IN THE SUPREME COURT OF FLORIDA

CASE NO.: 94,058
District Court Case No.: 98-01151
L.T. CASE NO. 97-14985

KESHBRO, INC., a Florida corporation, d/b/a Stardust Motel; and Harish Gihwala, individually,

Petitioners,

vs.

CITY OF MIAMI, a municipal corporation and THE CITY OF MIAMI NUISANCE ABATEMENT BOARD, a Quasi-Judicial Board

Respondents.

RESPONDENTS' ANSWER BRIEF

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RESPONDENTS' ANSWER BRIEF

STATEMENT OF THE CASE AND FACTS

Respondents, City of Miami and City of Miami Nuisance Abatement Board, collectively referred to as (the "Board" or "Respondents"), file this their Answer Brief. This appeal seeks review of a ruling of the Third District Court of Appeals in *City of Miami, et. al. v. Keshbro, Inc., et. al.*, 717 So. 2d 601 (Fla. 3d DCA 1998), reversing the trial court's granting of summary judgment on the issue of liability in favor of Plaintiffs/Petitioners', Keshbro, Inc. and Harish Gihwala, individually ("Petitioners"). *See* Order [Granting Summary Judgment] AR 1001[1] and Order on Motion for Reconsideration or Clarification AR 1002-1003. Respondents request this Court's ruling affirming the Court of Appeals' ruling in favor of the Respondents. As good grounds in support thereof, Respondents show that:

XII. INTRODUCTION

This appeal squarely addresses the viability of the Second District Court of Appeals' decision in *City of St. Petersburg v. Bowen*, 675 So. 2d 626 (Fla. 2d DCA 1996) and the applicability of *Bowen* to the facts of this case. Under the particular facts in *Bowen*, the Second District upheld a result which declined to apply the

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[1]"AR", refers to the Appendix submitted with Respondents' Brief in the Third District Court of Appeals, followed by the page number, commencing with page 1001 and proceeding sequentially.

"PB", refers to the Petitioners' Brief, followed by the page number.

Nuisance Exception to the Constitution's Takings Clause. That court ordered that an apartment owner who allowed drug dealing to occur on his property was entitled to compensation, by inverse condemnation, when his building was closed by the St. Petersburg Nuisance Abatement Board. That result, which was followed by the trial court below, was in conflict with the case law which holds that property which is a public nuisance may be the subject of a taking without compensation – this is the "Nuisance Exception" to the Takings Clause. *See, e.g.,Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992); *State of Colorado Dept. of Health v. The Mill,* 887 P.2d 993 (Colo. 1995) (*en banc*) (citing *Lucas* -- elimination of all economic use of land non-compensable if done to abate nuisance activity). The Third District Court of Appeals correctly held that the closure of the Petitioner's property was a non-compensable action taken pursuant to the Nuisance Exception to the Takings Clause. *Keshbro,* 717 So. 2d at 604.

Respondents further assert that the Third District Court of Appeals' decision should be affirmed by this Court as the facts of this case are so different from *Bowen,* that this case is clearly distinguishable from the facts in *Bowen*: the nuisance activity was inextricably intertwined with the operation of the motel such that the only way to abate the nuisance was to shut down the operation of the motel; the subject motel here was before the Miami Nuisance Abatement Board for the second time after a closure in 1992-93 under the same owner; the Board acted incrementally and tried

lesser sanctions without success before resorting to closure; there was an overwhelming amount of evidence of ongoing drug and prostitution activity on the premises which continued, unabated, when lesser measures were taken; and the motel is within 1000 feet of an elementary school. To the extent that this Court determines that it must consider the ruling in *Bowen,* this Court should disapprove of the Second District Court of Appeals' decision as it eliminated the Nuisance Exception and did so without undertaking any legal analysis into what the prior history of the law of Florida regarding abatement of nuisances is, and without regard to whether or not §893.138, Fla. Stat. (Supp. 1997) simply duplicates the result that could have previously been obtained pursuant to the common and prior statutory laws of the State of Florida.

II. STATEMENT REGARDING JURISDICTION OF THE BOARD

The City of Miami Nuisance Abatement Board is created by City Ordinance, City of Miami Code Chapter 46, pursuant to enabling legislation contained in §893.138, Fla. Stat. (Supp. 1997). AR 1004, 1011, respectively. In accordance with the Ordinance, the Board is permitted to hear cases in a quasi-judicial forum and determine whether or not properties are a "public nuisance" as defined by the Ordinance. The Ordinance proscribes such activity as drug sales, prostitution-related activity, gang related activity and gambling. The Board is permitted to punish properties found to be in violation of the Ordinance with sanctions including, *inter*

alia, closure of the property for up to a period of one (1) year. The Board's jurisdiction over a particular case lasts for a maximum of one (1) year.

III. STATEMENT REGARDING JURISDICTION OF THIS COURT

On December 10, 1996, the Board served a Notice to Appear on the Petitioners charging eight (8) separate instances of drug dealing and prostitution activity. AR 1013. On January 29, 1997, the Petitioners appeared before the Board, stipulated that the property was a public nuisance, agreed to abate the nuisance and agreed to the closure of six (6) rooms. AR 1018. On February 7, 1997, an Order of Public Nuisance was signed by the Board. AR 1021. On February 26, 1997, the Board held an evidentiary hearing to consider additional nuisance activity. On March 4, 1997, the Board entered an additional Order of Public Nuisance as the result of additional incidents of nuisance, and ordered seven (7) additional rooms closed. AR 1028. On June 25, 1997, the Board held another evidentiary hearing to consider still more nuisance activity. The Board ordered the entire property closed by Order dated June 30, 1997. AR 1031.

In separate actions, Petitioners filed suit to contest the Board's jurisdiction; AR 1034; and filed two (2) appeals in the Circuit Court from the Board's Orders. AR 1041, 1042. All of those actions have been dismissed and no further appeals are

pending. AR 1049, 1050, and 1051.[2] In the instant case, Petitioners filed suit on July 3, 1997, claiming that the temporary closure of their property is a temporary taking which requires compensation pursuant to the Constitutions of the United States and the State of Florida. Respondents filed their motion for summary judgment on October 27, 1997. AR 1052-1078. Petitioners filed their motion for summary judgment, on the issue of liability, on February 10, 1998. AR 1079. The trial court heard argument on January 27, 1998 and March 2, 1998, then entered an order granting summary judgment in favor of the Petitioners on April 13, 1998. AR 1001. The trial court entered its Order on Defendant's Motion for Clarification on May 6, 1998, stating that the summary judgment determined the issue of liability in favor of the Petitioners, and thereby setting forth the issues for appeal before this Court. AR 1002.

The Respondents appealed the trial court's judgment in favor of the Petitioners pursuant to Fla.R.App.P. 9.130(a)(3)(c)(iv). The Third District Court of Appeals held oral argument on July 30, 1998. On September 16, 1998, it issued its ruling in favor of the Respondents reversing the summary judgment in favor of the Petitioners and remanding for further proceedings before the trial court. *Keshbro,* 717 So. 2d at 605.

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[2] *See* AR 1056-1057 for a brief summary of the other actions leading up to the closure of the property. Orders from various courts are included in the record and are referenced in the Index to the Appendix.

Petitioners filed their Jurisdiction Brief with this Court on October 13, 1998. Respondents filed their Jurisdiction Brief on November 9, 1998 and this Court granted discretionary review on February 23, 1999.

IV. STANDARD OF REVIEW

This Court reviews this matter *de novo* as the intermediate court of appeals overruled the trial court finding, as a matter of law, that the Board is liable for a temporary taking of the Petitioners' property as a result of the Board closing a drug and prostitution ridden motel operated by Petitioners which Petitioners stipulated was a nuisance. The intermediate court of appeals reviewed this matter on interlocutory appeal of an adverse summary judgment pursuant to Fla.R.App.P. 9.130 (a)(3)(c)(iv). *Dauer v. Freed,* 444 So. 2d 1012 (Fla. 3d DCA 1984). This Court reviews this matter *de novo* as it involves a question of law. *Omar Blanco vs. State of Florida*, 706 So 2d 7 (Fla. 1996).

