The Florida Senate

Interim Project Report 2004-122 *November 2003*

Committee on Comprehensive Planning James E. "Jim" King, Jr., President

NUISANCE ABATEMENT

SUMMARY

Local governments may establish nuisance abatement boards to hear complaints of a public nuisance involving a number of illegal activities such as drug use and prostitution. Section 893.138, F.S., provides specific criteria that a property must meet before a local government may declare the property a public nuisance. After declaring the property a nuisance, a board may order the property owner to take necessary steps to eliminate the nuisance. Under this provision, some local governments have ordered the temporary closure of a property.

The takings issue is a concern for some local governments that have temporarily closed a property to abate a nuisance. Nationwide, courts have reviewed nuisance abatement laws to determine if a temporary closure constitutes a compensable taking. Some courts have applied the rule of *Lucas v. South Carolina Coastal Council*[1] in which the U. S. Supreme Court held that a regulatory action of government depriving a property owner of all economically beneficial uses requires compensation. The *Lucas* court also fashioned a nuisance exception to this rule.

The Florida Supreme Court in *Keshbro, Inc. v. City of Miami*[2] recognized Florida law is well settled that an injunction to abate a nuisance must be narrowly tailored to abate the specific objectionable conduct. The facts before the court resulted from the consolidation of two cases. In *Keshbro*, the court found the record adequate to support a temporary closure and, thus, no compensation was required. However, the court determined the record in *Kablinger*[3] lacked evidence that the business activity was inseparable from the illegal conduct and, therefore, the court ordered compensation for the period of closure. Based on this decision, legislation was filed in 2003 to address the takings issue as it relates to nuisance abatement boards. However, this legislation did not pass.

Staff submitted a survey to Florida's municipalities and counties requesting information on the success of nuisance abatement boards, any problems with the boards, and suggested revisions. In general, the respondents indicated that property owners either take appropriate steps to eliminate a nuisance after receiving notice of a complaint or bring the property into compliance with a board's orders following a hearing. The survey respondents suggested several changes to s. 893.138, F.S. Staff also consulted with representatives of organizations representing property owners potentially affected by nuisance abatement boards.

BACKGROUND

The issue of nuisance abatement is a concern for some local governments. Public nuisance complaints often involve illegal activity such as drug use, prostitution, dealing in stolen property, and criminal activity by street gangs. Currently, s. 893.138, F.S., allows local governments to establish a nuisance abatement board to hear public nuisance complaints. These boards may take various administrative actions to abate a drug-related, prostitution-related, or stolen-property related public nuisance and criminal street gang activity, including a temporary closure of the property. Section 60.05, F.S., also provides a process for citizens and the city or county attorney to petition for a temporary injunction to abate a public nuisance. For other types of public nuisances such as the disposal of dead animals, the abandonment of refrigerators and other appliances, and abandoned or derelict vessels, ch. 823, F.S., provides penalties for the maintenance of those nuisances.

[1] 505 U.S. 1003 (1992).
[2] 801 So. 2d 864 (Fla. 2001).
[3] *City of St. Petersburg v. Kablinger*, 730 So. 2d 409 (Fla. 2d DCA 1999) consolidated with *Keshbro, Inc. v. City of Miami*, 717 So. 2d 601 (Fla. 3d DCA 1998).

Specifically, s. 893.138, F.S., authorizes a local government to create an administrative board to address public nuisances. The board may impose administrative fines and penalties to abate a nuisance when a pending or repeated violation continues at a particular property. Those properties subject to the board include any place or premises that has been used for the following:

- on more than two occasions within a 6-month period as the site of a violation of s. 796.07, F.S., that prohibits prostitution;
- on more than two occasions within a 6-month period as a site for the unlawful sale, delivery, manufacture, or cultivation of a controlled substance;
- on one occasion as the site of a felony involving the unlawful possession of a controlled substance and that has been previously used as the site for the unlawful sale, delivery, manufacture, or cultivation of a controlled substance;
- by a criminal street gang for a pattern of criminal street gang activity as defined in s. 874.03, F.S.; or
- on more than two occasions within a 6-month period for a violation of s. 812.019, F.S., relating to stolen property.

Properties that meet the above criteria may be declared a public nuisance and the nuisance may be abated using the procedures in this section of law.[4] Section 893.138(3), F.S., allows a county or municipality to create, by ordinance, an administrative board to hear nuisance complaints.

