Ehrlich
O.A. 12-5-89

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, an agency of the State of Florida,

Petitioner,

v.

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

Respondent.

CASE NO. 74,046

Appeal From the District Court of Appeal, Second District

INITIAL BRIEF OF PETITIONER, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

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PREFACE

References to record pages will be shown by "R." followed by the record page number, e.g., "R." References to exhibit admitted in evidence at the damages trial will be shown by an abbreviation of the exhibit's sponsor (Pl. = Plaintiff, Def. = Defendant). These will be followed by "Ex.#" and "p.#" where appropriate. Citations to the transcript will be cited [T: p.#].

STATEMENT OF THE CASE

Mid-Florida Growers ("Mid-Florida") and Himrod & Himrod Citrus Nursery ("Himrod") (collectively, the "Nurseries"), filed this inverse condemnation suit on August 5, 1985. The Nurseries alleged that the destruction by burning of their citrus plants in October of 1984, pursuant to orders of the United States Department of Agriculture ("USDA") and the Florida Department of Agriculture and Consumer Services (the "Department"), constituted a taking by the Department by inverse condemnation for which they were entitled to compensation.

The trial was bifurcated and the liability issue tried on September 24, 1986. The trial court found that though the citrus canker eradication program through which the Nurseries' plants were destroyed was a valid exercise of the police power, it nonetheless constituted a taking and the Nurseries were entitled to compensation. On appeal, the Second District Court of Appeal and this Court affirmed the trial court's ruling. State, Dept. of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 505 So.2d 592 (Fla. 2d DCA 1987), aff'd, 521 So.2d 101 (Fla. 1988), cert. denied, U.S. ____, 109 S.Ct. 180, 102 L. Ed. 2d 149 (1988).

A jury trial to determine the compensation due the Nurseries was held March 22-24, 1989. The jury awarded Mid-Florida a total of $845,179 ($739,462 for the future value of the destroyed nursery stock and $105,717 for "lost production"), and awarded Himrod *a total* of $730,920 *($602,568* for the future

value of the destroyed nursery stock and **$128,352** for "lost production"). Previous payments under the joint USDA/Department compensation program were deducted and prejudgment interest from the date of destruction was added, resulting in judgments of **$966,177.95** and **$977,281.,** respectively.

On appeal, the Second District Court of Appeal ("2d DCA") affirmed the judgment for the value of the destroyed nursery stock (modifying the prejudgment interest computation), but reversed the award for "lost production." State. Dept. of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., ___ So.2d ___, 14 F.L.W. **650** (Fla. 2d DCA, March **8, 1989).** It remanded to the trial court and gave the Nurseries leave to amend their complaint to allege the "lost production" claim as a temporary taking under the United States Constitution. The 2d DCA certified two questions to this Court:

> I. WHETHER A CITRUS NURSERY OWNER WHOSE STOCK IS DESTROYED BY THE STATE DURING A QUARANTINE IS ENTITLED TO MEASURE ITS LOSS AS OF THE DATE OF THE REOPENED MARKET?
>
> II. WHETHER A CITRUS NURSERY OWNER IS ENTITLEDTODAMAGESFORLOSTPRODUCTION SUSTAINED AS AN INCIDENT TO THE DESTRUCTION OF HEALTHY CITRUS PLANTS ANDTHEDECONTAMINATIONOFTHEBUSINESS PREMISES?

This court has accepted jurisdiction.

STATEMENT OF THE FACTS

A. The Citrus Nursery Growing Cycle.

The 2d DCA described the citrus nursery growing cycle as follows:

> Each nursery in this case grows containerized product inside greenhouses. This is a relatively new method for starting citrus. It allows the nursery to avoid freeze damage to its stock and to receive the higher prices for its product which typically follow grove-damaging freezes. The containerized citrus is easier to handle and to plant than trees grown outdoors using the more traditional bare-root method.
>
> The nursery begins its assembly line by planting seeds in flats which contain approximately 100 cells. Most of the seeds germinate and produce seedlings. The plants are grown in the seedling stage for three to four months.
>
> After the plants have reached the end of the seedling stage, they are transplanted into four-inch containers. They are grown in these containers for approximately another three to fourmonths. This state of growth is frequently referred to as the liner stage. The liners are grown until the stems are approximately pencil size.
>
> The liners are grown strictly as root stock. The fruit they would bear is unacceptable. As a result, bud stock is removed from trees with desirable fruit. The buds are grafted to the liners to produce budded trees.
>
> The final stage ofproduction involves the budded trees. They are grown in the nursery for another six to nine months. The budded trees can be transplanted to six-inch pots or three-gallon containers.

> The larger pot allows for a larger tree, a longer shelf life, and a higher price.
>
> The total time to produce a marketable tree varies from ten months to twenty-two months. On the average, it takes approximately sixteen months to produce a marketable budded tree.
>
> Atypicalgreenhouse, likeanyfactory, has a maximum output. Mid-Florida's nursery, for example, starts approximately 35,000 trees every quarter. As a batch of seedlings moves up the production line to become liners, a new batch of seedlings is begun. The total production capacity of the Mid-Florida greenhouse is approximately 140,000 seedlings, liners, and budded trees. The Department destroyed all of the product within the nursery in all three stages of development.

14 F.L.W. at 650-51. [Attached as App. A].

Each of the Nurseries had purchased 6" pots during the summer of 1984 with the intention to use them the following season [T: 226-228, 247-248, 281], thus permitting the nursery stock to be grown to larger size with "a longer shelf life and a higher price."[1/] Neither had previously used or sold this size pot [T: 228].

B. The Asserted Takings.

As the 2d DCA observed, "this case involves three distinct exercises of the police power," which commenced with

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1/ 14 F.L.W. at 651. There was testimony that Mid-Florida transferred 12,000 budded trees from 4" to 6" pots in September, 1984 [T: 143]. Since this was just before the eradication at Mid-Florida (early October, 1984), both the trial court and the 2d DCA treated these as still being in 4" pots.

the discovery in September 1984 of a previously unknown strain of canker in Ward's Citrus Nursery.

> First, the Department entered an emergency order in September 1984, which placed a general quarantine upon nursery sales. The quarantine remained in effect until April 1, 1985. The quarantine had a significant impact upon a wide range of citrus nurseries and citrus groves. During the quarantine, citrus nursery stock could not be legally sold in Florida.[2/]
>
> . . .
>
> Second, the Department entered specific "immediate final orders" designating Mid-Florida and Himrod as "eradication areas." By virtue of these orders, their healthy citrus stock was burned.
>
> . . .
>
> Finally, the Department, in conjunction with the United States Department of Agriculture, conducted a decontamination of the greenhouses after the citrus stock was burned. Although the Department burned the citrus stock in this case by mid-October 1984, the decontamination was not completed until mid-December 1984. Thus, at a minimum, the nursery owners were temporarily shut down for approximately two months after the burning of their healthy stock because of the decontamination action.

Id. at 651. Placing the facts of these cases within the 2d DCA's structure:

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2. This sentence is incorrect. By its terms, the quarantine did not prohibit sale nor contracts for sale and delivery after the quarantine. These contracts are common in the citrus nursery business and generally involve an agreement by a nursery to grow a certain number and type of citrus plants to a particular stage of maturity, for another nursery or for a grove owner, for delivery at a specified time in the future and for a pre-determined price. [T: 171-74, 196].

First Staae: On September 14, 1984, the USDA imposed a federal quarantine on interstate movement of all citrus material. 49 Fed. Reg. 36,623. On September 19, 1984 the State of Florida followed suit and imposed an emergency quarantine on movement of all citrus material within the state unless accompanied by a permit or certificate issued by the USDA or the Department. Fla. Admin. Code Rule 5B-ER84-8, Part (7)(c). Id. As the 2d DCA observed (Id. at 651), the constitutionality of this quarantine was not raised in this case and has not been passed on in any other case.

