IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,046

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

Defendant, Petitioner,

v.

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

Plaintiffs, Respondents.

ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT PASSING UPON QUESTIONS CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE

REPLY 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. Citations to the transcript will be cited "T." followed by the transcript page number. As in the Department's Initial Brief, Mid-Florida Growers, Inc. will be referred to as "Mid-Florida", Himrod & Himrod Citrus Nursery will be referred to as "Himrod", and the two will be referred to collectively as the "Nurseries"; the Florida Department of Agriculture and Consumer Services will be referred to as the "Department"; and the United States Department of Agriculture will be referred to as the "USDA". The Department's Initial Brief will be referred to as "Init. Br." and the Answer Brief of Respondent as "Resp. Br.". Since the filing of the Department's Initial Brief, the decision of the Second District has been published in Southern Reporter, State. Dept. of Agriculture and Consumer Services v. Mid-Florida Growers. Inc., 541 So.2d 1243 (Fla. 2d DCA 1989) and this citation will be utilized herein.

INTRODUCTION

The Nurseries begin their Statement of the Case and Facts by misrepresenting their own amended complaint, claiming it "alleged that the Department's separate action incident to the destruction of stock, initially ordering [the Nurseries] not to resume production for a two year period, later reduced to 3-4 months, also required compensation." (Resp. Br. 1). In truth, the amended complaint simply added paragraphs seeking consequential damages or "lost profits" from the destruction of the plants:

> 19a. Plaintiffs have suffered and are also entitled to recover damages for the loss of use of their business assets, lost profits, re-start up expenses, continued overhead expenses, and relocation and/or extra greenhouse costs. (R. 147)
>
> **19b. By** destroying Plaintiffs' citrus trees, the Department effectively destroyed Plaintiffs' nursery businesses causing Plaintiffs to incur loss of use of their business premises, unproductive overhead, and unnecessary start-up expense. (emphasis added) (R. 163).[1/]

Although the Second District, outlining the various stages of the USDA/State canker eradication program, correctly observed that decontamination was one aspect of that program,[2/] decontamination was not raised by the amended complaint, or any other pleading.

In an apparent attempt to sweep the decontamination program within this Court's prior determination that the destruction of the plants was a "taking"[3/] the Nurseries,

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1/ Paragraph 19a. was added on granting of the Nurseries' Motion for Leave to Amend Second Amended Complaint. Paragraph 19b. was added on granting of the Nurseries subsequent Motion for Leave to Amend. See R. 190.

2/ Decontamination is the third of "three distinct exercises of this police power," 541 So.2d at 1245-6.

3/ See also the Nurseries' argument that the burning and decontamination were interrelated activities of the same program and full compensation will not occur "unless the program's entire effect, i.e., all the actions connected with the taking, are considered." Resp. Br. 32.

late in their brief, speak of "the unified nature of the destruction/prohibition actions as part of the same program" (Resp. Br. **39).** Nevertheless, the Nurseries repeatedly attack the decontamination (and the plant destruction as well (Resp. Br. 16, 38)) as "unjustified', apparently contesting this Court's acknowledgement that the destruction was a valid exercise of the State's police power in the interest of public safety and welfare.[4/] And, while attacking the decontamination as "unjustified", the Nurseries successfully prevented the Department from offering justification for it.[5/]

The Department brings to the Court's attention Section 17(3)(a) of the recently adopted Chapter 89-91, Laws of Florida (the "Canker Claims Laws);' which states:

> There is hereby appropriated $1,250,000 from the General Revenue Fund . . . for the purpose of fully satisfying the following judgments which became final prior to the effective date of this act:
>
> 1. Order imposing conditions of stay entered May 13, 1988, in Mid-Florida Growers. Inc. v. Department of Agriculture and Consumer Services, Hardee County Circuit Court, Case No. CA-G-85-275.
>
> 2. Order awarding attorneys' fees and costs entered May 13, 1988, in Mid-Florida Growers. Inc. v. Department of Agriculture and Consumer Services, Hardee County Circuit Court, Case No. CA-G-85-275.

