

# THE LEGAL BASIS FOR REGULATORY CONTROL OF INVASIVE CITRUS PESTS IN FLORIDA: A REVIEW OF THE CITRUS CANKER AND SPREADING DECLINE CASES

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In 2004-2005, Florida experienced five major hurricanes (Charley, Frances, Ivan, Jeanne and Wilma). These hurricanes have spread the Asian strain of citrus canker to previously canker-free areas of the state and prompted the federal government to declare eradication of the disease an unrealistic goal. We examine the state's authority to regulate invasive citrus pests by analyzing why and how Florida's Citrus Canker Eradication Program was thwarted by residential law suits, and by reviewing spreading decline cases. Although the canker

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eradication was repealed in January 2006, judicial decisions surrounding citrus canker remain a precedent to potential challenges to programs aimed at controlling other invasive pests. The state's efforts to take private property for this purpose through its police power must balance such discretion with the constitutional mandates of due process and just compensation. This review addresses these court decisions from the relatively conservative measures permitted in controlling the burrowing nematode to the more aggressive measures allowed in the citrus canker eradication program.

## I. INTRODUCTION

Florida is no stranger to agricultural diseases, particularly those affecting its citrus industry. In recent years, the most economically harmful citrus disease has been canker, a disease caused by the bacteria *Xanthomonas axonopodis* pv. *citri*. The disease has devastating impacts on citrus plants,<sup>1</sup> causing lesions on the fruit, leaves, and stems of citrus trees, defoliation, premature fruit drop, and a reduction in fruit productivity.<sup>2</sup> Fruits that are produced by canker-infected trees have unsightly blemishes. Together with Federal quarantine zones, the blemishes make the fruit very difficult to market.<sup>3</sup>

Citrus canker is not a new threat to the Florida citrus industry; Florida has twice successfully eradicated citrus canker.<sup>4</sup> Citrus canker was first detected in Florida in 1910 and later declared eradicated in 1947. However, in 1986, a highly aggressive Asian strain of the citrus canker was detected in Florida.<sup>5</sup> Some speculate that the 1986 strain was not a reintroduction but a perennial holdover from the 1910 *Xanthomonas axonopodis* pv. *citri* introduction.<sup>6</sup> The 1986 outbreak was declared eradicated in 1994, but the pathogen was found again in

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1. See Tim S. Schubert & Xiean Sun, *Bacterial Citrus Canker*, PLANT PATHOLOGY CIRCULAR NO. 377 (2003) (explaining the history, effects, and treatment options for bacterial citrus canker).

2. Tim S. Schubert et al., *Meeting the Challenge of Eradicating Citrus Canker in Florida—Again*, 85 PLANT DISEASE 340, 340 (2001) [hereinafter Schubert et al.].

3. Marisa L. Zansler et al., Inst. of Food and Agric. Scis., Univ. of Fla., Doc. FE531, *Florida's Citrus Canker Eradication Program (CCEP): Benefit-Cost Analysis 4* (2005), <http://edis.ifas.ufl.edu/FE531>.

4. DIV. OF PLANT INDUS., FLA. DEP'T OF AGRIC. AND CONSUMER SERVS., COMPREHENSIVE REPORT ON CITRUS CANKER ERADICATION PROGRAM IN FLORIDA (2006) (on file with author).

5. Schubert et al., *supra* note 2, at 345.

6. *Id.*

1995 in residential and commercial sites, most notably the Miami International Airport in Miami-Dade County.<sup>7</sup>

Facing potentially devastating effects to the citrus industry as well as Florida's economy, the U.S. Department of Agriculture ("USDA") and the State of Florida implemented a major dual-track citrus canker eradication program. Both programs required the removal of all trees within 1900 feet (initially 125 feet) of an infected tree.<sup>8</sup> The USDA administered and provided compensation to commercial citrus growers whose trees were taken, while the State of Florida administered and provided compensation to residential tree owners whose trees were removed by state officials.<sup>9</sup> Under the Florida Citrus Canker Eradication Program ("FCCEP") commercial growers were compensated \$26 per tree by the USDA,<sup>10</sup> while residential tree owners were provided \$55 per tree by the State of Florida.<sup>11</sup> Additionally, in Broward County, tree owners were given \$45 Wal-Mart gift certificates for the first tree taken (good for Garden Center purchases only).<sup>12</sup> Early legal challenges to the state and federal eradication programs happened almost immediately after the first tree was taken.<sup>13</sup>

In 2000, a group of residential property owners in south Florida were granted an injunction that halted the state's taking of trees that were suspected of harboring canker due to their close proximity to infected trees.<sup>14</sup> From 2000 to 2004, there were two 18-month gaps during which the state was enjoined from cutting down healthy residential citrus trees within 1900 feet of canker-infected trees. As a result, canker inoculum increased and was largely undetected on residential trees.

