IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. 05-CA-4120

FRANK AYERS, et al.,

Division 37

Plaintiffs,

v.

FLORIDA DEPARTMENT OF
AGRICULTURE AND CONSUMER
SERVICES,

Defendant.
_____/

ORDER ON LIABILITY CLAIMS AND DEFENSES

THIS CAUSE came before the Court for non-jury trial on October 22 - 25, 2012 and March 19, 2013[1] for determination of liability on Plaintiffs' claims for inverse condemnation and additional compensation under Counts I and III of Plaintiffs' First Amended Class Action Complaint. Present before the Court were Plaintiffs/Class Representatives Scott and Teresa Fishman, on behalf of themselves and the certified class, and Richard Gaskalla, Director of the Division of Plant Industry, on behalf of Defendant Florida Department of Agriculture and Consumer Services. Based on the stipulations contained in the parties' Pretrial Statement, the evidence consisting of documents and testimony, and argument of counsel on law and fact, the Court makes the following findings of fact and conclusions of law.

[1] Subsequent to the trial held on Oct 22 through 25, 2012 the Defendant located additional information regarding the class citrus trees in question. The Plaintiff moved to Re-Open the Case to address the newly discovered evidence. The Court granted the unopposed Motion to Re-open the Case and accordingly the trial was re-opened and additional evidence presented on March 19, 2013.

I. SUMMARY OF THE CASE

Plaintiffs commenced this action against the Department on May 12, 2005. On October 13, 2005, Plaintiffs filed their First Amended Class Action Complaint ("Complaint") asserting three causes of action: Count I for inverse condemnation under Article X, section 6(a) of the Florida Constitution; Count II for declaratory judgment concerning section 581.1845, Florida Statutes; and Count III for additional compensation under section 581.1845, Florida Statutes.

The Department moved to dismiss the Complaint and on February 2, 2006, then-Orange Circuit Judge Jay P. Cohen entered an order denying the Department's motion to dismiss. On February 16, 2006, the Department filed its answer and affirmative defenses, denying liability and asserting a number of affirmative defenses including, *inter alia*, that the Department "was entitled to destroy and remove citrus trees which presented an imminent threat to public health, safety, or welfare, or were a public nuisance, without compensation."

Plaintiffs moved to certify a class consisting of Orange County homeowners whose canker-exposed citrus had been removed by the Department prior to January 1, 2000. In December 2009, Judge Maura Smith conducted a multi-day evidentiary class certification hearing. Following precedent from the Fourth District Court of Appeal Judge Smith granted certification which was affirmed by the Fifth District Court of Appeal. *Dep't of Agriculture v. Ayers*, 65 So.3d 145 (Fla. 5th DCA 2011).

The Court set the case for non-jury trial on liability following the Fifth District's decision affirming class certification. In January 2012, both sides submitted various pretrial motions upon which the Court entered orders which included: (1) granting the Department's motion and held that the burden of proof for the liability trial would be clear and convincing evidence pursuant to section 11.066(2), Florida Statutes; (2) granting the Plaintiffs' motion and held,

based on *Dep't of Agriculture v Bogorff*, that the proper measure of damages for the residential citrus trees that are the subject of this case would be replacement cost, not diminution in the value of the residential properties where the subject trees were situated; (3) denying the Plaintiffs' motion to preclude or limit the testimony of the Department's scientists; (4) granting the Plaintiffs' motion to preclude the testimony of firefighter and food safety experts; and (5) denying the Department's motion in *limine* to exclude from evidence two memoranda from Department employee Constance Riherd, without prejudice to the Department to object to the admission of such memoranda during the liability trial. 35 So.3rd 84 (Fla. 4th DCA 2010) and 48 So.3rd 835 (Table)(Fla. 2010).

In early March 2012, notice was provided to the Class pursuant to the Court's Order Approving Form and Manner of Notice to the Class. A total of 219 members of the Class, identified on Exhibit A to the Affidavit of April Hyduk Re Requests for Exclusion Received, timely excluded themselves from the Class and, therefore, are not bound by any orders or final judgment entered in this case.

This case proceeded to non-jury trial on liability over four and a half days in October 2012 and was reopened for additional evidence on March 19, 2013. The Plaintiffs/Class Representatives Scott and Teresa Fishman maintain they received less than full compensation for three citrus trees removed from their property because they were located within 1900 feet of a tree visibly infected with citrus canker. The principal response by the Department is that the property removed – the canker-exposed citrus – was a public nuisance, and that the abatement of a nuisance is not compensable taking.

Of the original plaintiffs in this lawsuit, all except Scott Fishman and Teresa Hanifan-Fishman have dropped out or denied certification as class representatives. Mr. and Mrs.

Fishman, as the only remaining class representatives, are required to "prove their own individual cases and, by so doing, necessarily prove the cases for each one of the members of the class." *Humana, Inc. v. Castillo*, 728 So. 2d 261, 266 (Fla. 2d DCA 1999). Plaintiffs William J. Rogers and Jeanette B. Rogers remain in this case as plaintiffs but not as class representatives. The Rogers did not appear at the liability trial and no evidence was presented as to the value of the citrus owned by them.

The certified class consists of all owners of residential citrus trees situated in Orange County, Florida, not used for commercial purposes, that (1) were not determined by the Department to be infected with citrus canker, and (2) were destroyed by the Department under the CCEP (collectively, "Plaintiffs" and/or "Class").

II. ISSUES

For purposes of making its liability determination, the primary disputed issues this Court must resolve are: (1) whether the Department's physical destruction, under the CCEP, of the Plaintiffs' and Class members' residential citrus trees, that were not determined to be infected with citrus canker but were located within 1900 feet of another citrus tree determined to be infected with citrus canker, constituted a taking under Article X, section 6(a) of the Florida Constitution and/or entitle Plaintiffs' and the Class to compensation under section 581.1845, Florida Statutes; (2) whether the Plaintiffs' and Class members' residential citrus trees, that were not determined to be infected with citrus canker but were located within 1900 feet of another tree determined to be infected with citrus canker, presented an imminent threat to the public health, safety or welfare, or constituted a public nuisance; and (3) whether the conflagration doctrine shields the Department from liability for its physical destruction, under the CCEP, of the Plaintiffs' and Class members' residential citrus trees.

In determining these issues, the Court considered and weighed the testimony, credibility and demeanor of thirteen witnesses,[2] reviewed and considered numerous exhibits admitted into evidence, analyzed memoranda of law and supporting case authority submitted by the parties, and considered the arguments of counsel. The Court makes now these findings of facts and conclusions of law regarding liability under the constitutional claim for inverse condemnation (Count I) and the statutory claim under section 581.1845, Florida Statutes (Count III).

III. HOLDINGS

Based on the record evidence and applicable case law, the Court finds and holds that the Department's physical destruction, under the CCEP, of the Plaintiffs' and Class members' residential citrus trees, that were not determined to be infected with citrus canker but were located within 1900 feet of another citrus tree determined to be infected with citrus canker, constituted a taking under Article X, § 6(a) of the Florida Constitution, requiring full and just compensation under section 581.1845, Florida Statutes.

The Court also finds and holds, based on the record evidence and applicable precedent, that the Plaintiffs' and Class' citrus trees did not pose an imminent threat to the public health, safety or welfare, and did not constitute a public nuisance, as those terms have been defined and interpreted under Florida law.

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[2] In addition to eight witnesses who testified in person, by agreement of the parties, the prior trial and/or deposition testimony of five other witnesses was admitted and considered by the Court. The prior testimony of former Department Deputy Commissioner Craig Meyer, Plaintiffs' scientific expert Dr. Lavern "Pete" Timmer, and Department scientific expert Dr. Armando Bergamin, consisted of these witnesses' actual testimony from a Broward class action citrus canker liability trial. The prior testimony from retired Department employee Constance Riherd was her actual testimony from the Palm Beach compensation trial. Witnesses who testified in person included, Department employees Richard Gaskalla, Dr. Timothy Schubert, Debra Martinez, Dr. Xaioan Sun, Plaintiffs' expert tree appraiser Eric Hoyer, Plaintiffs/Class Representatives Scott and Teresa Fishman, Rex Clonts, and Dr. Timothy Gottwald.