IV. STATEMENT OF FACTS

The facts leading to the closure of the Stardust Motel by the Board evidence drug and prostitution related criminal activity on the Petitioners' property, all *within one thousand (1000) feet of Morningside Elementary School, over a period of at least ten (10) years*. In *City of Miami v. Stardust Motel and Keshbro, Inc.,* Case No. 91-011 (Nuisance Abatement Board, City of Miami 1992) the Board closed the Stardust Motel for drug and prostitution related activity. AR 1103. As set forth in the

Affidavit of Chief Brooks, City of Miami Police Department, the Stardust has a long history of criminal activity. When he was a Lieutenant in charge of the street narcotics units in the 1980's, the Stardust Motel was one of the "bad properties" on Biscayne Boulevard. AR 1109. After the property was closed in October of 1992, the Stardust Motel petitioned for an early reopening. AR 1114. The Board entered a reopening Order on March 4, 1993. AR 1118. Petitioners committed that they would: maintain the premises free of illegal activity, scrutinize potential motel guests and visitors, and prohibit the free passage of unregistered guests on the premises. AR 1118-1121. In spite of the Petitioners' representations in its Petition to Reopen, they failed to undertake their commitments as detailed below.

Some of the incidents, after the 1992-93 Nuisance Abatement Board case which led up to the second Nuisance Abatement Board case, in 1996-97, were based upon the continued criminal activity in, on and adjacent to the subject property. Some of those incidents that took place in 1996 are as follows:

i) July 11, 1996, prostitution related activity AR 1122 ;
ii) July 11, 1996, prostitution related activity AR 1123;
iii) July 31, 1996, possession and sale of cocaine AR 1124;
iv) July 31, 1996, purchase and possession of cocaine AR 1126;
v) July 31, 1996, sale and possession of rock cocaine AR 1128;
vi) August 7, 1996, possession of cocaine AR 1130;
vii) August 22, 1996, possession and sale of rock cocaine AR 1132 ;
viii) August 22, 1996, sale and possession of rock cocaine AR 1134;
ix) September 25, 1996, purchase and possession of rock cocaine AR 1136;
x) October 1, 1996, prostitution related activity AR 1138;
xi) November 5, 1996, prostitution related activity AR 1139 ;

xii) November 23, 1996, sale and possession of rock cocaine AR 1140;
xiii) November 23, 1996, possession of cocaine AR 1141 ;
xiv) November 23, 1996, sale and possession of cocaine AR 1142;
xv) December 4, 1996, possession and sale of marijuana AR 1144;

See also certified copies of City of Miami Police Department incident reports AR 1145-1163. The Board, faced with the longstanding history of illegal activity on the property spanning a decade, the prior case before the Board, the continuing criminal activity of drugs and prostitution, all within one thousand (1,000) feet of Morningside Elementary School, sent a Notice of Hearing/Notice to Appear and Complaint for Violation of Miami City Code in NAB Case No. 96-009 on December 10, 1996. AR 1013. The Board held a hearing on January 29, 1996. At that hearing, the Petitioners stipulated that the property was a nuisance and agreed to incorporate into the Board's Order the rehabilitation of six (6) rooms on the property which the Petitioners had already undertaken to improve. AR 1018. The Petitioners also agreed to undertake certain responsibilities with regard to abating the nuisance activity taking place on the property. AR 1018. (Stipulation of counsel for Petitioners at NAB hearing on January 29, 1997).

After the January 29, 1997 hearing, the activity continued: On February 4, 1997, an undercover police officer entered on the property and, at his request, a woman at the property purchased crack cocaine on his behalf, in two separate rooms in the motel. Thereafter, she solicited the officer for sex in exchange for a portion of

the cocaine. AR 1167-1169 (sworn testimony of City of Miami Police Officer Gary regarding the incident). On February 18, 1997, additional drug related activity took place on the property. AR 1176, 1182 (testimony of citizen Sal Patronaggio before the Board). On February 26, 1997, after the additional activity had taken place, the Board held a hearing wherein they considered the additional drug related activity and issued an Order on March 4, 1997, and sought to close an additional seven (7) rooms on the property. AR 1183. That Order, like all other orders of the Board ,was ignored by the Petitioners.

Subsequent to the February 26, 1997 hearing and March 4, 1997 Order, the following separate incidents and arrests took place:

i) March 11, 1997, possession and sale of rock cocaine AR 1186;
ii) March 11, 1997, possession and purchase of rock cocaine AR 1187;
iii) March 11, 1997, possession and purchase of cocaine AR 1188;
iv) April 10, 1997, possession and purchase of rock cocaine AR 1189;
v) April 10, 1997, sale and possession of marijuana and cocaine AR 1191;
vi) April 10, 1997, sale and possession of marijuana and cocaine AR 1193;
vii) May 27, 1997, possession of drug paraphernalia AR 1195.

Faced with this continuing pattern of criminal activity taking place on and in the premises of Petitioners' property and their complete disregard for orders of the Board, the Board held a hearing on June 25, 1997 and ordered the property closed effective June 30, 1997. AR 1031. Petitioners refused to abide by that Order until entry of an Order of Closure by the Circuit Court in and for Dade County on September 2, 1997. AR 1239. Proving that the nuisance activity would not cease until the property was

closed, on August 7, 1997, a possession of marijuana arrest was made on the property. AR 1197. As set forth in Section VII, *infra,* this activity and the subsequent closure of the property is a non-compensable taking and, therefore, Petitioners' Motion for Summary Judgment was inappropriately granted by the trial court and the Third District Court of Appeals appropriately reversed and remanded. As a matter of law, summary judgment is properly entered in favor of the Board.

ISSUE PRESENTED

Whether the temporary closing of the Petitioners' property, in order to abate a common law and statutory public nuisance involving criminal activity, constitutes a compensable taking pursuant the Constitutions of the United States of America and the State of Florida.

SUMMARY OF ARGUMENT

Focusing on the facts in this case, it seems preposterous that the owners, Keshbro and Gihwala, could receive compensation for this closure. Mr. Gihwala has lived on the property with his family since before the previous closure by the Board. AR 1198. He previously committed to improve management practices, yet, just three years later, he rented motel rooms to people who engaged in cocaine sales and prostitution solicitation on the premises. Through counsel, he stipulated that the property was a nuisance, again, and committed to abate the activity, again. The very next week, an undercover officer was able to purchase cocaine from two different

rooms, and was solicited for sex on the premises. Mr. Gihwala never testified or addressed the Board during the proceedings. The Board gave him additional chances to abate the nuisance without closure, but the illegal activity continued. The Nuisance Exception to the Takings Clause should apply to this case. The Third District Court of Appeals' decision should be upheld and the *Bowen* decision should either be disapproved as a mistake – misreading of applicable law – or distinguished as inapplicable to the facts of this case.

This Court should uphold the ruling of the Third District Court of Appeals for the following reasons:

1. The temporary closure of the Petitioners property by the Board falls within the Nuisance Exception of the Takings Clause.

2. The temporary closure of the property by the Board was a proper exercise of police power which is not a compensable taking pursuant to the United States Constitution and the Constitution of the State of Florida.

3. There is no right or investment backed expectation to run a commercial enterprise and allow rampant drug dealing and prostitution to take place thereon and then require the government to pay when it temporarily closes the property for the sole purpose of eliminating a public nuisance that is criminal in character.

