IN THE SUPREME COURT OF FLORIDA

KESHBRO, INC., a Florida corporation, *et al.*,
Petitioners,

vs.

THE CITY OF MIAMI, a municipal corporation *et al.*,
Respondents,

Case No. 94,058

BRIEF FOR THE FLORIDA LEAGUE OF CITIES, INC., AND THE CITY OF ST. PETERSBURG AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Sources

STATEMENT OF INTEREST

The Florida League of Cities, Inc. ("League") is a voluntary organization whose membership consists of municipalities and other units of government rendering municipal services in the State of Florida. Its membership presently numbers some 400 municipalities and four charter counties. Under its charter, its purpose is to work for the general improvement of municipal government and its effective administration, and to represent its members before the various legislative, executive, and judicial branches of government on issues pertaining to the welfare of its members.

The questions raised in this cause concern matters of utmost interest and grave concern to the membership of the League as the issues presented directly bring into question the authority of municipalities to protect the public's health, safety and welfare. This cause raises important issues relating to the longstanding authority of municipalities in Florida to regulate the use of land and to abate public nuisances, in this case drug activity and prostitution.

This cause therefore has a direct impact on the effective administration of municipal government in Florida, and the manner in which the Court addresses the issues presented is of fundamental importance to the membership of the League.

The City of St. Petersburg, Florida is a municipal corporation of the State of Florida. The City of St. Petersburg is

substantially interested in and would substantially be affected by the holding in this case.

STATEMENT OF THE CASE AND FACTS

The Florida League of Cities and City of St. Petersburg adopt the Statement of the Case and Facts as contained in Respondents' Brief.

SUMMARY OF ARGUMENT

The trial court erred in utilizing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1993), and *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), in granting partial summary judgment to Petitioners on the issue of liability. Neither *Lucas* nor *First English* establish a taking under the facts of this case; and indeed, no taking occurred in this case under either federal or state law because Petitioners were not permanently deprived of all economically viable use of the Stardust Motel nor was the motel rendered permanently valueless by virtue of the Miami Nuisance Abatement Board's six-month prohibition on rentals and business. Likewise, *First English* does not hold that a denial of all economically viable use on a temporary basis is a temporary taking. Furthermore, takings jurisprudence requires evaluation of property in its entirety, with spatial use and time elements. A partial, non-permanent restriction of one element is insufficient to effect a taking under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Even if the law were to treat the six-month prohibition as a *Lucas* taking, the *Lucas* nuisance exception plainly applies.

ARGUMENT

This case raises two vastly significant public policy issues for the state including the viability of its entire State and Local Government planning structure:

(1) The inability of county or municipal government to utilize short term (one year or less) interim development controls and moratoria to protect the planning process and enforcement of building and housing codes without *per se* violating *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); and

(2) Emasculation of the police powers of abating nuisances under an incredibly strict and parochial view of the effect of drug and criminal activities on the viability of rental housing code enforcement.

This matter calls into question the correctness of the Second District Court of Appeals' decision in *City of St. Petersburg v. Bowen*, 675 So.2d 626 (Fla. 2d DCA 1996), *rev. denied*, 680 So.2d 421 (Fla. 1996), *cert. denied*, 520 U.S. 1110 (1997) ("*Bowen*"), and the applicability of *Bowen* to this and similar nuisance abatement cases pending throughout Florida. Under facts particular to *Bowen*, the Second District erroneously applied the *Lucas per se* takings test, refused to apply the *Lucas* nuisance exception, and both misinterpreted and misapplied *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). These serious

errors resulted in the Second District finding that an apartment owner who had allowed illegal drug use and dealing to occur on his property and thus created a public nuisance was entitled to compensation when his building was temporarily closed for a period to rentals by the St. Petersburg Nuisance Abatement Board.

The *Lucas per se* takings test is not applicable to the present case and was not applicable in *Bowen*. Rather, both cases must be analyzed using the three-part *Penn Central* test.[1] *Bowen* is also contrary to contemporary takings analysis both nationally and in Florida, and shows a fundamental misunderstanding of takings law. The same fundamental errors were made by the trial court in the case at bar. The trial court's reliance upon *Bowen* in granting partial summary judgment to Petitioners demonstrates that *Bowen* must be reviewed and disapproved by this Court before the *Bowen* mistakes are perpetuated further.

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[1] The Supreme Court has identified factors to guide courts in ad hoc factual inquiries. The factors include: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government regulation. *Penn Central*, 438 U.S. at 124; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986). The facts in the present case clearly establish that no taking occurred. The economic impact was minimal due to the temporary nature of the Order, Petitioners could have had no distinct investment-backed expectation that they could operate a brothel and drug house on the property, and the exercise of the City's police power to abate a public nuisance is the highest type of governmental action. *See Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994) adopting the ad-hoc determination test for Florida.

I. THIS CASE IS NOT A *LUCAS* TOTAL DEPRIVATION CASE AND THE COURTS BELOW ERRED IN USING THE *LUCAS* ANALYSIS.

Keshbro and Gihwala (hereinafter collectively referred to as "Keshbro") and the courts below relied almost exclusively upon *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ("*Lucas*"), and *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) ("*First English*"), in an effort to establish or justify a right to judgment as a matter of law.[2] In a manner similar to *Bowen*, Keshbro urges that *Lucas* when read together with *First English* compels a finding of a temporary taking and hence a right to compensation based upon the Miami NAB's temporary rental prohibition order relating to the Stardust Motel.[3]

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[2] *See* Petitioners' Brief at pp. 16 to 30 where Petitioners argue the applicability of *Lucas* and *First English* to the present case. Petitioners also rely heavily on the Second District's decision in *Bowen*. *See* Petitioners' Brief at pp. 19 to 20, 27 to 30. Reliance upon *Bowen* is misplaced. *Bowen* exhibits the same fundamental misunderstanding of takings law (and especially *Lucas v. South Carolina Coastal Council*) as Keshbro and the courts below in this case. Proper analysis of *Lucas* and *First English* requires reversal of *Bowen* as well as reversal of the trial court's grant of partial summary judgment to Petitioners.

[3] Under Keshbro's theory, any "shutdown" of a business would require compensation, including presumably a one-week, one-day or even one-hour closure. Thus, a bar shutdown for liquor violations, a restaurant closed for health code violation or a building site closed for violations of a building code would require compensation because, according to Keshbro, government may permissibly prohibit illegal conduct but not other legal business operations. This, of course, would include municipal or county use of interim development controls or moratoria to protect the planning process during a plan or zoning amendment process.

Neither *Lucas* nor *First English* establish a taking under the facts of this case, and indeed no taking, temporary or otherwise, occurred in this case as a matter of law. The trial court erred in granting partial summary judgment in favor of Keshbro on the basis of *Lucas* and *First English* or in relying upon *Bowen* to establish liability.

Land use regulations that restrict use of property normally do not entitle a landowner to compensation by government for inverse condemnation. Compensation is only required where regulations, in the words of Justice Holmes, go "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)("*Pennsylvania Coal*"). The difficulty has always been in defining "too far" and determining "the point at which the regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986)("MacDonald"); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)("*Penn Central*"). The United States Supreme Court has, however, identified several categories of regulatory action as compensable.

A. THE UNITED STATES SUPREME COURT HAS RECOGNIZED THREE TYPES OF REGULATORY TAKINGS: PHYSICAL, TITLE AND ECONOMIC.

Three categories of "regulatory takings" claims have been recognized by the Supreme Court: (1) a *physical* taking where government physically invades the land (*Loretto v. Teleprompter Manhattan CATV Corporation,* 458 U.S. 419 (1982)("*Loretto*"); (2) a *title* dedication or *exaction* taking claim where a property owner is compelled as a condition of development approval to convey specific property or title (*Dolan v. City of Tigard*, 512 U.S. 374 (1994))("*Dolan*"); and (3) an *economic* taking claim in which a regulation restricts all or substantially all of the use of property, *Agins v. City of Tiburon*, 447 U.S. 255 (1980) ("*Agins*").[4]

Economic takings, as distinguished from *physical* or *title* takes, constitute the vast majority of inverse condemnation claims

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[4] Under *Agins*, once the substantial advancement test is dispensed with, "[t]he test to be applied in considering [a] facial challenge is fairly straight-forward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land....'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987)(*citing Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). In *Agins*, the City of Tiburon had modified its existing zoning with a new ordinance that restricted development to one single-family residence per acre in order to preserve open space for various ecological and aesthetic reasons. Yet, because economically viable use obviously remained, there was no taking. The Supreme Court also expressed its often repeated belief that a zoning ordinance is constitutional despite a diminution in property value when the owner "will share with others the benefits and burdens of the city exercise of its police power." *Agins*, 447 U.S. at 262.

based on regulatory takings and the rule adopted by the Supreme Court in *Agins*, stating that a land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," 447 U.S. at 260, is the *general rule* governing all regulatory takings and is based upon a *rational basis test*.

