., 680 So.2d 421 (Fla. 1996), the Second District Court of Appeal upheld a trial court's decision that the closing a 15-unit apartment complex for one year, pursuant to section 893.138, Florida Statutes, denied the owner of all economically viable use of the property and qualified as a compensable "taking" under the Fifth Amendment of the U.S. Constitution or under Art. X, s. 6(a) of the Florida Constitution. **CH/HB 381 contains the same potential liability for counties and municipalities who enact ordinances pursuant to this amendment.** A possible solution to this potential liability is to amend the bill to limit possible curtailment of an owner's use of his property to those limits which would not deny the owner of all economically viable use of the property.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Real Property & Probate amended the bill, as filed, to specify that liens created pursuant to this law may not be foreclosed on real property which is a homestead under s. 4, Art. X Fla. Constitution.

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Legislative Research Director:

P.K. Jameson

P.K. Jameson

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AS REVISED BY THE COMMITTEE ON COMMUNITY AFFAIRS:

Prepared by:

Legislative Research Director:

Tonya Sue Chavis, Esquire

Jenny Underwood Dietzel