Second Staae: Pursuant to USDA and Department citrus canker regulations, Himrod and Mid-Florida were designated "exposed" nurseries in September, 1984, meaning they had been "[s]ubjected to citrus canker infection or infestation because of location or contact with Xanthomonas campestris p.v. citri." Fla. Admin. Code Rule 5B-49.001(7) (1987); [T: 12]. The plants in these nurseries were destroyed between October 7 and October 19, 1984. [T: 248]. The destroyed nursery stock was:

	Mid-Florida	Himrod
Seedlings	30,000	56,800
Liners	22,404	62,004
Budded Trees in 4" pots	45,576	24,790
Budded Trees in 7 1/2" pots (or 3 gal. containers)	40,000	0
Total Destroyed	137,980	143,594

[T: 145, 146, 282, 286].[3]

Third Staae: Once the destruction of these citrus plants was completed, the greenhouses which contained them were required to undergo chemical decontamination to ensure that the canker bacteria had been fully eliminated from a particular site. Anticipating the recurrence of citrus canker in the United States, the USDA in 1982 had drafted a Citrus Canker Disease Action Plan to provide guidelines for the eradication of citrus canker when it reappeared. The 1982 Plan was revised in November 1984 (the "1984 Action Plan"), in order to provide more specific guidelines for the eradication of the canker perceived to exist after its discovery at Ward's and elsewhere in the fall of 1984.[4] The 1984 Action Plan details the decontamination procedures applied to both Mid-Florida and Himrod after destruction of their nursery stock. [T: 395-3981. The Action Plan required that the subject greenhouse be cleaned of all debris and plant material and then sprayed with a quaternary ammonium solution. [App. C at p. 11; Defendant's Exhibit 4]. At least 24 hours later, the

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[3] The schedule in the 2d DCA opinion (Id. at 651) is in error in that it omits the Mid-Florida three-gallon containers. That error was corrected following motions to clarify.

[4] The 1982 and 1984 Action Plans are attached hereto in the Appendix as Exhibits B and C. The Action Plans are not part of the record. One of the Action Plans (the 1987 Plan) was appended to Appellee's Cross-Reply Brief to this Court in State, Dept. of Agriculture and Consumer Services v. Richard O. Polk, d/b/a Richard Polk Nursery, No. 73, 842 (Fla., argued Apr. 5, 1989).

greenhouse would be drenched with a detergent solution. Id. On completion of these procedures, the greenhouse would be released from quarantine and could resume production of citrus. [Def. Ex. 4]; [T: 274, 396, 399, 425].

The process of decontamination was carried out at the Nurseries under the Action Plan and by federal authorities. [T: 277, 399, 425]. Only after the USDA certified the completion of the decontamination process could destroyed nurseries resume production. [T: 274, 396, 399, 424]. The USDA certified Mid-Florida to be decontaminated on December 4, 1984 and certified Himrod to be decontaminated on December 14, 1984. [T: 399]. Thereafter, the Nurseries could have resumed nursery production at any time. [T: 272, 274, 396, 399]. Movement of the product from the Nurseries could have resumed on April 1, 1985. [T: 408].

The impact of the foregoing measures on Mid-Florida was lessened by one event. In September and October 1984, after the citrus canker outbreak at Ward's, Mid-Florida received approval from the USDA and the Department to begin a new greenhouse operation on its property. The new greenhouse was at an approved distance from the exposed greenhouses and was not burned or decontaminated. [T: 191-92].

C. The Market for Nursery Stock.

The position of Mid-Florida and Himrod in this case, accepted by the jury and the 2d DCA, was that they were entitled

to receive the market value of the nursery stock destroyed, not as such stock existed and could have been sold at the time of destruction, but as it would have been at the time the Nurseries might have expected to sell it (which could be more than a year later and could not be earlier than April 1985, six months later). By reason of a "major freeze [which] occurred in January 1985" (14 F.L.W. at 651), the April 1985 prices were approximately 28% higher than August, 1984. While the Department and USDA destroyed seedlings and liners, Mid-Florida and Himrod had never sold seedlings and liners. While the Department and USDA destroyed budded trees in 4" pots and these Nurseries had regularly sold trees in 4" pots [T: 277, 160], this year Himrod had intended all its 4" trees and Mid-Florida had intended more than 1/2 its 4" trees to continue to grow and be sold in 6" pots.[5/] The Nurseries successfully argued that no "forced sale" view of inverse condemnation should be imposed on them, but rather they should be permitted to recover on the basis of growing all their destroyed stock

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[5] As noted above, neither Nursery had ever sold nursery stock in 6" pots (nor was there testimony that anyone else in the industry had).

to the point where the Nurseries would have liked to have sold them many months later.6/

6/ The key jury instructions, given over the Department's objections, were:

> Youshoulddetermine full compensation of the Plaintiffs' destroyed nursery stock as of October 7, **1984**, which is considered the date of taking. However, as further explained before, you need not determine market value as of this specific date if you find that the market for such nursery stock was non-existent or if the Plaintiffs would normally be expected to market their stock at a later time, in which events you may determine the market price at the time they reasonably planned to market or would have been able to market their stock.

[T: **609-10**, emphasis added]. Under this instruction the jury could apply the April **1985** market even if a market existed in October **1984**.

> Fair market value is the price that property would bring under normal market conditions. You should therefore exclude from consideration any condition of market short-term or temporary depression.
>
> Indeterminingthevalueof Plaintiffs' immature citrus nursery stock intended to be sold or used for commercial purposes, you may consider the value of such stock assuming it were brought to maturity and then sold. That is, you may consider the market value which Plaintiffs' immature seedlings and liners or young budded trees would have had as mature budded trees if they had not been destroyed.
>
> Alternatively, if you find that in spite of the destruction any of the immature stock referred to in this case had a market value at the time of destruction, then you may consider that value in determining full compensation.

[T: **611-12**].

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1. The actual market.

a. Seedlings and Liners.

As the 2d DCA observed: "Prior to the quarantine, there is evidence that a market existed for seedlings." In this case, the Department offered "no evidence that a market existed for liners in the fall of 1984."[7]

Despite its determination that there was evidence that a market for seedlings existed prior to the quarantine, the 2d DCA concluded:

> there was no legal market in October 1984 for the Nurseries' seedlings, liners, or budded trees. Thus, the Department's analysis is based upon a hypothetical market in October 1984, with prices derived from the earlier fall market.

14 F.L.W. at 651.

The first quoted sentence is inaccurate. The general manager of Mid-Florida, testified that some of the nurseries could sell during the quarantine and that he got some plants from another nursery and sold them. [T: 156-57]. Additionally, another nursery owner testified that in October of 1984, plants similar in size to 6" potted plants were selling for approximately $4.90, while those in 3-gallon containers sold for

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7. 14 F.L.W. at 651. The 2d DCA entered its certification order "[b]ecause the issues resolved in this appeal will undoubtedly affect other nursery owners . . . ." Id. at 654. The Department therefore advises the Court that in many of these cases it expects to introduce evidence that a market for liners existed at the time of the nursery stock destruction in those cases.

$6.75. [T: 266]. Moreover, reference to the 1984 Action Plan and the Department's Emergency Rules shows some movement of citrus plants between citrus nurseries was allowed, though subject to regulation. [App. C at p. R-21], see Fla. Admin. Code Rule 5B-ER84-8; Fla. Admin. Code Rule 5B-ER84-9. As the jury instruction quoted in footnote 6 shows, the jury need not have concluded that no market existed in October 1984 to award damages based on an April 1985 market (note disjunctive wording).

The August 1984 market price for seedlings was $150 to $200 per thousand. [T: 456-458, 476-4781. There is no testimony in the record as to the April 1985 market price for seedlings.

b. Budded Trees.

The budded trees destroyed were all in 4" pots. The market price for such stock in August 1984, pre-quarantine, was $3.50. [T: 170, 172, 249]. In April 1985, as the result of the January 1985 freeze the price of such stock had increased to $4.50. [T: 156, 158, 285].

There was no trial testimony as to the market price of budded trees in 6" pots in August 1984. The Nurseries' owners both testified that, in their opinion, they could have gotten $6.50 for this stock in April 1985. [T: 156, 285].