Finally, the Court finds and holds, based on the record evidence and applicable case law, that the Department is not shielded from liability for its destruction of Plaintiffs' and Class Member's trees under the conflagration doctrine.

Based on the foregoing, this Court finds for Plaintiffs, Scott and Teresa Fishman, and the Class and against the Department on the issue of liability under the constitutional claim for inverse condemnation and the statutory claim for additional compensation under Counts I and III of the Complaint as to Plaintiffs Scott and Teresa Fishman and the Class members. Accordingly, this case shall proceed to a jury trial to determine the amount of compensation due to Plaintiffs, Scott and Teresa Fishman and the Class members.

IV. STIPULATED FACTS

The Joint Pretrial Statement included the following stipulated facts:

1. This liability trial covers Plaintiffs' claims for inverse condemnation under Article X, Section 6(a), Fla. Const., and section 581.1845, Fla. Stat., to recover compensation on behalf of the certified class of Orange County homeowners whose residential citrus trees were classified as "exposed" and were physically destroyed by the Florida Department of Agriculture and Consumer Services on or after January 1, 2000 under the CCEP.

2. Pursuant to the Order Granting Motion for Class Certification, the certified Class is comprised of:

> All owners of citrus trees within Orange County, incorporated or otherwise, not used for commercial purposes, which were not determined by the Department to be infected with citrus canker and which were destroyed under the CCEP from January 1, 2000 to the present.

3. The Department is the agency of the government of the State of Florida responsible for adopting and implementing the CCEP, a joint state-federal program.

4. Class representative plaintiffs Scott and Teresa Fishman have owned a single family home located at 9124 Ridge Pine Trail, Orange County, Orlando, Florida 32819 as of April 8, 2003, and as of the time of the class certification hearing in December 2009.

5. Prior to April 8, 2003, three (3) citrus trees were located on the Fishmans' residential property in Orange County, Florida. On or before November 25, 2002, all three of the Fishmans' trees were classified as "exposed" by the Department. On or about April 8, 2003, the three (3) citrus trees located on the Fishmans' property were physically destroyed by the Department under the CCEP.

6. The Department's Pest Incident Control System ("PICS"), a computerized database prepared and maintained in connection with the CCEP, indicates that:

a. The total number of "exposed" residential citrus trees destroyed by the Department in Orange County under the CCEP on or after January 1, 2000 was 60,174; [3]

b. The total number of "positive" residential trees destroyed by the Department in Orange County under the CCEP on or after January 1, 2000 was 1,187;

c. The number of residential properties in Orange County on which only exposed trees were destroyed by the Department under the CCEP was 17,865;

d. The number of residential properties in Orange County on which only positive trees were destroyed by the Department under the CCEP was 139; and

[3] The trees owned by Plaintiffs and members of the Class that are the subject of this case were classified as "exposed" by the Department; namely, they were not determined by the Department to be infected with citrus canker but were located within 1900 feet of one or more other citrus trees that were determined to be infected with citrus canker ("positive").

e. The total number of residential properties in Orange County on which both positive and exposed trees were destroyed by the Department under the CCEP was 415.

7. According to PICS, between January 1, 2000 and the end of the CCEP in 2006, the Department destroyed a total of 682,204 residential citrus trees throughout the State of Florida under the CCEP: 577,253 of these trees were classified as "exposed" and 104,951 trees were classified as "positive."

8. According to PICS, the 577,253 citrus trees classified as "exposed" and physically destroyed by the Department between January 1, 2000 and the end of the CCEP in 2006 were located on 281,959 residential properties throughout the State of Florida.

9. The Department first confirmed the existence of Asian-strain citrus canker in each of the following Florida counties on the dates indicated:

Brevard	01/18/02
Broward	01/08/97
Charlotte	10/11/04
Clay	07/12/05
Collier	07/02/98
Miami-Dade	09/28/95
DeSoto	10/05/01
Glades	07/28/05
Hardee	05/17/05
Hendry	02/05/99
Highlands	05/13/02
Hillsborough	11/09/99
Indian River	01/08/05
Lake	01/19/06
Lee	08/19/02
Manatee	06/03/97
Martin	09/26/01
Monroe	06/19/02
Okeechobee	10/22/02
Orange	07/01/02
Osceola	11/01/04
Palm Beach	11/29/99

Polk	05/13/05
Sarasota	10/08/02
St. Lucie	12/22/04

10. On January 10, 2006, the United States Department of Agriculture notified the Department it would no longer fund the CCEP. In early 2006, the Department discontinued the CCEP.

V. DISPUTED ISSUES OF LAW AND FACT

The Joint Pretrial Statement identified the disputed issues of law and fact as:

1. Whether the Department's destruction of citrus trees owned by Plaintiffs and the Class under the CCEP, that were not determined to be infected with citrus canker but were located within 1900 feet of another tree actually determined to be infected with citrus canker, constituted a taking under Article X, Section 6(a) of the Florida Constitution.

2. Whether Plaintiffs and the Class are entitled to recover "additional compensation" for the destruction of their citrus trees under section 581.1845, Florida Statutes.

3. Whether the Department's physical destruction of citrus trees owned by Plaintiffs and the Class under the CCEP constituted a taking under articles X, Section 6(a) of the Florida Constitution.

4. Whether the citrus trees owned by Plaintiffs and the Class presented a threat to public health, safety or welfare, or constituted a public nuisance.

5. The extent, if any, to which Plaintiffs' and the Class' trees constituted compensable property.

6. The extent, if any, to which the spread of Asian strain citrus canker constituted a threat to the people of the State of Florida, Central Florida, and the Florida citrus industry.

7. Whether citrus trees exposed to Asian strain citrus canker would spread citrus canker to healthy trees.

8. Whether citrus trees harboring Asian strain citrus canker bacteria but not displaying symptoms could spread citrus canker to healthy citrus trees.

9. Whether citrus trees located within 1900 feet of citrus trees infected with Asian strain citrus canker would over time become infected.

10. Whether citrus trees sufficiently debilitated by other citrus diseases would become symptomatic with Asian strain citrus canker once exposed or infected.

VI. ANALYSIS

A. Guiding Legal Principles

1. Florida Takings Jurisprudence. The Florida Constitution protects individual property rights by prohibiting the government from taking private property for public use without the payment of full compensation. Article X, Section 6(a) of the Florida Constitution provides:

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

As explained in *Taylor v. Village of North Palm Beach*, 659 So. 2d 1167 (Fla. 4th DCA 1995), one of the principal purposes of the takings clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 1170 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). In other words, when the government acts for the benefit of the public as a whole or private industry, a select group of citizens should not bear the expense.

Eminent domain is the formal exercise of the government's power to take private property for the public good. Although the government generally exercises its power to condemn through formal eminent domain proceedings, governmental bodies sometimes take private property without first initiating formal proceedings. In those situations, the injured property owner may bring a claim for inverse condemnation. *City of Jacksonville v. Schumann*, 167 So. 2d 95, 98 (Fla. 1st DCA 1964); *State Dep't of Health and Rehabilitative Servs. v. Scott*, 418 So. 2d 1032, 1033 (Fla. 2d DCA 1982).

