IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CITY OF POMPANO BEACH, et al.,
Plaintiffs,

vs.

FLORIDA DEPARTMENT OF AGRICULTURE, et al.,
Defendants.
_____/

Case No. 00-18394 (08) CACE
JUDGE FLEET

FINAL JUDGMENT ON MOTION FOR INJUNCTIVE RELIEF

The matter now before the Court addresses the proposition of whether the State of Florida, acting through the agents of the Department of Agriculture, will be permitted to continue destroying all citrus trees situated within a radius of 1900 feet of a citrus tree patently infected with the bacteriological infection commonly referred to as "citrus canker". The Court has received extensive testimony from numerous witnesses, by deposition and by personal appearance in court. The parties to this significant litigation have been represented by very capable counsel, all of whom have worked diligently to present the interests of their respective clients in the posture they deem most persuasive. In addition to the citations of law and oral analyses thereof by counsel, the Court has engaged in independent legal research in its effort to reach a conclusion mandated by law. The Court has not engaged in any independent fact research.

The Court previously entered a temporary restraining order prohibiting Defendants from destroying any citrus tree not patently infected with citrus canker. The primary function of the

The Court is indebted to its Staff Attorney, James Rowlee, for his dedicated and tireless efforts in assimilating and organizing the data received as evidence in this case. His critique of the various drafts of this Final Judgment were invaluable.

hearings which occurred on November 9,10 and 13, 2000 was to determine whether the temporary injunction should be made permanent.

As mentioned by the Court upon the conclusion of oral arguments, the evidence in this cause can be separated into three distinct, although overlapping, parts: political, scientific and legal.

POLITICAL

Throughout the trial, the Department of Agriculture (Department) has sought to establish its approach to the problem of citrus canker as conservative. From the Department's perspective, its actions addressed not only the need to protect Florida's citrus industry but, also, the interests of the homeowners with citrus trees in their yards. It is interesting to note, however, the Department did not see the need to take steps to alert the general public to the occurrence of the meeting in Orlando in December, 1998 at which Dr. Timothy R. Gottwald presented his findings and recommendations. The attendance at this meeting, whether by design or by accident, had no representative of the general public in attendance although scientists and delegates from the commercial citrus industry were invited to attend. The extreme importance of this meeting is underscored by the undeniable, and admitted, fact the Department implemented the precise recommendations contained in Dr. Gottwald's presentation.

Notwithstanding numerous requests for the data upon which the Department embarked upon what can only be described as a "scorched earth policy" in reference to citrus trees located within 1900 feet of a tree patently infected with citrus canker, the information was not disclosed. It took an order from this Court before the Department did what it should have done before it began this dramatic, drastic and wholesale destruction of privately owned citrus trees. The only excuse for the secrecy surrounding Dr. Gottwald's report was his desire to protect

it as intellectual property in order to not defeat its publication, *in February, 2001*, in a technical journal unlikely to be either disseminated to, or read by, those whose private property was being destroyed without benefit of either administrative or judicial review. This can hardly be denominated a "reason", much less a justification.

The Department has pointed to the right of any aggrieved party to resort to the Fourth District Court of Appeal for a stay order to temporarily stop the destruction of a citrus tree as evidence of its concern for the rights of individual property owners. The weakness in this argument is obvious. The Department has, for several years, retained the premiere law firm of Adorno & Zeder to represent it in any and all litigation related to the citrus canker eradication activities. When Adorno & Zeder became ineligible, due to conflict of interest, to represent the Department before this Court, the equally premiere law firm of Greenberg Trauig was retained. In addition, Deputy Commissioner of Agriculture Craig Meyer is an attorney licensed to practice law in the State of Florida. In fact, it was Mr. Meyer who rewrote the IFO in order to, in his opinion, make it less ambiguous to the layman. When asked why no home owner appeal forms were developed and included in the IFO notice delivered to each site where trees were to be destroyed, his response was , "We just never discussed it." This hardly reflects concern for the home owner to have access to any legal resources, much less those which might be a match to the legal talent within, and available to, the Department.