Citrus canker is primarily transmitted to other trees by wind-driven rain. In 2004, hurricanes Charley, Frances, Ivan, and Jeanne, spread citrus canker from these residential trees to such an extent that 80,000 acres of commercial citrus were subsequently slated for destruction.<sup>15</sup> Concentrated efforts by governmental

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7. Tim R. Gottwald et al., *Citrus Canker: The Pathogen and Its Impact*, PLANT HEALTH PROGRESS, Aug. 12, 2002.

8. Zansler, *supra* note 3.

9. *Id.*

10. 7 C.F.R. § 301.75-15(b) (2007).

11. FLA. STAT. § 581.1845(1), (3) (2007) (Additionally, some Florida counties have supplemented the state compensation.).

12. Michael Kamprath, *Addressing the Shaky Legal Foundations of Florida's Fight Against Citrus Canker*, 20 FLA. ST. U. J. LAND USE & ENVTL. L. 453, 459 & n.54 (2005).

13. See Regina M. Fegan et al., *Protecting Agriculture: The Legal Basis of Regulatory Action in Florida*, 88 PLANT DISEASE 1040, 1041 (2004).

14. Anres Viglucci, *\$8 Million Added to Ease Canker Losses*, MIAMI HERALD, Nov. 2, 2000, at A1.

15. See L. Gene Albrigo et al., *The Impact of Four Hurricanes in 2004 on the Florida Citrus Industry: Experience and Lessons Learned*, 118 FLA. ST. HORTICULTURAL SOC'Y PROC. 66,

officials reduced this to 32,000 acres when Hurricane Wilma made landfall in 2005.<sup>16</sup> Due to the spread of the citrus canker pathogen by Wilma, officials faced the task of destroying an additional 168,000 to 220,000 acres of commercial citrus.<sup>17</sup> The inability of the state's canker eradication efforts to continue unabated meant the USDA efforts were largely ineffective. On January 10, 2006, the USDA stated that citrus canker "is so widely distributed that eradication is infeasible" and discontinued funding the commercial grower compensation program.<sup>18</sup> This change in policy came on the heels of a number of judicial decisions upholding the legality of FCCEP, but too late to save the USDA compensation program. Though the FCCEP was repealed in January 2006,<sup>19</sup> these judicial decisions will be precedential to potential challenges to similar programs designed to manage and control highly damaging, invasive agricultural pests like citrus canker and citrus greening.<sup>20</sup>

The State of Florida has a duty to protect its agricultural and natural resources from invasive plants, animals, and other species (*e.g.*, pathogens). The power to exercise protective measures originates from the police power inherent in Florida's sovereignty.<sup>21</sup> The use of police power to protect Florida's agricultural interests is delegated by the Legislature to the Director of the Division of Plant Industry within the Florida Department of Agriculture and Consumer Services ("FDACS").<sup>22</sup>

This review provides an overview of the State's use of police power to protect agriculture in conjunction with legal decisions that balance the exercise of this power with the constitutional mandates of due process and just compensation. These cases demonstrate how the courts apply these constitutional limitations in challenges to measures involving a less aggressive pathogen, such as the

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74 (2005); Press Release, USDA, USDA Determines Citrus Canker Eradication Not Feasible (Jan. 11, 2006) [http://www.doacs.state.fl.us/press/2006/01112006\\_2.html](http://www.doacs.state.fl.us/press/2006/01112006_2.html); Letter from Chuck Conner, Deputy Sec'y of USDA to The Honorable Charles H. Bronson, Comm'n of Agric. of Fla. Dep't of Agric. (Jan. 10, 2006) (on file with author).

