IN THE SUPREME COURT OF FLORIDA

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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.

RESPONDENT'S JURISDICTIONBRIEF

Respectfully submitted,

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STATEMENT OF FACTS

Legislative Authority of the Board-

The City of Miami Nuisance Abatement Board is created by City Ordinance, Miami City Code Chapter 46, pursuant to enabling legislation contained in $893.13 8, Fla. Stat. (1994). AR 1004, 1011, respectively.[1] 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 defmed 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. *See Mesa v. City of Miami Nuisance Abatement Board,* 673 So. 2d 500 (Fla. 3d DCA 1996).

Prior History-

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 (IO) years.* In *City of Miami v. Stardust Motel and Keshbro, Inc.,* Case No. 91-0 11 (Nuisance Abatement Board, City of Miami 1992) the Board closed the Stardust

[1] "AR" refers to the Appendix filed with this Brief, followed by the page number.

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 which is inextricably intertwined with the operation of the motel. 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- 112 1. In spite of the Petitioners' representations in its Petition to Reopen, they failed to do so, as detailed below.

The Current Case-

Some of the incidents, 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, Between July 11, 1996, and December 4, 1996, fifteen (15) separate incidents of drug and prostitution related activity took place, AR 1122- 163 The Board, faced with the longstanding history of illegal activity on the property spanning a decade, the prior case before the Board and the continuing criminal activity of drugs and prostitution, 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 10 13. 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 10 18. The Petitioners also agreed to undertake certain responsibilities with regard to abating the nuisance activity taking place on the property. AR 10 18. (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 was ignored by the Petitioners.

Subsequent to the February 26, 1997 hearing and March 4, 1997 Order, the seven (7) separate incidents and arrests took place for drug sales. AR 1186-1195. 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 the June 25, 1997 Order and refused to close the property until entry of an Order of Closure by the Circuit Court in and for Dade County. AR 1239. As set forth in Section II, *infra,* this activity and the subsequent closure of the property is a non-compensable taking.

SUMMARY OF THE ARGUMENT

A. Art. V, § 3(b)(3), Fla. Const. gives discretionary jurisdiction to this Court if a decision of a district court expressly and directly conflicts with the decision of another district court. The Third District Court of Appeal in *City of Miami, and The City of Miami Nuisance Abatement Board v. Keshbro, Inc. d/b/a Stardust Motel and Harish Gihawala, 23* Fla. L. Weekly D2128, 2129 n. 8 (Sept. 25, 1998), specifically stated that its decision did not conflict with *City of St. Peterburg v. Bowen, 675* So. 2d 626 (Fla. 2d DCA 1996), 680 So. 2d 421 rev. denied, U.S. ___ (1997) cert. denied. ("It is for this reason that we do not certify a conflict with *City of St Petersburg* v. *Bowen;* i.e., *Bowen,* does not include any discussion of inextricable intertwining of proscribed uses with other, valid, uses,"). Thus, the facts in this case are completely different than the facts in *Bowen* and no conflict exists. At best the dicta of the two opinions are in conflict; however, Art V § 3(b)(3), Fla. Const. requires a decision. Therefore, dicta conflict does not provide a basis for this Court's

jurisdiction.[2]

Even if this Court were to determine that a conflict exists, it should not exercise its jurisdiction. The Third District Court of Appeal has correctly read *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) and applied it to the facts of this case. *Bowen* appears to have gone up on an inadequate record and, therefore, it is appropriate for this Court to decline jurisdiction in *Keshbro* and thereby encourage an appeal from the Second District of a case which follows *Bowen* and which has more compelling facts.

B. Art. V, § 3(b)(3), Fla. Const. requires a district court of appeals to "expressly" construe the language or terms of a constitutional provision in order for this Court to exercise jurisdiction, Many district court decisions involve an application of state or federal constitutional principles to the facts of a case. A mere application of constitutional principles, however, does not amount to a construction. The decision in *Keshbro* turns on factual applicability and does not furnish a basis to invoke discretionary jurisdiction.[3] 2

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[2] Petitioners have also cited the Second District Court of Appeal case, *City of St. Petersburg v. Baird,* Case No. 98-008 (Fla. 2d DCA 1998), *per curium* affirmed, as being in conflict with *Keshbro.* However, *a per curium* affirmed decision that is not supported by an opinion is not reviewable. *Jenkins v. State,* 382 So. 2d 1356 (Fla. 1980).