Plaintiffs presented Ms. Caroline Seligman as a typical homeowner who sought to utilize the judiciary to stop what she perceived to be the wrongful destruction of her citrus trees. Ms. Seligman contacted the local office of the Department, but received little or no help. To her great fortune, Ms. Seligman met an unidentified attorney whom she said was Board Certified in appellate law. This unnamed attorney helped her draft a petition for stay which she later filed

with the District Court of Appeal in West Palm Beach. The Department's response to the Clerk issued stay order was a nine page brief with six exhibits attached. As required by law, Ms. Scligman would be required to respond to the Department's appellate brief were she to have any hope of preventing the destruction of her citrus trees. If the Department deems it necessary to retain the services of such distinguished law firms as Adorno & Zeder and Greenberg Trauig, how can one not trained in law adequately defend one's position in this complex case? The question clearly answers itself.

The disparity in representation between the Department and a home owner is obvious and drastically tilted in favor of the Department. The Department has spent taxpayers' funds to retain the finest of legal talent to support its cause and has invested nothing of significance to allow the people it is supposed to represent an opportunity to litigate on an even judicial or administrative playing field.

The cavalier attitude of the Department towards the rights of the general populace is not acceptable to this Court and should not be acceptable to any other reasonable judicial or administrative body. Ours is a republican form of government in which we, by a democratic process, elect government officials whose responsibility is to make informed decisions for us all. In this case, it appears as though the interests of home owners have been subordinated to the interests of the commercial citrus industry. To some extent, this perception could have been avoided, at least in part, by the simple procedure of preparing, and delivering with the citrus tree destruction notice, standard forms for a home owner to utilize in what is generally a pitiful effort to stop perceived unnecessary destruction of private property with neither due process of law nor reasonable compensation.

Insistence upon concealment of Dr. Gottwald's December, 1998 report, an ambiguously worded IFO, haste in implementation of a plan which, according to the testimony presented at this trial, is subject to question as to its validity, and refusal to render reasonable assistance to aggrieved home owners all contributed to the negative political reaction to the Department's actions. Indeed, the Department's totally unjustified "stonewalling" in reference to Dr. Gottwald's report grievously intruded upon the basic right of the Commissioner's constituents to know why their government was taking their property without compensation, to know why their constitutional right to privacy was being invaded without court order and to know why they were being effectively deprived of their right to petition their government for relief.

This Court firmly believes in the willingness of the people as a body politic to make those sacrifices necessary to protect the greater good of this state. Had the Department taken the time, and made a reasonably sincere effort, to inform the public of Dr. Gottwald's report and given them the opportunity to scrutinize it for accuracy and reliability, the Court is confident the general public would have been much less resistant to the citrus tree canker control program. It is not unreasonable to hypothesize, based upon the evidence developed during these proceedings, there might have been developed an alternative, less drastic, and more palatable program which would have a prognostication of success equal to the program now being utilized. Because of the intransigence of the Department, neither the Court nor the general public has the answers to these questions.

President Harry Truman was right when he said secrecy and a free democratic government don't mix.

FINDINGS OF FACT

Citrus canker is a bacterial disease affecting citrus plants and is chiefly spread by wind-driven rain and other means, such as infected lawn equipment.[2] Severe infections of citrus canker may blemish fruit and cause premature fruit drop. In 1995, when Citrus Canker was detected in South Florida near the Miami International Airport in Miami-Dade County, the Florida Commissioner of Agriculture declared citrus canker to be a plant pest and a nuisance capable of causing serious damage to citrus, and enacted Rule 5B-58.001 of the Florida Administrative Code specifying procedures for the treatment and eradication of citrus canker, establishing quarantine areas for citrus, and prohibiting the planting or moving of citrus without the Department of Agriculture's permission. To eradicate citrus canker in Miami-Dade County, the Department initially instituted a policy of cutting down infected trees and all other trees, including healthy trees with no visible signs of Canker, within a 125 foot radius of any infected tree. The Department ceased carrying out this 125 foot radius policy in February 1998, when it determined the policy was not effective in eradicating Canker.

