NUISANCE ABATEMENT

FINAL REPORT

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INTRODUCTION

This report presents findings from the study of four nuisance abatement programs in Miami Beach, Florida; San Diego, California; Portland, Oregon; and Denver, Colorado. While all four of these sites confront similar problems and rely on similar legal and evidentiary bases, there are distinct differences that have policy implications for other jurisdictions considering nuisance abatement programs.

Miami Beach, acting under a Florida statute, has established a Nuisance Abatement Board that has no responsibility other than drug abatement cases. Because its procedures are direct and simple, Miami Beach can act on a drug nuisance expeditiously. San Diego has worked to establish a city task force to bring all city code enforcement powers to bear on difficult properties. All jurisdictions have problems with landowners who are unsure of their rights and responsibilities. Portland has developed a landlord training program that has already reached thousands of property owners. Denver, operating under a Colorado statutory structure that merges nuisance abatement with asset forfeiture principles, has a more sweeping concept of nuisance abatement than the other three jurisdictions in this study.

Nuisance abatement differs from the other forms of drug enforcement in that it focuses on places rather than persons, specifically those places where a large volume of drug transactions take place. In illegal drug transactions, supply meets demand in specific places. The primary objective of nuisance abatement is to end the availability of those places as sites for drug transactions.

Nuisance is an old legal concept pertaining to how use of one's own property affects other people's use of their property. While the history of the law of nuisance, which we will examine in Chapter 1, is very confused and reaches a great many areas of activity of no concern to us here, the basic principles of nuisance in which we are interested have long been established. These are the principles governing use of real property to carry on illegal activities such as gambling, prostitution, sale of illegal liquor, and sale and consumption of illegal drugs.

Nuisance as a legal concept is closely related to the law of zoning. The early zoning cases, going back to the first three decades of this century, frequently rely on older nuisance cases for support of government power to regulate land use for the benefit of the broader community. Thus, nuisance abatement responds to neighborhood concerns in much the same way as zoning enforcement does.

For these reasons, the nuisance abatement programs in this study involved more than a police response. Police departments play a primary role in identifying problems, but several other city code enforcement agencies may get involved in resolving them. A house that has become a nuisance is also likely to be in violation of fire, health, sanitation, and zoning codes. Commercial

properties are also likely to be in violation of their business licenses. When litigation is necessary to gain code compliance, it is civil litigation, ordinarily brought by the city attorney, representing the city, rather than criminal prosecution by the state prosecutor.

Although the sanction can be stringent and costly, nuisance abatement is not the same as forfeiture. Nuisance abatement does not deprive an owner of title to realty, although some personal property can be taken under most nuisance statutes. Nuisance abatement does not pertain to fruits or instrumentalities of crime. It pertains to use of property. The point of code enforcement and civil abatement actions is not to punish property owners but to get them to comply with the law.

Property owners need not have been personally involved in criminal activity. Their obligation is to see that their property is used in accord with law, whether or not they work or reside on it. This may require that they evict tenants who have created nuisances, or provide whatever security is necessary to exclude law violators.

Colorado constitutes an exception to some of these generalizations. As noted earlier, Colorado statutes merge the two concepts of nuisance abatement and asset forfeiture. In a statutory scheme that is at least 75 years old, fruits and instrumentalities of crime, as well as places, can be declared public nuisances. Thus, under Colorado's public nuisance statute, the Denver district attorney proceeds against currency seized from drug couriers at Stapleton International Airport as a Class 1 public nuisance. This different statutory arrangement, while rooted in the same common law nuisance concepts as the other statutes studied here, has led to a different approach to real property nuisances in Denver.

This report is organized as follows. Chapter 1 examines the history of the legal concept of nuisance. Chapter 2 states the issues considered in designing this research project. Chapters 3, 4, 5, and 6 set forth findings from Miami Beach, San Diego, Portland, and Denver. Chapter 7 states our overall conclusions and policy recommendations from the research.

CHAPTER 1

LEGAL FOUNDATIONS OF NUISANCE ABATEMENT

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a "nuisance," and there is nothing more to be said.[1]

Thus begins the discussion of nuisance in a standard legal work, *Prosser on Torts*. Despite these discouraging words, the major elements of the kind of "public nuisance" with which this study is concerned have long been established and the concept has been defined with considerable precision. Nevertheless, a brief review of nuisance as discussed by Prosser is worth our while because of the issues that have been raised in several nuisance cases.

When the concept of nuisance, which simply means annoyance or inconvenience, made its first appearance, it pertained to interference with interests in land. "It became fixed in the law as early as the thirteenth century with the development of the assize of nuisance, which was a criminal writ affording incidental civil relief, designed to cover invasions of the plaintiff's land due to conduct wholly on the land of the defendant."[2] That was replaced in time by a common law action for nuisance, the forerunner of contemporary law of private nuisance.

A parallel development was that infringement on the rights of the crown, or of the general public, was a crime. The earliest cases deal with purprestures, that is, encroachments on the public highway or on the royal estate. The resemblance between interference with private land and interference with crown or public land was sufficient to call the latter a "public nuisance." The concept of public nuisance expanded over time to include a wide variety of things, many of them quite unlike the others: obstruction of highways, piers or wharves in navigable waters, lotteries, unlicensed stage plays, smoke from lime pits, smoke from trains, diversion of water from a mill.[3]

Throughout these developments, private nuisance remained an interference with land, public nuisance a much broader group of wrongs, indeed a catch-all of criminal offenses. But

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1 William L. Prosser, *The Law of Torts* (St. Paul, West Publishing Co., 4th Ed.), p. 571.

2 *Ibid.*, p. 572.

3 *Ibid.*

several principles have developed that are applicable to the situations with which this study is concerned.

Nuisance pertains to the use of property rather than to personal conduct. Every person has a right to reasonable use of his own property, but not to interfere with the reasonable use of someone else's property. The maxim *sic utero tuo ut alienum non laedas*, "use your own so that you do no harm to another," is frequently invoked in private nuisance cases. This focus on the use of one's own property has several implications for nuisance abatement cases.

The owner and the owner's tenants remain responsible for the property whether or not they have committed any specific criminal acts or participated in offensive conduct. Therefore, legal action can be directed at the owner, the tenant, or both to compel lawful use of the property.

The facts of most nuisance cases suggest continuing abuses rather than isolated incidents. In that respect, proof of nuisance differs from proof of most other crimes, in which specific criminal incidents must ordinarily be proved.[4] Reputation, which by definition contains a large measure of hearsay, is admissible under many nuisance statutes. In the older statutes, the terms "common fame" and "ill fame" appear. Such evidence would not be admissible to prove the commission of ordinary crimes.

The law still distinguishes public and private nuisances. Public nuisances, usually defined by statute or ordinance, offend public order or decency, or encroach on public rights. A bawdy house would offend public order. An illegal wharf can infringe the public's right to use of a navigable stream.

A private nuisance would be a use of property that annoys immediate neighbors. Such a use need not be illegal, but only inappropriate to the surroundings. Raising pigs on a farm is appropriate, but raising pigs in an urban residential neighborhood is not.

Because of the way in which nuisance developed as a legal concept, and because of the continuing vitality of the concepts of both public and private nuisance, both public officials and private citizens can initiate legal proceedings against nuisances. The state nuisance statutes and municipal ordinances examined in this study all contain provisions for suits by private citizens. Ordinarily, a private citizen would have to demonstrate some harm to himself or his own property interests, as distinguished from the public interest, to succeed in a private nuisance suit.

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4 There are other fields of law in which continuing behavior is proscribed. Antitrust violations are one example, civil rights violations another. The concepts of RICO and continuing criminal enterprise illustrate recent developments in criminal prosecutions reaching beyond proof of discreet criminal acts to a broader pattern of criminal behavior.

In three of the four jurisdictions in this study, the public official who brings nuisance abatement actions is the city attorney, the official usually in charge of a city's civil litigation.[5] In Denver, the actions are brought by the district attorney, that is, the criminal prosecutor. But they are civil actions. There is nothing in the Colorado statutory scheme to preclude their being brought by city attorneys.

We speak throughout this study of "nuisance abatement." "Abatement" is an open-ended term meaning whatever is required to bring the problem to an end. In the cases reviewed in this study, it has included razing the buildings on a site, boarding up houses, closing commercial establishments such as hotels and restaurants, seizing and selling personal property, imposing specific conditions for continued use and operation of a property, barring named individuals from a property. In Colorado, the public nuisance statute authorizes seizure of title to realty.

This range of options stems from the origin of nuisance abatement in English courts of equity, which historically have had broad power to shape remedies to the particular problems before them. A few words about equity are in order because of arguments that have been raised in nuisance cases.

Equity originated in the Court of the King's Chancellor to provide relief where none was available from the King's common law courts. Equity, or chancery, the court of the king's conscience, issues decrees or orders, but, unlike courts of law, equity has no jury trials and does not award damages. The most powerful of equity's decrees is the injunction, an order to a person not to do particular acts.

Historically, actions in equity have always been considered civil rather than criminal. Indeed, there is a principle that equity cannot enjoin a criminal act.

The distinction between courts of law and courts of equity has been abolished in the United States, but the principles of equity continue. They are simply applied by the same courts that apply common law legal principles.

CONSTITUTIONAL ISSUES

The power of the state to control nuisances is rooted in its police power, which is the basic power to regulate private activity for public health, safety, and welfare.

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5 The city attorney in San Diego does share criminal jurisdiction with the county district attorney. The city attorney prosecutes all misdemeanors within the city limits. The drug abatement component is based in the city attorney's criminal division.

> Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled 'Police Laws or Regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally.[6]

The sweep of the police power is illustrated by the following catalogue of objects and activities subject to regulation under the police power:

> The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill-fame; and the prohibition of gambling houses and places where intoxicating liquors are sold.[7]

There is a historical connection in the United States between the control of nuisance and the development of comprehensive zoning. The police power of the state is the basic sovereign power being exercised in both nuisance and zoning regulation. Early zoning cases frequently cite older nuisance cases as authority.

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6 1 Dillon Mun. Corp. 4th ed sec. 141, quoted in *L'Hote* v. *New Orleans*, 177 U.S. 587, 599 (1900).

7 *Lawton* v. *Steele*, 152 U.S. 133, 136 (1894)

Euclid v. *Ambler Realty Co.*,[8] the best known and most important of these early zoning cases, upholding a Cleveland suburb's comprehensive zoning ordinance, explicitly referred to nuisance principles:

> The ordinance now under review and all similar laws and regulations must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim "sic utere tuo ut alienum non laedas," which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or the thing considered apart, but by considering it in connection with the circumstances and the location. [Citation.] A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. . . .[9]

The police power is an inherent power of sovereignty, exercisable at state and local levels, but there are constitutional limitations on its exercise. Under the American federal system, the states are plenary sovereigns, with all sovereign powers that have not been removed or limited, and the United States is a limited sovereign, with only those powers that have been explicitly granted to it. Both the state and federal constitutions limit state power in several ways, state constitutions directly, and the United States Constitution through the due process and equal protection clauses of the Fourteenth Amendment. Through the years, every imaginable constitutional objection has been raised in nuisance cases, raised and rejected.

Many of the basic arguments were advanced in *Mugler* v. *Kansas*,[10] which upheld prohibition in Kansas. Because *Mugler* disposed of several basic constitutional objections, it merits close examination.

In 1880, Kansas had adopted a constitutional amendment forever prohibiting the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes. An implementing statute made sale of liquor a misdemeanor, declared every place

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8 272 U.S. 365 (1926)

9 272 U.S. at 387-388.

10 123 U.S. 623 (1887).

where liquor was sold in violation of the statute to be "a common nuisance," and established procedures by which such places could be abated as public nuisances.

Two cases were combined for decision. In the first, Mugler was prosecuted for manufacture and sale of liquor without the license or permit required by statute. He was found guilty and fined $100 for each of two offenses. In a companion case, Atchison County sued Ziebold and Hagelin to abate a brewery as a common nuisance and to enjoin its use for production and sale of liquor. After removal to federal court, the United States Circuit Court dismissed the case.

In the two cases, the defendants had built and used their buildings as breweries several years before adoption of prohibition. They continued that use after enactment of prohibition without required permits. The buildings would have had little value if not used for manufacturing beer.

The defendants challenged the Kansas prohibition amendment and statute as violating the Fourteenth Amendment, which reads in part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first issue was whether Kansas prohibition abridged any right, privilege, or immunity guaranteed by the Constitution. The Court held that it did not, relying on cases decided both before and after the adoption of the Fourteenth Amendment.

In *Bartemeyer* v. *Iowa*,[11] the Court had said that such regulation had been left to the states, and that there was no right to sell liquor secured by the Fourteenth Amendment, no such right growing out of citizenship of the United States. *Beer Co.* v. *Massachusetts*[12] and *Foster* v. *Kansas*[13] also had upheld prohibition as a legitimate exercise of the police power within a state.

In the *License Cases*,[14] the Court had held that Massachusetts, Rhode Island, and New Hampshire liquor control statutes were not repugnant to the Constitution. The question had been whether there was a conflict between the exercise by Congress of the power to regulate commerce and the exercise by the state of its police powers.

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11 18 Wall. 129.

12 97 U.S. 25.

13 112 U.S. 201.

14 5 How. 504.

The defendants in *Mugler* argued that the state did not have the power to control the growing or manufacture for one's own use, or for export or storage, of food or drink "not endangering or affecting the safety of others." The Court replied:

> But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.[15]

With these principles in mind, the Court could find no basis for saying that it was not within the power to the State of Kansas to adopt measures to protect the people from the admitted dangers from excessive use of liquor.

Did the Fourteenth Amendment take from the states the police powers that were reserved at the time the original Constitution was adopted? Not at all.[16] But the state is subject to the limitations of the Constitution in exercising its police powers. The defendants contended that, because their breweries existed before Prohibition and were suited only for the manufacture of beer, Kansas had taken their property for public use without just compensation and without due process of law.

> This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community.[17]
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> . . . . .
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> The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under

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15 123 U.S. at 660-661.

16 *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1885).

17 123 U.S. at 664.

> the implied obligation that the owner's user of it shall not be injurious to the public. [Citations.][18]

The Court discussed other cases upholding the police power: *Patterson* v. *Kentucky*,[19] in which Kentucky had imposed a penalty for selling liquids that would ignite below 130° Fahrenheit; *Fertilizing Co.* v. *Hyde Park*,[20] prohibiting transport of offal through the village, from which it quoted:

> We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.[21]

The court distinguished *Pumpelly* v. *Green Bay Co.*,[22] a flooding case. *Pumpelly* involved the power of eminent domain, which is constrained by the obligation to pay just compensation. *Mugler* involved the police power.

> As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, with due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the Sate must compensate

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18 123 U.S. at 665.

19 97 U.S. 501.

20 97 U.S. at 659, 667.

21 97 U.S. at 667, quoted at 123 U.S. 667.

22 13 Wall. 166.

> such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its own use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.[23]

It is true that, when defendants bought or built their breweries, such uses were not prohibited. But the state did not guarantee that its legislation on the subject would remain unchanged.

The Court then turned to Section 13 of the Act of 1881, which declared places where intoxicating liquors were manufactured or sold to be common nuisances. Upon the judgment of a court that such a place was a nuisance, the sheriff or marshal was to be directed to shut up and abate such place by taking possession of and destroying all liquor, together with bottles, glasses, bars, etc. The owner or keeper was, upon conviction, to be adjudged guilty of maintaining a common nuisance, and fined from $100 to $500, and jailed for 30 to 90 days. The attorney general, county attorney, or any citizen of the county could maintain an action to abate or enjoin the nuisance.

Ziebold and Hagelin argued that this scheme was an attempt to deprive persons of property and liberty without due process of law, especially when taken in connection with the provisions of Section 14 that it was not necessary in the first place for the State to prove that the party charged did not have a permit to sell liquors for the excepted purposes. The Court found nothing wrong with these regulations. "One is a proceeding against the property used for forbidden purposes, while the other is for punishment of the offender."[24]

Defendants also argued that Section 13 was a legislative declaration that a place was a nuisance, compelling the judiciary to accept the legislative determination. The Court rejected the argument:

> The statute is prospective in its operation, that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the State to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the

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23 123 U.S. at 668-669.

24 123 U.S. at 671.

> must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used, as to make it a common nuisance.[25]

The question of legislative definition of public nuisance is both a due process and a separation of powers question. Seventeen years before *Mugler*, the Court had decided *Yates* v. *Milwaukee*,[26] in which the Milwaukee city council had simply declared a wharf a public nuisance and directed that it be abated.

> But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could any such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself.[27]

The essential difference between *Yates* and *Mugler* is that in the Kansas legislation reviewed in *Mugler*, the judiciary was interposed between the legislature and the defendant. While the legislature could define "public nuisance," due process required a judicial determination of whether a particular structure of activity fit with the legislative definition.

The provision that the court is to grant an injunction at the beginning of the proceeding does not mean that the court is to grant an injunction simply because one is asked for, but only upon the showing of some evidence that a nuisance indeed exists.

> Here the fact to be ascertained was, not whether a place, kept and maintained for purposes forbidden by the statute, was, *per se*, a nuisance—that fact being conclusively determined by the statute itself—but whether the place in question was so kept and maintained.[28]

Another aspect of the due process argument in *Mugler* was that use of courts of equity for these proceedings was inconsistent with due process of law. The Court flatly rejected the argument. The Court quoted Justice Story to the effect that "In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth."[29]

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25 123 U.S. at 672.

26 77 U.S. (10 Wall.) 497 (1870)

27 77 U.S. at 505.

28 123 U.S. at 673-674.

29 2 Story's Eq. §§ 921, 922.

> The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. [Citations.][30]

To the objection that the Kansas statute makes no provision for jury trial, "it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance."[31]

To summarize *Mugler* briefly, it provides basic guidance, good to this day, on the following issues:

- Definition and proscription of public nuisances is a legitimate exercise of the police power of the state.
- The police power reserved to the states was not abrogated by adoption of the Fourteenth Amendment.
- Exercise of the police power by a state to regulate local matters does not violate the commerce clause of the Constitution.
- It is the duty of the legislature, exercising the police power, to determine what uses of property are to be regulated to protect public health, safety, and morals.
- Regulation of use of private property is an exercise of the police power, not of the eminent domain power, and is therefore not a taking of private property.[32]
- Definition of "public nuisance" by the legislature is not a deprivation of due process of law when there is provision for judicial determination of whether a particular property falls within the legislative definition.
- Use of the courts of equity in nuisance cases is not a deprivation of due process of law.
- Because nuisance actions are brought in equity, there is no right to jury trial.

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30 123 U.S. at 673.

31 123 U.S. at 673.

32 Within the last decade, the Supreme Court has concluded that zoning restrictions can reach a point where they constitute a taking of property for public use, but none of these cases involved anything resembling public nuisances of the type considered in this study. See *First Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987), and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987).

A Florida case decided almost 40 years after *Mugler* reworked many of the same constitutional issues, for the most part relying on *Mugler*, and added several other issues. In *Pompano Horse Club* v. *State*,[33] John M. Bryan, a citizen of Broward County, instituted a suit on behalf of the state against Pompano Horse Club, seeking abatement of a nuisance. The complaint alleged that the club ran a race track with parimutuel betting. The suit was directed only at the betting, not the racing. The trial court issued a temporary injunction. The club's appeal was a comprehensive attack on the Florida nuisance statutes.

The first major claim was the statute conferred no right on a private citizen to file suit. However, the plain wording of the statute conferred such a right, and the court held that the legislature could authorize such a suit if it so chose.

