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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Petitioner,

vs.

CASE NO. 70,524

MID-FLORIDA GROWERS, INC. AND HIMROD & HIMROD CITRUS NURSERY, a partnership composed of Joe Himrod and Joe B. Himrod,

Respondents.

RESPONDENTS' ANSWER BRIEF

M. Stephen Turner
BROAD AND CASSEL
P.O. Drawer 11300
300 East Park Ave.
Tallahassee, FL 32302
904/681-6810

ATTORNEYS FOR RESPONDENTS

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STATEMENT OF THE CASE

Petitioner, referred to as the "Department", seeks review of the decision of the Second District Court of Appeal in Case No. 86-2785, dated April 10, 1987, and published at 505 So.2d 592. A copy of that decision is appended to this Brief.

Respondent citrus nurseries brought suit for inverse condemnation against the Department in the Circuit Court for Hardee County. Respondents will be referred to as "Plaintiffs" or "Mid-Florida" and "Himrod".

The case proceeded to non-jury trial on September 10, 1986 before the Honorable Oliver L. Green, assigned from Polk County. (A. 1-177). The issues were framed by the Second Amended Complaint, Answer, and approved Pretrial Stipulation of the parties. (A. 178-187). Pertinent evidentiary matters not contained in Petitioner's Appendix ("A") are also appended hereto and referenced as "App."

The Second Amended Complaint alleged that while the Department could order the immediate destruction of Plaintiffs' citrus trees on an emergency basis to benefit the citrus industry as a whole, nevertheless, the citrus trees were actually healthy and undiseased, and the Department therefore caused a taking and was obligated to pay just compensation. (A. 180).

The Department contended that destruction of Plaintiffs' nursery stock was pursuant to regulatory power and therefore could not constitute a taking. The Department

stipulated, however, that whether a taking occurred under the circumstances was a disputed issue of fact.[1] (A. 184).

On October 10, 1986, the Circuit Court entered an Order of Liability for Taking, finding that while the Department had acted within its economic police power, a taking occurred in the particular circumstances of this case for which full and just compensation must be paid. (A. 188).

On appeal of this non-final Order determining liability in favor of Plaintiffs, the Second District unanimously affirmed through Judges Ryder, Campbell and Lehan. (A. 190-99; App. 1-5). The Second District held that Plaintiffs' suspect nursery stock was actually healthy, that

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[1]The Department also asserted for the first time in the Pretrial Stipulation that Respondent had released all claims for compensation (in receiving financial assistance of less than 30% of the value of their destroyed citrus trees). Plaintiffs asserted that release was not an issue in the case. (A. 185). The Department had not raised the affirmative defense of release in its Answer, and therefore waived any such defense. Sottile v. Gaines Const. Co., 281 So. 4458, 560 (Fla. 3rd DCA 1973). Furthermore, in absence of such asserted defense, Plaintiffs had not advanced or conducted discovery on the countervailing issues of financial duress, see NM Investors Life Ins. v. Prof. Grp., 468 So.2d 532 (Fla. 3rd DCA 1985), or unconstitutionality, see Storer Cable TV of Fla. v. Summerwinds Apt. Assoc. Ltd., 451 So.2d 1034 (Fla. 3rd DCA 1984) and Beattie v. Shelter Prop., 457 So.2d 1110, 1113 (Fla. 1st DCA 1984). Over objection, the Circuit Court permitted introduction of evidence on the release issue, subject to rebuttal. (A. 33-36, 45-48, 56-57). The Circuit Court found that the Department knew that Plaintiffs did not authorize full satisfaction of their claims and agreed to accept any payment as partial only, and that the Department thereby forewent any right to rely on its own conditions of payment. (A. 174-75, 188-89). Because no release occurred, it was unnecessary to address the avoidance issues of financial duress and unconstitutionality. The Department did not assign error on this issue.

valid exercise of police power did not preclude suit for inverse condemnation, that whether regulatory action amounts to a taking is determined on the facts of each case, that destruction of Plaintiffs' healthy nurseries helped assure the continued vitality of the State's citrus industry and thus benefitted the entire economy, and that the Circuit Court's determination of the Department's liability for inverse taking was clearly supported by substantial evidence.

Although expressing belief that its decision was correct, the Second District certified the question of whether the State can constitutionally destroy suspect plants which are later proven to be healthy without paying just compensation. (A. 199; App. 5).

STATEMENT OF THE FACTS

Because inverse taking turns on the particular facts of each case, and because the Department does not make an adequate presentation of the operative facts and circumstances, Mid-Florida and Himrod present a full statement of the evidence they adduced as Plaintiffs in the trial proceedings. This discussion will highlight the overwhelming evidence that their nurseries were in actual fact undiseased and not in imminent danger of infection or infestation when they were destroyed.

