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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

HARBIYA K. ABU-KHADIER, Appellant, v. CITY OF FORT MYERS, a Florida municipal corporation, Appellee.	)	Case No. 2D18-3068

Opinion filed October 30, 2020.

Appeal from the Circuit Court for Lee County; Keith R. Kyle, Judge.

John N. Bogdanoff of The Carlyle Appellate Law Firm, Orlando; and William M. Powell of Powell, Jackman, Stevens & Ricciardi, P.A., Cape Coral, for Appellant.

Theodore L. Tripp, Jr., Joel W. Hyatt, and Jeffrey S. Haut of Hahn Loeser & Parks LLP, Fort Myers; and Grant W. Alley of City of Fort Myers, Fort Myers, for Appellee.

CASANUEVA, Judge.

Harbiya Abu-Khadier (Landowner) appeals a final summary judgment entered in favor of the City of Fort Myers, defendant below.[1] She sought damages for inverse condemnation, under article X, section 6, of the Florida Constitution, after the City's Nuisance Abatement Board (NAB) ordered a one-year closure of the grocery store operating on the Landowner's property.[2] The ordered closure was based on repeated illegal drug transactions taking place on the property. Based on the circuit court's conclusion that the operation of the grocery store was inextricably intertwined with ongoing and pervasive illegal drug activity, the court concluded that no compensation was due for the one-year closure. Because the unrebutted testimony from the NAB hearing supports the circuit court's conclusion, we affirm.

We review an order granting summary judgment de novo. Sawyerr v. Se. Univ., Inc., 993 So. 2d 141, 142 (Fla. 2d DCA 2008). Summary judgment is proper when the movant establishes an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Id. All doubts and inferences must be resolved in favor of the nonmoving party. Id. "However, conclusory self-serving statements which are framed in terms only of conclusions of law are not sufficient to either raise a genuine issue of material fact or prove the non-existence of a genuine

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[1]This appeal is travelling with Abu-Khadier v. City of Fort Myers, 2D19-1072, which concerns the same parties, is an action for compensation for taking private property under 42 U.S.C. § 1983 (2016), and involves review of a summary judgment in favor of the City.

[2]RRHA, Inc., the grocery store operator and coplaintiff below, does not challenge the ruling on appeal.

issue of material fact." Progressive Exp. Ins. Co. v. Camillo, 80 So. 3d 394, 399 (Fla. 4th DCA 2012).

Here, the Landowner and the City filed opposing motions for summary judgment. The circuit court denied the Landowner's motion and granted the City's motion for summary judgment, denying the Landowner's claim of compensation under an inverse condemnation, or takings, claim.

"Eminent domain is the exercise of the government's power to take private property for the public good. This sovereign power is limited by our constitution which states that any taking of private property for a public purpose must be with full compensation to the owner. Art. X, § 6, Fla. Const. (1968)." Pinellas County v. Baldwin, 80 So. 3d 366, 370 (Fla. 2d DCA 2012) (quoting State, Dep't of Health & Rehab. Servs. v. Scott, 418 So. 2d 1032, 1033-34 (Fla. 2d DCA 1982)).

In Keshbro, Inc. v. City of Miami, 801 So. 2d 864, 869 (Fla. 2001) (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)), the Florida Supreme Court discussed two types of regulatory takings that require compensation: "(1) where the regulation compels the property owner to suffer a physical invasion, or (2) where the regulation 'denies all economically beneficial or productive use of land.' " Relevant here is the second type of taking, which applies even to temporary closures. Id. at 871. In such a case, "the State can resist compensation only if the regulation 'proscribe[s] use interests [which] were not part of [the property owner's] title to begin with' "; in other words, if the city "can identify 'background principles of nuisance and property law that prohibit the uses' proscribed by the orders." Id. at 869, 875 (alterations in original) (quoting Lucas, 505 U.S. at 1031). The regulation must do no

more than could have been achieved under the "law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." Id. at 870 (quoting Lucas, 505 U.S. at 1029). This exception to the right to compensation has been labeled the nuisance exception. Id.

Regulations or injunctions imposed for nuisance abatement must therefore be narrowly tailored "to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise." Id. at 876. Where separable from legal conduct, only the illegal conduct may be enjoined; conversely, where the illegal conduct is inextricably intertwined with the legal conduct, the city acts reasonably in ordering a temporary closure. See id.