While continuing to cut down only infected trees, the Department authorized Dr. Timothy Ross Gottwald, a plant pathologist employed by the United States Department of Agriculture, to spearhead an epidemiological "field study" designed to measure the rate of canker spread over designated areas in Miami-Dade and Broward Counties. Based upon the results of Dr. Gottwald's field study, the Department, in January 2000, implemented its policy which requires the destruction of all citrus trees patently infected with canker and all other citrus trees within 1900 feet of any patently infected tree.

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[2] Citrus Canker is technically defined as a "bacterial disease of citrus incited by the organism Xanthomonas axonopodis [pathovar] citri (formerly known as Xanthomonas campestris pathovar citri), Asian strain." See Fla. R. Admin. P. 5BER00-4 (adopting definition of "Citrus Canker" contained in former Rule 5B-58.001 of the Florida Administrative Code).

The Plaintiffs seek a permanent injunction prohibiting the Department from cutting down "exposed" citrus trees located within 1900 feet of a patently infected tree on four grounds: (1) the 1900 foot rule is not supported by competent, substantial evidence, (2) the Department has exceeded its statutory authority in implementing the 1900 foot policy, (3) the 1900 foot policy was never formally adopted as a rule in accordance with the Administrative Procedures Act, and, therefore, is invalid, and (4) the procedures used to implement the 1900 foot policy violate procedural due process.

CONCLUSIONS OF LAW

SCIENTIFIC EVIDENCE

In determining whether the Department's destruction policy is supported by competent, substantial evidence this Court may not reweigh the evidence or substitute its judgment for the judgment of the Department. Nor is the Court entitled to second guess the Department's decision, or engage in a battle of the experts. *City of Dania Beach v. Florida Power & Light*, 718 So. 2d 813, 815 (Fla. 4th DCA 1998); *City of Ft. Lauderdale v. Multidyne Medical Waste Management*, 567 So. 2d 955 (Fla. 4th DCA 1990) rev. den. 581 So. 2d 165 (Fla. 1991). "The test is not whether the circuit court would have reached the same conclusion based on the evidence, but whether there was **any** substantial, competent evidence upon which to base the [Department's] conclusion." *City of Dania, supra*. at 815-16.

When it adopted its 1900 foot radius destruction policy, the Department relied upon an epidemiological field study conducted by Dr. Timothy Gottwald, which measured the rate of canker spread throughout designated areas in Miami Dade and Broward Counties. Dr. Gottwald testified the field study, which began in February 1998, consisted of four test sites in Miami-Dade County and one in Broward County. The Broward site was divided into two parcels.

All of the test sites contained citrus trees infected with canker. The trees infected with citrus canker at the beginning of the study were designated "focal trees." Over thirty day intervals, Dr. Gottwald and his team of scientists surveyed each of the sites to determine the number of newly infected trees.[3] A primary assumption underlying the field study is any newly diseased tree was infected by the nearest previously diseased focal tree. Thus, whenever a newly infected tree was discovered the distance between the newly infected tree and the nearest previously infected, or focal, tree was calculated and recorded. Dr. Gottwald compiled the results of his study, marshaled the data, and produced a preliminary draft report in November 1998, which includes, *inter alia*, tables, or "disease gradients," charting, for each thirty day survey period, the number of focal trees, the number of newly infected trees, and the distances within which 90%, 95% and 99% of the newly infected trees were located in relation to the nearest focal trees. A typical table shows a 30 day interval consisting of 38 focal trees and 15 infected trees at one test site. Ninety percent (90%) of the newly infected trees were within 800 feet of the nearest focal tree, while 95% and 99% of the newly infected trees were within a distance of 4,150 feet. This particular table is only one of many tables which demonstrate canker spread over a variety of distances for each thirty day period in each of the five test sites.

Dr. Gottwald, in December 1998, convened a private meeting at his laboratory in Orlando, Florida, to discuss the methodology and the results of the study. The meeting was attended by officials and scientists from the Florida Department of Agriculture, as well as university scientists, representatives from various regulatory agencies, and possibly others.[4] The

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[3] Visual inspection was the method utilized to determine whether any new trees had been infected.