Under existing provisions, an employee or officer of the local government, or a resident within its jurisdiction, may file a complaint with the board not less than 3 days after giving written notice of the complaint to the property owner at his or her last known address. The board must then hold a hearing at which it may consider any evidence, including evidence that goes to the reputation of the property. During the hearing, the property owner shall be given an opportunity to present evidence in his or her defense. The board, after hearing the evidence, may declare the property a nuisance.[5]

Should the board declare the property a nuisance, the board may enter an order requiring the property owner to adopt procedures to abate the nuisance as appropriate under the circumstances. In addition, the board may enter an order prohibiting the maintaining of the nuisance; the operating or maintaining of the property, including the closure of the premises or any part thereof; or the conduct, operation, or maintaining of any business or activity on the property that is conducive to a public nuisance. Any such order issued by the board shall expire after 1 year or earlier as specified in the order. The order may be enforced according to the provisions of s. 120.69, F.S. However, this provision does not subject the municipality or the board it creates to abate public nuisances to ch. 120, F.S.[6]

Specifically, s. 120.69, F.S., allows the local government to seek enforcement of the nuisance abatement board's order by filing a petition in circuit court. Upon entering an order on a petition for enforcement, the court may award all or part of the litigation costs, reasonable attorney fees, and expert witness fees to the prevailing party as the court deems appropriate.[7]

This section of law allowing the creation of administrative boards does not prohibit the local government from proceeding by any other means against a public nuisance. For example, the local government may supplement the provisions contained in s. 893.138, F.S., with an ordinance. Such an ordinance may establish additional penalties for maintaining a public nuisance with those fines not to exceed $250 per day. Also, the fines may provide for the payment of reasonable costs, including attorney fees resulting from the investigation of and hearing on a public nuisance complaint, and provide for continuing jurisdiction over a nuisance property for a period of 1 year.[8]

A local ordinance may establish penalties for a recurring public nuisance not to exceed $500 per day. It may allow for the recording of orders relating to public nuisances so that subsequent purchasers, successors in interest, or assigns of the property have notice of the nuisance. Total fines imposed against a property owner pursuant to this section for a public nuisance or recurring public nuisance may not exceed $15,000.[9]

An ordinance can provide that recorded orders on a public nuisance may become a lien against the real

[4] S. 893.138(2), F.S.
[5] S. 893.138(3), F.S.
[6] S. 893.138(4), F.S.
[7] S. 120.69(7), F.S.
[8] S. 893.138(10), F.S.
[9] S. 893.138(10), F.S.

property that is the subject of the order. Under a local ordinance, a property subject to a lien may be foreclosed on to recover all costs, including reasonable attorney fees, related to the recording of the order and the foreclosure.[10] However, a homestead property as defined in s. 4, Art. X of the State Constitution is not subject to foreclosure.

Should a local government bring an administrative action against a public nuisance based on dealing in stolen property and there are multiple tenants at the site who conduct their own retail business, the property owner shall not be subject to a lien against his or her property if the owner evicts the business that has been declared to be a nuisance. This eviction must occur within 90 days after the property owner receives notification by registered mail that the tenant has a second stolen property conviction.

Temporary Injunctions and Abatement of Nuisances ─ 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 under the criteria listed above. 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.

The Attorney General, state attorney, city attorney, county attorney, or any citizen of the county may sue to enjoin a nuisance, the person maintaining the nuisance, and the property owner under s. 60.05, F.S. If the evidence supports a temporary injunction, the court may enjoin:

- the maintenance of the nuisance;
- the operation and maintenance of the site where the illegal activity is occurring;
- the owner of the site of the nuisance; and
- the operation of a business or activity in a structure on the property if connected with the maintenance of the nuisance.

Such an injunction may not preclude the operation of a lawful business that is not conducive to the maintenance of the nuisance. Three day's notice is required of the time and place of application for a temporary injunction.[11]

Evidence that speaks to the general reputation of the property is admissible. If a citizen files suit and the complaint is not dismissed, the state attorney shall proceed with the complaint. Should the court determine there was no reasonable ground to file suit, costs are taxed to the citizen.[12]

If the evidence shows a nuisance exists, the court shall issue a permanent injunction and the costs are taxed to the person establishing or maintaining the nuisance. These costs are a lien on the personal property found at the site of the nuisance and then attach to the real property occupied by the nuisance. Also, the court may evict a tenant for certain illegal activities if the tenant and property owner are parties to the nuisance abatement action and the eviction will effectively abate the nuisance.[13]

Adequate Opportunity to Abate the Nuisance ─ 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*.[14] 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. At the time the petitioners appeared before the board, the tenant had already moved out of petitioner's rental property.