4/ As this Court noted, the trial court found the destruction to be a valid exercise of the police power in the interest of public safety and welfare. State. Dept. of Agriculture and Consumer Services v. Mid-Florida Growers. Inc., 521 So.2d 101, 102 (Fla.), cert. denied, ___ U.S. ___, 109 S.Ct. 180, 102 L. Ed. 2d 149 (1988) and both the Second District (505 So.2d at 594 (Fla. App. 2d DCA 1987)), and this Court (521 So.2d at 103) accepted that conclusion.

5/ The Nurseries contended at trial that the prior rulings on liability established the law of the case and that any evidence regarding liability issues must be excluded. (T. 22-26, 51, 127). The trial court agreed. (T. 132).

6/ The validity of the jurisdictional aspects of the Canker Claims Law are before the Court in State. Dept. of Agriculture and Consumer Services v. Bonanno, Case No. 74,373 (Fla. filed June 30, 1989).

[3. Unrelated summary final judgment.]

[4. Unrelated order awarding attorneys' fees and costs.]

Although the Department did not concede any amount of damage suffered by the Nurseries:' the Legislature provided for payment of the referenced judgments to the Nurseries and the Department in consequence has now paid the Nurseries $1,149,921.01.

ARGUMENT

I. THE NURSERIES' ALLEGED LOSS OF PROFITS IS NOT COMPENSAFJLE UNDER FEDERAL OR STATE TAKINGS LAW.

The Nurseries state: "The Department gives scant attention to the lost production issue certified as one of great public importance." [8] This comment is accurate. The Second District's opinion on this subject, quoted in full by the State in its Initial Brief,[9] cites the applicable cases and Florida constitutional provisions, and correctly concludes that the Nurseries' claim, stated either as one for "lost production" or "business damages" is without merit. Therefore the State has directed its argument to the only way the Nurseries can still assert this claim -- as a "temporary taking." And, asserted as a

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[7] The Nurseries assert the Department conceded a damage amount regarding valuation of the trees. Resp. Br. 7-8. This is not accurate. The Department tried to present relevant evidence showing that the value of the Nurseries' stock was greatly diminished by a contemporary market scare regarding citrus canker, but were effectively prevented from pursuing this theory by the trial court. (T. 22-25, 51, 127, 132).

[8] Resp. Br. 31.

[9] See Init. Br. 31-2.

"temporary taking," the claim can only relate to the decontamination aspect of the canker eradication program.[10/]

A. The Nurseries' Repeated Attack On The State's Exercise Of The Police Power As "Unjustified" Sounds In Tort.

The decontamination of the nurseries, although a "distinct exercise of the police power" was part of an overall program that this Court has accepted as being a valid exercise of that power.[11/] If government is to operate effectively, an evaluation of the validity of a particular exercise of the police power in the area of public health and safety must be made at the time it is exercised (not with 20-20 hindsight based on after-discovered facts).[12/] This Court has concluded, however, that even though the police power is validly exercised in the area of public health and safety, a taking may still occur and in such case the State is liable to compensate the "condemnee" for the value of the property "taken."[13/]

10/ As noted above, the "lost production" or "business damages" in the Nurseries' amended complaint is limited to damages from destruction of the trees and, as such, is non-compensable under both the applicable law as stated by the Second District and under federal law. United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L. Ed. 311 (1945). The Second District, however, discussed the claim as "occur[ring] for a short period during the burning process, and for a longer time during the decontamination process." 541 So.2d at 1250. Therefore the permission by the Second District to the Nurseries "to amend their complaint in an effort to allege a temporary taking under the theory enunciated in First English [Evangelical Lutheran Church v. County of Los Aneeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L. Ed. 2d 250 (1987)]" (Id. at 1252) apparently comprehends the decontamination.

11/ Aspects of the program were initially upheld as responding to an "immediate danger to the public health, safety, or welfare" in Dennev v. Connor, 462 So.2d 534, 536 (Fla. 1st DCA 1985); Nordmann v. Florida Dept. of Agriculture and Consumer Services, 473 So.2d 278, 280 (Fla. 5th DCA 1988). See also n. 2, supra.