4. Petitioners were not deprived permanently of all economic benefits of their property as they used the property as a home and the property was zoned for sixty

(60) other uses which the Petitioners chose not to engage in. Further, once the nuisance was abated the property owner had full capacity to use the property for any use consistent with the zoning and planing laws. Thus, what occurred was an interference similar to what might occur if for example the property owner was required to close the property in order to clean up toxic waste stored thereon.

5. The *Bowen* case being relied upon by Petitioners in their claim for compensation for an alleged takings is not on point factually with this case, Florida law allows for the closure of the property without compensation, and *Bowen* grossly misreads federal law on the issue of takings.

6. The trial court relied on unsubstantiated, unsworn statements by Petitioners in granting its summary judgment and therefore the Order granting summary judgment was based upon legally insufficient evidence.

ARGUMENT

Petitioners rely upon the Second District's opinion *City of St. Peterburg v. Bowen,* 675 So. 2d 626 (Fla. 2d DCA 1996). AR 1200. The *Bowen* opinion needs to be reviewed in conjunction with Florida case law on nuisance and takings and with *Keshbro,* 717 So. 2d 601, *Lucas*, 505 U.S. 1013 and *The Mill,* 887 P.2d 993 (Colorado Supreme Court *en banc*) (citing *Lucas* -- elimination of all economic use of land non-compensable if done to abate nuisance activity); *see also Zeman v. City of Minneapolis,* 552 N.W. 2d 548 (Minn. 1996)(Minnesota Supreme Court *en*

banc)(character of government action in abating the nuisance activity outweighs the economic impact on property owner).

The *Bowen* decision as written, misses key issues and misapprehends the law -- as painfully illustrated by a comparison with the reasoned opinions of the courts in *Keshbro,* 717 So. 2d 601 and *The Mill,* 887 P.2d 993. Also, *Bowen* is distinguishable from this action because it relies upon facts and stipulations which differ significantly from the undisputed facts presented by Respondents in this case.

Petitioners claim that the temporary closure of their property constitutes a taking of their land. Petitioners' claim fails as: i) the temporary closure by the Board falls within the Nuisance Exception to the Takings Clause; or ii) the temporary closure was a proper exercise of police powers by the Board the purpose of which outweighs the economic impact on the Petitioners.

VI. MODERN TAKINGS LAW

There are two (2) separate areas of takings law before this Court. The first is the Nuisance Exception to the Takings Clause and the second is a three (3) part test which weighs the character of the government action against the economic impact on the individual. Under either, the Respondents properly prevail. *Lucas*, 505 U.S. 1013; *Keshbro,* 717 So. 2d 601; and *The Mill,* 887 P.2d 993 (nuisance exception) and *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1986) and *Zeman,* 552 N.W. 2d 548 (three part test). The supreme courts that have ruled on the

issue before this Court have held that the abatement of nuisance activity is a non-compensable taking.

The Third District Court of Appeals ruled that the Nuisance Exception applies in this matter and thus the closure of the Petitioners' property was a non-compensable taking.

A. Nuisance Exception

The Nuisance Exception to the takings clause allows for the abatement of a nuisance without compensation. The Supreme Court has set forth the requirements for newly legislated statutes used to abate nuisances as follows:

> A law or decree . . . must do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 505 U.S. at 1019. That being: the legislation passed to prevent a nuisance must adhere to the background principles of the law of public and private nuisance in the State of Florida in order to fall within the Nuisance Exception. As found by the Third District Court of Appeals : "The City and the Board thus must prove, in order to avoid paying compensation, that at the time the owners purchased the property, prior principles of nuisance law prohibited its use for the purpose proscribed by the Board's order as enforced by the injunction". *Keshbro,* 717 So. 2d at 603. The statute at issue in this case, §893.138, Fla. Stat., does adhere to the background

principles of the law of nuisance in the State of Florida. *See* Section VII A-C, *infra.*

In *The Mill,* 887 P.2d 993 the Supreme Court of Colorado makes it clear that certain rights to use are excluded from title, and do not constitute reasonable investment backed expectations. *The Mill* involved mining of uranium which caused pollution. *Id.* at 997-999. Pollution is a nuisance pursuant to the law of the State of Colorado. *Id.* at 1002. The nuisance activity of pollution was a factor "so overwhelming" as to dispose 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 completely destroyed by state regulation. *Id.* It was not found to be a taking because pollution would occur on the property if the mining went forward, and pollution is considered a nuisance pursuant to the common law of the State of Colorado. *Id.* at 1001 - 1002. 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 at issue simply duplicated those background principles. *Id.* Citing to *Lucas,* the court found that the regulation did duplicate the result that could be obtained pursuant to the background principles of the law of nuisance for the State of Colorado and, therefore, there was no taking. *Id.; see also, Hage v. United States,* 35 Fed.Cl. 147, 152 (1996). Further, property has never been understood to derive any value from activities that

endanger public safety, health or morals.[2]

B. Three Part Test-

In general there is no firmly established test for determining when a taking has occurred, when there is not a total and permanent taking of property. Instead, when a total taking has not occurred, takings law turns largely on the particular facts underlying each case. *See Penn Central,* 438 U.S. 104, 124; *Zeman,* 552 N.W. 2d 548. Under *Penn Central,* a court considering a takings claim must review: i) the economic impact of the regulation on the person(s) suffering the loss; ii) the extent to which the regulation interferes with distinct investment backed expectations; and iii) the character of the government action. *Id.* These three elements are reviewed to assess whether the complained of action effected a taking of private property for public use. *Penn Central,* 438 U.S. at 124. Petitioners have the burden regarding all of the elements of the *Penn Central* analysis as there is no presumption that a taking has occurred. When analyzing a temporary taking issue pursuant to these three elements, the court should weigh the first two elements regarding economic impact against the third element regarding the character of the government action. *Penn*

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[2]*See also* the 1997 case of *City of Milwaukee v. Arrieh*, 565 NW.2d 291, 294 (Wis.App. 1997) (citing *Bennis v. Michigan,* 516 U.S. ___, 134 L.Ed. 2d 68, 116 S.Ct. 994 (1996) for the proposition that "abatement of a nuisance does not violate either the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment").

Central, 438 U.S. at 124; *Zeman,* 552 N.W. 2d at 553-555.

VII. PURSUANT TO THE NUISANCE EXCEPTION TO THE TAKINGS CLAUSE THE TEMPORARY CLOSURE OF THE PETITIONERS' PROPERTY IS NOT A COMPENSABLE TAKING

Because the Nuisance Exception has direct application and should be applied in this case it will be discussed first. Petitioners allege that the Board's temporary closure of their property is a taking and requires compensation. Petitioners' claim fails as: i) the restrictions imposed upon them regarding the nuisance activity on their property were restrictions that existed when they took title; and ii) the nuisance activity is inextricably intertwined with the operation of the motel.

In analyzing the Nuisance Exception in takings cases a court should analyze whether the proscribed use was or was not part of the landowner's property interests at the time the property was purchased. *Lucas,* 505 U.S. at 1022; *Keshbro,* 717 So. 2d at 603; *The Mill,* 887 P.2d at 1001-1003; *see also, Department of Environmental Protection v. Burgess,* 667 So. 2d 268, 271 (Fla. 5th DCA 1995)(expressing the same proposition regarding the need for the court to look at the use at the time of the purchase of the property). If the proscribed use was not part of the landowner's property interest when it was purchased then no taking has occurred. *Lucas,* 505 U.S. at 1029; *Keshbro,* 717 So. 2d at 603; *Burgess,* 667 So. 2d at 271*;* and *The Mill,* 887 P.2d at 1001-1003. Just as the Plaintiff in *The Mill* never had the right to allow nuisance activity to take place on their property in the form of pollution, the

Petitioners never had the right to use their property to allow nuisance activity in the form of drug dealing and prostitution to occur thereon with their knowledge.

