STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GENERAL MOTORS CORPORATION, CHEVROLET MOTOR DIVISION,	)	
Petitioner,	)	
vs.	)	
FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,	)	CASE NO. 91-0217
Respondent,	)	
vs.	)	
POTAMRIN CHEVROLET, INC., and RELLEY CHEVROLET, INC.,	)	
Intervenors.	)	

RECOMMENDED ORDER

Pursuant to written Notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Daniel Manry, held a formal hearing in the above-styled case on May 31, 1991, in Tallahassee, Florida.

APPEARANCES

For Petitioner: James Williams, Esquire
Office of the General Counsel
General Motors Corporation
3031 West Grand Boulevard
Detroit, Michigan 48202

and

Dean Bunch, Esquire
Rumberger, Kirk, Caldwell,
Cabaniss, Burke & Wecheler
106 East College Avenue
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Tallahassee, Florida 32301

For Respondent: Michael J. Alderman, Esquire
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
Tallahassee, Florida 32399-0504

For Intervenors: James D. Adams, Esquire
7300 West Camino Real,
Boca Raton, Florida 33433

STATEMENT OF THE ISSUE

The issue for determination in this proceeding is whether Petitioner is entitled to the specific exemption in Section 320.642(5), Florida Statutes, from the general notice and protest provisions in Section 320.642.

PRELIMINARY STATEMENT

Petitioner notified Respondent on December 5, 1990, of Petitioner's intent to name a successor dealer in North Miami Beach, Florida for Landmark Chevrolet Corp. d/b/a Alan Mandel Chevrolet ("Landmark"). Petitioner claimed that the proposed opening of the successor dealer was exempt under Section 320.642(5), Florida Statutes, from the notice and protest provisions generally applicable under Section 320.642. Respondent determined in a letter dated December 19, 1990, that the proposed opening of the successor dealer was not exempt from the notice and protest provisions of Section 320.642. Petitioner filed a Petition for Administrative Hearing on January 3, 1991, challenging Respondent's determination.

Alan Jay Chevrolet, Inc., ("Alan Jay") filed its application on January 8, 1991, for a license as the successor dealer in North Miami Beach, Florida. Respondent refused to act on Alan Jay's application until this proceeding was resolved.

The Petition for Administrative Hearing was referred to the Division of Administrative Hearings for assignment of a hearing officer by letter dated January 4, 1991, and assigned to the undersigned on January 11, 1991. Petitioner and Respondent jointly moved to notify all Chevrolet dealers in Dade, Broward, Collier, and Monroe Counties ("potential intervenors") and to expedite this proceeding.[1]

Petitioner requested that a formal hearing be scheduled for February 15, 1991. Ruling on Petitioner's request was delayed until the time had expired for responding to the notice to potential intervenors. Petitions to intervene were filed by Potankin Chevrolet, Inc. ("Potamkin") and Kelley Chevrolet, Inc. ("Kelley") and were granted on March 11, 1991, without objection from either Petitioner or Respondent.

Petitioner filed an Emergency Motion to Toll Time on January 25, 1991. The motion requested the undersigned to enter a recommended order tolling the 12 month period of exemption in Section 320.642(5), Florida Statutes, for opening a successor dealer without notice and protest. The motion also requested that partial jurisdiction be relinquished to Respondent for the limited purpose of entering a final order adopting the recommended order.

Petitioner's Emergency Motion to Toll Time was denied. The undersigned determined that Respondent had issued a letter but never taken any agency action in the form of an order or otherwise denying Petitioner's application to open a replacement dealership pursuant to the exemption from protest provided in Section 320.642(5), Florida Statutes.[2] Jurisdiction was relinquished to Respondent to formulate agency action with respect to Petitioner's application.[3]

Respondent entered a final order denying Petitioner's Motion to Toll Time on April 11, 1991, and again referred the matter to the Division of Administrative Hearings for assignment of a hearing officer. The matter was again assigned to the undersigned on April 12, 1991.

Intervenors moved to dismiss the proceeding for lack of jurisdiction on April 26, 1991. Intervenors alleged that there were no disputed issues of material fact and that the Division of Administrative Hearings was without jurisdiction to conduct a proceeding under Section 120.57(1), Florida Statutes. The motion to dismiss was denied without prejudice.

