D/A 9-1-87

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,524

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Petitioner,

v.

MID-FLORIDA GROWERS, INC. and HIMROD & HIMROD CITRUS NURSERY, etc.,

Respondents.

/

REPLY BRIEF OF PETITIONER

FRANK A. GRAHAM, JR.
Resident Attorney
Department of Agriculture and
Consumer Services
Room 512, Mayo Building
Tallahassee, Florida 32399-0800
(904) 488-6851

ATTORNEY FOR PETITIONER

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ISSUE I

THE PROPRIETY OF AN EXERCISE OF POLICE POWER MAY NOT BE CHALLENGED IN AN INVERSE CONDEMNATION PROCEEDING.

Respondents have misinterpreted and misstated petitioner's point that respondents may not question in an inverse condemnation proceeding the propriety of the agency's action. The correct principle of law is that once a party fails to challenge the action prior to filing in circuit court for inverse condemnation or agrees to the propriety of the action, he is estopped from any further denial that the action itself was proper. Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982); Albrecht v. State, 444 So.2d 8 (Fla. 1984); and Atlantic International Investment Corp. v. State, 478 So.2d 805 (Fla. 1985).

This was emphasized in Albrecht v. State:

> The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists.

444 So.2d 12.

While respondents concede that the Department's action in destroying plants within 125 feet of exposed or suspect plants was proper, they contend that the proceeding in the trial court was the first opportunity for due process.

Respondents were afforded the same due process as were the plaintiffs in Albrecht v. State, State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), Denney v. Conner, 462 So.2d

534 (Fla. 1st DCA 1985), and Nordmann v. Florida Department of Agriculture and Consumer Services, 473 So.2d 278 (Fla. 5th DCA 1985). In State Plant Board v. Smith, plaintiffs challenged legislative authority to destroy infected and noninfected trees in an effort to eradicate the burrowing nematode. The act was challenged as to its constitutionality and injunctive relief was sought. Similarly, in Denney and Nordmann, the plaintiffs sought stay orders of the immediate final order to destroy citrus plants.

In the instant case, the respondents chose not to seek injunctive relief or to appeal the immediate final order. Instead, the respondents chose to consent and cooperate.

As was pointed out in Denney, an immediate final order is appealable and enjoinable. At no time was it ever contended by the respondents that they were not aware of their rights to challenge the action.

ISSUE II

WHEN THE PURPOSE OF DESTROYING PRIVATE PROPERTY IN THE EXERCISE OF POLICE POWER IS TO PREVENT A PUBLIC HARM, AND THE STATE HAS NO PROPRIETARY INTEREST IN THE PROPERTY, THERE IS NO TAKING REQUIRING COMPENSATION.

The exercise of police power to prevent the spread of disease, whether human, animal, or plant, is different from the exercise of the police power in the denial of dredge and fill permits, licenses, zoning applications, and other land use regulation situations.

To prevent harm by preventing the spread of disease is a fundamental duty of government.

The duty of government to protect the health, safety and welfare of the community, such as when a building in the path of a conflagration is destroyed to prevent the spread of a fire, is a function inherent in the police power of government. The authority to act to prevent harm may also be granted by laws of the State, such as section 585.031(17), Florida Statutes (1985), and the emergency rules adopted pursuant to the authority of the legislature authorizing the destruction of infected, exposed, and suspect plants.

In Adams v. Housing Authority of City of Daytona Beach, 60 So.2d 663 (Fla. 1952), the Court said:

> [T]here is a clear distinction between the power of eminent domain and the police power. The power of eminent domain is that sovereign power to take property for a public use or purpose and this cannot even be done without just compensation. On the other hand, the

> police power is that power by which the Government may destroy or regulate the use of property in order to 'promote the health, morals and safety of the community', and the police power may be exercised without making compensation for the impairment of the use of property or any decrease in the value of property by reason of the regulated use.

Id. at 666.

In State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), the court held:

> When, in the exercise of the police power, the State through its agents destroys diseased cattle, unwholesome meats, decayed fruit or fish, infected clothing, obscene books or pictures, or buildings in the path of a conflagration, it is clear that the constitutional requirement of 'just compensation' does not compel the State to reimburse the owner whose property is destroyed. Such property is incapable of any lawful use, it is of no value, and it is a source of public danger.

Id. at 406.

As was stated in State Plant Board v. Smith, "A legislative provision for compensation in such cases is a mere bounty that may, of course, be fixed at whatever level the Legislature desires." Id. at 407.

In State Plant Board v. Smith, the statute authorizing the containment and eradication of the burrowing nematode was challenged as to its constitutionality. The Court looked at the intent of the legislature in authorizing the destruction of infected and noninfected trees and said:

> It is abundantly clear, then, that the Act in question was enacted in the exercise of the police power of the sovereign state and not

> in the exercise of the power of eminent domain.

Id. at 405.

Police power action to prevent public harm, as contemplated in section 581.031(17) and the applicable rules, is distinguished from police power action derived from statutory authority which actually contemplates the possibility of a taking requiring compensation.

The cases cited by respondents to support their position that a valid exercise of the police power may still result in a taking fall into two categories: (1) denial of permits and licenses involving land uses; and (2) statutes prohibiting landlords from denying access by cable television companies to install service to tenants.

