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ISSUE I

WHETHER THE APPELLATE COURTS INTERPRETATION OF FEDERAL AND STATE CONSTITUTIONAL REQUIREMENTS GOVERNING "TAKINGS & JUST COMPENSATION" TO INNOCENT OWNERS CONFLICTS WITH BOWEN, LUCAS AND DEPARTS FROM ESSENTIAL REQUIREMENTS OF LAW BY MAKING A SUA SPONTE UNSUPPORTED FACTUAL FINDING OF CRIMINAL WRONGDOING, WITHOUT DUE PROCESS AND IN THE ABSENCE OF A CRIMINAL ACCUSATION OR CONVICTION

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**MISCELLANEOUS AUTHORITIES**

Ferguson, "The Evolution of the 'Nuisance Exception' to the Just Compensation Clause; From Myth to Realty," 45 Hastings L.J. 1539 (August, 1994).....

J. Sackman, Nichols' The Law of Eminent Domain, Sec. 6.09 at 6-55 (3d rev. ed. 1985)

Editorial, St Petersburg Times (Sunday. August 14, 1994)

Presidents Commission On Model State Drug Laws (December 1993)

Briefs and Pleadings in the Bowen & Baird v. City of St. Petersburg case courtesy of Attorney Robert H. Willis

## JURISDICTION

Petitioners, seek discretionary review, pursuant to Fla. R. App. P. 9.120 and Art. V Fla. Const. of the Third District Court of Appeals decision in City of Miami v. Keshbro Inc., 23 FLW 2128 (Appendix A) for following reasons: 1) the opinion expressly and directly interprets federal and state constitutional provisions, which define and protect fundamental property rights, 2) Keshbro directly conflicts with decisions of the Second District Court of Appeals: See City of St. Petersburg v. Bowen, 675 So. 2d 626 (Fla. 2d DCA 1996), rev. denied 680 So. 2d 421 (Fla. 1996) and City of St. Petersburg v. Baird, No. 98-008 re-hearing denied (Fla. 2d DCA 1998), (Appendix 3 slip opinion); City of St. Petersburg v. Cablinger case# 98-1350 (pending in 2d DCA) and the decisions of this Court: See Tampa-Hillsborough Cty. Exp'wav. Ass'n v AGWS Corp., 640 So. 2d 54 (Fla. 1994); and Joint Ventures, Inc v Department of Transportation, 563 So.2d 622 (Fla 1990.)

Art. V section 3(b) of the Fla. Const., and the rules of appellate procedure vest discretionary authority in this court to review any decision of a district court of appeal that 1) expressly construes a provision of the state or federal constitution or 2) expressly or directly conflicts with a decision of another DCA or the Supreme Court on the same question of law. [Both jurisdictional prerequisites are extant here]

Additionally, this court may review matters, which have a great effect on the proper administration of justice. The City of St. Petersburg, and Miami-Dade County have sought to file amicus curiae sub **judice** on these issues which is further evidence of the significance of these matters to municipal governments throughout **the** State of Florida. To permit innocent property owners within the Second District whose property is the subject of public nuisance abatement action to be compensated for the economic loss and to deny a similarly situated property owner compensation in the Third District is tantamount to a denial of equal protection under **the** law. Failure to review the Keshbro ruling promotes uncertainty in the rights, duties, liabilities and remedies of like **parties** and municipalities throughout the state.

#### **STATEMENT OF CASE**

The Third DCA reversed a trial court summary judgement ruling as to liability in favor of the "Stardust Motel" and adverse to the City, on Petitioners inverse. condemnation complaint. The appellate court recognized but departed from Bowen and thus created conflict with the Second DCA and other opinions of this Court.

This case involves **the** taking of private property rights without compensation. **Pecitioners** are the fee simple owners and

operators of the fifty-seven unit "Stardust Motel." The Stardust has been and remains fully licensed under state and local law for over ten years, under the current ownership. The owner/operator Harish Giwhala resides at the Stardust with his wife and two minor children.

In December 1996 the City of Miami through its Nuisance Abatement Board, (hereinafter "NAB"), promulgated pursuant to sections 45.5-5 of the Miami City Code, and enabling Florida Statute 893.138, filed a complaint/notice of hearing against "Stardust" alleging that the motel constituted a public nuisance by virtue of the purported use, sale and or possession of controlled substances by tenants, guests and other persons at or adjacent to the property. (Appendix C,D)

At the hearing, the Petitioners through counsel and in a spirit of cooperation with the City and its NAB did stipulate to a finding of Public Nuisance specifically as to the sale of controlled substances by unknown third parties at the premises. An Order to that effect, partially embodying the stipulation together with "Findings of Fact, Conclusions of Law, and some 26 points of remedial measures was entered on or about February 7, 1997. (Appendix E) Included was a limited closure of six motel rooms, for six months, as a sanction. This stipulation allowed the "Stardust" to continue the lawful operation of its motel



business and to maintain an economically viable use of its property.