A. Background principles of nuisance law in the State of Florida

Florida law has long held that the activity the Board is seeking to abate pursuant to §893.138, Fla. Stat. (Supp. 1997) and City of Miami Code Chapter 46 and taking place on the Petitioners' property is a public nuisance. *See* 1832 Fla. Terr. Laws No. 55 § 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, § 1 (examples offered by the legislature include: "any house or place of prostitution, assignation, lewdness or place or building where games of chance are engaged in violation of law or any place where any law of the State of Florida is violated[.]"; 1969 Fla. Laws ch. 69-364, § 1 (codified at Fla.Stat. §823.10)(public nuisance includes any building, that is "used for the illegal keeping, selling or delivery" of illegal drugs). *See also, Atkinson v. Powledge,* 123 Fla. 389, 167 So. 4(Fla. 1936); *King v. State,* 17 Fla. 183 (Fla. 1879) (both cited by Third District Court of Appeals in support of its holding that the closure in this matter is a non-compensable taking). Thus, §893.138, Fla. Stat. (Supp. 1997) and City of Miami Code Chapter 46 simply duplicate the background principles of the law of the State of Florida that have existed long before Petitioners ever acquired title.

B. Restrictions on criminal activity occurring on Petitioners' property inhered in the title itself

The Petitioners took title to the property in 1988, AR 1207-1213, and thus, the law of the Territory of Florida and, subsequently, the State of Florida for over 160 years prior to 1988 has held that the type of activity that §893.138, Fla. Stat. (Supp. 1997) and City of Miami Code Chapter 46 seek to prevent are nuisances. The restriction of this activity on the Petitioners' property inhered in the title itself. *Lucas,* 505 U.S. at 1029; *Keshbro,* 717 So. 2d at 603; *The Mill,* 887 P.2d at 1001-1003 . Thus, by using the powers conferred by the legislature of Florida in §893.138, Fla. Stat. (Supp. 1997), the Board, through the state statute, is simply duplicating the result that could have been achieved under the state's law of private nuisance, and/or, by the state to abate nuisances that effect the public in general. *Id.* Therefore, no taking has occurred as the Board's actions fall squarely within the Nuisance Exception to the Takings Clause. *Id.* [3] *See also, Keystone,* 480 U.S. at 491 n. 22;

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[3] *See also Mugler v. Kansas*, 123 U.S. 623 (1887), ("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 of 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 a noxious use of their property, to inflict injury upon the community".); *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470, 491 n. 20 (1987), ("[S]ince no individual has a 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.").

"[c]ourts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance"--citing *Pompano Horse Club, Inc. v. State ex rel. Bryan*, 111 So. 801, 807 (Fla. 1927)(Florida Supreme Court held preventing gambling on property is non-compensable taking because the state was suppressing an unlawful use of that property in a manner declared by law to be a nuisance, and though such action may impair the value of the property it is not a compensable taking). Therefore, this Court appropriately affirms the Third District Court of Appeals' decision which reversed the trial court.

C. Nuisance activity is inextricably intertwined with the operation of the motel

The Board acted appropriately by temporarily closing the property in light of the fact that the drug dealing is "inextricably intertwined" with the operation of the business. AR 1109, Affidavit of Chief Brooks. *Keshbro,* 717 So. 2d at 604 citing, *Health Clubs of Jacksonville, Inc. v. State of Florida,* 381 So. 2d 1174, 1176 (Fla. 1st DCA 1980) and *Five Sky Inc. v. State,* 131 So. 2d 39 (Fla. 3d DCA 1968).

In the instant case, closure came after the Petitioners were given numerous opportunities to demonstrate they could operate the business without the illegal activity taking place and, therefore, closure was appropriate. *Keshbro,* 717 So. 2d at 604; *Health Clubs of Jacksonville, Inc.,* 381 So. 2d at 1175. The Board did not rush to close the property but rather moved incrementally to abate the nuisance prior to

closing the Petitioners' property. *See* Statement of Facts, *supra.* Therefore, unlike the owner in *Bowen* the Petitioners here have been before the Board previously and were given time to abate the illegal activity on their property. AR 1103, 1114, and 1118. It is apparent that the business needed to be closed as it could not be run without the illegal activity occurring on the premises. *Keshbro,* 717 So. 2d at 604. Therefore, this Court appropriately affirms the ruling of the Third District Court of Appeals.

VIII. PURSUANT TO THE THREE PART TEST OF PENN CENTRAL THE CHARACTER OF THE GOVERNMENT ACTION OUTWEIGHS THE ECONOMIC IMPACT ON PETITIONERS; PETITIONERS HAVE NOT SUFFERED A TOTAL AND PERMANENT DEPRIVATION OF ALL ECONOMICALLY VIABLE USE AND VALUE FOR THEIR PROPERTY; AND TO THE EXTENT THE REGULATION INTERFERES WITH INVESTMENT BACKED EXPECTATIONS THE PETITIONERS' PROPERTY IS AND CAN BE USED FOR ALTERNATIVE PURPOSES

Petitioners make the conclusory allegation that the temporary closure of the property is a taking which requires just compensation. Reviewing this matter pursuant to *Penn Central* and *Zeman*, Petitioners argument fails as: i) the character of the government action, reducing illegal activity, is being achieved and outweighs the economic impact on the Petitioners; ii) to the extent Petitioners are impacted no citizen has an investment backed expectation to run a commercial enterprise with illegal activity occurring thereon; iii) to the extent that Petitioners argue that the regulation interferes with investment backed expectations, the Petitioners property

is being used as a home and can be used to run no less than sixty (60) different types of businesses; and iv) to the extent Petitioners are impacted, they have not suffered a deprivation of all economically beneficial use of their property.

Under *Penn Central* a court considering a takings claim must review: i) the economic impact of the regulation on the person(s) suffering the loss; ii) the extent to which the regulation interferes with distinct investment backed expectations; and iii) the character of the government action: to assess whether the complained of action effected a taking of private property for public use. The first two elements are weighed against the third element. Respondents acknowledge that the Third District Court of Appeals did not agree with Respondents' arguments pursuant to *Penn Central*. Specifically, the court of appeals held that there was a total deprivation of any economic use of the property and that Respondents' arguments to the contrary, which were made in the alternative, were unfounded.[4] While Respondents acknowledge the Third District's strong language regarding the applicability of the *Penn Central* line of cases under the facts of this case, Respondents believe the *Penn Central* reasoning can be considered in this case and, therefore, are appropriately arguing in the alternative.

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[4] *See Keshbro,* 717 So. 2d at 604 n. 7 (the City's assertion that the use of the property as a home was not a total deprivation of all economically viable use of the property defies the logic of finance and lacks reason).

A. Character of the government action–the third element of Penn Central

Consideration of the third element of *Penn Central* requires the examining court to undertake the following test: "If the purpose of the state regulation is designed to prevent harm to the public and is likely to achieve that goal and the harm suffered by the property owner does not appear to be one that should be borne by the entire community then no taking will be found". *See, e.g., Mugler,* 123 U.S. at 661-662; *Keystone,* 480 U.S. at 488-493; *Zeman,* 552 N.W. 2d at 554. The law at issue here is achieving its purpose of protecting the public by reducing illegal activity and the costs of abating the nuisance activity should not be borne by the residents of the City of Miami.

