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M E M O R A N D U M

DATE: November 29, 2016

TO: Mayor Chris Alahouzos
Vice Mayor Townsend Tarapani
Commissioner David Banther
Commissioner Rea Sieber
Commissioner Susan Slattery

CC: Mark LeCouris, City Manager
Robert Kochen, Chief of Police
Heather Urwiller, Director, Planning and Zoning Department

FROM: Jay Daigneault, City Attorney

RE: Tarpon Springs Nuisance Motels

Dear Mayor and Commissioners:

As part of the City's multi-pronged approach to dealing with the motels at issue, City staff has been asked to provide a comprehensive summary of its efforts to date. Further, this office has been asked to provide a legal perspective as to what remedies may be available to assist in those remediation efforts, including the exercise of eminent domain. Accordingly, this memorandum is submitted for your review along with the PowerPoint of the TSPD presentation from your recent meeting and a memorandum from the Director of the Planning and Zoning Department concerning the application of the City's comprehensive plan.

I. Executive Summary

In the aftermath of the seminal case of Kelo v. City of New London, the Florida Constitution and statutes have been clear about the exercise of eminent domain to address blighted or nuisance properties—it simply is not permitted.

There have been few updates in case law related to Florida nuisance statues. However, the Third District Court of Appeals has held that municipalities do have the ability to retroactively control for a public nuisance via ordinance. Nuisance abatement and the levying of fines are the primary tools used by municipalities throughout the state when it comes to deterring and eliminating nuisances and blighted properties. Private citizens may have a cause of action in tort

for nuisance against problem properties that are negatively affecting their residences or business. Finally, DBPR, the state licensing agency, may be able to provide some help in terms of controlling for nuisance lodging facilities via inspection and enforcement.

II. Analysis

A. History of Florida Constitutional Amendment Regarding Eminent Domain after *Kelo v. City of New London*

a. *Kelo v. City of New London*

In 2005, the United States Supreme Court decided the case of Kelo v. City of New London. The case dealt with power of state and local governments to take private real property via eminent domain.

The case was appealed to the U.S. Supreme Court from a decision by the Supreme Court of Connecticut in favor of the City of New London. The owners, including lead plaintiff Susette Kelo, sued the city in Connecticut courts, arguing that the city had misused its eminent domain power. The power of eminent domain is limited by the takings clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment. The Fifth Amendment states, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." Under the due process clause of the Fourteenth Amendment, this limitation also applies to the actions of state and local governments. The plaintiffs argued that economic development, the stated purpose of the taking and subsequent transfer of land to the New London Development Corporation, did not qualify as a public use under the Fifth Amendment.

The Connecticut Supreme Court issued its decision on March 9, 2004, siding with the city in a 4-3 decision.[1] The State Supreme Court held that the use of eminent domain for economic development did not violate the public use clauses of the state and federal constitutions. The court held that if a legislative body has found that an economic project will create new jobs, increase tax and other city revenues, and revitalize a depressed urban area (even if that area is not blighted), then the project serves a public purpose, which qualifies as a public use. The court also ruled that the government's delegation of its eminent domain power to a private entity was constitutional under the Connecticut Constitution. The United States Supreme Court granted certiorari to consider questions raised in Kelo, specifically whether a "public purpose" constitutes a "public use" for purposes of the Fifth Amendment's takings clause: "nor shall private property be taken for public use, without just compensation." Specifically, does the Fifth Amendment, applicable to the states through the due process clause of the Fourteenth Amendment, protect landowners from takings for economic development?

Kelo was the first major eminent domain case heard at the Supreme Court since 1984. In that time, states and municipalities had slowly extended their use of eminent domain, frequently to include economic development purposes. In the Kelo case, Connecticut had a statute allowing eminent domain for "economic development" even in the absence of blight. Interestingly, the development corporation was ostensibly a private entity. Thus, the plaintiffs argued that it was not constitutional for the government to take private property from one individual or corporation and

[1] Kelo v. City of New London, 268 Conn. 1, 843 A.2d 500 (2004), aff'd sub nom. Kelo v. City of New London, Conn., 545 U.S. 469 (June 23, 2005).