A alternating set of six rooms were to be closed, refurbished and then permitted to re-open by the NAB, so as to make the property more attractive to upscale clientele. The objective was to achieve a revitalization and beautification of the business. The stipulation was a joint accommodation/compromise between the City and the Stardust, with the Petitioners being fully cognizant of, and expressly reserving the their constitutional rights, as articulated in the precedent of Bowen.

Between the February 7, 1997 and June 25, 1997 the NAB conducted several additional hearings. On the basis of highly suspect hearsay testimony the NAB did modify its Order to further sanction the Stardust with a total closure of the premises, over the objection of counsel. The NAB expressly ordered that: "... the Stardust Motel shall be closed for the duration of this Board's jurisdiction, or until February 12, 1998. Respondents are ordered to remove all guests within five (5) days of the date of this Order." Only maintenance and security personnel were to be permitted on the property." (Appendix F,G) As a consequence of the ruling by the NAB, Keshbro was unable to put their property to any economically viable use during the six-month period.

On July 3, 1997 Keshbro Inc., filed a verified complaint for Declaratory Injunctive Relief and Inverse Condemnation (Appendix H) and shortly thereafter was obligated to file for bankruptcy prior to the imminent July 29, 1997 execution of the June 30, 1997 closure order, to ~~avert~~ foreclosure and prevent a total loss of the property and business investment. The bankruptcy's automatic stay, was lifted in late August 1997 permitting the circuit court to enforce the NAB order directing that the Stardust Motel close and cease business operations by 5:00 PM September 4, 1997. (Appendix G) The closure order was without prejudice to Keshbro's other remedies and inverse condemnation proceedings.

It is undeniable that Petitioners sustained business losses during the six month closure. The "Stardust Motel" re-opened on February 27, 1998 with refurbished rooms and decor.

Cross-motions for summary judgement were argued and on April 13, 1998, Keshbro's motion was granted as to the City of Miami's liability on the "takings" issue. Of paramount significance to the analysis of this case is the express finding by the NAB in its conclusions of law that, "The City of Miami does not assert or imply that the owner, personally, is a party to any drug sales or illegal activities." (Appendix E) To date, neither Keshbro Inc., nor Mr. Gihwala have ever been charged with any criminal

violation of F.S. Chapter 796 for procuring, deriving support from or renting space for purposes of prostitution. Nor has the Petitioner ever been arrested, charged or prosecuted for any violations of F.S. Chapter 893 pertaining to controlled substances in general or F.S. 893.137 (7) (a)5 in particular.

#### **SUMMARY OF ARGUMENT**

The Third DCA opinion in City of Miami v. Keshbro directly and irreconcilably conflicts with decisions of the Second DCA and the Florida Supreme Court. The decision furthermore permits the taking of private property for a public purpose without just compensation as required by the Fifth Amendment U.S. Constitution and Art. X sec. 6 Fla. Const. The court departed from the essential requirements of the law to impermissibly, "look beyond the limited wording of the closure order" Keshbro at 8. It also considered "history" beyond the 6 month statute of limitations, to conclude sua sponte & without any basis in the record or the benefit of a criminal trial, due process & conviction, that the motel owners were in fact operating a brothel and drug house, (Indeed if such were the case then criminal RICO statutes would govern operation, abatement, seizure and/or forfeiture of such a criminal enterprise) Finally, all cases relied upon by the court to escape the precedent of Bowen are not applicable as they concern criminal prosecutions of accused persons who were found

guilty or in contempt as directly complicitous in "mala-prohibita" common law public nuisance activities i.e. gambling, prostitution, narcotics etc.

#### **ARGUMENT**

The appellate courts interpretation of federal and state constitutional rights governing "takings & just compensation" to innocent owners conflicts with Bowen, Lucas and departs from the essential requirements of law by making a sua sponte unsupported factual finding of criminal wrongdoing without due process and in the absence of a criminal accusation or conviction.

Under Council, South Carolina Coastal regulations which deny a property owner of substantially all productive use of his land constitute one of the discrete categories of regulatory deprivations that require compensation **without, the usual case specific inquiry into the public interest being advanced in support of the restraint.** When a total regulatory taking occurs, the government can resist compensation only if the proscribed use merely prevents a common-law nuisance or does not restrict any part of the owner's inherent fee simple title. Id at 1017. In this **case as in Bowen** the NAB **absolute closure** decree deprived Keshbro of all inherent title right to use his motel complex. The Boards decree was not a restriction only to prevent common law nuisances as, "There is no common law nuisance doctrine which prohibits the use of a building for rental purposes." Bowen at 633. Clearly the closure Order denied any and

all uses of the motel, and deemed any person other than the owners, security or workmen as trespassers. Thus Keshbro could not during the closure period contract for example, to provide emergency post hurricane housing, or college dormitory services or serve as a homeless shelter or as temporary housing for Red Cross/Salvation Army clients in distress or burned out of their homes and or serve as a halfway house for any government or private sector program. Pursuant to federal, and state constitutional guarantees, ample case law authority and the Bowen decision, Petitioners are entitled to compensation for the "taking"/deprivation of use of their property. **As** a result of the closure, the court did find that Keshbro was deprived of all economic use of their property. The prohibited activity **was** any use of the motel/building. The NAB Order did not really proscribe any particular nuisance, such **as** would be done by enjoining the **sale** or use of drugs on the premises.