Undisputed Background Facts
(A. 184-85; App. 2)

The parties stipulated that in April 1984, Plaintiffs obtained citrus budwood from Ward's Nursery in Polk County to use at their nurseries in Hardee County. On August 27, 1984, some five months later, a form of citrus canker bacterial disease was detected at Ward's Nursery.

The Department obtained samples on September 6, 1984, to determine whether Mid-Florida's nursery stock was infested. On September 10, 1984, the Department informed that the tests were negative, i.e. did not establish that any stock was infected by or infested with citrus canker.

On October 2, 1984, Plaintiffs were advised that their nurseries must be burned and that quarantine was not an acceptable alternative.

From October 7 to October 19, 1984, the Department burned some 137,880 of Mid-Florida's and 143,594 of Himrod's citrus trees.

On October 16, 1984, the Department entered an emergency confirmatory order designating Plaintiffs' nurseries as eradication areas and directing immediate destruction of their nursery stock within 125 feet of plants budded from Ward's Nursery.

Himrod Nursery

Joe Himrod raised citrus and was in the citrus nursery business for over 40 years. He served on the County and State Citrus Advisory Committees. (A. 6).

On April 6, 1984, Mr. Himrod and his son cut about 1,000 budsticks (6" twigs or shoots) from citrus trees in Ward's Nursery. Their purpose was to carve out about 8,000 "budeyes" from the budsticks to graft onto root stock seedlings (liners) in Himrod's nursery to grow pedigree citrus trees. (A. 8-9).

When the Himrods cut the budsticks at Ward's nursery, they checked for visible symptoms of disease and found none. The budsticks came from a block at Wards where no infection was ever found. The Department certified on their purchase invoice that the budsticks were visibly free of disease and met the requirements of Ch. 581, Florida Statutes. (A. 9; App. 16).

The Himrods removed the leaves from the budsticks when they were cut. The budding tools were disinfected as a routine precautionary measure to prevent spread of any possible bacterial infection. (A. 10, 31).

The budsticks were packed in bundles with ice and transported back to Himrod's nursery. The budsticks stayed in refrigeration until the following day when they were unwrapped and placed on benches to dry in the sunlight. The "eyes" were then removed and inserted (budded) in seedling liners. These budded liners were placed in two of Himrod's

ten greenhouses. The small budsticks were discarded and destroyed. (A. 10-12, 29).

Over the next 5 months, some 30,000 citrus trees from the same or adjacent greenhouses in Himrod's nursery were transferred out to customers (grove owners or field nurseries). None of these transferred plants were ever deemed suspect or destroyed. None were ever found diseased, and no canker was ever discovered in any location to which the plants were transferred. (A. 13).

In late September 1984, state officials informed Mr. Himrod that the 8,000 liners budded from Ward's budsticks were considered "suspect". The Department made several inspections for canker leaf symptoms, but no infection was ever discovered. In fact, nothing sufficiently resembled a canker symptom to even justify taking a sample for laboratory analysis. Mr. Himrod never saw anything that appeared to be wrong with any plant. (A. 12, 14).

In October 1984, Mr. Himrod was told that the Department had no alternative but to destroy his nursery. Burning was ordered for a total of 143,594 citrus trees of differing varieties and ages. (A. 15-16; App. 17-18).

Only about 9,000 potted citrus plants some 200 feet away from Himrod's greenhouses were not destroyed. These ornamental plants continued to remain at the site, but they never manifested any symptom of citrus canker. (A. 17).

About two months after the burning, the Department also sampled Mr. Himrod's citrus grove adjacent to the nursery.

The plant pathology report was negative, and the grove also never manifested any symptom of canker. (A. 17; App. 19). Mr. Himrod had reset citrus trees from the nursery into the grove during the April to September 1984 period, yet none of these reset plants ever manifested any symptoms of citrus canker before or after the burning. (A. 18).

Mid-Florida Nursery

William Lambert, a part owner, testified that in April 1984 Mid-Florida Nursery cut about 700 budsticks from Ward's and budded them in the same manner as Mr. Himrod. Most of the budsticks came from a block at Ward's where no infection ever occurred, and all were certified as visibly free of disease and in compliance with Chapter 581. (A. 37-39; App. 20).

Mid-Florida and Himrod worked together for the past four years to develop and use a new type of greenhouse growing technique for budded liners called "lopping". Once the bud became part of the plant, the top was removed or bent so that the bud became the apical point. In this manner, the budeye and all foliage from the bud were bathed by direct sunlight over a period of weeks. The intensity of sunlight exposure was even greater because these budded plants were in greenhouses that had no roof. This unusual technique used by both Plaintiffs reduced the chances of any bacteria surviving because direct exposure to ultraviolet light destroys bacteria. (A. 39-42, 51-52).

During the period April to September 1984, Mid-Florida transferred over 20,000 greenhouse citrus trees from its nursery to other locations. None of these transferred trees were ever deemed "suspect" or destroyed, and none has ever manifest any symptom of citrus canker. (A. 42).

