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Abandoned Agricultural Property

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In the wake of the elimination of the Citrus Canker Eradication Program and Florida's determination that the prevention of the spread of citrus canker and other similar diseases is impossible on a statewide basis, several grove owners have voluntarily abandoned or are considering abandoning their citrus grove operations and property. Other owners are considering abandoning their grove operations due to lack of trees to replant, economic considerations or long term damage resulting from the adverse weather conditions such as the 2004 and 2005 hurricanes. Regardless of the reason, there are several considerations of which grove owners should be aware before abandoning their grove operation. This article discusses grove owners' potential civil liability for creating a private nuisance by abandoning or failing to properly manage their grove operation. The article also discusses the recommended best management practices for grove owners to employ for their active grove operations which practices should also be applied once the grove operation has been abandoned, as well as potential liability under existing leases and mortgages associated with abandonment of these best management practices. Finally, the article addresses potential tax consequences associated with abandoned agricultural property.

Liability for Private Nuisance

In today's litigious society, lawyers are often asked, "Can I get sued for that?" The response is almost always, "You can get sued for anything. The real question is, are you likely to lose?" Most of the time, this question is posed concerning the area of law known as Torts. A tort is any one of a multitude of claims where a wrongful act causes an injury to a party where that party is entitled to compensation for that injury. The most likely tort claim that may be brought against a grove owner that abandons a grove operation is a claim for private nuisance. Generally, a private nuisance occurs when one interferes with the reasonable use and enjoyment of another's private property and that interference causes damage to the property.

Abandoned citrus trees are more susceptible to infestations and diseases than trees that are properly maintained. Since such abandoned trees are not quarantined from the nearby

environment, the abandoned trees can become the launching point to spread harm to nearby grove operations. Thus, the abandonment of a citrus grove operation could damage a neighbor's reasonable use and enjoyment of his or her property. Florida case law provides little guidance concerning private nuisance claims brought by one agricultural owner against an adjoining land owner based on the adjoining land owner's abandonment of his or her grove operation. One of the challenges associated with a private nuisance claim is the fact that the abandoned grove owner's actions may not have caused the harm to a neighbor's land, but the damage may have been caused by an act of God. Even where an act of God is the direct cause of harm to a neighboring property, where the natural consequences of an act of God are reasonably foreseeable, failure to take certain practical precautions to guard against the act of God may give rise to a private nuisance claim.

One possible defense against a private nuisance claim is contained in the Florida Right to Farm Act, §823.14, Florida Statutes (the "Act"). The expressed goal of the Act is to protect reasonable agricultural activities from nuisance lawsuits. Pursuant to the Act, no farm operation which has been in operation for one year or more, since its established date of operation, and which was not a nuisance at the time of its established date of operation, can be or become a public or private nuisance if the farm operation conforms to generally accepted agricultural and management practices. Additionally, no farm operation can be or become a nuisance due to a change brought about to comply with best management practices recommended by the local, state or federal agencies.

The Act serves to protect active farming operations but does not necessarily extend to abandoned or unmanaged farming operations. Despite this limitation, a grove owner could argue that if an abandoned or an unmanaged farm operation, such as a citrus grove, is in compliance with the best management practices or procedures promulgated or recommended by federal, state or local agencies, then it should also be protected from public and private nuisance law suits.

Government-Owned Agricultural Property

From time to time, a governmental agency will purchase or use its power of eminent domain to condemn groves. One can strongly argue that the government-owner of any grove has a duty to properly maintain or fully destroy remaining trees. Grove owners that are located near government-owned groves may wish to consult with an attorney about the possibility of writing the government-owner to put them on notice of concerns and issues related to improper management (or lack of management) related to such groves. Inverse condemnation or nuisance issues may arise if the government's failure to maintain its groves causes damage to nearby commercial groves.

