(Converted to MSN Word Format - July 21, 2003)

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

CASE NO. 00-18394(08)

HAIRE, et al.,
Plaintiffs,

vs.

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES and STATE OF FLORIDA,

Defendants.

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ORDER GRANTING MOTION FOR TEMPORARY INJUNCTION

This cause came before the Court on July 7,2003 on Plaintiffs' Renewed Motion for Temporary Injunction. This court reviewed the motion and related filings, the evidentiary support presented and heard argument of counsel in support of and in opposition to the motion. The two primary factual issues involve the Department of Agriculture and Consumer Services' (the "Department") methodology for measuring the 1,900-foot radius for determining which trees are "exposed to infection," and the reliability of the Department's diagnoses of Asian-strain infection.

The court finds the Department's methodology for measuring the destruction radius from an infected tree is patently at odds with the 1,900 foot tree-to-tree measurement expressly required by §581.184, Florida Statutes, and is in conflict with this Court's Orders dated February 20, 2003 and April 29,2003. The Department's chain-of-custody procedures and protocols for testing canker samples have been found inadequate and have been revised by the Department's own personnel. The issue now under review is whether past canker samples which were the subject of these admittedly defective chain-of-custody and testing protocols can be relied upon by the Department to destroy trees. Based upon the information now before die Court, the Plaintiffs are entitled to the relief requested.

Specific Factual Finding.

1. **Measurement of the l,900-Foot Distance**.

Section 581.1S4(2Xa), Florida Statutes, expressly requires the Department to

"remove all... citrus trees exposed to infection." which are defined in §581.184(1)(b) to be "citrus trees located with 1,900 feet of an infected tree." (Underline added). Section 581.184(4)(c) states:

"Simultaneously with the delivery of an immediate final order, the department shall also provide the following information to the property owner:...(c) the Distance between the infected citrus tree and a property owner's exposed citrus trees." (Underline added). Consistent with these statutory mandates, an Order was issued on February 20,2003 requiring the Department to determine which trees are subject to removal by precisely measuring the 1,900-foot distance from a known infected tree. Subsequently, on April 29,2003, this Court issued a Case Management Order requiring the Department to specify the exact methodology it employs to take the required measurements.

In response to the Case Management Order, the Department stated it measures the I,900-foot radius by recording the location of the infected tree with a GPS unit having a 49-foot margin of error and then uses mapping software to draw a 1,851-foot radius around the infected tree. Under the submitted methodology, all properties fully within the 1,851-foot radius are considered "exposed to infection," and all trees located thereon are subject to removal. In contrast, all properties even partially outside the 1,851-foot radius are considered fully outside the destruction radius, although a citrus tree on a property may actually be well within 1,900 feet of a known infected tree.

There are three significant problems with the Department's described methodology.

First, it violates both the statutory mandates and this Court's February 20th Order

which specifically require tree-to-tree measurements. As stated above §581.184 mandates all trees within 1,900 feet of each infected tree be removed, a result which cannot be achieved when the starting point is a 1,851-foot radius. The evidence also demonstrates the Department's purported methodology may result in a radius in the range of 1,500 feet, perhaps less where large lots are involved. The Department lacks the authority to unilaterally modify the 1,900-foot statutory mandate.

Second, the evidence shows the Department has never actually used the described methodology. Weeks after providing the description, a Department manager who helped develop the methodology stated the Department was expecting to commence use of the methodology on June 7, 2003. The evidence shows, even after June 7,2003, the Department did not use its described methodology. Due to the inconsistent positions taken by the Department, this court does not know what measurement methodology is actually being employed by the Department. What is clear, however, is the Department has failed to employ tree-to-tree measurement of any kind. The Department, acting upon its own initiative, has always measured from the centroid (center point) of the property on which the infected tree was located to the centroid of the property on which a potentially exposed tree is located. Additionally, despite the statutory requirement the Department provide a tree owner with the distance between the known infected tree and the exposed tree, the Department admitted it has not, at least since early 2000, provided any tree owner with an immediate final order (IFO) which listed the accurate tree-to-tree distance. The IFO's thus far delivered have listed the distance between the centroids on the respective properties without regard to the actual locations of the trees. This centroid-to-centroid measurement would undoubtedly result in some destruction of trees beyond 1,900 feet from a known infected tree.