This was the case with the Stardust, a motel owned and operated by the plaintiff in Keshbro. The record reflected repeated and recurring drug and prostitution activity, including at least eight arrests within the motel and its curtilage. Id. at 867. "[T]he owners, for whatever reason, failed to stop [the drug and prostitution activity] operating on their property. . . . In order to preclude these proscribed activities, it was necessary to bar access to the base of operations, which, the Board concluded, could only be done by completely closing the Stardust . . . ." Id. at 876 (quoting City of Miami v. Keshbro, Inc., 717 So. 2d 601, 604 (Fla. 3d DCA 1998)). The supreme court agreed and concluded that the city acted reasonably in ordering the temporary closure of the motel, noting the record showed "extensive and persistent drug and nuisance activity which had become inextricably intertwined with the Stardust's operation." Id.

In contrast, the Keshbro court noted that the record in City of St. Petersburg v. Kablinger, 730 So. 2d 409 (Fla. 2d DCA 1999), did not support persistent

drug activity prior to the closure of an apartment complex. Keshbro, 801 So. 2d at 876-77. In Kablinger, the closure was ordered because the apartment complex had been the site of "at least two incidents involving the sale of cocaine within the preceding six months." Id. at 868. "[T]here was no extensive record indicating that the drug activity had become an inseparable part of the operation of the apartment complex." Id. at 877. Thus, the NAB's order requiring a one-year closure was not shown to be specifically tailored to abate the drug activity on the property. Id.

A similar order closing a residential rental property was quashed on certiorari where the NAB failed to give the landowner adequate opportunity to abate the nuisance prior to imposing the sanction. Powell v. City of Sarasota, 857 So. 2d 326, 328 (Fla. 2d DCA 2003). "An adequate opportunity to abate a nuisance necessarily includes notice that criminal activity that might constitute a nuisance is occurring, coupled with a reasonable amount of time to end the criminal activity." Id. There, the record criminal activity consisted of three covert, controlled buys from a tenant who moved out before an arrest could take place. The landowner's first notice was the filing of the action by the city three months later, "after the nuisance had already been abated through the departure of the offending tenant," and there was no evidence that the property was a public nuisance prior to the police activity. Id. at 327-28.

Here, by contrast, it is undisputed that the Landowner received numerous notices of drug transactions occurring on the property,[3] and it was well known throughout the community that the property was a site of frequent drug activity,

[3]At the NAB hearing, the Landowner stipulated to having received multiple notices that drug-related activity was occurring on the property.

endangering the community. The property was referred to as a drug haven full of loitering and open and notorious drug sales.

The City presented evidence at the NAB hearing that drug transactions occurred both inside and outside the store, including one deal that began just outside the front door and was completed inside the store in the presence of the cashier after he provided change to the purchaser. Detectives with the Fort Myers Police Department testified to and showed video from numerous controlled buys in which confidential informants purchased illegal narcotics from dealers waiting in the store parking lot, sometimes in direct view of the front door. One sale involving two juveniles took place inside the store.

While detectives testified to these controlled buys initiated by confidential informants, it is important to note that this was certainly not the only testimony regarding drug activity on the property. A law enforcement officer who regularly patrols the area testified that there was open and notorious drug dealing taking place at the property twenty-four hours a day.[4] He testified to receiving frequent complaints from residents in the neighborhood who do not feel safe to shop at the store, though it is the closest grocery store to them, because they are afraid they will get approached for drugs, and this happens as often inside the store as outside. He testified that it is "[a]bsolutely not" safe for children to go to the grocery store to buy things.[5] Members of the community

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[4]The City presented video of the crowds and activity on the property even between 2:00 and 3:00 a.m. on an average weekend.

[5]Additionally, an agent from the Division of Alcohol and Tobacco testified to an incident at the store in which a fourteen year old was sent into the store to purchase alcohol and tobacco undercover. As he was exiting the store, he was

also testified to the danger the store presents to the community and the need to close it down.

While the law enforcement officers acknowledged that this store was not the only source of complaints in the community, they testified that other convenience stores in the area do not have the same level of problems. Two of the officers testified that known drug dealers and other criminals duck inside the store when an officer approaches in a marked patrol car, using the store as "a safe haven." In the words of one detective, the dealers "just keep coming back to that spot"; it is "the tip of the spear." When asked if he believes that the business facilitates and makes those drug sales "easier, more frequent, and much harder for the Fort Myers Police Department to protect the citizens," the detective answered in the affirmative.

In essence, the City presented uncontradicted evidence of regular, open and notorious drug sales occurring on the property throughout the day and night, to such an extent that members of the community did not feel safe shopping at the store. The participants in the drug activity treated the property as a safe haven for conducting such criminal activity. Despite numerous notices of the nuisance activity and requests for assistance to address it, including a meeting which the store owner and Landowner failed to attend, the Landowner failed to respond, and the activity continued.

