

IN THE SUPREME COURT OF FLORIDA

Case No. SC02-1291
Lower Tribunal No. 3D01-1440

BRIAN P. PATCHEN and BARBARA G. PATCHEN,

Petitioners,

vs.

**FLORIDA DEPARTMENT OF
AGRICULTURE AND CONSUMER SERVICES,**

Respondent.

On Appeal from the Third District Court of Appeal

PETITIONERS' REPLY BRIEF ON THE MERITS

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A. The Answer Brief Misstates This Court’s Holding In Polk.

Throughout its answer brief (the “Answer Brief”), the Department confuses factual findings by the *Polk* trial court with this Court’s holding in *Department of Agriculture & Consumer Services v. Polk*, 568 So. 2d 35 (Fla. 1990). See e.g. Answer Brief at 8 (“In *Polk*, this Court held that citrus tree owners could not recover inverse condemnation damages when the Department destroyed trees that had been exposed to citrus canker because exposed trees are a public nuisance and hence have no marketable value. *Polk*, 568 So. 2d at 40”); Answer Brief at 20 (“In other words, this Court [in *Polk*] made a legal holding that destruction of exposed trees was not a taking . . .” (citing *Polk*, 568 So. 2d at 40 n. 4)). Contrary to the Department’s assertions, the portions of the *Polk* decision expressly cited by the Department for the alleged holding demonstrate that this Court merely affirmed the trial court’s factual delineation of the taking, which this Court determined was supported by competent substantial evidence.

Two years prior to *Polk*, in *Mid-Florida Growers*, this Court likewise affirmed a trial court finding that a taking resulted from the Department’s destruction of uninfected trees, despite the fact the Department deemed those trees to be exposed to canker infection. *Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla. 1988). If, as claimed by the Department, this Court held in *Polk* that the destruction of trees deemed “exposed” by the Department

cannot result in a taking as a matter of law, the *Polk* decision would have stated that the Court was overruling or receding from *Mid-Florida Growers*. No such language exists in *Polk* because, in both cases, the Court merely affirmed trial court determinations supported by competent substantial evidence.

Recognizing the weakness of its legal argument, the Department also seeks to factually distinguish *Mid-Florida Growers*. The Department asserts that, unlike the trees deemed “exposed” by the Department in *Polk*, the trees at issue in *Mid-Florida Growers* were merely deemed “suspect” by the Department. Answer Brief at 11 n. 2. This “distinction” is belied by the facts in *Mid-Florida Growers* and the Department’s own argument in that case.

First, while the term “suspect” was used in *Mid-Florida Growers* instead of the term “exposed,” the terms are synonymous. The Second District described the Department’s policy of destroying two types of trees, those found to be “diseased” (infected) and those found “to be suspect.” 505 So. 2d at 595. The Second District also recognized that these “suspect” trees, which appeared healthy, may or may not, in actuality, be healthy due to “the difficulties in determining whether canker is present in healthy trees.” *Id.*

Second, the Department itself, in *Mid-Florida Growers*, argued that:

[N]o 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.

521 So. 2d at 104 (emphasis added). Thus, contrary to the position asserted in its Answer Brief, the Department did, in fact, argue that the “suspect” trees at issue in *Mid-Florida Growers* were “exposed.”

Most importantly, this Court has already expressly rejected the primary argument the Department raises in its Answer Brief, namely, that a mere declaration that trees are “exposed” precludes any judicial inquiry and compensation. In *Mid-Florida Growers*, this Court unqualifiedly recognized that “[w]hether regulatory action of a public body amounts to a taking must be determined [by the trial judge] from the facts of each case” *Id.* It is, therefore, beyond legitimate dispute that, in Florida, trial judges determine whether regulatory action results in a taking based on the specific facts presented, and such determination will be affirmed on appeal if based on competent, substantial evidence. Contrary to the Department’s argument, neither this Court nor any other court has ever determined, as a matter of law, that the destruction of trees the Department deems to be exposed is not compensable.