Inverse condemnation is a cause of action by a property owner to recover the value of property that has been taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken. *Sarasota Welfare Home, Inc. v. City of Sarasota*, 666 So. 2d 171, 173 (Fla. 2d DCA 1995); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So. 2d 1377, 1384 (Fla. 4th DCA 1984). Inverse condemnation is available to remedy physical and/or regulatory takings. Generally, the only issues decided in an inverse condemnation proceeding are: (1) whether the governmental agency has effected a taking; (2) the nature and extent of the property rights taken i.e. was it compensable property; and (3) the date of the taking, which is used for valuation purposes. *Foster v. City of Gainesville*, 579 So. 2d 774, 776 (Fla. 2d DCA 1991). If the court determines a taking has occurred, a jury trial is held to determine the amount of compensation to which the property owner is entitled.

In an inverse condemnation proceeding, the trial judge is the trier of all issues, legal and factual, except for the question of what amount constitutes just compensation. *Dep't of Agriculture v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla. 1988). "The trial court's determination that government action has resulted in a taking is a factual one." *Gardens Country Club, Inc. v. Palm Beach County*, 712 So. 2d 398, 402 (Fla. 4th DCA 1998). Whether a

regulation amounts to a taking depends on the unique circumstances of each case. Therefore, the trial court's factual inquiry must be made on a case-by-case basis. *Rubano v. Dep't of Transp.*, 656 So. 2d 1264, 1266 (Fla. 1995). The trial court's determination of liability in inverse condemnation is presumed correct and will not be disturbed on appeal if supported by competent, substantial evidence. *Atlantic Int'l Inv. Corp. v. State*, 478 So. 2d 805, 808 (Fla. 1985).

Florida courts recognize a taking can occur when the government, validly exercising its police power, enacts a regulation or imposes a condition that interferes with private property rights. *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. 2d DCA 1994).

2. Takings Decisions Arising From Citrus Canker Eradication Programs. The determination of liability in this case must be evaluated within the context of guiding precedent and statutory law.

The Department's citrus canker eradication efforts must conform to the constitutional limitations placed on the exercise of the State's police power. The destruction of private property by the State is an extreme exercise of its police power and is justified only within the narrowest limits of actual necessity, unless the State pays full and just compensation. *Corneal v. State Plant Bd.*, 95 So. 2d 1 (Fla. 1957). Generally, when the State, pursuant to its police power, destroys healthy citrus trees, it must provide full and just compensation to the owners of the trees. *Mid-Florida Growers*, 521 So. 2d at 105.

The Department's destruction of uninfected citrus trees may be properly undertaken without payment of full and just compensation if citrus canker constituted a public nuisance or presented an imminent public danger. *Dep't of Agriculture v. Polk,* 568

So. 2d 35, 39 n.2 (Fla. 1990). Common law "nuisance" has generally been described as anything "which either annoys, injures or endangers the comfort, health, repose or safety of the citizen, or which unlawfully interferes with or tends to obstruct, or in any way render unsafe and insecure other persons in life or in the use of their property." *Prior v. White,* 180 So. 347, 355 (Fla. 1938) *(quoting* 3 *McQuillin on Municipal Corporations,* 2d Ed., p. 122). *Black's Law Dictionary* defines public nuisance as an "unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property." *Black's Law Dictionary* page 1172 (Ninth Ed. 2009)

A public nuisance violates public rights, subverts public order, decency or morals or causes inconvenience or damage to the public generally. *Orlando Sports Stadium, Inc. v. State of Florida*, 262 So. 2d 881, 884 (Fla. 1972). In *Orlando Sports Stadium*, the Court held that allegations of a sports stadium was being used as a meeting place for drug users dabbling in hallucinogens, barbiturates, amphetamines and other "habit forming" drugs were sufficient to state a cause of action for public nuisance. *Id.* at 885.

Other Florida decisions provide examples of the type of factual circumstances creating a public nuisance. In *Health Clubs, Inc. v. State*, 338 So. 2d 1324 (Fla. 4th DCA 1976), the Court found that a health club that allowed female employees to perform sexual acts on male customers presented a public nuisance. In *Five Sky, Inc. v. State*, 131 So. 2d 31 (Fla. 3d DCA 1961), the Court affirmed an injunction which declared a nightclub allowing prostitution on its premises to be a public nuisance.

In *Glogger v. Bell*, 200 So. 100 (Fla. 1941), the Court found that the odors that would emanate from the construction of an animal reduction plant in an area occupied by small homes,

two large dairies and a tourist court would amount to a public nuisance because the odors would materially affect the surrounding properties, in addition to causing nausea and discomfort. Similarly, in *Osceola County v. Best Diversified, Inc.*, 936 So. 2d 55 (Fla. 5th DCA 2006), the Fifth District affirmed a judgment against a property owner on a claim for inverse condemnation arising from the government's denial of permits to allow the owner to continue operating a landfill. The Court affirmed, in part, based on evidence that the operation of the landfill created a public nuisance as a result of continuing complaints from nearby residents of foul odors emanating from the landfill, the source of which was hydrogen sulfide. *Id.* at 57.

The Department may also be shielded from liability under the "conflagration" doctrine. The "conflagration" doctrine shields a governmental body from liability for the destruction of private property where the government is acting to protect others from an emergency or imminent threat to life and property. As explained in *Los Osos Valley Assocs. v. City of San Luis Obispo*, 30 Cal. App. 4th 1670, 36 Cal. Rptr. 2d 758 (2d Dist. 1994), "[t]he emergency exception is limited. It operates to avert impending peril [and] courts have narrowly circumscribed the types of emergency that will exempt the public entity from liability." *Id.* at 1680. An "emergency" is evidenced by an imminent and substantial threat to public health or safety and includes such occurrences as fire, floods, earthquakes, riots, accidents, or sabotage. *Id.* at 1681-82. "Instances of this character are the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, or rotten fruit, or infected trees where life or health is jeopardized." *Id.* at 1680.

In *Strickland v. Dep't of Agriculture*, 922 So. 2d 1022 (Fla. 5th DCA 2006), the Fifth District applied the conflagration doctrine (although not identified by title) and held that the Department could not be liable under theories of negligence or inverse condemnation arising

from damage caused to the property owner's trees, fencing and a dike that state firefighters damaged or destroyed to create a fire line while attempting to extinguish a large fire burning out of control. The Fifth District held that the government's destruction of private property to "prevent the spreading of a fire" is not a "taking in the constitutional sense." *Id.* at 1023.

In the context of plant disease eradication programs, the Florida Supreme Court has commented on the constitutional limitations placed upon the State's exercise of its police power as requiring actions that "are really necessary to preserve and protect the public health, safety and welfare." *Corneal v. State Plant Bd.*, 95 So.2d at 4. "[N]o case-and none cited-holding that a healthy plant or animal, not imminently dangerous, may be destroyed without compensation to the owner in order to protect a neighbor's plant or animal of the same specie." *Id,* at 6. Only in cases of obvious and immediate danger can the State, in the exercise of its police power, summarily destroy private property in order to protect the public. *State Plant Bd, v. Smith,* 110 So, 2d 401, 408 (Fla. 1959). The Florida Supreme Court used the examples of domestic animals that are infected with a contagious disease and an emergency created by conflagration, in which a building may be destroyed, as representative of conditions that pose a threat to public health and safety. *Corneal,* 95 So. 2d at 4.

The Florida Supreme Court defined those instances in which the constitutional requirement of 'just compensation' does not compel the State to reimburse the owner whose property is destroyed when "[s]uch property is incapable of any lawful use, it is of no value, and it is a source of public danger." *Smith,* 110 So. 2d at 407. The Court noted that "[t]he seizure of such goods is justified because the danger exists that the property deemed malefic will be distributed to the public to its injury, oı used for an illegal purpose ..." *Id.* at 408.