Pursuant to §893.138 (2), Fla. Stat. (1994): "Any county or municipality may, by ordinance, create an administrative board to hear complaints regarding the nuisances described in subsection (1)". AR 1214. Subsection (1) lists, among other things, unlawful sale, delivery, manufacture, or cultivation of any controlled substance and prostitution as nuisances covered by the statute. The Florida Legislature recently amended the statute listing the intent of the legislature in passing the statute as:

> (1) *It is the intent of this section to promote, protect, and improve the health, safety, and welfare of the citizens of the counties and municipalities of this state ... .*

§893.138, Fla. Stat. (Supp. 1997). AR 1214. A harm-prevention regulation for a

state purpose of protecting the public from noxious harm or illegal activity, is a powerful rationale militating against finding a taking. *Zeman,* 552 N.W. 2d at 554. The reviewing court must look to the nature of the regulation, its purpose and the probability of achieving that purpose with the regulation. *Id.* If the regulation is drawn to prevent harm to the public, broadly defined, and seems able to achieve this goal, then a taking has not occurred. *Zeman,* 552 N.W. 2d at 554*, citing, Keystone,* 480 U.S. at 488-493.

The City of Miami's decision to engage landlords and the police department in a cooperative effort to protect residential neighborhoods is well within its publicly-bestowed mandate. *Zeman,* 552 N.W. 2d at 554. The City of Miami Code Chapter 46 *et. seq.* fulfills that mandate to prevent and reduce illegal activity on the Petitioners' property. As set forth in the affidavit of Chief Brooks of the City of Miami Police Department:

> 5. In the case of the Stardust Motel, the City of Miami's Nuisance Abatement Ordinance prevents harm to the surrounding residential neighborhood by allowing the Board to stop illegal activity going on at the motel.
>
> 6. The Nuisance Abatement Ordinance deters criminal activity in neighborhoods by enlisting the aid of landlords. The Ordinance fosters cooperation between landlords and the police department to work towards a resolution that will end the illegal activity.
>
> 7. It is my opinion that the drug activity becomes inextricably intertwined with the operation of the motel and that the only effective remedy under those circumstances is closure of the motel.

> 8. When the City of Miami Nuisance Abatement board was formed, I noticed that the enforcement option of closure was a very effective option for eliminating drug sale activity at a particular location. I noticed that when properties were closed and the properties were secured, the police rarely were called out for additional arrests at those locations. I also noticed that it took a period of approximately six months for a property to lose its reputation as a drug haven.

AR 1109-1113. Thus, the law is achieving its purpose by reducing illegal activity.

Further, all of the activity that is codified in the ordinance is criminalized by the State of Florida. The City of Miami Code Chapter 46-8, "Enjoining of Nuisances" allows for the injunction of criminal activity defined in the following Florida statutes in order to protect the health, morals and welfare of the community: §796.01 *et. seq*. Prostitution; §823.01 *et. seq*. Nuisances; §849.01 *et. seq.* Gambling; §893.01 *et. seq.* Drug Abuse Prevention And Control. *See* City of Miami Code Chapter 46-8; AR 1004-1010. The prevention of this type of activity is incidental to operating rental dwellings in urban areas and when landlords do not cooperate pursuant to the ordinance, they contribute to the illegal activity continuing in their buildings. *Zeman,* 552 N.W. 2d at 554. In the face of this continuing activity, the City of Miami is well justified in temporarily closing the property. *Id.* This is especially so in light of the fact that this landlord was previously before the Board for the *same type of activity* and the property is a known drug and prostitution haven. AR 1103-1108 (previous hearing before the Board); AR 1109 (affidavit of Chief

Brooks).[5] Also, the Petitioners stipulated that the property is a nuisance. AR 1018.

Moreover, as set forth in the affidavit of Robert Flanders, the activities of drugs and prostitution taking place at the Stardust is devastating the surrounding neighborhoods, and as a result, the tax base for the City of Miami. AR 1217-1221. Mr. Flanders is a co-founder and vice president of the Upper Eastside Miami Council, Inc., a not for profit civic improvement organization focused on the clean-up and revitalization of Biscayne Boulevard. *Id.* He also sits on the Board of Directors for the Palm Bay Club, a homeowners association representing three hundred (300) people, which is located at N.E. 69th Street or approximately two blocks from the Stardust Motel. *Id.* He has lived at the Palm Bay Club since 1981 and has seen the quality of life, and safety of the neighborhood decline as drugs and prostitution increased at the Stardust. *Id*. The Stardust is the worst property in the Upper East Side. *Id.* The economic impact on the surrounding neighborhoods near the Stardust Motel due to the illegal activity is a substantial one. AR 1217-1221. In 1981 apartments at the Palm Bay Club and Condominium were between $900,000.00 - $1,000,000.00 in present value dollars. *Id.* Now those apartments are between $150,000.00 - $180,000.00, at a loss of as much as $850,000.00. *Id.* The closure of

[5] Petitioners argue that the Board improperly considered the prior closure in 1992-1993 when it decided ultimately to close the property in June of 1998. However, § 893.138 (3), Fla. Stat. (Supp. 1997) allows for the consideration of "evidence of the general reputation of the place or premises".

the Stardust Motel has resulted in less illegal activity in the surrounding neighborhood and as a result will raise the value of the property of the members of the Palm Bay Club and Condominium Homeowners Association. *Id.* The criminal activity of the Stardust Motel has resulted in a diminishing of the value of properties surrounding it and, therefore, the tax base of the City of Miami. *Id*. The criminal activity at the Stardust Motel stifles investment in the neighborhoods and property near it. AR 1217-1221. As an example, the homeowners association purchased an undeveloped piece of property contiguous to their condominiums for three hundred thousand dollars ($300,000.00). *Id*. At that time, it was valued on the tax rolls, at almost two million dollars ($2,000,000.00). *Id*. The reason for the decrease in value has been the direct result of the criminal activity at the Stardust Motel and the crime that takes place thereon. *Id*.

With the extensive prior history of drug dealing and prostitution on the Petitioners' property within one thousand (1000) feet of an elementary school, a drug free school zone, and the devastation to the property values and quality of life for the surrounding neighborhoods the following quote regarding the burdens of citizenship is appropriate. The Supreme Court explained in *Keystone*:

> [O]ne of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened some what by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are "properly treated as part of the burden of common citizenship."

Keystone, 480 U.S. at 491 (quoting *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949)). As the United States Supreme Court previously set forth, and the Minnesota Supreme Court in *Zeman* following the Court's prior precedents stated, "If the state regulation appears genuinely designed to prevent harm to the public and is likely to achieve that goal and the harm suffered by the property owner does not appear to be one that should be borne by the entire community [then no takings will be found]". *See, e.g. Mugler,* 123 U.S. at 661-662; *Keystone,* 480 U.S. at 488-493; *Zeman*, 552 N.W. 2d at 554. Here, the goal of preventing the criminal activity is achieved by the temporary closure of the property and the residents of the City of Miami should not bear the harm suffered by the Petitioners in this case by replacing the income stream from the illegal activity with that of the municipality. *Id.* This element of *Penn Central* is satisfied and as will be shown in Section VIII, B and C, *infra*, it clearly outweighs the other two elements of the *Penn Central* test. Therefore, this Court appropriately affirms the Third District Court of Appeals' reversal of the trial court.

B. Reasonable investment backed expectations and economic impact–the first two elements of Penn Central

I. Petitioners' reasonable investment backed expectations

The Petitioners do not have a right or a reasonable investment backed expectation to run a commercial enterprise in the State of Florida that allows rampant

drug dealing and prostitution to occur thereon. See, *Health Clubs of Jacksonville, Inc.,* 381 So. 2d 1174(running of purported health club allowing acts of lewdness thereon is properly enjoined by closure of the business). Hypothetically, allowing a rule to stand that would allow a commercial operation with illegal activity could shield owners of illegal commercial enterprises.