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 explained adequate notice consists of notice that a nuisance is occurring and a reasonable period of time to eliminate the illegal activity.[15]

Takings Jurisprudence and Nuisance Abatement ─ The United States Supreme Court, in *Lucas v. South Carolina Coastal Council,*[16] applied a "categorical rule

[10] S. 893.138(10), F.S.
[11] S. 60.05(2), F.S.
[12] S. 60.05(3), F.S.
[13] S. 60.05(4) - (5), F.S.
[14] *Powell v. City of Sarasota*, No. 2D03-33 (Fla. 2d DCA Oct. 15, 2003).
[15] *See id.* at 2, citing *Maple Manor, Inc. v. City of Sarasota*, 813 So. 2d. 204, 207 (Fla. 2d DCA 2002).
[16] 505 U.S. 1003 (1992).

of compensation". This rule requires federal and state governments to compensate a property owner when that government's regulation deprives the property owner of any economically beneficial use of the property.

The *Lucas* case involved the owner of two residential lots on a barrier island in South Carolina. He bought the lots in 1986 for the purpose of building single family homes on the adjacent parcels. The State enacted the Beachfront Management Act that prohibited the building of a habitable structure on the lots. The property owner filed suit, contending that the newly enacted legislation deprived him of all economically beneficial use of his property even if the statute was based on the lawful exercise of police power.[17] The Supreme Court of South Carolina held that a regulation designed to "prevent serious public harm" does not require compensation regardless of its effect on a property's value.[18] The U.S. Supreme Court reversed and held that a regulation depriving the property owner of all economically beneficial use of the property requires compensation unless the proscribed use was not part of the title.[19]

This categorical rule does not take into account whether the property owner is at fault, whether the specific remedies ordered by a nuisance abatement board are reasonably related to abating the nuisance, and whether the public benefit derived from abating the nuisance warrants the severity of the remedy to the property owner.[20] However, the *Lucas* court stated a nuisance exception to this rule does not require a government to compensate property owners if the regulation at issue prohibits a nuisance which renders the property unusable.

Courts across the country have dealt with the issue differently. Some state courts have developed a variety of rules to evaluate whether a government regulation allowing the abatement of nuisances is a compensable taking. Other states have upheld their nuisance abatement laws and forced property owners to eliminate the nuisance or face a closure or demolition notwithstanding the property owner's innocence. Relying on *Lucas*, some states have held that a temporary closure for the purpose of nuisance abatement results in the deprivation of all economically beneficial use of the property and is, therefore, a compensable taking.[21]

The Florida Supreme Court is among the minority of state courts that have applied *Lucas* and yet avoided a strict application of its nuisance exception, but rather considered the severity of the remedy ordered by a nuisance abatement board. These courts have recognized the state's ability to regulate nuisances to protect public health, safety, and welfare. However, these courts have also considered whether a temporary closure to abate a nuisance is a compensable taking, whether the property owner is at fault, whether the remedy ordered by a nuisance abatement board is narrowly tailored to eliminate the illegal activity, and whether there is an appropriate balance between the temporary deprivation of property rights with the public benefit derived from abating the nuisance.[22] [23]

The U.S. Supreme Court addressed the issue of whether a temporary moratoria on development during the process of creating a comprehensive land use plan effected a compensable taking in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[24] This case involved two building moratoria by the Tahoe Regional Planning Agency that totaled 32 months. Property owners affected by the moratoria filed suit contending the temporary building moratoria constituted a taking without compensation.[25] The Court focused its analysis on the categorical rule of *Lucas* and the ad hoc analysis required by *Penn Central Transportation Co. v. New York City*.[26]

The *Penn Central* case provided for an analysis of a number of factors including a regulation's economic effect on a property owner, the extent of any interference with a property owner's investment-backed expectations, and the nature or character of the

[17] *See id.*. at 1003.
[18] *See id.* at 1010, citing, *inter alia*, *Mugler v. Kansas*, 123 U.S. 623 (1887).
[19] *Lucas*, 505 U.S. at 1027.
[20] Carmon Harvey, Protecting the Innocent Property Owner: Takings Law in the Nuisance Abatement Context (Dec. 22, 2002) (unpublished manuscript, on file with the *Temple Law Review*).
[21] *See id.*
[22] *See id.*
[23] *Cf.* Milton A. "Al" Galbraith, Jr., The Future of Nuisance Abatement Boards in Light of *Tahoe-Sierra Preservation Council*, City, County and Local Government Law Section, 25th Annual Local Government Law in Florida Seminar, May 10-11, 2002 (discussing the application of the *Lucas* categorical rule to nuisance abatement cases).
[24] 535 U.S. 302 (2002).
[25] *See id.* at 306-07.
[26] 535 U.S. 302 (2002).