The price of stock in 7 1/2" pots (three-gallon

containers) in August 1984, pre-quarantine, was $6.75. The price in April 1985 was $7.50 [T:156].

2. The methodology for calculation of damases.

There were two essential ingredients to the jury's damages methodology: (i) the "forced sale" concept of inverse condemnation would not be imposed on the Nurseries, so they would not be required to sell seedlings, liners, or budded trees as they were in October 1984 but instead would be presumed to have sold the plants as planned by the Nurseries, many months later, and (ii) the market to be used was the freeze-inflated April 1985 market, not the August, 1984 pre-quarantine market or the market which, on the date of taking, one would have expected in April 1985. The 2d DCA made observations as to both these ingredients:

> If the nursery owners' product had not been destroyed in October 1984, it would have continued to grow during the quarantine. Thus, they [Mid-Florida and Himrod] theorize that the seedlings and liners could have been sold as budded trees between April 1985 and April 1986. Additionally, the nursery growers hypothetically transplanted some of their trees from four-inch containers to six-inch, or three-gallon containers to receive longer shelf life and a higher price.
>
> . . . .
>
> The nursery owners' theory of damage allows them to receive the benefit of the January freeze which they could not have predicted in October.

14 F.L.W. at 651 (emphasis added). Nevertheless, the 2d DCA accepted both ingredients and the jury's decision.

The August, 1984 market prices were essentially the same as those in effect for the previous nine months [Pl. Exh. 2]. The 2d DCA observed: "Because of a freeze in December 1983, the price of budded trees had gradually increased during 1984." 14 F.L.W. at 651. As the graph in Pl. Exh. 2 shows, the price level was virtually static during these nine months (so the increase referred to by the 2d DCA was very gradual). The "second major freeze" of January 1985 created "an immediate increase in the demand for young trees . . . [and the resultant approximately 28%] increase in market price lasted for approximately one year." Id.

3. The amount of damages.

a. Damases before deduction of expenses.

Based on the foregoing calculation, the Nurseries asked the jury to conclude that their damages before deduction of certain expenses should be:

Mid-Florida

Type of Plant	Number Burned	Market Price April 1985
Seedling	30,000	as 4" budded @4.50 = $135,000
Liners	22,404	as 4" budded @4.50 = $100,818
4" Budded	45,576	20,576 trees @4.50 = $92,592
6" Budded		25,000 trees @6.50 = $162,500
7.5" Budded (3 gallon)	40,000	40,000 trees @7.50 = $300,000

Himrod

Seedling	56,800	as 4" budded @4.50 = $252,000
Liners	62,004	as 4" budded @4.50 = $279,018
4" Budded	24,790	as 6" budded @6.50 = $161,135

b. Deduction of Expenses.

After establishing the purported value of the nursery stock in this future market, the Nurseries' expert, an economist, subtracted from the purported value in April 1985 certain expenses the Nurseries would have incurred had the stock not been destroyed in October 1984 but instead grown until April 1985. [T: 303-3091. Although some of these costs were identified,[8/] neither the expert's testimony nor the

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8/ The identified costs were:

(continued...)

exhibits to which he referred [Pl. Exh. 1 and 3] identify the remaining costs he subtracted. The total cost subtracted amounted to $51,448 for Mid-Florida and $93,605 for Himrod [Pl. Exh. 1 and 3].

The Nurseries' expert only deducted "variable costs," refusing to deduct "fixed costs." [T: 303-3041. Therefore he declined to consider any such costs as labor, utilities, or debt service. The Department contends this approach defies reason. If the Nurseries' are to receive the benefit of a market price in a future market to which they were hypothetically allowed to grow their product, then the Department submits, they should bear the burden of all costs required to bring the product to the market. The jury and the 2d DCA rejected the Department's position.9/

8/ (...continued)

Mid-Florida

Type of Plant	Number Burned	Costs Backed Out
Seedling	30,000	.849/ tree = $25,470
Liners	22,404	.49/ tree = $10,978
	Himrod	
Seedling	56,800	.849/ tree = $48,223
Liners	62,004	.49/ tree = $30,382

[T: 302-3061.

9/ The key jury instruction, given over the Department's objection, was:

> . . . in determining value for immature or maturing nursery stock, you should (continued...)

c. Award of damases.

The jury accepted, then, the expert's suggested deductions (only detailed to the extent shown above), and awarded damages on that basis. The trial court added prejudgment interest from October 7, **1984.** The 2d **DCA** agreed, except to commence the running of prejudgment interest in April **1985.**

D. Compensation for Lost Production.

Mid-Florida and Himrod asserted they had "additional" damages for lost production, and over the Department's objection, the Nurseries' expert quantified such "lost production." [T: 310-315].[10/] To arrive at a figure, the

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[9/] (...continued)
reduce the amount that would be received at sale upon the maturity by the cost to bring such stock to the planned mature state. Reduction would not be appropriate. however, to the extent that substantially the same production costs were in fact incurred by the Plaintiffs.

In other words, you may determine compensation for Plaintiff's destroyed nursery stock by making them whole for the lost future market value of their immature or maturing citrustrees, less any cost of production not actually incurred. [T: **611-612,** emphasis supplied]. The underscored sentence is incomprehensible. The Department submits this instruction permitted the jury to exclude significant costs of production.

[10/] As noted above, Mid-Florida was permitted to build a new greenhouse in September and October **1984** which was not decontaminated. The effect of this new greenhouse on Mid-Florida's "lost production" claim was not considered.

expert assumed a 16-month growing cycle at each Nursery and then divided the number of plants at each nursery at the time of the burn by 16 to get an average number of plants produced each month. [T: 316]. The Nurseries had previously testified that their production cycle is quarterly, with approximately 35,000 plants begun each cycle. [T: 188, 190]. The expert multiplied his monthly figure by the April 1985 prices to arrive at a purported monthly **"loss"** [T: 316-3181 and multiplied that **"loss"** by the four months (September through December) during which he was told there was no production allowed. [T: 315].[11/] The expert never explained how there could be "lost production" during those four months when he had just finished explaining how his calculation of the "lost profits" for the Nurseries assumed no production was lost. For Mid-Florida, the expert calculated lost production of $140,956, and for Himrod $146,688. [Pl. Exh. 1 and 3]; [T: 319-3201. The jury accepted this claim. Again pre-judgment interest was added by the trial judge from October 7, 1984, the date of destruction. The 2d DCA rejected the lost production claim as a matter of law, while permitting repleading for a "temporary taking" under the United States Constitution.

[11/] The 2d DCA observed that the decontamination period was **"at** a minimum" two months, and footnoted: "The nursery owners presented evidence that the temporary shutdown lasted as long as four **months."** 14 F.L.W. 650, 654, fn. 3.

SUMMARY OF ARGUMENT

The decontamination of the Nurseries' greenhousesdoes not give them any rights to compensation under federal or state law. Although the United States Supreme Court recently held a "temporary taking" is compensable under the United States Constitution, the action complained of must still be a **"taking"** under federal law if compensation is to follow. The Department submits that under controlling United States Supreme Court and other federal decisions, it is clear that neither the burning of Nurseries' stock or the subsequent decontamination of the greenhouses was a taking. **"Temporary** takings" have not been recognized under the Florida Constitution. Translated as claims for "lost production" or "business damage" (as the claims were denominated below) the claims are not recoverable under Article X, Section 6 of the Florida Constitution. Further, so long as the future market theory of recovery approved by the 2d DCA with respect to the burning of the Nurseries' stock is accepted, damages for the decontamination would constitute double compensation.

But the future market theory of recovery is unacceptable generally and particularly in this case, where the future market was acknowledged to be sharply distorted by a major freeze in January 1985. Full compensation is normally the fair market value of the property taken on the date of taking. Here steady and slightly increasing market prices had been in effect for some nine months before the quarantine.