The parties filed a Prehearing Stipulation on May 13, 1991, which contained stipulations of fact and law. Intervenors filed a Renewed Motion to Dismiss on May 14, 1991, asserting the same grounds as those asserted in the original motion to dismiss. The Renewed Motion to Dismiss was denied because the motion and prehearing stipulation did not clearly establish the absence of disputed issues of material fact.

At the formal hearing, Petitioner presented the testimony of Jim Gurley, Account Manager, Tampa Branch, Chevrolet Motor Division. Respondent presented the testimony of Neil Chamelin, Operations and Management Consultant, Division of Motor Vehicles, Florida Department of Highway Safety and Motor Vehicles. Petitioner presented six exhibits. Respondent presented one exhibit, and Intervenors presented three exhibits. All of the exhibits were admitted in evidence.

A transcript of the record of the formal hearing was filed with the undersigned on June 6, 1991. Proposed findings of fact and conclusions of law were timely filed by the parties on June 18, 1991. The parties' proposed findings of fact are addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Landmark Chevrolet, Inc., d/b/a A1 Mandel Chevrolet ("Landmark") operated a Chevrolet dealership located at 15455 West Dixie Highway, North Miami Beach, Dade County, Florida until August 2, 1989. Landmark operated the dealership pursuant to: (a) a Dealer Sales and Service Agreement (the "Dealer Agreement") between Landmark and Petitioner; and (b) a Franchised Motor Vehicle Dealer License from Respondent, License Number 9VF-10574. On August 2, 1989, Landmark ceased customary sales and service business operations.

2. Respondent revoked Landmark's license on October 12, 1989. The license revocation resulted from an independent investigation conducted by Respondent.

3. Petitioner notified Landmark on August 17, 1989, of Petitioner's intent to terminate the Dealer Agreement pursuant to Section 320.641, Florida Statutes. A copy of the notice of intent to terminate was furnished to Respondent in accordance with the requirements of Section 320.641.

4. Landmark filed a Complaint with Respondent on November 15, 1989, contesting Petitioner's termination of the Dealer Agreement. The Complaint invoked the protection of Section 320.641, Florida Statutes. Pursuant to Section 320.641(7), Petitioner was prohibited from terminating the Dealer Agreement prior to a final adjudication in the franchise cancellation proceeding.

5. Landmark's Complaint was referred to the Division of Administrative Hearings on December 6, 1989. Petitioner filed a

motion to dismiss the Complaint. Petitioner's motion to dismiss was granted in a recommended order entered by Hearing Officer Michael Parrish on January 22, 1990. A final order dismissing Landmark's Complaint was entered by Respondent on April 30, 1990. The time for appealing the final order expired on May 30, 1990, without appeal.

6. Petitioner notified Respondent on December 5, 1990, of Petitioner's intent to open a successor dealer for Landmark. Respondent determined in a letter dated December 19, 1990, that the proposed opening of the successor dealer was not exempt from the notice and protest provisions of Section 320.642, Florida Statutes. Respondent determined that the 12 month period of exemption began to run on October 12, 1989, when Landmark's license was revoked and expired prior to the date of the proposed opening of the successor dealer.

7. Petitioner had no prior notice of either Respondent's intent to revoke Landmark's license or the actual revocation of Landmark's license. Petitioner first learned of Respondent's revocation of Landmark's license on December 19, 1990. At that time, Respondent notified Petitioner that the 12 month period of exemption from protest had expired for purposes of the proposed opening of the successor dealer in North Miami Beach.

8. Respondent's determination that the 12 month period of exemption in Section 320.642(5), Florida Statutes, began on the date that Landmark's license was revoked constituted incipient agency action. The incipient agency action taken by Respondent deviated from Respondent's prior practice. Respondent's action determined the substantial interests of Petitioner.

9. Petitioner was prohibited by Section 320.641(7), Florida Statutes, from opening a successor dealer pursuant to Section 320.642(5) until a final adjudication was entered in the franchise cancellation proceeding under Section 320.641. Landmark's license was revoked on October 12, 1989. The franchise cancellation proceeding began on November 15, 1989, when the Landmark filed its complaint. A final order was entered in the franchise cancellation proceeding on April 30, 1990. The time for appeal expired on May 30, 1990. Petitioner did not notify Respondent of Petitioner's intent to open a successor dealer until December 5, 1990.