2. Petitioners have not suffered a deprivation of all beneficial use of their property as it was used as their home during the temporary closure and the property is zoned for approximately sixty (60) other uses

In analyzing the impact of the Board's actions on the Petitioners, they are living on the property, the property is zoned for a significant number of other uses, and the closure was only effective for a six month time period. Testimony taken before the Board on January 29, 1997, and pleadings before the trial court reveal that Mr. Gihwala lives with his wife and children at the motel in four (4) of the fifty-four (54) rooms on the site. AR 1198. The use of seven and one-half (7 ½%) percent of the premises as a home shows that the property was being put to an economically beneficial use during the temporary closure. Further, as set forth in the affidavit of Juan C. Gonzalez, Chief Zoning Inspector and Acting Zoning Administrator for the City of Miami Zoning Department, the property is currently zoned C-1 (restricted commercial) with a SD-9 overlay (special district). AR 1222. The property has approximately sixty (60) other potential uses. AR 1222-1226. The cost of a new

certificate of use to run an alternative business is merely $250.00. *Id*. Therefore, Petitioners are using the property as a home and can make use of the property for a myriad of different business purposes. In case after case analyzing takings issues, if an alternative use is available, even if it is not the best or most profitable use, then a taking has not occurred. *Lucas,* 505 U.S. at 1019, 1030. Therefore, under the two (2) elements of *Penn Central* used to analyze the economic impact of a regulation weighed against the other element regarding the harm that the Board is attempting to prevent, the prevention of the illegal activity outweighs the economic impact on the Petitioners. Therefore, if this Court determines that a total take did not occur it appropriately rules that the character of the government action in this matter outweighs the economic impact on the Petitioners or, at the very least, remand this matter for consideration of those issues on the evidence.

IX. THE BOWEN CASE BEING RELIED UPON BY PETITIONERS IN THEIR CLAIM FOR COMPENSATION FOR AN ALLEGED TAKING GROSSLY MISREADS FEDERAL AND STATE LAW ON THE ISSUE OF TAKINGS

The Petitioners rely upon the case of *City of St. Petersburg v. Bowen,* 675 So. 2d 626 (Fla. 2d DCA 1996), for the proposition that the City of Miami must pay compensation for the temporary closing of the Stardust Motel. The Petitioners' claim fails as: i) *Bowen* grossly misreads Federal and Florida law on the issue of takings; ii) Florida law allows for the closure of the property without compensation; and iii)

the facts of *Bowen* are not on point with the facts in this case.

A. Bowen is flawed in its analysis

Petitioners' reliance on *Bowen* spotlights the Second District Court of Appeals' flawed analysis.

1. Investment Backed Expectations Pursuant to the Nuisance Exception

Petitioners make much of their lost investment backed expectations relying on the reasoning of *Bowen*. PB 12. However as set forth in *The Mill* case, government can permanently or temporarily remove a landowner's investment backed expectation for purposes of abating a nuisance and when it does so it is a non-compensable taking. *Id.* at 1001 - 1002; *Keshbro,* 717 So. 2d at 604. This property had been before the Board before in 1992 and closed for a period of six (6) months. AR 1103. It came before the Board on January 29, 1997, after numerous incidents occurred on the property, and stipulated that the property was a nuisance. *See* Statement of Facts, *supra*. Those incidents continued in spite of the Board's jurisdiction over the property for six (6) months and the Board's incremental attempts to abate the nuisance activities. The Board did work with the Petitioners but the Petitioners failed or otherwise refused to abate the nuisance activities on their property. Although the Petitioners claim they were left with no available uses for the property they continued to live in the motel with their family.

The Petitioners ignored all of the Board's Orders. Unlike *Bowen* the orders

were incremental and only attempted to close a few rooms. It was not until it was obvious that in addition to wilfully and flagrantly ignoring the orders of the Board regarding the closure of rooms and failure to abate the nuisance activity that the Board held a hearing in June of 1997 and ordered the property closed entirely for six (6) months. The closure of the property is a non-compensable taking. *Keshbro,* 717 So. 2d at 604; *The Mill,* 887 P.2d at 1001 - 1002.

If the rule of law in *Bowen* is followed by this Court then the following hypothetical could occur: An owner of a manufacturing plant on the edge of the Everglades lives with his wife and family on the curtilage of the plant. He rents the plant to a paper manufacturer. The paper manufacturer deposits hundreds of pounds of pollutants into the Everglades every day via a drainage pipe which is visible. The "innocent property owner" knows that the polluting is occurring but does not attempt to abate the nuisance. If the State of Florida or Miami-Dade County wanted to shut the plant down, they would do so at their peril because the *Bowen* court's rationale would require payment for the abatement of the nuisance. That is not a sound proposition of law and is contrary to the law of takings in the State of Florida and the United States. Government should not have to pay compensation because it has had to implement a pre-existing limitation on the use of property by interfering with its use temporarily to remove a criminal public nuisance that the government did not create. A different conclusion makes the Takings Clause do something never

intended, namely, require government to compensate a property owner because of his mistakes. *See Zeman,* 552 N.W.2d at 548-554.

2. Bowen failed to separate economic issues from nuisance issues

Bowen has further flaws in its analysis. In *Bowen* the tenants were using drugs on the property. 675 So. 2d at 627. Incredibly, the court of appeals stated: "In the present case, there is no common law nuisance being prevented by the closure. The prohibited activity was *any* use of the apartment building." *Id.* at 631. The court confused the takings law analysis by not separating the economic use issues from the nuisance/police power issues. *See* Sections VI - VIII, *supra*. In economic terms, the "plight" of this motel owner is less compelling than that of a property owner whose tenant uses the property in a manner which pollutes the groundwater or the soil. Applicable law imposes strict liability upon the "innocent" owner, as well as the polluter, as the owner is the first line of defense to prevent pollution on the property. *See, e.g. Seaboard Systems Railroad, Inc. v. Clemente, etc., et. al.*, 467 So. 2d 348 (Fla. 3d DCA 1985). When the "economic analysis" in *Bowen* is compared with the economic policies upheld in *Seaboard* and *The Mill*, it appears clear that the analysis in *Bowen* is mistaken. Those mistakes have lead to a poorly reasoned opinion which should not be followed by this Court and applied to the facts in this case.

3. Inextricably intertwined

Unlike *Bowen* the Third District Court of Appeals correctly found that: "The

record shows that the prostitution and drug-related activities were inextricably intertwined with the motel". *Keshbro,* 717 So. 2d at 604. The inextricable intertwining of proscribed uses with other, valid, uses was the basis of the court of appeals' reasoning that *Bowen* did not conflict with this case. *Id.* at fn. 8; *see also,* Section VII C, *supra*; AR 1109-1113, Affidavit of Chief Brooks on inextricably intertwined proscribed and valid uses. Therefore, this case is factually different than *Bowen. Keshbro,* 717 So. 2d at 604 n. 8. To the extent that this Court agrees with *Bowen* it should be limited to the facts of that case i.e. first time offender, limited instance of drug activity, full punishment immediately etc. The dicta which goes beyond the limited holding should be disapproved by this Court.

4. Other errors in Bowen

The *Bowen* decision's rationale does not withstand scrutiny. The *Bowen* court: i) failed to distinguish between land use regulation for the common good and land use regulation used to abate a nuisance; ii) failed to recognize that title to property never included the right to permit criminal conduct to occur thereon; iii) failed to even examine the title possessed by the property owner; iv) eliminated the Nuisance Exception to the Takings Clause; and v) allows a property owner to profit from its own reckless failure to control criminal conduct which he has knowledge of. *Bowen* should not be followed by this Court.