12/ A California appellate court decided First English on May 26,1989 (since the filing of the Initial Brief), on remand by the United States Supreme Court. First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (Cal. Ct. App. May 26, 1989). A copy of this opinion (West galley proof) is Appendix A hereto. That court looked to the "avowed intent" or "avowed purposes" of the governmental action there involved as controlling (at 905). Cf. also Hadacheck v. Sebastian, 239 U.S. 394, 414, 36 S.Ct. 143, 60 L. Ed. 348 (1915).

13/ The federal rule is to the contrary. See Mugler v. Kansas, 123U.S. 623,668-9,8 S.Ct. 273, 31 L. Ed 205 (continued...)

Given the prior opinion by this court on liability, it is surprising to find the Nurseries repeatedly attacking the State's exercise of the police power as unjustified, something they do no less than nine times.[14] If in fact there was no justification for the State's three-stage program - quarantine, destruction, and decontamination - then the State did not validly exercise its police power. Under these circumstances, if the State is liable, its liability must be in tort.[15] This is how a federal court looking at this matter under federal law would view it, as the United States Court of Appeals for the Seventh Circuit has stated.[16] Either the State's program was a justified application of the police power, but nevertheless there was a compensable taking (which was this Court's thesis) or it was an unjustified application of the police power and the State is liable in tort (which is the logical consequence of the Nurseries' attack on the program as "unjustified").

13/ (...continued)
(1887), which permitted the prohibition of manufacture of intoxicating liquors by an existing distributor without compensation because the prohibition was "declared, by valid legislation, to be injurious to the health, morals or safety of the community." This passage was quoted with approval in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 1244, 94 L. Ed. 2d 472 (1987).

14/ A list of these attacks is Appendix B to this Reply Brief.

15/ Of course, a tort claim would be subject to sovereign immunity defenses, including non-waiver for operational level error.

16/

> [I]f in order to go into the dairy business the government condemns a herd of cattle, that is 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.

In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 799 F.2d 317 (7th Cir. 1986), cert. denied, 481 U.S. 1068, 107 S.Ct. 2460, 95 L. Ed. 2d 869 (1967). Not being able to deal with this analysis, the Nurseries label it "pure dicta." Resp. Br. 41. The Nurseries assert the Seventh Circuit analysis is "contrary to the analysis of many courts, including this Court." Id. None of the "many courts" is named. This Court did make a contrary analysis, as the Department has repeatedly acknowledged.

B. Florida Law Has Not Authorized Compensation For A Temporary Taking, Federal Law Would Not Do *So* In This Case. And Florida Should Not Do *So* In This Case.

That Florida courts have not found temporary takings to be compensable is clear from the judicial decisions cited by the Second District (541 So.2d at 1251), most specifically Morton v. Gardner, 513 So.2d 725 (Fla. **3d** DCA 1987), review denied, 525 So.2d 879 **(Ha.),** cert. denied, ___ U.S. ___, 109 S.Ct. 305, 102 **L.** Ed 324 (1988).[17/] The Nurseries argument on the basis of 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), review denied, 437 So.2d 677 (Fla. 1983) is dealt with in the Initial Brief.[18/]

Applicable Florida **law** construing takings would hold the act of decontamination, as opposed to the act **of** destruction, uncompensable under these facts. "**[A]** taking will not be established merely because the agency denies a permit for **a** particular use that a property owner considers to be the most desirable, or because the agency totally denies use **of** some portion of the property," Fox v. Treasure Coast Regional Planning Council, 442 So.2d 221, 226 (Fla. 1st DCA 1983), so long as some economically viable use of the property remains. To the same effect, see Graham v. Estuary Properties,

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[17/] The Nurseries seek to distinguish these cases (Resp. Br. **37-39).** But, despite their protestations, Morton most certainly was **an** inverse condemnation claim of a "temporary taking", which the Third District specifically found did not arise under Florida law because it involved only temporary loss of use of property.