In an economic takings case, the scope of legitimate state interest is broad and challenged regulations will not be found to effectuate a taking so long as the governmental entity has *rationally* concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land. *Penn Central*, 438 U.S. at 125. When "public purpose" is at issue the Supreme Court has held that any "conceivable" public purpose will satisfy this test. *F.C.C. v. Beach Communications Inc.,* 508 U.S. 307 (1993)(any "conceivable" public purpose will satisfy economic and social legislative action under constitutional scrutiny). When the relationship between the public purpose and the regulation is analyzed, the Supreme Court has held that a regulation "substantially advances" a legitimate state interest if the regulation is *rationally related* to any conceivable public interest. *Penn Central*, 438 U.S. at 125-127; *Concrete Pipe & Prod., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)(any conceivable public purpose); *Hawaii Housing Authority v.*

Midkiff, 467 U.S. 229, 242 (1984)(legislature rationally could have believed act would promote its objectives).

Under economic impact review a court examines whether there is a beneficial value remaining in the property, when viewed as a whole. Constitutional analysis does not turn on one "strand" in the bundle of property rights, but rather looks at the property as a whole. *Andrus v. Allard*, 444 U.S. 51 (1979); *Palm Beach County v. Wright*, 641 So.2d 50, 52 (Fla. 1994). The focus is not on what has allegedly been taken or prohibited, but what uses and value remain. Thus, even a dramatic reduction in value of property will not trigger compensation. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)(no taking despite 78% reduction in value of land); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)(an 91.4% reduction -- $800,000 to $60,000 -- is not a taking); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987)(50% of coal to remain found not to constitute a taking); *Haas & Co. v. City of San Francisco*, 605 F.2d 1117 (9th Cir. 1979)(95% reduction in value is not a taking); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987)(90% reduction in value is not a taking).[5]

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[5] *See Faux-Burhans v. County Comm'rs,* 674 F.Supp. 1172 (D. Md. 1987), *aff'd*, 859 F.2d 149 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989); *Terminal Equip. Co. v. City of San Francisco*, 270 Cal. Rptr. 329 (Ct. App. 1990)(restating the California rule that "all" reasonable use must be denied); *de Botton v. Marble Township*, 689 F. Supp. 477 (E.D. Pa. 1988)(finding no taking because plaintiff was not deprived of "all" use(s) of the property); *City of Virginia Beach v. Virginia Beach Land Inv.*

Thus, in *Concrete Pipe and Prod., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the U.S. Supreme Court after the *Lucas* decision determined that deprivation of 78% of property value (*Euclid)* and 91.5% of property value (*Hadacheck*) were deprivations that did not rise to either a *Lucas* 100% take nor even a *Penn Central* ad hoc balancing take. In fact the Court stated emphatically that it would not use a narrow view with a *per se* test like *Lucas* that is triggered by a total deprivation. The Court rejected an attempt by a claimant to "shoehorn" its way into the total deprivation rule by getting the Court to look at only the property affected: (in the *Bowen* case the "one year" out of the total usable life of the property):

> While Concrete Pipe tries to shoehorn its claim into this [*Lucas*] analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," we rejected this analysis years ago in *Penn Central Transportation Co. v. New York City*, * * *. To the extent that any portion of

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Ass'n No. 1, 389 S.E.2d 312 (Va. 1990)(stating that downzoning of 403 acre parcel from planned unit development to agriculture was not a taking--no deprivation of "all" economically viable use). *See also Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), *modified*, 857 F.2d 567 (9th Cir. 1988)(the court interpreted *First English* to require property owners to "demonstrate that all or substantially all economically viable use of the property ha[d] been denied"), *cert. denied*, 489 U.S. 1090 (1989); *Citizen's Ass'n v. International Raceways, Inc.,* 833 F.2d 760 (9th Cir. 1987)(the court interpreted *First English* as consistent with the view that a taking does not occur unless the owner is deprived of the "economically viable use of the property," and that a mere reduction in property's value would not be enough to constitute a taking).

> property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question. Accord, *Keystone Bituminous Coal Assn v. DeBenedictis*, * * *

Within the economic takings classification, there are two distinct subsets: (1) economic regulatory takings involving some level of interference with property (*Penn Central*, 438 U.S. at 104) and (2) economic regulatory takings involving a total denial of all economically viable use of property (*Lucas*, 505 U.S. at 1003; D. Mandelker, Land Use Law § 2.18 (4th ed. 1997)).

Because Keshbro had and at all times retained various actual and potential economic uses[6] of the Stardust Motel while subject to the approximately six-month NAB rental prohibition order, the NAB's temporary order could not and did not constitute a total denial of all economically viable use of the motel. Consequently, the *Lucas per se* takings analysis was and is inapplicable. Instead, analysis

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[6] Mr. Gihwala lives with his wife and children at the Stardust Motel in four of the fifty-four rooms. The use of the premises as a home establishes as a matter of law that Keshbro was not deprived of all economically viable use of the property even during the temporary prohibition on rentals. *See, e.g., City of Minneapolis v. Fisher*, 504 N.W.2d 520, 526 (Minn. App. 1993). The Stardust Motel property is zoned C-1 (restricted commercial) with an SD-9 overlay (special district). The Miami Zoning Ordinance allows for approximately sixty potential uses of the property. If an alternative use is available even if it is not the best or most profitable use, then a taking under *Lucas* has not occurred. *Lucas*, 505 U.S. at 1019, 1030.

under *Penn Central*[7] should have been be applied by the trial court, the Third District and should be used by this Court.

B. THE MIAMI NAB'S ORDER DID NOT INVOLVE A DENIAL OF ALL ECONOMICALLY VIABLE USE AND THEREFORE IS NOT A *PER SE* TAKING UNDER *LUCAS*.

In *Lucas*, David Lucas owned two beachfront lots on the Isle of Palms off the coast of Charleston, South Carolina. Lucas claimed that he was denied "all economically viable use" of his two lots by the South Carolina Beachfront Management Act. Lucas did not challenge the validity of the Beachfront Management Act; rather "Lucas maintained that if a regulation operates to deprive a landowner of 'all economically viable use' of his property, it has worked a taking for which compensation is due, regardless of any other considerations." *Lucas*, 505 U.S. at 1009. The South Carolina trial court "found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas' two lots were concerned, and that this permanent prohibition 'deprive[d]

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[7] The Supreme Court has identified factors to guide courts in ad hoc factual inquiries. The factors include: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government regulation. *Penn Central*, 438 U.S. at 124; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986). The facts in the present case clearly establish that no taking occurred. The economic impact was minimal due to the temporary nature of the Order, Petitioners could have had no distinct investment-backed expectation that they could operate a brothel and drug house on the property, and the exercise of the City's police power to abate a public nuisance is the highest type of governmental action.

Lucas of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, and render[ed] them valueless.'"[8] *Id*. (Emphasis added). The trial court thus concluded that Lucas' properties had been "taken" by operation of the Beachfront Management Act and ordered the payment of just compensation. The South Carolina Supreme Court reversed, finding that Lucas' failure to challenge the Beachfront Management Act itself was a concession that the Act fell into the "nuisance-like exception"[9] line of cases and was not an improper use of police power, and therefore no compensation was due. *Lucas*, 505 U.S. at 1010.

In a majority opinion authored by Justice Scalia, the Supreme Court found that the nuisance exception utilized by the Supreme Court of South Carolina was too broad:

> Where the State seeks to sustain regulation <u>that deprives land of all economically beneficial use</u>, we think it may resist compensation only if the logically antecedent injury into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's

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[8] Treating use and value as synonymous for takings analysis is common sense, for if property retains value as determined by the market, by definition it retains economically viable use through sale for market value.

[9] *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887).

> power over, the "bundle of rights" that they acquire when they obtain title to property.

Lucas, 505 U.S. at 1027 (Emphasis added, footnote omitted). The Supreme Court continued:

> We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land. Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance and nuisance already place upon land ownership.

Lucas, 505 U.S. at 1029. (Emphasis added).