In September 1984, the Department inspected Mid-Florida nursery and took samples for laboratory analysis. Mr. Lambert told the inspector that the sampled spots were from pipe drippings of PVC glue. The inspector said the Department was looking for any spots on leaves. The laboratory report, of course, was negative, noting that "these symptoms are unlike those of citrus canker". (A. 42-43; App. 21).

Nevertheless, Mr. Lambert was told by the Department that his nursery would have to be burned to protect the citrus industry of Florida from any possible spread of citrus canker. (A. 43-44). Some 137,980 greenhouse plants were ordered burned, including 8,000 liners budded with budeyes from Ward's in April 1984, which were the youngest plants in the nursery. (A. 44; App. 22-24).

The budded liners had gone through a complete growing season in optimal conditions for development of bacteria (i.e. high heat, density, and humidity), yet no symptom of citrus canker had manifest in them or any other plant at Mid-Florida nursery. (A. 50-55).

Only about 2,500 ornamental citrus trees situated about 250 feet from the greenhouses were not burned. These were constantly scrutinized by the Department for a long time after the burning, but none ever showed any sign of citrus canker. (A. 45).

Mr. Lambert testified that about 90% of Mid-Florida's business was destroyed by the burning. (A. 48).

Plaintiffs' Expert Testimony

Dr. Chancellor Hannon, a plant pathologist who worked for 9 years at the Department's Lake Alfred Citrus Experiment Station and was serving as a member of the Joint State-Federal Technical Advisory Committee on Citrus Canker, testified as an expert witness for Plaintiffs.

Dr. Hannon testified that the Department had assumed in 1984 that the virulent "Asiatic" or "A" strain canker was involved. But the canker at Ward's nursery turned out to be a mild, even weak pathogen now called the "nursery" strain. This "nursery" strain is not an aggressive or widespread disease nor a devastating threat to the citrus industry. (A. 67-68).

No grove trees around Ward's nursery were ever infected. And only seven trees among hundreds of thousands moved into groves from nurseries actually infected by this mild "nursery" strain were ever found positive in the field. (A. 68-69).

Dr. Hannon also testified that the Department's emergency rule requiring destruction of all trees within 125

feet of any plant or plant part relocated in a nursery from another nursery at which some infection was later discovered, was an unknown concept in bacterial disease treatment. (A. 74). When this guideline was first adopted by the Technical Advisory Committee on September 23, 1984, no one knew what they were dealing with. Everyone was in a state of panic, and action was taken out of fear more than knowledge. (A. 88).

If the concept of tracing exposed plants had validity, plants transferred from a relocated nursery should be followed to third and fourth locations, and all plants at these locations destroyed too, even though no infections were ever found. (A. 75).

By the time of trial two years later, this concept of wholesale destruction of suspect nurseries was abandoned in favor of a risk assessment program which observed the actual progress of any disease. Even infected nurseries are not currently destroyed under this program, but rather, infected trees are simply removed from the nursery. (A. 76, 93-94).

Dr. Hannon testified that Plaintiffs' nurseries were definitely not infected nor in imminent danger of infection at the time of their destruction. There were no lesions or other symptoms of infection, which must be present for inoculum (bacteria) to be produced to infest the plants and spread. If infection is imminent, there will be visible symptoms within 6 to 15 days. (A. 78-79).

Dr. Hannon also noted that other circumstances likewise supported his opinion. (A. 79-87).

°When Plaintiffs cut their budsticks, the derivative citrus trees at Ward's nursery had grown for two years and gone through regular inspections without any symptoms of canker, and canker did not occur at Ward's until five months thereafter.

°The budwood cutters did not notice anything peculiar when the sticks were cut.

°Clipping of the leaves at the site greatly reduced the chances of any inoculum being carried because the stomata cavity source is removed.

°Exposure to sunlight to dry the sticks would diminish the number of any bacteria.

°Removing the budeyes and discarding the stick further reduced the risk of infection.

°Any inoculum concentration on a budeye would be extremely small, whereas infection requires a substantial concentration.

°Plaintiffs' lopping technique of exposing the growing bud to sunlight would have a sterilizing effect on any bacteria.

°Even if some small amount of bacteria were present, that certainly does not mean that plants get infected (which is necessary for infestation and spreading).

°The budded liners had been in Plaintiffs' nurseries for a full growing season (May-September 1984) without any symptom of infection although the conditions were highly conducive to the development of disease.

Dr. Hannon came to the inescapable conclusion that not enough inoculum, if any, was present to cause disease. Furthermore, the possibility of any infection would be even further reduced because only a mild strain of canker was actually involved. (A. 81-82). Accordingly, the liners budded from Ward's budsticks and all of the other plants in Plaintiffs' nurseries were in fact healthy and valuable at the time of their destruction in October 1984. (A. 83).