[4] According to Dr. Gottwald, representatives of the citrus industry and a member of the press were also present. In contrast, Deputy Commissioner Craig Meyer testified he did not think representatives of the citrus industry or members of the press attended the meeting.

meeting was neither advertised, nor open, to the public.[5] Upon the conclusion of Dr. Gottwald's presentation, the scientists in attendance reached the general consensus a 1900 foot destruction zone should be established in order to capture 95% of the trees infected with canker.[6] In court, Dr. Gottwald testified the methodology he employed to carry out the study complied with generally acceptable scientific principles, the data contained in his report is valid and reliable, and he had reevaluated and reprocessed the data on several occasions over the several months after the Orlando meeting in order to verify its reliability, validity, and accuracy. His completed final report of October 1999 contained no substantive differences from the preliminary report presented at the December 1998 meeting.

Prior to implementing the 1900 foot destruction policy, the Department forwarded Dr. Gottwald's field study report to two plant pathologists for peer review. Those scientists, Dr. Lawrence Madden and Dr. Garbriel Pierce, both concluded the results of the study were scientifically reliable and accurate. Dr. Madden, an epidemiology expert, personally appeared at the evidentiary hearing and confirmed his support of Dr. Gottwald's report.[7]

Plaintiffs presented Dr. Jack Bailey, a plant pathologist from North Carolina State University, who specializes in reviewing scientific literature to determine effective techniques to implement effective public policy and management practices concerning the subject matter of such literature. Dr. Bailey reviewed Dr. Gottwald's field study report and assumed the validity

[5] The fact this meeting was not open to the public is totally unacceptable. The issues discussed were of extreme public importance. As previously stated, the lives and private property of the people of Florida were substantially and adversely impacted by the content of the discussion and the policy recommendation made by those in attendance.

[6] It must be emphasized that Dr. Gottwald's report does not recommend the creation of a 1900 foot buffer zone. Rather, the 1900 foot figure was established, as a general consensus, by the scientists who attended and participated in the December 1998 meeting organized by Dr. Gottwald.

[7] Dr. Madden vigorously supported Dr. Gottwald's underlying assumption concerning new infection having its genesis in the nearest patently infected citrus tree.

of the information therein contained to be valid. Notwithstanding such assumption, he questioned the legitimacy of the 1900 foot rule arising from the scientific information contained in the report. One of Dr. Bailey's concerns was the Department's decision to embark upon a program which it knew would not eliminate citrus canker. According to Dr. Bailey, by allowing 5% of the infection to escape, the Department is not engaging in effective eradication since the 5% of the infection which escapes would continue to spread and infect other trees.

Dr. Bailey expressed grave concern over the chipping method by which the Department destroys infected trees. He believes the chipping method contributes to the spread of canker since the "chipper" used to shred the infected tree limbs propels wood dust containing canker bacteria into the atmosphere where it can be spread by wind over great distances. The threat of wind-driven spread is based upon the reality wood dust is more aerodynamic than wind-driven rain and the chipper propels the wood dust into a turbulent area of the atmosphere. This hypothesis leads to the conclusion the chipping method, in all likelihood, could be causing canker to travel faster and farther through the atmosphere than if propelled only by wind-driven rain. All in all, Dr. Bailey surmised it to be quite possible the chipping method of destruction could, in fact, be exacerbating the spread of citrus canker in Florida.[8]

Dr. Gottwald is of the opinion while it is possible canker could be spread through the chipping method, any such spread had a negligible impact on the Department's eradication efforts since the spread occurred within the 1900 feet destruction zone. As to trees which are chipped at the edge of the 1900 buffer zone, Dr. Gottwald and Deputy Commissioner Craig Meyer both testified the areas surrounding the 1900 foot zone are periodically surveyed for infection and any infection which might have spread would be detected. If infested trees were

[8] Dr. Bailey acknowledged there have no been no studies conducted on the spread of citrus canker arising from chipping.

discovered, they were promptly destroyed. Deputy Commissioner Meyer iterated several times the belief the 1900 foot destruction zone policy, combined with subsequent surveys of the adjacent areas, has been a successful method in dramatically reducing the spread of citrus canker.

