IN THE
SUPREME COURT OF FLORIDA

FLORIDA SUPREME COURT CASE NO. 94, 058

THIRD DISTRICT OF APPEALS CASE NO. 98-01151

ELEVENTH JUDICIAL CIRCUIT CASE NO. 97-14985

KESHBRO, INC., a Florida corporation,
d/b/a "Stardust Motel" & HARISH GIHWALA, individually.

Petitioners,

vs.

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

Respondents.

PETITIONER'S BRIEF

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

STATEMENT OF CASE

This case involves the taking of private property rights without compensation. The Third DCA reversed the trial court's summary judgement ruling in favor of Petitioner's inverse condemnation complaint on the issue of liability. Despite finding that a "taking" did occur the court ruled that petitioners were not entitled to compensation. In so ruling the Third DCA recognized but departed from City of St. Petersburg v. Bowen [1] and thus created direct conflict with the Second DCA and other opinions of this Court.

Since 1988 the Petitioners Keshbro Inc., and Harish Gihwala are the fee simple owners and operators of a fifty-seven unit CBS building located at 6730 Biscayne Boulevard in the northeast sector of the City of Miami and do business as the "Stardust Motel". Harish Giwhala the owner/operator resides at the Stardust Motel with his wife and two minor children.

Biscayne Boulevard is currently undergoing gentrification and revitalization but was formerly plagued by serious urban decay, a dearth of municipal enforcement or police resources and thus became a haven of prostitution and narcotics, which persists to this day. (See Appendix Composite Exhibit K) Associated opportunistic street crime and serious violent crimes permeate the northeast corridor of Biscayne Blvd., Little Haiti and Liberty City.

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[1] 675 So. 2d 626 (Fla. 2d DCA 1996)

As recently as yesterday March 21, 1999 at 1:50 PM on a Sunday afternoon at 150 NE 64th Terr. in Miami and less than ten blocks away from the Stardust Motel (situated at 6730 Biscayne Blvd) a drug related drive by shooting involving automatic weapons resulted two fatalities and three wounded. One of the fatalities and the three of the wounded were innocent victims. Miami Police Chief William O'Brien was quoted in the Herald on Monday March 22, 1999 and said, "We have identified this area for both illegal gambling and drug transactions. We're taking action and will be taking action the future. It is in the midst of this hostile and violent environment that the Stardust Motel struggles daily to run a legitimate "mom and pop" business.

For more than ten years, under the current ownership the Stardust Motel has been a family run business which has consistently remained fully licensed under state and local law.

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

At the January 1997 hearing, the Petitioners through counsel and in a spirit of cooperation with the City and its NAB did

stipulate to a finding of Public Nuisance specifically as to the sale of controlled substances by unknown third parties at the premises. An Order to that effect, partially embodying the stipulation together with "Findings of Fact, Conclusions of Law, and some 26 points of remedial measures was entered on or about February 7, 1997. (Appendix E) Included was a limited closure of six motel rooms, for six months, as a sanction. This stipulation allowed the "Stardust" to continue the lawful operation of its motel business and to maintain an economically viable use of its property.

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

Between the February 7, 1997 and June 25, 1997 the NAB conducted several additional hearings. On the basis of highly suspect and legally insufficient hearsay testimony the NAB did modify its Order to further sanction the Stardust with a total closure of the premises, over the objection of counsel. The NAB expressly ordered that: "… the Stardust Motel shall be closed for the duration of this Board's jurisdiction, or until February 12,

1998. Respondents are ordered to remove all guests within five (5) days of the date of this Order." Only maintenance and security personnel were to be permitted on the property." (Appendix F,G) As a consequence of the ruling by the NAB, Keshbro was unable to put their property to any economically viable use during the six-month period.

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

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

The material facts were not in dispute below as evidenced by the cross-motions for summary judgement and stipulated facts. On April 13, 1998, Eleventh Judicial Circuit Court Judge Amy Dean granted Keshbro Inc.'s Motion for Summary Judgement as to the City of Miami's liability on the "takings" issue. In granting the

summary judgement the trial court correctly applied the existing law to the undisputed material facts and essentially found that: 1) Keshbro Inc., held a fee simple fee simple 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.

Based upon said undisputed facts and the controlling constitutional and case law precedents Keshbro is entitled to summary judgment as a matter of law.