B. The Destruction of the Patchens’ Trees Was Either A Categorical Taking Under *Lucas* Or Required A Fact-Specific Determination.

States have very limited power to destroy private property without compensation. The rationale for this dramatic limitation on state power was articulated in a warning 80 years ago, by Justice Holmes, that if the state is permitted, under the

guise of the police power, to even broadly restrict (let alone destroy) property without paying compensation, “the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992), quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The Patchens’ property was confiscated. Certainly, had the whole of the Patchens’ home, instead of just their trees, been confiscated, the action would be deemed to effect a categorical taking requiring compensation, without the necessity of any case-specific inquiry. *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 869 (Fla. 2001), citing *Lucas*, 505 U.S. at 1015. Alternatively, if, because trees (and not the Patchens’ entire home) were confiscated, the action is deemed to fall short of a categorical taking, it is “appropriately analyzed under the ad-hoc factual inquiry outlined in *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978).” *Keshbro*, 801 So. 2d at 871 n.12.

The *Penn Central* rationale is completely consistent with this Court’s declarations in *Polk* and *Mid-Florida Growers* that whether a taking results must be decided based on the specific facts presented. Thus, even if no categorical taking occurred, a factual inquiry was required under applicable precedent of this Court and the United States Supreme Court. The Third District erred in holding to the contrary.

Because of Department claims of nuisance, even if its destruction of the

Patchens' trees is deemed to effect a categorical taking, judicial fact-finding is necessary. Full compensation would be required unless the confiscation resulted from a genuine nuisance or otherwise resulted from a case "of actual necessity." *Lucas*, 505 U.S. at 1029 n.16; *Corneal v. State Plant Board*, 95 So. 2d 1, 4 (Fla. 1957) ("the 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) (emphasis added). The *Patchen* trial court erred by not factually determining whether the allegedly exposed trees constituted a "genuine nuisance" or whether the destruction resulted from a case of "actual necessity."

C. The Department's Unsubstantiated Claims Cannot Substitute For Judicial Fact-Finding.

Throughout its Answer Brief, the Department claims that all apparently healthy citrus trees within 1900 feet of each infected tree pose an "immediate public threat and a nuisance." There is no record support for this baseless claim. Recognizing this, the Department argues that its claim is "uniformly" supported by applicable statutes, by administrative rules and by applicable case law.

1. **There Is No Statutory Determination That All Trees Within Each Radius Are Nuisances, And Even If There Was, That Would Not End The Inquiry.**

There has never been any legislative determination that all trees within each 1900-foot radius are nuisances or imminently dangerous. Because there is no express legislative declaration of nuisance, the Department asks for one to be inferred.

Legislative intent to declare a nuisance, however, should not be inferred. *Keating v. State ex rel. Ausebel*, 173 So. 2d 673, 677 (Fla. 1965). If the Legislature intends to declare something a nuisance, it should do so in exceedingly clear language. *Id.*

Even where the Legislature has actually declared something to be a nuisance or imminent danger, where the statute is directed at something not by its nature a nuisance (such as healthy trees), “the courts are never foreclosed from making inquiry into the legislative findings. To impute absolute finality to a legislative ban would run counter to due process.” *Cohen v. State ex rel. McGowan*, 37 So. 2d 700, 701 (Fla. 1948). *See also Pompano Horse Club, Inc. v. State ex rel. Bryan*, 111 So. 801, 807, 810 (Fla. 1927) (citations omitted); *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 884 (Fla. 1972).

To determine whether a compensable taking would result from governmental action, a trial court must consider the factors that would be considered under nuisance law. *Lucas*, 505 U.S. at 1030-31. For state action without compensation to be justified, the state must do more than merely declare, in conclusory fashion, that the private property is injurious to other property. *Id.* at 1031. The state may not declare nuisances “*ipse dixit*.” *Id.* To demonstrate that no taking occurs and, therefore, that no compensation is required, the state must instead, as it must do to restrain a nuisance, expressly identify the specific principles of nuisance and property law that require the destruction. *Id.* The state has not done so.