The circuit court found, based on the evidence before the NAB and before the court on summary judgment, "that the Plaintiff's property was a well-known high risk area for illegal drug transactions for a number of years; that the City provided written

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grabbed by someone just outside the door who said: "Hey we've got some drugs for you."

notice of those activities to the Plaintiff; and that the Plaintiff failed to take reasonable actions to prevent the ongoing and pervasive drug activity." Thus, the court found that the business operating on the property "had become inextricably intertwined with the ongoing and pervasive illegal drug activity." We agree.

The Landowner, who did not testify at the NAB hearing, relies on the affidavit she filed in support of her motion for summary judgment. However, the affidavit does not contradict the facts relied on by the court to find the illegal activity was inextricably intertwined. While the affidavit stated that the Landowner did not know of the specific incidents of criminal activity until after they occurred, this does not equate to having no knowledge that criminal activity was occurring on the property. Indeed, there seemed to be no dispute on this point below. We conclude that the allegations in the Landowner's affidavit were insufficient to present a genuine dispute of material fact.

Further, while the owner's ignorance of criminal activity was noted as a factor in Powell, the facts here are markedly different. See id. at 328. In Powell, the nuisance order was based on three controlled buys to a single tenant in an apartment complex, and the property owner became aware of the controlled buys only upon the filing of the NAB action after the nuisance had already been abated. Id.

Here, the City sent the Landowner ten warning letters over a period of six years, and the Landowner was invited to but failed to attend a meeting called to address the pervasive problem. Critically, the controlled buys, of which the Landowner attested she had no prior knowledge, were far from the only drug activity that took place on the property. Rather, the undisputed testimony was that drug activity occurred on a regular

basis inside and outside the store, and the persistent criminal activity on the property was known throughout the community.

This was not a case based on isolated incidents or solely on covert, undercover sales. Cf. Keshbro, 801 So. 2d at 876-77 (noting there was no record of persistent drug activity precipitating the closure in Kablinger). Far from a rushed closure order based on isolated incidents of criminal activity, the City turned to the remedy of temporary closure only after repeated notices and requests for the Landowner's assistance in abating the nuisance.

In sum, the undisputed evidence supports the circuit court's conclusion that pervasive drug activity occurring both inside and around the store was inextricably intertwined with the business operated on the property. Similar to Keshbro, the evidence here showed "that the property was 'maintaining an atmosphere and reputation as a place of . . . drug sales.' " Id. at 867 n.5.[6] The nuisance exception was properly applied in this case, and the Landowner has not shown entitlement to compensation for the temporary closure. Accordingly, we conclude that the circuit court properly granted the motion for summary judgment.

Affirmed.

NORTHCUTT, J., Concurs.
ATKINSON, J., Dissents with opinion.

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[6]We reject the Landowner's argument that the City failed to meet its burden because it did not show that the Landowner participated in the criminal activity. The NAB order in Keshbro specifically noted that the City "attributed no criminal wrongdoing to" the owner of the motel and neither "assert[ed] nor impl[ied] that the owner, personally, [wa]s party to any drug sales or illegal activities." Keshbro, 801 So. 2d at 867 n.4.

ATKINSON, Judge, Dissenting.

I respectfully dissent, because the City did not establish that the illegal drug activity was so inextricably intertwined with the operation of the convenience store that the City would be unable to abate the former without completely shutting down the latter. The City presented an impressive volume of evidence that the sale of illegal drugs was occurring immediately outside the landowner's premises, and sometimes within it. However, quantity is not necessarily a substitute for quality—especially when, in order to avoid its constitutional obligation to provide compensation to the landowner, the government is required to establish that the specific nature of the proscribed lawful activity makes its prohibition indispensable to the prevention of unlawful activity. See Keshbro, Inc. v. City of Miami, 801 So. 2d 864, 876 (Fla. 2001) (concluding that lawful and unlawful activities were "inexplicably intertwined" where, "[i]n order to preclude the[] proscribed activities, it was necessary to bar access to the base of operations, which, the Board concluded, could only be done by completely closing the Stardust Motel" (quoting City of Miami v. Keshbro, Inc., 717 So. 2d 601, 604 (Fla. 3d DCA 1998))).