Dr. Whiteside, presented by Plaintiffs as an expert witness, is a retired plant pathologist with knowledge of citrus canker.[9] In his considered opinion, eradication of citrus canker is not necessary to protect the citrus industry. His experience taught him canker symptoms cannot always be detected by visual inspection, and it is impossible to *eradicate* canker unless every citrus tree in Florida is destroyed.[10] According to Dr. Whiteside, there are effective methods other than destruction of citrus trees to control the spread of citrus canker, one of which is application of copper spray bactericides. Dr. Whiteside's observations established as reality almost every commercial citrus grove in Florida is periodically sprayed with copper bactericides in order to control the spread of canker. He questioned the methodology used by Dr. Gottwald in conducting his field study on the spread of citrus canker. In Dr. Whiteside's view, there is no scientifically reliable evidence whatsoever to support the underlying assumption a newly infected tree becomes infected by its proximity to a focal tree. As Dr. Whiteside sees it, the only way to reliably determine the source of the infection is through genetic or serological testing, a process not utilized as a means of intelligence gathered and reported by Dr. Gottwald.[11]

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[9] Dr. Whiteside was the primary editor of the original *Compendium of Citrus Diseases* published in 1988 and a contributor to several articles, including citrus canker, in the second edition of the *Compendium* published in 2000. He declined to accept compensation for his testimony because, in his own words, he felt he had an obligation as a plant pathologist to provide information on this topic of great public concern.

[10] He believes every leaf of a citrus tree must be inspected to properly determine whether or not the tree is infected with canker. He also stated it is very difficult to detect canker by visual inspection since canker pustules can be as small as one millimeter in diameter.

[11] Dr. Gottwald agreed canker could spread over large distances and, therefore, a newly infected tree may have not been infected by the closest, previously infected focal tree. He postulated it is more probable than not the new infections arose from the closest, previously infected focal trees. Dr. Madden corroborated Dr. Gottwald's analysis in this regard. Moreover, Dr. Gottwald noted,

Dr. Heinz K. Wutscher, presented by Plaintiffs, is an expert in the field of pomology, the study of fruit trees, including citrus trees. In essence, he concludes the program of citrus tree destruction now underway in Florida is, and will be, ineffective as a canker eradication protocol. In all important respects, Dr. Wutscher raised the same concerns as Dr. Bailey and Dr. Whiteside concerning Dr. Gottwald's report and the efficacy of the Department's presently employed methodology. Like Dr. Whiteside, Dr. Wutscher testified without compensation. It is interesting to note he expressed the opinion those who were still dependent upon a public entity for compensation were either prohibited from, or ordered not to, speak out publicly in a manner not in accordance with the dogma of the funding agency.

In all candor, if the Court were to weigh the professional expertise of one side against the other, the Plaintiffs might well have come out on top. However, the test is not whether one side produced more or better experts than the other, but rather whether there was any substantial competent evidence upon which to base the Department's conclusion. Substantial competent evidence is evidence which will establish a legally reliable basis for the conclusion under review. This is defined as relevant evidence which a reasonable mind would accept as adequate to support the conclusion reached. *City of Ft. Lauderdale v. Multidyne Medical Waste Management*, 567 So. 2d 955, 957 (Fla. 4th DCA 1990), rev. den. 581 So. 2d 165 (Fla. 1991).

While Dr. Bailey, Dr. Whiteside, and Dr. Wutscher certainly raise valid concerns about the basic assumptions underlying the field study, the legitimacy of the 1900 foot rule, the chipping method, the 95% capture rate, and whether citrus canker can actually be eradicated in

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quite correctly, attributing a new infection to the closest previous infection is a "conservative approach," which actually underestimates the rate at which canker spreads over distances.

Florida, this Court does not have the legal authority to conclude the Department did not rely upon substantial, competent evidence upon which to base its present course of action.