Third, even if the Department's described methodology was permissible and had been actually put into use, such measurement methodology could not, according to the consistent position taken by the Department during the April, 2002 temporary injunction hearing, possibly achieve eradication, the statutory goal recognized by the *Haire* appellate decision. *Dept. of Agriculture v. Haire.* 836 So.2d 1040 (Fla.4th DCA 2002). Since the new methodology starts with, at most, an 1,851-foot radius and then subtracts from the radius all properties even partially outside the arc, the Department has established a removal radius substantially below 1,900 feet.(1) As stated in *Haire,* using a radius less then 1,900 feet would not be expected to achieve eradication: "[T]he Legislature chose [the 1900 foot] zone in order to include the vast majority of canker infection and exposure without having to destroy more trees than absolutely necessary." *Id.* at 1052 (underline added). Thus, in addition to the statutory violation, permitting destruction under the Department's measurement methodology would, based on the present evidentiary record and law of the case, serve no public purpose. *State Plant Board* v. *Smith,* 110 So.2d 401,409 (Fla. 1959).

2**. Diagnosis of Asian-Strain Canker Infection**.

Destruction is permissible only when based on a reliable diagnosis of Asian-strain infection. The evidence presented to the Court demonstrates the diagnoses conducted in the Plantation laboratory, which processes all samples of Miami-Dade, Broward and Palm Beach counties, are not reliable.

The Department developed a fourteen-step protocol for conclusively diagnosing Asian-strain infection. For virtually all of the samples from trees in southeast Florida, the Department uses only three tests. The Department's chief pathologists admitted those tests are insufficient to reliably distinguish Asian-strain canker from other citrus canker strains known to exist in Florida, i.e., nursery-strain and Wellington strain.(2) These strains are much less virulent than Asian-strain, the strain which was the subject

of the Gottwald study. Because of varying levels of virulence, a detection of nursery-strain canker requires no destruction at all, while a Wellington-strain detection requires destruction of only the infected tree.

The evidence shows other strains of canker could also exist undetected in Florida. Other strains, as happened with Wellington-strain, can appear suddenly and exist for years before detection. The Department is not conducting adequate testing to identify new strains. The Department is sufficiently testing far too few samples (as few as 2 in 5,000), the testing is based upon a preconceived notion about Wellington-strain and the Department has adopted what it terms “an emerging protocol" to conduct additional testing.(3)

The Department admitted there may have been wrongful tree destruction prior to adopting the new protocol. While the new protocol is an improvement, it is insufficient to reliably distinguish between strains of canker, whether known or presently unidentified.

Inexpensive tests are available to reliably diagnose Asian-strain canker infection but the Department is not conducting those tests. The Department argues additional testing is unnecessary since its diagnosis of Asian-strain infection would be accurate in a vast majority of cases.(4) Such argument might have some appeal if the only tree destroyed as a result of the diagnosis was the "infected" tree; here all healthy trees on the 260 acres surrounding the "infected" tree are also destroyed. Given the level of destruction resulting from a single diagnosis, the Department must base destruction decisions on reliable diagnosis, not merely likelihood or pre-conceived notions with a demonstrated history of error.

Even if the Department's limited testing was otherwise sufficient to reliably diagnose Asian-strain canker infection, the Department's diagnoses fail because of the absence of, or systematic violation of, necessary chain-of-custody procedures. During the April 2002 temporary injunction hearing Department witnesses indicated the

Department carefully followed procedures to ensure it was able to reliably identify the property from which the tree sample came. The evidence shows either these procedures do not exist or they are not being followed. Merely by way of example, identifying information may be added to sample bags or forms well after the sample was collected, without any independent verification of actual address from which the sample came. Additionally, samples are not consistently secured. The Department's Chief Plant Pathologist conceded unauthorized individuals could tamper with the samples. The Department could easily have prevented these problems by complying with simple, written procedures, but has not done so. This Court finds the samples collected to date cannot be reliably considered to have come from the properties identified on paperwork which accompanies the sample bags, creating an unacceptable risk of wrongful destruction of private property.