The state cannot dispositively declare that uninfected, healthy citrus trees are nuisances. Judicial fact-finding is necessary. The need for judicial scrutiny is even greater where, as here, the state can benefit financially from its own “findings:”

Where government acts in this context, it can no longer pretend to be acting as a neutral arbiter. It is no longer the impartial weigher of the merits of competing interests among its citizens. Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one, or more, of its citizens, the scales will tip in its own favor.

Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622, 626 (Fla. 1990).

2. No Administrative Rule Declares All Such Trees To Be Nuisances.

Likewise, there is no administrative rule that declares all uninfected, healthy trees within each 1900-foot radius to be nuisances. The Department’s attempt to claim support from an administrative rule is particularly curious given that the Department was found to have violated the mandates of the Administrative Procedures Act by failing to adopt a rule addressing its 1900-foot radius destruction policy. *Broward County v. Dept. of Agric. & Cons. Serv.*, DOAH Case No. 00-4520RX (July 31, 2001) (the “DOAH Decision”)¹, *affirmed Florida Department of Agriculture & Consumer Services v. Broward County*, 816 So. 2d 609 (Fla. 1st DCA 2002). The DOAH

¹ A copy of the DOAH Decision is included in the Patchens’ Appendix (PA. 61-133).

Decision also notes the extreme danger that would result from allowing property to be destroyed based solely on any administrative declaration of nuisance. The DOAH Decision recognizes that, if the Department is given free reign to classify trees as exposed, it could declare virtually every citrus tree in the state to be exposed and could order the removal of each such tree. (PA. 105). Without independent judicial fact-finding, an administrative agency would be able to eviscerate our Constitution's full compensation requirement.

3. No Case Has Declared That All Trees Within Each Radius Are Nuisances.

The Department also claims that the district court decisions in *Sapp Farms*, *Denney* and *Nordmann* declared that all trees within each 1900-foot radius are nuisances. *Sapp Farms, Inc. v. Florida Department of Agriculture & Consumer Services*, 761 So. 2d 347 (Fla. 3d DCA 2000); *Denney v. Conner*, 462 So. 2d 534 (Fla. 1st DCA 1985); *Nordmann v. Florida Department of Agriculture & Consumer Services*, 473 So. 2d 278 (Fla. 5th DCA 1985). Those cases did not address whether the trees were actually nuisances, and had nothing, whatsoever, to do with the compensation issue. As stated in *Sapp Farms*, those three cases dealt only with the validity of administrative orders to summarily destroy exposed trees. *Sapp Farms*, 761 So. 2d at 348. The Department's misuse of these cases is best exemplified by the following claim made on page 9 of its Answer Brief:

Florida law recognizes that an apparently healthy tree, once exposed to canker, presents a public nuisance that must be eradicated to prevent further infestation. *Sapp Farms v. Dep't of Agriculture*, 761 So. 2d 347, 348-349 (Fla. 3d DCA 2000).

Sapp Farms does not support the Department's claim. The language in *Sapp Farms* to which the Department clearly refers states something completely different:

Those circumstances underlie the department's conclusion that . . . appellants' plants still present an imminent danger in the spread of the disease since they have been exposed to infested or infected plants.

Sapp Farms, 761 So. 2d at 348-49 (quoting *Nordmann*, 473 So. 2d at 280) (emphasis added). The distinction lies in the nature of the administrative destruction orders at issue in *Sapp Farms* and *Denney* and referenced in *Nordmann*. Appellate courts do not review the agency's finding of "imminent danger" underlying these destruction orders. Rather, when these orders are appealed, the courts only facially review the order to "determine whether the order recites with particularity the facts underlying such [administrative] finding." *Denney*, 462 So. 2d at 535-36 (citations omitted). Thus, these cases contain no judicial finding that exposed trees are nuisances or imminent dangers. The cases recognize only that the Department included the requisite "magic language" in its summary destruction orders, which in and of itself permit destruction given the limited scope of appellate review of those

orders. These destruction orders have no impact, however, on the compensation issue.