IS THE 1900 FOOT POLICY A "RULE" UNDER THE APA

The Legislature has given the Department of Agriculture the authority "to adopt rules specifying facts and circumstances that, if present, would require the destruction of plants for purposes of eradicating, controlling, or preventing the dissemination of citrus." § 581.184, Fla. Stat. (1999). As an administrative agency, the Department is required to adopt its "rules" in accordance with the rulemaking procedures set forth in the Administrative Procedures Act. The APA, section 120.52 (15), Florida Statutes (1999) defines "rule" as follows:

> Rule means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes or solicits any information not specifically required by statute or by an existing rule

Whether an agency statement is a rule as defined in section 120.52 turns on the effect of the statement, not on the agency's characterization of the statement by some appellation other than "rule." *Department of Adminstration v. Harvey*, 356 So. 2d 323, 325 (Fla. 1st DCA 1977). The breadth of the definition of "rule" in Section 120.52(15) suggests the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them. Any agency statement is a rule if it "purports in and of itself to create certain rights and adversely affect others," *State Department of Administration v. Stevens*, 344 So. 2d 290, 296 (Fla. 1st DCA 1977), or serves "by [its] own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." *McDonald v. Department of Banking and Finance*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

It is clear the Department's establishment of the 1900 foot host-free buffer zone is a "rule" as the term is defined in the APA. The concept constitutes an "agency statement of general applicability which implements and prescribes law or policy in connection with the Department's citrus canker eradication program. The 1900 foot radius "policy" is the method by which the Department carries out its citrus canker eradication program. The Department has destroyed hundreds of thousands of trees in both residential and commercial areas pursuant to the 1900 foot policy and has informed the Plaintiffs in this case their trees will be destroyed in accordance with the policy.[12] Indisputably, the Department has used the 1900 foot buffer zone as a rule of decision and this decision has adversely affected Plaintiffs' rights to a very dramatic extent and will do so in the future.

Although the creation of the 1900 foot host-free buffer zone is a "rule" within the meaning of the APA, the Department never formally adopted it as one pursuant to the rule-making procedures of the APA. See 120.54, Fla. Stat. (1999). Neither the Department's Emergency Rule 5BER00-4, adopted on September 19, 2000, nor its predecessor, 5B-58.001, makes mention of the 1900 foot destruction radius. The Department's failure to include the 1900 foot rule in its emergency rule is bewildering to this Court. One would think a top priority of the Department would be to include the 1900 foot zone of destruction in its emergency rule, especially since the 1900 foot rule is an essential component of the Department's eradication policy and is principle method by which the Eradication Program is carried out.

Because the 1900 foot destruction zone is a "rule" which was not properly adopted in accordance with the rulemaking procedures of the APA, it is invalid as an improper exercise of delegated legislative authority. § 120.52(8)(a); *Price Wise Buying Group v. Nuzum*,

[12] Deputy Commissioner Meyer testified at least two hundred thousand trees had been destroyed .

343 So. 2d 115, 116 (Fla. 1st DCA 1977); *Harris v. Florida Real Estate Commission*, 358 So. 2d 1123, 1124 (Fla. 1st DCA 1978); *Florida Department of Offender Rehabilitation*, 352 So. 2d 575, 575 (Fla. 1st DCA 1977); *Harvey, supra*, 356 So. 2d at 325-326; *Department of Business Regulation v. Martin County Liquors, Inc.* 574 So. 2d 170, 173-174 (Fla. 1st DCA 1991); *Stevens, supra*, 344 So. 2d at 296.

RULE MAKING AUTHORITY

The Plaintiffs submit the proposition the Department exceeded its rule making authority by defining the word "exposed" in its Emergency Rule in a manner inconsistent with the legislature's definition of "exposed to infection" as set forth in section 581.184, Florida Statutes (2000). The Department defines "exposed" in Rule 5BER00-4 as "[d]etermined by the department to **likely** harbor citrus canker bacteria because of proximity to infected plants, or probable contact with personnel, or regulated articles, or other articles that may have been contaminated with bacteria that cause citrus canker, but not expressing visible symptoms." The phrase "exposed to infection," is defined by the legislature to mean "citrus trees 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." 581.184(1)(b), Fla. Stat. (2000) (emphasis added).

In the Court's view, the Department's definition is fundamentally inconsistent with the legislature's definition of the term "exposed to infection." The existence of canker is only a matter of probablity as far as the Department is concerned, but the legislature requires citrus trees to harbor citrus bacteria as a matter of certainty. By giving itself authority to destroy trees which *may* harbor citrus canker, notwithstanding the fact section 581.184 only authorizes destruction of trees which *actually* harbor citrus canker, the Department exceeded the parameters of its

delegated authority. It is well established administrative rules cannot exceed the scope of the enabling statute. *Department of Administration Division of Retirement v. Albanese*, 445 So. 2d 639 (Fla. 1st DCA 1984).