16. Tim R. Gottwald & Michael Irely, *Post-hurricane Analysis of Citrus Canker II*, AM. PHYTOPATHOLOGICAL SOC'Y, Apr. 5, 2007, <http://www.apsnet.org/online/feature/hurricane/>.

17. USDA, *supra* note 15.

18. Letter from Chuck Conner, Deputy Sec'y, USDA, to Charles Bronson, Comm'r of Agric., Fla. Dep't. Agric. & Consumer Servs. (Jan. 10, 2006).

19. See L.W. Timmer et al., *Fundamentals of Citrus Canker Management*, UNIV. OF FLA. IFAS EXTENSION, July, 2006, <http://edis.ifas.ufl.edu/PP153>.

20. Susan Salisbury, *More Citrus Growers are Going Organic*, PALM BEACH POST, Mar. 26, 2007.

21. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878); accord *Dep't of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24, 29 (Fla. 1990).

22. See Fla. Stat. §581.031(7) (2007) (describing the Department's power to declare a quarantine of an area due to plant pests or noxious weeds).

burrowing nematode, in comparison with the measures taken in controlling an aggressive strain of citrus canker.

## II. USE OF POLICE POWER TO TAKE PRIVATE PROPERTY

The State of Florida has the power to take private property for a public purpose as an incident to its sovereignty and requires no constitutional recognition.<sup>23</sup> One form of this authority is expressed when Florida uses its police power to take private property for the purpose of protecting “public safety, public welfare, public morals, or public health.”<sup>24</sup> “Police power” is sometimes used to only describe activities that do not require compensation. However, the invalid exercise of police power may require compensation.<sup>25</sup>

It should be noted that it is difficult to discern the boundary line between the actions that are compensable under the police power and compensable actions under the closely related concept of eminent domain.<sup>26</sup> The distinction is that eminent domain involves taking a property for a public use, where police power involves the destruction of such property to prevent its use in a manner that is detrimental to the public interest.<sup>27</sup> Broadly speaking, the courts will consider six factors when deciding whether State action is a valid exercise of police power or a compensable taking:

1. Whether there is a physical invasion of the property.
2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
3. Whether the regulation confers a public benefit or prevents a public harm.
4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
5. Whether the regulation is arbitrarily and capriciously applied.
6. The extent to which the regulation curtails investment-backed expectations.<sup>28</sup>

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23. See *Patterson*, 98 U.S. at 406; *Bonanno*, 568 So. 2d at 29.

24. *Sweat v. Turpentine & Rosin Factors*, 150 So. 617, 618 (Fla. 1933).

25. See *Dep't. of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35, 41 (Fla. 1990); *Dep't. of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 101-04 (Fla. 1988) (holding that full and just compensation is necessary when the state, pursuant to its police power, destroys healthy trees); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1381 (Fla. 1981); *State Plant Bd. v. Smith*, 110 So. 2d 401, 407 (Fla. 1959); *Conner v. Reed Bros., Inc.*, 567 So. 2d 515, 519 (Fla. Dist. Ct. App. 1990).

26. See 16A AM. JUR. 2D *Constitutional Law* § 318 (1998).

27. *Id.*

28. See *Graham*, 399 So. 2d at 1380-81.

In the canker and spreading decline cases, the determinations that cutting healthy-appearing, yet suspect citrus trees, were compensable takings largely depended on whether the State's action conferred a public benefit or prevented a public harm; and these cases preceded the legislature's 2002 statutory compensation scheme for trees cut after 1995.<sup>29</sup> After *Patchen v. Department of Agriculture and Consumer Services*, an owner of a healthy-appearing residential citrus tree that was cut by the State no longer has to prove that the State's actions constituted a taking.<sup>30</sup> However, the question of whether the statutory compensation is enough is unresolved. The following section addresses this question as well as due process limitations on police power.