10. Proposed Rule 15C-7.004 was published in the Florida Administrative Weekly, Vol. 17, No. 16, at page 1721, on April 19, 1991. Proposed Rule 15C-7.004(4)(a) provides:

(4) Application for Reopening or Successor Dealership, or for Relocation of Existing Dealership.

(a) If the license of an existing franchised motor vehicle dealer-is revoked for any reason, or surrendered, an application for a license to permit the reopening of the same dealer or a successor dealer within twelve months of the license revocation or surrender shall not be considered the establishment of an additional dealership if one of the conditions set forth in Section 320.642(5) is met by the proposed dealer. (emphasis added)[4]

11. Proposed Rule 15C-7.004(4)(a) was published prior to the formal hearing but will not become effective until after the formal hearing.[5] Respondent's determination in this proceeding, that a closing occurs upon the revocation or surrender of a dealer's license, is consistent with Proposed Rule 15C-7.004(4)(a).

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this proceeding. Sections 120.54 and 120.56, Florida Statutes.[6] The parties were duly noticed for the formal hearing.

13. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that it is entitled to open a successor dealer without notice to and protest by existing dealers pursuant to Section 320.642(5), Florida Statutes. The burden of proof in an administrative proceeding is on the party asserting the affirmative of the issue unless the burden is otherwise specifically established by statute. Young v. State, Department of Community Affairs, 567 So. 2d 2 (Fla. 3rd DCA 1990); Florida Department of Transportation v. J.W.C. Co. Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

14.. The statutory framework applicable to this proceeding is contained in Chapter 320, Florida Statutes, and particularly

Sections 320.61-320.70. Legislative intent for the applicable statutory framework is:

> . . . to protect the public health, safety, and welfare of the citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers.

Section 320.605.

15. Chapter 320, Florida Statutes, creates a complex relationship between manufacturers and dealers. The issues in this proceeding must be determined in a manner that gives purpose and effect to each of the various provisions in Chapter 320, including Sections 320.61-320.70, and that effectuates legislative intent. D.B. v. State, 544 So. 2d 1108, 1109-1110 (Fla. 1st DCA 1989); State v. Zimmerman, 370 So. 2d 11794th DCA 1979); Forehand v. Board of Public Instruction of Duval County, 166 So. 2d 668, 672 (Fla. 1st DCA 1964).

16. Section 320.642, Florida Statutes, authorizes existing franchised motor vehicle dealers to protest the establishment of an additional motor vehicle dealership or the relocation of an existing dealer by a manufacturer within a community where the same line-make vehicle is represented. Section 320.642(5) carves out the following exemption from the notice and protest provisions generally authorized in Section 320.642:

> The opening or reopening of the same or a successor motor vehicle dealer within twelve months shall not be considered an additional motor vehicle dealer subject to protest . . . . Any other such opening or reopening shall constitute an additional motor vehicle dealer within the meaning of this section.[7]

17. The terms "opening" and "reopening" are not defined in Section 320.642(5), Florida Statutes. Similarly, the event that begins the 12 month period of exemption from protest is not prescribed in Sections 320.60-320.70.

18. The "opening" or "reopening" of the same or successor dealer implicitly requires the prior closing of the same or

predecessor dealer. The same or predecessor dealer is closed for purposes of Section 320.642(5), Florida Statutes, if:

> (a) the dealership actually closes under circumstances that are tantamount to abandonment within the meaning of Section 320.641(4);[8]
>
> (b) the dealer's license is revoked by the Department in a proceeding brought pursuant to Section 320.27, or the dealer otherwise surrenders its license;
>
> (c) the dealer's license expires without renewal;
>
> (d) the dealer's license is transferred in connection with a buy-sell agreement and the relocation of the dealership; or
>
> (e) the franchise agreement between the dealer and the manufacturer is terminated by the manufacturer pursuant to Section 320.641.9

19. Respondent determined that the 12 month period of exemption begins from the date that the dealer's license is either revoked or surrendered. Revocation or surrender of the same or predecessor dealer's license eventually occurs in each event of closing. In practice, the revocation or surrender of a dealer license almost always occurs subsequent to other events of closing such as abandonment, execution of a buy-sell agreement, and cancellation of a franchise agreement. The Department can not assure itself of information sufficient to determine when the 12 month period of exemption from protest begins if the 12 month period of exemption from protest begins upon abandonment or execution of a buy-sell agreement.[10]