Department's Witnesses

Excerpts of the deposition testimony of the Department's designated official representative were presented. (A. 100; App. 6-15).

This Department witness testified that when canker was first discovered at Ward's nursery in 1984, there were many unknowns, and that the Department simply assumed the most severe kind of canker was involved because nothing else was known. (App. 10). The approach of destroying everything at Plaintiffs' nurseries because of a paper trace of some possibly exposed plant parts at another nursery admittedly served to assure the stoppage of possible spread of disease not known to exist in the event the disease may be present. (App. 11-12).

The Department also called an expert witness who concurred on cross-examination that destruction of Plaintiffs' nurseries occurred solely because plant parts were taken there from a nursery where canker was later discovered. (A. 143-44). This is a prudent management or preventative-medicine type measure to prevent any possible economic harm to the state's citrus industry. (A. 126-27, 157-58). The Department expert agreed the situation was comparable to destruction of a large circle of land to be sure that any possible problem of unknown dimensions was contained. (A. 158-59).

The Department expert acknowledged that the State's Citrus Canker Action Contingency Plan, which had been

developed over many years, did not contain any recommendation for so-called "exposed" plants (i.e. non-infected plants taken from a nursery where canker was discovered several months later). However, on a Sunday morning in early September 1984 shortly after the outbreak at Ward's nursery was first discovered, the Technical Advisory Committee decided on the emergency rule adopted by the Department to burn these so-called "exposed" plants and everything within 125 feet surrounding them, regardless of whether infection was actually discovered in them or anywhere at the relocated nursery. (A. 132-33). Of course, even the basic assumption for this panic decision was wrong since only a mild strain of canker was actually involved, not the virulent Asiatic strain. (A. 136-37).

The Department expert conceded that while infection had been found at other destroyed nurseries, no infection was ever found at Plaintiffs' nurseries, and none of the 50,000 plants transferred from these nurseries to other locations after the Ward's budding ever became infected. (A. 142, 151).

Finally, the Department expert conceded that measures such as decontaminating budding tools, freezing budsticks, and exposing budeyes to direct sunlight would further reduce the possibility of sufficient bacteria being present at Plaintiffs' nurseries to cause infection; and further conceded that he could not give an opinion that any infection existed or would likely exist at Plaintiffs' nurseries when they were destroyed. (A. 133, 138-43, 172).

Rulings Below

Based on the above evidence, the Circuit Court found that the Department had acted within its police power to protect the State's citrus industry for economic reasons, but that in the circumstances, destruction of Plaintiffs' nursery stock was a taking for which just compensation must be paid. The Circuit Court observed that it did not have to decide what result would obtain if one or more trees at the nurseries had been infected or if infection of the stock were shown to be likely. There was simply no proof of infestation, nor any evidence that the nurseries were likely to be infested. The evidence instead suggested that none of Plaintiffs' plants were diseased. (A. 171-72).

The Second District Court of Appeal affirmed the Order of Liability for Taking, holding that the Plaintiffs' citrus plants were healthy and that their destruction was an inverse taking not precluded by the Department's valid exercise of police power on an emergency basis for the economic welfare of the citrus industry. The Court ruled:

> "Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who are unfortunate enough to have purchased budsticks from the infected nursery." (App. 4-5).

SUMMARY OF THE ARGUMENT

It is well-settled that governmental action may be within the police power and yet also constitute a taking for which just compensation is due. Exercise of regulatory authority does not excuse the constitutional obligation to pay just compensation upon outright destruction of valuable property by the government.

Whether a taking occurs is a factual inquiry determined from the facts of each case, and when there is a physical invasion of property, courts readily find a taking.

The Circuit and Appellate Courts below correctly found that destruction of virtually all of Plaintiffs' healthy citrus plants without payment of just compensation was a taking. The small amount of any material possibly exposed to the mild canker strain present at Ward's Nursery, the particular methods of budding used, the nonappearance of canker during the optimal growing season, and the other attendant circumstances, precluded any possible presence or accumulation of inoculum significant enough to cause disease. The healthy condition of the plants were dramatically confirmed because no canker has ever appeared in any of the 50,000 plants from Plaintiffs' nurseries relocated elsewhere between budding and burning, nor in any plants or grove trees adjacent to Plaintiffs' nurseries, nor at any location anywhere near Plaintiffs' nurseries.

The Department's emergency action was based on its good faith statement of justification at the time. However, that

statement is not determinative of actual facts established at evidentiary hearing in this subsequent condemnation proceeding. Plaintiffs' citrus plants were considered suspect to enable their immediate destruction based solely on a paper trace of budeyes taken from a nursery where infection was found five months later. This general suspicion, formulated in a panic atmosphere and under the false assumption that virulent Asiatic canker was involved, does not prove in an inverse condemnation suit the destroyed citrus trees were in fact diseased or in imminent danger of disease.