[18/] See Init. Br. **29-31.** Despite the Nurseries' assertion (Resp. Br. 34), Mobile is a breach of promise case ("Mobile contended that contrary to the promissory representations, access was closed . . ." (427 So.2d at 1026). The underscoring of the Mobile quote in the Nurseries' brief (the "condemnation judgment does not preclude a subsequent claim for injuries . . . by negligent or wrongful acts") confirms the Nurseries may consider the decontamination a "negligent or wrongful act", i.e. a tort - a position in accord with their repeated use of the word "unjustified."

Inc., 399 So.2d 1374 (Fla.), cert. denied, 454 U.S. 1083 (1981); Hollander v. Biscayne Cove, 14 F.L.W. 1370 (Fla. 3d DCA June 6, 1989). There is no statutory right to receive general damages from a taking and the full compensation "demanded by our state constitution requires only that the condemning authority compensate the property owner for the full market value of the property taken." State. Dept. of Transp. v. Fortune Federal Savings and Loan Ass'n., 532 So.2d 1267, 1270 (Fla. 1988).[19/]

This Court, of course, may now determine that temporary takings should be compensable in Florida. In so doing, this Court is free to construct a law of inverse condemnation under the Florida Constitution more protective of private property (and, concurrently, less protective of the State's treasury) than that applied by the federal courts under the United States Constitution.[20/] The Department submits such a decision would not be wise.[21/]

The Department further submits a careful analysis of what the United States Supreme Court did and did not do in First English, supra, is advisable. That Court did clarify that "temporary" as well as "permanent" takings were cornpensable. But that Court did not change the federal law of takings. This was explicitly recognized by the California

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19/ Business damages or lost profits are also not compensable under the United States Constitution. United States v. General Motors Corp., supra, 323 U.S. at 383, (where the government has condemned a temporary occupancy, "value of goodwill or of injury to the business . . . must be excluded from the reckoning"). This case, although relied on by this Court in its liability decision here (521 So.2d at 103) is a damages case, not a liability decision (a special act authorized the condemnation of General Motors plant during World War 11).

20/ The Nurseries suggest this Court has done so in its liability decision (Resp. Br. 37, fn. 9) and the State is firm in its belief this Court did.

21/ This Court has previously indicated it is inclined to construe the "takings" rules of the two constitutions identically. State Road Dept. v. Chicone, 158 So.2d 753 (Fla. 1963). Considering the opacity of "takings" law generally, it is certainly advisable not to increase it by diverging federal and state interpretations.

appellate court in its recent First English decision.[22/] In fact, after a thorough discussion of the "public safety" exception to the takings clause enunciated in Mugler v. Kansas, supra, and its "progeny", the California First English court concluded that the landowner failed to state a claim because the uses the ordinance at issue denied could be constitutionally prohibited under the County's power to protect public safety. The court discussed at some length the difference between the compensability of "takings" which advance the "public health and safety" and those in the interest of land use regulation, observing that the United States Supreme Court in First English clearly determined that the former are non-compensable even if "all uses" are prohibited by the governmental action. 258 Cal. Rptr. at **901.** The court looked to the following language of the United States Supreme Court in Kevstone Bituminous Coal as defining the difference between the two kinds of regulation:

> "Many cases . . . have recognized that the nature of the State's action is critical in takings analysis. (Fn. omitted.) . . . The Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of reciprocity of advantage' that Justice Holmes referred to in Pennsylvania Coal . . . [O]ne of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others . . . [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it. . . . **As** the cases . . . demonstrate, the public interest in preventing nuisances is a substantial one, which in many instances has not

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22/ **The Supreme Court's majority opinion in First English held property owners are entitled to compensation for so-called "temporary takings", but only where the government regulation in question is ultimately ruled to have worked *an* unconstitutional taking. 258 Cal. Rptr. at 907.**

required compensation." (480 U.S. at pp. 488-489, 491, 492, 107 S.Ct. at pp. 1243-1244, 1245, 1246).