Civil Liability Under Existing Loans or Leases

Grove owners who have or are considering abandoning their active grove operation or discontinuing the best management practices that are currently recommended for such grove must review their existing lease and/or loan documents to make sure that such actions are not in direct violation of the covenants in their lease or financial covenants within the note, mortgage or loan agreement. Landlords, as well as lenders, institutional or private, who lease property, or loan funds, to agricultural operations, to secure their investment or property, usually require the

tenant or borrower to continue its operations and to use good husbandry practices. Abandoning ones grove or simply failing to manage the grove by utilizing good husbandry practices, which arguably equate with the current recommended best management practices for particular grove operations, may be considered in direct violation of a lease or loan covenant subjecting the grove owner to potential serious civil liability.

Best Management Practices

In response to the elimination of the Citrus Canker Eradication Program, and the continued management concerns of grove owners, the USDA¹, APHIS² and FDACS/DPI³ in consultation with the Florida citrus industry and other stakeholders developed the Citrus Health Response Plan (“CHRP”). The CHRP provides very basic, general guidance for disease management of active groves. Each grove owner is charged with the responsibility of adequately managing its own groves based on practices recommended by the University of Florida’s Institute of Food and Agricultural Sciences (“IFAS”) and the local State extension offices. Best management practices are to be grove specific and set forth in the compliance agreement between the grove owner and the USDA, which agreement remains a requirement for active groves.

The CHRP specifically addresses the concern of abandoned or unmanaged citrus groves that become pests or agricultural nuisances. Among the directives for IFAS, USDA/APHIS and the citrus industry as a whole is to promulgate a set of criteria that can be used to determine when properties are considered abandoned or unmanaged and what regulatory actions are appropriate. The need for future legislation and rule making dealing with abandoned groves or feral citrus is foreshadowed by the CHRP. New legislation will require a joint effort on the part of the citrus industry and state agency staff to determine the specific concerns of the individual property owner and the citrus industry as a whole and what measures are necessary to address these concerns for any proposed legislation. One suggested legislative incentive for abatement of such abandoned agricultural property is the ability of the owner to maintain the property classification of agricultural and the continued benefit of the agricultural exemption for a period of time after abandonment of the agricultural operation.

In an effort to explore this incentive and other means of controlling the spread of citrus canker and greening from abandoned groves, representatives of the Indian River Citrus League recently met with property appraisers for Indian River, Martin and St. Lucie counties. The general consensus from the meeting was that the property appraisers were committed to assisting the citrus industry in its attempts to eradicate or control the spread of citrus canker and greening. All parties agreed that abandoned/unmanaged citrus groves undoubtedly contribute to the spread of citrus canker and greening and that best management practices should remain in place, which include either eradication of trees or chemically killing dead, dying or infected trees, to prevent the risk of spreading the infection to healthy active groves.

¹ USDA refers to the United States Department of Agriculture.

² APHIS refers to the Animal and Plant Health Inspection Service, which is a division of the USDA.

³ The Division of Plant Industry (“DPI”) is a division of the Florida Department of Agriculture and Consumer Services (“FDACS”).

The classification of agricultural is determined on a yearly basis according to Florida statutes. The representatives of the three counties discussed several scenarios for requiring or encouraging the continued implementation of best management practices for abandoned or unmanaged groves. Among the scenarios were the following: (1) unmanaged groves losing the agricultural classification for failing to continue utilizing best management practices, and (2) permitting abandoned groves to enjoy the agricultural classification for a longer period of time if certain eradication steps are being implemented. These efforts need to be codified in state legislation which will provide the property appraisers with the direction and ability to implement them.