### III. LIMITATIONS ON POLICE POWER

The Florida Constitution limits the use of police power to control agricultural disease. Private property cannot be destroyed without "due process of law" and "full compensation."<sup>31</sup>

#### A. Substantive Due Process and Procedural Due Process

Due process includes both substantive and procedural elements. Substantive due process protects individual rights such as life, liberty, or *property*, and the exercise of a police power that infringes on one of these rights must bear a "reasonable relationship" to a legitimate objective.<sup>32</sup> The courts have long held that the protection of agriculture is a legitimate objective for the use of the State's police power.<sup>33</sup> As long as the legislative decision bears a reasonable relationship to protecting agriculture, the court will not substitute its own judgment.<sup>34</sup> Procedural due process ensures that process is fair when these substantive rights are at issue.<sup>35</sup> A procedural due process consideration relevant to the control of agricultural disease is the "opportunity to be heard" on whether the destruction is proper.<sup>36</sup>

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29. See *Mid-Florida Growers, Inc.*, 521 So. 2d at 102-03 (stating that, even where the state's actions confer a public benefit, there is a taking (citing *Graham*, 399 So. 2d at 1381)).

30. *Patchen v. Fla. Dep't of Agric. & Consumer Servs.*, 906 So. 2d 1005, 1008 (Fla. 2005).

31. FLA. CONST. art. I, §9; FLA. CONST. art. X §6.

32. *Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 782 (Fla. 2004).

33. *Id.* at 782-83.

34. *Id.* at 782, 786.

35. See *Herrera v. Collins*, 506 U.S. 390, 436 (1993).

36. See *Smith*, 110 So. 2d at 407 (citing *Louis K. Liggett Co. v. Amos*, 141 So. 153, 156 (Fla. 1932)).

### B. *Just Compensation*

The Florida Supreme Court stated that “the absolute destruction of property is an extreme exercise of police power and is justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation.”<sup>37</sup> However, the State is not compelled to compensate for property that is “valueless, incapable of any lawful use, and a source of public danger,”<sup>38</sup> such as “diseased cattle, unwholesome meats, decayed fruit or fish, infected clothing, obscene books or pictures, or buildings in the path of a conflagration.”<sup>39</sup> This provision can be rephrased to say that the state remains obligated to provide “just compensation,” but that the amount of compensation is a nullity if the property is without value.

## IV. COMPARING THE LIMITATIONS ON THE USE OF POLICE POWER: SPREADING DECLINE VERSUS CITRUS CANKER

The following cases demonstrate how the facts of a case play a key role in determining the state’s limitations when agricultural crops are destroyed through the exercise of police power. These cases deal with two of the most destructive diseases that have affected citrus trees, spreading decline and citrus canker.

### A. *Spreading Decline*

Spreading decline is caused by the burrowing nematode, *Radopholus similis*, a microscopic worm that damages the feeder roots of citrus trees.<sup>40</sup> The burrowing nematode travels very slowly through the soil and, over time, the root system deteriorates, causing the tree’s foliage and productivity to deteriorate.<sup>41</sup> As a result, infected trees are rendered commercially unprofitable under ordinary market conditions.<sup>42</sup>

Florida’s burrowing nematode eradication program called for the destruction of all of the citrus trees affected by the nematode and the first four trees

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37. *Corneal v. State Plant Bd.*, 95 So. 2d 1, 4 (Fla. 1957).

38. *Smith*, 110 So. 2d at 406-07.

39. *Mid-Florida Growers, Inc.*, 521 So. 2d at 103.

40. See generally R. F. Suit & E. P. DuCharme, *The Burrowing Nematode and Other Parasitic Nematodes in Relation to Spreading Decline of Citrus*, 37(7) PLANT DISEASE REPORTER 379-383 (1953) (discussing the burrowing nematode).

41. *Id.* at 379.

42. *Corneal*, 95 So. 2d at 3.

past the last visibly affected tree.<sup>43</sup> Because spreading decline spreads so slowly, courts did not consider it an immediate threat to agricultural resources. As a result, procedural due process requires the state to provide a hearing before, rather than after, the actual destruction of citrus trees under the burrowing nematode eradication program.<sup>44</sup>

The destruction of *diseased* trees under the program does not require compensation.<sup>45</sup> Even though it is justified under the police power as necessary to protect neighboring property, destruction of trees only *suspected* of being affected by the nematode does require compensation.<sup>46</sup> The state has to give compensation for the destruction of healthy but suspect trees because, although possibly soon infected, suspect trees do retain some value.<sup>47</sup>