There was no showing why these pre-quarantine prices did not accurately reflect market value on date of taking. But even if the future market were used, it would have to be as that future market was expected to be at the time of taking. Since it was conceded that the major freeze was unexpected, use of the resultant market prices was error. Further, the courts below declined to require the existing markets for seedlings and 4" budded trees to be utilized because, as to seedlings, the Nurseries did not intend to sell into that market and because, as to 4" budded trees, the Nurseries expected to sell much of this product in larger pots. This too was error. Finally, to the extent that the future market value was appropriate, the courts below committed error by only deducting some of the costs which would have been incurred had the nursery stock actually continued its growth and been marketed the following spring or later. Finally, the jury instructions on damages were wrong in a host of respects.

ARGUMENT

Counsel to the Nurseries filed an amicus brief and argued in Polk. The principal direction of that argument was the "lost production" aspects of the case, or, as it was referred to at that time, the concept of "temporary takings" under the Florida and United States Constitutions. For this reason, this brief will first address that issue, then turn to the damages issues raised by the first certified question and the issues dependent thereon.

I. THE DECISION TO DECONTAMINATE BUSINESS PREMISES FOLLOWING DESTRUCTION OF THE NURSERY STOCK THEREON DOES NOT CONSTITUTE A SEPARATE COMPENSABLE TAKING OR AFFORD ANY ALTERNATIVE CLAIM FOR LOST PRODUCTION.

A. Although Federal Law Permits Compensation For Temporary Takings, No Activity Here Involved Is A Taking Under Federal Law.

Under recent United States Supreme Court precedent, compensation may be recovered for "temporary takings" which deny a landowner all use of his property. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 2389, 96 L. Ed. 2d 250 (1987). First English established this principle as a matter of federal constitutional law. But First English, which came before the Supreme Court on a dismissal of a complaint, did not decide what facts would constitute a temporary taking. This decision in no way changed the law as to what constitutes a taking

under the Federal Constitution. Rather, it said if a taking occurs, the fact that it is temporary does not preclude compensation. The fundamental taking questions must still be satisfied: (i) was the denial of use a valid exercise of the government's police power? and (ii) does the government's action deny all use of the property? First English thus specifically confirms there is no "taking", temporary or otherwise, if the denial of use was a valid exercise of the police power:

> We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations.

107 S.Ct. at 2384-5 (citations omitted, emphasis added).

The Department submits there was no taking under federal law either by reason of the original destruction of nursery stock or the decontamination. The United States Supreme Court's analysis in Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L. Ed. 568 (1928) ("Miller") is instructive. The Miller Court addressed the constitutionality of a Virginia statute which gave the state entomologist the power to destroy red cedar trees which are "or may be the source or 'host plant' of the communicable plant disease known as cedar rust." Id. at 277. Cedar rust posed a danger to the apple industry which is "one of the principal agricultural pursuits in Virginia."

Id. at 279. As Justice (later Chief Justice) Stone explained for a unanimous Court, "The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards."[12] Id. at 278-79 (emphasis added).[13]

The United States Supreme Court has revisited this rule on more than one occasion. In Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L. Ed. 2d 631, reh'g denied, 439 U.S. 883, 99 S.Ct. 226, 58 L. Ed. 2d 198 (1978), the Court reaffirmed Miller holding that government can make "'a choice between preservation of one class of property and that of the other,'" and that in the context of such a decision property can be destroyed without compensation. Id. at 126 (quoting Miller). The Court in Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L. Ed. 2d 472 (1987) again confirmed there is no balancing between governmental and private interests, and observed that

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[12] Contrary to assertions by the Nurseries in this case and the nursery owner in Polk, destruction was not limited to red cedar trees known to be infected. The stattute covered trees "which are, or may be the source." Kelleher v. French, 22 F.2d 341, 344 (W.D. Va. 1927), aff'd, 278 U.S. 563, 49 S.Ct. 35, 73 L. Ed. 507 (1928).

[13] "The type of emergency situation that may enable the state to destroy property, without payment of compensation, is not limited to wartime conflict." 2 R. Rotunda, J. Nowak, J. Young, Treatise on Constitutional Law, § 15.12, at 143 (1986) (discussing Miller). Indeed the paradigm peacetime emergency situation is the destruction of trees to prevent the spread of a disease.

Miller concluded "the state's exercise of the police power to prevent the impending danger was justified and did not require compensation." 107 S.Ct. at 1245.

The Seventh Circuit, in the course of considering alleged improper government action in In re Chicaso, Milwaukee, St. Paul & Pacific R.R., 799 F.2d 317, 325 (7th Cir. 1986), cert. denied, 481 U.S. 1068, 107 S.Ct. 2460, 95 L. Ed. 2d 869 (1987) (an alleged error in the bankruptcy sale of the railroad line), gave an excellent current summary of federal takings law. The court queried, "So when does error 'take' property?" Id. at 325. The court posed both actual and hypothetical situations and came to the conclusion that, in circumstances similar to that in the instant case, there would be no taking.

> [I]f in order to go into the dairy business the government condemns a herd of cattle, that would be a compensable taking; if the government condemns the herd to stamp out an infectious disease, that is not a taking (both because the disease is the principal cause of the loss and because there are reciprocal benefits in the program of disease control), see Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L. Ed. 568 (1928); and if the government kills a given animal mistakenly thinking it diseased, that is a tort rather than a taking.

799 F.2d at 326. Citing errors of the government in many varied aspects of the law, the court found that "[n]one of these costly errors is a taking. . ." Id.

In Slocum v. United States, 515 F.2d 237 (5th Cir. 1975), Florida was faced with the threat of Velogenic

Viscerotropic Newcastle Disease (WND), a deadly communicable avian disease. Isolates from exotic birds imported by the Plaintiff showed the virus in two samples and on this basis the state ordered general destruction. The court summarized the evidence:

> Slocum's witnesses, including experts, pointed to the absence of proof that the birds were actually diseased and to the slender basis upon which the presence of virus, let alone disease, rested -- two samples. The Department presentation, on the other hand, stressed the enormous risk to the poultry business posed, the dearth of knowledge about VVND's clinical course and manifestations in such birds as Slocum's, and that the presence of the virus among the birds had been established by the only sure test known to science.

Id. at 238. The trial court found the government's order invalid. The appellate court reversed the trial court and ordered enforcement of the destruction order. Exposure was enough to warrant destruction. That the government might be wrong is not enough to justify invalidation of police power action. See also Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907, 914-15 (3d Cir. 1987).[14/]

The same principles have been applied by the federal courts in determining whether quarantines (including those for

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[14/] South Florida Growers Assoc. v. United States Dept. of Agriculture, 554 F. Supp. 633 (S.D. Fla. 1982) is also instructive. There the court upheld a challenge to the government's exclusion of Mexican citrus, observing that if the government had failed to do so, though it did not know whether the citrus was infected by canker, and the citrus did cause reintroduction of canker into Florida, the government could have been charged with a taking.

decontamination) constitute a "taking." These decisions have consistently refused to find a quarantine to be a taking. Thus, in Loftin v. United States, 6 Cl. Ct. 596 (1984), aff'd, 765 F.2d 1117 (Fed. Cir. 1985) a herd of dairy cattle was destroyed because some of the cattle had contracted tuberculosis. A quarantine was then imposed on the dairy following destruction of the cattle in order to clean and decontaminate the premises. The dairy owner claimed lost profits for this decontamination period both by reason of the cattle destruction, since he was forced to meet his contractual obligations by purchasing milk from others, and by reason of his inability to use his equipment during the decontamination. The court found the decontamination not to be a taking. See also Case v. U.S. Dept. of Agriculture, 642 F. Supp. 341 (M.D. Pa. 1986), aff'd per curiam, 829 F.2d 30 (3d Cir. 1987).

It is thus clear that under the United States Constitution, there was no taking either by virtue of the original burning of the citrus plants or the subsequent decontamination.