Dade County v. National Bulk Carriers, 450 So.2d 213 (Fla. 1984), involved denial of an application for an unusual permit to excavate a lake and to fill the remainder of the owner's land. The issue also involved a rezoning to the detriment of the property owner.

The Court stated:

> In our recent decisions in Albrecht v. State, 444 So.2d 8 (Fla. 1984) and Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982), we recognized the proposition that under certain circumstances a statute or regulation may meet the standards necessary for an exercise of the police powers and authorize a taking.

Id. at 215.

The Court pointed out:

> Under the type of statutory permitting-scheme involved in Key Haven, Albrecht, and Graham v. Estuary, it was contemplated that its application may result in a taking.

Id. at 216 (emphasis added).

Dade County v. National Bulk Carriers, Key Haven, and Albrecht v. State, all dealt with statutes similar to the statute involved in Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981). Each of the statutes in essence provides that:

> Nothing in this chapter authorizes any governmental agency to adopt a rule or regulation or issue any order that is unduly restrictive or constitutes a taking of property without the payment of full compensation, in violation of the constitutions of this state or of the United States.

Section 380.08(1), Florida Statutes (1985).

In summary, the cases concerning permits, licenses and other land use regulations involve the exercise of police power within an atmosphere of eminent domain concepts. Police power action to prevent the spread of disease, to eradicate a nuisance, and to prevent harm is the exercise of police power in an atmosphere that historically has not contemplated nor required compensation.

Plaintiffs' reliance on the cable television cases is misplaced.

The situation in Loretto v. Teleprompter Manhattan T.V. Corp., 458 U.S. 415, 102 S.Ct. 3164 (1982) cannot happen in

Florida. The Supreme Court of Florida declared section 83.66, Florida Statutes (Supp. 1982) to be unconstitutional and held that landlords were not forced to be subject to a taking even if full and just compensation were paid.

The instant case is different from State Plant Board v. Smith, and other cases wherein the Legislature mandated the payment of either full and just compensation or appraised value as a prerequisite to agency action.

In support of their argument that they are entitled to full and just compensation, respondents rely on State Plant Board v. Smith. One of the distinguishing aspects of State Plant Board v. Smith is that, in the very act authorizing the destruction of trees in an effort to eradicate spreading decline caused by the burrowing nematode, the legislature provided that just compensation was a requisite to the action of destruction.

Another aspect of the State Plant Board v. Smith case was that it involved a due process issue. The question was whether summary destruction could be made of healthy trees without the requirement of notice and hearing.

In the instant case, the legislature did not require payment of just compensation for the destruction of diseased or suspect citrus trees and stock, nor do we have an issue of due process.

Further, State Plant Board v. Smith and Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957), both involving the

burrowing nematode problem, were distinguished in Denney v. Conner and in Nordmann v. Florida Department of Agriculture and Consumer Services. In distinguishing between the burrowing nematode problem and the threat of canker, the Court in Denney said:

> We find the facts of the instant case to be clearly distinguishable from Corneal and Smith. No real controversy exists on the critical fact that citrus canker may be transmitted by both natural (wind and rain) and artificial (man and machinery) means and that it may lay dormant in apparently healthy plants for some months (one botanist opined up to eighteen months) after exposure to infected plants before manifesting signs of the disease. Those circumstances underlie the department's conclusion that, even though the plants appear healthy and at this time evidence no sign of citrus canker, appellants' plants still present an imminent danger in the spread of the disease since they have been exposed to infested or infected plants.

462 So.2d at 536 (emphasis added).

As pointed out in State Plant Board v. Smith, the reason that just compensation is not required following the exercise of a police power action that destroys diseased cattle, unwholesome meat and buildings in the path of a conflagration is because such property is incapable of any lawful use, is of no value, and is a source of public danger.

While it was the order of liability for taking which was challenged by the petitioner in the District Court of Appeal and it is the language of that order that controls, nevertheless, the rationale of the trial court as set forth in the court's ruling from the bench must be considered:

> I do determine that under the particular circumstances of this case, that the state, by its action, precluded either their own agencies or the plaintiffs from ever determining whether absolute destruction was an appropriate measure, and having done that a taking occurred.

A-172.

The district court of appeal held:

> While the State validly exercised its police powers in destroying the citrus trees, a taking occurred when the healthy trees were destroyed.

A-198 (emphasis added).

The inescapable conclusion is that if the trial court and the district court of appeal had found that the trees destroyed were not healthy, then there would not have been a taking and no compensation required.

A suspect or exposed plant is not a healthy plant.

When the Technical Advisory Committee determined that the method for eradicating citrus canker was by burning infected "exposed and suspect plants," then the "suspect and exposed" plants had no lawful use, were of no value, and were a potential source of public danger. One cannot conceive of a situation where there would be a market for "exposed or suspect trees."

Pursuant to section 581.03(17) and the applicable rules, the "exposed and suspect" plants are not "healthy" plants. While the statutes and rules may be challenged in an

appropriate proceeding, a court may not substitute its judgment for the judgment of those charged with the decision making process.

Respectfully submitted,

Frank A. Graham, Jr.

FRANK A. GRAHAM, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner was furnished to M. Stephen Turner, Broad and Cassel, Post Office Drawer 11300, Tallahassee, Florida 32302, by mail this 24th day of July, 1987.

Frank A. Graham, Jr.
FRANK A. GRAHAM, JR.