Destruction pursuant to the emergency rule, as applied to the facts of this case, was therefore a taking and would be unconstitutional unless just compensation were paid.

While no actual necessity required destruction of Plaintiffs' citrus trees, the Department caused their destruction in the exercise of economic police power as a precautionary measure to assure against any remote possibility of the spread of a disease of then unknown dimensions. There were less drastic means to accomplish this objective that would not unduly interfere with property rights, such as a temporary quarantine, or spray treatment or even removal of the budded plants from the nursery for observation. Having completely deprived Plaintiffs of their valuable property for public economic benefit, however, the Department effected a taking for which just compensation is constitutionally required.

ISSUE FOR REVIEW

WHETHER THE STATE MUST CONSTITUTIONALLY PAY JUST COMPENSATION FOR SUMMARY DESTRUCTION OF SUSPECT CITRUS PLANTS LATER SHOWN TO BE HEALTHY?

ARGUMENT

The Department contends that valid exercise of its police power precludes an inverse taking. This is not the law as the Second District opinion thoroughly explains. Moreover, the Supreme Court of the United States in Case No. 85-1199, First English Evangelical Lutheran Church of Glendale v. Los Angeles County, just decided on June 9, 1987, ____ U.S. ___, ____ S.Ct. _____ at Slip Op. at p.9, reiterates:

> "The basic understanding of the (fifth) Amendment makes clear that it is designed not to limit the governmental interference with property rights per se but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation."

See also Loretto v. Teleprompter Manhattan T.V. Corp., 458 U.S. 415, 425, 102 S.Ct. 3164, 3170 (1982)(a taking may occur and suit for inverse condemnation proceed even if governmental action depriving Plaintiff of property was a valid exercise of police power); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 648-49, 101 S.Ct. 1087 (1981)

(dissenting Op. of J. Brennan)[2]:

> "[I]n Goldblatt v. Town of Hempstead, 369 U.S. 590, 8 L.Ed. 2d 130, 82 S.Ct. 987 (1961), . . . the Court cautioned: 'That is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.' Id., at 594, 8 L.Ed. 2d 130, 82 S.Ct 987. On many other occasions, the Court has recognized in passing the vitality of the general principle that a regulation can effect a Fifth Amendment "taking." See, e.g., Prune Yard Shopping Center v. Robins, 447 U.S. 74, 83, 64 L.Ed. 2d 741, 100 S.Ct. 2035 (1980); Kaiser Aetna v. United States, 4444 U.S. 164, [450 U.S. 649] 174, 62 L.Ed. 2d 332, 100 S.Ct 383 (1979); Andrus v. Allard, 444 U.S. 51, 65-66, 62 L.Ed. 2d 210, 100 S.Ct. 318 (1979); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 2 L.Ed. 2d 1228, 78 S.Ct. 1097 (1958).

See also Albrecht v. State, 444 So.2d 8, 12 (Fla. 1984)(settled proposition that a regulation may meet standards necessary for the exercise of the police power but still result in a taking).

The Department contends that its emergency orders settled that Plaintiffs' nurseries were suspect and therefore not healthy. The emergency orders recite that Plaintiffs' nurseries presented imminent danger to the spread of canker and were an immediate threat to public

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[2]Justice Brennan's dissenting opinion to the Court's refusal to accept jurisdiction in San Diego Gas was cited with approval by the majority opinion in First English Evangelical Lutheran Church of Glendale v. Los Angeles County, supra, Slip Op. at pp. 10 & 11.

health, safety and welfare. The Department says this adjudicates or estops any claim for inverse condemnation.

This Court has already rejected any such notion. Albrecht v. State, supra, 444 So.2d at 12. An inverse condemnation suit is separate and distinct from, and involves allegations unrelated to any challenge to the propriety of governmental action, and determination or concession that the government's action was authorized by statute or rule does not necessarily determine that there was no taking. Id.; Dade County v. National Bulk Carriers, Inc., 450 So.2d 213, 215-16 (Fla. 1984); Atlantic Int'l Inv. Corp. v. State, 478 So.2d 805, 807 (Fla. 1985).

Plaintiffs do not challenge the Department's authority to act on an immediate basis to destroy plants with budeyes from a nursery where infection was discovered five months later, as well as plants within 125 feet thereof. These plants are considered "suspect" under the Department's emergency rule adopted in an atmosphere of uncertainty and perceived crisis.

But until this inverse condemnation proceeding, Plaintiffs had no opportunity for an evidentiary hearing and judicial review of the actual facts pertaining to destruction of their property. Indeed destruction began several days before the immediate burning orders were even reduced to writing.

