

House Bill 4302

Sponsor: Rep. Samuel Buzz Thomas

Committee: Civil Law and the Judiciary

Complete to 10-10-01

A SUMMARY OF HOUSE BILL 4302 AS INTRODUCED 2-2-01

The bill would create the “Drug Nuisance Abatement Act,” which would create a new civil cause of action to allow certain parties to attempt to enjoin certain drug distribution activities or “drug nuisances,” impose civil penalties, create funds, and close premises where drug use and dealing had occurred.

Drug nuisance. The bill would define a “drug nuisance” as premises on which drugs were made, used, distributed, or purchased. More specifically, a “drug nuisance” would mean premises where any of the following occurred:

- three or more separate "drug distribution events" (defined in the bill to mean the unlawful manufacture or delivery of, or possession with the intent to manufacture or deliver, a controlled substance, or an unlawful attempt or conspiracy to commit such acts) occurred during a one year period;
- two or more non-residents gathered on three or more separate occasions during a one-year period for the purpose of using illegal drugs (regardless of whether or not the drugs were distributed or purchased on the premises);
- any amount of a controlled substance were manufactured, more than 50 marijuana plants were growing at one time, or any controlled substance in an amount of one or more kilograms had been kept at one time;
- the premises were used in any way in furtherance of or to promote or facilitate unlawful drug manufacture or distribution.

Funds. The bill would create two funds within the state treasury, a “nuisance abatement and neighborhood rehabilitation fund,” and a “treatment for displaced residents fund.” The state treasurer could receive money or other assets for deposit into either fund and would be required to direct the investment of that money. At the end of the fiscal year, money in either fund would not revert to the general fund but would remain in the funds.

The state treasurer would pay money appropriated and made available by the state on an annual basis for funding local drug nuisance abatement, drug prevention, education, and housing and neighborhood rehabilitation programs into the “nuisance abatement and neighborhood rehabilitation fund” (“rehabilitation fund”). Money appropriated and made available for providing drug and alcohol rehabilitation treatment to residents that had been displaced by the bill’s provisions would be paid

into the “treatment for displaced residents fund” (“residents fund”) by the state treasurer. The Residents Fund would be administered by the Department of Community Health or its designee. Neither fund could be used to supplant existing municipal, county, state, or federal resources for the courts, nuisance abatement, drug prevention, education, housing and neighborhood rehabilitation, or treatment programs.

Plaintiffs. An action under the act could be instituted by any individual living or working within 1,000 feet of the location of the alleged drug nuisance. The counsel for a municipal or county governing body, the attorney general, the county prosecutor for the county with jurisdiction over the location of the alleged drug nuisance, or a community organization could also initiate an action under the act. A community organization would mean any group of individuals who live or work in a building, complex, street, block, or neighborhood, that is in any part located within 1,000 feet of the premises alleged to be a drug nuisance and whose purpose as a group is to benefit the quality of life in its neighborhood or community, including providing treatment programs.

A plaintiff would not be required to post a bond or any other form of security in order to begin a drug nuisance abatement action. Further, a plaintiff or anyone else who maintained or enforced an order under the act would be immune from civil liability for any losses or damages that might occur to the premises or any personal or movable property located at the premises.

Defendants. Any action under the act would have to be brought against the owner of the residence or property and could also be brought against the landlord, tenant, manager, operator, or supervisor of the alleged drug nuisance premises. The complaint would also have to list the property in question as a defendant and describe the property by street address, block and lot number or other appropriate means.

For the purpose of determining the owner of the property, the register of deeds’ office would, upon the plaintiff’s request, provide the name and address of the owner of the property from the office’s records without charge. The cost of these requests would be paid from the Rehabilitation Fund. The person in whose name the premises were recorded in the register of deeds’ office would be presumed to be the owner of the property. In addition, evidence that an individual had been the manager, operator, or supervisor, or was in some other way in charge of the alleged drug nuisance premises at the time the drug activity occurred, would raise a rebuttable presumption that he or she was an agent or employee of the landlord, owner, or lessee of the premises.

Drug nuisance abatement actions. An action to abate a drug nuisance could be instituted in addition to any other action or remedy allowed by law and would have to be brought before the circuit court and proven by a preponderance of the evidence. Such an action would have to be heard by the court on an expedited basis.