> Equally problematic is the Department's standard procedure after testing the sample is completed. The Department maintains a herbarium of samples so interested parties, including property owners, can verify diagnoses. However, on the day the sample is processed, the sample is placed in dryer which, for at least a significant percentage of the samples, immediately kills the bacteria, precluding the very verification the stored samples are supposed to provide. Visually observing the dried samples does not result in verification, since the visible symptoms may not have resulted from Asian-strain canker or from citrus canker of any kind. While the Department claims verification can be achieved through tests which can isolate the replicate bacteria, the bacteria replicated may, as discussed below, have been placed in the sample as a result of cross-contamination. Simply stated, the Department's procedures and practices prevent property owners from confirming the Department's diagnosis.(5)
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> Finally, the absence of quality control procedures has produced results which prevent the Department's diagnoses from being considered reliable. During the April 2002 temporary injunction hearing, and again during the recent depositions of Department scientists, the Department has consistently stated canker bacteria is highly infectious and spreads easily. When handling samples taken from trees in southeast Florida for purposes of diagnosis, the Department has failed to observe even minimal care to prevent cross-contamination.

None of the work areas or tools in the Plantation laboratory are decontaminated between samples. Most problematic, perhaps, is the scalpel, used each day to dissect

dozens of lesions presumed to contain canker bacteria, is not decontaminated between samples. While the Department conceded its practices could be cross-contaminating samples, it claims the amount of bacterial transfer is small, and therefore instances of significant cross-contamination should be few and far between. None of the reasons the Department asserts as supporting such limited risks, however, is factually accurate. For example, the Department claimed little bacteria would transfer because tree samples are dry, but later conceded some tree samples are wet at the time they are processed. The Department also claimed the bacterial transfer would not impact the important bacterial streaming test, but later stated under certain foreseeable circumstances it could impact the test or, alternatively, create a false illusion of bacterial streaming.(6)

As with chain-of-custody, decontamination is wholly within the control of the Department. The Department stated decontamination would have required nothing more than common alcohol and a Bunsen burner, items hardly foreign to laboratories. The lack of decontamination procedures, and the practices in Plantation violate those procedures.(7)

Since the procedures which result in cross-contamination of tree samples were revealed during a May 2003 deposition, the Department, while denying any past impropriety, has enacted comprehensive decontamination protocols which, effective July 1, 2003, will be utilized in between each tree sample tested in the Plantation laboratory. Although these protocols will be applied to all future testing, they cannot resolve past instances of cross-contamination. While it is presently impossible to quantify the extent to which test results have been compromised due to the above described practices, it is equally impossible to determine which results were compromised. Dr. Schubert, one of the Department's most tenured scientists, stated if there is any reason to suspect samples are cross-contaminated, those samples are of no use and must be rejected. This Court finds there is strong reason to suspect cross-contamination, and therefore rejects the samples previously collected by the

Department as a reliable basis for any future destruction of trees pending reasonable discovery and trial.(8)

General Findings and Conclusions of Law

In considering the Plaintiffs' Renewed Motion for Temporary Injunction, the Court recognizes the Citrus Canker Law has been held to be a constitutional exercise of the state's police power to protect Florida's important citrus industry. By the same token, the Court cannot ignore the compelling evidence of the Department's most recent failures to implement the statutory mandate in a manner consistent with the rights of property owners, prior orders of this Court, prudent chain-of-custody and quality control procedures and the express requirements of the statute itself. It would not have been difficult for the Department, which has exclusive authority to conduct testing with canker bacteria, to validate whether its testing protocols were causing false results; the Department failed to do so. The Department could have complied with express statutory requirements, and could have easily observed prudent decontamination protocols of the type it now volunteers to observe, but it never did so.

The Department does not seriously dispute these failures, but now proposes to amend its protocols for future testing of samples and for distance measurements.(9) The Department has also belatedly requested clarification of an order entered February 20, 2003. If this were the Department's first failure to implement the Citrus Canker law consistent with constitutional, statutory and evidentiary requirements, the Department's representation it will, in the future, correct the problems would have been more acceptable; unfortunately, that is not the case.

