

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 2118

SPONSOR: Comprehensive Planning Committee, Senators Dockery and Alexander

SUBJECT: Public Nuisances

DATE: April 21, 2003

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:

This bill clarifies the intent language of s. 893.138, F.S., to provide that a place or premises may be closed for 1 year to abate drug-related, prostitution-related, stolen-property related and street-gang related public nuisances on the property. The bill provides that a nonresident owner will have a reasonable time to abate the nuisance before the property is closed. A property will not be closed if the nonresident owner commences legal proceedings, within ten days of the hearing before the nuisance abatement board, to abate the nuisance. This bill provides that a closure to abate a public nuisance shall not constitute a taking.

This bill 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; 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 if stated in the order.²

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. Total fines imposed under the section may not exceed \$15,000.

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 1 year to abate drug-related, prostitution-related, stolen-property related and street-gang related public nuisances on the property.

The bill provides that a place or premises may be closed if it materially contributes to the nuisance. A nonresident owner of the premises must be given a reasonable amount of time to abate the nuisance prior to closing the property. If the nonresident abates the nuisance within a reasonable time or takes legal action on or before the tenth day after a hearing before the board that hears nuisance abatement complaints, and is diligently pursuing the action, the property may not be closed. The bill states that closure of a property does not constitute a taking.

Section 2 provides the act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹ S. 893.138(4), F.S.

² S. 893.138(5), F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill provides that closing a property which constitutes an unabated public nuisance shall 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.³ Additionally, where the regulation does not substantially advance a legitimate state interest, it is invalid⁴ and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property.⁵

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), 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."⁶ The Florida Supreme Court held the *Lucas* analysis applied to nuisance abatement actions under s. 893.138, F.S., in *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001). Accordingly, a

³ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

⁴ See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁵ See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

⁶ See *Lucas*, 505 U.S. at 1029.

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 under nuisance actions.⁷

The *Keshbro* court explained further 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.”⁸ In *Keshbro*, the Court affirmed that closure was appropriate when extensive and persistent drug use and prostitution had become “inextricably intertwined” with the operation of a motel, but closure of an apartment complex was not appropriate based on a showing that an apartment had been the site of cocaine sales on more than two occasions.⁹ In the latter circumstance, the Court found there was no extensive record indicating the repeated drug activity was an inseparable part of the operation of an apartment complex.¹⁰

This bill 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 finding 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 of the United States Constitution and not on 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 may have a negative economic impact on the area.

C. Government Sector Impact:

The bill may benefit local governments by allowing the closure of properties that constitute a public nuisance for up to one year without compensating the property owner.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

⁷ See *Keshbro, Inc.*, 801 So. 2d at 875.

⁸ See *Keshbro, Inc.*, 801 So. 2d at 876.

⁹ See *Keshbro, Inc.*, 801 So. 2d at 875-76.

¹⁰ See *id.*

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