> Within organic limitations, it is competent for the state by legislative action to designate the persons, or class of persons, who may maintain suits in the name of the state to restrain and abate public nuisances, and a broad discretion as to the means to be used should be accorded the law making power. [Citations.] When authority to bring the suit is properly conferred upon a private citizen, the suit is in effect one instituted in behalf of the public, and to which the public is the real party complainant, to the same extent as though the suit was brought by the Attorney General or public prosecutor.[34]

Such suits typically have a formal name such as "*State of Florida at the relation (or ex rel.) John M. Bryan* v. *Pompano Horse Club*," the full original name of the *Pompano Horse Club* case. "At the relation of" or "ex rel." is a way of saying that the relator brought the suit on behalf of the state.

In *Pompano Horse Club*, the club next raised a series of constitutional claims. The first was that the statute deprived it of the right to jury trial. Following and quoting *Mugler*, the Florida Supreme Court held that jury trials are not required in equity.

The court next rejected due process, equal protection, and taking arguments, again following *Mugler*. On the taking issue, the Florida Supreme Court simply adopted the language of *Mugler*.

The Florida nuisance statute provided the basic elements of due process. After quoting the statute, the court continued:

> Thus we see that the statute authorizes the court to proceed only upon reasonable notice, and leaves the court at liberty to give full effect to the principle that an injunction will not be granted to restrain a nuisance save upon clear and satisfactory evidence that one exists. The

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33 93 Fla. 415, 111 So. 801, 52 A.L.R. 51 (1927)

34 111 So. at 805.

> question for determination is, not whether a place kept and maintained for purposes forbidden by statute constitutes a nuisance—that fact having been lawfully determined by the Legislature—but whether the place in question was so kept and maintained.[35]

This short discussion is echoed in many places. The basic elements of due process of law are notice and the right to be heard, which all the statutes and ordinances considered in this study provide to defendants.

Nor could it be said that the Florida nuisance statutes deprived the defendants of equal protection. They were "based upon reasonable legislative classifications."[36] Equal protection arguments under the Fourteenth Amendment typically rest on legislative distinctions between the complaining party and other parties, with the essential question being the reasonableness of legislative distinctions or classifications. In equal protection cases in recent years, suspect classifications have been those based on race, gender, age, and the like. But equal protection arguments have not been persuasive in nuisance cases.

The Pompano Horse Club also argued that it was deprived of equal protection because the nuisance statutes were enforced in some counties but not in others.

> The fact that the injunctive provisions of the statute may be invoked in one county, and not in another, neither impairs nor destroys the uniformity of the statute, in a constitutional sense, so as to affect its validity under the equal protection clause.[37]

Next came a double jeopardy argument, the theory being that if the injunction is not obeyed, defendants may be punished for contempt and also for the commission of the crime itself, the same criminal act giving rise to both punishments. The argument has been rejected in many contexts:

> But these are not the "same offense." In the former case, he is punished for a violation of the orders of the court, and in the latter for an offense "against the peace and dignity of the state."[38]

The court then followed *Mugler* in holding that the procedure complained of was the proper subject for a court of equity. The right to jury trial secured by the Florida Constitution was the right that existed at the time of its adoption, and no right to jury trial in equity existed at

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35 111 So. at 807.

36 111 So. at 808.

37 111 So. at 808.

38 111 So. at 808.

that time. The federal right to jury trial pertains to criminal trials. A nuisance abatement action is civil, not criminal, and not a trial for a crime.

A general rule of equity is that equity will not enjoin the commission of a crime. The Florida Supreme Court responded by quoting a Kentucky case, "There is a manifest distinction between enjoining an individual from committing a crime and enjoining the owner of property, or its possessor, from allowing his property to injure others."[39] The court then continued:

> Where there is legislation authorizing courts of equity to enjoin acts constituting, and duly declared to be, a public nuisance, which acts at the same time are declared to be criminal, the best-considered cases uphold the jurisdiction of courts of equity to abate such nuisances by injunction. . . .
>
> The contention . . . probably rests upon a disregard of the distinction between a proceeding to abate a nuisance, which looks only to the property, a particular use of which constitutes the nuisance, and a proceeding to punish an offender for the commission of a crime.[40]

We can conclude this review of constitutional issues in nuisance cases by examining a recent Colorado case, *People* v. *Milton*.[41] Milton had been convicted of armed robbery. The car he used in the robbery was declared a class 1 public nuisance under the Colorado nuisance statute and forfeited in a separate civil proceeding. He appealed the forfeiture of his car, raising several constitutional issues.

Milton first contended that he had been subjected to double jeopardy. The Colorado Supreme Court noted that the proscription of multiple prosecutions applies only to criminal or quasi-criminal proceedings. Therefore, it would protect Milton only if the Colorado Public Nuisance Statute is essentially criminal in nature. But it cannot be so characterized.

The United States Supreme Court has established a two-pronged test for deciding whether a statutory forfeiture proceeding is essentially criminal in character: (1) Whether Congress indicated a preference for criminal or civil categorization; and (2) if Congress indicated an intention to treat a forfeiture proceeding as civil, whether the statutory scheme is so punitive either in purpose or effect as to negate congressional intention.[42]

The Colorado Supreme Court held that Colorado's nuisance abatement procedures are essentially civil for several reasons. The statutory language manifests a clear intent that they be

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39 111 So. at 809.

40 111 So. at 809.

41 32 P.2d 1199 (Colo. 1987)

42 *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984)

civil. The declaration of policy is that the nuisance be perpetually abated. The proceedings are to be governed by the code of civil procedure.

Nothing in the procedures is so punitive as to negate the legislative intent that they be civil. "While the forfeiture of the offending property is not without burdensome consequences to the owner of the property, this sanction is primarily directed toward achieving the salutary goal of preventing and terminating the harmful use of the property."[43] The statute imposes no penalty or fine on the owner, and it provides an opportunity for the owner to demonstrate that he was not a party to illegal activity or would suffer undue hardship from forfeiture.

Furthermore, the legislature may properly impose a civil sanction with respect to conduct that may also be punishable as criminal.

Milton next claimed that forfeiture of his car constituted a "forfeiture of estate" in violation of the Colorado Constitution. The parallel federal provision[44] was intended to prohibit certain practices countenanced by British law in the late 1700s, i.e., corruption of blood and forfeiture of all estates and disinheritance of heirs. It does not pertain to forfeitures of the type imposed on Milton.[45]

Milton also claimed he had been denied his constitutional right to speedy trial. That right pertains to the criminal prosecution, not ancillary civil proceedings. Milton's argument was based on the erroneous premise that forfeiture proceedings are criminal. Nuisance abatement in Colorado is a civil proceeding,[46]

To sum up, most basic constitutional arguments against nuisance abatement statutes—due process, equal protection, taking of private property for public use—were made and rejected long ago. *Mugler* v. *Kansas* was decided over a century ago, and it is still good law. Nuisance abatement statutes stand on firm constitutional ground.

NUISANCE ABATEMENT STATUTES

Each of the four states examined in this study has had nuisance abatement statutes for at least 70 years. California's Red Light Abatement Law was passed in 1913.[47] Colorado's Public Nuisance Act dates at least to 1915.[48] Oregon's "Nuisance Statute," since replaced, dated back to

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43 732 P.2d at 1204.

44 U.S. Constitution, Art. III, Sec. 3: "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

45 732 P.2d at 1205-6.

46 732 P.2d at 1206.

47 See *People* v. *Barbiere*, 33 Cal.App. 770, 166 P. 812 (1917).

48 Colorado Laws 1915, p. 360.

1864, when it was adopted from the well known Field Code of New York.[49] The nuisance statute being construed in *Pompano Horse Club* v. *State*,[50] was part of the 1920 Florida Revised Statutes. The nuisance provision itself may actually have been much older and simply recodified in 1920, but we have not researched that question.

Looking at these old nuisance statutes and the cases applying them, with the possible exception of California's Red Light Abatement Law, we have little doubt that they would have been adequate to address the new nuisances presented by drugs in the 1980s and 1990s, including crack houses. They proscribed uses of property for illegal purposes, and they covered such vices as prostitution, illegal liquor sales and consumption, and gambling. Because California's statute specified gambling and prostitution, it probably would not have applied to drugs, but narcotics trafficking is an illegal activity within the ambit of the other state nuisance statutes.

Be that as it may, under political and social pressures created by rising drug use and its blatant manifestations in residential neighborhoods, each of the legislatures of the four states studied has enacted recent provisions targeted at the drug problem.

In 1972, California took its Red Light Abatement Law and reenacted most of it as a Drug Abatement Act. The Red Light Abatement Law in the California Code presently reads as follows:

> Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance. . . .[51]

The Drug Abatement law, added in 1972 and amended in 1986, reads as follows:

> Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in this division, and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.[52]

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49 See *State* v. *Nease*, 46 Or. 433, 80 P. 897 (1905)

50 93 Fla. 415, 111 So. 801, 52 A.L.R. 51 (1927)

51 California Penal Code, § 11225.

52 California Health and Safety Code, § 11570.

The enforcement procedures under the more recent statute are plainly patterned after those of the Red Light Abatement Law.[53]

The Colorado legislature, which had repealed and reenacted its basic Abatement of Public Nuisance Act in 1972,[54] has since frequently amended it to address the changes in narcotics trafficking and narcotics interdiction. For example, the act now specifically provides for dog sniffs of currency, or, in the words of the statute, "an animal trained in the olfactory detection of controlled substances indicated the presence of the odor of a controlled substance on the currency as testified to by an expert witness."[55] In 1984, Colorado added the Contraband Forfeiture Act[56] to augment forfeiture powers in drug cases. As we shall see in Chapter 6, the powers under this act are much the same as the powers prosecutors already possessed, and the choice of which to use turns more on the division of forfeiture proceeds among public agencies than on the impact on an offender.

In 1987, Florida enacted a provision giving municipalities the power to create their own nuisance abatement boards to deal specifically with drug-related public nuisances.[57] We will examine its provisions in Chapter 3.

In San Diego and Denver, the city attorney and the district attorney, respectively, proceed against drug nuisances on the basis of the state statutes to which we have referred. In Miami Beach and Portland, the city attorneys proceed under local ordinances. Miami Beach's ordinance was passed under the 1987 Florida act referred to in the preceding paragraph.

Portland's ordinance, which does not rely on a specific state statutory authorization, almost got caught up in a state dispute over the power of local governments to adopt such ordinances. In three cases in 1990, the Oregon Supreme Court interpreted an Oregon statute to mean that local governments could not impose civil sanctions to enforce requirements or prohibitions also specifically defined as crimes by the state.[58] The Oregon legislature responded to the issue so promptly that it amended the law before the Supreme Court opinions were published.[59] Indeed, the new law is cited in the opinions.

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53 Compare California Health and Safety Code, §§ 11570 through 11587 with California Penal Code, §§ 11225 through 11235.

54 C.R.S. § 16-13-301 through 16-13-317.

55 C.R.S. § 16-13-303 (6)(B)(III).

56 C.R.S. § 16-13-501 through 16-13-511.

57 F.S. § 893.138.

58 *Springfield* v. *$10,000.00 in U.S. Currency*, 309 Or. 272, 786 P.2d 723 (1990); *Linn County* v. *22.16 Acres*, 309 Or. 279, 786 P.2d 726 (1990); *Multnomah Cty.* v. *$5,650 in U.S. Currency*, 309 Or. 285, 786 P.2d 729 (1990).

59 ORS 30.315.

To sum up, even though the four jurisdictions studied in this research are enforcing state statutes and local ordinances of recent vintage, the principles of public nuisance law being applied are long and well established, and the programs studied are not vulnerable to legal challenge.

CHAPTER 2

RESEARCH ISSUES AND DESIGN

CHOICE OF SITES FOR STUDY

The four sites for this study were chosen because they had been conducting nuisance abatement programs for two to three years and therefore had a substantial amount of experience to be reviewed. However, none of these sites conducted nuisance abatement as a research project. Data available for ILJ's study had been collected for management, not research purposes. Before-and-after data and control-group data were not collected, and it is impossible to be precise about the overall impact of nuisance abatement as a tool in confronting the street narcotics problem.

The greatest obstacle to evaluation of the overall effectiveness of nuisance abatement is the absence of a strategic concept. Of the four sites studied, San Diego and Portland articulated broader strategic concepts. San Diego's original program design spoke of neighborhood improvement, based on the Wilson-Kelling "broken window" idea,[1] but that general concept has not been developed into a geographical strategy to improve specific places. The City of Portland has undertaken a neighborhood revitalization program, but its nuisance abatement program has not yet been fully integrated into it.

Ideally, evaluation of effectiveness would examine the indicators of public order within a neighborhood:

- People walking peacefully throughout the neighborhood
- Children playing outdoors
- Neighborhood businesses operating
- Neighborhood businesses and residences kept clean
- Streets clean and free of debris
- Low number of criminal incidents
- Low frequency of police calls for service
- Low number of traffic accidents

Nevertheless, even in the absence of a strategic goal, with clearly established measures of a law abiding and peaceful community, it is still possible to assess the impact of nuisance enforcement in individual cases. In the cases examined by ILJ in this study, the signs of disorder before nuisance abatement were plentiful:

- Sales of crack or other drugs from a property
- Heavy automobile and pedestrian traffic to a property at all times of the day and night
- Congregating of apparent drug abusers at and near the property

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1 James Q. Wilson and George L. Kelling, "Broken Windows," *Atlantic Monthly*, March 1982, p. 29; "Making Neighborhoods Safe," *Atlantic Monthly*, February 1989, p. 46.

- Frequent calls for police service on serious matters
- Frequent arrests at the problem property
- Property characterized by bad maintenance
- Property littered with debris
- Property offensive to law abiding neighbors
- Persons frequenting the property menacing law abiding neighbors

Recidivism, always a major consideration in assessing effectiveness of sanctions against persons, turns out to be a concept applicable to properties abated as nuisances. Three different forms of recidivism appeared in the cases: (1) Owners or occupants resumed drug trafficking after an abatement order had expired, sometimes even while the order was in effect. (2) New owners or occupants took up the activities that had been abated. The most striking example of this occurred in San Diego, where a house abated as a nuisance was razed, but other people returned to the vacant lot, creating a new nuisance. (3) The persons who had created the problem moved to a new site, which, of course, is simply a form of personal recidivism.

CHOICE OF CASES FOR STUDY

The four cities studied were completely cooperative in providing access to files and data. In looking at available data in the four sites, we decided to examine a three-year period in Miami Beach, from 1988 through 1990, which were the first three years of the existence of the Nuisance Abatement Board. We were able to review virtually all the files in those cases, see all the properties that had been abated, and observe Nuisance Abatement Board hearings in three cases.

In the other three cities, we reviewed the data primarily from 1989 and 1990. We reviewed 50 case files in Denver, another 15 in San Diego, and about 20 in Portland. The descriptions in these files, which usually included police reports and often affidavits for search warrants, were quite adequate for the purposes of this research. We were also able to view many of the abated properties in San Diego and Portland.

The files and data reviewed depended on where the research was actually conducted. In Miami Beach and Portland, ILJ worked primarily in the police departments. In each of those cities, however, we were also working directly with the assistant city attorney responsible for nuisance abatement cases. In San Diego, our primary contact was with the assistant city attorney, and in Denver with the city prosecutor, who handled nuisance cases. Their data pertained to the cases referred to them, and a broader picture of police activity was not readily available.

In the following chapters, after describing the basic approaches to nuisance in the four jurisdictions, we relate the facts of selected cases. They have been chosen to illustrate the variety of problems addressed as nuisances, some of the investigative data supporting these cases, and the types of remedies employed (Appendix A contains a more complete set of case descriptions). It is in the remedies that the genius of equity can be seen. Where owners are clearly culpable, the

remedy can be harsh and stringent, even to the extent of forfeiture in Colorado. But when the owners are only partially to blame, or where circumstances are beyond their control, equity can develop solutions that assist as well as constrain them.

DECIDING TO ABATE NUISANCES

In the absence of an overall strategic concept, how do the jurisdictions studied decide to initiate a nuisance abatement case? In each instance, the initial target selection is done by the police department, almost always by the narcotics unit. In Miami Beach, the initiation and prosecution of nuisance cases begins and stays in the police department. The narcotics unit prepares a case for review by the police legal advisor, an assistant city attorney who works full-time for and in the police department. When the attorney decides that the case is ready for prosecution, it is filed before the Nuisance Abatement Board.

In San Diego and Portland, the initial work, including the sending of warning letters to the owners of problem properties, is done within the police department. The city attorney's office is advised of the department's work but does not get involved until the department refers the case to the city attorney. At that point, the city attorney will contact the landowner in an attempt to negotiate a settlement. The process is more formal in San Diego than in Portland. If necessary, the city attorney prosecutes the case in court.

In Denver, the district attorney waits for the police to finish their case, then takes over to forfeit property or abate nuisances under the public nuisance statute.

TYPES OF PROPERTIES ABATED

Both commercial and private properties can be targets of nuisance abatement. Commercial properties in turn can be divided into business and residential. The businesses include bars, restaurants, grocery stores, convenience stores, laundromats—in short, any kind of business where people tend to congregate. Commercial residential properties include hotels, motels, rooming houses, apartment buildings, apartment developments, trailer parks, and the like. Private residential properties include single-family houses, trailers, individual apartments.

From an enforcement perspective, the type of owner is probably more important than the type of property. If the owner of a property, be it commercial or residential, is on site and involved in the drug activity that leads to abatement, then prosecutors and courts have few qualms about invoking the most severe sanctions available.

Slumlords are often operating at both the legal and financial margin. Their tolerance of illegal activities on their property is but a part of their general disregard for community values and codes. They also receive little sympathy from enforcement officials.

But other types of owners present different and more difficult issues. The most problematic owners are those who live in a property being used for drug activity but are unable to control it. The most pathetic examples are elderly people whose houses have been taken over by children or grandchildren who turn the house into a crack house. The prosecution wants to deal with the nuisance without inflicting unnecessary harm on the elderly owners. Solutions are not easy. One is to frame an order that bars certain named individuals from the property, making them liable for arrest as trespassers simply for being there. But that solution does not clean up the property or alter its reputation.

A second problematic owner is the owner who does not really understand how to manage a property and does not have the resources to restore and maintain it if bad tenants trash it. The owner remains responsible, but is not really able to discharge his or her responsibility.

Another type of owner has fallen heir to property about which he or she knows little and in which he or she has little interest. This type of owner may not have the information, experience, or resources to cope with problems created by tenants.

Banks or other holders of security interests present still another problem. The asset against which they made a loan may be depreciating, but they may not have an immediate right to possession. Nor are they necessarily interested in or capable of directly managing property. But their financial stake in the property, plus the availability of other resources, will usually stir them to take the action necessary to protect their financial interests.

COMPARISON OF DIFFERENT STATE AND LOCAL APPROACHES

The original statutory or common law authority to abate nuisances was probably adequate in each state studied by ILJ. As we have seen, each state had nuisance abatement statutes going back either to the last century or the early part of this century. The basic legal principles had been long ago established by case law. However, in each state studied, recent statutes were enacted to respond to the drug crisis.

Florida authorized establishment of nuisance abatement boards by municipalities. Its new statute defines nuisance in terms of two drug offenses, ignoring any concept of continuing illegality at a site. From the perspective of code enforcement officials, the availability of a nuisance abatement board enables a municipality to prosecute nuisances quickly without waiting to be heard by congested courts, where heavy criminal dockets make it difficult to receive prompt hearings on minor civil matters.

In Oregon, some form of nuisance statute has been on the books since 1864. Portland adopted its Specified Crime Property Ordinance in 1987, providing a carefully designed procedure to take advantage of traditional nuisance concepts.

California has simply adapted its 1913 Red Light Abatement statute to controlled substance offenses. While the controlled substance statute is a separate section of the California Health and Safety Code, its wording and procedures are essentially the same as the Red Light Abatement Act.

Colorado has added a contraband substance statute, but the prosecutor in Denver continues to use the much older public nuisance statute, which has also been amended in recent years to make its coverage of controlled substance offenses unarguable. The district attorney's preference for the public nuisance statute turns on the formula for distribution of forfeited assets.