government's action."[27] This type of analysis permits a "careful examination and weighing of all the relevant circumstances."[28] The Court clarified that the categorical rule in *Lucas* is applicable to only those extraordinary cases where a regulation permanently deprives a property of all value. The Court reiterated that a regulatory takings analysis requires a "fact-specific inquiry."[29] Upon further review, the Court declined to create a new categorical rule for circumstances in which an individual property owner bears the burden that should be borne by the public as a whole.[30] The Court concluded that "the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach" and affirmed the lower court's ruling that the temporary moratoria did not constitute a taking.[31]

Florida Case Law – In 2001, the Florida Supreme Court accepted *Keshbro, Inc. v. City of Miami*[32] and *City of St. Petersburg v. Kablinger*[33] for review and consolidated those cases. The issue before the court was whether the temporary closures effected by the respective nuisance abatement boards and their corresponding city code provisions to abate public nuisances constituted a compensable taking.[34] As a requisite matter, the court made a determination of the appropriate takings analysis given the facts of these cases.[35]

In *City of Miami v. Keshbro*, the petitioner, Keshbro, Inc., owned and operated a 57-unit motel. The City of Miami's nuisance abatement board closed the property in 1992 for 1 year based on drug use and prostitution-related violations. Petitioner reopened the motel in 1993 and the same illegal activities began to occur. The city served the petitioner notice in 1996 that the motel again constituted a public nuisance based on the drug- and prostitution-related activities and cited at least 8 arrests involving those activities. The petitioner agreed to a partial closure of the motel. Four months later, the nuisance abatement board, at a status hearing, ordered an additional 7 rooms closed because of incidents of the same illegal activities. Following 3 arrests for the sale of cocaine on the motel premises, the board ordered the entire motel closed for 6 months in 1997.

The petitioner in *Keshbro* 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 v. South Carolina Coastal Council*. The court held the nuisance abatement board's order did deprive 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.[36]

In *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*. The Florida Supreme Court accepted the cases based on conflict jurisdiction.[37]

Both the appeal courts in the *Keshbro* and *Kablinger* decisions relied on *Lucas*.[38] In *Lucas*, the U.S. Supreme Court recognized that regulatory action requires compensation where the regulation results in (1) the property suffering a physical invasion or (2) the property owner is deprived of all beneficial or productive use of the land.[39] According to the *Lucas* court, a state can only avoid compensating the property owner if the regulation at issue prohibits uses that are not associated with title.[40] The U.S. Supreme Court stated earlier in *First English Evangelical Lutheran Church v. County of Los Angeles*[41] that "[t]emporary takings which, as here, deny a landowner all use of his

[27] *See id.* at 315, *citing*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).
[28] *Tahoe-Sierra Preservation Council*, 535 U.S. at 322, *citing*, *Palazzalo*, 533 U.S. at 636.
[29] *Tahoe Sierra Preservation Council*, 535 U.S. at 332.
[30] *See id.* at 342.
[31] *See id.* at 342.
[32] 717 So. 2d 601 (Fla. 3d DCA 1998).
[33] 730 So. 2d 409 (Fla. 2d DCA 1999).
[34] *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 866 (Fla. 2001).
[35] *See id.* at 867.
[36] *See id.* at 867-68.
[37] *See id.* at 868-69.
[38] *See id.* at 869.
[39] 505 U.S. 1003, 1015 (1992).
[40] *See id.* at 1017-18.
[41] 482 U.S. 304 (1987).

property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[42]

Reviewing the facts of *Keshbro* and *Kablinger*, the Florida Supreme Court determined the nuisance abatement board orders in question "rendered the properties economically idle".[43] The Court then looked to see if the cities had identified any "background principles of nuisance and property law that prohibit the uses."[44] The *Lucas* court stated that "[a] regulation so restricting the use of property can '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.'"[45] Therefore, the Court focused in *Keshbro* on whether the order sought the same relief that could have been obtained by an adjacent landowner of uniquely affected party under Florida's nuisance abatement law and the complementary powers of local government.[46]

