

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1443 Local Administrative Action to Abate Public Nuisances and Criminal Gang Activity

**SPONSOR(S):** Community & Military Affairs Subcommittee; Criminal Justice Subcommittee; Frishe and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1580

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Krol	Cunningham
2) Community & Military Affairs Subcommittee	14 Y, 0 N, As CS	Gibson	Hoagland
3) Judiciary Committee	16 Y, 0 N	Krol	Havlicak

### SUMMARY ANALYSIS

Section 893.138, F.S., authorizes counties and municipalities to create an administrative board to hear complaints regarding certain public nuisances. These nuisances may include places or premises that have been used:

- on more than two occasions within a 6-month period, as the site of a violation relating to 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 gang for the purpose of conducting criminal gang activity;
- on more than two occasions within a 6-month period, as the site of dealing in stolen property.

If the administrative board declares a place or premises to be a public nuisance, it may enter an order requiring the owner to adopt a procedure considered to be appropriate under the circumstances to abate the nuisance or it may enter an order immediately prohibiting:

- 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 or activity on the premises which is conducive to such nuisance.

An order entered expires after 1 year or earlier if stated in the order.

The bill amends s. 893.138, F.S., to add the following to the list of places that may be declared to be a public nuisance and that are subject to the local administrative abatement procedures:

- Places or premises that have been used on more than two occasions within a 6-month period, as the site of the storage of a controlled substance with intent to unlawfully sell or deliver the controlled substance off the premises.

The bill also allows an administrative board, after proper notice and a hearing, to extend the term of the abatement order for up to 1 year upon a finding of recurring public nuisance activity or noncompliance.

The bill may have a positive fiscal impact on counties and municipalities. See fiscal comments.

The bill has an effective date of July 1, 2012.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1443e.JDC

DATE: 2/16/2012

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Public Nuisances

Chapter 823, F.S., contains a variety of provisions that declare certain places public nuisances. For example, s. 823.05(1), F.S., declares any building, booth, tent, or place a public nuisance if such building, booth, tent, or place:

- tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in s. 823.01, F.S.;<sup>1</sup>
- constitutes a place of prostitution, assignation, or lewdness;
- is a place or building where games of chance are engaged in violation of law; or
- is a place where any law of the state is violated.<sup>2</sup>

Section 823.10, F.S., provides that a public nuisance is any store, shop, warehouse, dwelling house, building, structure, vehicle, ship, boat, vessel, or aircraft, or any place, which is:

- visited by persons to unlawfully use any substance controlled under ch. 893, F.S.,<sup>3</sup> or any drugs as described in ch. 499, F.S.,<sup>4</sup> or
- used to illegally keep, sell, or deliver the drugs described above.

Generally, the remedy for those harmed by a public nuisance is injunctive relief pursuant to the provisions of ch. 60, F.S. However, some statutes set forth criminal penalties for maintaining a public nuisance. For example, it is a third degree felony for any person to willfully keep or maintain a public nuisance described in s. 823.10, F.S., where such public nuisance is a warehouse, structure, or building.<sup>5</sup>

#### Abatement of Public Nuisances

Section 60.05, F.S., provides that when a nuisance as defined in s. 823.05, F.S., exists, 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. The court may issue a temporary injunction without bond upon evidence<sup>6</sup> or affidavit that a location is shown to be a public nuisance, to enjoin:

- the maintaining of a nuisance;
- the operating and maintaining of the place or premises where the nuisance is maintained;
- the owner or agent of the building or ground upon which the nuisance exists;
- the conduct, operation, or maintenance of any business or activity operated or maintained in the building or on the premises in connection with or incident to the maintenance of the nuisance.<sup>7</sup>

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<sup>1</sup> A violation of s. 823.01, F.S., is a second degree misdemeanor and punishable by a fine of up to \$500. Section 775.083, F.S.

<sup>2</sup> Section 823.05(1), F.S., also provides that if a person is found guilty of maintaining a public nuisance, the building, erection, place, tent, or booth and the furniture, fixtures, and contents are declared a nuisance.

<sup>3</sup> Section 893.02(4), F.S., defines "controlled substance" as "any substance named or described in Schedules I-V of s. 893.03, F.S."

<sup>4</sup> Section 499.003(19), F.S., defines "drug" as "an article that is: (a) Recognized in the current edition of the United States Pharmacopoeia and National Formulary, official Homeopathic Pharmacopoeia of the United States, or any supplement to any of those publications; (b) Intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals; (c) Intended to affect the structure or any function of the body of humans or other animals; or (d) Intended for use as a component of any article specified in paragraph (a), paragraph (b), or paragraph (c), but does not include devices or their components, parts, or accessories." Section 499.003, F.S., also defines the following drugs: "compressed medical gas;" "contraband prescription drug;" "new drug;" "prescription drug;" "proprietary drug" or "OTC drug;" and "veterinary prescription drug."

