

06-0186

M A N D A T E

from

**DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT**

FILED
06 JAN 17 PM 4:32
DIVISION OF
ADMINISTRATIVE
HEARINGS

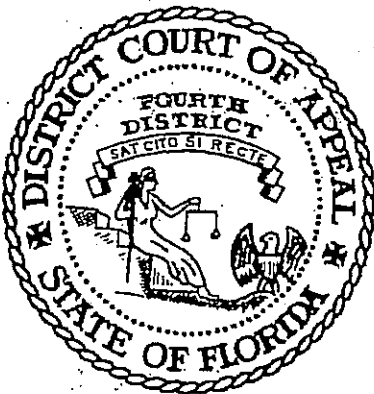
This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had on said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable W. MATTHEW STEVENSON, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE: August 5, 2005
CASE NO.: 4D04-1253
COUNTY OF ORIGIN: Palm Beach
T.C. CASE NO.: 22-174873-001
STYLE: DONALD G. TUTEN

v. STATE OF FLORIDA DEPT. OF ENVIRONMENTAL PROTECTION



Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

ORIGINAL TO: Department of Environmental Protection

cc:
Frederick M. Dahlmeier
Richard W. Cantrell

John R. Beranek

Francine M. Ffolkes

cd

ATTACHMENT 1

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2005

FILED
06 JAN 17 PM 4:32
DIVISION OF
ADMINISTRATIVE
HEARINGS

DONALD G. TUTEN,
Appellant,

v.

**STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**
Appellee.

No. 4D04-1253

[July 20, 2005]

POLEN, J.

This appeal arises from the issuance of a default permit to Appellant, Donald Tuten ("Tuten"), from the Appellee, the Florida Department of Environmental Protection ("DEP"). We reverse the DEP's issuance of the default permit and remand jurisdiction to the DEP to allow it to conduct an administrative hearing, pursuant to this court's instruction in *Tuten v. State of Florida, Department of Environmental Protection (Tuten I)*, 819 So.2d 187 (Fla. 4th DCA 2002).

Tuten submitted an application to the DEP seeking permission to dredge a canal to provide material for a house pad. *Id.* at 187-88. As a result of extensive delay, primarily due to the bouncing back and forth of Tuten's application between the DEP and the South Florida Water Management District, this court held that pursuant to sections 120.60(1) and 403.0876, Florida Statutes (2000), DEP must issue a default permit to Tuten. *Id.* at 189. However, this court added:

We do not find . . . that requiring the issuance of the permit precludes the DEP from taking measures to protect the environment. The Second District has held that the statutes allow the DEP to hold a hearing "to determine the reasonable mitigative conditions necessary to protect the interest of the public and the environment, prior to issuing a default permit." *Manasota-88, Inc. v. Agrico Chem. Co.*, 576 So. 2d 781, 783 (Fla. 2d DCA 1991). If a

party finds the conditions imposed "onerous or unreasonable," the appellate courts are available for review. Id.

We reverse and remand to the DEP to issue a default permit after a hearing to determine if conditions should be imposed to insure the protection of the environment.

Id. Almost two years later, with no default permit or evidentiary hearing in sight, Tuten filed a Motion to Show Cause asking why a default permit without any conditions should not be granted because of the lack of an evidentiary hearing over this span of time. Eleven days later, the DEP issued a permit with general and specific conditions believed necessary to protect the interest of the public and the environment. Contained within the permit was a notice of Tuten's rights. Pursuant to sections 120.569 and 120.57, Florida Statutes, the default permit and all conditions set forth therein are final unless a sufficient petition for an administrative hearing is timely filed (21 days). Tuten failed to petition for an administrative hearing, choosing instead to file the instant appeal more than twenty-one days later, bringing the case to this court once again.

We reverse the DEP's issuance of the default permit and remand jurisdiction to the DEP to allow it to conduct an evidentiary hearing on the issue of conditions to be placed on the permit. Pursuant to this court's ruling in *Tuten I*, the DEP must conduct an administrative hearing prior to the issuance of the default permit. "When the mandate was received by the [DEP], the [DEP] should have carried and placed into effect the order and judgment of this Court. Absent permission to do so, the [DEP] was without authority to alter or evade the mandate of this Court." Stuart v. Hertz Corp., 381 So. 2d 1161, 1163 (Fla. 4th DCA 1980).

GUNTHER and WARNER, JJ., concur.

* * *

Appeal from the State of Florida Department of Environmental Protection; L.T. Case No. 22-174873-001.

Frederick M. Dahlmeier of Cromwell & Dahlmeier, P.L., North Palm Beach, and John Beranek of Ausley & McMullen, Tallahassee, for appellant.

Francine M. Ffolkes, Tallahassee, for appellee.

Not final until disposition of timely filed motion for rehearing.