The Department also misstates *Miller v. Schoene* by asserting it holds, as a matter of law, that no compensation is required for the destruction of trees deemed exposed. *Miller v. Schoene*, 276 U.S. 272 (1928). *Miller* dealt with the destruction of infected trees, not healthy trees. *Id.* at 278. The Department asserts that “the exposed trees removed by the Department were a threat to citrus groves in Florida in the same manner as cedar trees [at issue in *Miller*] were a threat to apple orchards in Virginia.” Answer Brief at 18. Aside from ignoring the fact that the cedar trees in *Miller* were actually infected, the Department ignores the fact that the destruction of trees in *Miller* was limited to the area immediately surrounding apple orchards, to create a buffer zone around the orchards. *Id.* While the Department’s argument would have some validity if it were only creating 1900-foot buffer zones around each grove, it is pure fallacy to argue that healthy, allegedly exposed trees counties away from commercial groves constitute the “same manner” of threat as do infected trees in extremely close proximity to orchards.

4. Whether The Destruction Is A Valid Exercise Of The State’s Police Power Is Irrelevant.

The Department also argues that its new 1900-foot destruction radius is based on “scientific advances.” As this Court knows, the new “science” was recently, in the

context of a preliminary injunction hearing, determined to be unreliable and unsound. *Florida Department of Agriculture & Consumer Services v. Haire*, 2002 WL 1481388, 27 Fla. L. Weekly S683 (Fla. Jul 11, 2002). The purpose of the science was to measure how far canker can spread, and to determine from that distance an exposure zone. Assuming, *arguendo*, the science validly showed that canker can spread 1900 feet, then destroying all trees within 1900 feet may be a valid exercise of the state's police power. However, the Department's argument that a valid exercise of the police power precludes the finding of a compensable taking has been consistently rejected by this Court. *Polk*, 568 So. 2d at 39; *Mid-Florida Growers*, 521 So. 2d at 105.

This Court has also rejected the argument that "exposed" trees are unhealthy as a matter of law and, therefore, their destruction cannot result in a taking. *Mid-Florida Growers*, 521 So. 2d at 104. Because the Department cannot establish that point as a matter of law, it attempts to establish it as a matter of fact, stating:

[A]ll citrus trees within the 1900-foot radius will eventually harbor the bacteria through the natural spread of the disease.

Answer Brief at 5. The record citation for this alleged fact is "R4-659," which is part of the summary judgment order on appeal. This "fact" is not contained on that page, on any other page of the summary final judgment, or anywhere else in the record.

Because canker can spread, and because its spread may be difficult to timely detect, it may be valid, to control canker spread, to destroy some measure of trees in close proximity to known infected trees. The Department refuses to concede, however, that it is this difficulty to timely detect new infections that purportedly requires the destruction of healthy trees. The Department will not concede that fact because that concession would destroy its claim that all exposed trees are nuisances and imminently dangerous. This claim is the Department's only defense to the Patchens' compensation lawsuit. The Department's claim that all trees within each 1900-foot radius will become infected is untrue and unsupported in the record.

D. Constitutional Democracies Are Not Always Convenient.

The Department further argues that allowing homeowners a jury trial to determine compensability would be "chaotic." Answer Brief at 15. Even if true, this Court, citing approvingly to the words of an eminent domain scholar, recently stated:

[T]he constitutional guarantee of compensation does not extend only to cases where the taking is cheap or easy. . . . If one must make a choice between the government's convenience and a citizen's constitutional rights, the conclusion should not be much in doubt.

Palm Beach County v. Cove Club Investors Ltd., 734 So. 2d 379, 389 (Fla. 1999)

(citation omitted). Additionally, while full compensation is constitutionally required, there is no constitutional right to a jury trial of inverse condemnation claims.

Department of Agriculture & Consumer Services v. Bonanno, 568 So. 2d 24, 28 (Fla.

1990). The Legislature could establish a valid administrative tribunal affected to adjudicate the amount of compensation owed to the Patchens and other property owners. *Id.* The Department should seek relief from its claimed “chaos” from the Legislature, not by seeking to avoid our Constitution’s unqualified full compensation mandate.