Of paramount significance to any analysis of this case is the express finding by the NAB in its conclusions of law that, "The City of Miami does not assert or imply that the owner, personally, is a party to any drug sales or illegal activities." (Appendix E) To date, neither Keshbro Inc., nor Mr. Gihwala have ever been charged with any criminal violation of F.S. Chapter 796 for procuring, deriving support from or renting space for purposes of

prostitution. Nor has the Petitioner ever been arrested, charged or prosecuted for any violations of F.S. Chapter 893 pertaining to controlled substances in general or F.S. 893.137 (7)(a)5 in particular. Yet nevertheless, the Third DCA decision in Keshbro concedes the "taking" but purports to deny compensation on the basis that the nuisance was "inextricably intertwined" with the operation of the business and "that the motel was in reality, not a motel, but rather a brothel and drug house which the owners for whatever reason, failed to stop operating on their property." Keshbro slip opinion at 8

SUMMARY OF ARGUMENT

The Third DCA opinion in City of Miami v. Keshbro directly and irreconcilably conflicts with decisions of the Second DCA and the Florida Supreme Court. The decision furthermore permits the taking of private property for a public purpose without just compensation as required by the Fifth Amendment U.S. Constitution and Art. X sec. 6 Fla. Const. The court departed from the essential requirements of the law to impermissibly, "look beyond the limited wording of the closure order" Keshbro at 8. The appellate court also considered "history" beyond the six month statute of limitations, to conclude sua spopnte and without any basis in the record or the benefit of an indictment, information, arrest, criminal trial, due process, conviction or verdict of guilt,

substantiated by a jury's finding by proof beyond a reasonable doubt, that Keshbro Inc. and/or Harish Gihwala, the motel owners, were in fact operating a brothel and drug house. (Indeed if such were the case then criminal RICO statutes would govern enforcement, abatement, seizure and/or forfeiture of such a criminal enterprise) Finally, all cases relied upon by the court to escape the precedent of Bowen are not applicable as they concern criminal prosecutions of accused persons who were found guilty or in contempt as directly complicitous in "mala-prohibita" common law public nuisances i.e. direct participation and profit from activities such as gambling, prostitution, narcotics etc.

Additionally, the Petitioners challenge and attack the motel closure, reversal of the summary judgement, finding that a taking occurred but compensation was not justified as a denial of equal protection, being arbitrary and capricious and predicated upon extraneous and incompetent evidence unsupported by and in direct conflict with the record. Nor are such closures effective in eradicating the alleged nuisance activities.

ARGUMENT

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

Sufficiency of the Evidence

Keshbro has at all stages of these proceedings called into scrutiny the competence, quality and sufficiency of the evidence, while the respondents consistently extol its quantity and history.

Between the February 7, 1997 signing of the Order incorporating and adopting the January 29th 1997 Stipulation, and the June 30,1997 closure order, the NAB took several actions to further sanction the Stardust for events which occurred before the NAB Order was ever properly executed and perfected. Pursuant to the City Code the NAB must deliver the signed ORDER to the property owner and wait five days from signing and before enforcement jurisdiction attaches. The Order although signed on February 7, 1997 was never properly delivered to Keshbro or its counsel until March 25, 1997. Keshbro although cognizant of the stipulation objectives was never properly advised as to the operative effective date of the order. Thus Keshbro was denied due process and notice of the actual commencement date of the NAB one-year jurisdiction and the associated operative period for the enforcement provisions. (See, Mesa v. City of Miami Nuisance Abatement Board,[2] wherein the Third District Court of Appeals instructed Miami that, "Nuisance Abatement Boards, like all quasi judicial boards must provide proper notice and opportunity to be heard before board takes action which affects the interests of parties before it.") These issues were the subjects of several unsuccessful, interrupted or abandoned

[2] 673 So. 2d 500 (Fla. 3d DCA 1996)

(due to the bankruptcy) collateral appeals, petitions for Writs of Prohibition and injunctive relief.

Over the strenuous objections of counsel the NAB proceeded to modify and further sanction the Stardust with additional room closures for alleged events that occurred at the property on February 4, 1997, before the Stipulation ever went into effect.

The NAB furthermore relied upon the testimony of casual observations by Sal Patranzio, a local resident. Mr. Patranzio testified that, on February 17, 1997 he observed nothing more egregious than what he concluded to be two prostitutes, one black, one white hanging on the Stardust fence, while, two black gentlemen across the street **seemed** to use hand gestures as far as whom to approach and what to do with those gentlemen[3] At other times the testimony of various witnesses recounted mere allegations that known prostitutes were detained in and around the Stardust, or that a prostitute may have been arrested at another location, but found to be in possession of Stardust room key or that a prostitute told an undercover officer she could or could not get a room at the Stardust.

Such bare allegations do not support the quantum leap in logic or reason that the motel functioned as a bordello. There was not one documented instance of a true prostitution arrest at the Stardust. In point of fact Lt. Aguirre the police commander for the northeast Neighborhood Enhancement Team (NET) and a principal

[3] (AR 1176- 1178 or pages 42 –44 Transcript of February 26, 1997 H earing)

City witness testified at the initial evidentiary hearing stated that, **"I strongly don't think prostitution activity per se is going on inside that motel."**[4] (emphasis mine) Nevertheless, based on this caliber of speculative, highly suspect and unreliable testimony from biased civilians and community residents / activists, the NAB culminated with an order totally closing the entire motel.