### B. Citrus Canker

Florida implemented a more aggressive program in its attempt to eradicate the Asian strain of citrus canker. The bacterium causes defoliation, tree die-back, blemished fruit, reduced fruit quality, and premature fruit drop.<sup>48</sup> Unlike the slow spreading decline, citrus canker spreads rapidly by wind-driven rain, flooding, air currents, insects, birds, human movement within the groves, and movement of infected plants and seedlings.<sup>49</sup> Symptoms may manifest as early as seven to fourteen days after infection,<sup>50</sup> but may take up to sixty days or more to appear.<sup>51</sup> However, the maximum visualization does not occur until approximately 107 to 108 days after infection.<sup>52</sup>

In 2002, the Citrus Canker Law amendments, Sections 581.1845 and 933.07(2) of the Florida Statutes, required the destruction of all citrus trees within 1900 feet of an infected tree and allow area-wide search warrants.<sup>53</sup> This enlarged the existing statutory 125-foot buffer zone, which was based on an Argen-

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43. *Id.*

44. *See Smith*, 110 So. 2d at 403, 408.

45. *Corneal*, 95 So. 2d at 5. *Cf. State v. Main*, 37 A. 80, 84 (Conn. 1897) (upholding the eradication of trees with "peach yellows").

46. *Corneal*, 95 So. 2d at 6-7.

47. *Mid-Florida Growers, Inc.*, 521 So. 2d at 104.

48. Schubert et al., *supra* note 2, at 340.

49. *Id.* at 343.

50. *Id.* at 342; *see Dep't of Agric. & Consumer Servs. v. City of Pompano Beach*, 792 So. 2d 539, 542 (Fla. Dist. Ct. App. 2001).

51. Schubert et al., *supra* note 2, at 342.

52. Gottwald et al., *supra* note 7.

53. FLA. STAT. § 933.07(2) (2007); FLA. STAT. § 581.1845 (stating that the department has set a rule that states trees exposed to infection are those within 1900 feet of an infected tree).

tinean study that estimated the expected range of canker spread.<sup>54</sup> Destruction of all citrus trees within the 125-foot buffer had survived a number of court challenges. Citrus canker was determined to be an imminent threat, which justified destruction of trees prior to a hearing.<sup>55</sup> In cases that examined the legality of the USDA's eradication program, the courts also determined that all *healthy but suspect commercial trees within 125 feet of an infected tree* did not require compensation because they were "incapable of any lawful use, [are] valueless, and [are] a source of public danger."<sup>56</sup>

A 2002 study by Gottwald *et al.* determined that "the 125 foot radius was inadequate because it only captured about thirty to forty-one percent of infection . . . spread[ing] from a diseased tree."<sup>57</sup> Based on the Gottwald study, the Florida Legislature ultimately concluded that an enlarged 1900-foot buffer was necessary and amended the statutes.<sup>58</sup> Procedurally, section 581.1845 of the Florida Statutes originally required that owners be notified of the impending destruction by order.<sup>59</sup> The owner had the option to ask for a stay of destruction in an appellate court where the only issues were whether the tree itself was infected, as well as whether the tree was within 1900 feet of an infected tree.<sup>60</sup> Since the disease spreads at a fast rate, the court held that the state had adequate reason to not conduct a full hearing prior to eradicating an "imminent danger."<sup>61</sup> The owners may opt for a hearing after destruction.<sup>62</sup> The hearing determines if the destruction of exposed but healthy residential trees constitutes a taking and if so, the amount of

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54. See Gottwald *et al.*, *supra* note 7.

55. See *Denney v. Conner*, 462 So. 2d 534, 536 (Fla. Dist. Ct. App. 1985) (declining to order a pre-deprivation hearing where an immediate threat to the public health, safety, and welfare was present); see also *Nordmann v. Dep't of Agric. & Consumer Services*, 473 So. 2d 278, 280 (Fla. Dist. Ct. App. 1985) (affirming injunctive relief that allowed appellee, the State Department of Agriculture and Consumer Services, to implement an eradication program over the objection of appellant, the grower, citing imminent danger to the public).

56. *Dep't of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 505 So. 2d 592, 595 (Fla. Dist. Ct. App. 1987). See *City of Pompano Beach*, 792 So. 2d at 541; see also *Dep't of Agric. & Consumer Servs. v. Varela*, 732 So. 2d 1146 (Fla. Dist. Ct. App. 1999).

57. *Haire*, 870 So. 2d at 779.