The most recent evidence of the Department's failures to observe required procedures in its Plantation laboratory bears a striking resemblance to the failures documented by State Auditor General Report No. 03-130 (Feb. 2003), concerning the high error rate in the Department's eradication program computer data base due to the

lack of quality controls. It also resembles the videotape evidence presented in April 2002 documenting the failure of Department inspectors to follow mandatory decontamination procedures in the field. The same careless and haphazard conduct in implementing the Citrus Canker Law was mentioned in *Haire* decision, which noted the substantial delays in removing known infected trees. *Haire,* 836 So.2d at 1058. Yet another example was the Department's practice of conducting nonconsensual, warrantless searches of private residential properties which, despite the uniform body of contrary case law persisted for years until finally enjoined by this Court. It is against this backdrop the Court must assess the Department's most recent failures.

This Court recognizes both the *Haire* appellate court and Florida Supreme Court denied motions to stay the *Haire* decision pending Supreme Court review, and is otherwise mindful of the procedural posture and substantive appellate ruling in this case. This Court has no authority to prevent the Department from destroying infected trees and trees which are “exposed to infection," as such term is used in §581.184, Florida Statutes. This Court does, however, have the authority to temporarily enjoin the Department from destroying trees which are not infected or "exposed to infection” or from senselessly destroying private property.

This Court has discretion to issue a temporary injunction only when the movant demonstrates it will suffer irreparable harm unless the status quo is maintained, there is no adequate remedy at law, it has a clear legal right to the relief requested, and the temporary injunction will serve the public interest. *Surplus Credit, Inc. v. Office of the Attorney General,* 752 So. 2d 1225,1227 (Fla. 4th DCA 2000). Based on the above-stated facts, Plaintiffs have clearly demonstrated the existence of each of these elements. Instructively, this demonstration was largely based on the deposion

testimony of the Department employees with direct knowledge of certain practices which undoubtedly caused substantial unauthorized and unnecessary destruction of the property in the past and which would undoubtedly, without a temporary injunction, cause similar destruction in the immediate future.

Based on the *Haire* decision, subject to any contrary decision by the Florida Supreme Court, the Department has a clear legal right to destroy trees it has reliably demonstrated are infected with Asian-strain citrus canker, and to destroy all citrus trees it has reliably determined are within l,900 feet of each such infected tree. But, with that right, the Department is obliged to act legally to limit its destruction to those trees it is statutorily authorized to destroy. Plaintiffs have a clear legal right, guaranteed under Article I of the Florida Constitution, to possess and protect citrus trees which have not been demonstrated to fit an authorized destruction category. To the contrary, the public interest is served by, among other things, preventing the unnecessary and unauthorized destruction of private property and the public's resulting financial liability.

Plaintiff's demonstrated they face irreparable harm, and it is undisputed a substantial number of irreplaceable trees face imminent destruction based on the improper and unreliable diagnoses and measurements referenced above. The temporary injunction will also prevent undeniable violations of §581.184, Florida Statutes, and this Court's previous order which requires the Department to determine distance through precise tree-to-tree measurements.

There presently exists an unacceptable risk of completely unnecessary destruction of benign private property, which risk directly results from the Department's failure to observe ordinary diligence and to comply with clear statutory mandates. There is no adequate remedy at law.

The Department argues this Court has no jurisdiction over its measurement methodology and protocols for diagnosing canker under *City of Pompano Beach's* failure to exhaust administrative remedies holding. *Fla. Dept. of Agriculture v. City of Pompano Beach,* 792 So.2d, 539 (Fla. 4th DCA 2001). The Court cannot agree. This Court finds Plaintiffs are not required to exhaust any administrative remedies since no adequate remedies are or remain available under the Administrative Procedures Act. Several exceptions to the exhaustion doctrine, as recognized in *Pompano Beach,* are applicable.

While Plaintiffs assert there is never any available remedy under the

Administrative Procedures Act when challenging an immediate final order, this issue need not be reached.(10) Here, there are no administrative remedies to exhaust, as the administrative appeal period has long since expired for many, if not most, of the citizens whose trees are slated for imminent destruction, including several named plaintiffs who previously testified before this Court. Some, or perhaps many, of these tree owners would undoubtedly have exercised their appellate rights had they then had reason to know the Department's diagnosis was unreliable and the distance measurement listed in the IFO not accurate or legally valid. In the absence of any available administrative remedy, and in the face of procedures plainly at odds with the controlling statute, orders of this Court and the Department's own protocols, the Court cannot be without power to act.