The different statutory approaches have produced marked differences in the ways the four jurisdictions handle nuisance abatement. The process is simplest and most straightforward in Miami Beach, where the police department legal advisor goes directly to the Nuisance Abatement Board with the department's cases. The board has no backlog and acts immediately. In Portland and San Diego, the police department takes several preliminary steps, including the issuance of warnings, before referring a case to the city attorney. The number of referrals is small, compared to the number of complaints being received in the police departments, and the number of cases litigated is smaller still.

In Denver, the prosecutor uses the Colorado Public Nuisance Act for asset forfeiture. Nuisance abatement, as we see it in the other three jurisdictions, is a secondary consideration.

CHAPTER 3

MIAMI BEACH, FLORIDA

FLORIDA LAW

The Miami Beach Nuisance Abatement Board was established by city ordinance pursuant to an authorization given to municipalities by the Florida State Legislature. In 1987, as part of the Crime Prevention and Control Act, the legislature enacted F.S. § 893.138, entitled "Local administrative action to abate drug-related public nuisances."

The first subsection of § 893.138 provides that "Any place or premises which have been used on more than two occasions as the site of the unlawful sale or delivery of controlled substances may be declared to be a public nuisance. . . ." Three points should be noted about this language.

First, the section pertains only to controlled substance offenses and not to any of the many other crimes or offensive uses of property that fall within the common law concept of public nuisance. A later provision of the section explicitly states that the section does not restrict the right of any person to proceed under F.S. § 60.05 against any public nuisance. That section is a general nuisance abatement statute.

Second, § 893.138 requires only two occasions of drug trafficking as a basis for declaring a site a public nuisance. It says nothing about how close in time to each other these occasions must be, nor how flagrant or notorious they must be. General nuisance concepts usually include some elements of continuous behavior that is at least sufficiently flagrant to come to the attention of neighbors or the general public.

Third, the section specifies "unlawful sale or delivery of controlled substances," apparently excluding mere use of controlled substances. In enforcing its ordinance, Miami Beach has not sought to proceed on the basis of use alone, which is a prudent course to follow. Given the penal nature of the statute and ordinance, it will undoubtedly be strictly construed against the city, and its failure to include use would in all likelihood be construed as a deliberate legislative decision to limit the statute to sale and delivery.

The second subsection of F.S. § 893.138 authorizes any county or municipality to "create an administrative board to hear complaints regarding the nuisances described in subsection (1)." The complaints referred to may be brought by "any employee, officer, or resident" of the municipality on at least three days written notice to the owner of the premises at his last known address. At a hearing on a complaint, "the board may consider any evidence, including evidence

of general reputation of the place or premises," and the owner "shall have an opportunity to present evidence in his defense."

It is interesting to note that the statute allows the board to consider "any evidence," including evidence as to reputation, even though nuisance as defined in subsection (1) rests on two occasions of unlawful sale or delivery of controlled substances. However, considering the broad enforcement powers given the board, it is appropriate that it consider more than the requisite two sales in shaping its remedies.

If the board declares that a site is a public nuisance as defined in subsection (1), it may enter an order "immediately prohibiting":

> (a) The maintaining of the nuisance;
>
> (b) The operating or maintaining of the place or premises; or
>
> (c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.

Under subsection (4) of F.S. § 893.138, an order entered by the board shall expire at the end of one year or at such earlier time as the board states in its order. If it so chooses, the board may bring a complaint under F.S. § 60.05 seeking a permanent injunction against any nuisance as described in subsection (1).

MIAMI BEACH ORDINANCE

Miami Beach enacted Ordinance No. 87-2578 on September 16, 1987, establishing the Miami Beach Nuisance Abatement Board. The ordinance, which appears in the City Code as Chapter 17D, "Abatement of Nuisances," went into effect on October 1, 1987, and the Nuisance Abatement Board held its first hearing in March 1988.

As stated in the ordinance's title, the purpose of the Nuisance Abatement Board is:

> . . . to hear complaints and evidence regarding drug-related nuisances on premises located in Miami Beach, to declare said premises public nuisances, to enter orders prohibiting the maintenance of said nuisances, and the operation of said premises and to bring suit for permanent injunction against said nuisances. . . .

The ordinance also authorizes the city attorney or any citizen of the city to sue to enjoin any nuisance as defined in F.S. § 823.05, the persons maintaining it, and the owner or agent of the building or ground on which the nuisance exists. It is interesting to note that F.S. § 823.05 is the general nuisance provision, not the drug-related nuisance provision under which the board was

established. Therefore, if the city attorney concludes that the Nuisance Abatement Board's powers under F.S. § 893.138 are not sufficient to address a particular problem, he or she can still proceed under the general nuisance statute.

The ordinance provides that the board shall consist of five members serving staggered two-year terms. Members are to be persons who reside or maintain a business establishment in Miami Beach. The board is to include one representative from each of three specified areas of Miami Beach. The chairman is to be a licensed attorney with trial experience. In the hearings observed by ILJ, it was evident that the members then serving on the board had substantial experience in real estate sales and management. One member was a physician with public health experience.

NUISANCE ABATEMENT BOARD'S HEARINGS

From its establishment in 1987 through the end of 1990, the Miami Beach Nuisance Abatement Board conducted hearings on 23 different properties. The first case was brought before the board in March 1988.

The work of the board has always been closely coordinated with overall city code enforcement. Thus, while the board's jurisdiction is based on drug sales, the board insists on compliance with all city codes as part of its abatement orders. The code enforcement office provides administrative support to the Nuisance Abatement Board, with the secretary of the director of code enforcement serving as the secretary to the Nuisance Abatement Board.

All the Miami Beach nuisance abatement actions during the period studied were against commercial properties. No commercial enterprise can operate without an occupancy permit issued by code enforcement, which refuses to issue such a permit unless all the conditions imposed by the Nuisance Abatement Board have been satisfied.

The targets of abatement in Miami Beach have included a wide variety of enterprises:

- Restaurants
- Bars
- Clubs
- Hotels
- Apartment buildings
- Rooming houses
- Grocery stores
- Laundromats
- Check cashing services

In cases involving establishments with liquor licenses, the board has sometimes deferred action because of actions being taken by state liquor control officials.

MIAMI BEACH ABATEMENT PROCESS

Cases in Miami Beach begin with investigations by the narcotics unit of the Miami Beach police department. To determine whether drug sales are in fact taking place at a suspected site, the narcotics unit conducts undercover buys and controlled buys by confidential informants. It also conducts surveillance to show traffic in and out of the site.

Although the Florida statute and Miami Beach ordinance require only two drug transactions for a site to be declared a nuisance, police department policy has been to document at least five drug sales at the site. The purpose is to show a continuing series or pattern of sales to rebut any claims of incidental actions. Such documentation also allays concerns of the members of the board, who are reluctant to close down a person's business and livelihood.

The narcotics unit ascertains the property owner's name and address from city real estate records. It also checks with the occupational license office to determine what and to whom licenses have been issued.

The police department legal advisor, who is an assistant city attorney, oversees these initial steps. The legal advisor is assigned full-time to the police department and works in police headquarters, greatly facilitating communication and cooperation with the narcotics unit's detectives.

The chief of police sends a letter to the resident manager, the owner, and sometimes a tenant, notifying them of the complaint that one or two drug buys have occurred and that action is needed to rectify the problem. In some cases, the addressees have responded promptly by calling the legal advisor and negotiating a solution.

But Miami Beach places less emphasis on this early notice and negotiation process than the other sites studied in this project. The reason is that proceedings before the Nuisance Abatement Board are simpler to initiate and prosecute than proceedings in court, which all the other three jurisdictions studied must use. The Miami Beach board has no other function and is more willing than courts to be involved in negotiations to resolve a problem.

At the hearing before the board, the legal advisor presents the city's case, usually calling the detectives who have been investigating the site to testify as to their findings. Patrol officers may also be called to testify to calls for service they have handled at the address.

The property owner is entitled to have counsel present and usually does. The owner is entitled to cross-examine the city's witnesses and to present evidence on his or her own behalf.

Respondents in the Miami Beach cases have included owners, licensees, receivers, successors in title, prospective purchasers. Where owners or licensees have been directly involved in drug trafficking, the board has usually ordered closure of the premises. Where owners have made plausible arguments that they have been unwittingly victimized by tenants, the board has

established conditions designed to enable the owner to get control of the situation, but the sanction of complete closure still hangs over the owner. Where new owners are taking over the property, the board has retained jurisdiction while providing them the opportunity to address the problems created by the prior owners.

Because of the small number of nuisance cases and because Miami Beach is a compact city, a Miami Beach narcotics detective was able to take ILJ staff to all the sites against which actions had been brought. Of these 23 sites, five were closed and five were vacant. Twelve had been reopened or restored, but of these, five were again under investigation for narcotics trafficking.

The conclusion that can be drawn from these cases is that the Nuisance Abatement Board can be an effective tool against narcotics trafficking at particular sites. The most successful cases are those where the property has been restored to good condition and profitable use without a relapse into drug trafficking. A lower level of success was achieved where a property now stands closed or vacant. The failures are those properties where drug trafficking has continued or returned, but these are not complete failures. They can again be subjected to the jurisdiction of the board and more stringent action can be taken against them.

The work of the Miami Beach Nuisance Abatement Board is summarized in Exhibits 3-1 and 3-2 at the end of this chapter. In the following section, we review the facts of several of its cases in detail.

TYPICAL MIAMI BEACH CASES

1342 Washington, International Coffee Shop & Mini Market. The police record showed that eight drug sales had taken place in eight days in plain view of the owner and two of his employees. Aggravating circumstances were that children had seen drug sales, beer was served in paper cups, and billiards were played for money in a back room. Alcohol Beverages and Tobacco (ABT) entered an emergency order of suspension.

In June 1988, the board closed the shop. In November 1988, the owners came with a request that a new tenant be allowed to open a restaurant. The board asked that they provide a specific plan. In March 1989, the board authorized reopening with the new tenant. In January 1991, her restaurant was operating and had been written up in the Sunday Magazine of the Miami Herald as an example of the success of the nuisance abatement program.

1439 Alton Road, Frank's Grocery. Seven buys were made by confidential informants at Frank's Grocery in June and July 1988:

June 22	$10 worth of marijuana.
June 23	$10 worth of marijuana.
June 26	$10 worth of marijuana.
June 28	Gram of cocaine.

July 20	One-half gram of cocaine.
July 28	One-half gram of cocaine.

On July 28, 1988, a search warrant was executed and 76 grams of cocaine seized. At its September hearing, the Nuisance Abatement Board prohibited all business for one year. In September 1989, the owner withdrew a request for reconsideration because the year's abatement had almost expired.

In January 1991, a carry-out called the Chicken Grill was on the site. The police department believed that someone was still dealing drugs at the site.

1220 Collins, Webster Hotel. The Webster Hotel had been a constant source of problems. In the first nine months of 1988, the police department had 282 calls for service there or in the immediate vicinity:

Disturbance	112
Suspicious person	66
Theft	20
Assault	7
Burglary	10
Arrests	67
	282

In October, the board prohibited hotel business at the site for one year. By January 1991, there had been a complete and highly successful restoration of the building, which now operates as a residential hotel.

836 Pennsylvania, Majestic Apts. The Majestic Apartments had 12 units. Between January 1 and April 30, 1989, police made 25 arrests at the apartment building and nine more in the same block. There were 18 calls on people selling drugs. The arrests were for theft, vandalism, disturbances and fights, and the following drug charges:

- January 4, Apartment 7– seven people arrested and 39 pieces of crack (17.4 grams) confiscated.
- February 24, Apartment 4– one arrest and crack and crack pipes confiscated.
- March 2, Breezeway, first floor–two arrests, six rocks seized.
- March 17–One arrest, crack and paraphernalia confiscated.
- April 1–Four arrests, crack and paraphernalia seized.
- May 4–One arrest, crack and paraphernalia seized.

On June 14, 1989, the Nuisance Abatement Board prohibited all business for one year. All persons were to vacate the premises within 15 days, the owner within 30 days. The building was to be closed and secured within 15 days. The owner was to prepare plan for renovation.

By January 1991, the building had been condemned as unfit for human habitation. It was not under repair.

1337 Euclid, Lawn Court Apts. The Lawn Court Apartments produced 120 calls for service in an 18-month period:

Suspicious person	30
Disturbance	34
Injured person	14
Battery	5
Burglary	3
Drunks	3
Robberies	2
Shots fired	1
Narcotics	1
Miscellaneous	27
Total	120

The police department made 29 arrests at the site, including 19 drug-related arrests. Preparing a case for the Nuisance Abatement Board, the police department made seven controlled narcotics buys.

In July 1989, the board directed several specific reforms in the operation of the building:

- Hiring of resident manager.
- Renovation to attract better quality tenant.
- No new leases for 90 days.
- Security gate around property.
- Security guard for 90-day period.
- 8-unit "hotel" to be converted into apartments.
- No further narcotics activity.

At the time of ILJ's last site visit in January 1991, the building was being gutted and restored.

1401 Collins, Beach Plaza Hotel. The CAD address report on the Beach Plaza Hotel showed the following for May to August 1989: 20 disturbance calls, five arrests, and several observations of cocaine and other drugs on the premises.

At the Nuisance Abatement Board hearing in September 1989, the board prohibited all business at the site until November 1 or such later date as owner could show the following:

- Security guard 24 hours
- Front door secured
- Register of hotel guests
- No visitors after 11:00 p.m

Only three named people were allowed to stay. Everyone else was ordered out.

By January 1991, the site had been cleaned up. It is now occupied by an elderly, peaceful clientele.

6752 Collins Ave., Kurby's Bar. The police department CAD records showed that Kurby's Bar had been a continual source of problems. Between January 1 and May 10, 1990, there had been 26 calls for service, including the following:

- Subject took pills, unconscious inside bar
- Vandalism
- Man refusing to leave
- Two white males fighting in alley
- Several males could become violent
- Heart attack
- Armed white male selling drugs
- Drunk female locked inside bathroom, broke window
- Three males fist fighting
- Subject took wallet
- Subject threatens to kill wife
- Stabbing

At the June 1990 hearing, the owners obtained a continuance because of late retention of an attorney. But at the July hearing, the board ordered several specific steps to be taken by the bar:

- Background checks on new employees
- All employees to be trained in liquor law
- Security guard on Friday and Saturday
- Manager present in evening hours
- Troublemakers not tolerated
- Back door secured
- Improved lighting
- Coordinate efforts with police department in cleaning up area.

In January 1991, Kurby's Bar was still open but was under investigation.

101 Washington, Apartments. The apartment portion of this building, which also included the grocery that had been closed in the Nuisance Abatement Board's first action in 1988, contained 33 units. The police department CAD records showed 55 incidents at the address between January 8 and September 4, 1990. These included:

- Fires
- Plumbing leaks
- Fights
- Landlord-tenant disputes
- Auto theft
- Narcotics
- Burglary
- Harassment of passing citizens
- Urination in public
- Barking dog

In preparing the case for the Nuisance Abatement Board, the police documented six narcotics sales at the address. The notice to the owner stated that illegal narcotics activity at the addressed had been documented between May 17 and July 14, 1990. The August 1990 hearing was continued because the owner's lawyer was in trial. But at the September hearing, the board

ordered that the building be vacated by all tenants and remain vacant for 30 days. The new owner was to develop a renovation plan and appear before board.

The new owners were actually previous owners who had foreclosed on mortgages on the property. By October 1990, they had obtained building permits and begun renovations. In January 1991, they reported that the building was secured 24 hours a day; that new windows, plumbing, roof, cabinets, and flooring had been installed; and that 90 percent of the code violations had been cured. They expected to complete the renovation by March 1, 1991.

1420 Collins Ave., Apartments. The apartment building at 1420 Collins Avenue has 30 apartments and eight hotel rooms. Its assessed value is $294,314. A letter to the owner of record in September 1990 stated that the building had been the subject of complaints of narcotics use and sale. At the hearing on October 17, 1990, a court-appointed receiver for the property appeared in response to the notice. The board ordered that the building was to be vacated and remain vacant for 30 days. The receiver was to present renovation and management plan, which he did in January of 1991.

He reported that foreclosure proceedings were under way, everyone had been evicted, a new manager had been hired, code violations had been cured, and renovation was moving toward completion. New tenants must be able to demonstrate that they are employed. The new managers will live in the building. There would be rentals only for monthly or yearly terms. The narcotics sergeant recommended front and rear lighting and that only residents be allowed to sit in front of the building. The board decided to permit the building to reopen and to retain jurisdiction until October 1991.

Exhibit 3-1

Miami Beach Nuisance Abatement Board

CASE NO.	ADDRESS	NAME	NUISANCE BOARD ACTION		CURRENT STATUS			
			CLOSED FOR ONE YEAR	CONDITIONS SET	VACANT	CLOSED	RESTORED	UNDER INVESTI-GATION
88-0001	101 Washington	Grocery	■		■			
88-0002	650 Euclid Ave.							■
88-0003	1342 Washington	International Coffee Shop & Mini Market	■				■	
88-0004	1601 Euclid	Redwood Apts	■				■	
88-0005	439 Alton Road	Frank's Grocery	■				■	■
88-0006	1220 Collins	Webster Hotel	■				■	
88-0007	506 Washington	Lily White	■		■			
88-0008	1448 Washington	Check Cashing		■			■	
89-0001	744 6th St.	My Grocery	■				■	■
89-0002	1326 Pennsylvania	Avivas Apartments		■	■			
89-0003	155 Ocean Drive	Ocean Haven Bar	■				■	■
89-0004	949 Washington	949 Shops Inc.	■				■	
89-0005	836 Pennsylvania	Majestic Apts.	■		■			

Exhibit 3-1 (continued)

Miami Beach Nuisance Abatement Board

CASE NO.	ADDRESS	NAME	NUISANCE BOARD ACTION		CURRENT STATUS			
			CLOSED FOR ONE YEAR	CONDITIONS SET	VACANT	CLOSED	RESTORED	UNDER INVESTI-GATION
89-0006	1337 Euclid	Lawn Court Apts.		■		■		
89-0007	6300 Collins Ave.	Lombardy Inn		■		■		
89-0008	1401 Collins	Beach Plaza Hotel		■			■	
90-0001	314 72nd St.	North Shore Bar		■			■	■
90-0002	6600 Collins Ave.	Rowe Motel Bar	■				■	
90-0003	6752 Collins Ave.	Kurby's Bar		■				■
90-0004	216 Lincoln Road	Flame Steak Disco		■		■		
90-0005	101 Washington	Apartments		■		■		
90-0006	300 Meridian	Apartments	■		■			
90-0007	1420 Collins Ave.	Apartments		■			■	
91-0001	942 Pennsylvania	Apartment Bldg		■				
	TOTALS		**12**	**11**	**5**	**4**	**12**	**6**

Exhibit 3-2

Miami Beach Nuisance Abatement Board

1988

CASE NO.	DATE OF HEARING	ADDRESS	NAME	DISPOSITION	CURRENT STATUS
88-0001	03-09-88	101 Washington	Grocery	Closed.	Closed.
88-0002	05-11-88	650 Euclid Ave.	Ledi Construction		Still dealing.
88-0003	06-08-88	1342 Washington	International Coffee Shop & Mini Market	Closed.	Restaurant under new tenant.
	11-09-88			New tenant wants to open restaurant. Must provide plan.	
	03-08-89			Business may reopen under new tenant.	
88-0004	06-08-88	1601 Euclid	Redwood Apts	Continued.	Fresh paint.
	07-20-88			Building closed and code compliance ordered.	No problems.
	11-09-88			Order not fully complied with. No further drug arrests.	
88-0005	09-14-88	1439 Alton Road	Frank's Grocery	All business prohibited for one year.	Chicken Grill. Still dealing.
	09-13-89			Owner will wait because year has almost expired.	
	06-13-90			Reviewed in colloquy.	
88-0006	10-12-88	1220 Collins	Webster Hotel	Hotel business prohibited for one year.	Residential hotel. Excellent restoration.