258 Cal. Rptr. at 902, n. 10.[23/]

The United States Supreme Court would not find the decontamination aspect of the canker eradication program (or the destruction aspect, either, for that matter) to be a compensable taking. Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L. Ed. 568 (1928)[24/]; Mueler v. Kansas, supra; First English, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 59 L. Ed. 2d 631, reh'e denied, 439 U.S. 883, 99 S.Ct. 226, 58 L. Ed. 2d 198 (1978) and Keystone Bituminous Coal Ass'n v. DeBenedictis, supra. Therefore, First English, while authority for "temporary takings" being compensable, is not

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[23/] The Nurseries cite Owen v. United States, 851 F.2d. 1404 (Fed. Cir. 1988) (en banc) and Yuba Goldfields. Inc. v. United States, 723 F.2d 884 (Fed. Cir. 1983) for the proposition that "Federal cases recognize that harm mistakenly inflicted by intentional governmental activity can be a taking." Resp. Br. 41. Owen solely involved the issue of whether the government's navigational servitude extended laterally as well as vertically, the decision being that if the government activity took "fast land in either direction, the servitude did not apply. The government had also acknowledged before the program started that it would be liable for such taking in inverse condemnation. Yuba involved the government taking the inverse condemnee's mineral rights by refusing to permit the condemnee to enter the government's land to exercise them.

[24/] As the California appellate court observed in the First English remand:

> If there is a hierarchy of interests the police power serves -- and both logic and prior cases suggest there is -- then the preservation of life must rank at the top [as was the case with the regulation here involved] . . . We need not address the ultimate question -- is the public interest at stake in this case so paramount that it would justify a law which prohibited any future occupancy or use of appellant's land. Certainly, the owners of red cedar trees were not entitled to any public compensation when the state required them to destroy those trees in order to save the "lives" of apple trees in Miller v. Schoene, supra.

258 Cal. Rptr. at 904.

The Nurseries seek to distinguish Miller v. Schoene and its "progeny," on the basis that these cases apply only to situations where the plants or animals destroyed are infected or diseased. But that is not what the statute there involved said. The statute empowered the State entomologist to destroy red cedar trees which are "or may be the source or 'host plant' of the communicable disease known as cedar rust," Id. at 277 (emphasis added). The Nurseries contend Miller v. Schoene was "extensively argued in the liability appeal to this Court and in the certiorari petition to the United States Supreme Court." (Resp. Br. 39). In fact Miller was not cited to the Second District at all, and a review of the briefs in this Court belies the Nurseries' contention. Miller was extensively argued in the State's memorandum in support of the Department's Motion for Rehearing.

authority for the decontamination here being a "taking" at all. The Department submits this Court should likewise find no "taking," temporary or otherwise in that regard.

11. THE VALUATION OF THE NURSERIES' CITRUS STOCK SIX MONTHS AFTER ITS TAKING SUBVERTS THE ESTABLISHED JURISPRUDENCE OF EMINENT DOMAIN.

A. The Nurseries' Subjective Intentions Regarding The Future Use Of Their Destroyed Stock Does Not Allow Them To Value Their Stock At A Future Date, Particularly Because Their Stock Was Mature (i.e. Salable In That Form) On The Date Of Taking.

The Nurseries' Brief reflects a fundamental misconception of the law of inverse condemnation in repeatedly arguing that the Nurseries intended to sell budded plants in the spring of 1985 (or later) had the State not destroyed their stock. The State does not contest the Nurseries' intent. Specifically the State concurs that:

1. The Nurseries did not intend to sell seedlings;

2. The Nurseries did not intend to sell liners;

3. The Nurseries did intend to sell budded stock in the largest pots they could.

Rather the State says this intention (and non-intention) is irrelevant by reason of the very essence of the State's power of eminent domain. "Eminent domain is the inherent sovereign power to compel a holder of property to yield his title and transfer it for a full consideration to the state, . . . which takes it by an involuntary proceeding because it is needed for public use." 3 Nichols on Eminent Domain § 9.1[2] (3d Ed. 1985).