The mere observation or presence of a person(s) suspected of being a prostitute or even the sighting of someone who has in fact been convicted of prostitution, in a public or private place, without more does not even amount to sufficient probable cause to arrest. Therefore the City / NAB should have been be hard pressed to accuse the owners of the premises where the alleged observation occurred, of promoting a prostitution-related public nuisance. The NAB should never have admitted or relied upon such equivocal testimony.

Even known prostitutes have a right to live and reside somewhere. What is prohibited under Florida law is that they actually engage in direct acts of or solicitation for prostitution. No such criminal acts were ever pled, alleged or testified to in the complaint or at the hearing. (See Notice of Hearing / Complaint and Transcript of Hearing Jan. 27, 1997.) See also Wyche v. State of Florida,[5] wherein Florida Supreme Court Justice Barkett, held that a Tampa City ordinance making it unlawful to loiter in a

[4] (Exhibit H Transcript of January 29 1996 Hearing at pages 102-104)
[5] 619 So. 2d. 231 (Fla. 1993)

manner and under circumstances manifesting a purpose of engaging in acts of prostitution was unconstitutional.

In expounding upon its decision the Wyche Court stated that "The First Amendment to the United States Constitution and article I, section 4 of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. (citations omitted) Further, the First Amendment and article I, section 5 of the Florida Constitution protect the rights of individuals to associate with whom they please and to assemble with others for political or social purposes. (citations omitted) When law makers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. (citations omitted) As the United States Supreme Court has noted, because First Amendment freedoms need breathing space to survive, governments may regulate in the area only with narrow specificity. (Citations omitted) **Put another way, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct.** (emphasis added)

The Tampa ordinance, by potentially applying to such conduct as talking and waving to other people, clearly implicates protected freedoms. The ordinance limits the rights of those who have been previously convicted of prostitution to engage in non-criminal routine activities. The ordinance suggests that it is incriminating when a "known prostitute" "repeatedly beckons to, stops or attempts to stop or engages passers-by in conversation or repeatedly stops, or attempts to stop motor vehicle operators by hailing, waiving of arms, or any bodily gesture. Hailing a cab or a friend, chatting on a public street, and simply strolling aimlessly are time honored pastimes in our society and are clearly protected under Florida as well as federal law. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed 2d 110 (1972). All Florida citizens enjoy the inherent right to window shop, saunter down a sidewalk and wave to friends and passersby with no fear of arrest. A formerly convicted prostitute engaging in these activities however, risks prosecution under the ordinance for loitering, and the risk of arrest certainly would deter the exercise of these rights. (Citations omitted.) The United States Supreme Court has made clear that loitering, wandering, sauntering and other idle activities are not in and of themselves unlawful.[6]

[6] Wyche at 234-237

Nevertheless without any direct substantive proof to support allegations of actual prostitution at the Stardust the NAB expressly ordered that:

> "… the Stardust Motel shall be closed for the duration of this Board's jurisdiction, or until February 12, 1998. Respondents are ordered to remove all guests within five (5) days of the date of this Order." Only maintenance and security personnel were to be permitted on the property."[7]

Thus it appears that while the holding of Wyche proscribes the arrest of the known prostitute who simply engages in non criminal routine activities in public; said same activities, will however, inure to the detriment of the property owner or merchant from whose establishment, curtiledge or adjacent public right of way the known prostitute expressed her non criminal routine activities.

The City's improper but somewhat successful attempt to sully the record by introduction of extraneous prejudicial matters, such as 1992 NAB closure of the Stardust Motel were rightfully ignored by the trial court. However it would seem that the appellate court impermissibly considered said negative history in derogation of Florida Statute 893.138 and the narrowly defined limits of the enforcement jurisdiction within which NAB's may sanction properties. The Florida legislature has expressly limited NAB jurisdiction to one year. Commencements of NAB complaints are restricted by statute to instances of public nuisance, which occur

[7] Transcript of June 25, 1998 NAB proceedings at page 91 lines

within six-months of the first documented incident. Since the instant Notice of Hearing / Notice to Appear/ and Complaint were originally filed on December 10, 1996 thus events or allegations of public nuisance prior to June 14, 1996 are of no legal significance or relevance and ought not to have been considered below.

Inexplicably Judge Fletcher's opinion asserts contradictory positions, which defy legal reasoning or logic in an attempt to justify its denial of compensation for the "taking". On the one hand, the Keshbro decision reasons that, "The City and the Board must prove, in order to avoid paying compensation, that at the time the owners purchased the property prior principals of nuisance law prohibited its use for the purpose proscribed by the Board's order as enforced by the injunction." Keshbro slip opin. at 5. Conversely the court goes on to state that, "While the City's and the Boards action denied the owners of all economically beneficial uses of the property, no compensation is required as the actual uses prohibited were a brothel and drug house which have no tradition of protection at common law…" Id. at 9. There is no competent record evidence, which sustains such a slanderous allegation against the petitioners.