Exhibit 3-2 (continued)

Miami Beach Nuisance Abatement Board

1988

CASE NO.	DATE OF HEARING	ADDRESS	NAME	DISPOSITION	CURRENT STATUS
88-0007	11-09-88	506 Washington	Lily White Laundromat	All business prohibited for one year.	Vacant lot.
	09-13-89			Letter to owner re granting request for rehearing returned by post office.	
	06-13-90			Reviewed in colloquy.	
88-0008	11-09-88	1448 Washington	Check Cashing Service	Continued, provided that off-duty police are hired for security.	Ice Cream Store
	01-11-89			Conduct of any business conducive to nuisance prohibited, but business may reopen in 30 days. If any evidence of narcotics activity, business will be closed for one year.	

Exhibit 3-2 (continued)

Miami Beach Nuisance Abatement Board

1989

CASE NO.	DATE OF HEARING	ADDRESS	NAME	DISPOSITION	CURRENT STATUS
89-0001	01-11-89 03-08-89	744 6th St.	My Grocery	All business prohibited. Motion for stay denied. All business prohibited for one year. Owner prohibited from leasing premises for one year.	"Tu" Grocery. Probably still dealing.
89-0002	01-11-89	1326 Pennsylvania	Avivas Apartments	All business prohibited for one year.	Being gutted and restored.
	03-08-89			Owner may contract with real estate leasing company to lease apartments and screen tenants. Resident manager to be employed. Background to be screened. To act as liaison with MBPD. Building will be brought up to Code. Proffered improvements: lighting, screens, cutting of shrubs, painting. Higher rents to attract better class of tenant.	
	09-13-89			New owners inform NAB they plan to renovate and reopen. Board continues until work has been done.	
	06-13-90			Reviewed in colloquy.	
89-0003	03-09-89	155 Ocean Drive	Ocean Haven Bar	All business prohibited for one year. ABT suspended license.	Closed. Apartments above still open.
	06-14-89			Request to reopen denied.	
89-0004	03-09-89	949 Washington	949 Shops Inc.	All business prohibited for one year.	Lucky Lady Beauty Salon. No problems.
	06-14-89			Owners may enter lease with new tenant to operate Art Deco furniture business.	

Exhibit 3-2 (continued)

Miami Beach Nuisance Abatement Board

1989

CASE NO.	DATE OF HEARING	ADDRESS	NAME	DISPOSITION	CURRENT STATUS
89-0005	06-14-89	836 Pennsylvania	Majestic Apts.	All business prohibited for one year. All persons to vacate within 15 days, owner within 30 days. Building to be closed and secured within 15 days. Owner to prepare plan for renovation.	Condemned as unfit for human habitation. Not under repair.
89-0006	07-19-89	1337 Euclid	Lawn Court Apts.	Hire resident manager. Renovate to attract better quality tenant. No new leases for 90 days. Security gate around property. Security guard for 90-day period. 8-unit "hotel" to be converted into apartments. No further narcotics activity.	Being gutted, restored.
89-0007	07-19-89 09-13-89 06-13-90	6300 Collins Ave.	Lombardy Inn	Continued. Owner to present evidence of changes and security plan. Board approves security measures, retains jurisdiction. Reviewed in colloquy.	Closed.
89-0008	09-13-89 06-13-90	1401 Collins	Beach Plaza Hotel	Business prohibited until Nov. 1 or such later date as owner shows: Security guard 24 hours. Front door secured. Register of hotel guests. No visitors after 11:00 p.m. Three people allowed to stay. Everyone else must go. Continued to Nov. 1. Reviewed in colloquy.	Cleaned up. Now occupied by elderly clientele.

Exhibit 3-2 (continued)

Miami Beach Nuisance Abatement Board

1990

CASE NO.	DATE OF HEARING	ADDRESS	NAME	DISPOSITION	CURRENT STATUS
90-0001	06-13-90	314 72nd St.	North Shore Bar	Continued because of ongoing ABT hearing and because site is closed.	Seaside Oasis. Known dealer standing outside.
	07-18-90			Continued.	
	10-17-90			New partners have applied for license for Seaside Oasis.	
90-0002	06-13-90	6600 Collins Ave.	Rowe Motel Bar	Continued because of ongoing ABT hearing and because site is closed.	Closed.
	07-18-90			Operation of bar prohibited for one year. Upon sale to unrelated third party, new owners must come before board. Order continues to Oct 1.	
90-0003	06-13-90	6752 Collins Ave.	Kurby's Bar	Continuance because of late retention of attorney.	Open and under investigation
	07-18-90			Background checks on new employees. All employees to be trained in liquor law. Security guard on Friday and Saturday. Manager present in evening hours. Troublemakers not tolerated. Back door secured. Improved lighting. Coordinate efforts with MBPD in cleaning up area.	
90-0004	06-13-90	216 Lincoln Road	Flame Steak Disco	Operation of disco prohibited. Restaurant may remain open.	Restaurant open, Disco closed.

Exhibit 3-2 (continued)

Miami Beach Nuisance Abatement Board

1990

CASE NO.	DATE OF HEARING	ADDRESS	NAME	DISPOSITION	CURRENT STATUS
90-0005	08-08-90	101 Washington	Apartments	Continued because lawyer in trial.	Under renovation.
	09-12-90			Building to be vacated by all tenants. To remain vacant for 30 days. New owner to develop renovation plan, appear before board.	
	10-17-90			Building permits have been obtained. Building closed, renovation begun. Continued.	
	01-01-91			Building secured 24 hours a day. New windows, plumbing, roof, cabinets, flooring. 90 percent of code violations cured. Complete March 1, 1991.	
90-0006	08-08-90	300 Meridian	Apartments	Continued because of disputed service.	Windows boarded but no apparent work.
	09-12-90			Continued because lawyer left hearing.	
	10-17-90			Business of operating apartment prohibited.	
90-0007	10-17-90	1420 Collins Ave.	Apartments	Building to be vacated. To remain vacant 30 days. Receiver to present renovation and management plan.	Renovation under way.
	01-16-91			Receiver comes in with progress report. Foreclosure under way. Everyone evicted. New manager. Code violations cured.	

CHAPTER 4

SAN DIEGO, CALIFORNIA

In May 1989, an abatement unit was formed in San Diego, California. It was comprised of representatives from the San Diego's City Attorney's Office, Police Department, Fire Department, Building Inspection Department, Zoning Department, and the County Health Department. These departments were to target properties with numerous narcotics or vice related violations as abatement cases. On October 16, 1990, the San Diego City Council increased funding for what had come to be called the Drug Abatement Response Team (DART) to ensure continuation of this valuable resource in attacking neighborhood deterioration.

DART's current full-time staff includes one deputy city attorney, a legal assistant and legal secretary in the City Attorney's Code Enforcement Unit, one police detective, and one building inspector. DART is jointly managed by a police sergeant and Supervising Deputy City Attorney.

The theory underlying DART is that there is a strong relationship between dilapidated property and crime, a relationship frequently referred to as the "broken window theory."[1] Dilapidated buildings send a signal to the community that no one cares. This in turn attracts the criminal element to the dilapidated property. Arrests of offenders do not ensure that future illegal activity will be eliminated from the problem properties.

Knowing this, the departments involved in DART used their individual enforcement roles collectively to eliminate narcotics and vice violations. The team found that it could rehabilitate property and eliminate illegal activity by placing responsibility on the property owners to comply with code regulations.

Essential to the effective operation of DART were two full-time positions: a full-time deputy city attorney assigned from the Code Enforcement Unit and dedicated to nuisance abatement cases, and a full-time police detective from the San Diego Police Department's Special Operations Unit. Because of the lead role taken by the city attorney's office, San Diego has the most detailed instructions on case preparation found in any of the four jurisdictions studied by ILJ. With the possibility of trial always in mind, the city attorney's office has given very specific guidelines on how a case is to be assembled. The procedure is worthy of summary here.

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1 James Q. Wilson and George L. Kelling, "Broken Windows," *Atlantic Monthly*, March 1982, p. 29; "Making Neighborhoods Safe," *Atlantic Monthly*, February 1989, p. 46.

OVERVIEW OF DART PROCEDURES

The San Diego abatement procedure can involve five major steps:

- Preliminary Investigation and Evaluation
- Notification to the Owner by Letter or in the Field
- City Attorney's Office Hearing
- Monitoring the Property
- Referral or Closing of the Case

Preliminary Investigation and Evaluation. The San Diego Police Department receives complaints from citizens, other city departments, or its own officers and detectives. The police officer completes an abatement evaluation form, providing the following information about the property:

- Type
  - House
  - Business
  - Apartment
  - Other
- Type of activity
  - Narcotics
  - Vice
- Description of Problems
- Owner(s) of property (computer printout for site to be attached)
- Arrests on property (computer printout to be attached for past year arrests)

The investigating officer, who could be a police officer or a detective, works an abatement case from beginning to end.

With the development of a specialized Problem Oriented Policing (POP) program throughout the San Diego Police Department in 1989, DART serves as one of the creative alternatives that POP officers can use in applying the strategies of community oriented policing. By far the large majority of cases that have proceeded through San Diego's abatement process were initiated by officers as POP projects. These officers identified properties with continuous drug activities and worked with their POP sergeants to develop alternative policing solutions. In some instances, it was as simple as getting the local telephone company to remove a pay phone from in front of a small market that was constantly used by drug dealers to coordinate their deals. In more complex cases, these officers prepared the entire abatement package under the guidance of the DART detective, obtaining declarations from neighbors, taking photographs, attending office hearings, and serving court orders.

The DART detective is assigned to coordinate the investigation and assist the investigating officer in overcoming any obstacles and obtaining the assistance of other city departments and

resources. The DART detective is also responsible for ensuring that the abatement package (prepared by the investigating officer) fulfills the requirements outlined by the city attorney. If the facts developed in the preliminary investigation do not meet the criteria for a drug abatement case, the DART detective may make a referral to other city departments or resources for appropriate action.

Notification to the Owner by Letter. In a potential abatement case, the San Diego police department sends a letter to the owner by registered mail. This letter may be preceded by a phone call to verify ownership and to assess the property owner's attitude and knowledge about the situation. If specific code violations have been identified, the DART detective may request a code inspection before the date of the office hearing.

DART Notification in the Field. Within the past six months, the DART detective has experimented with owner notification in the field. Here the DART detective, together with the building inspector, may call the owner immediately to join them at the property to discuss the drug activities and code violations after their preliminary inspection. This may happen after the narcotics street team has served a warrant and secured the property. This technique can effectively impress the owner with the severity of the situation. If the owner cannot be located at that time, the DART detective may contact the owner later or send a demand letter.

City Attorney's Office Hearing. The DART detective schedules a hearing in the city attorney's office. The DART detective, deputy city attorney, beat officer, property owner, and property owner's representative will be present at this meeting. If code violations have been identified, the code inspector will also be present.

The property owner is given a list of all the violations and must agree upon a specific compliance deadline. Thirty to 45 days is a reasonable request. The owner is also given a list of improvements (such as fencing, lighting, graffiti removal, proper rental agreements, etc.) that will assist in deterring the illegal activity. If a tenant is suspected of being a drug dealer/user, the owner may be advised of any evidence that could facilitate a possible eviction action against the tenant. Only evidence that would otherwise be available to the landlord (such as a record of convictions) will be revealed.

Monitoring the Property. After the hearing, the site will be monitored by the assigned officer and the code inspector to ensure the owner's compliance with the recommendations. If justified, police officers should continue to make arrests on the property throughout this period. These arrests may be used as evidence in court to prove that a nuisance still exists.

Referral or Closing of the Case. Depending upon what happens after the office hearing, the case will either be closed or referred for prosecution. If narcotics activity has not substantially abated, an action plan will be prepared.

DART INVESTIGATIVE PACKAGE

When DART decides to proceed against a property, a detailed investigative plan is developed and executed. The investigating officer documents *present* narcotic activity on the property in an investigation package that may include any or all of the following:

- Undercover surveillance. This may have been done before the office hearing where there was substantial probability of noncompliance by the property owner.
- Controlled buys and search warrants.
- Joint inspections to identify code and to document violations.
- Neighborhood/business survey within affected area. This will usually be within the affected block or immediately adjacent areas. During the survey process, efforts will be to identify individuals or businesses willing to "testify" in the form of a declaration for drug abatement action.
- Aerial photographs to document public nuisance and its relationship to the neighborhood, schools, or other significant locations.

The officer also documents *past* narcotic and criminal activity on the property to provide the following:

- Establish relevant criminal profile period—one to three years for civil action.
- Copy and certify all arrest and incident crime reports *on the property* for the crime profile period.
- Analyze arrest reports (and relevant crime reports) occurring *on the property*.
  - Separate narcotic and non-narcotic arrests.
  - Identify those individuals engaging in illegal narcotic activity on the property on a consistent basis. Such persons can be profiled in the civil complaint by the crime analyst or lead police officer and their names included in restraining or stay-away orders.
  - Identify major non-narcotic criminal activity related to narcotics trafficking or use, i.e., homicides, assaults, drive-by shootings.
  - Identify police officers who have substantial experience and personal knowledge of relevant criminal activity on the property.
  - Obtain declarations from those police officers who have made significant or major arrests on the property.
- Prepare crime analysis declaration.
- Prepare police officer declaration.

– Identify lead officer–usually referring officer.

– Identify support declarations.

Declarations. These declarations deserve further elaboration. As statements about narcotics activity on the target property, they are part of demonstrating the reputation of the property, and declarations from neighboring citizens are important in framing recommendations to solve the nuisance problem.

The investigating officer is to prepare a lead declaration. Officers who have assisted in the DART investigation will also be responsible for preparing declarations. Declarations will minimally include officer's expertise, case investigation, past and present illegal activity, and arrests observed.

Police officers working such cases should have a strong working knowledge of narcotics and should be considered expert in the field of narcotics. The officers will be testifying as experts in both criminal and civil courts in both written and oral statements.

Community support is essential to stopping the narcotics activity at a particular property. Involvement from community groups can be of the utmost help in obtaining pertinent information regarding narcotics activity in their respective areas. The investigating officer is to contact citizens who live or work in the area and prepare citizen declarations that includes all suspicious activity occurring on the subject property.

Real estate data. The investigating officer is to obtain full information about the real estate, including a description of the property, legal ownership, tract numbers, zoning classifications, and any other information available. The investigating officer should also obtain information about the property owner(s) involved, including residence address, telephone, and criminal records.

Photographs. The investigating officer is to take photos of the exterior and interior of the property. Generally, an aerial photo will be required. If surveillance videos are made, a copy must be given to the DART unit.

Code Inspectors. Code inspectors also have a role in development of the investigative package. They may have been referral sources to begin with, having observed narcotics activity at locations where they were responding to code violations. Or police officers who had observed code violations while investigating criminal activity may have requested code inspections.

DART may request a code inspection before an office hearing, with the possible result that preliminary notice of violation might be presented to the owner at the hearing. Where code violations are only identified after the office hearing, DART will request an inspection and inspection report to compel the property owner to correct all violations.

If a drug abatement complaint is not filed, code inspectors are to continue to work with the owner to gain compliance. During the monitoring period, code inspectors should submit periodic

reinspection reports to the prosecutor to ensure compliance. If a drug abatement action is filed, then the code violations are included in the drug abatement complaint.

DART is responsible for coordinating joint inspections to ensure effective use of city resources and cooperation in getting identical compliance dates. There are sometimes emergency inspections in conjunction with search warrants or "knock and talks." Code enforcement agencies are requested to designate inspectors who can be called for an inspections with minimum notice.

As part of the DART expansion in October 1990, a housing inspector is now assigned to DART on a full-time basis. The inspector accompanies the DART detective on daily inspections of potential DART locations.

In addition to the above, the investigative package is to contain a case summary, an overview by the investigating officer providing everyone a basic understanding of the problems and type of property being investigated. The summary should articulate the following: property location, type of activity, the type of violations, and, if known, the suspects involved. The investigating officer should also articulate the type of improvements that can be made by the property owner to deter the activity.

With thorough preparation, most cases can be abated without filing a law suit. The office hearing leads to the resolution of most cases. The task force data for 1989, 1990, and the first half of 1991 are shown in Exhibit 4-1.

Exhibit 4-1

The City of San Diego's
Drug Abatement Response Team
Workload Statistics 1989-1991

	1989	1990	1991*
Abatement Intake-new cases received	56	45	89
Evaluation and Screening			
Referrals to other city departments			
or other divisions in police department	20	15	29
DART Investigations	36	30	60
Workload Activities:			
Field Contacts with Owners & Managers	33	15	52
Office Hearings	21	7	5
Inspections with Search Warrants	–	–	–
Joint Inspections with Code Enforcement.	–	–	–
Civil Complaints Filed	7	4	3
Closed Cases:			
Abatement after Investigation or			
Notification with Property Owner	4	10	39
Abatement after Office Hearings	8	21	–
Abatement after Court Action	7	4	–
Totals	19	35	39

*1991 Statistics reflect only the first six months of 1991.

As the DART program has evolved, its statistical measures have changed. Several new categories have been included that were not as closely monitored by the police department at the start of the program. This partially explains the dramatic increase in field contacts and new cases. The decline in office hearings is the result of the hiring and training of new personnel. The number of office hearings for the remainder of 1991 should increase as the new team members become more experienced. The closed cases reflect cases closed in that calendar year. Thus, the actual office hearing or court action may have occurred in the previous year. What follows is a brief glimpse at the number and breakdown of DART's active caseload as of June 1991:

DART Investigations	18
Office Hearing Stage	2
Litigation Stage (City Attorney's Office)	8
Monitor Stage	3
Total Active Cases	31

TYPICAL SAN DIEGO NUISANCE CASES

228 South Meadowbrook. The defendants were an elderly couple whose grandsons were extensively involved in narcotics trafficking. Three of the seven grandsons involved in narcotics trafficking were also hard-core members of the Crips, a local black street gang. Leaders in the gang, they used gang members for distribution and sale of narcotics, forming a cohesive network that operated in the predominantly black community. The defendants, grandparents of the drug traffickers, were either unwilling or unable to control the activity of their grandsons, and, after being given notice of the narcotics activity occurring on their property, made no attempt to curb it. The grandsons used the house as the distribution center, with most drugs sales occurring at a major intersection approximately two blocks away from the house. A court order was obtained that enjoined all narcotics activity from occurring on the premises and restricted gang members and some of the grandsons from coming within 300 feet of the subject property. This order resulted in a tremendous decrease in narcotics trafficking, and eventually the grandparents sold their property and relocated.

3260 Martin Street. This was a large apartment complex of approximately 18 units with a narcotics trafficking problem that was primarily the result of management neglect. After this problem was identified to the drug abatement team by patrol officers on this beat, the property owner was contacted and an office hearing was held with him to discuss the drug activity. At the conclusion of the office hearing, which was participated in by the city attorney's office and the

San Diego police department, including the beat officer familiar with the property and its associated problems, a list of specific recommendations was made to the property owner regarding how he could abate the narcotics activity on his property. Initially, the property owner was reluctant to implement some of the recommendations because they involved significant expenditures. The recommendations included the installation of a wrought iron fence around the perimeter of the property, lighting, and hiring a property manager. However, after the suggestions had been implemented, the property owner contacted the DART detective to express his appreciation to the drug abatement team for their suggestions. He acknowledged the effectiveness of those suggestions in reducing narcotics activity on his property.