20. The Department is statutorily charged with responsibility for administering Chapter 320, Florida Statutes, including the regulation of licenses pursuant to Section 320.27, the protest procedures in Section 320.642, and the exemption from protest in Section 320.642(5). The revocation or surrender of a dealer's license is the only event of closing in which the agency charged with responsibility for administering Sections 320.27, 320.642, and 320.642(5) has unilateral access to

information sufficient to determine the date for beginning the 12 month exemption from protest.

21. Respondent's determination that the 12 month period of exemption from protest should begin from the date that a dealer's license is revoked or surrendered does not preclude a manufacturer from claiming the benefit of the statutory exemption in Section 320.642 (5), Florida Statutes, for the purpose of "reopening . . . the same . . . dealer." Since the license for the same dealer would have been revoked or surrendered, the manufacturer could not reopen the same dealer in any event. Any other "closing" of the same dealer would not begin the 12 month period of exemption from protest. In the event of such a "closing", the manufacturer would be free to "reopen" the same dealer at any time. The adverse affect on the statutory exemption in Section 320.642 (5), if any, is limited to the exemption for "opening . . . a successor . . . dealer . . . ."

22. Section 320.641, Florida Statutes, prescribes procedures for the cancellation of dealer franchise agreements by manufacturers. Section 320.641 (7) prohibits a manufacturer from naming a "replacement" dealer prior to the final adjudication by the Department in the franchise cancellation proceeding.[11]

23. Section 320.641 (7), Florida Statutes, does not have the effect of precluding GM from availing itself of the 12 month period of exemption from protest otherwise available in Section 320.642 (5) if the license revocation or surrender occurs after a final adjudication is entered in the franchise cancellation proceeding. Section 320.641(7) would have precluded GM from availing itself of the 12 month period of exemption from protest if the license revocation or surrender had preceded the franchise cancellation by more than 12 months. In this case, the license revocation preceded the final order in the franchise cancellation proceeding by approximately seven and a half months. Petitioner had approximately four and a half months in which to open a successor dealer exempt from notice and protest. However, Petitioner did not notify Respondent of Petitioner's intent to open a successor dealer exempt from notice and protest until December 5, 1991. The 12 month period of exemption from protest had expired approximately 60 days earlier.

24. GM asserts that beginning the 12 month period of exemption on the date of revocation or surrender of a dealer's license denies GM a clear point of entry in which to claim the

benefit of the exemption. A license revocation proceeding or license surrender is conducted between the Department and the dealer pursuant to Section 320.27, Florida Statutes. GM has no statutory right to notice of the revocation or surrender and has no right to be notified of when the 12 month period of exemption from protest in Section 320.642 (5) has begun. In addition, GM asserts that it is prohibited by Section 320.641 (7) from naming a replacement dealer pursuant to Section 320.642 (5) during the pendency of a franchise cancellation proceeding. GM claims that beginning the 12 month period of exemption from protest on the date of the license revocation or surrender ". . . threatens, restricts, and may even eliminate the manufacturer's exemption" whenever the license revocation or surrender precedes the franchise cancellation proceeding.[12]

25. The 12 month period of exemption from protest is not a ". . . substantial and vested right . . ." which Section 320.642(5), Florida Statutes, "commands." The quoted language is more accurately applied to the right of existing dealers to protest an additional dealership. Even if the quoted language is equally applicable to the statutory exemption in Sec. 320.642(5), the two "rights" must be balanced in a manner that effectuates the statement of legislative intent in Sec. 320.605.