The closure, Keshbro was deprived of all economic use of their property – not merely any use of their property solely related to drug or prostitution activities. Most importantly the closure prohibited the Stardust motel from any room rentals; its principal purpose, character and functional source of generating legitimate

business income. If Keshbro Inc., or Mr. Gihwala were indeed engaged in such nefarious and illegal activities, there are a multiplicity of enforcement tools available i.e. (IRS audits, federal RICO and state criminal statutes, civil and or criminal forfeiture proceedings etc. etc all of which are much more efficacious in permanently eradicating the source of the a public nuisance.

The Keshbro corporation has consistently for more than ten years paid its mortgage, insurance, business, sales, property taxes, obtained and renewed appropriate business and occupational licenses with financial proceeds of its lawful business operations. Keshbro has complied with various state, and federal regulatory authorities as well as having implemented renovations for the compliance with the public accommodations requirements pursuant to 42 USC Section 12101 the "Americans with Disabilities Act." Thus there was never any assertion or record finding below sufficient to warrant the quantum leap in logic for the appellate court that the nuisance was inextricably intertwined with the operation of a brothel or drug house. Operating the property as a motel with rooms for transient lodging was clearly a lawful enterprise for which Keshbro had a proper investment-backed expectation and business history.

Under Lucas v. South Carolina Coastal Council,[8] regulations which deny a property owner of substantially all productive use of

[8] 505 U.S. ___, 112 S. Ct 2886 (1992)

his land constitute one of the discrete categories of regulatory deprivations that require compensation **without the usual case specific inquiry into the public interest being advanced in support of the restraint**. When a total regulatory taking occurs, the government can resist compensation only if the proscribed use merely prevents a common-law nuisance or does not restrict any part of the owner's inherent fee simple title. [9]

In Keshbro as in Bowen the NAB absolute closure decree deprived Keshbro of all inherent title right to use his motel complex. The Boards decree was not a restriction only to prevent common law nuisances as "There is no common law nuisance doctrine which prohibits the use of a building for rental purposes." Bowen[10] Clearly the closure Order denied any and all uses of the motel, and deemed any person other than the owners, security or workmen as trespassers. Thus Keshbro could not during the closure period contract for example, to provide emergency post hurricane housing, or college dormitory services or serve as a homeless shelter or as temporary housing for Red Cross/Salvation Army clients in distress or burned out of their homes and or serve as a halfway house for any government or private sector program.

Moreover, to find compensable takings, Florida courts require even less than total deprivation of use. In numerous cases, Florida courts have held that only a substantial deprivation or

[9] id. at 1917
[10] Bowen at 631

interference is necessary to constitute a compensable "taking." [11]

Pursuant to federal, and state constitutional guarantees, ample case law authority and the Bowen decision, Petitioners are entitled to compensation for the "taking"/deprivation of all use of their property. The court did find that Keshbro was deprived of all economic use of their property but deems the taking as one not entitled to compensation. The prohibited activity was any use of the motel/building. The NAB Order did not really proscribe any particular nuisance, such as would be done by enjoining the sale or use of drugs on the premises. The Third DCA miscomprehends or intentionally contorts the holding of Lucas. The fact is that the Nab Order proscribed all uses legal and illegal. It is for the taking/denial of the properties legal uses that Keshbro seeks and is entitled to compensation.

Bowen, on similar factual and legal grounds held that the total **closure of a 15 unit apartment building based on narcotics sales by tenants was a compensable taking and that if the City wants to wage war in part by means of this type of taking then the**

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[11] In Tampa – Hillsborough County Expressway Authority v. A.G.W.S. Corp., 640 So. 2d 54, 58 (Fla. 1994) (emphasis added), the Florida Supreme Court holds a "taking occurs where regulation denies substantially all economically beneficial or productive use of land." In Palm Beach County v. Tessler, 538 So. 2d 846, 849 (Fla. 1989) (emphasis added), the Florida Supreme Court holds that there "is a right to compensation through inverse condemnation when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of property itself." In Joint Ventures, Inc. v. Dept. of Transportation, 563 So. 2d 622, 624, fn. 6 (Fla. 1990), the Florida Law of Eminent Domain, Sec. 6.09 at 6-55 (3d rev. ed. 1985) (emphasis supplied in original), that the "modern prevailing view is that any substantial interference with private property which destroys or lessens its value…is, in fact and in law, a 'taking' in a constitutional sense."

City will be required to pay landowners just compensation.

[12]

Circuit Court Judge Horace A. Andrews granted Bowen's summary judgment as to the City's liability to compensate the property owner. Judge Andrews also found that the City of St. Petersburg imposed a temporary loss of all economic use of the apartments. As explained by the trial court, the City's closure order failed to "proscribe any particular nuisance" which would have left "other legal uses available" to the landowner; to the contrary, the closure decree "left no uses available."