Full due process normally must be extended before private property can be condemned or destroyed. Rowland v. State, 176 So.2d 545 (Fla. 1937). But in emergency

circumstances, due process occurs when a claim for inverse taking is heard. See e.g. Plant Board v. Smith, 110 So.2d 401, 407-08 (Fla. 1959) (emergency circumstances may justify summary action towards suspected plants because harm might be disseminated, but such action is subject to later judicial review).[3]

Emergency rules take effect upon compliance with the requirements of Florida Statute §120.54(9) including the agency's statement of facts it perceives requires emergency action. An emergency order similarly demands the agency's clear statement of sufficient reasons for an immediate serious danger. See Florida Statute §120.60(7). Whether the emergency order was in compliance with statutory requirements and appropriate at the time is not the issue in a later inverse taking action. For example, a sufficient statement of reasons for emergency suspension could not dictate the ultimate result of license revocation proceedings. Valid authority to take emergency action in broadly defined circumstances does not therefore immunize the Department from the constitutional obligation to pay just compensation if the actual facts upon later judicial review show that its action amounted to a taking.

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[3]Also see Connor v. Carlton, 233 So.2d 324 (Fla. 1969), upholding summary destruction of cattle suspected to have the virulent disease of Brucellosis, but in the context of an authorizing statute, F.S. §585.09 et. seq., providing limited compensation for infected animals that are destroyed and full value compensation for those which are non-infected.

This was implicitly recognized in Denney v. Connors, 462 So.2d 534 (Fla. 1st DCA 1985), which refused to stay the Department's emergency order for summary destruction of 3,500 apparently healthy citrus trees purchased from a nursery where canker was found. The emergency order recited that these suspect trees presented an imminent danger in the spread of canker which was easily transmitted. The Court specifically noted, however, that only the Department's police power to act on an emergency basis was being upheld, and that no determination was being made about whether the destroyed trees were in fact healthy or diseased, and that the issue of compensation was not being addressed.

It is notable that Denney implicitly recognized that an inverse taking may have occurred even where relocated trees were involved, not just small plant parts such as budeyes, and even where only the relocated trees were destroyed, not virtually all the plants at the relocated site.[4]

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[4]Florida Statutes, §581.031(17) authorizes destruction of plants and plant parts that are infested with plant pests, or located near an area of known infestation, or came from a situation where they were reasonably exposed to infestation, when necessary to prevent or eradicate pests. The statute does not authorize destruction of the location to which possibly exposed plants or plant parts were transferred. Yet the Department's emergency rule extended destruction to virtually all non-exposed plants at the location to which exposed plant parts were transferred. Under the plain meaning of the statute, see State Dept. of Business Reg. v. Salvation, Ltd., 452 So.2d 65 (Fla. 1st DCA 1984), most of plaintiff's citrus trees may have been destroyed beyond statutory authority. Compare F.S. §581.03(7) authorizing quarantines of nurseries likely to carry dangerous plant pests. This point is not material, however, since inverse condemnation lies even if the regulatory action was valid.

In Nordman v. Florida Dept. of Agriculture, 473 So.2d 278 (Fla. 5th DCA 1985), involving a similar situation, 568 citrus plants were purchased from a citrus nursery where canker was found six months later. Following Denney, the Court upheld summary burning of those 568 plants and treatment of adjacent trees on an emergency basis. However, in the conclusion of the opinion, not quoted or referenced in the Department's Initial Brief, the Court specifically emphasized that its only holding was that the emergency order was adequately justified. "The appellate court did not attempt to determine whether the trees in question were in fact healthy or diseased, and did not address the issue of compensation." Id. at 280.

The inverse condemnation action below focused on these very points.

Physical Invasion of Property is a Taking

The Department contends that the destruction of property was not a taking because no possessory or proprietary interest passed to the State. But there is no such requirement.

A taking that deprives the owner of his right to use property can occur in a variety of ways, from excessive regulation to excessive overflight. E.g. Askew v. Gables-by-the-Sea, Inc., 333 So.2d 56 (Fla. 1st DCA 1976), cert. den. 345 So.2d 420 (Fla. 1977)(governmental interference causing loss of federal permit was an inverse

taking); Zabel v. Pinellas Cty. Water & Nav. Auth., 171 So.2d 376 (Fla. 1965)(denial of property right to fill land was inverse taking absent proven overriding public necessity that granting permit to fill would materially and adversely affect the public interest).

The key is whether there is governmental interference with the property, the burden of which should be born in all fairness by the public as a whole. It is the owner's loss, not the government's gain, which measures the value of the property and imposes the constitutional obligation to pay just compensation. See e.g. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra, Slip Op. at 11 & 14.

In Loretto v. Telepromter Manhattan CATV. Corp., 458 U.S. 419, 441, 102 S.Ct. 3164, 3179 the Court said:

> "We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation."