Even if the administrative appeal period had not already expired, the same result would obtain. With regard to the Department's distance measurements which are contrary to earlier orders entered by the Court, the Court certainly has the authority to enforce those orders; the Department has provided no authority to the contrary. Moreover, the Department's use of a measurement methodology which is contrary to the statutorily required tree-to-tree 1,900 foot measurement is "*without colorable statutory authority"* and therefore constitutes a well established exception to the exhaustion doctrine. *City of Pompano Beach, 792* So.2d al 546. (court's emphasis). The Department's measurement methodology neither *"has apparent merit or depends upon some factual determination." Id* at 547 (court's emphasis). The Department, through use of its newly announced measurement methodology, will continue to violate the express statutory requirements. By violating unambiguous mandates of its enabling statute, the Department is acting illegally. *Fla. Dept. of Environmental Regulation v. Falls Chase Special Taxing District,* 424 So.2d 787, 795 (Fla. 1st DCA 1983). Since its illegal action has and will result in, significant encroachment upon private property rights, this Court has jurisdiction to act. *Id. at 793.*

The same is true of the Department's chain-of -custody and testing protocols for canker samples. While the Department has revised these admittedly defective protocols, it continues to destroy trees based upon samples processed under the discarded procedures. This appears to be the epitome of arbitrary and capricious state action. Continuing to destroy trees based on past defective diagnoses and unlawful measurement practices, while employing proper decontamination and other protocols only to new testing and measurements, constitutes a gross and flagrant abuse of power, and is therefore subject to this Court's power to issue a temporary injunction. *Odham v. Foremost Dairies, Inc.* 128 So.2d 586,592 (Fla. 1961).(11)

The Department further alleges the movants lack standing. The Court finds, based on the present record, the movants have a sufficient stake in the outcome of these issues raised to confer standing. *Pandya* v. *Israel,* 761 So.2d 454,456 (Fla. 4th DCA 2000). The individual movants face imminent destruction, of their private property, and the public entity movants filed multiple claims, which remain pending, seeking to enforce their respective tree preservation ordinances.

The Court also finds a temporary injunction is necessary to permit Plaintiffs to engage in further discovery on these issues including, if necessary, conducting their own independent examination of the Department's practices as described above. Plaintiffs are entitled to take such discovery. The issues presented in the instant temporary injunction motion could also have a significant impact on the class-action inverse condemnation claims, which in turn will significantly impact hundreds of thousands of property owners statewide and the state's financial coffer. These issues should not be resolved with undue haste. Appropriate, required discovery and independent examination are not presently possible, since the wrongful destruction of private property is imminent.

The Court further finds no bond is necessary given the status of the parties and the issues addressed herein.

4. **Relief.**

It is, therefore, ORDERED and ADJUDGED:

1. The Department is temporarily enjoined from destroying any citrus tree in Miami-Dade, Broward or Palm Beach counties based on tree samples collected prior to the date hereof;

2. With regard to any and all tree samples collected after the date hereof, the Department is temporarily enjoined from destroying any tree without:

a. Maintaining the integrity of the sample by complying, and requiring each employee handling the sample to certify such compliance, with effective written chain-of-custody procedures;

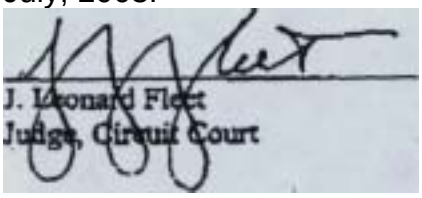
b. Performing all tests necessary to reliably diagnose and determine the subject tree is infected with Asian-strain citrus canker, including a hypersensitive reaction test (HR test), genetic (DNA) testing, and pathogenicity (host range) testing.

c. Complying with written procedures which require the full and effective decontamination of all testing equipment and surfaces in between each sample, and individually certifying, for each sample, full compliance with such procedures;

d. For a period of not less than twenty (20) days after delivery of all IFO's issued or to be issued in reliance on the sample, preserve, and make available for inspection, the sample, and all paperwork and sample bags, in such a manner as will permit any affected tree owners to obtain timely independent verification of the diagnosis; and

e. Precisely measuring, through more exacting GPS equipment, customary land surveying or through other means if approved in advance by this Court, the actual distance between the infected tree and each individual tree "exposed to infection," and providing the precise tree-to-tree distance to each affected tree owner at the time the IFO is delivered. ;