Regarding compensation, section 581.1845, Florida Statutes, provided for compensation to homeowners whose trees were removed under the CCEP. Eligible homeowners were entitled to receive $55 for each destroyed tree. Section 581.1845(3), Florida Statutes (2003). The statute also provided that if "the homeowner's property is eligible for a Shade Dade or a Shade Florida Card, the homeowner may not receive compensation under this section for the first citrus tree removed from the property as part of a citrus canker eradication program. Section 581.1845(3), Florida Statutes (2003). The statute also stated that the per-tree amount paid under this compensation program "does not limit the amount of any other compensation that may be paid by another entity or pursuant to court order for the removal of citrus trees as part of a citrus canker eradication program." Section 581.1845(4), Florida Statutes (2003).

The constitutional and statutory requirements of full compensation, public nuisance and conflagration have been addressed by Florida Courts in a series of decisions arising from the Department's destruction of citrus trees under the CCEP.

During the 1980s, the Department destroyed uninfected nursery and commercial citrus trees in Central Florida under an earlier iteration of the CCEP. Citrus growers brought inverse condemnation suits to recover full compensation for the destruction of their trees. In *Dep't of Agriculture v. Mid-Florida Growers, Inc.*, 505 So. 2d 592 (Fla. 2d DCA 1987), the Second District affirmed a decision finding the Department liable in inverse condemnation for its destruction of the grower's citrus trees under the CCEP:

> When the state, in the exercise of its police power, destroys diseased cattle, decayed fruit or diseased trees, the constitutional requirement of 'just compensation' clearly does not compel the state to reimburse the owner for the property destroyed. Such property is incapable of any lawful use, it is valueless, and it is a source of public danger. 'A legislative provision for compensation

> in such cases is a mere bounty.' *State Plant Board v. Smith*, 110 So. 2d 401 (Fla. 1959).
>
> Different is the situation, however, where healthy cattle, fruit or trees are destroyed to protect public health, safety or welfare. While the general principle is that no compensation is required when there is a valid exercise of the police power, the general principle is not without exception. Whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances in that case.' *Penn; Smith.*
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> Appellees had the misfortune of having innocently bought a few hundred budsticks from Ward's Nursery, which was subsequently declared to be infested with canker. The state examined and tested appellees' trees. The tests proved negative. Yet, the state ordered the destruction of appellees' healthy trees.
>
> We hold that while the state validly exercised its police powers in destroying the citrus trees, a taking occurred when the healthy trees were destroyed. The nursery owners must be compensated. We understand the difficulties the state faces in confronting citrus canker. Canker, unlike spreading decline, is a particularly resilient disease which may be spread by both natural and artificial means and which may lay dormant in healthy plants for some months before manifesting signs of the disease. We understand the difficulties in determining whether canker is present in healthy trees. Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who were unfortunate enough to have purchased budsticks from the infected nursery.

Id. at 595 (emphasis added).

Affirming the Second District's decision, the Florida Supreme Court held:

> Finally, we reject the Department's claim that even if the certified question is answered in the negative, no compensation is required under the present circumstances because the trees that were destroyed had been in the presence of or exposed to canker infested nursery stock and were therefore not healthy.

Mid-Florida Growers, 521 So. 2d at 104. The Court continued:

> The Department contends that no taking occurred in the instant case because the trees were destroyed in order to prevent a public harm. We, however, agree with the district court's conclusion that destruction of the healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a public harm.

Id. at 103 (emphasis added). The holdings in *Mid-Florida* is consistent with *Taylor* and the line of cases recognizing that when the Department validly exercises its police power for a public benefit, a select group of citrus tree owners should not bear the cost of the actions for the benefit of the public as a whole.

Two years later, the Second District affirmed another order finding the Department liable in inverse condemnation for citrus trees destroyed in Polk County. *Conner v. Reed Bros., Inc.*, 567 So. 2d 515 (Fla. 2d DCA 1990). *Reed Brothers* notes:

> It is undisputed that no one ever observed any sign of disease in any of Reed Brothers' trees or seedlings, and the stock appeared healthy. In 1985, however, the Department's experts believed that the state was experiencing an outbreak of citrus canker, that the disease could remain dormant or undetectable for a significant period of time, and that Swingle variety citrus provided an ideal host for the disease. Thus, the quarantine of Reed Brothers was purely precautionary to prevent a potential, but invisible and undiagnosed, disease from spreading to other groves.

Id. at 516 (emphasis added). The Second District concluded that the Department's actions could not be justified by the claim that it was protecting the public from harm:

> The Department argues that the rule announced in this case could have a chilling effect on the exercise of its duty to protect the public from agricultural risks which can be controlled only through quarantines. It suggests that the health and safety of Floridians would be imperiled if it were required to delay or forego a quarantine due to an evaluation of a quarantine's potential cost to taxpayers versus the benefit it would provide. While these concerns merit debate, we do not believe they are justified by the holding or by the unique circumstances in this case. The balance

> of factors in this case by the trial court and our analysis on appeal is strongly affected by the absence of any risk to public health or safety. The balance would surely have weighed far greater in favor of the Department if this quarantine had been necessary to prevent a public harm or if it had protected a health or safety interest. *See Conner v. Carlton*, 223 So. 2d 324 (Fla.), *appeal dismissed*, 396 U.S. 272, 90 S.Ct. 481, 24 L.Ed. 2d 417 (1969) ("Diseases affecting the health of persons or domestic animals are considered in law to be more malefic than diseases infesting or infecting plant life.")

567 So. 2d at 515 (emphasis added).

The same year, the Florida Supreme Court decided *Dep't of Agriculture v Polk* affirming a trial court's determination that the Department was liable in inverse condemnation for the destruction of hundreds of thousands of apparently healthy citrus trees under the canker eradication program. *Dep't of Agriculture v Polk*, 568 So.2d 35 (Fla. 1990). *Polk* arose from the Department's destruction of the commercial nursery's entire stock following the discovery that ten trees within the nursery showed actual signs of citrus canker. The nursery claimed that the Department's destruction of the entire nursery stock constituted a taking. During the liability trial, considerable evidence was presented relating to "the issue of whether the bacterial disease constituted a nuisance or presented an imminent public danger so that destruction without payment of compensation was permissible or whether, under the circumstances, the destruction of the nursery stock was a taking of property for which full and just compensation was due." *Id.* at 39. The trial court found the Department's destruction of a large portion of Polk's uninfected nursery stock amounted to a taking. *Id.* at 38. The trial court also found that the ten infected trees and those within 125 feet of them realistically had "no marketable value". *Id.*at 40, FN 4. Based on that evidence, the trial court held the Department liable under inverse condemnation for all of the destroyed trees except for the ten diseased trees and those within 125 feet of them. *Dep't of Agriculture v Polk*, 568 So.2d 35. The trial to determine the amount of compensation

ensued, resulted in a judgment over $3 million. *Id.* Both sides appealed. The Second District certified the case as being of great public importance, requiring immediate resolution by the Supreme Court. *Id.* The Florida Supreme Court affirmed the trial court. *Id.* at 40.

In early 2000, the Department began destroying residential citrus trees located within 1900 feet of canker-infected trees. The citrus trees owned by Miami Beach homeowners Brian and Barbara Patchen were among the first trees destroyed under the CCEP's new 1900-foot policy. The Patchens sued the Department for inverse condemnation. The trial court granted the Department's motion for summary judgment. The Third District affirmed, and certified the following question to the Florida Supreme Court as being of great public importance:

> Does the Florida Supreme Court's decision in *Department of Agriculture & Consumer Services v. Polk*, 568 So. 2d 35 (Fla. 1990), which held that the Department's destruction of healthy *commercial* citrus nursery stock within 125 feet of trees infected with citrus canker did not compel state reimbursement, also apply to the Department's destruction of uninfected, healthy *noncommercial, residential* citrus trees within 1900 feet of trees infected with citrus canker?