The use of Bowen's property, as an apartment house was not a nuisance at common law. The trial court concluded Mr. Bowen was entitled to compensation for the one year taking of his property with the total amount of such compensation to be determined subsequently by the court. All appellate courts, including the Florida and U.S. Supreme Court have left undisturbed this decision of Judge Andrews;

[13] **(except the 3 DCA)**

Similarly in the instant, Keshbro's temporary deprivation of all economic use of its commercial property constitutes a compensable, constitutional taking. Albeit temporary, this

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[12] Bowen at 632

[13] **Bowen, 675 So. 2d 626 (Fla. 2d. DCA 1996), rev. denied, 680 So. 2d. 421 (Fla. 1996), and cert. denied, 117 S. Ct. 1120 (1997).**

deprivation constitutes a taking of private property for public purpose for which the constitution mandates full and fair compensation pursuant to federal and state law.

The Just Compensation Clause of the Fifth Amendment of the United States Constitution and Article X, Section 6, of the Florida Constitution requires that a landowner be compensated when a government entity takes his property.

[14] While property may be "regulated to some extent, if the regulation goes too far it will be recognized as a taking"

[15] Indeed, as previously argued, the "modern prevailing view is that any substantial interference with private property which destroys or lessen its value…is, in fact and in law, a 'taking' in a constitutional sense."

[16] Temporary takings which, as in this case, deny a landowner all use of his property for a limited time period are no different in kind from permanent takings for which the Constitution clearly requires compensation.

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[14] The Just Compensation Clause of the Fifth Amendment provides in relevant part that " private property [shall not] be taken for public use, without just compensation." The Florida Constitution bars the taking of private property except for public use, and then only after full compensation. Dept. of Transportation v. Weisenfield, 617 So. 2d. 1071 (Fla. 5th DCA 1993); Schick v. Florida Department of Agriculture, 504 So. 2d 1318 (Fla. 1st DCA 1987)

[15] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). While takings typically occur when the government acts to condemn property in the exercise of its eminent domain power, "the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." First English Evangelical Luther Church, 482 U.S. at 316 (1987).

[16] Joint Ventures Inc., 563 So.2d at 624, fn. 6 (quoting J. Sackman, Nichols "The Law of Eminent Domain," Sec. 6.09 at 6-55 (3rd rev. ed. 1985) (emphasis supplied in the original)

[17]

Regulations that deny the property owner substantially all economically beneficial or productive use of his land constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint.

[18] **The United States Supreme Court provides clear justification for this rule initially in Lucas.**

[19] **As the Lucas Court explains, the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."**

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[17] **First English Evangelical Lutheran Church, 482 U.S. at 318 (holding a landowner whose property is subject to a temporary taking must be compensated). Cf. San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 657 (1984) (Brennan, J., dissenting) ("Nothing in the Just Compensation Clause suggests that takings must be permanent and irrevocable"). See also Bowen, 642 So. 2d. at 837.**

[18] Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 S. Ct. 2886, 2895 (1992) (holding that a property owner suffers a taking if governmental regulation requires him to leave his property economically idle); First English Evangelical Lutheran Church, 482 U.S. at _____ (holding a temporary deprivation of economically beneficial or productive use may constitute a taking); Tampa-Hillsbourgh County Expressway Authority, 640 So. 2d at 58 (Fla. 1994) (holding a "taking occurs where regulation denies substantially all economically beneficial or productive use of land"); Joint Ventures, Inc., 563 So. 2d. at 624 (Fla. 1990) (holding the "state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property"); Palm Beach County, 538 So. 2d at 849 (holding that there "is a right to compensation through inverse condemnation when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself").

[19] **Lucas, 505 U.S. at _____, 112 S. Ct. at 2894.**

[20] **Id. In the dispositive United States Supreme Court case, Mr. Lucas owned beachfront property in South Carolina which he wished to develop. Lucas, 112 S. Ct. at 2889. The South Carolina Legislature subsequently passed a statute called "The Beachfront Management Act" which essentially prevented Mr. Lucas from developing his property. Id. Mr. Lucas then filed suit contending the legislature effected a taking of his property without just compensation. Lucas, 112 S, Ct. at 2890.**

The property owner Lucas did not take issue with the Act's validity as a lawful exercise of the State police power, but contended that the Act's complete extinguishment of his property's value entitled him to

Rejecting noxious-use logic, the Lucas Court held that the question of whether a government regulation may eliminate all economically beneficial uses of property without the requirement of compensation must turn on "the understandings of our citizens regarding the content of, and the State's power over, the 'bundle or rights' that [property owners] acquire when they obtain title to property."

[21] **Because it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the state's subsequent decision to eliminate all economically beneficial use, the Court determined that a regulation having such effect cannot be newly decreed and**

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compensation regardless of whether the legislature had acted in furtherance of legitimate police power objective. Id. The trial court agreed; it concluded that the properties of Lucas had been taken by the operation of the Act and ordered the State of South Carolina to pay just compensation. Id.