B. Florida Law Does Not Authorize Compensation For Temporary Takings.

The Florida Constitution has not been construed to award compensation for a "temporary taking." Morton v. Gardner, 513 So.2d 725 (Fla. 3d DCA 1987), rev. denied, 525 So.2d 879 (Fla.), cert. denied, ____ U.S. ____, 109 S.Ct. 305, 102 L. Ed. 2d 324 (1988) (no taking for total deprivation

of use of commercial fishing boat for 124 days); Hillsborough County v. Gutierrez, 433 So.2d 1337 (Fla. 2d DCA 1983) (no taking for temporary ouster from home by flooding caused by county; claim sounds in tort, not inverse condemnation); State, Dept. of Transp. v. Donahoo, 412 So.2d 400 (Fla. 1st DCA 1982) (no taking from temporary invasion due to construction around hotel);[15] Flake v. State. Dept. of Agriculture, 383 So.2d 285 (Fla. 5th DCA 1980) (no taking for quarantine which did not itself destroy property andwhichmerely placed restrictions on use by the owner). The analyses in Morton and Flake are particularly relevant.

In Flake, a citrus nursery had imported 34 Star Ruby grapefruit trees from Texas and planted them in its groves. 383 So.2d at 286. Budwood taken from these trees was then used to establish the nursery. Id. at 287. The Star Ruby was very susceptible to "foot-rot", a serious citrus disease

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[15] A divided First District in 1959 indicated negligent placing of fill in property could constitute a taking. State Road Dept. v. Darby, 109 So.2d 591 (Fla. 1st DCA 1959). Donahoo reversed this indication once the legislature waived sovereign immunity as a defense. The Donahoo court stated:

> "The destruction of the free-standing brick wall located at the rear of appellees' property, however, can arguably, under Darby, be considered a taking. We think Darby to be inapplicable to the facts before us since it was decided long before the legislature conditionally waived the state's immunitytotortactionsbyenacting Section 768.28, Florida Statutes (1975)."

412 So.2d at 403. Donahoo was preordained by Dept. of Transp. v. Burnette, 384 So.2d 916, 922 (Fla. 1st DCA 1980).

which was widespread in Florida, and to "ringspot", a disease about which little was known. Id. When the Star Ruby trees were later discovered by state officials (the nursery had failed to go through the proper importation procedures), a quarantine was imposed which prohibited movement of the nursery stock beyond the nurseries' contiguous groves. Id. The nursery challenged the quarantine as a taking without just compensation. Id. at 286. The court rejected the claim, because the quarantine did not destroy property or appropriate it for public use:

> 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.

Id. at 289 (citing Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957)). Under this standard, the prohibition on production of citrus during the decontamination period does not constitute a taking.

In Morton, supra a commercial lobstering boat was seized by the Marine Patrol pursuant to Section 932.701-.704, Fla. Stat., the Florida Contraband Forfeiture Act, on the suspicion that it was carrying marijuana. Approximately 124 days later, it was determined that the vessel had not been carrying marijuana and the vessel was ordered returned to its owners. The owners, in a counterclaim to the original forfeiture action, claimed they had been wrongfully deprived of the use of their fishing vessel for the 124 days and that

such deprivation constituted a taking for which they were entitled to be compensated. 513 So.2d at 727.

The court rejected this claim, reasoning:

> Only a permanent deprivation of an owner's use of his property will support such an action. State, Dept. of Health and Rehabilitative Services v. Scott, 418 So.2d 1032 (Fla. 2d DCA 1982). When government action merely impairs the owner's use of his property, "the action does not constitute a 'taking' but is merely consequential damage and the owner is not entitled to compensation." Tequesta v. Jupiter Inlet Corp., 371 So.2d 663, 669 (Fla. 1979), cert. denied, 444 U.S. 965, 100 S.Ct. 453, 62 L. Ed. 377 (1979). The damages then are damnum absaue injuria and thus not compensable.

513 So.2d at 729-30 (emphasis in original). The court went on to equate "loss of use" claims with claims for "lost profits" which the courts have consistently held to be not compensable.

The Nurseries in their amicus brief in Polk contended that Anhoco Corp. v. Dade County, 144 So.2d 793 (Fla. 1962), conformed, 145 So.2d 561 (Fla. 3d DCA 1962) and Division of Admin., State Dept. of Transp. v. Mobile Gas Co., 427 So.2d 1024 (Fla. 1st DCA), rev. denied, 437 So.2d 677 (Fla. 1983) by analogy indicate the Florida Constitution has been construed to give compensation for a "temporary taking." Anhoco is the second of two access cases of the same name. Access is "a property right which appertains to the ownership of land." Palm Beach Countv v. Tessler, 538 So.2d 846 (Fla. 1989). In Anhoco, the State Road Department condemned under its statutory authority a portion of Anhoco's land abutting a conventional

service road in order to create a limited access highway.[16] Although this Court acknowledged government could reaulate access by prohibiting U-turns, specifying driveway locations, and the like, this Court concluded Anhoco's right of ingress and egress had been destroved by changing the highway into a limited access facility, and required payment of compensation.[17] After the total destruction of access, substantially equivalent alternative access was later provided by construction of a frontage road. The compensation was thus in the nature of severance damages from the foundational taking for the road itself. Severance damages (also called damage to the remainder) are part of the constitutional requirement for just compensation. Division of Admin., State Dept. of Transp. v. Grant Motor Co., 345 So.2d 843, 845 (Fla. 2d DCA 1977).

Mobile Gas does not appear to have any relevance at all. That case involved the failure of the Department of Transportation to construct a project in such a way as to provide access, contrary to its express promise in a prior eminent domain case. The court held the Department's promise

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16/ In the first Anhoco case, Florida State Turnpike Authority v. Anhoco Corp., 116 So.2d 8 (Fla. 1959), conformed, 117 So.2d 15 (Fla. 3d DCA 1960) this Court held that the Department's statutory authority required it to obtain in fee simple all propertyneeded for creation of limited access facilities.

17/ The taking of the original access was permanent, not temporary. The word "temporary," which was used with reference to the denial of access, (see Anhoco at 793; Tessler at 848), appears to reflect the fact that alternative satisfactory access was subsequently provided.

was valid and breached and damages for the breach of promise were recoverable.

C. The Second District Correctly Held That Florida Law Does Not Authorize Compensation For "Lost Production" Or "Business Damages" In This Case.

As the 2d DCA concluded:

> The claim for lost production arises out of the interruption of production caused by the Department's exercise of police power. This interruption occurred for a short period during the burning process, and for a longer time during the decontamination process. The owners argue that the interruption can be viewed as "incidental" to the burning process. Under this method, the interruption creates consequential damages arising out of the taking of personal property . . . .
>
> If the claim for lost production is analyzed as incidental to the taking of the personal property, these damages clearly are not recoverable as compensation under article X, section 6, of the Florida Constitution. The constitutional right to receive full compensation under eminent domain is not a right to receive general damages. The taking of the citrus plants authorizes the grove owners to receive full compensation for the plants. While the owners are entitled to receive "prospective revenue" which is directly derived from the plants themselves, they are not entitled to receive general damages arising from the "business operated at a particular location." T & H Associates, 395 So.2d at 560.
>
> The claim for lost production is a claim for consequential, business damages. It is well established that "the right to business damages is a matter of legislative grace, not constitutional imperative." Jamesson V. Downtown Dev. Auth., 322 So.2d 510 (Fla. 1975). See also State Dep't of

> Transp. v. Fortune Fed. Sav. & Loan Ass'n, 532 So.2d 1267 (Fla. 1988); Texaco, Inc. v. Dep't of Transp., No. 71,914 (Fla. Jan. 5, 1989) [14 F.L.W. 5]. The legislature has not graced these nursery owners with a statute authorizing business damages. Section 73.071(3)(b), Florida Statutes (1987), allows for severance damages to remaining property where the state takes less than the entire property. That statute is not applicable to this taking of personal property.[6]
>
> The nursery owners argue that such consequential damages would be available in a typical tort action against a third person who negligently destroyed their nurseries. See R.A. Jones & Sons, Inc. v. Holman, 470 So.2d 60 (Fla. 3d DCA 1985), review dismissed, 482 So.2d 348 (Fla. 1986). While this may be correct, they have only brought an action for inverse condemnation and not an action in tort. . . . Unless the grove owners could establish operational as compared to planning-level errors, their tort action would have been barred by sovereign immunity. Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979).