Because the State destroyed the Nurseries' stock in October, 1984 the State "bought" and the Nurseries "sold' their nursery stock at that time.[25/] The time for determining value of property is the time of taking, which is when the State's inherent sovereign power to take property through involuntary proceedings "crystalizes into the assertion of that right by the sovereign . . ." Yoder v. Sarasota County, 81 So.2d 219, 221 (Fla. 1955). The Nurseries' intentions, had the destruction not occurred, were destroyed along with their plants.[26/]

The issue, then, becomes solely one of damages, as measured by the sale price of the plants on the date of taking, not on the date established by the Nurseries' lost intentions. Assuming there was no market at time of destruction -- October 1984[27/] -- because of the quarantine imposed (initially by the USDA, in early September 1984) then there are two possible constructs of such damages. The first of those is the one the Department believes appropriate. The second of those is what the Department believes to be the only rational application of a "sale-into-a-future market" hypothetical approach.

25/ A taking by the government in a condemnation action is characterized as a sale, albeit a forced one. Madden v. Commissioner, 514 F.2d 1149, 1151 (9th Cir. 1975), cert. denied, 424 U.S. 912, 96 S.Ct. 1108, 47 L. Ed. 2d, 316 (1976); Stockton Harbor Industrial Co. v. Commissioner, 216 F.2d 638 (9th Cir. 1954), cert. denied, 349 U.S. 904, 75 S.Ct. 581, 99 L. Ed. 1241 (1955).

26/ The Nurseries argue from Swift & Co. v. Housing Authority of Plant City, 106 So.2d 616 (Fla. 2d DCA 1958), that evidence of future uses or plans existing on date of taking are admissible. Certainly a willing buyer and a willing seller will consider uses to which the land is reasonably adaptable. Swift, supra at 619. See also Division of Bond Finance, State, Dept. of General Services v. Rainey, 275 So.2d 551 (Fla. 1st DCA 1973) (evidence of future building plans are admissible as factor buyer would take into consideration in determining purchase price at date of taking). But this case does not concern adaptability of land or plants which a buyer would consider. A hypothetical buyer in October 1984 would pay nothing more for marketable product (seedlings and budded plants) than the current market price for that product.

27/ The State in its Initial Brief cited the evidence that there may then have been a market (Init. Br. 11-12) and observed the jury need not have found there was one under the jury instructions (e.g., Init. Br. 10, n. 6; 36, n. 19). Contrary to the Nurseries' assertions (Resp. Br. 9) the State does not "complain of' or "attack" the jury instructions. The State merely notes the consequences of the instructions.

1. First Possibility.

a. Whatever could be sold into an existing market (whether or not the Nurseries would have sold into that market had there been no destruction) would be sold into that market, which in this case would be everything but liners.?'

b. The hypothetical sales price in October 1984 was the same as when the quarantine began, since the prices had jumped after the December 1983 freeze and remained relatively constant (a very gradual rise) since.

c. Under these circumstances there would be loss[29/] from decontamination as measured by the inability of the Nurseries to recommence production from time of forced sale of existing stock in October 1984 until decontamination was completed at the end of December. This loss would consist of fixed, but not variable, costs incurred by the Nurseries during that period and a "timing" loss of use of money for two months (the imputed interest on anticipated profit for two months).

2. Second Possibility.

a. The Nurseries would hypothetically continue to grow their stock as they intended to do but for the destruction and sell it in the spring of 1985

28/ As shown in the Initial Brief (Init. Br. 45, 46) Lee County v. T & H Associates, Ltd., 395 So.2d 557 (Fla. 2d DCA 1981) stands for the proposition that when no market for mature plants exists probable net yield can be used to construct an alternate value. "The measure of damages ordinarily applicable to total destruction of a growing annual or ordinary crop is the value of the crop at the time and place of destruction." 21A Am. Jur. 2d Crops § 75, at 699. It is only the absence of market value which necessitates the adoption of an alternative method of valuation, such as probable net yield. 21A Am. Jur. 2d Crops § 76, at 700.