Florida law is well settled that an injunction issued to abate a public nuisance "must be specifically tailored to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise."[47] Applying this principle to the cases at hand, the operation of the motel in *Keshbro* was found by the Third District Court of Appeal to be inexplicably intertwined with illegal drug and prostitution activities. The record demonstrated the city's patience in abating the nuisance. However, the illegal activities persisted despite the city's efforts. Thus, the court held that the petitioner in *Keshbro* was not entitled to a summary judgment on inverse condemnation.[48]

In contrast, the *Kablinger* case lacked an integral connection between the illegal activity and the apartment complex. The closure order was issued in this case after the apartment had been the site of at least 2 cocaine sales. The Court found the *Kablinger* record lacked evidence that the sale of illegal drugs was inseparable from the operation of the apartment complex. Therefore, the Court affirmed the summary judgment based on inverse condemnation.[49]

Proposed 2003 Legislation – During the 2003 Regular Session, Senate Bill 2118 proposed several changes to s. 893.138, F.S., but the bill did not pass into law. Those changes included clarifying that the administrative penalties available to local governments include the power to close nuisance properties for up to 1 year if necessary to abate drug-related, prostitution-related, stolen-property-related or street-gang-related public nuisances.

This bill also contained language that provided greater notice to nonresident property owners. It requires a nonresident owner be given a reasonable period of time to abate the nuisance before the property is closed. The property of a nonresident property owner that abates the nuisance within a reasonable time or diligently pursues legal action to abate the nuisance may not be closed by the board. Such legal proceedings must be initiated by the nonresident property owner on or before the tenth day following a hearing in front of the administrative board. The bill also provides that a nonresident owner's opportunity to abate the nuisance or take legal action against the nuisance may occur before or after the hearing.

Notably, the bill also stipulates that a closure of property constituting a public nuisance shall not constitute a taking. This provision is in response to the *Keshbro* decision discussed above. Discussion among committee members during presentation of this bill centered on the takings issue. In response to the discussion, Senate amendment no. 165782 to Senate Bill 2118 was adopted to provide that a board may, in its discretion, allow a property that has been closed to reopen if the property owner makes a showing that the nuisance has been abated and the proposed occupants are unlikely to maintain a nuisance on the property.

METHODOLOGY

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 408 municipalities and 67 counties regarding their use of nuisance abatement boards and received a 25% response rate. The survey of local governments posed a series of questions as discussed below.

[42] *Keshbro*, 801 So. 2d at 871, citing *First English*, 482 U.S. at 318.
[43] *Keshbro*, 801 So. 2d at 875.
[44] *See id.* at 875, citing *Lucas*, 505 U.S. at 1031.
[45] *Lucas*, 505 U.S. at 1031.
[46] *Keshbro*, 801 U.S. at 875-76.
[47] *See id.* at 876.
[48] *See id.*
[49] *See id.* at 876-77.

FINDINGS

Staff submitted a survey on nuisance abatement boards to the municipalities and counties. The following are the questions with a summary of responses.

Pursuant to s. 893.138, F.S., has your local government created an administrative board for the purpose of abating public nuisances?
Thirty-three respondents indicated they have created such a board.

In what year did your local government create its administrative board that addresses public nuisances?
Although s. 839.138, F.S., was not enacted until 1995, a number of the respondent local governments had already established nuisance abatement boards at that time with one board dating back to 1980.

Since the administrative board's creation, please estimate the number of properties that have been temporarily closed as the result of an administrative board action?
Most respondents reported that no properties were closed as the result of a board's order. However, one respondent indicated its board had temporarily closed 22 properties since its inception in 1989.

On average, how long have these properties remained closed as the result of an administrative board action?
The period of time properties remained closed by a nuisance abatement board varied from 10 days to 365 days.

How many properties have been temporarily closed by an administrative board action more than once?
Only one respondent indicated that a single property have been closed more than once.

Of those properties that have been temporarily closed more than once, what is the most number of times that a property has been closed since the creation of the administrative board?
The respondents indicated that a single property was closed twice.

Have any of these temporary closures been the subject of "takings" litigation? If the answer is yes, what were the results of the litigation?
The majority of respondents indicated the board's actions had not been the subject of takings litigation. However, the nuisance abatement board for the City of St. Petersburg has been involved in two appellate cases. The Second District Court of Appeal found the temporary closure of properties was a compensable taking in both cases and required compensation.[50]

In addition, the City of Lakeland has experienced several problems. First, a property owner petitioned the circuit court for review contending the closure was a compensable taking. The city counter-sued for enforcement of the board's order. Although the court denied review finding the order was based on competent and substantial evidence, the court's decision stated that it did not preclude the property owner from filing a separate action for compensation. The city did not pursue its enforcement order. In the second instance, the city sued for enforcement of the board's order and the property owner raised the issue of a "taking without compensation". The property was sold and the suit dismissed.