Patchen v. Dep't of Agriculture, 817 So. 2d 854, 855-56 (Fla. 3d DCA 2002).

While the *Patchen* appeal was pending before the Supreme Court, the Florida Legislature enacted section 581.1845, Florida Statutes, providing for payment of fixed compensation to the owners of all residential citrus trees destroyed under the CCEP. However, section 581.1845(4) provided that the "specification of a per-tree amount paid for the residential citrus canker compensation program does not limit the amount of any other compensation that may be paid . . . pursuant to court order for the removal of citrus trees as part of a citrus canker eradication program."

Also during the pendency of the *Patchen* appeal, the Fourth District and the Florida Supreme Court upheld the propriety of the CCEP's new 1900-foot policy, but held that the

Department's destruction of uninfected residential citrus trees under the CCEP constituted state action for the benefit of the public as a whole and, therefore, was not exempt from the constitutional requirement of just compensation. In *Dep't of Agriculture v. Haire*, 836 So.2d 1040 (Fla. 4th DCA 2003), the Fourth District reversed an injunction preventing the Department from destroying uninfected residential citrus trees within the 1900-foot radius. The Court held that "[i]n sum, *because protecting the citrus industry benefits the public welfare*, it is within the state's police power to summarily destroy trees to combat citrus canker. This action does not violate due process *so long as compensation is given for the destruction of trees having value*."[FN4]

> FN4. We are aware of *Department of Agriculture & Consumer Services v. Polk*, 568 So. 2d 35, 43 (Fla. 1990) ... However, in that case the destroyed trees were for sale in a commercial nursery, and any tree exposed to citrus canker has no value for commercial purposes. This would be particularly so of commercial nursery stock, as no grower would knowingly buy exposed trees. Because citrus canker does not necessarily destroy the tree or affect the fruit for human consumption, that rationale would not make homeowners' citrus trees worthless."

Id. at 1050 (emphasis added). The Fourth District held that a claim for inverse condemnation was the proper remedy for obtaining the constitutional guarantee of just compensation:

> Furthermore, the availability of inverse condemnation proceedings provides the avenue for judicial review the trial court found lacking. The statute does not remove from the judge the issue of whether a taking has occurred. Nor does it remove from the jury the determination of value. Although section 581.1845 provides for a set amount of compensation per tree, it provides that the per-tree compensation "does not limit the amount of any other compensation that may be paid by another entity *or pursuant to court order* for the removal of citrus trees as part of a citrus canker eradication program." (emphasis added). We conclude, therefore, that the statute does not purport to exclude inverse condemnation actions.

> The homeowners' remedy for destruction of their trees is an action for inverse condemnation, an action which these homeowners have already brought. (citation omitted). In an inverse condemnation proceeding, the court determines if the destruction of exposed but not infected trees constitutes a taking, and the jury determines the compensation to be awarded.

Id. at 1054 (emphasis added).

The Florida Supreme Court affirmed, *Haire v. Dep't of Agriculture,* concluding the Department's decision to destroy all residential trees within 1900 feet did not mean they had no value:

> Regarding this case, there is no question that the protection of the citrus industry is a legitimate objective for the use of the State's police power. (citations omitted).
>
> . . .
>
> In accord with our precedent, we conclude that the schedule established by the Legislature [under Section 581.1845] sets a floor but does not determine the amount of compensation. When the State destroys private property, the State is obligated to pay just and fair compensation as determined in a court of law. We emphasize the fact that the Legislature has determined that all citrus trees within 1900 feet of an infected tree must be destroyed does not necessarily support a finding that healthy, but exposed, residential citrus trees have no value.

Haire v. Dep't of Agriculture, 870 So.2d 774 at 782, 785 (Fla. 2004) (emphasis added, footnote omitted).

A year later, in *Patchen v. Dep't of Agriculture*, the Supreme Court answered the certified question and quashed the Third District's decision. 906 So.2d 1005 (Fla. 2005). The Court held that *Polk* does not bar homeowners from suing in inverse condemnation to recover full compensation resulting from the Department's destruction of healthy, uninfected residential citrus trees under the CCEP. *Patchen v. Dep't of Agriculture,* 906 So.2d 1005 (Fla. 2005) addressing *Dep't of Agriculture v Polk,* 568 SO.2d 35 (Fla. 1990).

The most recent decision addressing the issues involved in this case was an appeal by the Department of a final judgment awarding about $8 million in compensation to Broward County homeowners for destroyed citrus trees. *Dept. of Agriculture & Consumer Services v Bogorff,* 35 So.3d 84, (Fla. 4th DCA 2010). The Fourth District affirmed the liability finding stating there was "...substantial competent evidence that healthy, privately owned citrus trees are not harmful or destructive, even though found within 1,900 feet of a tree having citrus canker. There is evidence in the record that healthy trees taken under the CCEP had continued to produce the fruit, the juice, the shade, the pleasing aromas, the agreeable vistas – all the virtues for which their owners carefully planted and tended them. There was expert testimony that no study using an acceptable scientific method supports a conclusion that healthy trees so situated will necessarily develop citrus canker or bring trouble or damage to anybody." *Id.* at 88.

The Fourth District rejected the Department's argument that it was not liable because healthy trees exposed to citrus canker constitute a public nuisance having no value. *Bogorff*, 35 So. 2d at 88-89. Relying on *Haire* v. *Dep't of Agriculture* the Court held that it was apparent from the history of the case that the Department destroyed the homeowners' healthy trees not because they were "imminently dangerous" to anybody, "but instead to benefit the citrus industry in Florida." *Id.* at 89. The Fourth District continued: "If trees are destroyed not to prevent harm but instead to benefit an industry, it is difficult to understand how [the Department] can argue on appeal that the trees legally constituted a nuisance without any value." *Id.* The Court concluded that the "facts of this case require no application of multi-part, recondite tests to decide whether the State regulation has gone too far and must pay compensation. Cutting down and destroying healthy non-commercial trees of private citizens could hardly be more definitely a taking." *Id.* at 90. In a special concurrence, Judge Levine wrote to "emphasize the clear legal right of the

individual homeowner to receive just compensation as a result of the actions of the State. The State's actions in cutting down these trees most assuredly constituted "takings," . . . that demanded just compensation." 35 So.3d at 92. "By requiring the State to abide by its constitutional obligation to compensate individual homeowners, we safeguard the property rights of all." *Id.*

VII. FINDINGS AND CONCLUSIONS ON PLAINTIFFS' CONSTITUTIONAL CLAIM FOR INVERSE CONDEMNATION AND FOR ADDITIONAL COMPENSATION UNDER SECTION 581.1845

The Court makes its findings and conclusions based on the evidence presented during the liability trial and consideration of the foregoing case law. The primary disputed issues to be determined on the Plaintiffs' claims are: (1) whether the CCEP conferred a public benefit; and (2) whether the residential citrus trees owned by Plaintiffs and members of the Class had compensable value at the time they were destroyed by the Department under the CCEP.

A. The CCEP Conferred a Public Benefit.

Most of the evidence concerning the discovery of citrus canker in Southeastern Florida and the events that followed was undisputed.

Citrus canker was diagnosed in September 1995 near Miami International Airport, prompting the Department to launch the CCEP in an urban environment for the first time. Initially, the Department only destroyed infected ("positive") trees. Within a year, the Department began destroying all infected trees, as well as all uninfected ("exposed") citrus trees within 125 feet of each infected tree.

In March 1998, then Agriculture Commissioner Bob Crawford ordered a moratorium on the continued destruction of uninfected trees. The moratorium remained in place for 12-18 months while the Department commissioned a study concerning the natural spread of citrus

canker in urban Southeastern Florida. The Department ultimately based its 1900-foot eradication policy on this study, led by Dr. Timothy Gottwald, a scientist employed by the United States Department of Agriculture ("USDA"), the Department's partner agency in the CCEP.