Storer Cable T.V. of Florida, Inc. v. Summerwinds Apts. Associates, Ltd., 451 So.2d 1034, 1036 (Fla. 3rd DCA 1984), followed Loretto, holding that courts uniformly find taking upon permanent physical occupation "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. * * * Such an

appropriation is perhaps the most serious form of invasion of a owners property interest."(e.s.)

In affirming the Third District's decision, this Court in Storer Cable T.V. v. Summerwinds Apts., 493 So.2d 417, 419 (Fla. 1986) held:

> "After tracing more than a century of its applicable decision of law, the United States Supreme Court (in Loretto) reaffirmed the rule that 'a permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve.' " (citation omitted).(e.s.)

There was no dispute in this case as to the degree of harm inflicted. The Department deprived Plaintiffs of all beneficial use of their property. There was no mere temporary restriction or impairment of use or decrease in value by regulation. Instead, there was a direct, physical invasion of property by destructive burning that confiscated all value. Such governmental action is readily considered a taking. See e.g. United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062 (1946); Pinellas County v. Brown, 420 So.2d 308, 310 (Fla. 2nd DCA 1982).

No Actual Necessity to Destroy Plaintiffs' Property

Since Plaintiffs' healthy citrus plants were destroyed by physical invasion, just compensation is constitutionally required. As stated in Brazil v. Div. of Admin., 347 So.2d 755, 758 (Fla. 1st DCA 1977):

> "The absolute destruction of property is an extreme exercise of the police power and is justified only within the narrow limits of actual necessity, unless the state chooses to pay compensation."

C.f. Zabel v. Pinellas Cty Water & Nav. Auth., supra, 171 So.2d at 379 (total denial of property use constitutes a taking unless overriding public necessity is proven).

In Corneal v. State Plant Bd., 95 So.2d 1, 4 (Fla. 1957) this Court held that destruction of property was an extreme exercise of the police power and that just compensation must be paid when destruction was for precautionary purposes as opposed to actual harmful conditions:

> "In enacting regulatory measures which protect but do not destroy property, the law need not restrict itself to conditions actually harmful but may require precautions within the whole range of possible danger. (citations omitted). But the absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity, unless the State chooses to pay compensation." (e.s). Id. at 4.

The Corneal decision then cites examples of actual necessity justifying summary destruction without just compensation, viz: 1) domestic animals infected with contagious disease that are a menace to public safety; 2) a building in the path of a fire that must be destroyed to stop the course of the fire; and 3) fruit trees actually infected by a contagious disease which were or would soon be of no practical value to the owner. Id., at 4-5.

But when healthy trees are destroyed as a precautionary measure to protect the healthy trees of other property owners, not because of actual proven necessity, this Court firmly held in Corneal that just compensation is constitutionally required:

> "We have found no case - and none has been cited - holding that a healthy plant or animal, not imminently dangerous may be destroyed without compensation to the owner in order to protect a neighbor's plant or animal of the same species. And, indeed, we would not be inclined to follow such a decision, had one been made. * * * [W]e hope we never become insensitive to the clear and indefeasible property rights of the people guaranteed by our state and federal organic law, nor forgetful of the principal of universal law that the right to own property is an indispensable attribute of any so-called 'free government' and that all other rights become worthless if the government possess an untramelled power over the property of its citizens." Id. at 6.

Similarly, State Plant Board v. Smith, supra, 110 So.2d at 407-08, noted that diseased or infected property can be destroyed without compensation because it is incapable of lawful use, is of no value, and is a source of public danger. Thus legislation denying or limiting compensation was held valid for destruction of infected trees, but invalid for destruction of healthy trees and even for infested trees which were in fact productive.[5]

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[5]"But where, as here, a provision for 'just compensation' is a clear requisite to the act of destruction, then we find no authority for the legislature's specification of the maximum compensation to be paid." 110 So.2d at 407.

Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246 (1928), cited but not discussed by the Department, is illustrative. In that case, infected red cedar trees were ordered cut (with the owner able to use the felled wood) as the only practical means to stop their communication of rust disease to nearby apple orchards. The infected cedars were held to constitute a nuisance, and their mandatory removal to prevent actual impending danger was therefore non-compensable.

In this case, Plaintiffs used a few hundred budsticks from Ward's nursery to bud some 8,000 seedlings. Five months later, canker was discovered at Ward's. Because of this paper trail, and solely because of it, Plaintiffs' nursery businesses were destroyed seven months after the budding. The Department destroyed not only the 8,000 budded liners, but virtually all of the citrus trees at each nursery (about 281,00 trees in all).

There was no proof of any actual harm being caused to other property or of any actual harmful condition being present. Inspections and sampling proved negative, yet plenty of time had elapsed for infection to occur if there were sufficient canker bacteria to cause any problem. The circumstances of budding and Plaintiffs' unique growing techniques buttressed the absence of any disease. In addition, thousands of citrus plants adjacent to, and transferred from the nurseries never manifested any symptom

of canker after their destruction. Expert opinion also established that Plaintiffs' plants were healthy.