38th and National. This commercial intersection has been plagued by an array of drug and criminal activity involving the sale and use of drugs, abuse of alcohol, purse snatching, and other associated criminal activities. The criminal activities center on the parking lots of two liquor stores located at this intersection, which serve as a magnet for drug activity. Community residents have organized in the area and made demands on the police department at meetings attended by up to 300 community residents. These residents expressed their frustration and outrage at their inability to use commercial establishments in this area because of fear of being victimized.

In January 1990, an office hearing was held with both the lessees and property owners of the two liquor stores, with the captain of the area in attendance. At the office hearing, the property owners, lessees, and their attorneys were advised of the problems on the property and given a list of recommendations that they were strongly urged to implement to abate the public nuisances on their property. Compliance with these recommendations is now being monitored by the San Diego police department and the drug abatement team.

The property owners have implemented the DART recommendations with a dramatic decrease in the number of crime-related incidents. Those recommendations included enclosing their respective parking lots and hiring security guards to monitor those individuals who would be allowed onto their property, i.e., their parking lots, and to prevent loitering in front of their establishments. As a result of these changes, the area has benefited greatly and the San Diego police department is satisfied with the owner's compliance.

5081 La Paz Drive. This house was used as the headquarters of the Syndo Pirus, also known as the Syndo Mob and the Lincoln Park Pirus, a subset of the Crips. It was owned by a widow whose children and grandchildren used the house both as a crack house and a distribution center. It was the subject of frequent neighborhood complaints. Three search warrants based on controlled buys were executed at the site.

Crime analysis showed that between January 1, 1988, and August 31, 1989, it had been the site of 73 arrests and 106 calls for service, broken down as shown in Exhibit 4-2.

Exhibit 4-2

Arrests and Calls for Service at 5081 La Paz Drive
January 1988 - August 1989

ARRESTS	NUMBER	TOTAL
Narcotics offenses		
Under influence of controlled substance (none recovered)	28	
Under influence of controlled substance (controlled substance recovered)	18	
Possession of controlled substance	9	
Possession of BUNK (counterfeit narcotics)	5	
Total narcotics offenses	60	60
Other offenses (including murder, burglary, assault with deadly weapon, escape)		10
Total Arrests		70
CALLS FOR SERVICE		
Citizen calls		
Narcotics related	33	
Disturbances	8	
Gunshots	2	
Miscellaneous	14	
Total	57	57
Police initiated calls		
Citizen contacts or field interviews	20	
Request for cover unit or to meet police officer	18	
Stolen vehicle recovery	4	
Miscellaneous	7	
Total	49	49
Total calls for service		106

The owner of the house was unable to control the activities of her children and grandchildren. The city attorney filed a drug abatement action and obtained an injunction against using the premises for the purpose of unlawfully selling, serving, storing, keeping, or giving away controlled substances or their precursors. The injunction also specifically barred several named individuals from going on the property. Despite this provision, some of these persons returned to the property, subjecting themselves to arrest for contempt of court.

In order to address the issue of these individuals' returning without being arrested, the city attorney's office sought the support of the Municipal Court to assure that persons who violated this drug abatement order would receive appropriate attention and, if found guilty, appropriate sentencing. As a result of this effort, criminal prosecution for violations of a court order were systematically initiated against enjoined individuals who violated this order. As a result of this effort, major violators are now serving sentences totaling two and one-half years. A stipulated permanent injunction was filed in February 1991 that enjoined all narcotic activity and a temporary restraining order for one year subject to modification was obtained. The defendant has applied for and is scheduled to receive a rehabilitation loan for this property by October 1991. At that point, the defendant's granddaughter will move in with the defendant and work to create a changed environment.

CHAPTER 5

PORTLAND, OREGON

The Portland, Oregon, City Commission has given the Portland Police Bureau and Portland City Attorney a very effective tool for dealing with crack houses, the Specified Crime Property Ordinance, Chapter 14.80 of the City Code. The crimes specified in the ordinance are unauthorized delivery or manufacture of a controlled substance, gambling, and prostitution. A "specified crime property" is any kind of structure, building, or unit of a building where the specified crimes are taking place. § 14.80.020 (D). The ordinance provides that any structure used as a specified crime property is subject to closure for a period of up to one year, and that any person who uses, maintains, or allows a structure under his or her ownership to be used or maintained as a specified crime property is subject to civil penalties of up to $500 a day. § 14.80.010 (A), (B).

PROCEDURE UNDER THE ORDINANCE

The Specified Crime Property Ordinance empowers the chief of police to initiate the procedure culminating in closing a property. When the chief believes that a structure is being used in violation of the ordinance, he or she is to notify the owner or owners of record in writing that the structure has been determined to be a specified crime property. This notice is to contain "a concise description of the conditions" leading to the chief's findings. § 14.80.030 (A)(1)(b).

This notice is to be served on the owner or owner's agent at least 10 days before commencement of any judicial action. Service is to be made either personally or by registered or certified mail. Each person is to be served at his or her address as it appears on the last equalized assessment of the tax roll, as well as on the last recorded instrument of conveyance, and as may be otherwise known to the chief of police. If no address appears or is known, then a copy is to be mailed to the person at the address of the structure believed to be a specified crime property. § 14.80.030 (A)(2).

At least five days prior to commencement of any judicial proceeding, notice must also be mailed to the occupant of the structure if the occupant is not the owner. If nothing is heard from the owner 10 days after notice has been served or mailed, notice may be posted at the property. § 14.80.030 (A)(3).

Concurrent with notice to owners and occupants, the chief of police is to send a copy to the Commissioner in Charge,[1] together with any documentation the chief believes supports closure of the structure or imposition of civil sanctions. The commissioner may authorize the city attorney to initiate legal proceedings. § 14.80.030 (B).

At any time after an action has been filed and before trial, the owner and the city may stipulate to a course of action to abate the conditions violating the ordinance. With such a stipulation, the city must agree to stay proceedings for not less than 10 nor more than 60 days. Either party may petition for additional time to complete the actions contemplated by the stipulation. However, if the city reasonably believes the owner is not diligently pursuing these actions, it may then apply to the court for release from the stay and seek appropriate relief. § 14.80.040 (A).

In actions seeking closure of a structure, the city has the initial burden of proof to show by a preponderance of the evidence that the structure is a specified crime property. § 14.80.040 (B). In actions seeking civil penalties from an owner, the city has the initial burden of proof to show by a preponderance of the evidence that the owner had knowledge of activities or conditions constituting a violation. § 14.80.040 (C). Evidence of a structure's general reputation and the reputation of persons residing in or frequenting it is admissible. § 14.80.040 (D).

Except in an emergency closure action under § 14.80.050 (B), which pertains to sites with toxic, flammable, or explosive materials, it is a defense to an action seeking closure that the owner of a structure at the time in question could not, in the exercise of reasonable care or diligence, determine that the structure was being used or maintained as a specified crime property. § 14.80.040 (E).

In establishing the amount of any civil penalty, the court may consider any of the following factors (§ 14.80.040 (F)):

1. The actions taken by the owner(s) to mitigate or correct the problem at the structure;
2. The financial condition of the owner;
3. Whether the problem at the structure was repeated or continuous;
4. The magnitude or severity of the problem;
5. The economic or financial benefit accruing or likely to accrue to the owner(s) as a result of the conditions at the structure;
6. The cooperativeness of the owner(s) with the city;

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[1] Each member of the Portland City Council has direct responsibility for administering a major component of city government. The Commissioner in Charge referred to in the ordinance is that person on the Portland City Council who is assigned responsibility for the Bureau of Police.

7. The cost to the city of investigating and correcting or attempting to correct the condition;
8. Any other factor deemed by the court to be relevant.

If it is determined that a structure is an immediate threat to public safety and welfare, the city may apply to the court for interim relief. In such a case, the notification procedures need not be complied with. § 14.80.050 (A).

Special provisions apply to places used for manufacture of controlled substances involving toxic, flammable, or explosive substances. If the chief of police determines that a structure has been used for purposes or processes that, in the opinion of Police Bureau or Fire Bureau personnel, present a continuing threat to public safety or welfare, the city may obtain an order barring that structure's use or occupancy for 60 days. § 14.80.050 (B).

No person may enter the structure during the first 20 days of this 60-day period without prior written approval of the city or a court order. After this 20-day period, the owner may enter to clean and decontaminate the structure in accordance with guidelines established by the Oregon Department of Human Resources, Health Division. § 14.80.050 (B)(1). The owner must attest in writing that the structure has been cleaned and/or decontaminated in accordance with the guidelines, at which time it may be reused or reoccupied, provided it is not otherwise subject to the Specified Crime Property Ordinance. § 14.80.050 (B)(2). If the owner fails to comply, the city may seek an order preventing use or occupancy of the structure for such further time as it deems appropriate, unless the owner can satisfy the court that the structure no longer presents a continuing threat to public safety or welfare. § 14.80.050 (B)(3).

If the court finds that a structure is a specified crime property as defined in the ordinance, it may order that it be closed for any period up to one year and that the owner(s) pay to the city a civil penalty of up to $500 for each day the owner had knowledge of activities or conditions at the structure constituting a violation of this Chapter. § 14.80.060 (A).

The court may also authorize the city to secure the structure against use or occupancy if the owner(s) fail to do so within the time specified by the court. All costs reasonably incurred by the city in doing the work will be made an assessment lien upon the property. "Costs" means those costs actually incurred by the city for the physical securing of the structure, plus any tenant relocation costs given under the ordinance. § 14.80.060 (B).

A tenant is entitled to reasonable relocation costs if, without actual notice, the tenant moved into the structure after either an owner or agent received notice of the chief of police's determination pursuant to § 14.80.030 (A) or § 14.80.060 (B)(3)(a), or after an owner or agent received notice of an action brought pursuant to 14.80.050. § 14.80.060 (B)(3)(b).

Any person assessed costs of closure and/or a civil penalty by the court is personally liable for their payment to the city. § 14.80.060 (C).

It is possible for an owner to obtain relief from a closure order. The owner must:

1. Appear and pay all costs associated with the proceedings;
2. File a bond in an amount not less than the tax-assessed value of the structure;
3. Keep the bond in force for a period of not less than one year or for such period as the court directs;
4. Enter into a stipulation with the city to abate immediately the conditions giving rise to the violation and to prevent them from being established or maintained thereafter. The stipulation will then be made part of the court's files.

If the owner violates the terms of the stipulation, the city may apply to the court for an order awarding up to the entire amount of the bond as a penalty as well as such other relief, including closure for any additional period of up to one year, as is deemed appropriate by the court. § 14.80.070.

Finally, the ordinance provides that the court may, in its discretion, award attorneys fees to the prevailing party. § 14.80.080.

POLICE ENFORCEMENT

In General Order 630.81, issued in July 1987, the Portland Police Bureau outlined the internal procedure to be followed in enforcing the ordinance. The volume of cases has forced some modification of the procedures in practice.

The general order said the regulation was meant to be used only in situations where there have been citizen complaints about activity at the structure or there is significant danger to the public. The order provides that an officer or investigating unit may initiate procedures authorized by the ordinance and send an inter-office memo and case package to the Drugs and Vice Division (DVD).

The memo is to include an address and a detailed description of the property, as well as a concise description of the violations at the property. All relevant police reports are to be attached and forwarded with the inter-office memo. An investigator from the DVD will be assigned to process all the cases.

The DVD investigator is to determine who the owner or owners of the properties are, as well as any holders of security interests (mortgages, trust deeds, land sale contracts) in the real property. That is to be done by contacting Multnomah County Records and getting the identities of the owners and holders of security interests from the Deed and Mortgage Indexes. The investigator may also use other sources of information (police reports, water bureau records, etc.) to determine the identities of owners and occupants.

Under the general order, after the investigator has prepared all appropriate notification letters for the chief's signature, the entire case package is to be sent to the bureau's legal advisor for review. Under the present structure of the police bureau, the legal advisor is a deputy city attorney assigned to and working in the police bureau on a full-time basis. The legal advisor is to review the case, and thereafter will forward the file to the deputy chief of investigations, who is to present the notification statements to the chief for review and signature.

The notification statement is returned to DVD to be mailed to the appropriate persons and at the appropriate times as required by the ordinance. The investigator is to mail the notice either by certified mail or first class mail depending on the circumstances. The investigator may also post the property with a notice if 10 days has elapsed from the original mailing and no contact has been received by the city during that period of time.

Copies of the entire file and of the notification statement are to be sent immediately to the Commissioner in Charge of the Police Bureau, as well as any other documentation which supports the closure of the structure. The Commissioner will then contact the city attorney's office for judicial proceedings if appropriate.

As enforcement of the ordinance has developed in practice, DVD usually sends simple warning letters before undertaking all the procedures required under the ordinance and the general order. These letters are sent to both the owner of record and the occupant of the property. The warning letter itself is often sufficient to provoke the desired response. The sanctions are so severe that most landowners have sought to clean up their properties without forcing the city to go through the whole process.

In the three years since adoption of the Specified Crime Property Ordinance, the Portland Police Bureau has developed several ways of tracking properties on which action may be necessary. When a complaint is received, the DVD assigns it a complaint number and enters the address into its specified crime property data base. The entries are printed out each month by address, and the DVD analyzes the print-out to see what addresses are receiving the most complaints. For example, in March 1991, the analysis for the preceding three months produced the table shown in Exhibit 5-1. Obviously, such a table gives excellent guidance on setting investigative priorities. DVD uses a rule of thumb that it will investigate an address only after it receives five complaints about it.

Several comments are in order about that rule. First, it is not a hard and fast rule. There is no automatic formula for issuance of a warning letter. One complaint, sufficiently substantiated, can lead to investigative action. More than five unsubstantiated complaints may not lead to action. It is important to recognize that police warning letters cannot be triggered by some threshold number of complaints from citizens. The police bureau does not want to be compelled

Exhibit 5-1

Summary of Drug House Locations
12-1-90 to 2-28-91

Addresses with one complaint	378
Addresses with two complaints	108
Addresses with three complaints	30
Addresses with four complaints	16
Addresses with five complaints	7
Addresses with six or more complaints	40
Total Different Addresses	579
Total address records	1,178

to act because of letter-writing campaigns repeating essentially the same information several times. It has to be wary of complaints that are essentially about deviant life style rather than about commission of the specified crimes. And it must be wary of being used by citizens seeking to harass a target.

Investigations are guided by Fourth Amendment principles, requiring probable cause, which is a qualitative rather than a quantitative standard. The probable cause underlying an application for a search warrant is based on what a reasonable person would believe, under all the circumstances, is probably happening. There is nothing specifically quantitative about probable cause.

When the police bureau does act on a particular property, there are several steps it can take. The simplest is to send a warning letter advising the owner of record that the property is the subject of complaints to the police bureau. That letter makes no representation as to the merits of the complaints, but it does warn "that in the event a police investigation determines that the reported illegal activity is in fact occurring, proceedings may be commenced to cause the closure of the structure, as well as the imposition of a civil penalty against you, and all owners, in accordance with City of Portland Ordinance 14.80."

Without undertaking a full investigation, the police bureau may send patrol officers or detectives to the house or apartment to see if the occupants will consent to a search. If they do consent, and if the search finds drugs, the bureau will send a letter advising the owner of the search. This letter also states "that in the event a police investigation determines that illegal drug activity is continuing," legal action may follow under the ordinance. The letter also states that a copy has been sent to the city attorney, but that "No formal action has been started at this time." The letter suggests that the owner take remedial action and advise DVD of any action taken.

If the police bureau develops probable cause, it obtains and executes a search warrant. That will be followed by a search warrant advisory letter, telling the owner that a search warrant has been executed on the property and that legal action against the property may follow.

The most serious form of warning letter is the certified letter, so called because it is sent by certified or registered mail. This is the letter required by the ordinance, and it reads as follows:

> This certified letter is being sent to advise you, as the owner of [address], Portland, Oregon, that on [date] I have found this structure to be in violation of the City of Portland ordinance 14.80.010, Specified Crime Prohibited.
>
> That on [date], this property was used for [description of offense], and in violation of Portland Ordinance 14.80.010.
>
> This letter serves as notification to you, the legal owner, that I will commence proceedings to cause the closure of this structure as well as the imposition of civil penalties against you, and all owners. The proceedings will commence ten days after the date of the mailing of this letter unless action is taken to correct or mitigate the problem at the structure within the next ten days.
>
> A copy of this letter is being forwarded to the Commissioners-in-Charge of the Police Bureau and City Attorney Paul Elsner. I suggest that you contact City Attorney Elsner at 248-4047, if you have any questions.

It is important to recognize that the enforcement goal being sought is compliance with the law, not the boarding-up of houses. It is difficult to secure an empty house completely, and crack dealers are attracted to abandoned properties. Boarded houses are a blight on the neighborhood. It is in the best interests of the community if houses are occupied by law abiding citizens. For these reasons, the police bureau encourages owners to clean up their properties. Portland has found it necessary to sue under the Specified Crime Property Ordinance only a dozen times.

ENFORCEMENT PATTERNS

Exhibit 5-2 shows several things about the development of Portland's enforcement practices. In 1987 and the first part of 1988, DVD numbers were not routinely assigned to all complaints. The various types of warning letters had not yet been differentiated, at least for record keeping purposes. Of the total of 34 letters sent out in 1987, 23 were warning letters and

Exhibit 5-2

Portland Letters to Landowners and Tenants

1987

	DVD Number Assigned	Warning Letters	Search Warrants	Search Warrant Advisory Letters	Consent Searches	Consent Search Advisory Letters	Owner Eviction/ Voluntary Closure	Emergency Closure	Certified Letters
August		1					1		
September		4					1		3
October							3	2	2
November		6					2		
December		12							6
		23					7	2	11

Exhibit 5-2 (continued)

Portland Letters to Landowners and Tenants

1988

	DVD Number Assigned	Warning Letters	Search Warrants	Search Warrant Advisory Letters	Consent Searches	Consent Search Advisory Letters	Owner Eviction/ Voluntary Closure	Emergency Closure	Certified Letters
January		8					4		2
February		19					2	2	
March		7					3	2	1
April		4					2	2	2
May		8					1		2
June	825	17					10		4
July	683	45					3		3
August	894	46					5		1
September	726	47							3
October	727	37					2	1	1
November	463	35		1			1		1
December	629	32					3	1	1
	4,947	305		1			36	8	21

Exhibit 5-2 (continued)

Portland Letters to Landowners and Tenants

1989

	DVD Number Assigned	Warning Letters	Search Warrants	Search Warrant Advisory Letters	Consent Searches	Consent Search Advisory Letters	Owner Eviction/ Voluntary Closure	Emergency Closure	Certified Letters
January	660	20	25				4		1
February	582	29	20					1	
March	888	15	17		4		9		
April	856	16	15		2			1	1
May	823	21	22		1				1
June	903	23	20		2				
July	899	36	28		5				1
August	1,069	28	23	21	5				
September	1,029	31	29	3	3				1
October	885	23	16	20	2				
November	605	16	16	22	2				1
December	439	8	18	11	2		1	1	1
	9,638	266	249	77	28		14	3	7

Exhibit 5-2 (continued)

Portland Letters to Landowners and Tenants

1990

	DVD Number Assigned	Warning Letters	Search Warrants	Search Warrant Advisory Letters	Consent Searches	Consent Search Advisory Letters	Owner Eviction/ Voluntary Closure	Emergency Closure	Certified Letters
January	611	26	24	11	2			2	1
February	534	20	24	19		2			
March	732	15	12	19					2
April	619	13	14	9	2				1
May	536	7	23	8	1				1
June	582	18	12	15	1	1			1
July	508	2	6	16	2				2
August	679	33	10	20	4	1			2
September	632	23	9	2	2	6			3
October	549	15	5	12		3			
November	425	9	14	2	4	4			1
December	314		12		2				1
	6,721	181	165	133	20	17		2	15

11 were certified letters, two warning letters for every certified letter. That ratio was to change markedly in following years, when the number of warning letters rose steadily but the number of certified letters remained fairly constant. It is also interesting to note that in 1987, there were seven owner evictions or voluntary closures, showing some owner reaction to police pressure. These evictions have been occasionally reported by owners to the police, who have not regularly kept statistics on them.