Another respondent became concerned by litigation in a neighboring jurisdiction and suspended its board for a 3-year period. During that period, the local government's ordinance relating to nuisance abatement was amended to provide for remedies other than closure to abate a nuisance. Finally, at least one respondent indicated it had considered establishing a board, but decided against the idea because of concerns over takings litigation and the potential liability.

In general, would you characterize the administrative board as successful at abating public nuisances? Please explain your answer.
Most respondents indicated the board was successful in abating nuisances. Specifically, one reply stated that property owners appearing before the board had sold, renovated, or demolished the structure contributing to the nuisance. Another respondent had a successful board until the *Keshbro* and *Kablinger* cases and does not think those decisions provide any guidance on whether a particular closure constitutes a compensable taking.

Those respondents that order specific remedies other than closure have indicated this approach is successful in abating nuisances. For example, Miami-Dade County's nuisance abatement board has reached many agreements that require property owners to provide private security, install fencing and lighting to prevent loitering, evict tenants committing illegal activities, remove junk and trash from the property, and secure

[50] *See City of St. Petersburg v. Bowen*, 675 So. 2d 626 (Fla. 2d DCA 1996). *See also City of St. Petersburg c. Kablinger*, 730 So. 2d 409 (Fla. 2d DCA 1999), consolidated with *Keshbro*, 801 So. 2d 864 (Fla. 2001).

vacant properties. According to Miami-Dade County, its ordinance has provided an opportunity for residents, police officers, and county officials to develop procedures for abating a particular nuisance and, thus, requiring property owners to accept their responsibility to prevent nuisances from occurring on their property. Other respondents, including the Cities of Daytona Beach, Delray Beach and Sanford, report that their respective boards have been successful in gaining compliance from almost all of the properties brought before the board.

With regard to temporary closures, the Miami-Dade County board has issued an order to close a property only when the owner fails to comply with the established plan to abate the nuisance or if requested by the owner to facilitate the eviction of a tenant. If necessary, the Miami-Dade County board orders temporary closures of 30 days until the property owner presents an acceptable plan to abate the nuisance. The board credits its success in part to the process of notifying a property owner of a possible nuisance prior to the property being declared such and, therefore, giving the owner a chance to correct the problem.

Would you recommend any changes to s. 893.138, F.S.?

Respondents suggested amending s. 893. 138, F.S., to do the following:

- provide that a temporary closure is not a taking;
- provide a statement of legislative intent that the state shall follow the decisions of the U.S. Supreme Court on the issue of whether a temporary closure of property constitutes a compensable taking;
- allow for an administrative action against the tenant committing the illegal activity;
- stipulate that local governments are not precluded from including other types of nuisance or criminal activities in their optional ordinances;
- redefine "occasion" as any day there is evidence that a criminal violation is an ongoing violation (i.e., every day that marijuana is cultivated);
- make entering or remaining on a premises closed by board order a trespass under ch. 810, F.S.;
- suspend the state license of a hotel/motel, restaurant, or alcoholic beverage establishment during the temporary closure;
- allow evidence of crimes other than drug or prostitution activity when considering closure; and
- clarify that a special master could be appointed to hear nuisance complaints as opposed to an administrative board.

RECOMMENDATIONS

Section 893.138, F.S., is being used successfully by a number of local governments. The proposed changes to this section recommended by the survey respondents and discussed above may improve this provision of law, but are not critical at this time.

Although the issue of whether a property temporarily closed by a nuisance abatement order is a compensable taking has been a concern for several local governments, the Florida Supreme Court has held that such a closure may constitute a taking in certain circumstances. The Court's holding in *Keshbro* and *Kablinger* requires a local government to demonstrate that a temporary closure ordered by a nuisance abatement board is narrowly tailored to abate the nuisance. Essentially, the operation of the business located at the property in question must be inextricably intertwined with the illegal activity.

The Legislature should consider amending s. 893.138, F.S., to allow a nuisance abatement board to reopen a property upon a showing that the nuisance has been abated and the proposed tenants are unlikely to maintain a nuisance on the property.