give it to another, if the government was simply doing so because the repossession would put the property to a use that would generate higher tax revenue.
Kelo became the focus of vigorous discussion and attracted numerous supporters on both sides. In a 5–4 decision, the Supreme Court held that the general benefits a community enjoyed from economic growth qualified private redevelopment plans as a permissible "public use" under the takings clause of the Fifth Amendment.[2]

b. Florida Constitutional Amendment

In response to the decision in Kelo v. City of New London, Florida passed a ballot measure amending the Florida Constitution. In 2006, Article X, Sec. 6 was adopted as part of the Florida Constitution restricting the use of eminent domain. Article X states in relevant part:

> SECTION 6. Eminent domain.—
>
> (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
>
> (b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.
>
> (c) Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.[3]

This constitutional provision was later codified in the Florida statutes. Section 73.014, Fla. Stat., provides that "abating or eliminating a public nuisance is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution."[4] Section 73.014, Fla. Stat., does still allow a municipality to abate nuisances via code enforcement, to the extent that the ordinances do not authorize the taking of private property by eminent domain.[5] It also states that political subdivisions cannot exercise the power of eminent domain to take private property for the purpose of preventing or eliminating slum or blight conditions, as it is not a valid public purpose per the Florida Constitution.[6]

Perhaps due to the clear and unequivocal language of the statute, a diligent search has found only one Florida appellate case that references it. In City of Hollywood Redevelopment Agency v. 1843, LLC., the Fourth District dealt with a case in which the city's community redevelopment agency (CRA) filed an eminent domain petition seeking to condemn a parcel of property for use in a development project. The Fourth District held that the CRA had a valid reason to condemn the property in 2005 and the agency's disqualification of an alternative site plan that would have

[2] Kelo v. City of New London, Conn., 545 U.S. 469 (June 23, 2005)

[3] Art. X, § 6, Fla. Const.
[4] § 73.014(1), Fla. Stat.
[5] § 73.014(1), Fla. Stat.
[6] § 73.014(2), Fla. Stat.

required the partial destruction of a historically significant hotel did not demonstrate that the condemnation was not reasonably necessary.[7] In Judge Davidson's concurrence, she references § 73.014, Fla. Stat., stating that:

> In the past, local governments could legally take private property in a CRA and then sell it to a private developer for private development purposes for the elimination of slum or blight. This can no longer be done. § 73.014, Fla. Stat. (2006). Today, private property taken pursuant to a local government's taking power must be for uses that historically have had a public purpose, such as roads, utilities, and transportation-related services.[8]

Judge Davidson's also wrote that if § 73.013, Fla. Stat. (2006) applied to the instant case, the property at issue could not be condemned.[9]

Harry Hipler, writing in the August 2007 edition of the Florida Bar Journal stated that, as a result of Kelo v. City of New London and the fear that "blighted area" was insufficiently defined in the statutes, the Florida Legislature passed statutory amendments contained in Ch. 2006-11, Laws of Florida, severely restricting a condemning authorities' power to take private property for economic development. This law amended Chapter 73 Fla. Stat. and created a prohibition against the transfer of property to a private entity or natural person that can be taken through eminent domain. Local governments are now restricted to taking private property for uses that have historically had a public purpose, i.e., roads, utilities, public infrastructure, transportation related services, civic buildings, and so forth. Local governments cannot take private property in a CRA or elsewhere and soon thereafter sell it to a private developer for private development purposes as it once could for the elimination of slum or blight.[10]

B. Review of Nuisance Abatement law

Florida's nuisance abatement statutes are found at §§ 823.05 and 60.05, Fla. Stat. respectively.

Section 823.05 et seq. deals with places that attract, maintain and harbor continuing public nuisances:

> (1) Whoever shall erect, establish, continue, or maintain, own or lease any building, booth, tent or place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in s. 823.01, or 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 is violated, shall be deemed guilty of maintaining a nuisance, and the building, erection, place, tent or booth and the furniture, fixtures, and contents are declared a nuisance. All such places or persons shall be abated or enjoined as provided in ss. 60.05 and 60.06.[11]

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[7] City of Hollywood Cmty. Redevelopment Agency v. 1843, LLC, 980 So. 2d 1138 (Fla. 4th DCA 2008).
[8] Id. at 1144
[9] Id.
[10] Harry M. Hipler, Tax Increment Financing in Florida: A Tool for Local Government Revitalization, Renewal, and Redevelopment, Fla. B.J., July/August 2007, at 66
[11] § 823.05(1), Fla. Stat.