The Supreme Court of South Carolina reversed. Lucas V. South Carolina Coastal Council, 404 S. E. 895 (1991). It found dispositive what it described as the property owner's concession "that the Beachfront Management Act [was] properly and validly designed to preserve…South Carolina Beaches." Lucas, 404 S.E. 2d at 896. Relying upon Mugler v. Kansas, 123 U.S. 623 (1887), and its progeny, the South Carolina Supreme Court ruled that when a regulation respecting the use of property is designed to prevent a serious public harm or noxious uses of property akin to public nuisance, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value. Lucas, 404 S.E. 2d at 899 (citing, inter alia, Mugler)

Concluding the South Carolina Supreme Court erred in applying Mugler's "harmful or noxious uses" principle, the United States Supreme Court reversed. Lucas, 112 S. Ct. at 2897. The Court explained the "harmful or noxious uses" principle was merely the court formulation of police power justification necessary to sustain any regulatory diminution in property value without incurring an obligation to compensate. Id. Reviewing relevant decisions, the Court noted the distinction between regulation that "prevents harmful or noxious uses" and "confers benefits" is difficult. If not impossible, to discern on an objective, value free basis and therefore " noxious use justification cannot be the basis for the departing from the [the Court's] categorical rule that total regulatory takings must be compensated." Lucas, 112 S. Ct. at 2899.

[21] **Lucas, 505 U.S. at _____ 112 S. Ct. at 2898-00**

sustained without compensation being paid to the owner. The Court held:

> **"Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."**[22]

Thus, under the Lucas decision, no compensation is owed – in this setting as with all takings claims – only if the State's affirmative decree simply makes explicit what already inheres "in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership."[23] **In other words, a law or decree with such an effect must "do no more than duplicate the result that could have been achieved in the courts" by adjacent landowners or the State in an action to abate traditional, common-law nuisances. With the Lucas ruling, the Court severely limited the application of any nuisance exception by restricting its employment only to prevent common-law nuisances or to other restrictions inherent in an owner's fee simple title.**

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[22] **Id. at 2899-00**

[23] **Id. at 2899**

[24]

As Judge Andrews found in Bowen and Judge Dean found in Keshbro the NAB's closure meant that the property "can be put to no other use during the close down period." Accordingly Keshbro was deprived of beneficial use, a "taking" occurred and compensation is a matter of constitutional right

As previously noted, Miami's absolute and total closure decree is not a restriction inherent in Keshbro fee simple title. When Keshbro acquired their property, they possessed the rights to use their land for many purposes, including as a motel. These rights were part of their fee simple title. The closure order precluded their use of the property in any manner for effectively six months. Contrary to the mandate of Bowen and Lucas, Miami's unqualified closure, proscribed restrictions of use interests, which were "part of [petitioner's] title to begin with."[25]

There "is no common law nuisance doctrine which prohibits use of a building for rental purposes."

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[24] **In his opinion concurring in the Lucas judgement, Justice Kennedy notes that the nuisance exception is quite narrow. Lucas, 505 U.S. at ____ 112 S. Ct. 2093 (Kennedy, J. Concurring in Judgement). In writing " The Evolution of the Nuisance Exception to the Just Compensation Clause; From Myth to Realty, " 45 Hastings L. J. 1539, 1553 (August 1994), Scott R. Ferguson notes:**

Although the Supreme Court has never fully embraced the nuisance exception and the circuit courts have uniformly and consistently rejected it, Lucas v. South Carolina Coastal Council turned the legal status of the nuisance exception on its head. Rather than recognizing the proper place of the theory as only one factor among many in the balancing test prescribed by precedent, the Lucas majority transformed the nuisance exception into a true, categorical exception to the Takings Clause. The nuisance exception established in Lucas is, however severely restricted in scope— to only the prevention of common-law nuisances or other restrictions inherent in an owner's fee simple title will fall within the exception.

[25] **Lucas, 505 U.S. _____, 112 S. Ct. 2899; Bowen, 675 So. 2d at 631.**

[26] Under Lucas, the City's decree must "**do no more than duplicate the result that could have been achieved**" in an action to abate traditional, common-law nuisances. If any adjacent landowner or the State brings an action to abate a nuisance at common law, injunctive remedies are limited to abatement of the nuisance; an equity court may not deprive the owner of all land uses. See Florio v.State

[27] holding that an injunctive order should be adequately particularized, especially where some activities may be permissible and proper. Contrary to established case law Miami's decree does not merely duplicate the result, which could have been achieved in an action to abate a traditional, common law nuisance but instead exceeds it.

Appellant, City of Miami had the burden of proof to demonstrate that the prohibited use of the property constitutes a nuisance under state common law doctrine.