E. The Patchens Need Not Accept The Validity Of The Department’s Actions.

The Department, citing *Key Haven*, correctly states that where a property owner chooses to seek inverse condemnation damages without first exhausting available administrative remedies, the property owner cannot challenge the propriety of the administrative action. *Key Haven Assoc. Enter. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1983). The “exhaustion doctrine” is not jurisdictional; it is a matter of judicial policy. *Id.* at 157. The reason for the doctrine is to restrain unwarranted judicial intervention into the administrative process. *Id.* However, judicial intervention is not unwarranted where there is no adequate administrative remedy. This Court expressly recognized that circuit courts “have the power, in all circumstances, to consider constitutional claims,” and that this power can be exercised where there is no adequate administrative remedy. *Id.* at 156-57 (citation omitted) (italics in original).

Unlike the petitioner in *Key Haven*, the Patchens did not have any adequate administrative remedy. The Department never provided any predeprivation notice to the Patchens that their healthy trees would be destroyed. The Patchens were thus prevented from seeking any predeprivation remedy whatsoever. (R. 129-131).

Even had the Department provided predeprivation notice, as it customarily does in the form of an Immediate Final Order (“IFO”), review of an IFO is an illusory remedy, not a meaningful one. The futility of appealing an IFO was recently described in full detail by the Third District. *Markus v. Florida Department of Agriculture*, 785 So. 2d 595, 596 (Fla. 3d DCA 2001). Simply stated, IFOs cannot be meaningfully challenged since, given the limited scope of review, the Department has conclusively resolved all issues without ever conducting any hearing. Here, there is no need to restrain judicial interference into any administrative process because there is no ongoing administrative process and no meaningful administrative remedy. The policy reasons underlying *Key Haven* do not here exist, and the circuit court should therefore be free to exercise its power to consider the Patchens’ due process claim.

The Department also falsely asserts that the Patchens did not raise any “due process claim” in their complaint. Yet as detailed on pages 29-30 of the Patchens’ initial brief, the complaint fully alleged that the Patchens’ property was taken without due process of law. Additionally, an action for inverse condemnation is a “due process claim” under Art. I § 9 and Art. X, § 6(a).

A claim for inverse condemnation arises when government takes private property without due process of law. *State Road Department v. Tharp*, 1 So. 2d 868 (Fla. 1941). Under the Constitution, due process requires procedural due process, as provided under Art. I, § 9 of the Florida Constitution and Chapters 73 and 74, Florida Statute, and substantive due process, including as provided by the constitutional guarantee of full compensation under Art. X, § 6. In this case, both procedural and substantive due process have been denied, and that denial was properly alleged.

The Patchens are entitled to a determination of their right to compensation for the taking of their property without due process of law.

CONCLUSION

This Court, and the United States Supreme Court, have consistently held that whether state action results in a compensable taking must be judicially determined based on the specific facts presented. The Third District misread *Polk* in holding that trees the Department deems exposed, whether within 125 feet, 1900 feet or 10 miles of an infected tree, are valueless as a matter of law. There is no evidence in the record that all exposed trees, or specifically the Patchens' trees, are nuisances or imminently dangerous. The Department's argument that healthy, fruit-laden trees are, like diseased cattle, incapable of any lawful use, is meritless.

The Department, and more recently the Legislature, determined that the public is best served by eradicating canker through the destruction of infected and healthy

trees alike. Property owners, like the Patchens, who lost their valuable, benign property for an alleged public benefit must be fully compensated or, at a minimum, must be allowed to present facts in furtherance of a claim for full compensation.

The Patchens respectfully request that the certified question be answered in the negative.

CERTIFICATE OF SERVICE

We hereby certify that true and correct copies hereof were mailed to all parties listed on the attached Service List this _____ day of September, 2002.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the font used in this computer-generated reply brief is Times New Roman, 14-point, and complies with Fla. R. App. P. 9.210(a)(2).

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