29/ That loss exists does not mean it is cornpensable under the law of "takings". As shown by the discussion above at pp. 6-9, it would not be. The Second District so recognized.

at prices which, at time of destruction, they could have anticipated they could have sold the stock for in the spring of 1985.[30/]

b. Under these circumstances, there would be no damage from the decontamination because the Nurseries hypothetically were in full production during the decontamination period.[31/]

c. The Nurseries would not receive the windfall from actual sales prices in the spring of 1985 as created by the January 1984 freeze. **A** windfall to these Nurseries is no more permissible than depriving a field nursery owner whose stock was destroyed in October 1984 of full compensation for that destruction because a freeze would otherwise have destroyed the stock in January 1985. Since the issue is value in October 1984, no one should be hurt or helped by subsequent acts of God. The Nurseries' callous suggestion to the contrary as to their freeze-impacted field nursery brethren must be rejected.[32/]

The Nurseries have argued that Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957) and State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959) show this Court there "impliedly" adopted the "sale-into-a-future-market"approach (the Second Possibility above). **A** review of this Court's opinions and the briefs filed in this Court reveals the

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30/ The Second District accepted this hypothesis in part because it believed the quarantine lasted until April **1, 1985 (541** So.2d at **1255).** Actually it ended on December **1, 1984** as to nurseries which were **not** exposed. The Nurseries' counsel specifically so stated (T. 26). Reference to the testimony of Richard Gaskalla, the Director of the Division of Plant Industry, confirms that only suspect plants were quarantined until April **1985.** (T. **407-408).** Therefore both parties agreed a market for non-exposed plants existed after December **1, 1984.**

31/ As the Second District stated: "The total production capacity of the Mid-Florida greenhouse is approximately **140,000** seedlings, liners, and budded trees" **(541** So.2d at 1245) and the total trees destroyed were **137,980 (541** So.2d at **1246).**

32/ See Resp. Br. **27,** n. 5 in response to Init. Br. **37,** n. **20.** In fact the field nursery would argue for the pre-quarantine August **1984** price, a game of "Heads I Win, Tails You Lose" as to the State.

Nurseries are wrong. The trees destroyed in the nematode eradication program there involved were mature, fruit producing trees. The State proposed destroying not only infected trees, but trees around them known by the State to be healthy. The owners of the trees successfully sought an injunction against the destruction of the healthy trees without compensation.

The Corneals argued they would be damaged by the loss of the trees, including their loss of income therefrom.[33/] This Court held that the trees could not be destroyed unless "compensation be made for, at least, the loss of profits sustained by the owner whose healthy trees are destroyed under the compulsory program of 'pull and treat'. . . ." 95 So.2d at **6-7** (emphasis added). The decision does not even imply, much less state, which aspect of the damage the Corneals recited they might suffer the underscored words refer to. Certainly neither Corneal nor State Plant Board endorses a "probable net yield" approach (or any other approach to calculation of damages) as the Nurseries assert. Resp. Br. 20.

Following Corneal, the legislature adopted Chapter **57-365,** Laws of Florida, to establish a means of determining and paying the compensation due for destruction of healthy trees. This Court ruled on that statute in State Plant Board, but made no independent comment on damage issues. This Court did observe:

> "Just compensation" for the destruction of a citrus tree in a grove infested with burrowing nematodes is not the equivalent, as it cannot be, of the "fair market value" of a citrus grove in which no infestation has been found.

110 So.2d at **406.** The Nurseries may find no solace in these decisions.

[33/] **The Corneals' asserted damages are described in their Initial Brief of Appellants to this Court at 11-12.**

The Department submits that its suggested approach to damages (the First Possibility above) should be adopted by this Court and the Second District reversed.

CONCLUSION

For the foregoing reasons, both Certified Questions should be answered in the negative and the Court should reverse and remand with the directions specified in the Initial Brief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by mail this 11th day of July, 1989 on M. Stephen Turner, **Esq.,** Broad and Cassel, P.O. Drawer, 11300, Tallahassee, FL, 32302.

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