In 1988, the volume of warning letters rose slowly in the first half of the year, then very markedly in the second half of the year, reaching a total of 305 for the year. Positive responses by owners continued at about the same pace as in 1987, owner convictions and voluntary closures numbering 36 for the year, with most of those being owner evictions. The police bureau issued 21 certified letters in 1988, maintaining much the same rate established in late 1987.

In 1989, the total number of letters rose again. Warning letters numbered 266, and the new category of search warrant advisory letters, which began to be counted separately in August, numbered 77, making a total of 343 warnings to owners and tenants. Certified letters, the most serious threat to the landowner, declined by two-thirds, from 21 in 1988 to seven in 1989.

In 1990, the number of certified letters climbed back to 15, and the total number of letters to landowners and tenants rose over 300—181 warning letters, 133 search warrant advisory letters, and 17 consent search advisory letters. We infer from the disappearance of owner evictions and voluntary closures in 1990 that the police bureau stopped tallying them, not that owners quit evicting problem tenants.

Lacking the resources to examine a significant sample of the sites on which warning letters were sent, ILJ was not in a position to assess their effectiveness in obtaining compliance. But the procedures used by the police bureau reflect a rational escalation of threatened sanctions against problem properties. Many of the simple warning letters are not based on well substantiated complaints, nor do they pretend to be. But the consent search and search warrant advisory letters do represent significant police action. Landowners can be expected to respond to them because they constitute serious threats to their interests. Only the most obstinate or most lawless would refuse to respond in any way. These most difficult cases are showing up in the certified letter totals.

PORTLAND CASES

For the most part, the case files reviewed by ILJ in its last site visit to Portland showed the same kinds of drug activity—crack houses, gang distribution of crack, commercial sites used for drug trafficking—we have already discussed in the earlier chapters of this report. However, one case stood out as exceptional and is worthy of special attention.

An interstate highway runs north and south through Portland. The city has had trouble with some of the motels adjacent to the interstate, particularly one at 800 East Burnside. It was the subject of frequent calls for service on narcotics trafficking and prostitution. The police department built a substantial case against the motel, and the city attorney filed a nuisance abatement suit against it under the specified crime property ordinance. The ownership of the motel changed hands shortly before the filing of the suit, and the new owners entered into a very restrictive stipulation with the city, including the following provisions:

- Owners were to rent units backing onto three designated streets and in the center of the structure before renting any non-kitchen units backing onto a fourth street. Kitchen units could be rented only for a minimum of three days.

- All motel guests were to produce either one piece of identification with a photograph or at least two other pieces of identification sufficient to identify the guest. All identification was to be photocopied and attached to the registration.

- Owners were to inquire whether the guest was driving and to list the make, model, and license number of the guest's vehicle. The owners were to visually verify the vehicle information and note any discrepancies.

- Owners were to inquire whether guest had luggage. If not, then this information was to be noted on the registration documents.

- Owners were to make a duplicate set of all registration documents and provide them to the city, which was to pick them up once every 24 hours.

- Rooms were to be rented only once between 11:00 a.m. and 1:00 p.m. the following day.

- All persons visiting guests at the structure were required to notify the owners of their presence and to identify any vehicles they were using. All guests were to be notified of this requirement at registration.

- The owners were to post and maintain signs, at the registration desk and in each room, in English and in Spanish, stating the following:

  > All persons who are not registered guests shall notify the registration desk when entering the motel. Persons failing to comply with this requirement may be subject to arrest for trespass. This requirement is for the safety and comfort of our guests and required by Ordinance No. 159640.

- Owners were to cooperate with law enforcement personnel if owners, their agents, or law enforcement personnel suspected criminal activity on the premises.

- If the city or owners determine that a person is in violation of the requirements that all visitors report to the desk, owners agree to request such persons to leave the premises and, should these persons refuse to comply, agree to file such complaints and take such action to arrest and prosecute the person for criminal trespass.

- All traffic was to enter from one street and exit by another.
- Owners were to improve and maintain lighting in and around the motel.
- The city was to provide owners with the names of persons who have been arrested on the premises within the last 90 days, along with their photographs. The owners were to include these names on any exclusion list they maintained.

The motel functioned under these extraordinary restrictions for the period agreed to, but after the abatement order expired, the motel returned to its former practices. Neighboring business enterprises were very upset and convincingly argued that local conditions did not in any way justify the motel's lapses. Other motels and businesses in the immediate vicinity operated profitably completely within the law.

In early 1991, the police had once again built a substantial case against the site and asked the city attorney to refile against it seeking complete closure for the maximum period allowed by law.

PORTLAND'S LANDLORD TRAINING PROGRAM

Portland's Landlord Training Program directly addresses a problem encountered in every community: What can landlords do within the law to protect themselves against tenants who use their property to deal drugs? John H. Campbell was a Portland citizen who saw the value of his own family's property seriously depreciated by narcotics trafficking in his neighborhood. Obtaining grants from the Bureau of Justice Assistance, he formed a non-profit corporation, Campbell Resources, Inc. Working closely with the Community Policing Division of the Portland Police Bureau, Campbell has developed, refined, and marketed a training program for both professional and amateur landlords. It tells them how to avoid renting to potential trouble-makers, how to recognize drug trafficking on their properties, and how to evict drug dealers.

The major points of the program, to each of which a full chapter of the program's training manual was devoted, are summarized in the manual as follows:

Preparing the Property

- Make sure property meets habitability standards. Violations on the landlord's part are recognizable by the tenant and show a willingness by the landlord to look the other way. Violations may also waive some landlord rights.
- Keep the property visible. Cut back shrubs and trees, light entrances, use fencing that can be seen through.

Applicant Screening

- At every step, reinforce the message that you are an active manager, committed to providing honest tenants with good housing and keeping dishonest tenants out.

- Establish written criteria. Communicate them to the applicant. Communicate your commitment to complete applicant screening.

- Thoroughly screen each applicant. At a minimum, check photo ID and social security card, run a credit check, independently verify previous landlords, and don't accept applicants just because your gut says they're okay.

- Apply the rules and procedures equally to all applicants.

- Learn the warning signs of dishonest applicants.

Rental Agreements

- Use a contract consistent with current law or you will lose options.

- Point out key provisions that address "loopholes" and assure that the tenant knows that you take them seriously.

- Get signature on property condition, smoke detectors, and other issues to protect against later false accusations.

Ongoing Management

- Don't bend your rules. By the time most drug houses are identified, they have a history of evictable behavior that the landlord ignored.

  - Don't accept rent after you are aware of a breach, without noting the circumstances in writing and serving the appropriate notices.

  - Serve the appropriate notices quickly to reinforce your commitment.

- Know your responsibilities as a landlord.

- Conduct periodic inspections. It's your responsibility; it's a deterrent; it protects your legal options.

- Watch for utility problems and keep a paper trail of all activity.

- Open communication channels so that you hear of problems early.

  - Trade phone numbers with neighbors.

  - In multi-family properties, start apartment watches.

Warning Signs of Drug Activity

- Dealing, distribution, labs and grow operations all have different characteristics.
- The most common illegal drugs sold today are cocaine (including crack), heroin, methamphetamine, and marijuana.

Clandestine Labs

- If you discover a clandestine lab, leave immediately, wash your hands and face, check your health, call the narcotics unit of your local law enforcement agency. Learn the process involved in cleaning up.

Eviction

- Don't wait. Act. If a tenant is not in compliance, address the situation immediately.
- Know *how* to evict. Get a copy of the landlord-tenant law and read it. If you're not sure, don't guess. Get a lawyer experienced in landlord-tenant relations, Cases are often lost on technicalities. You should:
  - Know the type of eviction notice available to you.
  - Know the process for serving notices and not be afraid to use it.
  - Understand the eviction process *including* the difference between the full-length process and the typical, more rapid outcome.
- If a neighbor calls with a complaint, know how to respond.

Role of the Police

- Know how to work with the police, but don't expect cooperation when your (civil) concerns and their (criminal) concerns conflict.
- In Portland, don't treat a letter from the Drugs & Vice Division as an early warning—treat it as a *final* warning. Take action immediately.
- The Portland Police Bureau sends out four types of letters to landlords. Know how to react to each.

Section 8 Program

- Before renting through Section 8, learn about the program's benefits and drawbacks.
- Recognize that publicly funded renters tend to have broader rights and, for compelling reasons, are more likely to fight eviction.
- Read your contracts carefully—there are differences from private rental contracts. For example:

- The lease is permanent—"no cause" notices are never allowed.
- Other eviction options may have limitations not typically found privately.

- Assure that applicable lease provisions are spelled out in an addendum.
- Know the unique steps involved in screening Section 8 applicants.

In January 1991, Campbell Resources published an evaluation of its work to date. From its 1989 pilot through the fall of 1990, Campbell Resources had conducted 19 training sessions, which run for five hours on a Saturday or on two consecutive week nights. The sessions drew more than 2,000 people, as shown in the following exhibit:

Exhibit 5-3

Attendance for Landlord Training

	89 Pilot	Spring 90	Fall 90	Total
Number of Sessions	5	8	6	19
Number of People	576	838	794	2,208

The training programs have attracted the full range of property managers, including many who have just one or two properties to rent out. Almost two-thirds of the management groups that attended the training managed fewer than ten units. This is important for two reasons. The managers of a small number of units are probably more vulnerable to the depredations of drug dealers because of their limited experience and limited resources, although there are certainly large complexes that have been plagued by drug trafficking. Second, the managers of few units are in the best position to implement what they learn in the training sessions. They are more likely to be owner-managers, less likely to be employees of owners, than the managers of large complexes.

Another important consideration is the number of units affected by the training. The number of units represented by private landlords or small/mid-sized management companies was 33,970. The number of units represented by public agencies or very large management companies was 35,200. The total units represented was 69,170.

In detailed evaluation questionnaires at the end of each session, the programs have received high ratings from those in attendance. In an evaluation six months after the pilot program, 92 percent of the respondents said they had made changes in the way they manage their property. The actions taken included the following:

- More frequent or more careful inspections of property (77 percent)
- Adjustments in applicant screening (74 percent)
- Examination of visibility of property and improvements where necessary (e.g., trimming shrubbery, increasing outdoor lighting) (70 percent)
- Development or revision of written criteria for applicants (62 percent)
- Purchase of updated forms to match current landlord-tenant law (57 percent)
- Exchange of phone numbers with neighbors (46 percent)
- Work on apartment watches (12 percent)

In the four cities studied by ILJ, the Portland landlord training program represented the most significant step towards nuisance *prevention*. It is particularly significant that it was developed in conjunction with Portland's community policing program. While narcotics trafficking is a serious law enforcement problem, it is also a devastating community problem. Community policing seeks to involve the community, to empower the community in the solution of its problems. The landlord training program is an excellent example of providing people with the knowledge they need to regain control of their property and their community.

CHAPTER 6

DENVER, COLORADO

COLORADO DEFINITION OF PUBLIC NUISANCE

The fourth site in ILJ's study of nuisance abatement was Denver, Colorado. As discussed in Chapter 2, the Colorado statute on public nuisances is much broader than those of the other states in this study, including powers found in asset forfeiture statutes of other states.

Article 13 of the Colorado Code of Criminal Procedure, entitled Abatement of Public Nuisance,[1] classifies public nuisance into four classes. The cases reviewed by ILJ were brought as Class 1 Public Nuisance cases, but only a few of them were cases brought against real property and therefore like the cases studied in the other chapters of this report. The majority of the Denver cases were brought to forfeit currency or vehicles. Because the Colorado statute reaches so much further than the other nuisance statutes we have seen, its provisions merit more extensive discussion.

Class 1 Public Nuisances. It is in the definition of class 1 public nuisances that Colorado differs so greatly from other states. A class 1 public nuisance includes every building or part of a building, including the ground upon which it sits and all its fixtures and contents, every vehicle, and any real property when it is used for any of the following:[2]

- Prostitution, pandering, or pimping.
- Gambling, or transporting gambling proceeds, records, or devices.
- Unlawful manufacture, cultivation, growth, production, processing, sale, distribution, storage, or possession of any controlled substance, or imitation controlled substance, except for possession of less than eight ounces of marihuana.
- Receiving or transporting stolen goods.
- Unlawful manufacture, sale, or distribution of drug paraphernalia.
- Child prostitution or sexual exploitation of children.
- Commission of any felony not otherwise included in this section.

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1 C.R.S. §§ 16-13-301 through 16-13-317.

2 C.R.S. § 16-13-303 (1)(a) to (1)(k).

- Commission of felony vehicular eluding.
- Commission of hit and run with serious bodily injury or death.
- Committing a drive-by crime.

The act further provides that:[3]

> All fixtures and contents of any building, structure, vehicle, or real property which is a class 1 public nuisance . . . are subject to seizure, confiscation, and forfeiture . . . . In addition, the personal property of every kind and description, including currency and other negotiable instruments and vehicles, used in conducting, maintaining, aiding, or abetting any class 1 public nuisance is subject to seizure, confiscation, and forfeiture . . . .

The act also declares the following to be class 1 public nuisances subject to forfeiture:[4]

(a) All currency, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for any public nuisance act; or

(b) All proceeds traceable to any public nuisance act; or

(c) All currency, negotiable instruments, and securities used or intended to be used to facilitate any public nuisance act.

The state's right to forfeiture is not absolute. The statute allows an affirmative defense to confiscation and forfeiture if the owner establishes by a preponderance of the evidence that:[5]

- The possession of the property is not unlawful;
- The owner of the property was not a party to the creation of the nuisance; and
- The owner of the property or his immediate family would suffer undue hardship by the forfeiture, confiscation, or destruction of the property.

An owner establishes that he was not a "party to the creation of the nuisance" only if he shows that:[6]

- The property had been taken from him and used without his consent, express or implied, or that he was uninvolved in the public nuisance acts and neither knew nor reasonably should have known of those acts; and
- He had done all that reasonably should have been done to prevent the property from becoming a public nuisance or from becoming involved in public nuisance acts.

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3 C.R.S. § 16-13-303 (2).

4 C.R.S. § 16-13-303 (3).

5 C.R.S. § 16-13-303 (5)(a).

6 C.R.S. § 16-13-303 (5)(b).

In cases under the controlled substance provisions, the act creates a rebuttable presumption that currency is property subject to forfeiture whenever the evidence shows a substantial connection between currency and the acts constituting a public nuisance. A substantial connection exists if:[7]

- Currency in the aggregate amount of one thousand dollars or more was seized at or close to the time that evidence of the violations was developed or recovered; and
- The currency was seized on the same premises or in the same vehicle where evidence of the violations was developed or recovered; or
- The currency was seized from the possession or control of a person engaged in the violations; or
- Traces of a controlled substance were discovered on the currency or an animal trained in the olfactory detection of controlled substances indicated the presence of the odor of a controlled substance on the currency as testified to by an expert witness.

The nuisance statutes we have seen from the other states in this study pertain to real property. The sanctions under those statutes usually include forfeiture of the contents of real property but stop at closure of real property for up to one year. Colorado class 1 public nuisances include vehicles and currency as well as real property, and the statute authorizes forfeiture of all kinds of property. And the inclusion of property "used in the commission of any felony not otherwise included in this section"[8] makes class 1 public nuisances co-extensive with all felony provisions of the Colorado code.

Class 2 public nuisances. The other three classes of Colorado public nuisance are much like the traditional concepts of nuisance. Class 2 public nuisances include the following:[9]

- Any place where people congregate, which encourages a disturbance of the peace, or where the conduct of persons in or about that place is such as to annoy or disturb the peace of the occupants of or persons attending such place, or the residents in the vicinity, or the passersby on the public street or highway; or
- Any public or private place or premises which encourage professional gambling, unlawful use, sale, or distribution of imitation controlled substances, drugs, controlled substances, or other drugs the possession of which is an offense under the laws of this state, furnishing or selling intoxicating liquor to minors, furnishing or selling fermented malt beverages to persons under the age of eighteen, solicitation for prostitution, or traffic in stolen property.

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7 C.R.S. § 16-13-303 (6).

8 C.R.S. § 16-13-303 (1)(i).

9 C.R.S. § 16-13-304.

Class 3 public nuisance. In the next class are activities like traditional non-criminal nuisances. Class 3 public nuisances include the following:[10]

- Conducting or maintaining any business, occupation, operation, or activity prohibited by a state statute; or
- Continuous or repeated conducting or maintaining any business, occupation, operation, activity, building, land, or premises in violation of state statute; or
- Any building, structure, or land open to or used by the general public, the condition of which presents a substantial danger or hazard to public health or safety; or
- Any dilapidated building of whatever kind which is unused by the owner, or uninhabited because of deterioration or decay, which condition constitutes a fire hazard, or subjects adjoining property to danger of damage by storm, soil erosion, or rodent infestation, or which becomes a place frequented by trespassers and transients seeking a temporary hideout or shelter;
- Any unlawful pollution or contamination of any surface or subsurface waters in this state, or of the air, or any water, substance, or material intended for human consumption.

Class 4 Public Nuisance. Practice of a profession or operation of a business without a required license or revocation of a required license is a class 4 public nuisance.[11]

COLORADO CONTRABAND FORFEITURE ACT

In 1984, the legislature enacted the Colorado Contraband Forfeiture Act.[12] The acts covered by the statute include the following:[13]

- Unlawful manufacture, cultivation, growth, production, processing, or distribution for sale of, or sale of, or storing or possessing for any unlawful manufacture or distribution for sale of, or for sale of, any controlled substance, any other drug the possession of which is an offense under the laws of this state, or any imitation controlled substance;
- Unlawful manufacture, sale, or distribution of drug paraphernalia;
- Transporting, carrying, or conveying any contraband article in, upon, or by means of any vehicle for the purpose of sale, storage, or possession of such contraband article;

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10 C.R.S. § 16-13-305.

11 C.R.S. § 16-13-306.

12 C.R.S. §§ 16-13-501 through 16-13-511.

13 C.R.S. § 16-13-503 (1).

- Concealing or possessing any contraband article in or upon any vehicle for the purpose of sale of such contraband article;
- Using any vehicle to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, or purchase for sale of any contraband article, or the sale, barter, exchange, or giving away of any contraband article; and
- Concealing or possessing any contraband article for the purpose of sale.

Like the Public Nuisance Act, the Contraband Forfeiture Act exempts mere possession of less than eight ounces of marihuana.[14]

As far as a defendant is concerned, there is little difference between the two acts. Both subject property, vehicles, and currency to forfeiture. But as far as the prosecuting attorney is concerned, the formula for distribution of forfeiture proceeds among public agencies is more favorable to his office under the Public Nuisance Act than under the Contraband Forfeiture Act. Therefore, where either statute can be used, the prosecutor ordinarily uses the Public Nuisance Act.

DISTRICT ATTORNEY'S OFFICE APPROACH

In Denver, nuisance abatement proceedings are conducted by the district attorney, that is, the prosecutor's office, even though they are civil proceedings. Three lawyers in the district attorney's office handle these cases. They think of themselves as an asset forfeiture rather than a nuisance abatement unit.

It is the district attorney's policy to wait until police have completed their work on a case, but not necessarily until a criminal prosecution has been completed. In fact, in many cases, there never is a prosecution, and the asset forfeiture or nuisance abatement is the full sanction imposed on the offender.

While nuisance abatement proceedings are usually thought of as ancillary to criminal proceedings, no conviction is necessary for an abatement or forfeiture. The owner may not have been charged with any offense.

The district attorney's rule of thumb on cash forfeitures is that if the amount is over $3,000, he files the case as a nuisance abatement. If the amount is under $3,000, the district attorney prefers to use forfeiture as part of the plea bargain with the defendant.