[28]

Bowen, Lucas, Joint Venture and Tampa-Hillsborough County Exp'way Auth., are binding legal precedents. In all of the cases cited, by the Third DCA, (i.e. Health Clubs of Jacksonville, Inc. v. State, 381 So. 2d 1174 (Fla. 1st DCA 1980); Five Sky Inc., v. State, 131 So. 2d 36 (Fla. 3d DCA 1968); Atkinson v. Powledge,

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[26] Bowen 675 So.2d at 631.

[27] 119 So. 2d 305 (Fla. 2d DCA 1960)

[28] Lucas, 505 U.S. at _____, 112 S, Ct. at 2899. Bowles v. United States, 31 Fed. Cl. 37, 45 (1994).

123 Fla. 389, 167 So. 4 (1936) and King v, State, 17 Fla 183 (1879) it is the owner's use of property which is deemed a public nuisance and therefore proscribed. In contrast, the Miami NAB sought to completely close Keshbro's Stardust Motel purportedly to curtail alleged drug use by someone other than the innocent property owner. Unlike the cases cited by the Third DCA or the City below, there is no evidence that Keshbro consented to, participated in or profited from the third party criminal activity deemed a public nuisance.

The specific language in the NAB Order of February 7, 1997 and its Findings of Fact and Conclusions of Law expressly qualifies that, **The City of Miami does not assert or imply that the owner, personally is party to any drug sales or illegal activities.** (Exhibit H) Yet incredulously, the City did later argue below in an attempt to impugn the reputation of Kesbro Inc., as well as the character of the Harish Giwhala, "…that the residents of the City of Miami should not bare the harm suffered by the Keshbro in this case by replacing the income stream from the illegal activity with that of the municipalities." (See Miami's 3d DCA Brief at p. 20) There is not one scintilla of record evidence to justify the scurrilous allegation that Keshbro's income is derived from illicit proceeds and criminal conduct.

The total closure of the business was excessive and not likely to achieve the intended ideals of abating the nuisance.

Even in Orlando Sports Stadium v. State, 262 So. 2d 881 (Fla. 1972) the court did not condone regulations which destroy all uses of private property. In Orlando Sports Stadium, Justice Adkins notes especially that the government does "not seek to enjoin the overall operation of the Orlando Sport Stadium, but only a limited used thereof."

[29] He explains that the situation sought to be enjoined would be analogous to that of a tavern or nightclub that becomes a nuisance by virtue of its patrons' raucous conduct.

[30] **A valid injunction for such properties would be limited to abatement of nuisance conduct and could not include all uses of the property. Id.**

The Supreme Court must not abandon the trial Court's adherence to the Bowen decision, and the legal concept of "stare decisis." As evidenced by the previously declined appeals to the Florida Supreme Court and United States Supreme Court, the Bowen decision enunciates sound legal reasoning, based upon the most fundamental constitutional principles.

Moreover, the legislature's recent amendments to section 893.138, Florida Statutes (1997), do continue to provide new and alternative nuisance sanctions i.e. administrative fines (capped at $5,000.00), rather than absolute denial of property use, which

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[29] **Orlando Sports Authority at 885**

[30] **Id. (citations omitted to cases addressing open drinking, vulgar language, obscene conduct, and habitual assembly of lewd women.)**

evidences the broad acceptance of Bowen and rejection of the Appellant's over-reaching, confiscatory conduct. Indeed, municipalities may continue to opt for the most extreme of sanctions such as closure and total temporary economic depravation of economically viable use of land, but when it does chose to do so, in lieu of less onerous sanctions, then it must be prepared to respect the constitution and compensate the landowner for the public relief or remedy which has disproportionately burdened the innocent landowner.

Indeed, it is these sound constitutional principles and public policies which support Bowen and underpin the granting Keshbro's motion for summary final judgment as to liability. As the Florida Supreme Court explains:

> [T]he State must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, **thereby unfairly imposing the burdens of providing for the public welfare upon the affected owner.**[31]

The Fifth Amendment's protections exist to prevent government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The government may not take from the property owner, under the guise of regulation, core value of property, nor can it force a discrete minority or single individual to bear costs of

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[31] **Joint Ventures, Inc., 563 So. 2d at 624 (emphasis added)**

public goods that should be born by the society as a whole.

[32] As the Bowen court concludes,

> "If [the City]…wishes to continue to shut down peoples' businesses in such a way to deprive them of all economic use of the property, then [the City] …must be willing to pay for its actions."