[3] The other basis relied on Petitioners to invoke this Court's jurisdiction is inapplicable: Art. V, § 3(b)(5), Fla, Const.'s "great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court", rests exclusively with a district courts of appeal.

ARGUMENT

I. *THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DOES NOTDIRECTLYAND EXPRESSLY CONFLICT WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL AS THE THIRD DISTRICT COURT OF APPEAL HAS DIRECTLY STATED THAT THE OPINION DOES NOT CONFLICT DUE TO THE FACTS OF CASES*

Petitioners argue that the Third District Court of Appeal's opinion in City of *Miami, and The City of Miami Nuisance Abatement Board v. Keshbro, Inc. d/b/a Stardust Motel and Harish Gihawala,* 23 Fla. L. Weekly D2128, 2129 (Sept. 25, 1998), conflicts with *City of St. Peterburg* v. *Bowen,* 675 So. 2d 626 (Fla. 2d DCA 1996). Petitioners argument fails as the Third District Court of Appeal correctly found no direct conflict with the Second District Court of Appeal because the facts are not analytically the same in the two (2) cases.

A. The decision of the Third District Court of Appeal does not conflict with the decision of the Second District Court of Appeal

Pursuant to Art. V, § 3(b)(3), Fla. Const., this Court has discretionary jurisdiction to review a decision that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. *Jenkins, 3 82 So.* 2d at 13 59, The opinion must conflict "in an express manner" or "to represent in words" a conflict. *Id,* Finally, where a cause is distinguishable on its facts from those cited in the conflict, there is no conflict jurisdiction. *Department of Revenue v. Johnston,* 442 So. 2d 950, 95 1-952 (Fla. 1983).

In *Keshbro,* the Third District Court of Appeal found the following:

> However, when we look beyond the limited wording of the closure orders to the property's extensive history upon which the orders are based, the record reflects 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. The record shows that the prostitution and drug-related activities were inextricably intertwined with the motel.

Keshbro, 23 Fla. L. Weekly at D2129. The district court then stated: '"It is for this reason that we do not certify conflict with *City of St. Petersburg v. Bowen*; i.e., *Bowen* does not include any discussion of inextricable intertwining of proscribed uses with other, valid, uses". *Id.* at n. 8. As set forth in the Statement of Facts, *supra, the* property at issue in this case was rife with rampant crack and powder cocaine sales and prostitution occurring thereon. In fact, the Petitioners in this matter stipulated that the property was a nuisance. AR 10 18. The property had a reputation for this type of activity over a period of ten (10) years. AR 1109. The property had been closed previously by the Board and allowed to re-open early on the agreement that the property owner would abate the nuisance activity. AR 1114, 1118. He did not.

The facts of the case showed that the proscribed uses were inextricably intertwined with the other valid uses such that it was necessary to bar access to the base of the operations, which, the Board concluded, could only be done by completely closing the Stardust Motel. *Keshbro,* 23 Fla. L. Weekly at D2 129 citing *Health Clubs of Jacksonville, Inc. v. State,* 38 1 So. 2d 1174 (Fla. 1st DCA 1980) and *Five Sky, Inc. v. State,* 13 1 So. 2d 36 (Fla, 3d DCA 1968); see *also,* Statement of Facts, *supra,* and affidavit of Miami Police Chief Brooks regarding personal

knowledge of the criminal activity on the property stretching over a decade when he was a Lieutenant in charge of the Street Narcotics Unit in the City of Miami during the 1980's. AR 1109.