Denver takes a view of abatement against realty substantially different from that in the other three jurisdictions in this study. Under the Colorado nuisance statute, title to real property can be transferred to the state under the type of circumstances encountered in many crack house cases. This possibility has led to a reluctance to use nuisance abatement against single family

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[14] C.R.S. § 16-13-503 (2).

residences. The district attorney does not want to be in the real estate business, and certainly does not want to become a slumlord. In a few of the cases in which the state has gained title to houses, the city has found it very difficult to get rid of them. The Denver real estate market has been very weak in recent years, and the seized properties have been particularly difficult to sell because of their highly offensive condition.

However, the Denver district attorney has found nuisance abatement a very effective tool against commercial properties, which ordinarily can be sold.

The sample of cases reviewed by ILJ included eight against houses. In two of these cases, the house was forfeited. In three others, the owners of the houses were allowed to remain in them, but several named individuals were barred from the houses by the court's final order. We will look more closely at two of those cases in a moment.

STAPLETON INTERNATIONAL AIRPORT

The most striking difference between Denver and the other jurisdiction studied comes in the Stapleton International Airport cases. A Denver police department unit works at the airport to interdict drug traffic. Using courier profiles and receiving support from security personnel and airline employees, the unit has made a number of currency and narcotics seizures.

Because probable cause for a search or seizure does not usually exist in the airport cases, officers of the unit will ordinarily asked a suspect if they may talk to him or her for a few minutes. The officers try to obtain the suspect's consent to a search, either of the person or of the person's luggage. Many people consent to the search. If the suspect is carrying a large amount of cash, the suspects will also be ask for an explanation. The officers will also ask if they can subject the cash to a sniff by one of the unit's two trained narcotics dogs. Again, the suspects often consent. If a dog alerts on the currency, it will be seized, and the prosecutor will be asked to file against it as a public nuisance.

Ten of the cases in the sample reviewed by ILJ were currency seizures at Stapleton. The people involved usually were stopped because they fit into drug courier profiles, but a few were stopped because of specific information provided either by other police departments or by security and airline personnel at the airport. Four of the cases reviewed by ILJ, including one where the seizure was for more than $100,000, ended in default judgments for the city, which means that the suspects simply walked away from the money. In the other six cases, negotiated settlements usually led to a splitting of the seized currency between Denver and the suspect.

Such splits, which occurred in many cases besides the Stapleton cash seizures, usually stem from each side's assessments of its litigative costs and risks. The city has the upper hand because it has the money from the initial seizure. Having the money is always a litigative advantage. The

costs to the city are those of putting on a full forfeiture case. Because the police have usually documented the seizure fully and are experienced witnesses, the litigative cost to the city is not great. The cost and risk to defendants are substantial. The defendants have to pay for representation in court. They have to demonstrate some plausible reasons for carrying substantial sums of cash and some legitimate source for it. The source is also of interest to taxing authorities. It is not surprising that many defendants settle for getting part of their money back. As Exhibit 6-1 shows, often the prosecution and defense simply split the seized money in half.

In both the airport cases and other Denver cases, defendants represented by counsel usually fare better. In the sample studied by ILJ, counsel were usually involved in the cases in which part of the seized currency was returned. Negotiations are common, trials rare. There were no trials in the cases in ILJ's sample.

Denver's nuisance proceedings are summary. The prosecutor's office has developed a set of forms for every step of these cases. Only the supporting affidavits by investigating officers reveal anything about the distinctive facts of each case.

It is impossible to assess the long range effects of these forfeitures on individual defendants. The Denver asset forfeiture unit conducts no follow-up on the people with whom it deals. Most of them, especially the people stopped at the airport, are simply gone. Where forfeiture is collateral to a criminal proceeding, the tracking of the defendants would be done in another part of the criminal justice system.

DENVER CASES

Because ILJ asked specifically to look at some real property cases, the sample of files reviewed cannot be fairly characterized as a random sample. Real property seizures may be over-represented in the sample.

A summary of the data derived from the files reviewed is shown in Exhibit 6-1 at the conclusion of this chapter. Summaries of some of these cases are presented in the following pages. A preliminary comment should be made about the names of these cases.

In the case summaries that follow, we have listed only the file numbers from the district attorney's office. The full formal names of these cases usually name a defendant and identify the specific property being forfeited, reflecting the *quasi in rem* nature of the proceedings. For example, Case 89-06 is formally entitled *People of the State of Colorado* v. *Tony Coleman, Claire Brown, and all unknown persons who claim any interest in the subject matter of this action, $2,750.00 in United States Currency.*

Exhibit 6-1

Denver Caseload Analysis

REFUND	STATUTE		CURRENCY	VEHICLE	REALTY	SIA[1]	DEFAULT	DISMISSED	JUDGMENT	
	PNA	CFA								
89-06[2]	■		2,750			■	■			
89-09	■		4,590				■			
89-10			2,000	Car						
89-11	■		8,060			■	■			
89-12	■		2,078						1,039	1,039
89-13	■		2,100					■		
89-15	■		3,163				■			
89-16		■	10,000			■			5,000	5,000
89-18	■		94,438						94,438	
89-22	■		6,290			■			3,690	2,600
89-23	■		2,579				■			
89-25	■		19,850				■			
89-28	■		7,052			■			4,937	2,115
89-29	■				House			■		
89-29	■		3,194	Truck					Truck	3,194
89-30	■				House		■		House	
89-33	■			Car			■			
89-34	■				House				10,000	Balance from sale

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1 Stapleton International Airport.

2 Because each of the prosecutors in the Denver district attorney's offices numbered his own files, there is some duplication in the following case numbers.

Exhibit 6-1 (continued)

Denver Caseload Analysis

REFUND	STATUTE PNA	STATUTE CFA	CURRENCY	VEHICLE	REALTY	SIA	DEFAULT	DISMISSED	JUDGMENT	
89-35	■			Truck			■			
89-37	■		10,000						5,000	5,000
89-38	■		10,445				■			
89-39	■		7,002					■		
89-39	■				House				House	
89-40	■		13,413		House[3]					
89-40	■		1,700						■	
89-43	■		9,980						5,480	4,500
89-43	■		499		House[4]					
89-44	■							■		
89-45	■		11,875				■			
89-47	■			Car[5]						
89-48	■		35,187			■			21,000	14,187
89-49		■	4,260			■			2,130	2,130
89-50	■		6,336			■			3,168	3,168[6]
89-51		■	14,496				■			

3 Condition: David Molina not to return to house.

4 Condition: Frank Montoya not to be permitted in house.

5 Car returned to owner because of too large a lien.

6 $300 to tipsters

Exhibit 6-1 (continued)

Denver Caseload Analysis

REFUND	STATUTE PNA	STATUTE CFA	CURRENCY	VEHICLE	REALTY	SIA	DEFAULT	DISMISSED	JUDGMENT	
89-52	■		1,500	Truck Car					1,500	Vehicles
89-53	■		7,764						4,270	3,500
90-01	■		9,722			■			6,722	3,000
90-10	■		5,000						4,000	1,000
90-18	■		2,086	Car					2,000	86 Car
90-22	■		4,100						2,460	1,640
90-23	■				House[7]					
90-26	■		2,612		House[8]					
90-28	■		4,065	Car			■			
90-29	■		10,730						4,000	6,730
90-30	■		8,504						6,000	2,504
90-33	■		33,591					Open.[9]		
90-34	■		10,695				■			
90-35	■		4,163				■			
90-38	■			Car			■			
90-46	■			Car					[10]	
90-47		■	102,150			■	■			
90-87	■		12,397	[11]						

7 Partial abatement for one year.

8 Abated. Two named individuals, all Bloods, and all males under 45 years of age, except delivery and repairmen, barred from premises.

9 Defendant asserts that money is from business of many years.

10 Car returned to mother. She is to sell and keep from son.

11 Not yet filed. Agreement reached with counsel to accept service.

The full title of Case No. 89-40 is *People of the State of Colorado* v. *Reagan E. David, Diane C. David, David Marlena, also known as David Molina, and all unknown persons who claim any interest in the subject matter of this action, real property located at 355 1/2 South Eliot Street, situated on N. 1/2 of Plot 9, Block 8, and E. 1/2 vacated alley adjacent, Mountain View Park, City and County of Denver, Colorado, and all of the fixtures, contents, and currency therein including $13,413.33 in United States currency.*

Case 89-06. A Continental ticket agent called the Stapleton Narcotics Unit (SNU) to report that a young black male had just bought a one-way ticket to Los Angeles for cash. He had flashed a large roll of cash and had no identification. Narcotics officers approached and asked if they could talk to him. He produced a roll of cash from his pants pocket, $2,750 he said he had earned working odd jobs. He agreed to go with the officers and consented to a narcotics dog sniff of the money. The dog alerted on the envelope with his money. An aunt appeared the next day and said that she had given the young man the money to take to Los Angeles for an operation for his mother. She did not understand why he had not offered that explanation to the investigating officers. The money was seized and ultimately forfeited in a default judgment.

Case 89-11. Acting on a tip from a Colorado Springs officer, members of the SNU stopped the suspect and asked if they could talk to him. In the course of the conversation, he produced a $8,060 in cash from his pocket. In a consent search, a dog alerted on the cash. It was ultimately forfeited in a default judgment.

Case 89-13. In an arrest for cocaine and heroin trafficking, $2,100 was seized. The prosecutor dismissed the forfeiture case because the cash was forfeited in the companion criminal case.

Case 89-15. Investigators developed probable cause for a search warrant on the home of a suspected marijuana dealer. The search found 82.13 grams of marijuana, several weapons, including a sawed-off shotgun, and $3,163 in cash. The prosecutor proceeded against the cash as a public nuisance, and when the defendant failed to respond, the court entered a default judgment.

Case 89-16. An airport security officer advised the Stapleton Narcotics Unit that a man had just passed through screening with a large amount of cash. Stopped by SNU officers, the man produced $10,000 in cash. He said he was in the restaurant business and was on his way to California to buy more equipment. He consented to a canine sniff of the money, during the course of which he commented to one of the officers: "I don't suppose anyone ever gets the dope money back." The dog alerted on the cash. In a subsequent stipulation approved by the court, the city returned $5,000 and forfeited $5,000.

Case 89-29. Undercover buys of cocaine and heroin provided probable cause for search warrants at four addresses. A 1978 Chevrolet truck and $3,194 were among the items seized. A consent judgment allowed the defendant to remove items of personal property from the truck, but the truck was forfeited. The currency was returned to the defendant.

Case 89-34. In a case to seize a crack house, defendants agreed to sale of the house at fair market value, with a division of the proceeds to be made as follows:

- If the equity in the property after expenses exceeds $20,000, the city will receive by way of forfeiture the first $10,000 at the time of closing and the defendants will keep the remainder of the equity.
- If the equity is less than $20,000 after expenses, then the city and defendants will split the equity on a 50-50 basis.
- It is understood that all mortgages will be paid at the time of closing before any equity is divided by the parties.

The defendants were to maintain payments on mortgages, taxes, utilities, upkeep, and insurance until the property is sold. The consent order also provided that if the defendants were involved in any other Class 1 public nuisance action at any other location in Colorado, the city would have a right to request forfeiture of all the equity in the subject property.

Case 89-38. Two different confidential informants told a Denver narcotics detective that a Hispanic male called "Manuel" was selling cocaine out of apartment 804 at the Parkway Center Apartments. Shown the picture of a man previously arrested by the Denver police department, one of the informants was able to identify him as the man in the Parkway Center. Detectives obtained and executed a search warrant, seizing cocaine, marijuana, LSD, a hydroponic growing chamber, other drug paraphernalia, and $10,445 in currency. A drug dog later alerted on the money. The currency was forfeited as a public nuisance in a default judgment.

Case 89-39. The city dismissed this suit against $7,002 because a stipulated forfeiture in a companion criminal case rendered the nuisance abatement suit moot.

Case 89-39. In a default judgment, the court found the premises at 3240 Columbine Street to be a public nuisance and forfeited them to the state. The order provided that a sheriff's sale be deferred and that any lienholders be allowed to foreclose on any liens. If upon completion of the foreclosure process a lienholder gained a legal right of possession to the premises, the sheriff was to release the keys to the lienholder's attorney or authorized representative. In the meantime, lienholders were to be permitted access to the property for maintenance purposes.

Case 89-40. The complaint in this case alleged that Reagan E. and Diane C. David own the premises at 355 1/2 South Eliot Street, and that David Marlena, also known as David Molina, leased the premises and owned its fixtures and contents. In July 1989, the premises were used for the sale and distribution of cocaine. On July 28, 1989, the premises were the site of an attempted murder. Marlena was arrested and $13,413.33 seized from him at the site. The prosecutor later moved for and obtained a default judgment against the currency, alleging that David Marlena had been served with process but never responded. In a separate consent judgment, the city agreed to allow return of the premises to the Davids, provided that they would "never again knowingly permit David Marlena, also known as David Molina, or any of his employees, agents, associates, or relatives to enter or remain on the premises . . . ."

Case 90-22. On February 16, 1990, two narcotics detectives went to 4985 Bryant Street. Mindy Sue Horn answered the door. The detectives told her that they suspected Mrs. Horn and her husband of storing narcotics inside their residence. Mrs. Horn consented to a search, saying that there was only a small amount of marijuana, which she kept for her personal use. During the search, the detectives found two baggies containing marijuana, and they also found a safe. Mrs. Horn agreed to open the safe, which contained $4,100 in currency. A drug dog later alerted on the currency. The prosecutor filed a public nuisance action against the money, and the Horns retained counsel and contested the action. Eventually, a stipulated judgment was entered in which the state retained $2,460 and the balance of $1,640 was returned to the Horns.

Case 90-23. This action was commenced as a public nuisance action against Lilah Freelon "and all unknown persons who claim any interest in the subject matter of this action, real property located at 2389 Jasmine Street." A consent judgment was eventually entered with several specific provisions. The premises were closed for a period of one year for residential use by any person other than Lilah Freelon.

> . . . For the one year period of time, the premises shall be in the joint custody and control of Lilah Freelon and this court. Only Lilah Freelon shall reside on the premises, on a long term basis.
>
> B. Lilah Freelon is hereby enjoined and restrained, during the one year period of time, from permitting the following persons to enter or remain on the premises for any purpose:
>
> 1. Samuel E. Warren, DOB 8/11/73
> 2. James C. Freelon, DOB 4/13/69
> 3. Steve Freelon, DOB 11/10/70
> 4. ~~Jeremy S. Warren, DOB 3/4/80~~
> 5. Any other male person under the age of 35 years, except Jeremy S. Warren.

> The said premises are specifically closed as against any use or presence by the above persons for the one year period. Upon discovering any of the above persons on the premises, Lilah Freelon agrees to and shall report the presence of such person or persons on the premises to the police and shall sign an offense report for criminal trespass against such person or persons. Such person or persons who are found on the premises without a court order in their immediate possession permitting such presence shall be deemed to be trespassing in violation of § 18-4-502, 503 C.R.S. (as amended). Lilah Freelon shall inform the listed persons of the provisions of this order, as soon as possible after service of the order upon her.
>
> C. Visitation of the excluded persons listed above in paragraph B shall be permitted to occur on December 24 and December 25, 1990, and only on those dates.
>
> . . . . .
>
> G. If the police have a reasonable articulable suspicion that any person is present on the subject premises in violation of this order, they shall be permitted to enter onto the premises to arrest said person.

Another provision returned a car to Lilah Freelon, provided that she was not to permit any of the persons listed earlier to use it. The court retained jurisdiction of the case for one year.

Case 90-26. A similar order was entered against Mary Wilkerson, allowing her to remain at 3951 Colorado Boulevard, but barring the following persons and classes of persons:

1. Johnny Terrell.
2. Harold "Tiger" McClain.
3. Any member of a criminal gang known as the "Bloods."
4. Any other male person under the age of 45 years, except a delivery or repair person.

Mary Wilkerson was also specifically prohibited from having any amount of controlled substance on the premises.

The affidavit in support of the complaint had stated that the premises, a single-family dwelling, had been the subject of at least four search warrant from February 1987 to February 1990. On February 18, 1987, Mary Wilkerson had been arrested for possession of eight ounces of marijuana. In October 1988, 20 pounds of marijuana had been seized at the house. In October 1989, an undercover officer made a buy of marijuana from Johnny Terrell, who used the 3951 Colorado as his permanent address, in the presence of Mary Wilkerson. In February 1990, a confidential informant made a controlled buy at the site. In the search that followed, nine baggies of marijuana, a .44 caliber pistol, and $2,612 in currency were seized.

The house had been used by Bloods for crack and cocaine sales. Officers had contacted several Bloods there, and Harold McClain, a well known gang member, listed the house as his address.

Case 90-46. This case named Vickie Jones, her son Khari Jones, and a 1984 Chevrolet S-10 Blazer as defendants. The prosecutor had filed to forfeit the vehicle, which was owned by Vickie Jones. In a consent judgment, the court returned the vehicle to Vickie Jones with instructions that she was to sell it within 90 days to anyone except Khari Jones, and that Khari Jones was not to receive any of the proceeds of the sale. Paragraph 5 of the judgment dealt further with the problems Vickie Jones had had with her son:

> 5. Defendant Vickie Jones acknowledges that the only reasonable course for the future to prevent her vehicles from becoming a public nuisance or being involved in public nuisance acts is not to permit the use by Khari Jones of any vehicle she owns, and thus waives the affirmative defense provided by Section 16-13-303(5), C.R.S., as to future use of any vehicle she owns by Khari Jones.

CHAPTER 7

CONCLUSIONS AND POLICY ISSUES

BEST FEATURES OF PROGRAMS ANALYZED

Each of the nuisance abatement programs reviewed in this study had features that other jurisdictions could find advantageous in developing their own abatement programs. Combining the good features of these four programs could lead to outstanding programs.

Miami Beach's Nuisance Abatement Board

Miami Beach has the most expeditious system for handling cases. Existence of the Nuisance Abatement Board enables the police legal advisor to get defendants before a body with abatement authority within a few days after the police are ready with their case. Because of the informality of the proceedings, case preparation is far simpler than in the other jurisdictions studied. Police witnesses are called and testify before the board. Defendants are given an opportunity to confront these witnesses and to present their own cases. The board is often ready to render its decision at the end of the first hearing.

Furthermore, the solutions proposed by the Nuisance Abatement Board are tailored by persons experienced in real estate management. Because the board has continuing jurisdiction, it can give owners the opportunity to remedy problems and come back before the board with evidence of their solutions.

All the programs studied provide for warnings to owners, but these warnings are probably least significant in the context of the Miami Beach proceedings. Because there is no delay in getting hearings, there is no great necessity for preliminary warnings or negotiations. The issues can be brought before the board, which can assess for itself whether the landowners should be given more time to cure their violations.

The Nuisance Abatement Board in Miami Beach is explicitly authorized by state statute.[1] But the administrative board authorized by the statute is certainly not unusual. There are many analogues in municipal government, for example, boards or administrative officers for tax assessment equalization, zoning variances, business license issuance and revocation, equal opportunity enforcement, and the like. Whether or not a drug abatement board or officer can be established in a given locality is a matter of state law that will vary from state to state.

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[1] F.S. § 893.138.

But the advantages are obvious: expeditious proceedings, specialization by the board, alleviation of burdens on court dockets. Of course, any administrative system must provide the basic elements of due process of law which are notice and an opportunity to be heard. And the administrative decision should be subject to judicial review. It is interesting to note that, in the first three years of operation of Miami Beach's Nuisance Abatement Board, no one has filed suit challenging a final board decision.

Portland's Landlord Training Program

Portland's landlord training program is a significant step for improving the capabilities of the people responsible to solve their own problems without city intervention. In all jurisdictions studied, there were cases where landowners were unsure of their rights and duties. Portland's program attacks these uncertainties directly.

The Portland program also represents a significant form of preventive action. The training manual lays great emphasis on screening applicants so that landlords do not find themselves with problem tenants.