The Supreme Court noted that over time, the "harmful or noxious" use language upon which government entities had based regulation that proscribed certain uses without compensation had transformed into "harm preventing" regulation. Consequently, the Supreme Court held that for an act of governmental regulation to be upheld, which deprives a landowner of all use of property, the regulation may only "proscribe use interests [which] were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Justice Scalia explained that the challenged regulation must be tied to a common-law property or nuisance principle -- an inquiry that involves three factors: (1) the degree of harm to public land and resources, or adjacent private property, posed by the activities; (2) the social value of the claimant's activities and its suitability to the location in question; and (3) the relative ease

with which the alleged harm can be avoided through measures taken by the claimant and government. *Lucas*, 505 U.S. at 1030-1031. In making the analysis the Supreme Court instructed courts to look to the Restatement (Second) of Torts to determine what prohibitions were placed on use of the property. *Lucas*, 505 U.S. at 1030-1031. The Restatement, in turn, looks to statutory enactments. *See* RESTATEMENT (SECOND) OF TORTS § 826, cmt. A (1979).[10]

The *Lucas*' categorical taking rule, however, only pertains to claims where property is permanently rendered without any use and thus valueless in perpetuity. *Lucas*, 505 U.S. at 1012 ("taking was unconditional and permanent"); *see,* R. Meltz, D. Merriam and R. Frank, The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation, pp. 139-141 (Island Press 1999); D. Mandelker, Land Use Law § 2.18 (4th ed. 1997); R. Freilich, E. Garvin & D. Martin, Regulatory Takings: Factoring Partial Deprivation into the Taking Equation, Ch. 8 in Takings (ABA, David Callies, ed., 1996). Indeed, Justice Scalia emphasized that the *Lucas* petition for *certiorari* squarely raised the question of whether regulatory prohibitions had rendered Lucas' beachfront

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[10] "In respect to certain types of intentional invasion, there has been a crystallization of legal opinions as to gravity and utility, with the result that the invasions are held to be reasonable or unreasonable as a matter of law. This crystal-lization may appear in the form of legislative enactment. . . ." Common law nuisance principles are continually evolving to reflect societal changes, technological advances, and newly-discovered hazards.

land permanently valueless. *Lucas*, 505 U.S. at 1007; *see also,* 505 U.S. at 1018 ("the relatively rare situation where the government has deprived the owner of all economically beneficial use"); and 505 U.S. at 1020 n. 9 (trial court's finding that the lots were rendered valueless was the premise of the petition for *certiorari*, which was not being reconsidered because it was not challenged). Repeatedly Justice Scalia underscored the draconian prohibitions of the Beachfront Management Act and its "complete extinguishment of property" and "permanent ban on construction insofar as Lucas' lots were concerned" and noted that the Act permanently deprived of "any reasonable economic use of the lots . . . and eliminated the unrestricted right of use, and render[ed] them valueless." *Lucas*, 505 U.S. at 1009. Justice Scalia stressed the Beachfront Management Act's "obliteration of the value of petitioner's lots," and that a categorical taking occurred because the Act's prohibitions were "unconditional and permanent" and a "total deprivation of beneficial use," and government has deprived a landowner of all economically beneficial uses. *Lucas*, 505 U.S. at 1017-1018. The *Lucas per se* rule only applies where the permanent deprivation of the use and enjoyment of property causes a permanent and total diminution in the value of the property -- "all economically beneficial uses," and that "all" means "all." *Lucas*, 505 U.S. at 1016 n. 7; 505 U.S. at 1019 n.8. Justice Scalia refused to entertain any argument (raised by the dissents) that

"valueless" meant something less than a complete and permanent destruction of all use and value or for a periof of time less than permanent. *Lucas*, 505 U.S. at 1020 n. 9; 505 U.S. at 1016 n. 7; 505 U.S. at 1019 n. 8. Indeed, Justice Scalia refers to "deprivation of all economically beneficial uses" numerous times in the *Lucas* opinion. *See also* Sword & Shield Revisited, Ch. 8, pp. 438-444 (ABA 1998).

The indispensable nature of complete loss of use and value to the *Lucas per se* rule is also shown in the Supreme Court's discussion of how to apply the categorical rule. For example, the Supreme Court stressed the importance of properly defining the relevant parcel as the entire parcel of property "against which the loss is to be measured." *Lucas*, 505 U.S. at 1016 n. 7. The Supreme Court concluded that the relevant parcel is easily defined in *Lucas* because the challenged regulation "left each of Lucas' beachfront lots without economic value." Id. The Supreme Court's treatment of its prior takings decisions also demonstrates that the *Lucas per se* rule is limited to permanent and total loss of use and value. The Supreme Court specifically distinguished several previous cases that had found no taking because "[n]one of them . . . involved the allegation that the regulation wholly eliminated the value of claimant's land." *Lucas*, 505 U.S. at 1026.

When a court applies the totality rule, it becomes immediately clear that *Lucas* is applicable to only a minimal number of cases

becuase in *Lucas*, the Supreme Court found that no categorical taking occurs unless the property owner is permanently deprived of all value and use when viewed in light of the entire property.

Despite the *Lucas* Court's repeated emphasis on the very limited applicability of the categorical rule, litigants still attempt to make claims come within the *per se* rule when they have been deprived of less than all use or fail to use the entirety of the property both geographically and temporally as the measuring rod. *See, for example, Concrete Pipe & Prod. of Calif. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)("Concrete Pipe"), where the company tried to fashion its claim of loss of less than all its property into a *Lucas per se* challenge. The Supreme Court flatly rejected the claim as an attempt to "shoehorn" the challenge into the *Lucas* analysis. *Concrete Pipe*, 508 U.S. at 643-644.

Thus it is important to determine that the phrase "all value" as used in *Lucas* means that the regulation has permanently destroyed all value, both in a physical and temporal sense. *Lucas*, 505 U.S. at 1016 n. 7, 505 U.S. at 1019 n. 8. *See, Woodbury Place Partners v. City of Woodbury*, 492 S.W.2d 258, 260-261 (Minn. App. 1992), where the court determined that a two-year moratorium on subdivision approval, site plan review, plan amendments or rezonings of certain land was not a *Lucas per se* take despite the city's stipulated lack of all economically viable use of the

property during the two-year period. *Woodbury*, 492 N.W.2d at 260, 261 n.2. Like the trial court here (and in *Bowen)*, the trial court in *Woodbury* erroneously applied the *Lucas per se* test holding that the two-year development moratorium effected a taking. The appellate court reversed and in doing so specifically rejected the partnership's *Lucas per se* argument:

> To invoke the total takings analysis of *Lucas*, the partnership relies exclusively on the stipulation that the moratorium denied all economically viable use of the property from March 23, 1988 to March 23, 1990. We interpret the phrase "all economically viable use for two years" as significantly different from "all economically viable use" as applied in *Lucas*. The two-year deprivation of economic use is qualified by its defined duration. In Minnesota, moratoriums on development to aid planning processes cannot exceed thirty months.[11] Minn.Stat. § 462.355, subd. 4 (1990). This is significantly different from the presumptively permanent South Carolina regulation which imposed prohibitions on development. That the Woodbury property's economic viability was delayed, rather than destroyed, is implicitly recognized in the language of the stipulation. "[A]ll economically viable use from March 23, 1988 to March 23, 1990" recognizes that economic viability exists at the moratorium's expiration.
>
> By narrowly defining the measurable property interest as a two-year segment, the partnership equates its loss of use to a "total" taking. *Lucas* acknowledges that the "rhetorical force" of the "no economically

[11] Under Florida Statutes a closure order upon a finding of public nuisance may only last one year. F.S.A. § 893.138(4). The NAB's Order in this case was only for about six months.

> viable use" rule is "greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." ___ U.S. at ___, 112 S.Ct. at 2894 n. 7. However, the Supreme Court has repeatedly resisted attempts to narrowly define attributes of property ownership to show total deprivation of economic use through regulation.
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> * * *
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> When measured against the value of the property as a whole, rather than against only a two-year time frame, the moratorium did not deny the partnership "all economically viable use" of its property. Delaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings. *Agins v. Tiburon*, 447 U.S. 255, 263 n. 9, 100 S.Ct. 2138, 2143 n. 9, 65 L.Ed.2d 106 (1980). (Emphasis added).