14 F.L.W. 653-54 (footnote omitted).

This holding is in accord with other cases recognizing that full compensation relates to the loss of tangible property, Grant Motor Co., supra, 345 So.2d at 846; Dept. of Transp. v. Fortune Federal Savings and Loan Assoc., 532 So.2d 1267 (Fla. 1988) and, with respect to business damages, follows the general rule in the United States. United States v. General Motors Corp., 323 U.S. 373 (1945); Nicols on Eminent Domain § 13.3 (Rev. 3d ed. 1976). See also Loftin v. U.S., supra and Mulkey v. Division of Admin., State, Dept. of Transp., 448 So.2d 1062 (Fla. 2d DCA 1984) which concluded lost profits from reduced

profit-making capacity of the business constitute business damages, uncompensable absent legislative grace to award them. The damages asserted here from the reduced "profit-making capacity" during the decontamination time are the same. Loss of profits resulting from such **"downtime"** is not compensable.

D. So Long As The Future Market Theory Approved By The Second District Is Accepted, Damages For **"Lost** Production" Would Result In Double Compensation.

On their basic taking claims, the Nurseries were awarded monies on the assumption the plants were not destroyed in October **1984,** but instead grew until April **1985** or later, then sold. On their **"lost** production" claims, they sought monies to compensate them for their inability to grow plants in the same greenhouses[18/] during the identical period of time. [T: **152, 315].** Thus, **"lost** production" damages claimed by the Nurseries duplicate damages already awardedthe Nurseries under the "future market" theory approved by the 2d DCA with respect to the destruction of nursery stock. The 2d DCA acknowledged as much in concluding that prejudgment interest could run only from April **1985,** which was the date it permitted to be used for fixing the basic **"taking"** damages. **14** F.L.W. at **655,** fn. 5. By allowing the Nurseries to recover for the profits they would have obtained had their stock continued growing to maturity in April 1985, there can be no "lost

18/ Mid-Florida's new greenhouse was not the subject of a quarantine.

production" by an assumed failure to grow other stock in the same sreenhouses from the burning in October 1984 until two months (or four months) thereafter. One simply can not be permitted to recover first for the full value of hypothetically mature plants, and, again, for being prohibited from bringing them to maturity.

11. A CITRUS NURSERY OWNER WHOSE STOCK IS DESTROYED BY THE STATE DURING A QUARANTINE IS NOT ENTITLED TO MEASURE ITS LOSS AS OF THE DATE OF THE REOPENED MARKET

A. The Ordinary Measure of Full Compensation For Taken Property Is Its Fair Market Value At Time Of Taking.

Under the Florida Constitution, full compensationmust be paid when property is taken for a public purpose. Article X, Section 6, Florida Constitution. While the current Florida Constitution uses the term **"full"** compensation, that term has been construed by the same standard as **"just"** compensation under Section 12 of the Declaration of Rights, Florida Constitution (1885) as well as the **"just"** compensation clause of the United States Constitution. State Road Dept. v. Chicone, 158 So.2d 753 (Fla. 1963). The general rule is that **"just"** or **"full"** compensation is the value of the property at the time it was taken. Olson v. United States, 292 U.S. 246, 54 S.Ct. 704, 78 L. Ed. 2d 1236 (1934); County of Volusia v. Pickens, 439 So.2d 276 (Fla. 5th DCA 1983). Just compensation contemplates that the owner will be made whole, but not more,

Olson v. U.S., supra, and encompasses the public who pay for the taking as well as the individual property owner. United States v. 564.54 Acres of Land, 441 U.S. 506, 99 S.Ct. 1854, 1860, 60 L. Ed. 2d 435 (1979). "The sovereign must pay only for what it takes, not for opportunities which the owner may lose." United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 282, 63 S.Ct. 1047, 87 L. Ed. 1390 (1943).

As the 2d DCA conceded, the value of the property taken is ordinarily measured by the fair market value at the time of the taking. 14 F.L.W. at 652; see also Dept. of Transp. v. Nalven, 455 So.2d at 304; County of Volusia v. Pickens, 439 So.2d at 277. Fair market value is defined as "what a willing buyer would pay in cash to a willing seller", United States v. Miller, 317 U.S. 369, 374, 63 S.Ct. 276, 87 L. Ed. 336 (1943); United States v. 320.0 Acres of Land, 605 F.2d 762, 781 (5th Cir. 1979), looking at "comparable sales on the open market." Kimball Laundry Co. v. United States, 338 U.S. 1, 6, 69 S.Ct. 1434, 93 L. Ed. 1765 (1949); Staninger v. Jacksonville Expressway Authority, 182 So.2d 483, 489 (Fla. 1st DCA 1966). This concept contemplates consideration of the prices obtained by others for similar property, United States v. 729.773 Acres of Land, 531 F. Supp. 967, 974 (D. Haw. 1982); United States v. 576.734 Acres of Land, 143 F.2d 408, 109 (3d Cir.), cert. denied, 323 U.S. 716, 65 S.Ct. 43, 89 L. Ed. 576 (1944); Barnes v. United States, 538 F.2d 865, 210 Ct. Cl. 467 (1976).

Measures of compensation other than "fair market value" are not used unless there is no reliable evidence of market value or "when its application would result in manifest injustice to owner or public." Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 10, n.14, 104 S.Ct. 2187, 2194, n. 14, 81 L. Ed. 2d 1 (1984); United States v. 50 Acres of Land, 469 U.S. 24, 105 S.Ct. 451, 83 L. Ed. 2d 376, 382 (1984); See also Culbertson v. State Road Dept., 165 So.2d 255 (Fla. 1st DCA 1964).

Thus, there are two basic rules for determining the value of the property "taken". First, the value is the "fair market value", and second, it is the fair market value as of the time of taking. The 2d DCA concluded that "the jury in this case was authorized to find that a market did not exist for the nursery owners' product in October 1984" and hence there was no fair market value for their plants as of that time.[19/] With this "no market" predicate, the Nurseries successfully sought the "expected" fair market value of their plants after the plants had grown sufficiently for them to

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19/ Despite this conclusion of the 2d DCA, the jury may not have so found. The jury instruction permitted the jury to use the April 1985 market if they found no market in October 1984 "or if the Plaintiffs would normally be expected to market their stock at a later time." See fn. 4, p. 7. Since the Nurseries' intent and expectations incontestably were "to market their stock at a later time" the jury never needed to have found the alternative disjunction, no market in October 1984. Absent a finding of no market, the 2d DCA was in error in stating with approbation: "The jury was instructed that it could consider either the future market value or the market value at the time of the destruction. 14 F.L.W. at 652 (emphasis added).

desire to market them in their then state of growth. There are three flaws in the Nurseries' argument. First, the Nurseries' approach confuses market existence with their desire to sell into that market. Second, even if no market existed for the plants at the time of taking, the applicable fair market value is that closest in time without distortion, which certainly must be the August **1984** pre-quarantine steady price rather than the April **1985** prices grossly distorted by a major freeze.[20] Finally, even if the future market were relevant, it would be relevant only as it was expected to be at time of taking (that is, without the major freeze inflation, not as it actually turned out to be).

Thus, the trial court denied the Department's motion for directed verdict[21] and then, over the objection of the Department, permitted the jury to:

20/ Applying the Nurseries' theory of market value would be disaster to a field nursery destroyed before the January, **1985** freeze, as, given its severity, a field nursery would have been destroyed by the freeze. To use the **"aftersight"** market value reasoning, as the Nurseries' proffer here is simply wrong.

21/ At the close of Mid-Florida and Himrod's case, the Department moved for a directed verdict arguing **1)** all the nursery plants which were marketable at the time of the burn (seedlings and mature budded trees) must be valued at that time using the then prevailing prices; 2) only those plants (liners) for which, because of immaturity, there was no market can be valued using a future market price, and the subjective intent of the nurseries as to when they would sell the plants is irrelevant; **3)** any lost profits which may have been incurred during the quarantine or the decontamination, or both, constituted consequential, business damages which are not recoverable. [T: **374-3861.**

> (i) determine not to apply a market price to product which could have been marketed in its then growth stage (seedlings and 4" budded trees): and
>
> (ii) determine to apply market prices in the next post-quarantine market commencing April 1985 (a market which the 2d DCA concluded was artificially high) and then to ignore the substantial inflation in that market caused by the intervening event which was unexpected at time of taking.