In December 1998, Dr. Gottwald shared the preliminary study results with the Department, including Dr. Timothy Schubert, the Department's chief scientist and expert at trial. Based on the study's preliminary results, Department officials advocated enlarging the zone of destruction of uninfected trees from 125 to 1900 feet. Dr. Schubert opined the study was not designed to state – and did not conclude – that all trees within 1900 feet of an infected tree would eventually get citrus canker. No studies were identified at trial that concluded, scientific probability, that all trees within 1900 feet of a canker-infected tree would become infected with canker. The evidence showed there has not been another study concerning the spread of citrus canker in an *urban* environment.

Beginning January 1, 2000, the Department implemented the new policy of destroying all citrus trees located within 1900 feet of every canker-infected tree. The expansion from 125 feet to 1900 feet enlarged the zone of destruction from one-third (1/3) of an acre to approximately 260 square acres surrounding every canker-infected tree.

The Department's Deputy Commissioner Craig Meyer and Richard Gaskalla, Director of the Department's Division of Plant Industry ("DPI") testified the CCEP was primarily designed to protect the commercial citrus industry as a benefit to the public welfare: Deputy Commissioner Meyer testified the Department's decision to pursue eradication of citrus canker was based on the following: (a) to prevent canker from spreading into commercial citrus groves and thereby protecting the commercial citrus industry; (b) to prevent the imposition of trade barriers for the protection of the commercial citrus industry; and (c) to make it safe for people to

grow citrus in their yards. He noted that hundreds of thousands of residential citrus trees were "sacrificed to protect" to Florida's commercial citrus industry and unless the Department adopted an eradication program, Florida commercial citrus would be quarantined by the USDA.

The evidence demonstrated the 1900-foot policy was primarily adopted to confer a public benefit by protecting Florida's commercial citrus industry. The Court finds that the Department decided to remove homeowner trees to accomplish its stated goal of canker eradication.

B. The Department's Operation of the CCEP.

DPI Director Gaskalla, DPI employee Debra Martinez and Dr. Schubert described the operation of CCEP which included; training of Department personnel, methods for detecting and diagnosing citrus canker, multiple inspections of Plaintiffs' and Class members' citrus trees, information recorded during inspections, the destruction of Plaintiffs' and Class members' citrus trees, and the Department's records memorializing this information. (Pl. Exs. 34, 70, 71,72, 110).

The evidence showed that between January 2000 and January 2006 (when the Department shut down the CCEP), the Department entered onto 18,280 private residential properties in Orange County and destroyed 60,174 trees owned by the Plaintiffs and members of the Class that were not determined to be infected with citrus canker. The Department classified the 60,174 trees as "exposed," meaning they were not visibly infected with citrus canker, but were located within 1900 feet of another citrus tree(s) that was determined to be infected with citrus canker. (Pl. Ex. 110).

Before destroying Plaintiffs' and Class members' trees, Department personnel inspected the trees on at least one and usually two occasions, for evidence of citrus canker. During the pre-destruction inspections, the Department did not observe symptoms of citrus canker and did not

otherwise determine that the citrus trees owned by Plaintiffs and the Class were infected ("positive") with citrus canker. The Department personnel were directed to take samples that were sent to a laboratory for analysis in any doubtful cases.

Citrus canker is diagnosed based on visual symptoms because it produces characteristic lesions on the fruit and leaves. It takes approximately five days under optimal conditions, to as long as ten days under less optimal conditions, for visible symptoms of citrus canker to appear. The Department acknowledged its personnel were trained to identify canker in the field and, when visual symptoms were present, could accurately identify them about 99% of the time.

Plaintiffs' expert Dr. Timmer, University of Florida Professor Emeritus of Plant Pathology, testified that "if no symptoms of disease are found, the assumption is the tree is healthy." Dr. Schubert stated he had seen healthy citrus trees, without symptoms, located close to visibly infected trees. Dr. Schubert also explained that research plant pathologists, like Plaintiff's expert, Dr. Timmer, consider citrus trees located within 1900 feet of a tree infected with citrus canker as "healthy", while regulatory plant pathologists, like himself, consider them "exposed."

The Department prepared contemporaneous records concerning the residential citrus trees it inspected and destroyed under the CCEP. These contemporaneous records described the Department's classification of such trees as "exposed" (uninfected) or "positive" (infected). These data were inputted into the Department's PICS database.

Department witnesses Gaskalla and Schubert confirm the Department destroyed the Plaintiffs' and Class member's 60,174 "exposed" citrus trees without observing visible symptoms of canker on them, or obtaining independent confirmation of the existence of canker bacteria through laboratory testing. It is also undisputed that the Department did not observe

visible symptoms of citrus canker on the "exposed" trees owned by Plaintiffs and the Class; did not conduct any tests of Plaintiffs' and the Class members' trees in the field or the laboratory to determine whether they were infected ("positive") with citrus canker or whether citrus canker bacterium was present on the trees; and that the "exposed" trees owned by Plaintiffs and the Class were never determined to be infected ("positive") with citrus canker. Thus, there was no recorded evidence that the Plaintiffs' and Class members' 60,174 trees were infected with citrus canker at the time they were destroyed.

Plaintiffs/class representatives Teresa and Scott Fishman testified about their contacts with the Department that resulted in the April 8, 2003 destruction of the three (3) citrus trees on their Orange County residential property and testified that their three citrus trees were healthy and showed no visible signs of citrus canker. The Department's records of the Fishman trees, corroborate the Fishmans' testimony and confirm the Fishmans' three trees were not infected ("positive") with citrus canker on the date of their destruction. (Pl. Ex. 72).

DPI Director Gaskalla testified that the same type of information reflected in the Department's records relating to the Fishmans' three trees would be found in records relating to all other Class members' trees destroyed under the CCEP. Specifically, all trees with no visible signs of canker after physical inspection were labeled "exposed." Department witnesses also confirmed the Department used the same procedures and policies regarding the inspection and destruction of residential citrus trees owned by all members of the Class as were used with respect to the Fishmans' trees. This evidence established that the Department's operation of the CCEP was carried out uniformly on all 18,280 affected Orange County residential properties. Accordingly, based on the evidence, the 60,174 trees owned by members of the Class were not found to be infected with citrus canker at the time of destruction.

Plaintiffs' expert, Dr. Timmer, explained that citrus canker does not render infected trees incapable of bearing fruit, does not render the fruit on infected trees inedible as fresh fruit nor unusable for juicing, and does not render the tree unusable as a typical ornamental tree in someone's backyard; and there was decreased life expectancy of a citrus tree located within 1900 feet of another citrus tree infected with citrus canker provided the tree receives appropriate nutritional support. Both Dr. Timmer and Dr. Schubert testified they have seen healthy trees in close proximity to canker-infected trees. Dr. Timmer testified that while there is a probability that some trees around an infected tree are or will become infected, he stated that if the infected tree is removed, there is a presumption that the canker disease will not spread further. Dr. Timmer concluded that if an "exposed" citrus tree does not become infected, it is as healthy as any other citrus tree.

The Court finds there is clear and convincing evidence that the citrus trees owned by Plaintiff Scott and Teresa Fishman and the Class were not infected with citrus canker at the time they were destroyed by the Department.

C. Plaintiffs' and Class Members' Residential Citrus Trees Had Compensable Value at the Time of Destruction.

The analysis of whether an "exposed" citrus tree has compensable value depends on whether the tree is used for commercial purposes or belongs to a homeowner. The Florida Supreme Court in *Haire* observed, consistent with *Polk*, that any tree for sale in a commercial nursery that is exposed to citrus canker has "no marketable value" for commercial purposes. *Haire v. Dep't of Agriculture*, 836 So. 2d at 1050 n.4. Because citrus canker does not necessarily destroy the tree or affect its fruit for human consumption, "that rationale would not make homeowners' citrus trees worthless." *Id.* In *Patchen*, addressing the issue of value, the Florida Supreme Court declined to extend its "no marketable value" holding in *Polk* to the

Department's destruction of uninfected, healthy residential citrus trees within 1900 feet of canker-infected trees. *Patchen v. Dep't of Agriculture,* 906 So. 2d at 1005-06.