DONE and ORDERED in Fort Lauderdale, Broward County, Florida this 18th day of July, 2003.



cc: All Counsel of Record

(1) Even the 1,851-foot starting point may present a loss of more than 49 feet from the required 1,900-foot radius. Because the margin of error on the particular GPS unit used by the Department is plus or, minus 49 feet, a radius of up to 1,949 feet may be required to truly remove all trees within 1,900 feet of a known infected tree. Thus, the starting point of the radius may effectively be as little as 1,802 feet. The Department conceded more precise GPS units are available, but said the expense was not justified.

(2) Based on the limited testing performed in the Plantation laboratory, Wellington-strain is always indistinguishable from Asian-strain. Nursery-strain symptoms are usually easy to distinguish, but in some cases they, too, are indistinguishable based on the tests performed in Plantation. The evidence shows, to date, about 99% of tree samples received only the limited testing conducted in the Plantation laboratory.

(3) Until recently, the Department believed Wellington-strain affected only key lime trees in a discrete geographic area of Palm Beach County. As such, the Department had historically tested only key lime trees in that area for Wellington-strain infection. The evidence submitted shows even the informal procedure whereby samples from such trees would be sent to the Department's Gainesville laboratory was not followed. Plaintiffs presented examples showing the Plantation laboratory routinely is not provided with information identifying the tree variety, thus the laboratory would not know which samples required further testing in Gainesville

(4) The Department uses transparent circular reasoning to support this assertion. For example, the Department alleges it has only rarely found examples of nursery-strain

bacteria which had raised (not flat) lesions and yellow halos, identical to Asian-strain. Therefore, the Department asserts it may conclusively diagnose every sample with raised lesions as Asian-strain "based on the preponderance of the evidence" without conducting further testing necessary to determine the strain.

(5) Additionally, property owners cannot verify the address of the property from which the sample was taken, since the sample bag is also immediately discarded.

(6) Because the defective procedure routinely employed in the Plantation laboratory can create a false illusion of bacterial streaming, the diagnosing protocols employed in Plantation are not sufficient to distinguish Asian-strain canker from certain endemic non-bacterial diseases which create substantially similar visual symptoms on Florida citrus.

(7) Additionally, Plantation test "results" are recorded before the test is actually performed. This informal but standard procedure in Plantation violates the procedure applicable to the Department's Gainesville laboratory.

(8) The Department asserts Plaintiffs have not presented any expert testimony proving the testing prior to implementation of the new protocols led to unreliable diagnoses. The court finds, for the purposes of this temporary injunction, testimony from Plaintiffs own experts was unnecessary since the clear statements of the Department's employees provide strong evidence of the unreliability of past diagnoses. This evidence is buttressed by the significant changed protocols resulting from that very testimony.

(9) The Department argues its scientist's statement that, despite all the admitted problems, the diagnoses of Asian-strain are still reliable to a reasonable degree of scientific certainty, was not countered by any testimony offered by Plaintiffs. However, after making the above-referenced statement, the Department's scientist admitted the statement was made on the basis of assumptions which proved untrue.

(10) Although unnecessary to reach this issue, this Court does not interpret *Haire* as authorizing the Department to employ systemic practices which completely undermine the reliability and propriety of its actions and violate unambiguous statutory mandates. The *Haire* appellate court could not have intended for tens of thousands of individuals to assume substantial burdens, and to likewise inundate appellate courts, when such burdens could easily have been avoided had the Department acted lawfully and with required diligence. Additionally, the evidence shows the Department has never been, and is not now, in a position to provide statutorily-required information which relates directly to a tree owner's ability to seek appellate review of an IFO, and to obtain a stay, under the criteria established by *the Haire* decision.

(11) The Court also notes several counts remain pending under the respective governmental plaintiffs' tree preservation ordinances. The only evidence in the present record with regard to those counts addresses major environmental and public health consequences resulting *from* significant loss of tree canopy. The tree preservation claims are not subject to any exhaustion of administrative remedies requirement.