Section 60.05 et seq. deals with the abatement of nuisances:

> (1) When any nuisance as defined in s. 823.05 exists, the Attorney General, state attorney, city attorney, county attorney, or any citizen of the county may sue in the name of the state on his or her relation to enjoin the nuisance, the person or persons maintaining it, and the owner or agent of the building or ground on which the nuisance exists.[12]

Since the 1960s, Florida courts have held that businesses that continually attract unwanted and illegal behavior can be classified as a public nuisance. In State v. Rapuano, the Second District reversed a trial court order denying state's petition to declare a motel a public nuisance. The Second District reversed the lower court and held that the premises (a "beer parlor and motel"), where police officers had on numerous occasions been called to and repeatedly made arrests for drunkenness and disorderly conduct, loud and vulgar noises and patrons engaging in acts of misconduct at premises, was public nuisance within § 823.05, Fla. Stat.[13]

Likewise, in Health Clubs, Inc. v. State ex rel. Eagan, the Fourth District heard a case involving a massage parlor and health spa involved in "lewdness." The Fourth District made clear that "where illegal conduct which has been decreed to constitute a public nuisance is separable from legal conduct within a business enterprise, only the illegal conduct may be enjoined."[14] Furthermore, in 4245 Corporation v. City of Oakland Park, the Fourth District held that the fact some indecent acts constituting lewdness occurred on premises did not support finding that the corporate business could not be operated as a legitimate business without permitting acts of lewdness, and did not justify injunction totally putting corporation out of business. Trial courts should limit injunction to illegal acts of lewdness and give corporations an opportunity to function as legitimate enterprises.[15]

C. Survey of Florida Nuisance Abatement Case law Over the Past Decade

a. Brief Overview of Nuisance in Tort

A nuisance is the use of one's land in a fashion that it harms the land or some incorporeal hereditament of another's land.[16] Nuisances are incapable of complete categorization, but generally rest upon the intentional invasion of another's rights or the negligent use of one's property in a manner inconsistent with its surroundings.[17] The offending use must be "unreasonable, unwarrantable or unlawful."[18] Nuisances are often divided into public and private nuisances; public nuisances are those that annoy the community or injure the health, manners or morals of the community.

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[12] § 601.05 (1), Fla. Stat.
[13] State v. Rapuano, 153 So. 2d 353 (Fla. 2d DCA May 17, 1963).
[14] Health Clubs, Inc. v. State ex rel. Eagan, 338 So. 2d 1324 (Fla. 4th DCA Nov. 12, 1976).
[15] 4245 Corp. v. City of Oakland Park, 473 So. 2d 12 (Fla. 4th DCA July 17, 1985)
[16] Beckman v. Marshall, 85 So. 2d 552, 554 (Fla. 1956)
[17] Durrance v. Sanders, 329 So. 2d 26 (Fla. 1st DCA 1976).
[18] Corbett v. Eastern Air Lines, Inc., 166 So. 2d 196 (Fla. 1st DCA 1964).

By statute, abatement of public nuisances may be enforced by the "[a]ttorney General, state attorney, city attorney, county attorney, or any citizen of the county" in which the nuisance lies.[19] Private nuisances are those that violate private rights and, in distinction to public nuisances, harm only a few people.[20] Whether or not an action or conduct is a private nuisance depends on whether the use of the property is reasonable under the circumstances and whether there is actual physical discomfort.[21] A private nuisance is also termed a non-possessory invasion of another's land.[22]

A complaint for nuisance depends upon whether the nuisance is public or private. A complaint for public nuisance should follow the dictates of Fla. Stat. § 823.05. A complaint for private nuisance should state the property or person creating the nuisance; the property affected; the particular form or manner of nuisance; the effect on the nearby property owners; and the legality or unreasonableness (as determined by the character of the neighborhood) of the use.[23]

Priority of occupation, otherwise known as "coming to the nuisance," is generally not accepted as a defense to a private nuisance action; but may have an effect on whether injunctive relief will be granted.[24,25] Likewise, a party cannot permit another party to construct what later is deemed a nuisance and then later complain of the nuisance.[26] Finally, doing what has been authorized by the state cannot be deemed a public nuisance so long as the authorization was lawful and proper.[27]

The preferred remedy for both public and private nuisances is abatement through the issuance of an injunction.[28,29] However, damages may be obtained for both a private and a public nuisance.[30,31]