Pursuant to *Haire* and *Patchen*, the issue for this Court's determination is whether evidence was presented demonstrating that the Plaintiffs' and Class members' "exposed" residential citrus trees had compensable value on the date they were destroyed. Both the Fourth District and the Supreme Court in *Haire* rejected the assertion that healthy, but exposed, citrus trees have no value. The Fourth District stated: "Because citrus canker does not necessarily destroy the tree or affect the fruit for human consumption, that rationale would *not* make homeowners' citrus trees worthless." *Haire*, 836 So. 2d at 1050 (emphasis added). The Florida Supreme Court stated: "We emphasize the fact that the Legislature has determined that all citrus trees within 1900 feet of an infected tree must be destroyed does *not* necessarily support a finding that healthy, but exposed, residential citrus trees have no value." *Haire*, 870 So. 2d at 785 (emphasis added); *see also Corneal*, 95 So. 2d at 5 ("Here, as has been noted, the regulation in question involves the destruction of healthy trees, as well as trees affected with spreading decline. *Even the affected trees cannot be said to be completely worthless, since they continue to bear fruit and do not die.*") (emphasis added). In holding that the Florida legislature established a *minimum* floor of compensation, the Florida Supreme Court recognized in *Haire* that these trees do in fact have value, and the *amount* of value is for a jury to decide in an inverse condemnation proceeding.

As a threshold in the present case, the Court notes it is undisputed the trees owned by the Plaintiffs, Scott and Teresa Fishman and the Class were destroyed by the Department, resulting in a total loss of use and value. Evidence that the trees in question had compensable value at the time of destruction, includes the following:

1. Plaintiffs/Class Representatives Scott and Teresa Fishman offered the following credible and competent testimony their trees had compensable value at the time of their destruction[4]:

    a. Their trees did not have symptoms of citrus canker, were otherwise healthy, and that two were fully mature and fruit-bearing prior to destruction;

    b. Department personnel who inspected the trees stated their trees were not infected with citrus canker;

    c. Each of their three trees was worth more than the total amount of the $100 Shade Florida/WalMart Card and $110 warrant received from the Department under section 581.1845, Florida Statutes.[5]

2. The Plaintiffs' tree appraiser and arborist, Eric Hoyer, opined the Fishman's three citrus trees and all 60,174 of the Class members' trees destroyed under the CCEP had compensable value on the date destroyed. He further stated that even a canker infected residential citrus tree has value, albeit a reduced value, which would be reflected in its condition rating. In reaching his opinions, regarding the value of residential citrus trees, Mr. Hoyer considered their variety, size, condition and location of the trees.

3. Plaintiffs' expert Dr. Timmer testified that trees not exhibiting visible symptoms of canker are presumed healthy, and an otherwise healthy citrus tree located within 1900 feet of a canker infected citrus tree does not have a decreased life expectancy provided the tree receives nutritional support and that otherwise healthy residential citrus trees had value.

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[4] The Department did not present evidence rebutting the Fishmans' opinions of value of their three citrus trees.

[5] In takings proceedings, a property owner can value his own property, and upon presenting competent evidence tending to establish such a value, a presumption arises that the property is in fact worth that amount. Wilkerson v. Division of Admin., 319 So.2d 585, 586 (Fla. 2d DCA 1975).

4. Beginning in 2001, the statutory compensation plan, codified under section 581.1845, Florida Statutes, offered some compensation to homeowners whose citrus trees were destroyed under the CCEP. The statutory compensation plan is consistent the residential trees having value at the time of destruction.

Based on the foregoing, the Court finds the Plaintiffs' and Class members' citrus trees, that were not determined to be infected with citrus canker prior to their destruction by the Department, had compensable value at the time of destruction. The amount of compensation due to Plaintiffs and the Class in this phase of the case is reserved for a jury in takings proceedings.

VIII. FINDINGS AND CONCLUSIONS REGARDING THE DEPARTMENT'S PUBLIC NUISANCE AND CONFLAGRATION DEFENSES.

The Department's defense is that exposed citrus trees posed imminent public harm or constituted a public nuisance. Based on the findings below, the Court concludes that the spread of citrus canker did not pose imminent public harm or constitute a public nuisance under applicable legal precedent, and that the Department is not shielded from liability under the conflagration doctrine under the facts of this case.

PUBLIC NUISANCE

Persuasive evidence that citrus canker does not qualify as a public nuisance included the following:

1. Plaintiff's expert, Dr. Timmer testimony that from a scientific perspective, citrus canker did not threaten the public health, safety, welfare or morals. He opined:

    - Citrus canker does not prevent the continued use, enjoyment or productivity of residential citrus trees, as well as the continued productivity of commercial citrus infected with or exposed to citrus canker.

- It is a bacterial disease affecting all citrus varieties and exists in many of the world's citrus-producing countries;

- is a leaf-spotting, fruit-spotting organism that affects the appearance of fruit and leaves through cosmetic lesions, but is "highly unlikely" to kill infected trees (Dr. Schubert conceded that he has *never* seen a homeowner's tree die from citrus canker);

- does *not* render infected trees incapable of bearing fruit, does *not* render fruit inedible as fresh fruit or for juicing purposes, and does *not* render trees unusable in homeowners' yards, although it may reduce the amount of fruit yield;

- is *not* harmful to humans or animals, poses *no* threat regarding the widespread destruction of property, does *not* threaten the food supply, and does *not* affect any other plant varieties; and

- is spread by wind-blown rain and human movement of equipment, citrus plants and debris.

2. Department witness Mr. Rex Clonts owns and operates a commercial citrus grove in Central Florida. He continues to grow, sell and profit from the fruit from trees infected with citrus canker and from trees located within 1900 feet of canker-infected trees.

3. DPI Director Gaskalla and Dr. Schubert acknowledged the Department did not follow the protocol mandated by the Department's relied upon "Gottwald study" to destroy all "positive" and "exposed" trees within 14 days of the date of identification of the "positive" tree suggesting the Department did not treat citrus canker as a public nuisance.

4. Department scientist Dr. Sun performed more recent inspections in Orange County to determine the prevalence of citrus canker. He indicated that while a number of the trees he previously inspected were now infected with canker, there are a number of

properties in the Fishman's neighborhood that have citrus trees that remain canker-free nearly a decade after the Fishmans' trees were destroyed.

5. Dr. Schubert noted that the Gottwald study does not state that all trees within 1900 feet of an infected tree will become infected with citrus canker and recognized there is no scientific study concluding that all "exposed" trees will become infected with citrus canker. Dr. Schubert also explained that canker inoculum can land on a citrus tree and never result in any citrus canker infection. He testified that 99% of the canker bacterium that land on citrus trees will quickly die off without ever infected a tree.

6. The Department did not issue warnings not to eat or share fruit from trees infected with canker or not to eat or share fruit from uninfected ("exposed") trees and did not issue a public health warning concerning such trees.

7. There was no recall of fruit or juice.

8. There was no persuasive evidence of widespread property destruction caused by citrus canker.

9. There was no evidence of the following:

    a. citrus canker spreads to non-citrus trees and/or plants;

    b. citrus canker renders the fruit inedible;

    c. citrus canker makes the fruit unusable for juice;

    d. citrus canker presents a threat to the health of people or animals;

    e. citrus canker causes other diseases and

    f. renders a citrus tree unusable as a typical ornamental residential fruit tree in a backyard.