Bowen, on similar factual and **legal** grounds held that the total closure of a 15 unit apartment building based on narcotics sales by tenants was a compensable taking and that if the City wants to wage war in part by **means** of this type of taking then the City will be required to pay landowners just compensation. Id at 632. Bowen also ruled that the City's closure order failed to "proscribe any particular nuisance" which would have left "other

legal uses available" to the landowner; to the contrary, the closure decree "left no uses available." See Pompano Horse Club Inc. v. State, 111 so. 801 (Fla. 1927); Dent. of Agriculture v. Mid-Fl Growers, 521 So2d 101 (Fla. 1988); Orlando Sports Stadium v. State, 262 So. 2d 881 (Fla. 1972); Joint Ventures id.; and Tampa-Hillsborough id.

The Just Compensation Clause of the Fifth Amendment of the United States Constitution and Article X, Section 6, of the Florida Constitution requires a landowner be compensated when a government entity takes his property. While property may be "regulated to some extent, if the regulation goes too far it will be recognized as a taking." Indeed, **as** previously argued, the "modern prevailing view is that any substantial interference with private property which destroys or lessen its value...is, in fact and in law, a 'taking' in a constitutional sense." Joint Ventures id at 624 Fn. 6.

The Third DCA relied upon cases wherein the owner's use of property, was deemed a public nuisance and therefore proscribed. In contrast, the NAB Orders in Bowen and Keshbro sought to close premises purportedly to curtail alleged drug use/sale by someone other than the innocent property owner. There is not one scintilla of record evidence to justify the Keshbro courts assertion that "the motel was in reality a brothel or drug

house." No such finding was ever made by the Board, plead with legal sufficiency or found by the trial court. (Appendix I,C & E)

CONCLUSION

Despite Judge Fletcher's comment in Fn. 8, Keshbro is in direct conflict with Bowen. Federal & state constitutional guarantees for "just compensation" after a "taking" were misconstrued and violate fundamental rights of property owners to legal redress for excessive governmental intrusion. Un-reviewed Keshbro will promote disparate treatment and unequal protection of the law for innocent property owners. Given the existence of many NABs throughout the state the conflict will reoccur. Thus acceptance of review is a question of great public concern & significance to the administration of justice in Florida. Bowen and Keshbro are innocent landowners whose properties fell victim to urban decay, selective enforcement & the ravages of a drug war run amok. Over zealous police power cannot justify a deprivation of constitutional protections afforded to property owners.

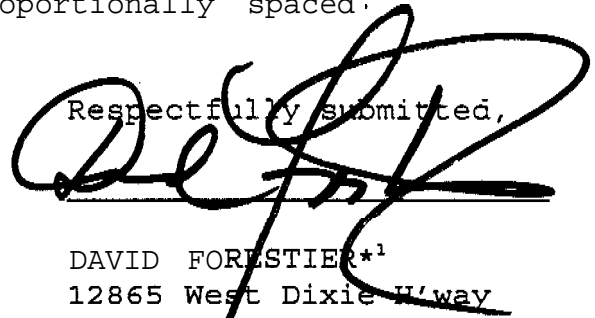
WHEREFORE all the above enumerated legal and factual grounds, Keshbro prays that this court will accept jurisdiction and Grant this petition for discretionary review and permit briefs and oral argument on the merits.

CERTIFICATE OF SERVICE & FONT SIZE

I **HEREBY** CERTIFY that a copy of the foregoing has been furnished by first class United States mail or **FedEx**, postage prepaid to Sid White Clerk of the Florida Supreme Court at Supreme Court Bldg., 500 South **Duval** Street, Tallahassee, Fl 32399-1925; to **Douglas** Broeker and Paul **Feltman**, of Sweetapple, Broker & **Varkas**, Attorney's for the City at 66 West Flagler St., Ste 1000 Miami, **Fl.** 33130; to Jose Fernandez Esq., Assistant City Attorney, 444 SW 2<sup>nd</sup> Ave., Riverside **Plaza**, Ste. 945 Miami, **Fl.** 33130 and to Harvey Ruvin Clerk of the Courts, 73 West Flagler, Miami **Fl** 33130 on this 20<sup>th</sup> day of October 1998 per directions of Fla. Sup. Ct. Clerk.

Counsel furthermore **certifies** that this document was typed in 12 point Courier, which is non-proportionally spaced.

Respectfully submitted,



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<sup>1</sup> Counsel **wishes** to acknowledge and give credit to the **contributions** of Attorney Robert H. Willis Jr., (counsel for **William A. Bowen**), Of the Law **Firm** of **Skelton, Willis, & Bennet**, 259 Third Street North, St. Petersburg **Fl.** 33701. Tel., # (813)- 822-3907. Significant portions of the briefs, Arguments and research graciously shared, are incorporated or adapted herein.