The statute for abatement of public nuisances provides for an award of attorney fees to a prevailing defendant if the court finds that there was "no reasonable ground for the action."[32] Absent a contractual basis for same, there is no right to attorney fees in private nuisance case.

b. Recent §§ 823.05 and 60.05 case law

[19] § 60.05 (1), Fla. Stat.
[20] Prior v. White, 132 Fla. 1, 180 So. 347, 116 A.L.R. 1176 (1938).
[21] Beckman v. Marshall, 85 So. 2d 552 (Fla. 1956).
[22] Restatement (Second) of Torts § 821D (1979).
[23] Saadeh v. Stanton Rowing Foundation, Inc., 912 So. 2d 28, 202 Ed. Law Rep. 913 (Fla. 1st DCA 2005).
[24] Lawrence v. Eastern Air Lines, 81 So. 2d 632 (Fla. 1955) (defendants could not defend their diverting of historical surface water flows on the basis that landowners "came to the nuisance").
[25] Pizio v. Babcock, 76 So. 2d 654 (Fla. 1954) (parties purchasing a motel on federal highway in Broward County were on notice that establishments in the area were loud and noisy and could not obtain injunctive relief against noise).
[26] City of Miami Beach v. Texas Co., 141 Fla. 616, 194 So. 368, 128 A.L.R. 350 (1940) (municipality which permitted the construction of bulk gasoline tanks could not later deem the tanks to be nuisance).
[27] South Lake Worth Inlet Dist. v. Town of Ocean Ridge, 633 So. 2d 79 (Fla. 4th DCA 1994) (sand transfer plant authorized by the Department of Natural Resources could not be deemed a nuisance so long as it operated according to its grant).
[28] Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801, 52 A.L.R. 51 (1927).
[29] Shamhart v. Morrison Cafeteria Co., 159 Fla. 629, 32 So. 2d 727 (1947).
[30] Burnett v. Rushton, 52 So. 2d 645 (Fla. 1951).
[31] Ford v. Dania Lumber & Supply Co., 150 Fla. 435, 7 So. 2d 594 (1942).
[32] §§ 60.05(3) and 60.05(5), Fla. Stat.

Over the past ten to fifteen years, there have been few relevant appellate cases dealing with nuisance abatement.

In Manatee County v. J. Richard Kaiser Enterprises, Inc., the Second District heard a case where the county sought to have a nightclub found in contempt of an injunction and declared a public nuisance. The Second District held that the nightclub was in violation of the injunction and, further, that the County was allowed to present evidence at an evidentiary hearing that the nightclub was a public nuisance. At the evidentiary hearing for violation of the injunction, the trial court prohibited Manatee County from offering evidence to establish that the nightclub constituted a public nuisance as defined in § 823.05, Fla. Stat.[33] The trial court placed this limitation on Manatee County because it believed that the only basis upon which it could declare the nightclub a public nuisance was for violations of the injunction and that if Manatee County wanted the nightclub declared a public nuisance as defined by § 823.05, Fla Stat., it would have to file a separate lawsuit. The Second District held that, "[w]e find nothing in the injunction that supports the trial court's conclusion. On the contrary, 'proper proof' to establish that [the nightclub] was a nuisance would go beyond what would suffice to prove a violation of the injunction."[34]

The Third District held that an ordinance enacted to curb a public nuisance could apply retroactively. Bal Harbour Village v. Welsh, was a case dealing with the constitutionality of a village ordinance that forbade housing more than two dogs at one residence. At issue was whether the ordinance, duly enacted pursuant to the Village's police power to abate a nuisance, may be constitutionality enforced against a Village resident who owned and housed more dogs than the established limit, prior to the enactment of the ordinance. The Third District held that the ordinance was valid against the resident, stating "the legislature has broad discretion to declare a particular activity to be a public nuisance and enact legislation to abate the same in the exercise of its police power…In order to pass constitutional muster, all laws or ordinances enacted pursuant to the exercise of the state's police power must be reasonable and not arbitrary."[35] The Third District also held that the code provision limiting the number of dogs could be applied to the resident in question, as "property rights could be limited by police power to abate public nuisances."[36] In this way, the Village was able to properly use its police power to control for a nuisance even if it applied retroactively against a citizen of the municipality.