<sup>5</sup> A third degree felony is punishable by up to 5 years imprisonment and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S.

<sup>6</sup> Evidence of the general reputation of the alleged nuisance and place is admissible to prove the existence of the nuisance. Section 60.05(3), F.S.

<sup>7</sup> Section 60.05(2), F.S.

The injunction must specify the activities enjoined and must omit any lawful business unrelated to the maintenance of the nuisance complained of.<sup>8</sup> At least 3 days' notice in writing must be given to the defendant of the time and place of application for the temporary injunction.<sup>9</sup>

If the existence of the nuisance is proved at trial, the court will:

- issue a permanent injunction;
- order the costs to be paid by the person establishing or maintaining the nuisance; and
- assess the costs as a lien on all personal property found in the place of the nuisance.<sup>10</sup>

In a proceeding abating a nuisance pursuant to s. 823.10, F.S., or s. 823.05, F.S., if a tenant has been convicted of an offense under ch. 893, F.S., or s. 796.07, F.S., the court may order the tenant to vacate the property within 72 hours if the tenant and owner of the premises are parties to the nuisance abatement action and the order will lead to the abatement of the nuisance.<sup>11</sup>

### **Abatement of Public Nuisances through Administrative Boards**

In addition to the abatement of public nuisances through court proceedings pursuant to ch. 60, F.S., s. 893.138, F.S., provides counties and municipalities with local administrative action to abate criminal gang activity, and drug-related, prostitution-related, or stolen property-related public nuisances. Any county or municipality may, by ordinance, create an administrative board (board) to hear complaints regarding the public nuisances described below.<sup>12</sup>

Section 893.138(2), F.S., provides that the following places and premises may be declared a public nuisance if the place or premise 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 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;<sup>13</sup>
- 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 gang for the purpose of conducting criminal gang activity as defined by s. 874.03, F.S.;<sup>14</sup> or
- on more than two occasions within a 6-month period, as the site of a violation of s. 812.019, F.S., relating to dealing in stolen property.

Section 893.138(3), F.S., also provides that any pain-management clinic, as described in s. 458.3265, F.S., or s. 459.0137, F.S., may be declared to be a public nuisance if the location has been used on more than two occasions within a 6-month period as the site of a violation of:

- s. 784.011, F.S., s. 784.021, F.S., s. 784.03, F.S., or s. 784.045, F.S., relating to assault and battery;
- s. 810.02, F.S., relating to burglary;

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Section 60.05(4), F.S., providing that if the personal property lien is not enough to pay the costs then the lien will be placed on the real estate occupied by the nuisance. No lien will be attached to the real estate of any other than said persons unless 5 days' written notice has been given to the owner or his or her agent who fails to begin to abate the nuisance within the 5 days provided.

<sup>11</sup> Section 60.05(4), F.S.

<sup>12</sup> Section 893.138(4), F.S.

<sup>13</sup> "Controlled substance" is defined in s. 893.138(10), F.S. as including any substance sold in lieu of a controlled substance in violation of s. 817.563, F.S., or any imitation controlled substance defined in s. 817.564, F.S.

<sup>14</sup> Section 874.03(4), F.S., defines "criminal gang-related activity" as "an activity committed with the intent to benefit, promote, or further the interests of a criminal gang, or for the purposes of increasing a person's own standing or position within a criminal gang; an activity in which the participants are identified as criminal gang members or criminal gang associates acting individually or collectively to further any criminal purpose of a criminal gang; an activity that is identified as criminal gang activity by a documented reliable informant; or an activity that is identified as criminal gang activity by an informant of previously untested reliability and such identification is corroborated by independent information."

- s. 812.014, F.S., relating to dealing in theft;
- s. 812.131, F.S., relating to robbery by sudden snatching; or
- s. 893.13, F.S., relating to the unlawful distribution of controlled substances.