58. *Id.*; see also 2000-308 Fla. Laws 4, the legislature defined citrus trees "[e]xposed to infection" as those "harboring the citrus canker bacteria due to their proximity to infected citrus trees, and which do not yet exhibit visible symptoms of the disease but which will develop symptoms over time, at which point such trees will have infected other citrus trees."

59. See FLA. STAT. § 581.1845(5)(b) (2007); see also *Patchen*, 906 So. 2d at 1008. The statute is remedial, and under its plain meaning, homeowners who had trees destroyed on or after January 1, 1995, are entitled to compensation.

60. See *Haire*, 870 So. 2d at 777-80.

61. *Id.* at 787.

62. *Id.*

compensation required.<sup>63</sup> These hearings determined if residential trees within the 1900-foot buffer zone require compensation beyond the \$55 provided by the statute.<sup>64</sup> As previously stated, the USDA offered \$26 per destroyed commercial tree.

Enlarging the buffer zone from 125 to 1900 feet reignited legal challenges. In several citrus canker takings cases, homeowners alleged that the FDACS was conducting unreasonable searches of their property by taking trees within the 1900-foot radius without allowing the homeowner any “opportunity to be heard.”<sup>65</sup> Specifically, they alleged that 1) the 1900-foot rule established by the legislature did not establish probable cause of a tree being infected and did not provide any basis to search a property suspected of harboring an infected tree, and 2) that the area-wide search warrants requested by FDACS constituted an unreasonable search of properties for which probable cause was not established.<sup>66</sup> The area-wide search warrants included properties that did not necessarily harbor citrus trees within 1900 feet of an infected tree.<sup>67</sup>

In *Florida Department of Agriculture and Consumer Services v. Haire*, the court was asked to determine the constitutionality of the Florida Statutes, Sections 581.184 and 933.07(2).<sup>68</sup> Procedurally, the court upheld a previous decision declaring that citrus canker was an “imminent danger,” and justified destruction prior to an “opportunity to be heard” for trees within the 1900-foot zone,<sup>69</sup> but that area-wide warrants were constitutional and not a violation of the Fourth Amendment to the U.S. Constitution’s prohibition against unreasonable searches and seizures.<sup>70</sup> Following these rulings, the FDACS will still be able to seek warrants to search residential properties without establishing probable cause for each individually-identified property.<sup>71</sup>

In its examination of substantive due process, the court determined that the 1900-foot buffer zone bore a “reasonable relationship” to protecting the citrus industry.<sup>72</sup> The court noted that restricting the legislature to acting only in areas of scientific certainty would result in a level of supervision hostile to our basic

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63. *Id.*

64. FLA. STAT. § 581.1845(6).

65. *See e.g., Haire*, 870 So. 2d at 777-78.

66. *See id.*

67. *Id.* at 788-89.

68. *Haire*, 870 So. 2d at 777.

69. *Id.* at 788.

70. *Id.* at 789 (upholding the Fourth District Court of Appeal decision concluding that the statute did not deny either substantive or procedural due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Florida Constitution. Specifically, a single affidavit could support the issuance of multiple warrants.).

71. *Id.*

72. *Id.* at 782-83.

principles of government.<sup>73</sup> It is the charge of the elected legislative representatives, not the courts, to decide the proper course of action to protect the public.<sup>74</sup> The courts can only overturn a legislative exercise of police power if it lacks a “reasonable relationship” to the legitimate objective.<sup>75</sup> Here, judicial intervention was not warranted because the legislature based its actions on the advice of a Technical Advisory Committee as well as a peer-reviewed, published study.<sup>76</sup>

While the *Haire* court found the legislative action valid, the court reiterated that this did not relieve the State from paying “just compensation.”<sup>77</sup> The compensation in the statute provided a floor value guaranteed to the affected owner, even if the tree was valueless.<sup>78</sup> This was valid because the homeowner still had the opportunity to have a judicial determination of what was “just compensation” for the tree beyond this floor value.<sup>79</sup>

In *Patchen v. Florida Department of Agriculture and Consumer Services*, the Florida Supreme Court was asked whether healthy but suspect residential trees within 1900 feet of an infected tree were without value.<sup>80</sup> Previously, in *Department of Agriculture and Consumer Services v. Polk*, the court held that healthy commercial trees within a 125-foot buffer zone were without value and a source of public danger.<sup>81</sup> The court in *Patchen* was asked to address whether this rationale extended to the 1900-foot buffer zone, particularly within a residential context.<sup>82</sup> The court neglected to answer this question, holding that the legislature had already decided that homeowners who met the statutory requirements were entitled to a minimum level of compensation, essentially conceding the point of whether cutting healthy trees amounted to a taking.<sup>83</sup> The court again reiterated that this does not prevent the homeowner from bringing a judicial action to determine whether trees within 1900 feet are of greater value than the \$55