26. The 12 month period of exemption from protest is an exception to the statutory right of dealers to protest an additional dealership or relocated dealer. Statutory exceptions to general statutory provisions are to be strictly construed against one attempting to take advantage of the exception. State v. Nourse, 340 So. 2d 966, 969 (Fla. 3d DCA 1976). Exemptions from general statutory requirements are to be construed in the same manner as exceptions. See, e.g., Tribune Company v. In re Public Records, P.C.S.O., 493 So. 2d 480, 483 (Fla. 2d DCA 1986) (citing Cf. Nourse, which dealt with an exception, for the proposition that exemptions from disclosure in Ch. 119 should be construed narrowly); Haines v. St. Petersburg Methodist Home. Inc., 173 So. 2d 176, 179 (Fla. 2d DCA 1965) (holding that exemptions from taxation are to be strictly construed against the taxpayer and in favor of the sovereign). Any ambiguity in the exception in Section 320.642(5), Florida Statutes, to the statutory right of existing dealers to protest an additional or a relocated dealer is properly construed in a manner that restricts the use of the exception. Nourse, 340 So. 2d at 969.

27. The position asserted by GM is based upon the assumption that one claiming the benefit of an exemption has a

due process right to notice from the agency that the period of exemption has begun. GM cites no authority for such an assumption and no authority has been found by the undersigned. It is not unreasonable for the Department to place the onus of determining when the statutory exemption begins to run upon the person claiming the benefit of the exemption. GM has access to public records maintained by the Department that disclose any license revocation or surrender and can otherwise assure itself of notice of a license revocation or surrender through the terms of the franchise agreement.

28. Construing the statutory exemption in Section 320.642(5), Florida Statutes, narrowly against GM effectuates the statement of legislative intent in Section 320.605. The separate elements of legislative intent in Section 320.605 are balanced in the protest procedures and criteria prescribed in Section 320.642.

29. The procedures and criteria in Section 320.642, Florida Statutes, must be followed in determining whether existing dealers are providing adequate representation. The procedures and criteria prescribed in Section 320.642 are susceptible to change. Conditions that warrant an additional or replacement dealer at a given time and place may not lead to a similar result at a later time.

30. Respondent's position recognizes the fact that conditions prescribed in Section 320.642, Florida Statutes, change over time and effectuates the statement of legislative intent in Section 320.605. If the 12 month exemption period were to begin on the date the manufacturer cancelled the franchise agreement, the manufacturer could effectively circumvent the statutory right of dealers to protest an additional dealership by artificially delaying the date of the franchise cancellation until the manufacturer was ready to open or reopen the same or successor dealer within 12 months of the franchise cancellation.[13] Beginning the 12 month period of exemption from the date of license revocation or surrender eliminates the potential for abuse by manufacturers and permits existing dealers to exercise their statutory right to protest an additional dealership or replacement dealer as conditions change over time.

31. Respondent's position recognizes the fact that the agency charged with responsibility for administering Chapter 320, Florida Statutes, must have the means of assuring itself of information sufficient to determine when the 12 month period of

exemption from protest begins and whether the opening or reopening of the same or successor dealer is subject to protest. If the 12 month period of exemption from protest were to begin upon abandonment or execution of a buy-sell agreement, the agency charged with responsibility for administering the protest and exemption procedures in Section 320.642 may not be able to assure its access to information required to determine when the 12 month period of exemption from protest began. Determining the 12 month exemption period by reference to the revocation or surrender of the dealer's license defines both the protest period and exemption period by reference to the only event of closing for which the agency charged with responsibility for administering both periods maintains records.

32. The Department's interpretation of the time to begin the 12 month period of exemption from protest in Section 320.642(5), Florida Statutes, effectuates a reasonable balance of the separate elements of legislative intent in Section 320.605. Those elements include regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, and providing consumer protection and fair trade.

33. Final agency action may be based upon incipient policy when the incipient policy is consistent with a rule published prior to the formal hearing but not effective until after the formal hearing. Baptist Hospital Inc. v. State, Department of Health and Rehabilitative Services, 500 So. 2d 620, 625 (Fla. 1st DCA 1987). Proposed Rule 15C-7.004(4) (a) was published prior to the formal hearing but will not become effective until after the formal hearing. Respondent's determination that a closing occurs upon the revocation or surrender of a dealer's license is consistent with Proposed Rule 15C-7.004(4)(a).[14] The purpose of a proceeding under Section 120.57(1), Florida Statutes, is to formulate agency action, not to review action taken earlier and preliminarily. Couch Construction Company, Inc. v. Department of Transportation, 361 So. 2d 172, 176 (Fla. 1st DCA 1978); McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order should be entered denying Petitioner's request for an exemption from protest under Section

320.642(5), Florida Statues, for the proposed opening of a successor dealership.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 15th day of July, 1991.