PROCEDURAL DUE PROCESS

Plaintiffs advance at least two arguments to support their contention Emergency Rule 5BER00-4 denies constitutional due process to aggrieved parties : (1) it does not require the Department to attach to the Immediate Final Order ("IFO") any proof a tree sentenced to destruction has been exposed to an infected tree within the 1900 foot radius, and (2) it does not require a minimum waiting period between the date the IFO is delivered and date the tree is destroyed, thereby permitting the Department to immediately destroy the tree before the tree owner has any meaningful opportunity to appeal the IFO.

Section (5)(c) of Rule 5BER00-4 provides in entirety as follows:

> The Department shall issue an Immediate Final Order stating the quarantine and control methods to be implemented on the infected or exposed citrus located on the property. It may be delivered in person, by mail or similar common carrier, or posted on the property. Immediate final orders are not required for control action in commercial citrus groves provided the owner agrees voluntarily to the control action and enters into an agreement not to sue with the department.

Unlike Rule 58.001(5), which expired on September 1, 2000, the current rule does not require the Department to attach to the IFO any of the following: (1) a copy of a citrus canker diagnostic report verifying the presence of, or exposure to, citrus canker as determined through either a laboratory or field diagnosis, (2) a written inventory including size, condition, and variety of citrus located on the infected or exposed property, (3) a map of the infected or exposed

property with the location of citrus subject to control action, and (4) a recommendation for control action.

By adopting the present rule, the Department has divested itself of any obligation to submit any proof to tree owners the trees it has sentenced to destruction have been exposed to citrus canker. The Court views the Department's casting aside of any responsibility to furnish tree owners with minimum proof supporting its decision to destroy trees exposed to canker as an inexcusable violation of procedural due process, particularly since the Department's decision is made, and the trees are destroyed, without a hearing. While the Court recognizes the IFO gives a tree owner the opportunity to obtain a copy of the diagnostic report and the location of the nearest infected citrus tree by calling a citrus canker hotline, this arrangement is insufficient to meet minimal procedural due process requirements and flies in the face of basic notions of fundamental fairness.[13] Constitutional procedural due process requires, at the very least, the Department furnish, at the time an IFO is delivered to the owner of the doomed tree, all information utilized to support the Department's destruction decision. Forcing the aggrieved tree owners to undergo the rigors and inconvenience associated with contacting the Department in order to obtain the information the Department should have furnished in the first place is just morally and legally wrong.

Upon reading the original IFO used by the Department until mid-October of this year, one is thrust into the bizarre world of a Kafka drama. The IFO states:

> The Department has found citrus trees on your property. Citrus trees infected with citrus canker or exposed by being located within 1900 feet of an infected tree will be removed.
> ...

[13] As is evident from the testimony of the individual tree owners, this arrangement is almost totally useless. Delay in response, insufficiency of information furnished and distance required to travel all militate against considering this process to be fair.

> If you do not agree with this Immediate Final Order, you may appeal by filing the original of a Notice of Appeal with the Clerk, Florida Department of Agriculture and Consumer Services, Mayo Building, Room 509, Tallahassee, Florida 32399-0800, within 30 days of the date of this order, and filing a copy of the Notice of Appeal, accompanied by the filing fees prescribed by law, with the Clerk of the appropriate District Court of Appeal.

What the tree owner is supposed to appeal is a mystery to this Court. The IFO does not contain a finding the citrus trees on the property are either infected with canker or are located within 1900 feet of an infected tree. Rather, as already indicated, the IFO merely states the Department has found citrus trees on the property and citrus trees infected with citrus canker or those trees located within 1900 of an infected tree will be removed. To say the original IFO is poorly drafted risks understatement; "confusing," "ambiguous," and "unclear" are more appropriate descriptions. Regrettably, there must be many orphan trees whose parents were destroyed in order to make the paper upon which these practically and legally useless documents were printed.