San Diego's Task Force

Of the jurisdictions studied, San Diego has gone furthest in formalizing a multi-agency task force to deal with nuisances. Houses and businesses that constitute drug nuisances are almost certainly in violation of several other state and city codes. San Diego's task force approach lays the foundation for coordinated full-code enforcement against a property.

Denver's Use of Nuisance Abatement for Asset Forfeiture

Because of the broad reach of Colorado's public nuisance statute, Denver has been able to use it for asset forfeiture, including forfeiture of real property, and to reach forms of property other than real property. The other nuisance abatement statutes examined in this study reach and allow seizure of personal property at a site declared to be a public nuisance, but they do not allow permanent forfeiture of the realty itself. The more usual procedure is to authorize closure of a site for one year, with the title remaining in the original owner. Under circumstances prescribed in the statute, Colorado authorizes transfer of title to realty to the state.

While it may sometimes be desirable to invoke this drastic sanction, Denver uses it with caution. When many properties have reached the physical condition in which they can be declared nuisances, they are not worth having. The city of Denver does not want to seize title to them and then become responsible for maintaining them.

UNDESIRABLE FEATURES OF PROGRAMS STUDIED

There are several drawbacks to the nuisance abatement programs studied by ILJ. Some are inherent in existing statutory requirements, others in the way cities use the nuisance abatement tool.

Other than in Miami Beach, the jurisdictions studied must cope with the delays inherent in civil litigation. If a landowner refuses to cooperate and forces the city to use its full legal authority, Denver, San Diego, and Portland must file suit in their nuisance abatement actions in the local court of general jurisdiction. The cases are placed on the civil docket, where they may or may not receive expedited treatment.

In Denver, the prosecuting attorney has assured the court that he will not impose on the court's time. The typical Denver nuisance case has been carefully prepared so that the court has little to do but review the file and sign the final order. Even in contested cases, the prosecutor tries to reach a stipulated order with opposing counsel, again leaving the court little to do but sign the agreed order. Few of these cases have gone to trial.

Preparation of cases for filing in court, even in Denver, is far more time-consuming and burdensome than in the administrative procedure used in Miami Beach. All the formalities must be complied with: filing of the bill of complaint, service on all defendants, allowing time to pass for filing of answers, scheduling the case for hearings, responding to discovery, and trial. Of course, the full process can be by-passed at any time by agreement of the parties, and most nuisance abatement cases get settled without trial.

Apart from the complexities and inconvenience of litigation, every program examined by ILJ lacked an overall strategic plan of which nuisance abatement was only one part. In developing its city task force, San Diego has articulated the conceptual basis for an overall strategy. The point made, based on the Wilson-Kelling "broken window" theory, is that whole neighborhoods go into decline if individual properties are allowed to deteriorate without intervention. Nuisance abatement attacks the problems posed by these individual properties.

While San Diego's task force concept is a sound one, it does not appear to be integrated into an overall neighborhood improvement strategy. While each of the cases examined was soundly based and well handled, they seemed like good individual cases rather than parts of a broad campaign.

SIGNIFICANCE FOR COMMUNITY POLICING

Nuisance abatement is of the essence of restoration and maintenance of order in a community, a primary police mission. Nevertheless, preparation of a nuisance case requires some adjustments in the way police officers and detectives look at and prepare a case.

Nuisance cases often involve defendants who have had no direct connection with criminal activity on their property. The court is not looking for evidence to support a finding of guilt or innocence. It is looking for a solution to the problem represented by the nuisance, and it has broad powers to create a solution. Invoking the law's strongest provisions and closing a house, apartment building, or business may exacerbate rather than alleviate a neighborhood problem. Boarded buildings may attract rather than exclude undesirables. Neighbors want structures occupied and used by law-abiding citizens.

What this implies for the police is a different form of case preparation. They should be assisting in formulating solutions to the problem. In canvassing a neighborhood to develop reputation evidence, they should be seeking to learn the full scope of the local problem. As we have seen in the preceding chapters, sometimes the solution lies in the exclusion of certain people, even though they are relatives of the owners. With rental properties, careful selection of new tenants may be the solution. Or perhaps structures are in such bad repair that razing them is the best solution. Whatever the best answer may be, it lies in the future, not in the establishment of the elements of a criminal offense, which of necessity always looks to the past.

Nuisances are an excellent example of a community problem to be addressed by problem-oriented or community policing. Unlike an individual criminal, the site of a nuisance cannot be removed from the community (except by razing). As we have seen, a nuisance can "recidivate," that is, a site that has once been cleaned up can again become the site of drug dealing or prostitution or other forms of crime. That is more likely to happen where only the short-term problem has been dealt with, and the circumstances that allowed it to arise persist. This in turn strongly suggests that nuisance abatement should be part of a broader strategy for neighborhood and community rehabilitation.

In all sites studied in this report, citizen complaints played a major role in getting police to act on a specific site. Because community involvement is a major component of community policing, nuisance abatement presents an excellent opportunity for police departments to demonstrate that community involvement makes a difference.

As the Portland landlord training program demonstrates, there are non-police solutions to community problems.

RESPONSIBILITY FOR PROPERTY

From all the sites studied, it is clear that the degree of difficulty in a given nuisance case depends on both the willingness and capability of owners to take full responsibility for management of their property. Exhibit 7-1 shows the types of owners and managers being encountered in nuisance cases.

Exhibit 7-1

Owners-Managers

Who are the owners of the property?

Resident Owner (non-commercial)

- Dealer-participant
- User
- Not in control

Non-resident Owner (non-commercial)

- Relative as tenant
- No manager
- Owner acting as manager
- Property manager
- Professional real estate management firm

Commercial Owner

- Commercial operator
  - Hotel and motel
  - Apartment houses
  - Rental houses
- Security holder who has foreclosed
- Security holder who has not foreclosed
  - No right to possession
  - Must go through procedure
  - Theory of waste

Public agencies

- Housing authorities
- Municipal governments

Who are the managers of the property?

- Resident owner
- Non-resident owner
- Professional manager
- Professional real estate management firm

Where the owner lives on the property and is dealing in narcotics, there is little reason to refrain from invocation of the full sanction provided by law. In Colorado, that can mean seizure of the property and transfer of title to the state. In Florida, Oregon, and California, that can mean closure of the property for a year and seizure of personal property on the site. Where the owner lives on the property and uses narcotics, full enforcement should probably be considered, although there may be mitigating circumstances. All other cases present more difficult problems.

The most difficult cases are those where the resident owners are no longer able to control their property. The worst cases involved grandparents who could not control their crack-dealing grandchildren. In two San Diego cases, the grandchildren were gang members who used the grandparents' home as a base for operations. In one instance, they used the grandparents' home to stash drugs that they sold on a nearby street corner. In another case, gang members made the grandmother's house a hang-out where they used drugs themselves. The grandmother would lock herself in her room at night while the gang used her house.

In these cases, the house constitutes the primary, if not the sole, asset of the grandparents. The value of that asset, never great to begin with, is rapidly depreciated by the drug activities of the grandchildren. Seizure or closure of the house as a public nuisance does not solve the grandparents' problem; it exacerbates it. These cases present the city with a set of problems to which nuisance abatement actions are an important, but only a partial, solution. The courts can frame appropriate orders, but other social service agencies of the city should also become involved. That is why the San Diego task force approach is so important.

Based on this experience, San Diego's abatement team will soon include a new position—a Community Resource Specialist. This person will assist property owners who do not have the ability or resources to regain control of their drug infested properties. Obviously, this assistance will be carefully used to ensure that it does not reward property owners for intentional neglect. Yet, this position may be the missing link to facilitate the permanent rehabilitation of the property. The Community Resource Specialist might coordinate a neighborhood clean-up of vacant lots, guide a senior citizen property owner to appropriate social service agencies, assist in the abatement of nuisance activities by city work crews, and liaison with community groups and the apartment owner's associations.

Because of the flexibility of their equity jurisdiction, courts can fashion remedies to address these situations. Because the real offenders are not owners or necessarily even occupants of the sites to be abated, they have no rights in the sites that can be curtailed by the courts. But they can be barred from the premises by court order. Then, if they appear on the site, they can be arrested as trespassers or cited for contempt of court. In one San Diego case, 12 named individuals and all members of a particular gang were barred from the site. However, despite the court order, some of the named individuals returned, subjecting themselves to arrest.

In another San Diego case, the ultimate solution to the problems created by drug-dealing relatives was for an elderly couple to sell their house and relocate to another city. To reach this solution, they needed substantial assistance and guidance from the city beyond the scope of the nuisance abatement suit itself.

Turning to non-commercial, non-resident owners, the problems that they present are measured by their competence as property managers. Many people who have no special competence in managing property buy houses or small apartment buildings as investments. If they do not hire responsible property managers, they are particularly vulnerable to illegal uses of their property. Such owners are among those who can greatly benefit from programs like Portland's landlord training program.

Two cases illustrate the particular problems presented by these owners. In Miami Beach, a man with extensive experience in property maintenance, but not in property management, bought a small apartment building. Several units in the building were under investigation by the police for narcotics trafficking. The owner claimed ignorance of the alleged drug activity. In proceedings that were still continuing at the time of this study, the Nuisance Abatement Board directed him to hire a resident manager, establish a screening program for applicants, and improve the physical security of the building. He was given a month to produce letters from long-term, elderly tenants attesting to his efforts to improve the building and eliminate trouble-making tenants.

In a San Diego case, a woman who lived in Los Angeles gained title to a house, probably by inheritance. The house was declared a public nuisance and, by agreement between the owner and the city, torn down. But then the vacant lot was taken over by homeless people, and the city initiated another nuisance abatement action against the site. The case was continuing at the time of this study, and the owner had declared bankruptcy.

Commercial owners are in many respects easier to deal with. Their interest in property is presumably to make a profit, and nuisance abatement actions that close properties impose costs while curtailing income. It is to their financial interests to cure the problems as quickly as possible. Nevertheless, there are owners who are operating so close to the financial margin that they believe that they cannot adopt the procedures and make the improvements necessary to bring their properties into compliance with applicable codes. Such owners can expect little sympathy from enforcement officials. Nuisance abatement actions are completely appropriate in their cases.

Occasionally, there are parties with security interests but without possessory rights in a problem property. For example, in Miami Beach, a previous owner had taken back a second mortgage on a building that was being abated as a nuisance. Because such parties usually have no right to immediate possession of the property, they must file other legal proceedings to protect their rights. Ordinarily, they would be in a position to foreclose, but even then their interests

might be secondary to those of a prior security or lien holder. It was suggested to ILJ that such parties might proceed on a common law theory of waste, but we have not researched that question.

In the final analysis, all nuisance questions return to the basic proposition that property owners are responsible for seeing that their property is used in accordance with the law. Nuisance abatement actions are necessary only when owners have been particularly derelict in meeting that basic responsibility.

APPENDIX A

NUISANCE ABATEMENT CASE SUMMARIES

NUISANCE ABATEMENT CASE SUMMARIES

1601 Euclid, Redwood Apts. The Redwood Apartments are a two-story building with 34 units. Investigators observed pedestrian traffic concentrated around three apartments. Narcotics investigators made seven controlled buys in a 12-day span in late April and early May 1988. There was an additional incident of controlled delivery of cocaine a week later. The owner was notified of a Nuisance Abatement Board hearing to be held in June, but he obtained a continuance. At a July hearing, the board closed the building and ordered code compliance.

In November 1988, the board's order had still not been fully complied with, but there had been no further drug arrests. By January 1991, the building had been freshly painted and there were no further problems.

The owner of the Redwood Apartments was to appear before the Nuisance Abatement Board later to account for another one of his properties.

506 Washington, Lily White Laundromat. In November 1988, on the basis of evidence showing four drug transactions, the board prohibited all business for one year. The following September, the city attorney reported to the board that a letter to the owner about a request for rehearing had been returned by the post office. The site is now a vacant lot.

1448 Washington, Check Cashing Service. In November 1988, the board continued the case, provided that off-duty police were hired for security. In January 1989, conduct of any business conducive to nuisance was prohibited, but business could reopen in 30 days. If there were any further evidence of narcotics activity, the business would be closed for one year. The site is now an ice cream store.

744 6th St., My Grocery. In January 1989, on the basis of eight drug transactions demonstrated by the evidence, the Nuisance Abatement Board prohibited all business at the site. In March 1989, the board denied a motion for a stay. It prohibited all business for one year and prohibited the owner from leasing the premises for one year.

In January 1991, the premises operated under the name of "Tu Grocery," a slight variation of its earlier name. It was suspected of still being a site for narcotics dealing.

1326 Pennsylvania, Avivas Apartments. The Avivas Apartments had 36 units. The building had an assessed value of $170,286. In January 1989, the board prohibited all business for one year. But in March, finding that the owner had taken steps to eliminate the drug-related

public nuisance, the board suspended its earlier order contingent on the respondent's continued responsiveness. The board authorized the owner to contract with a real estate leasing company to lease apartments and screen tenants, and it specified these further conditions:

- Resident manager to be employed.
- Background to be screened.
- Resident manager to act as liaison with police department.
- Building to be brought up to Code.
- Proffered improvements:
  - Lighting
  - Screens
  - Cutting of shrubs
  - Painting
- Higher rents to attract better class of tenant.

In September, new owners informed the Nuisance Abatement Board that they planned to renovate and reopen. The board continued jurisdiction until the work has been done.

The new owners performed the following work:

- Refinished all hardwood floors.
- Replaced all appliances.
- Relandscaped the property.
- Installed a fire alarm system.
- Remodeled the kitchens.
- Replaced air conditioners and doors.
- Contracted for fencing.

They had also retained a firm to screen tenants by conducting background checks to include:

- Past residence references.
- Employment information.
- Criminal records.
- Personal references.

New tenants are to pay the first and last month's rent, plus a one month's rent as security deposit.

In January 1991, the building was being gutted and restored.

155 Ocean Drive, Ocean Haven Bar. At the hearing on March 9, 1989, on the basis of evidence of 10 narcotics transactions, the board prohibited all business for one year. ABT also suspended the bar's license. In June 1989, a request to reopen was denied.

In January 1991, the bar was still closed. Apartments above it in the same building were still open. No particular trouble had been associated with them.

949 Washington, 949 Shops Inc. From January 4 to February 17, 1989, undercover officers made seven buys from the proprietress. An additional buy was made on the day of her arrest, and 30 grams of cocaine were seized in a consent search. Gambling devices were also seized.

With evidence of eight transactions before it, on March 9, 1989, the Nuisance Abatement Board prohibited all business for one year. In June, in response to a request, the board agreed that the owners could enter a lease with a new tenant to operate Art Deco furniture business but retained jurisdiction over the case.

In January 1991, the Lucky Lady Beauty Salon was operating on the site. There are no apparent problems with it.

6300 Collins Ave., Lombardy Inn. The police department made nine controlled buys at the Lombardy Inn, seven of which were placed in evidence before the Nuisance Abatement Board. In June 1989, the board continued the case and directed the owner to present evidence of changes and a security plan. In September, the board approved the security measures, but retained jurisdiction. In January 1991, the Lombardy Inn was closed and boarded.

314 72nd St., North Shore Bar. The North Shore Bar was the subject of both Nuisance Abatement Board and ABT action. The matter was continued at the June 1990 hearing of the Nuisance Abatement Board because of the ongoing ABT hearing and because the site was closed. By October 1990, new partners had applied for a license for to conduct a business at the site as the Seaside Oasis.

In January 1991, a known drug dealer, one who had been involved in both the North Shore Bar and the Rowe Motel Bar investigations, was observed standing in front of the Seaside Oasis.

6600 Collins Ave., Rowe Motel Bar. In June 1990, the Nuisance Abatement Board proceeding against the Rowe Motel Bar was continued because of an ongoing ABT hearing and because the site was closed. The police department and ABT investigations had included several undercover and confidential informant buys. One suspect had pulled a knife on a narcotics detective to try to force him to use cocaine. At the July 1990 hearing of the Nuisance Abatement Board, the board prohibited operation of bar for one year. The board also provided that, upon sale to an unrelated third party, the new owners must come before board. In January of 1991, the bar was still closed.

216 Lincoln Road, Flame Steak Disco. The Flame Steak House was a restaurant and disco. Several undercover and confidential informant narcotics buys were made in the disco portion of the establishment. Alcohol Beverages and Tobacco issued an emergency order of

suspension against the disco in April 1990, and its hearing officer recommended a 60-day suspension of license. At its June 1990 hearing, the Nuisance Abatement Board issued an order prohibiting operation of the disco but allowing the restaurant to remain open.

In January 1991, the restaurant was open, but the disco was still closed.

300 Meridian, Apartments. The small apartment building at 300 Meridian Avenue was owned by the same man who owns the Redwood Apartments. It has 24 units. In the case before the Nuisance Abatement Board, the police department documented 17 narcotics buys between June 6 and July 26, 1990. In August and September, the owner obtained continuances, the first because of disputed service, the second because his lawyer left the hearing. But at the October 1990 hearing, the board ordered the building closed and prohibited the business of operating an apartment. In January 1991, the windows were boarded and there was no work apparent on the building.

2976 Webster Street. This property was a small, single-family house that was primarily being used as a shooting gallery by the tenant and his associates. In addition to the injection of illegal drugs, the property was also a congregation place where rowdy conduct, drinking, and use of other illegal substances were a daily occurrence. This case was referred to the drug abatement team by the beat officer, who complained of its being a long-standing problem. The drug abatement detective contacted the absent property owner, who resides in Los Angeles, and arranged for her to visit the property to personally observe the condition of her property. The property owner did visit the site and consented to having the building demolished instead of merely cleaned and boarded, which would have still presented a law enforcement problem in terms of vandalism. With the assistance of the drug abatement detective, who streamlined the demolition process for the property owner, the property was demolished within 30 days of the initial site visit by the property owner.

Unfortunately, demolition of the house did not end the problem. The vacant lot soon became a haven for homeless men, who erected shanties and tents and once again turned the site into a blight on the neighborhood. The property owner agreed with the city to allow the city to clear the lot at her expense. Under the agreement, the lot was to be fenced. The property owner went into bankruptcy.

At the end of September 1989, this property was dismissed from the bankruptcy courts and the city attorney's office obtained an abatement order to clean and clear the lot. The order also allowed the city to re-erect the fence that had been placed on the lot by the property owner. Within a two-to-three week period, the fence disappeared from the lot. It was later discovered that the property owner, who had placed a rent-a-fence on the property had ceased payments and the fence contractor had seized their property. Again, the conditions on the lot began to

deteriorate. It become a site for illegal dumping and reverted to its former use, a heroin shooting gallery.

At the time of the latest abatement, July 16, 1991, there was a large amount of trash and debris that had been illegally dumped on the property. Several transients had again erected shacks and were living on the property. Additionally, the lot was strewn with used syringes. A litter control inspector was on the property and saw one drug user in the process of shooting up. The latest abatement order also allows the city to erect a fence around the perimeters of the property to avoid the trespassing and illegal dumping that has plagued this property since the structure on it was demolished in August 1989.

Las Flores Hotel. This was a less than prosperous small downtown hotel, where drug and prostitution activity was allowed to occur by the hotel management. A stipulated permanent injunction was reached between the property owner and property management, which enjoined all prostitution and drug activity on the premises. Monitoring by the San Diego police department indicates that the drug and prostitution activity has been abated.

Coast Hotel. This is a reactivated past drug abatement target where prostitution and drug activity have begun to reoccur, according to undercover police investigation conducted with the consent of the property management. The stipulated permanent injunction reached between the property owner, the lessee, and property management, required that all prostitution and drug activity cease. Additionally it required the implementation of standard hotel management practices. An action plan between the city attorney's office and the police department is being implemented. This will result in a contempt hearing being held against the parties and possibly new charges being filed against the responsible parties.