In *Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. banc 1996), the Minneapolis Supreme Court followed *Woodbury* in holding a temporary revocation of an apartment license to abate nuisances (criminal activities) was not subject to the *Lucas per se* rule because Zeman's license was taken, if at all, only temporarily. *Zeman*, 552 N.W.2d at 553 n.4. The Minnesota Supreme Court found that the case should be analyzed using the *Penn Central* factors, and concluded that since the ordinance was designed to serve a legitimate public interest -- deterring criminal activity in residential neighborhoods -- it serves a public harm prevention

purpose and did not result in a taking of Zeman's property. *Zeman*, 552 N.W.2d at 553-555.

In *Moore v. City of Detroit*, 406 N.W.2d 488 (Mich. App. 1987), the court upheld a nuisance abatement ordinance which created a program that allowed third parties the right to enter and repair abandoned properties declared unlawful nuisances. The court found that because the physical occupancy was only temporary (while abating the nuisance) analysis was not proper under *Loretto* (and obviously *Lucas* as well); rather the dispositive inquiry was whether the physical possession was reasonable in time and nature under the circumstances. *Moore*, 406 N.W.2d at 491.

Thus, it is clear that to qualify as a *Lucas* categorical taking, the property must be rendered without any use and thus permanently "valueless" by reason of the application of the regulation. *Lucas*, 505 U.S. at 1018-1019. If the regulation is temporary or if any use or value remains, the *Lucas per se* rule does not apply. *See Reahard v. Lee County*, 968 F.2d 1131, 1134 (11th Cir. 1992)(because *Lucas* taking requires deprivation of all use and value court).

C. TAKINGS ANALYSIS REQUIRES CONSIDERATION OF THE PROPERTY IN ITS ENTIRETY, INCLUDING TIME AS WELL AS SPATIAL AND USE ELEMENTS.

In *Penn Central* the Supreme Court explained that: "'Taking' jurisprudence does not divide a single parcel into discrete segments and then attempt to determine whether rights in a

particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses both the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130. Consistent with *Penn Central*, the Supreme Court declined to find a categorical taking in *Andrus v. Allard*, 444 U.S. 51 (1979), where a governmental regulation prohibited the owner from selling his property. The Court reasoned that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id*. at 65-66.[12]

Florida adopted this reasoning in *Palm Beach County v. Wright*, 641 So.2d 50, 54 (Fla. 1994)(*citing Department of Transportation v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA 1993)). This concept was characterized by Justice Stevens in *First English*: "Regulations are

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[12] In *Andrus v. Allard*, the Supreme Court pointed out that the destruction of one strand of the bundle of property rights does not constitute a taking "because the aggregate must be viewed in its entirety." Temporary interference in the use of land destroys only one part of one "strand" of the bundle of rights. Property has value in many dimensions, including total present worth and value over time. Timesharing or interval ownership are contemporary examples of the division of property into temporal segments. The inconvenience of a temporary interference in the use of land under police power regulation only destroys a part of one strand of the bundle of rights of property. It can hardly be said to be a "taking" when viewed in the aggregate.

three dimensional: they have depth, width, and length. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred." *First English*, 482 U.S. at 330.

Lucas does not support Keshbro's argument that a prohibition on "conducting, operating or maintaining any rental activity or business on said premises" for approximately a six-month period constitutes a taking. Even if all economically viable use of the Stardust Motel had been denied for a period of six months because of the Miami NAB's Order,[13] the phrase "all economically viable use for *six months*" is legally different from "all economically viable use" as used and applied in *Lucas*.[14]

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[13] Petitioners' repeated claim that the NAB's Order "proscribed all uses" (p. 18) or "prohibited all uses" (p. 18) or "completely closed" the Stardust Motel (p. 26) is factually and legally incorrect. The six-month prohibition on rentals and business left all other uses allowed under the Miami Zoning Code, including the continued use of the Stardust Motel as a residence for Mr. Gihwala and his family. The Motel still has all legal uses available after the six-month period, and the motel retained its intrinsic value. The motel was not rendered permanently and totally without use and value by virtue of the NAB's temporary order. Petitioners' attempt to "shoehorn" the temporary prohibition into a *Lucas per se* take should be rejected.

[14] *See Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 261 (Minn.App. 1993)(two-year moratorium on all planning permits is significantly different than permanent prohibition on development in *Lucas*; property's economic viability was delayed, rather than destroyed; economic viability existed at the moratorium's expiration); *City of Minneapolis v. Fisher*, 504 N.W.2d 520 (Minn. 1993)(one year closing of public bath as public nuisance for prostitution held not to be a taking under federal or state law since temporary closure did not

The Miami NAB's six-month prohibition on rentals and business did not deprive Keshbro of "all economically beneficial uses" during the six-month period nor did the NAB's Order permanently deprive Keshbro of "all economically beneficial uses" into perpetuity as required by *Lucas*. The NAB's temporary order did not displace Keshbro's ownership and did not invade the private domain, and did not make actual use of Keshbro's property. To the contrary, by definition, the NAB's Order only interrupted or postponed Keshbro' private use of the Stardust Motel. The six-month prohibition on rental or business did not render the Stardust Motel valueless -- Keshbro was still free to use the Subject Property for all other uses available under the City's Zoning Code,[15] Keshbro could have and Mr. Gihwala (and his family) did occupy part of the motel, Keshbro could have sold or assigned the property, Keshbro could have and apparently did redevelop or renovate the Property.[16] Even

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deprive owner of all economically viable use of property).

[15] The Zoning District allows some sixty separate uses.

[16] Keshbro concedes that the six-month rental prohibition only resulted in "business losses" and that the "Stardust Motel reopened on February 27, 1998 with refurbished rooms and decor." Petitioners' Brief at p. 5. The Fifth Amendment does not guarantee the most profitable use of property, nor guarantee that a property owner will be able to develop exactly what is wanted. *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1410 (11th Cir. 1989); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). The standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all economically viable use of the land. A land use regulation may deprive an owner of the best use or uses of property without the payment of any

during the almost six-month period, the Stardust Motel retained intrinsic value and there was a wide a range of reasonable uses available to Keshbro as well as all future uses available after the nearly six-month rental prohibition period. Furthermore, by definition, a six-month restriction on rental or business uses is not and was not permanent and did not deprive Keshbro of all economic uses. If a regulation is temporary and reasonable in length, all reasonable use has not been denied because all future uses remain.

Lucas thus provides no legal basis for finding a taking under the facts of this case (and likewise provided no basis for the taking found by the Second District in *Bowen*). Florida law follows *Lucas*. *See, e.g., Tampa-Hillsborough Expressway Auth. v. A.G.W.S. Corp*, 640 So.2d 54 (Fla. 1994)("A taking occurs where regulation denies substantially all economically beneficial or productive use of land")[17]; *State Department of Environmental Protection v.*

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compensation. *Goldblatt v. Town of Hempstead*, 369 U.S. at 59; *Pace Resources v. Shrewsbury Tp.*, 808 F.2d 1023 (2d Cir. 1987)(citing *Penn Central*, 438 U.S. 104); *MacLeod v. Santa Clara County*, 749 F.2d 541, 548-549 (9th Cir. 1984).

[17] In *A.G.W.S.*, the Florida Supreme Court held that landowners with property inside the boundaries of maps of reservation invalidated by *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla. 1990) are not legally entitled to receive *per se* declarations of taking because the invalidation was on the basis of due process, not because the filing of such a map always resulted in a taking. Whether the filing of a map reservation resulted in a taking of particular property would depend upon whether its effect was to deny the owner substantially all of the economically beneficial or productive

Burgess, 667 So.2d 267 (Fla. 1st DCA 1995)(A constitutional taking can occur when a regulation deprives the property owner of substantially all economically beneficial or productive use of the property). The NAB's six-month restriction on rental or business activity did not as a matter of law deprive Keshbro of substantially all economically beneficial use of the property and did not render the Stardust Motel permanently without all use and thus valueless. The trial court erred in holding that a taking occurred under either federal or state law.[18]

The trial court likewise erred in finding that the temporary taking announced in *First English* applied in the present case -- even if the Miami NAB's Order were ripe for adjudication[19] and the

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use of the land. *Palm Beach County v. Wright*, 641 So.2d 50, 52 (Fla. 1994).

