

STORAGE NAME: h0381.rpp
DATE: March 10, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
REAL PROPERTY & PROBATE
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 381

RELATING TO: Public Nuisances

SPONSOR(S): Representative Carlton

STATUTE(S) AFFECTED: Section 893.138, Florida Statutes

COMPANION BILL(S): SB 190

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

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

I. SUMMARY:

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 order to abate drug-related or prostitution-related public nuisances and criminal street gang activity.

This bill will take effect October 1, 1997.

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

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II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

PUBLIC NUISANCE

Section 893.138(1), Florida Statutes, (1996 Supp.), provides that any place or premises that has been used on more than two occasions, within a 6-month period, as follows, may be declared to be a public nuisance, and the nuisance may be abated pursuant to the procedures in this section:

(a) As the site of a violation of section 796.07, Florida Statutes. Section 796.07, Florida Statutes, prohibits prostitution, lewdness, and assignation, as defined therein.

(b) As the site of a unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

(c) On one occasion as the site of the unlawful possession of a controlled substance, where the possession constitutes a felony and previously has been used on more than one occasion as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance; or

(d) Any place or building used by a criminal street gang for the purpose of conducting a pattern of criminal street gang activity.

LOCAL PUBLIC NUISANCE BOARD

Section 893.138(2), Florida Statutes, (1996 Supp.), provides that a county or municipality may, by ordinance, create an administrative board to hear complaints regarding the nuisances described in subsection (1) above. Any employee, officer, or resident of the county or municipality may bring a complaint before the board after giving not less than 3 days' written notice of such complaint to the owner of the place or premises at the owner's last known address.

A hearing must be held by the board wherein the board may consider any evidence, including evidence of the general reputation of the place or premises. The owner of the premises must have an opportunity to present evidence in his defense.

If the board declares a place or premises to be a public nuisance, the board may enter an order requiring the owner to adopt appropriate procedures to abate the nuisance. The board may also enter an order immediately prohibiting:

(a) The maintaining of the nuisance;

(b) The operating or maintaining of the place or premises, including the closure of the place or premises or any part thereof; or

(c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to the nuisance.

An order entered under subsection (3) will expire no later than 1 year after it is entered.

ENFORCEMENT

Section 893.138(5), Florida Statutes (1996 Supp.), provides that an order entered under subsection (3) may be enforced pursuant to section 120.69, Florida Statutes. In addition, this section specifically provides that the act does not restrict the right of any person, from suing for temporary or permanent injunctive relief as provided in section 60.05, Florida Statutes.

Section 120.69, Florida Statutes, (1996 Supp.), permits an agency to seek enforcement of an 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 \$1,000.

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.

B. EFFECT OF PROPOSED CHANGES:

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.

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

DELEGATION

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).

HB 381 provides a list of additional penalties which may be imposed by a county or municipal ordinance with an expression that the county or municipal government is not limited by the list. Although 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). HB 381 appears to provide adequate standards and guidelines for the imposition of "additional penalties" for public nuisances. Therefore, there should not be a delegation problem resulting from this bill.

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.

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(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?

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:

See Effect of Proposed Changes section.

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.

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

See 1 and 2 above.

D. FISCAL COMMENTS:

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:

Homestead Property

Section 4(a), Art. X, Florida Constitution, provides an exemption of homestead property from forced sale. Creditors may not require homestead property to be sold for the repayment of obligations of indebtedness, except for obligations incurred in the purchase, improvement, or repair of the home or for labor performed on the house or field. Therefore, the liens and forced sales anticipated by this bill would likely be unconstitutional if attempted against homestead property.

Taking

In *City of St. Petersburg v. Bowen*, 675 So.2d 626 (Fla. 2nd DCA 1996), rev. den., 680 So2d 421 (Fla. 1996), the owner of a 15-unit apartment complex which the city had ordered closed based on evidence of tenant drug use therein filed a complaint for inverse condemnation against the city. The court entered summary judgment in favor of the property owner. On appeal, the district court held that the municipal order closing the apartment complex for one year as a statutory nuisance qualified as a compensable temporary "taking" under the Fifth Amendment of the U.S. Constitution or under Art. X, s. 6(a) of the Florida Constitution. Therefore, the owner is entitled to payment for the fair value for the use of the property for one year. *Id.* at 632.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

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