Moreover, the suspect disease turned out to be a mild strain of canker, rather than the virulent Asiatic strain, which further militated against any infection or infestation resulting from the Ward's budeyes. And even if some infection had occurred, there was no actual necessity for wholesale destruction. Indeed, in dealing with the nursery strain now, the Department simply removes infected trees from the nursery for observation (and does not even destroy them).

The lack of compelling necessity is evident from the Department's failure to follow the Plaintiffs' 50,000 citrus trees transferred to other locations after the budding. If these plants were actually dangerous enough to be destroyed while on Plaintiffs' premises, they would pose similar danger at the sites to which they were transferred shortly before the burning. Yet the Department took no action of any kind toward these trees.

The Department also conceded through its own witnesses that destruction of Plaintiffs' citrus plants was a general precautionary measure as part of a management program. The Department was unsure what it was dealing with and wanted to take the most severe steps to be certain there would be no problem to the citrus industry.

Thus, in actuality, destruction of Plaintiffs' nurseries exceeded the immediate necessity of the occasion and therefore must be justly compensated. See Horne v. City of Cordele, 230 S.E.2d 333, 335 (Ct. App. Ga. 1976) and authorities therein. The Department's general concern for the citrus industry that canker might possibly develop and spread from Plaintiffs' nurseries could have been addressed in other, less drastic ways that did not amount to a taking, such as temporary quarantine, spray treatment, or removal of selected plants.[6] See Id.

An instructive case by contrast is Flake v. State, 383 So.2d 285 (Fla. 5th DCA 1980). The appellate court there affirmed, as within the discretion of the trial court, denial of inverse condemnation against the Department for a 9-month quarantine of Flake's citrus nursery which was proven infected with necrotic ring spot virus. The Court held:

> In imposing the quarantine there was no attempt at destruction of trees suspected to be infected or of healthy trees, but only a requirement that the nursery stock not be moved to noncontiguous property while the state completed its examination of similar stock for suspected disease carrying potential.
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> * * *

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[6] If there is another reasonable way to achieve a state purpose with lesser burden on constitutionally protected property, the State may not choose a way of greater interference; if it acts at all, the State must choose a less drastic means. Attorney General of New York v. Soto Lopez, ___ U.S. ___, 106 S.Ct. 2317, 2324 (19__)(plurality op. J. Brennan).

> In enacting regulatory measures which protect but do not destroy property, the law need not restrict itself to conditions actually harmful but may require precautions within the whole range of possible dangers..., and the trial court properly found the action here to be precautionary and not destructive in nature. (e.s)

In this case, the Department's precautionary action was also destructive toward Plaintiffs' nurseries even though no infection was present. Certainly the trial court here had discretion to find a taking, just as the trial court in Flake had discretion not to find a taking where only a temporary quarantine was imposed and infection was present.

Destruction of healthy citrus plants to assure against any possible harm to the citrus industry may be within the Department's economic police power,[7] but this is not the same as absolute necessity for destruction of plants that are infected or so likely to be infected with a virulent disease as to render them a dangerous nuisance without practical value.

Accordingly, a taking occurred, and payment of just compensation is constitutionally required. Plaintiffs' loss is appropriately passed to the public who benefitted from a citrus industry made more secure thereby. Plaintiffs cannot fairly be expected to sacrifice their individual investments for the general public good.

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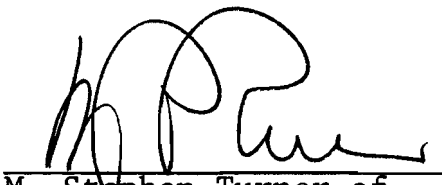
[7]There is no question that protection of the State's citrus industry is within the economic police power. See Coca Cola v. State Dept. of Citrus, 406 So.2d 1079, 1085 (Fla. 1981); State Dept. of Citrus v. Griffin, 239 So.2d 577, 578 (Fla. 1970).

CONCLUSION

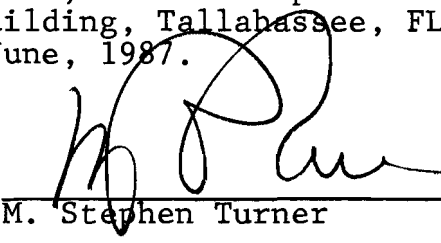
As applied to the facts of this case, the question certified by the Second District Court of Appeal should be answered in the negative, and its decision should be affirmed.



M. Stephen Turner of
BROAD AND CASSEL
P.O. Box 11300
300 E. Park Avenue
Tallahassee, FL 32302
904/681-6810

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to FRANK A. GRAHAM, JR., Florida Department of Agriculture, Room 515, Mayo Building, Tallahassee, FL 32301; by U.S. Mail this 29th day of June, 1987.



M. Stephen Turner