[18] The *Bowen* court made the same fundamental error by erroneously equating a one-year prohibition on apartment rentals with deprivation of all use and value. During the one-year rental prohibition period, the *Bowen* apartment building still retained intrinsic value and still possessed both present and future uses. The temporary order merely interrupted or postponed the private use of property. At most, the temporary interference only diminished the cumulative value of the *Bowen* property over time. The *Lucas* categorical test requires a total and permanent denial of all economically viable use. The *Bowen* court misinterpreted and misapplied *Lucas* by holding that *Lucas* applied to an interference with one use of the property which was by its own terms temporary. Quite aside from the *Bowen* court's subsequent misinterpretation of the *Lucas* nuisance exception (discussed *infra*), the *Bowen* court's error in utilizing *Lucas* in the first instance requires reversal of *Bowen*.

[19] *Williamson Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *Villas of Lake Jackson, Ltd., v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997); *Taylor v.*

NAB's temporary Order were held to constitute a *Lucas* taking under federal or state law. *First English* does not alter the *Lucas per se* taking analysis, and is erroneously cited by Keshbro for the proposition that denial of all economically viable use even on a temporary basis is a *per se* taking. (Petitioners' Brief at pp. 20-21).

In *First English*, the Supreme Court held that invalidation of an unconstitutional ordinance was not a sufficient remedy to meet the demands of the Just Compensation Clause once it is determined that governmental action has already worked a taking. 482 U.S. at 319, 321 ("We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective").[20]

First English involved a moratorium of five years of all uses of the church's land. Upon remand the California Court of Appeal dismissed the action because, after weighing the character of the governmental action to prevent flooding against the temporary

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Village of North Palm Beach, 659 So.2d 1167 (Fla. 4th DCA 1995); *City of Key West v. Berg*, 655 So.2d 196 (Fla. 3d DCA 1995); *City of Jacksonville v. Wynn*, 650 So.2d 182, 186 (Fla. 1st DCA 1995).

[20] *See Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 n.4 (11th Cir. 1996), noting that *First English* is not applicable to moratoria or other temporary actions but rather *First English* is applicable only where the ordinance is indefinite in duration and would expire only if declared unconstitutional or repealed.

period of deprivation, the court found that no taking, temporary or otherwise, had occurred. The United States Supreme Court denied *certiorari*. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal. Rptr. 893 (1989), *cert. denied*, 493 U.S. 1056 (1990):

> THE INTERIM ORDINANCE IS FURTHER JUSTIFIED AS A REASONABLE TEMPORARY LIMITATION ON CONSTRUCTION TO MAINTAIN THE STATUS QUO WHILE THE COUNTY DETERMINED WHAT, IF ANY, STRUCTURES WERE COMPATIBLE WITH PUBLIC SAFETY.
>
> As an independent and sufficient grounds for our decision, we further hold the interim ordinance did not constitute a "temporary unconstitutional taking" even were we to assume its restrictions were too broad if permanently imposed on First English. This interim ordinance was by design a temporary measure--in effect a total moratorium on any construction on First English's property--while the County conducted a study to determine what use and what structures, if any, could be permitted on this property consistent with considerations of safety. We do not read the U.S. Supreme Court's decision in First English as converting moratoriums and other interim land use restrictions into unconstitutional "temporary takings" requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration or scope. On its face, Ordinance 11,855 is reasonable in all these dimensions.
>
> The ordinance had the legitimate avowed purpose of preserving the problem and devised a permanent ordinance which would allow only safe uses and the construction of safe structures in and near the river bed. The restrictions in Ordinance 11,855 were reasonably related to the achievement of this objective. Given the seriousness of the safety concerns raised by the presence of any structures on this property, we find it was

entirely reasonable to ban the construction or reconstruction of any structures for the period necessary to conduct an extensive study and fully develop persuasive evidence about what, if any, structures and uses would be compatible with the preservation of life and health of future occupants of this property and other properties in this geographic area.

We do not find the ordinance remained in effect for an unreasonable period of time beyond that which would be justified to conduct the necessary studies of this situation and devise a suitable permanent ordinance.

* * *

SINCE THERE WAS NO UNCONSTITUTIONAL "TAKING" OF LUTHERGLEN, FIRST ENGLISH HAS NOT STATED A CAUSE OF ACTION ENTITLING IT TO COMPENSATION.

Since we hold the instant complaint is insufficient to state a cause of action that the limitations imposed by the interim ordinance represented an unconstitutional "taking" of First English's property it follows First English is not entitled to compensation for a "temporary taking" between the time the interim ordinance was enacted and it was superseded by the somewhat less restrictive permanent ordinance. The Supreme Court's majority opinion in First English held property owners are entitled to compensation for so-called "temporary takings", but only where the government regulation in question is ultimately ruled to have worked an unconstitutional taking. "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.... We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during

> which the taking was effective." (*First Lutheran Church v. Los Angeles County, supra,* 482 U.S. at pp. 319, 321, 107 S.Ct. at pp. 2388, 2389.) Here we find interim ordinance 11,855 did not "work a taking of all use" of appellant's property. Consequently, there is no "duty to provide compensation for the period during which [that ordinance] was effective."

First English, 210 Cal. App.3d t 1373-1374, 258 Cal. Rptr. at 906-907.

First English does not, as Keshbro argues, hold that denial of all economically viable use solely on a temporary basis is a *per se* taking. (Petitioners' Brief at 21-22). *First English* does not hold such and Petitioners have cited no case holding that a temporary regulation effects a temporary taking. *See, e.g., Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d at 262-263. If a regulation is temporary and reasonable in length, all reasonable use has not been denied because there is future use remaining. Thus, for temporary regulations, the test is whether the regulation left a reasonable use over a reasonable period of time. *See Lawton v. Steele*, 152 U.S. 133 (1894); *Guinnane v. City & County of San Francisco*, 197 Cal. App.3d 862, 241 Cal. Rptr. 787 (1987); *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291 (N.Y. App. 1972), *appeal dismissed*, 409 U.S. 1003 (1973); *Arverne Bay Const. Co. v. Thatcher*, 15 N.E.2d 587 (N.Y. 1938); L. Bozung & D. Alessi, Recent Developments in Environmental Preservation and the Rights of Property Owners, 20 URB. LAW 969

(1988); T. Roberts, Moratoriums Are Alive and Well, 48 URB. LAND 34 (Sept. 1989). In fact, moratoria of less than two years duration have been held not to constitute a taking. *See, e.g., Tocco v. New Jersey Council on Affordable Housing*, 576 A.2d 328 (N.J. App. 1990), *cert. denied*, 499 U.S. 937 (1991)(18-month moratorium held valid); *Friel v. Triangle Oil Co.*, 543 A.2d 863, 867 (Md. App. 1990)(2-year moratorium held not to constitute a taking); *Zilber v. Town of Moraga*, 692 F.Supp. 1195 (N.D. Cal. 1988)(18-month moratorium held valid).

Regulations have depth, width and length. Depth defines the extent to which the owner may not use the property in question; width defines the amount of property encompassed by the regulations; and length refers to the duration.[21] No one of these elements can be analyzed alone to evaluate the impact of the regulation, or to determine whether a taking has occurred. To focus on the six-month duration of the NAB's Order distorts the fundamental nature of land use and ignores the obvious fact that the NAB's six-month prohibition on rentals only postponed the private use of property; it did not destroy it. *See generally*, N. Williams, R. Smith, C. Siemon, D. Mandelker & R. Babcock, THE WHITE RIVER JUNCTION MANIFESTO, 9 Vt. L. Rev. 193, 215-218 (1984). Yet that is exactly what Keshbro urges.

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[21] *First English*, 482 U.S. at 330-331 (Stevens, J., dissenting).

A permanent restriction depriving a property owner of all economically viable use of property could conceivably qualify as a temporary taking under *First English* between the time the permanent regulation was applied to the property and the date of its invalidation or withdrawal. *First English*, 482 U.S. at 321.[22] However, a regulation that is by its own terms temporary in duration does not by definition deprive a property owner of all economically viable use. Likewise, temporary takings apply to the period of time between application of a permanent restriction and subsequent invalidation, not the period during which a temporary measure is applied.[23] The obvious reach of *First English* is to retrospectively temporary takings (*i.e.*, regulations subsequently rescinded or declared invalid), not prospectively temporary regulations such as the NAB's six-month prohibition on rentals and business. Even the *Bowen* court which completely misread and misapplied *Lucas* apparently recognized that *First English* is limited to situations where the regulation is determined to constitute a taking and is subsequently withdrawn or invalidated.

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[22] The opinion presupposes that "temporary regulatory takings" means "regulatory takings which are ultimately invalidated by the courts." *First English*, 482 U.S. at 310.