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73. See generally *id.* at 783-86 (The court noted “it is within the State’s police power to protect the citrus industry, which directly or indirectly affects the welfare of a great portion of the population of the State.” (citing *Johnson v. State*, 128 So. 853, 857 (Fla. 1930))).

74. *Id.* at 786-87.

75. *Id.* at 782-83; See *Golden v. McCarty*, 337 So. 2d 388, 390 (Fla. 1976) (holding that tattooing bore a substantial relationship to public health, thus justifying regulation).

76. See generally *Haire*, 870 So. 2d at 779.

77. *Id.* at 785.

78. *Id.* (citing *Bonanno*, 568 So. 2d at 31).

79. *Bonanno*, 568 So. 2d at 30. See *Rich v. Dep’t of Agric. & Consumer Servs.*, 898 So. 2d 1163 (Fla. Dist. Ct. App. 2005).

80. *Patchen*, 906 So. 2d at 1005-06.

81. *Polk*, 568 So. 2d at 4.

82. *Patchen*, 906 So. 2d at 1005-06.

83. See *id.* at 1008.

floor prescribed by the legislature, affirming that what constitutes “just compensation” was a judicial function which could not be preempted by the legislature.<sup>84</sup>

The control of citrus canker, like spreading decline, justifies the exercise of police power. In both instances, the legislatures’ eradication programs were valid because they bore a “rational relationship” to protecting the citrus industry. However, the procedural due process requirements are different for citrus canker. Citrus canker, unlike spreading decline, poses an imminent danger, thus justifying the lack of a full hearing prior to destruction.

The one remaining unsettled legal issue regarding the FCCEP concerns compensation, even with respect to canker-infected trees. The state does not have to give compensation for canker infected *commercial* trees because they are without value,<sup>85</sup> but the status of residential tree value is still unsettled. However, unlike spreading decline, healthy but suspect trees may or may not be subject to compensation under common law. Yet it appears that the Florida courts are willing to consider destruction of healthy trees as a compensable taking.

Currently, there is an apparent conflict in the law between the 3rd and 4th appellate districts. The 3rd District Court of Appeal has held that trees exposed to canker have “no marketable value and therefore, no damages can be awarded.”<sup>86</sup> Florida’s Fourth District Court of Appeals – which includes Broward, Indian River, Okeechobee, Palm Beach, St. Lucie, and Martin counties – has allowed homeowners in Broward County to move forward with a class action suit that contends that the FDACS must provide replacement costs for their mature citrus trees, including all ancillary costs, even for infected trees.<sup>87</sup> Currently, there are nine plaintiffs representing a potential class of about 100,000 residential citrus owners in Broward County.<sup>88</sup> It is still an open question as to whether a *healthy but suspect tree within 1900 feet of an infected tree* may have value beyond the \$55 floor assigned by the legislature, and whether an infected residential tree has value in the Fourth Appellate District.

### C. Lessons for Citrus Greening

Citrus greening (*huanglongbing*), which was recently detected in the state, is a fast-spreading and highly destructive disease that is of great concern to Florida citrus growers and the Florida Department of Agriculture and Consumer

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84. *Id.*; FLA. STAT. § 581.1845; *Haire*, 870 So. 2d at 785.

85. *Polk*, 568 So. 2d at 40 & n.4.

86. *Varela*, 732 So. 2d at 1147 (citing *Polk*, 568 So. 2d at 40 n.4).

87. *See Haire*, 870 So. 2d at 785.

88. *See id.* at 779; *see also* Personal Communication, Parsons, Attorney, FDEP; Interview with Parsons, Attorney, FDEP.

Services. Citrus greening is caused by the bacteria *Candidatus Liberibacter spp.*, spread by two species of psyllids.<sup>89</sup> Unlike citrus canker, citrus greening causes rapid decline and death of citrus trees within a few years rather than a mere drop in productivity.<sup>90</sup> To prevent use of residential citrus trees as host plants for psyllid populations in areas testing positive for greening, the State of Florida may need to begin removing residential trees once again.