Any employee, officer, or resident of the county or municipality may bring a complaint before the board after giving at least 3 days' written notice of such complaint to the owner of the place or premises at the owner's last known address.<sup>15</sup> A hearing must then be held, where the board may consider any evidence<sup>16</sup> and the owner of the premises has an opportunity to present evidence in his or her defense. After such hearing, the board may declare the place or premises to be a public nuisance as described above.<sup>17</sup>

If the board declares a place or premises to be a public nuisance, it may enter an order requiring the owner of such place or premises to adopt a procedure considered to be appropriate under the circumstances to abate any such nuisance or it may enter an order immediately prohibiting:

- 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 or activity on the premises which is conducive to such nuisance.<sup>18</sup>

An order expires after 1 year, or earlier if stated in the order.<sup>19</sup> The order may be enforced pursuant to the procedures contained in s. 120.69, F.S.<sup>20,21</sup>

The board may also bring a complaint under s. 60.05, F.S., seeking temporary and permanent injunctive relief against any nuisance described in subsection (2).<sup>22,23</sup>

Nothing contained within s. 893.138, F.S., prohibits a county or municipality from proceeding against a public nuisance by any other means.<sup>24</sup>

Section 893.138(11), F.S., provides that the provisions outlined above may be supplemented by a county or municipal ordinance, which may include, but is not limited to, provisions that establish additional penalties for public nuisances that:

- include fines not to exceed \$250 per day;<sup>25</sup>
- 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 not to exceed \$500 per day for recurring public nuisances;<sup>26</sup>
- 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;

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<sup>15</sup> Section 893.138(4), F.S.

<sup>16</sup> Section 893.138(4), F.S., provides that evidence of the general reputation of the place or premises is admissible at the hearing.

<sup>17</sup> *Id.*

<sup>18</sup> Section 893.138(5), F.S.

<sup>19</sup> Section 893.138(6), F.S.

<sup>20</sup> Section 120.69, F.S., relates to enforcement of agency action. This section provides that an agency may seek enforcement of an action by filing a petition for enforcement in the circuit court where the subject matter of the enforcement is located.

<sup>21</sup> Section 893.138(7), F.S.

<sup>22</sup> Section 893.138(8), F.S.

<sup>23</sup> Section 893.138(9), F.S., provides that this section does not restrict the right of any person to proceed under s. 60.05, F.S., against any public nuisance.

<sup>24</sup> Section 893.138(11), F.S.

<sup>25</sup> Section 893.138(11), F.S., provides that the total fines imposed pursuant to the authority of this section shall not exceed \$15,000.

<sup>26</sup> *Id.*

- 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.<sup>27</sup>

### Effect of the Bill

The bill amends s. 893.138(2), F.S., to add the following to the list of places that may be declared to be a public nuisance and that are subject to the local administrative abatement procedures established in s. 893.138, F.S.:

- Places or premises that have been used on more than two occasions within a 6-month period, as the site of the storage of a controlled substance with intent to unlawfully sell or deliver the controlled substance off the premises.

Upon receiving a complaint of recurring public nuisance activity or noncompliance and after providing at least 3 days' notice to the owner of a place or premises that has been declared to be a public nuisance, the board must conduct a hearing to determine whether the owner has violated the administrative order. If a violation is found, the bill allows the administrative board to extend the term of the abatement order for up to 1 year and may impose additional penalties authorized by s. 893.138, F.S., and by a supplemental county or municipal ordinance.

The bill specifies that the above extension allows the administrative board continued jurisdiction over any place or premise that has been or is declared to be a public nuisance.

The bill also fixes statutory drafting errors created by the 2011 addition of subsection (3).<sup>28</sup>

#### B. SECTION DIRECTORY:

**Section 1:** amends s. 893.138, F.S., relating to local administrative action to abate drug-related, prostitution-related, or stolen-property-related public nuisances and criminal gang activity.

**Section 2:** provides an effective date of July 1, 2012.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill provides counties and municipalities with the ability to administer fines on public nuisances where the place or premise has been used on two or more occasions within a 6-month period as the site of storage of a controlled substance with intent to unlawfully sell or deliver the controlled substance off the premises. This may provide counties and municipalities with increased revenue.

<sup>27</sup> Section 893.138(11), F.S., provides that no lien created pursuant to the provisions of this section may be foreclosed on real property which is a homestead under s. 4, Art. X of the State Constitution.

<sup>28</sup> Ch. 2011-141, L.O.F.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2012, the Criminal Justice Subcommittee approved a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Specifies that a place or premise that has been used on more than two occasions as the site of storage of a controlled substance with intent to sell or deliver the controlled substance off the premises may be declared a public nuisance.
- Clarifies the process the local administrative abatement board must follow when determining whether the owner of a place or premise declared to be a public nuisance has violated an order.
- Fixes statutory drafting errors.

On January 31, 2012, the Community & Military Affairs Subcommittee adopted an amendment to clarify that in order for a place or premises to be declared a public nuisance if the location has been used on more than two occasions within a 6-month period as the site of the storage of a controlled substance with intent to sell or deliver the controlled substance off the premises, there must be the intent to *unlawfully* sell or deliver the controlled substance off the premises.

The analysis is drafted to the committee substitute as passed by the Community & Military Affairs Subcommittee.