[23] To establish a taking, the permanent economic loss of all value of the property must be shown, not merely loss of use. *Penn Central*, 438 U.S. at 130; *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072-1074 (11th Cir. 1996). Keshbro did not and indeed could not show a permanent loss of all use and value of the Stardust Motel. The Stardust Motel resumed operations at the end of the six-month period and apparently is now in operation.

Bowen, 675 S.2d at 629 ("Regulations found by the courts to be invalid because they deprive landowners of substantially all use of their property without compensation are not ordinarily struck down as unconstitutional. The government is forced to choose between paying just compensation to keep the regulation in effect or removing the regulation"), but nevertheless went on to misapply *First English*.

This Court should reject the improper use of *First English* by reversing the trial court in this case and reversing *Bowen*.

D. *BOWEN* SHOULD BE RECONSIDERED IN THE CONTEXT OF THE ANALYSIS ESTABLISHED IN *PALM BEACH V. WRIGHT*.

The present case can easily be distinguished from *City of St. Petersburg v. Bowen*, 675 So.2d 626 (Fla. App. 2 Dist. 1996), *rev. denied*, 680 So.2d 421 (Fla. 1996) *cert. denied*, 520 U.S. 1110 (1997),[24] and the cases relied upon in *Bowen*, namely *Joint Ventures,*

[24] Keshbro incorrectly argues that this Court's denial of review and the United States Supreme Court's denial of *certiorari* is equivalent to an approval of *Bowen*. *See* Petitioners' Brief at pp. 25 and 27. Denial of review by this Court or denial of *certiorari* does not indicate agreement nor is it the same as an affirmance. Furthermore, *stare decisis* is not sufficient reason to perpetuate a legally defective case. This Court's comments regarding *stare decisis* in *State v. Gray*, 654 So.2d 552, 554 (Fla. 1995), are worthy of repeating: "*Stare decisis* does not command blind allegiance to precedent. Perpetuating an error in legal thinking under the guise of *Stare decisis* serves no one well and only undermines the integrity and creditability of the Court." *Bowen* should be reexamined and reversed.

Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990),[25] and *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994).[26]

From a fact perspective, it is critical that alternative economically viable uses remained available and were utilized during the period of the Miami NAB Order, whereas the facts in *Bowen* indicate that as a consequence of the ruling the owners were unable to put property to "any economic use." Economically viable use is one of the key elements in takings analysis and must be evaluated on an *ad hoc* basis to determine the existence of a taking. *See Penn Central*, 438 U.S. 104 (1978); *Palm Beach v. Wright*, 641 So.2d 50 (Fla. 1994)(*citing Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981)).

From a legal standpoint, it must be noted that before a regulatory action may be determined to have effected a taking under *Palm Beach v. Wright*, 641 So.2d 50 (Fla. 1994), a two-step analysis is necessary: (1) the regulation "provides sufficient flexibility

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[25] In *Joint Ventures*, this Court invalidated the state statute allowing the Department of Transportation to record a map reservation which prevented the grant of any development permits for any use for up to a ten-year period. *Joint Ventures* was not a claim for compensation, but an action to invalidate the regulation. *Joint Ventures*, 563 So.2d at 625.

[26] *A.G.W.S.* is a case where a regulation was found to be unconstitutional and invalidated by the court. 640 So.2d at 56. In neither *Bowen* nor the present case has any such invalidation occurred nor have the regulations been challenged or withdrawn.

so that it cannot be determined whether a taking has occurred ... until the property owner submits" a request for a specific use, or (2) the regulatory authority "has the flexibility to ameliorate some of the hardships of a person owning" the affected property, the taking issue cannot be resolved until such ameliorative relief has been requested.

In the present case, Keshbro, in addition to those permitted uses remaining under the Miami's Zoning Ordinance, could have applied for clarification of the NAB Order, a variance or modification of the NAB Order or other ameliorative relief, and until that occurrence the type and magnitude of the impact, if any, cannot be known. Because of the existence of relief and the failure to attempt to ameliorate the impact of the NAB Order, *Palm Beach v. Wright*, rather than the cases relied upon in *Bowen* (*i.e., Joint Ventures* and *A.G.W.S.*), controls this portion of the analysis and, consequently, requires reconsideration of the takings issue under an anlysis different than that used in *Bowen*.[27]

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[27] In *Bowen*, the City of St. Petersburg sought to abate a public nuisance in the form of the illegal sale and possession of drugs and controlled substances. The illegal sale and possession of controlled substances has long been deemed a nuisance by the State of Florida. No one has the right to maintain illegal conduct. Mr. Bowen had no right or property right to permit the sale of illegal drugs on his property nor did his title include the right of illegal drug sales. The permissible remedy for a nuisance may include forfeiture of the property. *United States v. Ursery*, 578 U.S. 267, 275-276 (1996)(civil forfeiture of house used for unlawful processing of a controlled substance); *Bennis v. Michigan*, 516 U.S. 442 (1996); closure of the premises, *City*

Bowen is demonstrably wrong in its use and application of *Lucas* to a regulation which by definition was only temporary in duration and could not have permanently deprived Mr. Bowen of all uses and value in his apartment building. The *Bowen* court erroneously interpreted *Lucas* to apply to situations where a regulation temporarily deprives the owner of uses. *Lucas* requires a permanent deprivation of all uses and a total deprivation of all value. *Lucas*, 505 U.S. at 1009, 1012, 1016 n.7, 1018, 1020 n.9. The use and misinterpretation of *Lucas* in *Bowen* requires its reversal.

Bowen is also palpably wrong in its use of *First English* to establish a temporary taking. *First English* is only applicable to situations where a taking has already been determined and the offending regulation is either invalidated or rescinded. *First English* does not create a new category of *per se* takings nor stand for the proposition that a denial of all economically viable use even on a temporary basis is a *per se* taking. The ordinance in *Bowen* was neither rescinded nor invalidated nor was there a taking determined. The *Bowen* court simply misread *First English* and misapplied it to the facts.

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of Minneapolis v. Fisher, 504 N.W.2d 520 (Minn. 1993)(one year closing of public bath house as nuisance for prostitution), or an injunction against the nuisance activity depending on the circumstances. *See, e.g., Orlando Sports Stadium, Inc. v. State of Florida*, 262 So.2d 881 (Fla. 1972).

II. EVEN IF THE COURT WERE TO TREAT THE NAB SIX-MONTH USE RENTAL RESTRICTION AS A *LUCAS* TAKING, THE PUBLIC NUISANCE EXCEPTION WAS APPLICABLE TO THE NAB ORDER.

It is clear that the present case does not fall within the purview of *Lucas* because Keshbro was not permanently deprived of all economic use and value[28]; however, even if a *per se Lucas* taking were somehow found to exist in this case, the Miami NAB's Order falls within the *Lucas* nuisance exception. The trial court erred in failing to recognize and utilize the nuisance exception in granting partial summary judgment to Keshbro. The Third District properly found that the nuisance exception applies if the NAB's Order were subject to *Lucas* analysis. *City of Miami v. Keshbro*, 717 So.2d 601 (Fla. 3d DCA 1998).

In *Lucas*, the Supreme Court announced an exception where a regulation is found to have deprived the owner of all use and value:

> The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to the public land and resources or adjacent private property posed by the claimant's proposed activities, *see, e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question,

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[28] The Third District's Opinion finding that *Lucas* applies (Slip Op. at 6, 717 So.2d 601, 605) is contrary to *Lucas* itself. A temporary closure could not as a matter of law permanently deprive an owner of all uses and all value. The Third District's Opinion is erroneous in this regard.

> *see, e.g., id.,* § 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taking by the claimant and the government (or adjacent private landowners) alike, *see, e.g., id.,* §§ 827(e), 828(e), 830.

505 U.S. at 1030-1031. Stated differently, a use can be prohibited without the requirement to pay compensation--even if it is the only use to which the property can be put--if the use constitutes a nuisance under state law. Viewed in this context, it is evident that the Takings Clause was not intended to apply to nuisances, *i.e.*, if the use could be enjoined in a public or private action, then the property owner has no property interest to continue that use. When the challenged regulation deprived him of that already-actionable use, the property owner is entitled to no compensation because he had no redressable property right in the first place. Inquiry into the three *Lucas* nuisance exception factors and the pertinent Restatement section inescapably leads to the conclusion that the Miami NAB's Order falls within the *Lucas* nuisance exception. Compensation is not due for a regulation that prohibits a nuisance and deprives the owner of all use of the property.[29]

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[29] There are many declared nuisance activities in Florida; some of these include: Fla. Stat. § 125.01 (1995)(powers to abate nuisances related to zoning and housing community redevelopment); Fla. Stat. § 135.563 (1995)(abatement of nuisances of dumping sewage, chemicals, explosives, refuse, dredging, causing water pollution and inland shore erosion); Fla. Stat. §§ 161.052, 161.053 (1995)(nuisance abatement related to beach and shore preservation, by regulation of coastal construction); Fla. Stat. § 316.077 (1995)(display of unauthorized signs, signals or markings deemed nuisance); Fla.