There is absolutely no discussion in *Bowen* on the issue of valid and proscribed uses being inextricably intertwined. Therefore, the opinions do not expressly and directly conflict and this Court appropriately declines to exercise jurisdiction. *Johnston, 442 So.* 2d at 95 1-952; *Keshbro,* 23 Fla. L. Weekly at D2129 at n. 8.

B. *This Court should decline to exercise jurisdiction as it is more appropriate to review a decision from the Second District*

Even if this Court were to determine that a conflict exists, it should not exercise its jurisdiction. The Third District Court of Appeal has correctly read *Lucas* and applied it to the facts of this case. While Respondents assert that the *Bowen* decision reads *Lucas* incorrectly, *Bowen* appears to have gone up on an inadequate record. Therefore, it is appropriate for this Court to decline jurisdiction in *Keshbro* and thereby encourage an appeal from the Second District of a case which follows *Bowen* and which has more compelling facts.

II. *THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY CONSTRUE THE LANGUAGE OR TERMS OF A CONSTITUTIONAL PROVISIONBUTRA THER TURNS ON THE FACTUAL APPLICABILITY OF THE FACTS TO THE PRECEDENTS OF THE UNITED STATES SUPREME COURT*

Petitioners argue that the Third District Court of Appeal has construed the language of the Fifth Amendment's Taking Clause. This assertion is mistaken: the

district court merely applied the constitutional provision, as interpreted by the Supreme Court, to the facts of this case.

Art. V, § 3(b)(3), Fla. Const. requires a district courts of appeal to "expressly" construe the language or terms of a constitutional provision. Many district court decisions involve an application of state or federal constitutional principles to the facts of the case. A mere application of constitutional principles, however, does not amount to a construction. *Armstrong v. City of Tampa,* 106 So. 2d 407, 409 (Fla. 1958). It is not sufficient merely that the judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution; the provision must be expressly construed. *Id.* The decision in *Keshbro* turns on factual applicability and does not furnish a basis to invoke discretionary jurisdiction. Id.; *Keshbro,* 23 Fla. L. Weekly at D2129 at n. 8.

As discussed in Section I, *supra,* this matter turns on the fact that the proscribed uses and valid uses were inextricably intertwined, given that fact and the long-standing problems on the property it was necessary to bar access to the base of operations which could only be done by closing the Stardust Motel. The district court merely applied the holding of *Lucas* to the facts of this case. *See Keshbro,* 23 Fla. L. Weekly at D2129 citing *Lucas,* 505 U.S. at 1031-1032. A newly legislated law or decree must do no more than duplicate the background principles of public or private nuisance. *Id.* at 1019. As long as it duplicates the background principles of public or private nuisance law, no taking will be found. *Id,*

The Petitioners took title to their property in 1988. AR 1209-1213 . As the Third District Court of Appeal correctly held, no compensation is required as the actual uses prohibited were a brothel and drug house which have no "tradition of protection at common law," *Lucas,* 505 U.S. at 1016, and which were not a part of the owners' title, or bundle of rights, at the time they acquired the property, as such uses have, since long prior thereto, been considered to be nuisances. *See Atkinson v. Powledge,* 123 Fla. 389, 167 *So. 4* (1936); *King v. State,* 17 Fla. 183 (1879); see *also,* 1832 Fla. Terr. Laws No. 55 § 47; 19 17 Fla. Laws ch. 7367, § 1; 1969 Fla. Laws ch. 69-364, § 1 (codified at Fla. Stat. § 823.10). 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. (1994.) and City of Miami Code Chapter 46 seek to prevent are nuisances. This Court appropriately denies Petitioners' request to invoke this Court's discretionary jurisdiction.

CONCLUSION

Based upon the foregoing this Court appropriately does not have jurisdiction in this matter. Alternatively, if this Court determines that it does have jurisdiction it should not exercise that jurisdiction as the Third District Court of Appeal reached the correct result pursuant to *Lucas,* and this Court more appropriately hears an appeal from the Second District Court of Appeal.

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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 4th day of December, 1998 to: David Forestier, Esq., Forestier & Laughton, P.A., 12865 W. Dixie Highway, North Miami Beach, FL 33161-5808.

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