The evidence in this case established that police were at least four times more likely to be called to the landowner's premises than other nearby convenience stores. And on at least one occasion, a drug transaction seems to have occurred under the proverbial nose of a store employee. However, in order to avoid compensating the property owner, the taking of private property "to abate public nuisances must be specifically tailored to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise." See Keshbro, 801 So. 2d at 876 (citing Brower v. Hubbard, 643 So. 2d 28, 30 (Fla. 4th DCA 1994) ("Injunctions must be specifically

tailored to each case; they should not infringe upon conduct that does not produce the harm sought to be avoided" (emphasis added))). Unlike the motel in Keshbro, which was described by the court as, "in reality, not a motel, but rather a brothel and drug house which the owners . . . failed to stop operating on their property," the City in this case did not establish that "the drug activity had become an inseparable part of the operation of the" landowner's convenience store. See Keshbro, 801 So. 2d at 876–77. While the evidence showed that drug dealing was ubiquitous at the location, that is not equivalent to a finding that the criminal activity is "part and parcel of the operation" of the property owner's legitimate business. See id. at 876 (emphasizing that "the drug and prostitution activity had become part and parcel of the operation" of the motel).

Society relies on law enforcement personnel to perform the difficult and dangerous function of interdicting illegal activity. And officials have many tools at their disposal with which to achieve the prevention and punishment of illicit drug sales, one of which is the proscription of all beneficial, legitimate use of private property. Cf. id. at 871–74 (explaining that temporary "deprivation of all economically beneficial or productive" use can constitute a compensable taking). Government may on occasion decide that resort to such an extreme measure is the most beneficial course of action. See City of St. Petersburg v. Bowen, 675 So. 2d 626, 629 (Fla. 2d DCA 1996) (noting that complete closure of a business was "one of the most invasive methods of abating the purported nuisance that was available"). However, if government seeks to be relieved of its constitutional obligation to compensate individuals for the taking of their property, it must establish that such a measure is not only prudent but necessary—that the business operation being forcibly shuttered is so "inextricably intertwined" with the

criminal activity that they are "inseparable," such that accomplishment of the law enforcement objectives cannot be achieved without a complete closure. See Keshbro, 801 So. 2d at 876–77. While the evidence painted a dire picture of the goings on at the premises, neither the evidence nor the City's explanation of its predicament depicted an inability to interdict drug transactions without taking the property of a businesswoman who provided unrebutted testimony that she was not involved in or complicit with the criminal acts perpetrated by others in and around her business.

"Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . 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." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992). In other words, landowners are not entitled to compensation where the elimination of "the land's only economically productive use . . . does not proscribe a productive use that was previously permissible under relevant property and nuisance principles." Id. at 1029–30. However, the sale of sundry items from a convenience store was certainly part of the landowner's title as a previously permissible use—and its proscription even under these facts cannot be characterized as the elimination of a likely antecedent to a public nuisance in the way that would, for example, denial of a permit for "a landfilling operation that would have the effect of flooding others' land" or the forced removal of improvements from a "nuclear generating plant" situated "astride an earthquake fault." See id. at 1029–30 (citing these as examples of property uses "for what are now expressly prohibited purposes" that were "always unlawful, and (subject to other constitutional limitations) [for which] it was open

to the State at any point to make the implication of those background principles of nuisance and property law explicit").

The store had been habitually utilized by drug dealers as a location to connect with customers and occasionally as a redoubt into which to disappear when the presence of law enforcement might otherwise lead to the detection of their illicit business dealings. Nonetheless, the sale of twinkies and the sale of narcotics in and around the same structure remains incidental, not causal—the former being among those economically productive uses not understood to be a potential precipitant of a societal ill subject at any time to the state's "power to abate nuisances that affect the public generally." Id. at 1029. As such, to avoid compensating the landowner in this case, the City was required to establish that its year-long prohibition of convenience store activities accorded with the nuisance-mitigation authority the Florida Supreme Court described in Keshbro. In that case, the Court included among noncompensable takings the proscription of use interests that would normally be unrecognizable as a potential catalyst for a public nuisance—operating a motel or convenience store, for example—under circumstances in which the State has proven that such use has become so intertwined with actual nuisance activity that eradication of the nuisance cannot be achieved without a complete cessation of the landowner's legitimate use of her property. Whatever the wisdom of this narrowing of the right of compensation, the government's bar is still appropriately set high, given the constitutional protection at stake. See art. X, § 6(a), Fla. Const. ("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."). Because the evidence

did not eliminate all disputes of fact so as to establish the City had met that bar as a matter of law, I would reverse the trial court's entry of summary judgment in favor of the City.