Section 893.138, Florida Statutes, and Miami City Code Chapter 46, allow boards to declare certain specific activities to be public nuisances[30] and to abate such public nuisances through a variety of specified procedures. Pertinent here are the provisions of subsections (2)(a), (2)(b) and (2)(c) making any place or premises used as the site for the purpose of lewdness, assignation or prostitution and/or use of a site for the unlawful sale, delivery, manufacture, or cultivation of any controlled substance subject to nuisance determination. In order to abate a declared

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Stat. § 327.53 (1995)(relating to marine vessel safety, vessel sewage deemed a nuisance); Fla. Stat. § 333.02(1)(a) (1995)(abatement of nuisances relating to airport land hazards and incompatible use of vicinity lands); Fla. Stat. § 335.092 (1995)(abatement of nuisances created by advertisements along Everglades Parkway); Fla. Stat. § 339.241 (1995)(abatement of nuisances relating to Florida's Junkyard Control Law); Fla. Stat. §§ 370.061; 370.1103; 370.15; 370.16 (1995)(abatement of nuisances relating to illegal actions under Saltwater Fisheries); Fla. Stat. § 372.31 (1995)(abatement of nuisances relating to illegal fishing devices); Fla. Stat. §§ 372.6672; 372.98; 372.993; 372.995 (1995)(abatement of nuisances relating to wildlife and recreational fishing); Fla. Stat. § 373.433 (1995) (abatement of nuisances relating to stormwater management systems); Fla. Stat. § 381.0067 (1995)(non-compliance with Florida Safe Drinking Water Act deemed nuisance); Fla. Stat. §§ 386.01, 386.02, 386.03, 386.041, 386.051 (1995)(nuisances relating to public health and sanitation deemed abateable); Fla. Stat. §§ 403.0-21, 403.191, 403.413 (1995)(nuisances related to pollution control); Fla. Stat. § 479.105 (abatement of nuisances created by illegally erected signs in public right-of-way).

[30] Fla. Stat. § 893.138(2). A "public nuisance " under Florida law "violates public rights, subverts public order, decency or morals, or causes inconvenience or damage to the public generally." *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So.2d 881, 884 (Fla. 1972).

public nuisance the statute authorizes closure of the site as well as prohibiting the conduct, operation or maintenance of any business or activity on the premises which is conducive to the nuisance. Fla.Stat. § 893.138(4)(b) and (c). Section 893.138 limits the duration to one year. § 893.138(5). The City's Nuisance Code was enacted pursuant to the authority of Fla. Stat. § 893.138 and mirrors the statute's language, procedures and remedies. The Nuisance Code was in effect at the time Keshbro acquired the Stardust Motel in 1998 as was Fla Stat. § 893.138.

The illegal sale of controlled substances and prostitution at the Stardust Motel come squarely within the definitions of "public nuisance" under Florida law at the time Keshbro allegedly acquired in the Stardust Motel in 1988. The Third District was correct in noting that the Stardust Motel was in reality a brothel and drug house rather than a motel. (Slip. Op. at 8, *City of Miami v. Keshbro*, 717 So.2d 601, 605 (Fla. 3d DCA 1998)). Little needs to be said about the harm prostitution and illegal drugs cause to society in general or the effect that a house of prostitution and/or "drug house" has on neighborhoods or the value of adjoining property. Similarly, there is no social benefit or value to prostitution to the "john," or in the case of illegal drugs to the drug pusher or users or society in general.[31] Finally, the well-

[31] Petitioners do not contend that prostitution and illegal drug sales and use are not nuisances, nor do they claim that Miami Nuisance Abatement Ordinance and Florida statutes are not

known serious and debilitating harms caused by prostitution, illegal drug sales and drug delivery can be remedied by closing the "house of prostitution" and/or "drug houses," thereby removing the prostitutes, drug dealers and stopping those who frequent the "bordello" and/or "drug house." All three *Lucas* nuisance factors are easily met in this case.

Numerous cases have applied the *Lucas* nuisance principles: *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995); *M & J Coal Co. v. U.S.*, 47 F.3d 1148 (Fed. Cir. 1995); *Creppel v. U.S.*, 41 F.3d 627 (Fed. Cir. 1994) and *Preseault v. U.S.*, 100 F.3d 1525 (Fed. Cir. 1996); *Hendler v. United States*, 38 Fed.Cl. 611 (1997); *767 Third Ave. Assoc. v. United States*, 48 F.3d 1575 (Fed. Cir. 1995). In *Creppel,* the court analyzed police power challenged on the basis of taking: When presented with a regulatory taking claim, three separate nuisance criteria should be analyzed: (1) the character of the governmental action; (2) the economic impact of the regulation; and (3) the extent that the regulation interferes with distinct investment backed expectations.

The first criterion -- the character of the governmental action -- examines the challenged restraint under state nuisance

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valid exercises of the police power. Further, there is no contention that the Nuisance Abatement Ordinance does not advance a legitimate state interest. Indeed, Petitioners recognize that prostitution and illegal drug sales and usage are serious matters involving the public's health, safety and welfare. (Petitioners' Brief at pp. 2-3).

law. If the regulation prevents what would or legally could have been a common law nuisance, then no taking has occurred. The state merely acted to protect the public under its inherent police power. *Lucas*, 505 U.S. at 1028-1029; *M & J Coal Company*, 47 F.3d at 1153-54; *Hoeck,* 57 F.3d at 789; *Preseault*, 100 F.3d at 1538-39 are in accord. The same analysis was adopted in *City of Milwaukee v. Arrieh*, 565 N.W.2d 291, 295 n.10 (1997); *Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. banc 1996); *City of Minneapolis v. Fisher*, 504 N.W.2d 520 (Minn. App. 1993); and *Moore v. City of Detroit*, 406 N.W.2d 488 (Mich. App. 1987), cases strikingly similar to the instant case. The First District followed a similar approach in *Dept. of Environmental Protection v. Burgess*, 667 So.2d 267, 270-271 (Fla. 1st DCA 1995).

Applying this analysis, the character of the government action involved in this case is the determination made pursuant to Fla. Stat. Annot. § 893.138, that a public nuisance, both under the common law and statutes of Florida, existed on the subject property requiring governmental action to rid the public nuisance. *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So.2d at 884; *see also Jacobs v. City of Jacksonville*, 762 F.Supp. 327, 331 (M.D. Fla. 1991).

When Keshbro first obtained the motel, Keshbro's title did not including the right to permit the motel to be used for prostitution and/or the sale or use of illegal drugs. *See M & J Coal Company v. United States*, 47 F.3d 1148 (Fed. Cir. 1995). Such conduct

constituted a "public nuisance" under the common law of Florida long before Keshbro obtained title to the motel. Thus, the government acted to abate a common law nuisance that could have been enjoined; a nuisance that was also contrary to the statutes of Florida, such as 1832 Fla. Terr. Laws No. 55 Sec. 47 (public nuisance activities include those that tend to annoy the community or injure the health of its citizens in general, or to corrupt the public morals); 1917 Fla. Laws, Ch. 7367 Sec. 1, § 823.05, Florida Statutes, § 823.10, Florida Statutes; and § 60.06, Florida Statutes. The public harm that is involved in this case, namely the need to act against the property to abate a public nuisance, is not the kind of decision that should be borne by the whole community. *Zeman*, 552 N.W.2d at 554. It was not the public that permitted the Stardust Motel to be used for prostitution and/or for the sale of illegal drugs.[32]

Keshbro could not have acquired the property in 1988 with any expectation that using or permitting the motel to be used for prostitution and/or the sale of illegal drugs was part of the title. Thus, the NAB's Order falls within the nuisance exception recognized by *Lucas*.