At the evidentiary hearing, the Department presented evidence it discontinued using the original IFO in mid to late October, 2000. The new IFO has cured the prior lack of notice problems but, unfortunately, is beset with its own procedural due process problems. The revised IFO fails to provide the owner of a tree destined for execution a meaningful opportunity to appeal the Department's decision. The revised IFO states and appeal may be filed with the "... appropriate District Court of Appeal" within thirty days of the delivery of the IFO. It then states

> Although you have a right to appeal this action within 30 days of this order, ***please understand that the mere filing of a notice of appeal does not guarantee that your infected or exposed trees will not be cut. The Department has the authority to immediately remove the infected or exposed trees. However, no trees will be cut earlier than five calendar days from the date you receive this letter.*** . . . If you wish to prevent cutting of your trees, you must appeal and seek a stay of our action from the appellate court and

> present it Ken Bailey, Program Director . . . within five days of your receipt of this letter. Furthermore, you have to exhaust your administrative remedies through an appeal before you can seek injunctive relief. [Emphasis supplied].

In essence, the 30 day appeal period actually shrinks to a 5 day period in which a layman is expected to file an appeal and seek a stay. From the Court's perspective, this abbreviated appeal period places a constitutionally unfair and undue procedural burden on the average lay person to spare their trees from the fate of the ax.

The five day appeal requirement places those tree owners who want to save their trees from destruction in a terrible bind-- they must, at a frantic pace, retain counsel to file both the appeal and motion for stay, and in doing so, must incur legal and filing fees.[14] Those persons who have neither the know-how nor the financial resources to retain an attorney are left on their own to navigate the maze of the legal world and reach their destination within a mere five days![15]

To assume one not skilled in the intricacies of law appreciates and understands what is meant by a "stay", much less has the knowledge and technical skills with which to prepare the documents required for such a proceeding, is borderline arrogance. Laymen are not law students and do not have the benefit of a course in civil appellate procedure. Coming from all walks of life, there is good reason to conclude laymen may be uncertain as to the meaning of terms which

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[14] This is a particularly hard pill to swallow, since it is the Department's decision to destroy tress without a hearing which has created the need to file the appeal.

[15] Plaintiff Carolyn Seligman, a Broward resident, was confronted with this exact scenario. At trial, she testified she never received an IFO, but only learned her trees were slated for destruction after she called the canker hotline for information. After she drove to the Department's local office, she was given an IFO and told to file both an appeal and motion to stay with the Fourth District Court of Appeal. She drove herself to the Fourth District in West Palm Beach, but when she got there she had no idea how to draft a motion for stay. By happenstance, she ran into a generous appellate attorney in the lobby of the courthouse, who agreed to assist her in drafting a hand written motion for stay, which she filed after paying a $250.00 filing fee. The Fourth District immediately issued a stay. She then had to drive back to the Department's office in Plantation and serve the stay upon a representative.

are relatively easily understood by lawyers and judges. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 555; *Tejada v. Roberts*, 760 So. 2d 960 (Fla. 3rd DCA 2000); *Shaw v. Lazar, 766 So. 2d 341 (Fla. 4th DCA 2000).*

CONCLUSION

The foregoing considered, it is

ORDERED AND ADJUDGED:

(1) The 1900 policy is a rule which was not adopted in accordance with the rulemaking procedures set forth in the Administrative Procedures Act, and therefore, it is invalid.

(2) The Department exceeded its delegated authority in defining "exposed" in a manner inconsistent with the legislature's definition of "exposed to infection" in section 581.184, Fla. Stat. (2000).

(3) The IFO violates procedural due process, and, therefore, is unconstitutional.

(4) The Plaintiffs' request for a permanent injunction is **GRANTED.**

(5) The Department is hereby permanently enjoined from cutting down in Broward County healthy citrus trees which have no visible symptoms of canker but which are located within 1900 feet of a citrus tree infected with canker. The Department may continue to destroy only those trees which are patently infected with canker.

DONE AND ORDERED in Chambers, Ft. Lauderdale, Broward County, Florida, this 17th day of November, 2000.

J. LEONARD FLEET NOV 17 2000
A TRUE COPY

J. LEONARD FLEET
CIRCUIT JUDGE

cc: counsel of record