The clear evidence was that the August 1984 market prices reflected a slightly upward and virtually stable price level from the December 1983 freeze. There was absolutely no evidence to show that the quarantine on nursery plant movement after September 1984 resulted in either an increase or reduction of prices which would render the August 1984 prices unreliable. There was thus no reason not to apply the standard rule that existing market prices are to be used.

It defies common sense to say that sales of nursery stock defined by the USDA and the Department as "exposed", once the quarantine was announced, would have been at prices higher than pre-quarantine prices.[22/] In any case, as the 2d DCA found (14 F.L.W. 651), the April 1985 price was materially distorted upward by a January 1985 major freeze which could not have been anticipated at the time of the destruction of nursery stock in October, 1984.

22/ As this Court is well aware, one issue raised in Polk was the exclusion by the same trial judge as conducted this trial of evidence showing that fear of the consequences of purchasing exposed nursery stock would have a material negative effect on prices.

Simply put, there is no rational basis in the record for failing to choose a pricing level (August 1984) which appears to be totally accurate (and in all probability favorable to the Nurseries) for a different pricing level (April 1985) known to be distorted from the date of taking by reason of external events. Under Nour v. Division of Admin., State, Dept. of Transp., 267 So.2d 365 (Fla. 1st DCA 1972), evidence of "relatively recent sales of comparable property" controls the determination of fair market value. In any eminent domain case, retrospective consideration of market values over a period of time prior to the date of taking must be used because the appraiser always updates past prices to date of appraisal and further updates them to date of trial. In establishing fair market value, the courts look to the hypothetical willing buyer and the hypothetical willing seller and actual comparable sales on the open market. United States v. 320.0 Acres, 605 F.2d 762, 781 (5th Cir. 1979). Under controlling law, then, the prices established by the Department in this record as of August, 1984 would all constitute reliable evidence of the market value of the nursery trees in early October, 1984, and would preclude use of other methodologies.

The 2d DCA approved the trial judgment on the basis of this reasoning:

> In light of the state quarantine, the jury in this case was authorized to find that a market did not exist for the nursery

> owners' product in October 1984.[23] Thus, the jury had no practical option but to consider evidence of earlier or later market prices. In this case, the lower court did not compel the jury to adopt the future market approach. Instead, the jury instructions permitted the jury to "value the nursery stock in accordance with the highest and most profitable use for which it is reasonably adaptable and needed, or is likely to be needed, in the near or foreseeable future.[24]

14 F.L.W. 652.

This reasoning must be wrong. Even if there were no actual determinable market and fair market value as of the date of taking, the principle must remain unchanged: the jury is to use the best available information as to the expectations of future value (assuming there is no present market or fair market value) as of the time of taking. The 2d DCA permitted the Nurseries to receive "the benefit of the January freeze which they could not have predicted in October." Id. at 651. By definition, they were given that which they could not have expected. [25]

The inadequacy of the future market value theory as used by the nursery owners and the 2d DCA becomes clear by

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[23] The doubt that the jury in fact did so find is detailed above, supra, p. 35, n. 19.

[24] The jury instructions are set forth on pages 9 and 10. A careful reading of these instructions does not justify the 2d DCA's reading of them.

[25] Failure to hold true to principle will result in the State being forced to play roulette. If the April 1985 price had been lower than the pre-quarantine price (which it might well have been absent the major freeze) the Nurseries would have sought the pre-quarantine price.

analogy to contract law. Takings and just compensation analysis has been analogized to a theory of implied contract. United States V. Lynah, 188 U.S. 445, 461, 23 S.Ct. 349, 47 L. Ed. 539 (1903), ovrl'd on other arounds sub nom United States v. Chicago, 312 592, 61 S.Ct. 772, 85 L. Ed. 1064 (1941); United States v. Dickinson, 331 U.S. 745, 67 Ct. 1382, 91 L. Ed. 1789 (1947). The similarities between the determination of damages for takings are thus markedly similar to the determinations of damages for breach of contract. Both require determination of damages in an effort to put the aggrieved party "in the position he would have been in" were it not for the taking/breach. Olson, supra, 292 U.S. at 255.

Lake Region Paradise Island, Inc. v. Graviss, 335 So.2d 341 (Fla. 2d DCA), cert. dismissed, 338 So.2d 842 (Fla. 1976) involved a contract under which the plaintiff could purchase at a certain future date a 10% interest in a mobile home park. The question was the date of measurement of damages and the plaintiff sought a date of measurement subsequent to the date of breach. In rejecting the claim, the court held

> While there are exceptions, damages for breach of contract are generally to be measured as of the date of the breach, with interest to the date of trial. Under such a rule, fluctuations in value of the matter or thing contracted for after breach do not affect the recovery allowed, the object of the rule being to place the plaintiff in the same position he would have been in had the contract been performed on the date fixed therein for performance. It isn't unfair to deny audience to a plaintiff who would if the property increased in valued, claim entitlement to

> the better position now, the time of trial, on the grounds that that's where he'd be had the vendor performed then, the time of the breach. Whether he would not have 'sold off' is too speculative and self-serving to be a viable criterion; and, certainly, if the property decreased in value, he'd be claiming damages as of the time of the breach.

335 So.2d at 342-3 (emphasis is original).

The analogy to contract law is again instructive with respect to the nurseries' claims based on their intent to move plants into 6" pots, though they had never sold plants in 6" pots before. Under general contract principles in this state, to recover damages "there must be an on-going business with an established sales record and proven ability to realize profits at the established rate. Conner v. Atlas Aircraft Corp., 310 So.2d 352 (Fla. 3d DCA 1975), [cert. denied, 322 So.2d 913 (Fla. 1975)]; Belcher v. Import Cars, Ltd., 246 So.2d 584 (Fla. 3d DCA 1971), [cert. denied, 252 So.2d 801 (Fla. 1971)]." Daytona Migi of Jacksonville, Inc. v. Daytona Automotive Fiberglass, Inc., 388 So.2d 228, 232 (Fla. 5th DCA 1980), later appeal dismissed, 417 So.2d 272 (1982).

B. If A Market Exists, The Market Value In That Market Is Applied Whether Or Not The Inverse Condemnee Desired To "Sell" Into That Market.

The approach to price is part of an overall misconception of the law of takings indulged in by both the trial court and the 2d DCA. A taking is, pure and simple, a forced sale. This Court in this case has concluded the taking

was justified[26]. This justified taking substituted cash for the Nurseries' property at the time of "sale". The Nurseries had no right not to "sell". Here, there was a market for seedlings. That these Nurseries did not intend to sell their seedlings into it is irrelevant. The Nurseries were forced to sell by the superior right of the State to take. The same is true for the budded stock. The Nurseries only had 4" containers in stock on October, 1984. That the Nurseries might have continued to grow the stock into 6" or three-gallon (7 1/2") containers had they not been burned, must be irrelevant.[27]

The Nurseries have argued that preventing them from hypothetically growing the burned nursery stock until April 1985 is unfair [T: 17-20]. Fairness is a two-edged sword and fairness to the State is as necessary as fairness to the Nurseries. And, as the United States Supreme Court has acknowledged and accepted " . . . in some cases, this standard [fair market value on the date of appropriation] fails fully to indemnify the owner for his loss." Kirby Forest Industries,

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[26] " . . . we do not disagree with the Department's contention that the state's order was a valid exercise of its police power . . ." State. Dept. of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., supra, 521 So.2d at 103.

[27] Even if it were impossible to determine the fair market value of seedlings at the time they were taken, a strong seedling market existed in the spring of 1985. The destroyed seedlings should then be valued as seedlings using the 1985 market price, instead of using the future market value of a mature tree and attempting to back out the costs to bring it to that hypothetical future market. The same is true of 4" budded trees.