Finally, in Saadeh v. Stanton Rowing Foundation, the First District heard on appeal a case where property owners brought an action against a school foundation seeking damages arising out of the school's use of adjoining riverfront property as a boating facility for students. The First District held that the school's use did not comply with the ordinance and triable issues existed as to whether school's use rose to the level of a private nuisance.[37] The court remanded the case, but did note that, "[m]ere compliance with a zoning ordinance will not, in and of itself, absolve a property owner from any claim of nuisance. A court examining a claim of nuisance must focus not only upon legality, but also upon reasonableness of the use as such use affects the public and private rights of others and must of necessity be determined from the facts and circumstances of particular cases as they arise."[38]

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[33] Manatee County v. J. Richard Kaiser Enterprises, Inc., 874 So. 2d 38, 39 (Fla. 2d DCA May 7, 2004).
[34] Id. at 39
[35] Bal Harbour Vill. v. Welsh, 879 So. 2d 1265, 1267 (Fla. 3d DCA Aug. 11, 2004).
[36] Id. at 1268
[37] Saadeh v. Stanton Rowing Found., Inc., 912 So. 2d 28 (Fla. 1st DCA Aug. 23, 2005).
[38] Id. at 32

D. Review of Nuisance Strategies Other Florida Municipalities Pursued

In June, 2016, a Clay County Circuit Court Judge ordered that a motel be closed enforcing a closure petition issued by the Town of Orange Park. Judge Mike Sharritt ruled the Parkway Inn must remain closed through December 31, 2016 as the hotel in question (Parkway Inn, formerly Rodeway Inn) was a public nuisance because of pervasive criminal activity including meth labs, illegal drug use as well as a chronic public health and safety problem.[39] The order came after about 17 months of contention with the property owner, the city and county. The Nuisance Abatement Board has monitored the motel since February of 2015.

In June, 2015, the New Plaza Motel in St. Petersburg was ordered closed for a year by the Nuisance Abatement Board.[40] St. Petersburg Police described the problems with the motel as a recurring nuisance, included narcotic problems, drug deals, and other vices.

In 2014, the Riviera Motel in Clearwater was declared a public nuisance because it was considered an abandoned building and had fallen into disrepair. The property has been levied fines of $250 a day, but remains at the center of a legal battle between the owners of the motel and a property developer.[41]

The Mosley Motel in St. Petersburg has long been an issue when it comes to public nuisance, because of drug crimes and prostitution. In January, 2016, the property was set for foreclosure but the owners filed for bankruptcy. In August, 2016, the Mosley Motel in St. Petersburg was sold to new owners.[42]

E. Avenue via the State

Hotels and motels must register and have a license with the Florida Department of Business and Professional Regulation (DBPR).[43] The Division of Hotels and Restaurants (HR) allows for citizens and municipalities to file complaints against a lodging facility if they believe state statute or regulations are being broken or there is a concern for the health, safety and welfare of patrons. Speaking with the Chief Attorney at HR, it has been confirmed that complaints against a motel can be forwarded to the Tampa Office which has jurisdiction over licensed lodging facilities in Pinellas County. When filing a complaint, the Tampa Office will take into consideration any photographic evidence or documentation that may show potential food and lodging violations.

F. Police Department Strategies

Tarpon Springs Police Department has detailed the strategies they are using and have used in the Spring Bayou Initiative presented to the Board of Commissioners previously, which included Operation Room Service (multi-agency round-up and arrests related to drug and firearm crimes), a multi-faceted approach using TSPD, the Fire Department, Building Department,

[39] "Judge orders Orange Park Motel Closed." The Florida Times-Union, June 15, 2016.
[40] "Nuisance Motel Ordered Closed For Year in St. Pete." WTSP, June 18, 2015.
[41] "Huge Wyndham Grand to Have Ripple Effect on Clearwater Beach Surroundings." Tampa Bay Times, January 21, 2015.
[42] "Those who live at St. Petersburg's Mosley Motel must leave their home — and soon." Tampa Bay Times, August 4, 2016.
[43] §§ 509.013 (4)(a), 509.241, Fla. Stat.

Planning and Zoning and Code Enforcement, as well as an increased presence and enforcement at the nuisance properties.[44]

As always, please do not hesitate to contact me or other appropriate staff should you have concerns regarding this memorandum.

/s/ Jay Daigneault, Esq.
City Attorney

[44] "Spring Bayou Initiatives" Tarpon Springs Police Department