The CHRP does not suggest specific best management practices for active or abandoned groves. IFAS has, however, made several recommendations that can be used for both active grove operations and abandoned/unmanaged groves. At this time, IFAS is not recommending that grove owners push or remove their citrus trees that are infected with citrus canker or any other disease. For those areas where canker is not “widespread” or “endemic”, which are few in Florida, local elimination of infection sources can still be productive. With that in mind, the goal remains to avoid allowing citrus canker to spread unchecked. Some of the best management practices recommended by IFAS include, but are not limited to, the following:

1. Treating canker infection with copper and other sprays to reduce infection;
2. Treating citrus leafminer populations to reduce the leaf injury that allows canker to build up in higher levels;
3. Installing windbreaks to reduce aerial spread of canker with rain and wind;
4. Continuing to monitor via surveys and risk assessments of the location of canker to be aware of its spread; and
5. Continuing disinfection procedures to reduce transport to neighboring groves.

Although the above practices recommended by IFAS are tailored to active grove operations, IFAS suggests that the same or similar measures continue to be used for unmanaged or abandoned groves so that they do not become nuisances to neighboring properties and actively contribute to the spread of pests and diseases. Grove owners that are not managing their groves or have abandoned the grove are encouraged to consider the risk that the abandoned/unmanaged property poses to the area and to respond to limit their potential liability.

Florida Citrus Mutual⁴ is currently exploring a “voluntary abandoned grove program” that would incorporate some form of continued management practices, including, but not limited to, the killing of diseased trees. As suggested in the CHRP and by Florida Citrus Mutual, one potential incentive being considered for this continued management by the owner is that the property is able to maintain its classification as agricultural for property assessment purposes for a certain period of time. This particular type of incentive will require new legislative policy approved and implemented on the state and local levels. IFAS and the local citrus agencies will soon be releasing new developments and directives in relation to the proposed management of

⁴ Florida Citrus Mutual is the largest grower organization serving over 8,000 grower members since 1948. Information about the organization can be obtained from its website at <http://www.flcitrusmutual.com/>

abandoned groves. It is critical that grove owners become informed in order to ensure compliance.

Potential Tax Consequences to Consider

There are certain tax incentives for grove owners who are considering abandoning or have already abandoned their grove operations. A grove owner who has abandoned citrus trees may be entitled to a loss deduction for federal income tax purposes. Generally, where a taxpayer irrevocably discards depreciable property that was used in an activity engaged in for profit, the taxpayer may take a loss measured by the amount of the taxpayer's adjusted basis in the abandoned property.

To take the loss, the grove owner must have the intent to irrevocably discard the asset so that it will neither be used again by the grove owner nor retrieved by the grove owner for sale, exchange, or other disposition. At the very least, the grove owner should affirmatively establish an intent to abandon the citrus trees through corporate documents, for instance an act of the board evidenced by corporate minutes or a signed acknowledgement of abandonment by all members of a limited liability company. However, the clearest showing of intent would be to push the trees, clearly establishing that the use of the trees in the profit-venture has been abandoned. If the grove owner has the requisite intent to abandon the property, then in the year of abandonment a loss deduction may be claimed for federal income tax purposes. The loss is limited to the adjusted basis in the citrus trees abandoned.

At the state tax level, a grove owner must be aware that once the property is no longer used for a "bona fide" agricultural operation, the property assessor will reassess the property as non-agricultural unless the incentives discussed above are enacted. This reassessment may increase the real estate tax liability of the grove owner.

In conclusion, there are serious risks and concerns of which grove owners of abandoned/unmanaged groves, as well as active groves, need to be aware in relation to the operations on their properties themselves, in the form of significant tax liability and civil liability under existing lease and loan covenants, as well as how their actions are effecting the surrounding area, in the form of potential civil liability. Grove owners need to continually educate themselves about the current best management practices and taxation programs for active and abandoned/unmanaged groves, as they will be changing and evolving while the state and local agencies and the citrus industry work together to control the spread of citrus canker and other diseases in an effort to protect the viability of this necessary industry in Florida.

About Dean Mead:

Dean Mead is a full-service law firm that represents businesses and individuals throughout Florida. The firm's Agribusiness Team provides comprehensive legal representation to successive generations of agriculture clients throughout the state. Dean Mead has more than 45 lawyers practicing in Orlando, Fort Pierce and Viera.

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