DANIEL MANRY
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of July, 1991.

ENDNOTES

1/ The Chevrolet dealers in the listed counties are those that would be entitled to notice if the notice and protest provisions in Sec. 320.642, Fla. Stat., were determined to apply.

2/ Petitioner gave Respondent written notice of Petitioner's intent to apply for permission to open a successor dealer exempt from protest pursuant to Sec. 320.642(5), Fla. Stat. Respondent advised Petitioner that the 12 month period of exemption in Sec. 320.642(5) had expired. Petitioner then filed its application to open a successor dealer exempt from protest. Respondent had referred the matter to the Division of Administrative Hearings prior to the filing of Petitioner's application.

3/ The final order entered by Respondent incorrectly recited that Petitioner's application had been previously denied. The recitation in the final order was in fact the first written denial of Petitioner's application for permission to open a successor dealer exempt from notice and protest.

4/ Sec. 320.642(5)(a)-(d), Fla. Stat., imposes certain criteria that must be met for the exemption from protest to apply. Those criteria, however, are not at issue in this proceeding.

5/ The validity of Prop. Rule 15C-7.004(4) (a) was upheld in a separate consolidated rule challenge proceeding conducted pursuant to Secs. 120.54 and 120.56, Fla. Stat. See Division of Administrative Hearings Case No. 91-2591R.

6/ Except for references to Sec. 320.27, Fla. Stat., all chapter and statutory references are to Florida Statutes (1989) unless otherwise stated. Sec. 320.27 was amended in 1990 by Ch. 90-163, Laws of Florida. The amendments are set forth in Sec. 320.27, Fla. Stat. (1990 Supp.).

7/ Sec. 320.642(5)(a)-(d), Fla. Stat., imposes certain criteria that must be met for the exemption from protest to apply. Those criteria, however, are not at issue in this proceeding.

8/ A dealership closes each day that it closes its doors. The parties agreed, however, that the closing that is implicit in Sec. 320.642(5), Fla. Stat., requires a substantial closing similar to an abandonment described in Sec. 320.641(4). Abandonment occurs under Sec. 320.641(4) whenever the dealer fails to be engaged in business with the public for 10 consecutive business days excluding acts of God, work stoppages, or delays caused by a strike, labor difficulties, freight embargoes, or other causes over which the dealer has no control, including a violation of Sections 320.60-320.70, Florida Statutes.

9/ The validity of Prop. Rule 15C-7.004(4) (a) was upheld in a separate consolidated rule challenge proceeding conducted pursuant to Secs. 120.54 and 120.56, Fla. Stat. See Division of Administrative Hearings Case No. 91-2591R. The parties in the consolidated rule challenge proceeding included the parties in this proceeding. A disposition on the merits of a factual issue made in a prior administrative proceeding involving the same parties is barred by the doctrine of res judicata from being contested in a subsequent administrative proceeding involving identical parties and issues. McGregor v. Provident Trust Co. of Philadelphia, 162 So 323, 327 (Fla. 1935); Hays v. State, Department of Business Regulation. Division of Pari-Mutuel Wagering, 418 So. 2d 331, 332 (Fla. 2d DCA 1982). The doctrine of judicial estoppel precludes a party from asserting in one proceeding a position that is inconsistent with that party's position in a prior proceeding. McKee v. State, 450 So. 2d 563 (Fla. 3d DCA 1984).

10/ The Department would have information sufficient to determine the date for beginning the 12 month period of exemption from protest if the closing occurred upon the cancellation of the franchise agreement. Section 320.641(1), Fla. Stat., requires written notice to the Department of the manufacturer's intent to cancel a franchise agreement. However, the potential for frustrating legislative intent for Ch. 320 is greater if the 12 month period of exemption from protest begins when the franchise agreement is cancelled. See discussion at Conclusions of Law, paras. 20-25, infra.

11/ Sec. 320.641(3), Fla. Stat., also provides that franchise agreements and certificates of appointment shall continue in effect until a final adjudication is entered in the franchise cancellation proceeding.

12/ GM argues that the exemption period is restricted whenever the license revocation or surrender precedes the final order in the franchise cancellation proceeding by less than 12 months. The exemption period would be eliminated whenever the license revocation or surrender precedes the final order in the franchise cancellation proceeding by more than 12 months.