10. The primary concern was the impact of citrus canker on the commercial citrus industry. The potential impact presented by citrus canker is economic in nature, affecting the commercial citrus industry through potential restrictions on the shipment of fresh Florida citrus fruit and increased production costs.

Accordingly, the Court finds the Department did not establish that citrus canker posed a threat to the public health, safety or morals and did not constitute a public nuisance at the time of destruction of the residential citrus trees.

The present case is distinguishable from the factual scenarios of the cases relied upon by the Department. See *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001), *Orlando Sports Stadium, Health Clubs, Five Sky, Glogger and Osceola.*[6] Residential citrus trees "exposed" to but not infected with citrus canker do not present an unreasonable interference with a right common to the general public. Further, "exposure" is not a condition dangerous to health, offensive to community moral standards, or in any way unlawfully obstructing the public in the free use of public property. Therefore, this Court concludes that the residential trees owned by Plaintiffs and the Class did not represent an inconvenience or annoyance to the public, and rejects the Department's defense of public nuisance.

In light of the types of situations deemed public nuisances by the courts, the Court finds and concludes that citrus trees situated within 1900 feet of canker-infected trees, a disease that does not preclude consumption of the fruit, cause illegal or unlawful harm to the public, is therefore not within the definition of a public nuisance.

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[6] The Department's position that legislation authorizing the destruction of trees under the CCEP demonstrates the trees' lack of value is not convincing. The Supreme Court recognized in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that because a legislature announces that something is a nuisance does not automatically mean it is a nuisance. *See id.* at 1031 ("to win its case South Carolina must do more than proffer the legislature's declaration that the uses [the property owner] desires are inconsistent with the public interest").

The Department's assertion that Plaintiffs' uninfected citrus trees would or might contract citrus canker at some point in the future and, therefore, constituted a public nuisance is not persuasive. In takings cases, including those involving the destruction of citrus trees, property is valued *as of the date of the taking*. *Mid-Florida Growers,* 570 So. 2d at 899 ("*future prospects*" for the destroyed property are *irrelevant* in condemnation proceedings; valuation is generally based on fair market value *on the date of the taking*).

In *Mid-Florida,* the Florida Supreme Court held that while the Department was within its authority to protect the citrus industry in destroying the plaintiff's trees, the Department's destruction of healthy trees was a compensable taking. The Court held that the Department could not rely on the nuisance defense, because there was no evidence that the taken trees were a nuisance, since the mere potential that property could become a nuisance does not defeat a takings claim. *See Mid-Florida*, 521 So. 2d at 103-104.

Furthermore, the Supreme Court held, in *Haire* and *Patchen*, that the owners of such trees are entitled to compensation. *Haire v. Dep't of Agriculture*, 870 So.2d 774 (Fla. 2004) and *Patchen v Dep't of Agriculture*, 906 So.2d 1005 (Fla. 2005). Those holdings are consistent with numerous other decisions recognizing that the state must pay fair and just compensation when it destroys private property for a public purpose. "[T]he absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation." *Corneal v. State Plant Bd.*, 95 So. 2d at 4. "[W]here property is destroyed in order to save property of greater value, a provision for indemnity is a plain dictate of justice and of the principle of equality." *Id.* (citation omitted).

CONFLAGRATION DOCTRINE

The Defendant relies upon *Strickland v Dept. of Agriculture* and other cases to support their conflagration defense. 922 So. 2d 1022 (Fla. 5th DCA 2006). In *Strickland,* summary judgment in favor of the Department was affirmed in an inverse condemnation claim for property damage caused while extinguishing large out of control fires.

The present case is distinguishable from a fire posing an imminent threat to life and property, in which the government is acting to prevent a public harm. Further, the courts noted that such property is of no value, incapable of any lawful use and a source of public danger. *Strickland v Dept. of Agriculture*, 922 So. 2d 1022 (Fla. 5th DCA 2006) citing *State Plant Board v Smith*, 110 So. 2d 401, 406-407 (Fla. 1959). The evidence in the present case did not show that there was an "emergency" in the sense that this word is used in conflagration cases and did not show that the property was of no value.

The *Los Osos Valley Assocs. v. City of San Luis Obispo* opinion explains, "[t]he emergency exception is limited. It operates to avert impending peril [and] courts have narrowly circumscribed the types of emergency that will exempt the public entity from liability." *Los Osos Valley Assocs.*, 30 Cal.App. 4th at 1680. An "emergency" is evidenced by an *imminent and substantial threat to public health or safety* and includes such occurrences as fire, floods, earthquakes, riots, accidents, or sabotage. *Id.* at 1681-82. "Instances of this character are the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, or rotten fruit, or infected trees *where life or health is jeopardized.*" *Id.* at 1680 (emphasis added). The undisputed evidence proved that none of those conditions existed here.

The Department's conflagration evidence and argument analogizing the scenario in this case to a fire or a war is not persuasive under the facts of the present case. This was not an emergency involving an imminent and substantial threat to public health or safety. Accordingly, the Court rejects the conflagration defense as inapplicable under the facts of the present case.

IX. CONCLUSION.

Based on the foregoing findings of fact and conclusions of law, this Court **ORDERS and ADJUDGES** as follows:

1. The Court finds in favor of the Plaintiffs, Scott and Teresa Fishman and the Class and against the Department on the issue of liability under the claim for inverse condemnation under Count I of the Complaint. The Department's physical destruction, under the CCEP, of the Plaintiffs' and the Class members' citrus trees, that were not determined to be infected with citrus canker but were located within 1900 feet of another citrus tree determined to be infected with citrus canker, constituted a taking under Article X, § 6(a) of the Florida Constitution;[7]

2. The Court finds in favor of the Plaintiffs and the Class and against the Department on the issue of liability under the statutory claim for additional compensation under Count III of the Complaint. The Department's physical destruction, under the CCEP, of the Plaintiffs' and the Class members' citrus trees, that were not determined to be infected with citrus canker but were located within 1900 feet of another citrus tree determined to be infected with citrus canker, entitles Plaintiffs and the Class to a jury trial addressing compensation under section 581.1845, Florida Statutes;

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[7] All persons who properly and timely submitted requests for exclusion in accordance with this Court's prior order are hereby excluded from the Class and are not bound by this order and for all further purposes. A list of those persons who excluded themselves from the Class has previously been filed with the Court.

3. Plaintiffs' and Class members' citrus trees, that were not determined to be infected with citrus canker but were located within 1900 feet of another tree determined to be infected with citrus canker, did not present an imminent threat to public health, safety or welfare, or constitute a public nuisance;

4. The Department is not absolved of liability under the conflagration doctrine for its physical destruction, under the CCEP, of the Plaintiffs' and the Class members' citrus trees, that were not determined to be infected with citrus canker but were located within 1900 feet of another citrus tree determined to be infected with citrus canker;

5. The parties shall proceed to jury trial to determine the amount of compensation due to Plaintiffs and the Class on a date to be set by the Court; and

6. The Court reserves jurisdiction to address attorney's fees and costs, and to enter such supplemental orders as may be necessary in furtherance to this Order.

DONE and ORDERED in Chambers in Orlando, Florida, this 17 day of May, 2013.

PATRICIA A. DOHERTY
CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Order was submitted via U.S. Mail to: Robert C. Gilbert, Esquire, Grossman Roth, P.A., 2525 Ponce de Leon Boulevard, Suite 1150, Coral Gables, Florida 33134; William S. Williams, Esquire, Lytal Reiter, LLP, 515 N. Flagler Drive, 10th Floor Northbridge Centre, West Palm Beach, FL 33401; and Wesley R. Parsons, Esquire, Clarke Silverglate, P.A., 799 Brickell Plaza, Suite 900, Miami, Florida 33131.

5/17/13
Date

Dee McClendon, Judicial Assistant