Inc. v. United States, supra, 467 U.S. at 10, fn. 15, 104 S.Ct. at 2194, 81 L. Ed. 2d at 10.[28] Thus, as to the stock on hand in October 1984 and using the cost exhibit prepared by the Nurseries [Def. Ex. 2] and the prices in the market in August 1984, it is possible to determine the relative profit margins available by sale at the two levels of plant maturity. For seedlings, the cost to grow is 12 cents each and the sale price established by the evidence was 15-20 cents. The difference (3-6 cents) is then divided back into the *cost* to grow to get the range of profit on sale of the seedling: 28-67%. The Nurseries' normal profit margin at the time for plants in 4" pots was about 58% (sale price $3.50 less; cost to grow of $2.22 or net profit of 58%). Allowing the Nurseries 20¢ for each seedling subject to forced sale would achieve a 67% profit margin.

The future market analysis advocated by the nurseries and the 2d DCA gives both nurseries far more than 100% profit on all of the plants.[29] This puts these nurseries in a far

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[28] The Supreme Court noted this to be true "[p]articularly when property has some special value to its owner because of its adaptability *to* his particular use, the fair market value measure does not make the owner whole. . . We are willing to tolerate such occasional inequity because of the difficulty of assessing the value an individual places upon a particular piece of property and because of the need for a clear, easily administrable rule governing the measure of "just compensation." [illegible] to [illegible]by Forest, supra, 104 S.Ct. at 2194, n. 15. Id. (citation omitted).

[29] Seedlings 2,220 (cost to grow mature plant) - .849 (cost Nurseries say they saved) = 1.37. 4.50 - 1.37 = 3.129. The profit margin is 228%

(continued...)

better position than the hypothetical competitor, discussed by the 2d DCA, who has taken the risk of holding his plants until the April market and out of whose profit will come the fixed expenses incurred to hold them to that time. Far from being in the same position as they would have been had their plants not been destroyed, the Nurseries have been given a windfall.

C. Alternatives Are Utilized Only If No Market Exists Into Which The Inverse Condemnee Must "Sell".

Only if there is no market does one consider alternatives. That appears to have been the case in Lee County v. T & H Associates, Ltd., 395 So.2d 557 (Fla. 2d DCA 1981), repeatedly cited by the 2d DCA here. T & H Associates involved watermelons which "were only three or four inches high at the time of taking." 395 So.2d at 558. There appears to have been no market for such a product.[30] Here there was a conceded market for seedlings. T & H Associates is therefore simply inapposite.[31] The other Florida decisions cited by the

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[29] (...continued)
Liners 2.220 (cost to grow mature plant) - .490 (costs Nurseries say they saved) = 1.73. 4.50 - 1.73 = 2.27. The profit margin is 160%

[30] Conceivably such immature watermelon plants could be sold for cattle food; certainly they could not be sold as "watermelons."

[31] The Department also argued to the 2d DCA that T & H Associates by its terms applied only to growing periods of (continued...)

Nurseries in their amicus brief in Polk all involve contract or tort claims for loss of, or injury, to a srowinq crop. See, Wicoma Inv. Co. v. Pridgeon, 137 Fla. 540, 188 So. 597, 600 (1939); Twyman v. Roell, 123 Fla. 2, 166 So. 215 (1936); R.A. Jones & Sons, Inc. v. Holman, 470 So.2d 60, 70-71 (Fla. 3d DCA 1985); Mulford Hickerson Corp. V. Assrow-Kelsore Co., 282 So.2d 19 (Fla. 4th DCA 1973), quashed on other grounds, 301 So.2d 441 (Fla. 1974); Wm. G. Roe & Co. v. Armour & Co., 414 F.2d 862 (5th Cir. 1969). Furthermore, the Nurseries candidly concede in their amicus brief that the probable net yield approach is used in other jurisdictions "for the destruction of or injury to growing crops (not yet ready for market)". See, Amicus brief at 6. These decisions, then, are equally inapposite.

D. If The Alternative Of Future Market Value Is Used, All Expenses, Fixed or Variable, Must Be Deducted To Determine Lost Profit.

The Nurseries' expert did not back out all appropriate costs. Under the case law permitting use of future market

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31/ (...continued)
less than one year and another decision found no such rule could apply where, as here, the growing period is over one year. United States v. 131.68 Acres of Land, 695 F.2d 872 (5th Cir.), cert. denied, 464 U.S. 817, 104 S.Ct. 77, 78 L.Ed. 2d 88 (1983) (where sugar cane crop was to be harvested over a three year period, lessee of the condemned land was entitled to the value of the crop in the year of the taking, minus the harvesting costs, plus costs incurred to the time of the taking towards the future crops). The Department fully reiterates this distinction, but more broadly avers that T & H Associates simply does not apply.

value in rare situations, the costs which must be backed out of the future market value are "the value and amount of labor and expenses which would have been necessary to continue the cultivation and marketing of the crop after its destruction." Daily v. United States., 90 F. Supp. 699, 701, 116 Ct. Cl. 723 (1950). By definition this means expenses, fixed or variable.

Defendant's Exh. 2 reflects the *costs* to grow citrus nursery plants to the point they may be marketed as 4" budded trees. According to this exhibit it costs $.117 to grow a seedling, $1.025 to grow a liner, and $2.220 to grow a mature 4" budded tree, Thus, the existence of a liner in October 1984 assumes an embedded cost of $1,025 plus an additional cost of $1.195 ($2.220 - 1,025) to grow it to maturity. Assuming the April 1985 4" budded tree price is $4.50 and the unexpended $1.195 is subtracted therefrom, the net remaining value is $3,305 for the liner. This is $.70 less than the jury awarded the Nurseries or, for all liners, a total of $43,713.

The same analysis (likewise using Defendant's Exh. 2) can be applied to seedlings. The additional cost to grow tho seedling to maturity would be $2.103 and using the April 1985 $4.50 price (though the seedlings would in fact not yet have matured), [T: 164, 250] each seedling has a net value of

$2.397, which is an aggregate of $67,628 less the jury awarded the Nurseries.[32/]

The 2d DCA sought to compare the Nurseries to an "Undamaged Competitor" 14 F.L.W. at 653. That court's comparison is flawed. The "value" of nursery stock to the Undamaged Competitor is necessarily offset by everything that Competitor spent to grow that stock (i.e., the entire $2.220), whether it is a fixed cost or a variable cost. The courts below permitted the Nurseries were permitted to assign only a portion of their costs to creating the hypothetical "value", i.e. only some of the $2.220. That is unacceptable.

CONCLUSION

For the foregoing reasons, both Certified Questions should be answered in the negative and the Court should reverse and remand with directions to

A. deny the Nurseries any right to amend their complaint to allege a "temporary taking" under the United States Constitution,

B. mandate a retrial on damages based on the requirements that

1. the Nurseries "sell" into the market all their nursery stock for which there was a market in existence on the date of taking or August 1984 if there was no market in existence on

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[32/] A similar analysis is difficult for the 4" budded trees since the Nurseries' expert did not break down the expenses for them.

the date of taking (regardless of whether they expected or desired to "sell" into that market), and

2. as to any nursery stock of the Nurseries as to which no market existed on the date of taking or August 1984, that the Nurseries receive the fair market value expected on the date of taking for the product into which such nursery stock would have grown at the first date it could have been sold (ignoring all unexpected factors such as major freezes) less all costs (variable or fixed) which would have been incurred to grow the nursery stock to such product at such first date.

Respectfully submitted this 22nd day of May, 1989.

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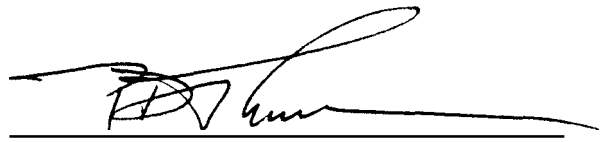
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by hand delivery to M. Stephen Turner, Esq., Broad and Cassel, P.O. Drawer, 11300, Tallahassee, FL, 32302, this 22nd day of May, 1989.



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