To initiate an action under the act, a complaint would have to be personally served on each of the defendants and all defendants would have to receive notice. However, if after 20 days from the filing of the complaint, the plaintiff filed an affidavit that in spite of due diligence he or she had been unable to serve one or more of the defendants, service by certified mail and affixing a copy of the complaint to the premises would be permitted. In such a case, service would be deemed complete

five days after the complaint was mailed and the plaintiff had filed an affidavit with the court that the copy of the complaint had been properly posted.

Any tenants or residents (other than transient guests of a hotel, motel, or guest house) of the premises that might be affected by the action would also have to be provided with reasonable notice of the suit (as determined by the court) and an opportunity to be heard at all hearings on the matter.

In addition, notice that the premises were involved in a pending civil action (notice lis pendens) would have to be filed with the register of deeds' office at the same time as the complaint.

The circuit court would have authority over the premises where the drug activity allegedly occurred (in rem jurisdiction) allowing the court to seize and hold that property. If the court determined that either a preliminary or permanent closing order were warranted and the premises involved contained multiple residences, dwellings, or businesses, the order would have to be limited, so far as was practicable, to the portion of the premises necessary to abate the drug nuisance and prevent its recurrence. In addition to any other relief provided by the act, the court could order a defendant to provide relocation assistance to any tenant ordered to vacate the premises, provided the court determined that the tenant had not been involved in and did not knowingly aid in the nuisance. Relocation assistance would have to include moving costs, security deposits for utilities and comparable housing, lost rent, and other expenses as determined reasonable by the court.

If a drug nuisance abatement action ended in a settlement or judgment in favor of the plaintiff, the plaintiff would be entitled to recover the actual costs of the action, including attorney fees, expenses for investigation, and for enforcement of court orders. The defendants would be jointly and severally liable for payment of these costs.

Action for damages. In addition to an action to abate a drug nuisance, anyone whose property or business had been damaged by a drug nuisance could bring a separate action for actual damages against anyone who had knowingly conducted or allowed the drug nuisance. In such an action, evidence that the defendant had failed to initiate an eviction action against a tenant under the "Expedited Eviction of Drug Traffickers Act" after having been notified by certified or registered mail of the tenant's drug distribution activities would be sufficient to show that the defendant had knowingly permitted the conduct constituting the drug nuisance. (Note: The bill makes reference to the "Expedited Eviction of Drug Traffickers Act". However, currently, there is no companion bill that has been introduced that would create the Expedited Eviction of Drug Traffickers Act.)

Any evidence that could be or had been used in an action for an injunction or other civil relief under the act could also be used in an action for damages. In addition, expert testimony as to the amount of actual damage or loss would also be admissible. Further, the plaintiff in an action for damages would also be entitled to costs in the same fashion as a plaintiff in an action for injunctive relief or penalty and the defendants would also be jointly and severally liable.

Evidence. All relevant evidence would be admissible, including evidence of reputation, the use or threat of violence, and prior efforts or lack of effort by the defendant to abate the drug nuisance. Evidence that the "drug distribution event" used to establish the drug nuisance had resulted in an arrest, prosecution, conviction, or adjudication of delinquency would not be required. However, evidence of a criminal prosecution or juvenile adjudication that resulted in a conviction or adjudication of delinquency for the drug distribution event that constituted the nuisance would create

a rebuttable presumption that the event had occurred. In addition, any evidence or testimony from such a criminal or juvenile proceeding would be admissible.

If a juvenile proceeding that had not resulted in an adjudication of delinquency had been closed to the general public under the juvenile code, the court could order the evidence or records opened if it found that the records or evidence were relevant to the fair disposition of an action under the bill.

Further, anyone who in good faith testified, participated, instituted, or encouraged someone to institute, participate, or testify in an action under the bill or provided information relied upon by a person in instituting or participating in a civil action under the bill would be immune from civil liability.

Law enforcement agencies would be required to provide full or edited police and/or forensic records and reports that concern drug distribution events committed on the involved premises to any person seeking to secure compliance with the provisions of the bill. However, if the agency believed that the information would jeopardize an investigation, prosecution, or other proceeding or would violate federal or state law, the agency could refuse to disclose the information.