The spreading decline and citrus canker cases have paved the way for a more effective Citrus Greening Control Program (“CGCP”) that may not fall prey to costly injunctions.<sup>91</sup> To survive legal challenges, the CGCP must first establish a radius of likely infection based on a scientific study similar to the Gottwald *et al.* studies.<sup>92</sup> Warrants must list the specific property addresses and provide probable cause to search the suspect premises. Being within the radius established by the scientific study will suffice for probable cause. Since citrus greening is fatal, unlike citrus canker, courts will likely allow FDACS to destroy infected trees without compensation, if indeed the biological justification for tree removal still remains. However, it may be too late. This would be the case even for the 4th Appellate District; however, suspect trees taken within the designated radius will likely be judged to have value, thus requiring compensation. The level of compensation cannot be legislated. The law regarding agricultural pests and the defensive taking of trees is relatively settled. It is likely that a citrus greening eradication program, should one be deemed necessary, would survive legal challenges and help protect Florida’s multi-billion dollar citrus industry. Once the Broward County compensation cases are settled, there will be a better understanding of how Florida courts would assess the value of trees potentially affected by citrus greening, helping policymakers estimate the potential costs of a citrus greening program.

## V. CONCLUSION

The state is allowed flexibility in its exercise of police power so long as there is a “reasonable relationship” to protecting agriculture. This flexibility was evident in the cases upholding the destruction of all trees within 1900 feet of a

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89. K.-R. Chung & R. H. Brlansky, Inst. of Food & Agric. Sci., U. of Fla., *Citrus Diseases Exotic to Florida: Citrus Leprosis* (2006), <http://edis.ifas.ufl.edu/PP148>; Susan E. Halbert & Keremane L. Manjunath, *Asian Citrus Psyllids (Sternorrhyncha: Psyllidae) and Greening Disease of Citrus: A Literature Review and Assessment of Risk in Florida*, 87 FLA. ENTOMOLOGIST 330, 331 (2004).

90. *See id.*

91. *See* USDA, Citrus Greening Control Program in Florida Nurseries (2006), [http://www.aphis.usda.gov/plant\\_health/ea/downloads/citrusgreening1-06ea.pdf](http://www.aphis.usda.gov/plant_health/ea/downloads/citrusgreening1-06ea.pdf).

92. *See generally* Gottwald *et al.*, *supra* note 7.

tree infected with citrus canker. One must keep in mind that the constitutional limitations are just that, limitations. Statutes may extend benefits beyond the limitations of the Constitution. Many statutory schemes allow for compensation of both diseased and non-diseased trees alike. For instance, although courts have held that diseased trees are without value, section 581.1845 of the Florida Statutes requires compensation to homeowners for the destruction of their trees in the amount of \$55 per tree. The State, by compensating for diseased trees, extends a benefit beyond what is required by the Florida Constitution. It is still an open question as to whether healthy but suspect trees within 1900 feet of a tree infected with citrus canker have a value beyond \$55, and whether infected residential trees have any value in the 4th Appellate District – but this issue may be settled by the end of 2007.

A number of considerations must be in balance to enact legislation protecting agriculture and the state's economy. In this instance, state authorities may be authorized to destroy all trees within 1900 feet of a tree infected with citrus canker. However, the rapid spread of citrus canker in the 2004-05 hurricane seasons, on the heels of the judicially-facilitated obstacle to canker containment, rendered the program impracticable. The FCCEP was ended in 2006 when faced with a lack of federal funds and a statute calling for the destruction of twenty-five percent of Florida's current citrus crop.<sup>93</sup> Presently, the State advances a series of best management practices for citrus producers called the Citrus Health Response Plan, which does not require the removal of infected trees.<sup>94</sup> As the Florida citrus industry braces itself for a new invasive agricultural pest – citrus greening, lessons from the citrus canker, and spreading decline cases may help guide policymakers should they decide to create a citrus greening eradication program.

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93. Nadia Gergis, *USDA Won't Pay for Eradication of Citrus Canker*, FORT PIERCE TRIB., January 12, 2006, at A1.

94. See generally Timmer et al., *supra* note 19.