13/ There are two conjunctive requirements that must be met in order for a manufacturer to avail itself of the statutory exemption in Sec. 320.642(5), Fla. Stat. The first requirement is procedural in that it requires the opening or reopening of the same or successor dealer within 12 months of an unspecified event. The second requirement is substantive in that it requires objective criteria prescribed in Sec. 320.642(5)(a)-(d) to be met in order for the exemption to apply.

14/ See also Turro v. Department of Health and Rehabilitative Services, 458 So. 2d 345, 346 (Fla. 1st DCa 1984) (holding that a procedural rule which takes effect after the commencement of a formal hearing may be considered in recommending final agency action). But see York v. State ex rel Schwaid, 10 So. 2d 813, 815 (Fla. 1943); City of Margate v. Amoco Oil Company, 546 So. 2d 1091, 1094 (Fla. 4th DCA 1989); Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 407 So. 2d 263, 265 (Fla. 3d DCA 1981); Sexton Cove Estates Inc. v. State Pollution Control Board, 325 So. 2d 468 (Fla. 1st DCA 1976).

APPENDIX

Petitioner submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

The Petitioner's Proposed Findings of Fact

Proposed Finding of Fact Number of	Paragraph Number in Recommended Order Acceptance or Reason for Rejection
1-3	Accepted in Finding 1
4	Accepted in Finding 3
5	Accepted in part in 4
6	Accepted in Finding 5
7	Rejected as immaterial
8-10	Accepted in Finding 5
11	Accepted in Findings 2, 7
12-14	Accepted in Finding 7
15-18	Rejected as irrelevant and immaterial
19-20	Accepted in Finding 8
21-25	Rejected as irrelevant and immaterial
26	Accepted in Finding 6
27	Accepted in Finding 8
28-29	Accepted in Finding 7
30	Rejected as irrelevant and material but included in preliminary statement
31	Accepted in Finding 9
32	Rejected as irrelevant and immaterial
33	Accepted in Finding 9
34-38	Omitted from copy of proposed findings of fact filed with the undersigned
39-41	Rejected as irrelevant and immaterial
42-43	Rejected for the reasons stated in Findings 10-11
44-50	Rejected as irrelevant and immaterial
51	Accepted in Conclusions of Law 8
52-53	Rejected as irrelevant and

	immaterial
54-55	Rejected for the reasons stated in Conclusions of Law 14-16
56	Rejected for the reasons stated in Conclusions of Law 17-21
57-58	Rejected for the reasons stated in Findings 10-11
59	Accepted in Finding7
60-64	Rejected as irrelevant and immaterial
65	Accepted in Finding8
66	Rejected as irrelevant and immaterial

Respondent submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

The Respondent's Proposed Findings of Fact

Proposed Finding of Fact Number	Paragraph Number in Recommended Order of Acceptance or Reason for Rejection
1-3	Accepted in Finding 1
4	Accepted in Finding 5
5	Rejected as irrelevant and immaterial
6-8	Accepted in Finding 5
9	Accepted in Findings 2, 7
10	Accepted in Finding 6
11-12	Accepted in Finding 7
13-17	See preliminary statement
18-25	Rejected as irrelevant and immaterial
26	Accepted in Conclusions of Law 17-20
27	Accepted in Finding 8
28	Accepted in Finding 3
29-30	Accepted in Finding 2
31	Accepted in Finding 4
32	Rejected as irrelevant and immaterial
33-34	Accepted in Conclusions of

	Law 8
35-37	Rejected as irrelevant and immaterial
38	Accepted in Conclusions of Law 16
39-41	Rejected as irrelevant and immaterial

Intervenors submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

The Intervenors' Proposed Findings of Fact

Proposed Finding of Fact Number	Paragraph Number in Recommended Order of Acceptance or Reason for Reiection
1-3	Accepted in Finding 1
4	Accepted in Finding 3
5	Accepted in Finding 4
6	Accepted in Finding 5
7	Rejected as irrelevant and immaterial
8-10	Accepted in Finding 5
11	Accepted in Findings 2, 7
12	Accepted in Finding 6
13	Accepted in Finding 7
14	Accepted in Finding 7

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.