X. THE TRIAL COURT ENTERED SUMMARY JUDGMENT BASED UPON UNSWORN AND UNSUBSTANTIATED CLAIMS OF THE PETITIONERS AND, THEREFORE, ITS ORDER IS LEGALLY INSUFFICIENT

The trial court granted Petitioners' motion for summary judgment based upon an alleged taking of their property. That claim fails as, given all reasonable inferences drawn in favor of the Respondents, Petitioners have failed to carry their burden of proof by either rebutting the defense of the Nuisance Exception or the elements set forth in *Penn Central*. In Petitioners' Brief at 5, they claim that the trial court essentially found:

> 1) Keshbro Inc., held a fee simple fee simple (sic) title to the property; 2) that the City of Miami Filed a complaint against Keshbro through its Nuisance Abatement Board, (hereinafter "NAB," alleging that the Stardust Motel constituted a nuisance because of alleged "drug use" on the property; 3) that at a subsequent hearing the NAB ultimately modified its order, which resulted in total closure and temporary taking of all economic use of the property for nearly six-months; (in actuality the NAB's remaining jurisdiction and operative closure period was 175 days to be precise); 4) that Keshbro was prohibited from the conduct, operation or maintenance of any business or motel rental activity within the entirety of said premises for the balance of the NAB's jurisdiction.

AB 5-6. While the Respondents do not disagree with some of the facts set forth above, the trial court's order made no such findings, AR 1001-1002, and Petitioners are simply incorrect in their assertion. *See* Section XI, *infra*.

The movant for summary judgment bears the burden of showing, by competent evidence, the nonexistence of any question of material fact. The movant's proof must be conclusive, such that all reasonable inferences which may be drawn in favor of the

opposing party are overcome. *Landers v. Milton*, 370 So. 2d 368, 370 (Fla.1979); *Holl v. Talcott*, 191 So. 2d 40, 43-44 (Fla.1966); and *Lenhal Realty, Inc. v. Transamerica Commercial Finance Corp.*, 615 So. 2d 207, 208 (Fla. 4th DCA 1993). "[I]f the record raises even the slightest doubt that an issue might exist, summary judgment is improper." *Holland v. Verheul*, 583 So. 2d 788, 789 (Fla. 2d DCA 1991).

The trial court ignored the law on the issue of nuisance and the Takings Clause. *See* Section VII, A, *supra.* The Petitioners failed to overcome the Respondents' defense pursuant to the Nuisance Exception. This coupled with the fact that the Petitioners stipulated that the property was a nuisance should have resulted in a ruling in favor of the Board. *Lucas,* 505 U.S. at 1029; *Keshbro,* 717 So. 2d at 603; *The Mill,* 887 P.2d at 1001-1003.

Even if the trial court determined that the Nuisance Exception did not apply in this matter and rather based its ruling upon *Penn Central,* it failed to review the evidence before it as required pursuant to *Penn Central.* Under *Penn Central,* a court considering a takings claim must review: i) the economic impact of the regulation on the person(s) suffering the loss; ii) the extent to which the regulation interferes with distinct investment backed expectations; and iii) the character of the government action to assess whether the complained of action effected a taking of private property for public use. *Penn Central,* 438 U.S. at 124. Petitioners have the burden regarding all of the elements of the *Penn Central* analysis as there is no

presumption that a taking has occurred.

Here, Petitioners submitted virtually no evidence. Respondents submitted a mountain of unrebutted evidence. At the very least for Respondents there was a genuine factual dispute as to whether the character of the government action outweighed the economic impact on Petitioners and their reasonable investment expectations. The only evidence submitted by the Petitioners in support of their motion for summary judgment was a conclusory affidavit of Harish Gihwala. AR 1227. Nowhere do the Petitioners argue the character of the Board's action other than to make the conclusory allegation that crime still existed in the neighborhood after they were closed. Nowhere do they discuss the economic impact on their property except to say they were forced to file bankruptcy. On that point, Petitioners assert that their declaration of bankruptcy on July 27, 1997, was a result of the Board's Order of Closure on June 30, 1997. This strains credulity as the property was not closed until September 3, 1997, over one (1) month *after* the bankruptcy petition was filed. The bankruptcy action, like all others filed after the January 29, 1997 hearing before the Board, was simply an abuse of judicial process to frustrate the Board's authority. AR 1056-1057. This was in stark contrast to the voluminous evidence submitted by the Board as outlined in its Proposed Findings of Fact and Conclusions of Law, AR 1244.

The trial court erred in entering summary judgment on the issue of liability as

all reasonable inferences drawn in favor of the Board show that: i) the Nuisance Exception applies in this matter and the closure was a non-compensable taking; or, alternatively, ii) Petitioners failed to carry their burden of proof under the three (3) elements of *Penn Central*. Therefore, this Court affirms the decision of the Third District Court of Appeals, or alternatively, remands this matter to the trial court for a further proceeding including trial of the issues.

XI. PETITIONERS' BRIEF IS REPLETE WITH ALLEGATIONS AND FACTS NOT IN THE RECORD BEFORE THIS COURT OR THAT ARE OTHERWISE FALSE

Petitioners do not contest that their property was a nuisance and they stipulated that it was during the January 29, 1997 Board hearing. PB 1. Petitioners do not contest the facts as previously set forth in the Respondents' brief filed with the Third District Court of Appeals which show the large number of incidents of crack cocaine sales, powder cocaine sales and prostitution that took place on their property leading up to the closure by the Board on June 30, 1997. *See* Statement of Facts, *supra.* Those facts evidence rampant drug and prostitution related criminal activity on the Petitioners' property, all *within one thousand (1000) feet of Morningside Elementary School, over a period of at least ten (10) years. Id.* Rather than dispute the facts as set forth by the Respondents, Petitioners merely seek to add items from outside the record or as in the case of referencing the trial court's order incorrectly state facts to suit whatever argument they are making at a particular time in their Brief.

Point 1-

As to when the Board's jurisdiction "commenced" for purposes of the one (1) year period, PB at 9, the issue has nothing to do with the fact that Petitioners entered into a stipulation before the Board on January 29, 1997, a copy of which was mailed to them, and thereafter there was drug and prostitution activity on the premises in February (two incidents), March 11 (three incidents), April 10 (three incidents), and May 27 (one incident). AR 1186-1195. Also, a prohibition action was brought on this point in the Circuit Court in and for Miami-Dade County and dismissed and not appealed. Therefore the argument is waived.

Petitioners again took the position that the Board could not consider nuisance activity in February, 1997 in their appeal before the Circuit Court in and for Dade County, Florida, Appellate Division, in *Keshbro Inc., Harish Gihwala v. City of Miami Nuisance Abatement Board*, Case No. 97-124 AP. However, that appeal also was abandoned and, therefore, Petitioners have waived the right to bring that issue before this Court. *Cf. Angora Enterprises, Inc. v. Cole,* 439 So. 2d 832, 835 (Fla. 1983); *Carillon Hotel v. Rodriguez,* 124 So. 2d 3 (Fla. 1960). Finally, Petitioners argument is disingenuous as they reopened on January 29, 1998 and, therefore, considered January 29, the operative date for the Order to take effect. If Petitioners really believed that March 25 was the date the Order took effect for purposes of considering further incidents of nuisance, then they would have remained closed for

another month and a half.

Point 2-

The Petitioners claim that the appellate court made a "sua sponte unsupported factual finding of criminal wrong doing". PB 8. This is incorrect. The court of appeals specifically stated: "No unlawful activity on the part of the owners has been alleged". *Keshbro,* 717 So. 2d at 602 fn. 3. The Petitioners are making the same error that the Second District Court of Appeals did by not separating the proscribed uses from other valid uses. No one has the right to run a commercial enterprise with rampant drug dealing and prostitution occurring thereon. This coupled with the fact that proscribed and valid uses were inextricably intertwined led the Board to the conclusion that the property had to be closed for a period of six months in order for the nuisance activity to cease. *Id.* at 604; *see also* Affidavit of Chief Brooks, AR 1109-1113 at paragraph 8. If the Petitioners were serious about abating the criminal activity they could simply hire a security company and post a guard.