This case should not be about whether the nuisance exception exists under the United States and Florida Constitutions, because no taking occurred as a matter of law. Regrettably, however, the trial court and Third District forced a discussion of the nuisance

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[32] *See City of Milwaukee v. Arrieh*, 565 N.W.2d 291, 295 fn. 10 (1997), where the various Supreme Court cases including *Lucas* are analyzed and where the court distinguishes a taking for the public good from a non-taking regulation to abate a public harm. A regulation to abate a public harm in the form of a public nuisance does not constitute a taking.

exception. In *City of St. Petersburg v. Bowen*, the Second District virtually eliminated the nuisance exception and did so without regard to the effect of Section 893.138, Fla. Stat. (Supp. 1997). Because Section 893.138, Fla. Stat. (Supp. 1997), duplicates the result that could have been obtained pursuant to the law of nuisance in the State of Florida, the six-month rental prohibition is a non-compensable taking. *Bennis v. Michigan*, 516 U.S. 442 (1996)(complete forfeiture of property is non-compensable taking if done to abate nuisance); *Lucas*, 505 U.S. at 1003 (law must simply duplicate the result that could have been obtained at common law); *State of Colorado Dept. of Health v. The Mill*, 887 P.2d 993 (Colo. banc 1995)(*citing Lucas*--elimination of all economic use of land non-compensable if done to abate nuisance activity); and *Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. banc 1996). The Supreme Court of Colorado has likewise considered the actual closure of a business *en banc* and determined that under the United States Constitution and United States Supreme Court precedents the abatement of nuisance activity is a non-compensable taking.

In *State of Colorado Dept. of Health v. The Mill*, 887 P.2d 993 (Colo. banc 1995), the Supreme Court of Colorado made it clear that certain rights are excluded from title, and do not constitute reasonable investment backed expectations. The nuisance activity was a factor "so overwhelming" that it disposed of the taking issues. *Id.* at 1002 (*citing Ruckelshaus v. Monsanto Co.*, 467 U.S.

986, 1005 (1984). The use of the property for purposes of mining, although being the only economic use of the property, was destroyed by state regulation. It was not found to be a taking because pollution would occur on the property if mining were allowed. In arriving at that conclusion, the Colorado Supreme Court reviewed the background principles of common law nuisance in the state to determine if the regulation simply duplicated those background principles. *Id.* (*citing Lucas*). The court found that the regulation did duplicate the result that could be obtained under the background principles of the law of nuisance and, therefore, there was no taking. *Id. See also Bernardsville Quarry v. Bernardville Borough*, 129 N.J. 211, 608 A.2d 1377 (1992).

The law of the State of Florida for over one hundred and sixty (160) years prior to Keshbro's acquisition of the Stardust Motel prevented this type of activity from occurring. Certainly neither Keshbro's "bundle of rights" included the right to permit prostitution and/or illegal drug sales and usage at the Stardust Motel to occur and then be immune from actions to abate the public nuisance.

Keshbro argues that it lost its investment-backed expectations. However, as recognized in *The Mill*, government may permanently or temporarily remove a landowner's investment-backed expectation for purposes of abating a nuisance without paying compensation. *Id.* at 1001-1002. *See* D. Mandelker, Investment-

Backed Expectations in Takings Law, 27 URB. LAW. 215 (1995). Investment-backed expectations do not apply to an owner's investment but primarily refer to what regulation the land could be properly subject to at the time of purchase, specifically including nuisance. Petitioners had no right or reasonable investment backed expectation to operate a brothel and/or drug house. *Health Clubs of Jacksonville v. State,* 381 So.2d 1174, 1775 (Fla. 1st DCA 1980).

The trial court had before it a common law nuisance under Florida common law, since prostitution and the sale of illegal drugs from the property in question subverts public order and decency, and serves to corrupt the public morals. *Orlando Sports Stadium, Inc., supra*. If a *Lucas per se* taking is found, the *Lucas* exception also exists and should be applied. The Third District was correct in finding that the *Lucas* nuisance exception applies and it was error for the trial court not to apply it and find no taking.

Governments possess the power to eliminate nuisances and criminal activities which have adverse effects on the health, safety, welfare or morals of the community. Courts have long recognized police power authority powers and have distinguished abatement actions from takings in several situations. In a case involving the application of a nuisance abatement statute to a criminal nuisance the Supreme Court in *Bennis v. Michigan*, 516 U.S. 442 (1996), held that power exercised to abate a public nuisance

does not implicate the taking clause of the Fifth Amendment. *City of Minneapolis v. Fisher*, 504 N.W.2d 520 (Minn. App. 1993)(one year closure of public bath house as public nuisance held not to be taking under federal or state constitutions); *Just v. Marinette*, 201 N.W.2d 761, 767 (Wis. 1972) (recognizing distinction between the taking of property for the public good, for which compensation is required, and the taking of property to prevent a public harm, for which compensation is not required).

Nuisance abatement actions range from closure for specified duration, *Wade v. United States*, 992 F.Supp. 6 (D.D.C. 1997) (closure of 'disorderly house' for period of one year pursuant to nuisance abatement ordinance) to complete demolition of structures). In *Boynton v. Mincer*, 75 So.2d 211 (Fla. banc 1954), the state sought to restrain as a nuisance an alleged lottery and bookmaking business. The court stated that "merely engaging in gambling and no more is sufficient in itself to abate the place as a nuisance under the statute." *Id.* at 215 (*citing Pompano Horse Club v. State*, 93 Fla. 415, 111 So. 801 (1927)). "The theory of the statute is that property owners are duty bound not to use their property for illegal purposes." *Id.*

The Miami Nuisance Abatement Ordinance establishes that property used for prostitution and/or the sale of controlled substances is a public nuisance and may be abated. The supporting policy is the same -- landowners are duty bound not to use their

property to injure other property or for illegal purposes -- and is consistent with a concept announced by the Supreme Court over one hundred years ago: "All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U.S. 623, 625 (1887).

In *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D. Fla. 1989), a landowner challenged a town ordinance imposing setback requirements as a deprivation of economic use. The court held that "the government can destroy all economic use if necessary to avoid a public nuisance or nuisance-like use." *Id.* at 609. "The public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation." *Id. (citing Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987)). The court emphasized the distinction between abatement of a public nuisance (preventing public harm) and a taking (promoting the public interest) by quoting the Supreme Court in *Mugler*:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by

> anyone, for certain forbidden purposes is prejudicial to the public interest. . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals or the safety or the public, is not -- and, consistently with the existence and safety of organized society, cannot be -- burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by the noxious use of their property to inflict injury upon the community.

McNulty v. Indialantic, 727 F. Supp. at 610 (*citing Mugler v. Kansas*, 123 U.S. at 668-69). Quoting *Keystone*, the court explained that "the special status of this type of state action can also be understood on the simple theory that since no individual has the right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Id.*

In the present case, the City of Miami permissibly restricted Keshbro from using the property for declared public nuisance, even assuming, *arguendo*, that the City denied economically viable use for a period of six months. This restriction did not constitute a taking, temporary or otherwise, under either state law or federal law.

Keshbro has not challenged the Nuisance Abatement Ordinance, itself, or its application to the Stardust Motel (the latter element is comprised of the official classification of the property as a "public nuisance," the Order issued by the Nuisance Abatement

Board, as well as execution of the Order). The fact that the motel constituted a public nuisance is sufficient reason to invoke the City's police powers with the legally established objective of preventing or eradicating a public harm. To the extent that the governmental action in the present case fits within the classification of abatement rather than taking, the City's exercise of its police power was justified and does not require compensation. The trial court erred in failing to apply nuisance abatement principles, requiring reversal.

III. CONCLUSION

The partial summary judgment granted by the trial court should be reversed because the actions of the Miami Nuisance Abatement Board did not permanently deprive Petitioners of all economically viable use of the property and the NAB's Order did not permanently deprive Petitioners of all value.

This Court should hold that no taking occurred as a result of the NAB's Order, or if so that the *Lucas* nuisance exception applies.

The Second District's decision in *St. Petersburg v. Bowen*, 675 So.2d 626 (Fla. 2d DCA 1996), *rev. denied,* 680 So.2d 421 (Fla. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1120 (1997), was incorrectly decided. *Bowen* should be reviewed by this Court and reversed.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing were sent on April _, 1999 by Federal Express to the Clerk of the Florida Supreme Court at Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1925, and two copies were served by Federal Express to: David Forestier, 12865 West Dixie Highway, North Miami, FL 33161, Attorney for Petitioners, and two copies to Paul B. Feltman and Douglas C. Broeker, 1000 Concord Building, 66 West Flagler Street, Miami, Florida 33130, Attorneys for Respondents.