Finally, if their testimony were needed to prove the drug nuisance, the court could issue orders to protect certain witnesses who were not police officers where there had been a prior threat of violence or act of violence by the defendant or any other person. In order to protect the witness, the court could bar disclosure of the witness' name, address or other information that could identify the witness.

Continuances, stays of proceedings, and dismissals. The court could not grant continuances or stays except for compelling and extraordinary reasons, or for good cause if sought by the prosecuting agency. Cases also could not be dismissed for want of prosecution (failure of the plaintiff to move the case forward in a reasonable fashion) unless the court were clearly convinced that the interests of justice required the dismissal; however, such dismissal would have to be without prejudice. Further, if the court determined that the plaintiff had failed to prosecute the matter with reasonable diligence, the court could substitute an otherwise authorized person as plaintiff, provided that person consented to the substitution.

Preliminary injunctions. A plaintiff could seek a preliminary injunction under the act by alleging that the premises constituted a drug nuisance. After receipt of such a complaint the court would have to schedule a hearing within thirty days. The plaintiff would be required to notify the owners of the premises at least five days before the hearing, and if the plaintiff were unable to do so, the court could reschedule the hearing. The court could issue a preliminary closing order if the court found that the premises were a drug nuisance, the owner's agent had been notified of the drug nuisance by certified letter at least 30 days before the complaint seeking injunctive relief had been filed, and the public health safety, or welfare immediately required it.

If a pretrial restraining order or closing order was warranted, the local sheriff or police department would be responsible for enforcing the order. An officer would be required to post a copy of the order in a conspicuous place or on one or more of the principal entrances of the premises. If

the order closed the premises, a printed notice with block lettering stating "closed by court order" of sufficient size to be observed by anyone trying to enter the premises and stating that the entire premises or a portion of the premises were closed by court order would have to be posted with the court order. The notice would also have to include the date of the order, the court that had issued the order, and the name of the law enforcement agency that had posted the notice. If the order was a preliminary restraining order, a notice stating that certain activity was prohibited and that removal of furniture, fixtures, or other personal or movable property was prohibited by court order would have to be posted with the court order. The act would also provide that anyone who mutilated or removed a posted notice or order without proper authority would be guilty of a misdemeanor.

When an officer served a preliminary closing order, he or she would be required to provide outreach information and referral materials on how to obtain alcohol and other drug rehabilitation treatment to all the residents of the premises who were present at time. A one page summary of the information and materials would have to be posted with the preliminary closing order and notice. The materials and information would be prepared by the Department of Community Health or its designee and would be provided to all sheriffs' departments and local police departments with the authority to enforce closing orders under the act.

The court would be required to notify local alcohol and other drug counseling or treatment agencies, the local child welfare agency, and other appropriate service agencies of the pending removal of an individual at least 10 days prior to that removal.

Post-trial penalties. If, after trial, the court determined that the subject premises were a drug nuisance, the court would be required to grant permanent injunctive relief as necessary to abate the nuisance, order the closure of the premise or an appropriate portion thereof for up to one year, and impose a civil penalty. The court would be required to issue orders to abate the drug nuisance and to prevent its recurrence. The court's orders, to accomplish this, could include, but would not need to be limited to, any of the following:

**** Directing the sheriff to seize all materials and equipment that had been used to create and maintain the drug nuisance and to sell them with the net proceeds to be paid into the Rehabilitation Fund and the Residents Fund.**

**** Allowing the plaintiffs to repair or otherwise alter the premises to bring it into compliance with the applicable codes, regulations, ordinances and statutes. The expenditures could then be filed as a lien against the property.**

**** Closing the premises or an appropriate portion to the extent necessary to abate the nuisance with a copy of the order and the judgment to be posted in the same fashion as a preliminary closing order for up to one year.**

**** Ordering the suspension or revocation of a business, professional, operational, or liquor license.**

**** Ordering the suspension of city, state, or federal governmental subsidies paid to the property owner until the nuisance has been abated.**

** Appointing a temporary receiver to manage or operate the property for as long as the court deemed necessary. A receiver would have the powers and duties ordered by the court, which could include, but would not be limited to, all of the following:

- a) Dealing with rents due from the tenants, including spending such money to further the receiver's powers.
- b) Leasing or renting the property or portion of the property.
- c) Maintaining the property or making or authorizing needed repairs.
- d) Hiring security or other personnel as necessary for the operation of the premises.
- e) Hiring an attorney to bring or defend against lawsuits arising from the receiver's management of the premises.