Point 3-

Petitioners attempt to dismiss the sworn testimony and observations of a local resident at the Board's February 26, 1997 meeting, regarding prostitution on or near the property and go into some detail as to why it is allegedly speculative, highly suspect and unreliable evidence and therefore unworthy of the Board's consideration. However, the Board's March 4, 1997 Order of Closure relied upon sworn testimony

of a police officer and a citizen. Those individuals were under oath and cross-examined. The law permits "evidence of the general reputation of the place or premises". §893.138(3), Fla. Stat. (Supp. 1997). Petitioners concede "what is prohibited under Florida law is that they [prostitutes] actually engage in acts of prostitution". AB 12. As City of Miami Police Officer Gary testified under oath before the Board on February 4, 1997, he entered on the property and at his request a woman at the property purchased crack cocaine on his behalf in two (2) separate rooms in the motel. Thereafter, she solicited the officer for sex in exchange for a portion of the cocaine. AR 1167-1169 (sworn testimony of City of Miami Police Officer regarding the incident). This is contrary to the Petitioners' bald assertion that "[t]here was not one documented instance of a true prostitution arrest at the Stardust". PB 11. It was the Officer's testimony and the sworn testimony of the citizen that was considered by the Board on the February 26, 1997 hearing. From that, the Board issued an Order on March 4, 1997 deciding to close an additional seven (7) rooms on the property. AR 1183. Although Petitioners contest that information being considered by the Board, the issue is irrelevant as Petitioners willfully and flagrantly ignored the March 4 Order of the Board and did not close the rooms as ordered. In fact, Petitioners ignored all pronouncements and orders of the Board leading up to the June 30, 1997 Order of Closure and thereafter until the circuit court below ordered the property closed on September 2, 1997, two (2) months later. The Petitioners also

completely ignore the other illegal activity in the form of drug sales, that are running rampant on their property as if that fact had no significance.

Point 4-

Petitioners allege that their July 29, 1997 bankruptcy filing was the result of the Board's Order of Closure on June 30, 1997. PB 4. However, the Board did not get an order to close from the Circuit Court until September 2, 1997, one (1) month *after* the bankruptcy filing and two (2) months after the order of closure on June 30. The bankruptcy filing like all of the actions taken by the Petitioners was dilatory and an attempt to frustrate the jurisdiction of the Board.

Point 5-

Although the Petitioners make much of the fact that they attempt to cast themselves as innocent property owners, they are innocent property owners who rent rooms to drug dealers and allow prostitution to be solicited on their property. PB 16. They take issue with the fact that Respondents in this case rightly claim, that if the Petitioners are paid for the closure due to the nuisance activity on their property, the income stream from the illegal activity taking place on their property will be replaced by the municipality. PB 26. They further claim: "[t]here is not one scintilla of record evidence to justify the scurrilous allegation that the Keshbro's income is derived from illicit proceeds and criminal conduct." PB 26. However, given the fact the income stream from the rental of the property comes from people who engage in illegal drug

sales and prostitution on the property, it is obvious and apparent that the income stream from the illegal activity will be replaced with that of the municipality if the Nuisance Exception is not applied in this case. As to their complaint that Respondents "impugn the reputation of Kesbro (sic), Inc., as well as the character of Harish Gihwala", PB 26, this property has the reputation as the worst property on Biscayne Boulevard going back over a decade. AR 1109, Affidavit of Chief Brooks of the City of Miami Police Department. The property was found to be a nuisance and closed in 1992 - 1993. AR 1103. Contrary to Petitioners contention that the prior closure is irrelevant, the statute makes the previous closure relevant as repeat offenders are fined more. *See* § 893.138, Fla. Stat. (Supp. 1997), AR 1215 - 1216. Petitioners stipulated that the property was a public nuisance in January 1997. Thereafter multiple, flagrant violations of drug and prostitution laws occurred. *See* Statement of Facts, *supra*. Mr. Gihwala never even testified before the Board on his own behalf, instead he entered into a stipulation with the Board through counsel to abate the nuisance. He refused to address the Board. The property is two (2) blocks from an elementary school. Petitioners' attempts to avoid addressing the facts of this case by casting themselves as "innocent property owners" is shocking and lacks credulity.

Point 6-

Petitioners claim that the Legislature's recent amendment of §893.138, Fla.

Stat. (Supp. 1997) allowing for administrative fines, is evidence of the broad acceptance of *Bowen*. PB 28. The Legislature did not remove the ability of a given Board to close an entire premises or any part thereof for a period of one year. *See* §893.138(4)(b) Fla. Stat. (Supp. 1997). Further, they included the following preamble in Section 1 of 893.138: "It is the intent of this Section to promote, protect and improve the *health, safety and welfare* of the citizens of the counties and municipalities of this State. . .". Clearly, the Legislature was addressing the proper exercise of police powers pursuant to the Nuisance Exception by mentioning health, safety and welfare. Instead of embracing *Bowen*, they were in fact apparently confronting it.

Point 7-

Petitioners incorrectly state that this Court is bound by "stare decisis" because this Court did not exercise discretionary jurisdiction in the *Bowen* case. PB 27. Petitioners are wrong. Denial of review by this Court or the United States Supreme Court's refusal to grant certiorari does not mean the *Bowen* decision was affirmed or otherwise approved by this or any other court. Denial of review does not have the same precedential value as a decided case. *Cf. Mystan Marine, Inc. v. v. Harrington,* 339 So. 2d 200, 201-202 (Fla. 1976)(denial of certiorari by court of appeals has no precedential value when done without opinion).

Point 8-

Petitioners claim that City of Miami Police Lt. Aguirre stated before the Board that prostitution activity was not going on at the motel. PB 11, citing to the transcript of the January 29, 1997 hearing before the Board. However, this is a selective quote. The full transcripts of proceedings before the Board were filed in support of the Respondents' Motion for Summary Final Judgment. They are now in the record of this appeal. *See* Supplemental Index to Record for Defendants' Brief in Support of Summary Final Judgment. The Lieutenant told the Board:

> I am the Commander of the Upper East Side NET area. And one of the things that the Board hasn't considered and certainly the citizens that are here hasn't (sic) considered is our ability to go back into that area and make cases. We have made "X" number of cases within the six months, and I can guarantee you that if this motel continues to operate the way it has in the past, it won't take me long at all to build up more cases.
>
> . . . You do have your prostitution, you do have narcotics in there, and it's easy for us to go back in there and make a buy.

Supplemental Index to Record for Defendants' Brief in Support of Summary Final Judgment at Tab A, pp. 102-103. Once again, Petitioners omit or ignore facts and cast themselves as innocent or otherwise having no responsibility to prevent the criminal nuisance activity taking place on their property.

CONCLUSION

Petitioners seek eminent domain compensation, upon a theory of inverse condemnation, because their motel was closed as a result of numerous incidents of drug and prostitution related criminal activity. Weighing the factors as set forth in the applicable takings clause analysis in light of the facts of ongoing drug and prostitution activity, unsuccessful efforts to impose lesser sanctions and that full closure of the motel does not deprive Petitioners of all use of the property, this is not a compensable taking. *Bowen* does not apply to the facts of this case -- separate and apart from the fact that *Bowen* is a poorly reasoned decision which misapprehends applicable law. In any event, the Nuisance Exception applies as Petitioners cannot be permitted to substitute a municipal income stream when their money flow from the illegal activity taking place on the nuisance property is closed off.

Based upon the undisputed facts in this case and the applicable law, this Court appropriately affirms the Third District Court of Appeals' decision in *Keshbro* in favor of the Respondents, reversing the trial court's entry of summary judgment on the issue of liability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this motion is in Times New Roman 14 pt. font and that a true and correct copy of the foregoing has been furnished by U.S. Mail on this ____ day of July, 2001 to: David Forestier, Esq., Forestier & Laughton, P.A., 12865 W. Dixie Highway, North Miami Beach, FL 33161-5808.

By: _____
PAUL B. FELTMAN