Such sound constitutional principles and public policies have been expressed in other words by editorial writers:

> "Crime and drugs are problems every local government has a responsibility to combat, but that's what our police and courts are for…If due process still means anything in this part of Florida, the excesses of [the City's]…Nuisance Abatement Board will eventually result in a judgment that causes the city to pay dearly to compensate a resident whose rights have been violated…"[33]

As counsel for Bowen, Baird and Cablinger Robert H. Willis so ably summarized in his briefs, "In a society which traditionally measures progress and success – its own as well as its members – by material well-being, rules which openly or tacitly permit the government to impoverish individuals pose a threat not only to "property" rights, but also to all other rights. For, if the government can empty a citizen's pockets with impunity, it also has within its reach the means of infringing on his other vital rights. Moreover, the man confronted with the loss of the economic end product of a lifetime will more often than not become quite tractable vis-a-vis the government that wields such power over him." We must

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[33] **Editorial, St. Petersburg Times (Sunday August 14, 1994).**

not as a free democratic society be blinded by the holy war against the plague of drugs and disembowel our beloved constitution in the battle. The solution is not to single out one property in a long neglected corridor of an urban area. Keshbro remains committed to and has a financially vested self interest in working towards the betterment of the neighborhood, however, they should not bear that burden alone and nearly loose their business in the process without being compensated therefore.

CONCLUSION

This Court should adopt Judge Amy Dean's decision and Affirm summary judgment in favor of Keshbro.

Despite Judge Fletcher's comment in Fn. 8, Keshbro is in direct conflict with Bowen, Lucas et al. Federal and state constitutional guarantees compelling "just compensation" after a "taking" were misconstrued by the court in violation of fundamental constitutional principals and the rights of property owners to legal redress for excessive governmental intrusion.

The Keshbro appeal has broad interest as evidenced by the multiple and varied requests to file amicus briefs. Additionally, several similar cases are currently pending at the trial court or appellate stage throughout the State of Florida. Among these are City of St. Petersburg v. Baird PCA affmd., by Judges Frank, Thread and Quince on June 10, 1998; City of St. Petersburg v. Cablinnger, case# 98-08, appeal pending in the Second DCA; Washington v. City

of Opa Locka case # 97-11783 in the Eleventh Judicial Circuit, pending motion for summary judgement before Judge M. Esquiroz. Un-reversed Keshbro will promote disparate treatment and unequal protection of the law for innocent property owners throughout the state. The legal issues and property rights questions raised by this case have generated interest and concern far and wide. Regrettably most small business owners are ill equipped to combat the unlimited resources of governmental entities.

Thus we look to this court to balance the scales and correct the injustice being visited upon the Keshbro and other similarly situated prperty owners in the future. Given the existence of so many NABs throughout the state and the clear status of the law this conflict must be resolved in favor of Keshbro / Harrish Giwhala an innocent landowner and small businessman trying to earn a living and provide a service in a high crime area.

Hypothetically, if the Bowen holding is not upheld with Keshbro's right to compensation, then any innocent property owner, business operator or even the secured mortgagee of the premises would face significant additional risk of to a business investment. A business owner or investor could be exposed to a lengthy business closure, financial ruin, protracted and costly litigation, bankruptcy, and injury to business/personal reputation. All this could befall them for any two documented instances of third party (read guest, trespasser, invitee, or licensee) criminal conduct with in a six month window. A subsequent declaration of public

nuisance, despite their best efforts to comply with the law, will deny them any economically viable use of their land by government order; resulting in another “taking” for up to one year without any legal right to compensation. The potential threat to legitimate business will discourage and further reduce investment in certain areas compounding the problem. The adverse impact of failing to secure and protect property against this erosion of long held American notions of property rights will indeed have a more deleterious impact upon our State than the nuisance sought to be abated. The policies advanced are antithetical to our state and federal constitutions.

Bowen and Keshbro are innocent landowners whose properties fell victim to urban decay, municipal neglect, followed by arbitrary selective enforcement & the ravages of a drug war run amok and directed at the small merchants with limited resources or political clout. Over zealous exercise of “police power” cannot justify a deprivation of constitutional protections historically afforded in jurisprudence to innocent property owners and businessmen.

WHEREFORE all the above enumerated legal and factual grounds, Keshbro prays that this court will grant it relief by ruling in its favor, rejecting the Third DCA opinion, and affirming the summary judgement as to the City’s liability for a compensable taking, with entitlement to full and fair compensation, plus interest during closure period, lost business profits, pre and post judgement

interest, costs and statutory attorny's fees for all stages of these litigation proceedings administrative, trial and appellate as well as all other relief deemed appropriate by this Honorable Court.

CERTIFICATE OF SERVICE & FONT SIZE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by first class United States mail or FedEx, postage prepaid to Sid White Clerk of the Florida Supreme Court at Supreme Court Bldg., 500 South Duval Street, Tallahassee, Fl 32399-1925; to Douglas Broeker and Paul Feltman, of Sweetapple, Broker & Varkas, Attorney's for the City at Courvoisier Centre II-Suite 805, 601 Brickell Key Drive, Miami, Fl. 33131; to Jose Fernandez Esq., Assistant City Attorney, 444 SW 2nd Ave., Riverside Plaza, Ste. 945 Miami, Fl. 33130 and to Harvey Ruvin Clerk of the Courts, 73 West Flagler, Miami Fl 33130 on this 22ND DAY of March 1999 per the instructions of the Florida Supreme Court Clerk.

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

Respectfully submitted,

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