A receiver, whether appointed before or after trial, would have to be sworn and affirm faithfully and fairly to discharge the trust committed to him or her. If the court deemed it necessary, the court could also order the receiver to post a bond for an amount set by the court.

A permanent injunction issued under the act would be a lien against the premises found to be a drug nuisance. A judgment against the defendant that imposed a civil penalty or costs would be a lien upon real estate owned at the time the judgment was rendered and upon any real estate that the defendant subsequently acquired for a period of 10 years after the date of the judgment.

Closure of the premises. Unless the court was clearly convinced that the closure would exacerbate rather than eliminate the nuisance or would be extraordinarily harmful to the community or public interest, the court would be required to order the closure of the premises or an appropriate portion thereof. Such a closing of the premises would not constitute an act of possession, ownership, or control by the court, the plaintiff, or the government official or entity responsible for enforcing the court's order.

If the defendant submitted clear and convincing proof that the drug nuisance had been satisfactorily abated and was not likely to recur, a decision to close the premises or some portion thereof could be vacated at any time after the trial. In deciding whether to vacate such a decision, the court would have to consider the nature, severity, and duration of the drug nuisance and all other relevant factors, including all of the factors used to determine whether it would be appropriate to modify or vacate a pretrial closure order.

Once the premises or a portion of the premises had been closed by court order, the premises could not be reopened without an inspection and finding that the premises were in compliance with applicable state and local housing, building, fire, zoning, health and safety codes, ordinances, statutes and regulations. If the inspection revealed violations of the codes, the court would be required to issue orders or grant relief as needed to bring the premises into compliance. Until the premises were

brought into compliance with the codes, the court could order the premises to remain closed, even if doing so would cause the closure order to exceed the one-year time limit.

Civil fine. In addition to the other penalties, the court would also be required to impose a civil penalty against any defendant who knowingly conducted or permitted a drug nuisance. The penalty would be the greater of \$25,000 or the market value of the entire premises involved. If the court determined that, under the totality of the circumstances, this penalty would result in a miscarriage of justice, it could lower the amount of the penalty. Ten percent of the civil penalty would be used to offset the costs of collection, and the remainder would be split in half. Forty-five percent would be deposited in the Rehabilitation Fund and the remaining forty-five percent would be deposited in the Residents Fund.

Failure by the defendant to initiate an eviction action under the Expedited Eviction of Drug Traffickers Act against a tenant after having been notified that of the tenant's drug distribution activities by certified or registered mail, or evidence that within two years before the present drug nuisance a prior closure order had been vacated because the defendant had established that the nuisance had been abated and was not likely to recur, would be considered sufficient evidence to establish (if not rebutted) that the defendant had knowingly permitted the drug nuisance.

An unpaid civil penalty could be waived, suspended, or revoked if the defendant transferred title of the premises to the plaintiff or a community organization approved by the court and the court were satisfied that the defendant had not violated any orders issued under this act. A community organization would have to be a nonprofit incorporated organization or association that is exempt from taxation under section 501(c) of the Internal Revenue Code and was authorized by its charter to rehabilitate, restore, manage or operate commercial or residential premises. The defendant would be required to retain all state and local tax liability of the premises, unless the organization agreed otherwise. In addition, if the defendant refused to meet the tax liability and the organization had not agreed otherwise, the defendant's obligation would attach to any other real property in the same county owned by the defendant.

Negotiation. Settlements made by the parties would be subject to the court's approval and could be reached at any time before or after trial. The court could vacate a closing order at the plaintiff's request if, as with the removal of a civil penalty, the defendant had transferred the title of the premises to the plaintiff or a community organization. No prerelease inspection of the property would be required if the defendant agreed to transfer the property in this manner. However, if the parties reached a settlement involving the transfer of the property or title to the property were transferred by a defendant to avoid payment of a civil penalty under the act, the property would not be exempt from the applicable zoning, health and safety codes.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.