STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ED MORSE CHEVROLET OF SEMINOLE, INC.,	)	
Petitioner,	)	
vs.	)	
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,	)	
Respondent,	)	CASE NO. 91-4315
and	)	
MAHER CHEVROLET, INC. and JIM QUINLAN CHEVROLET, INC., and CHEVROLET DIVISION, GENERAL MOTORS CORPORATION,	)	
Intervenors.	)	

RECOMMENDED ORDER

A hearing was held in this case in Tallahassee, Florida on October 28 and 29, 1991 before Arnold H. Pollock, a Hearing Officer with the Division of Administrative Hearings.

APPEARANCES

For the Petitioner: Michael A. Fogarty, Esquire
P.O. Box 3333
Tampa, Florida 33601

For the Respondent: Michael J. Alderman, Esquire
DHSMV
A-324, Neil Kirkman Building
Tallahassee, Florida 32399-0500

For the Intervenors: Daniel E. Myers, Esquire
Maher and Walter E. Forehand, Esquire
Quinlan 402 North Office Plaza Drive
Suite B
Tallahassee, Florida 32301

For the Intervenor: Dean Bunch, Esquire
General Motors
851 East Park Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The issue for consideration in this hearing is whether Petitioner, Ed Morse Chevrolet of Seminole, Inc., should be granted a license as a franchised motor vehicle dealer in Seminole, Pinellas County, Florida

PRELIMINARY MATTERS

By application dated May 31, 1991, Petitioner, Ed Morse Chevrolet of Seminole, Inc., (Morse), applied to the Respondent, Department of Highway Safety and Motor Vehicles, (Department), for a franchise motor vehicle dealer license under the provisions of Section 320.27, Florida Statutes. Thereafter, on June 17, 1991, the Department, by letter of even date, notified Petitioner that it was initially denying Petitioner's application for a franchised motor vehicle dealer license because its application appeared to be a subterfuge for the purpose of circumventing the requirements of the statute. By Petition for formal administrative hearing dated June 24, 1991, Petitioner requested a formal hearing on the Department's intended denial and by letter dated July 9, 1991, the Department forwarded the file to the Division of Administrative Hearings for the appointment of a Hearing Officer to conduct a hearing under the provisions of Section 120.57(1), Florida Statutes.

Thereafter, on July 12, 1991, Intervenor Maher Chevrolet, Inc., (Maher), and Jim Quinlan Chevrolet, Inc., (Quinlan), both filed a Petition for leave to intervene herein in opposition to the award of the license to the Petitioner. Shortly thereafter, the Department filed a Motion to Amend its denial letter. By Order dated October 21, 1991, the undersigned granted the Petition to Intervene and the Motion to Amend and expedited discovery in that the hearing was scheduled to commence shortly thereafter. The undersigned had, on July 26, 1991, by Notice of Hearing, set the case for hearing in Tallahassee on October 28 - 30, 1991 and consistent therewith, the hearing was held as scheduled.

At the hearing, Petitioner presented the testimony of Donald A. MacInnes, Vice President and Chief Financial Officer of Morse Operations, Inc., the parent holding company of Petitioner; Henry C. Noxtine, the retired chief of the Department's Dealer Certification Division; John Sanford Pettit, owner of Autobuilders of South Florida, Inc., a construction company; John Stephen Kettell, a principal in Seminole Engineering; and Edward J. Morse, Jr., President of Ed Morse Chevrolet Lauderhill and President, Dealer/Operator of Ed Morse Chevrolet of Seminole, Inc. Petitioner also introduced Petitioner's Exhibits 1 - 15, 17 - 21, 23 - 29, 29, 31 - 43, 45 - 55, and 56 - 59. Petitioner's Exhibits 56 - 58 are the depositions of Charles F. Duggar, administrator of the Department's dealer license section; Charles Brantlry, Director of the Division of Motor Vehicles; and Neil Vhamelin, operations and management consultant manager with the Department, respectively.

Intervenors, Maher and Quinlan, presented the deposition testimony of Ed Morse, Senior, and the live testimony of Gerard R. Quinlan, Vice President of Jim Quinlan Chevrolet, Inc., and introduced Intervenor's Exhibits 1 - 11 and 13 and 14. Exhibit 12 for Identification was not offered.

The Department presented no evidence and General Motors Corporation adopted Petitioner's case.

Petitioner, Respondent, and Intervenor's Maher and Quinlan submitted Proposed Findings of Fact which have been ruled upon in the appendix to this

Recommended Order. Intervenor, General Motors Corporation did not submit any post-hearing matters.

At the hearing, the undersigned withheld ruling on the issue of the admissibility of Petitioner's Exhibit 59, a Consent Order pertaining to prior agency action in another case involving J. O. Stone Buick. Upon due consideration of the matters presented, the objection to that evidence is overruled, and the documentation regarding the prior agency action in that case is admitted.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Department was the state agency in Florida charged with the licensing of automobile dealerships in this state.

2. In December, 1987, Petitioner, Morse, applied to the Intervenor, General Motors Corporation, Chevrolet Division, (Division), for an automobile dealership franchise to be constructed in Seminole, Pinellas County, Florida. Thereafter, the Division issued a letter of intent to the Petitioner indicating its intent to authorize a dealership by Petitioner, with a potential volume of 1,360 new Chevrolet cars and trucks per year. The letter of intent also outlined the number of display spaces and service stalls necessary to adequately conduct the sales, service, warranty and pre-delivery work, and for a dealership with the projected volume involved here, a facility consisting of 213,825 square feet of land would be required.

3. Subsequent to the issuance of that letter of intent, Quinlan filed a protest with the Department requesting a determination of the need existing at that time for a new dealership in Seminole, Florida, and a hearing on this protest was held before the Division of Administrative Hearings on May 1 - 4, 1989. The Hearing Officer concluded that need did exist and thereafter the Department adopted the Recommendation of the Hearing Officer, indicating that a license would be issued when Morse had complied with all applicable provision of the pertinent statute. The Order granting the license was appealed to the District Court of Appeals which affirmed the agency action and entered its mandate to that effect on June 18, 1990. As of that date, Petitioner was aware that it was lawfully entitled to proceed with the construction of its facility without further regard for the protest, and, being a dealership run by experienced auto dealers, it must have understood that under the terms of the pertinent statute and rule, it had one year in which to construct its permanent facility. At that time, the Division urged Petitioner to begin construction immediately after the favorable resolution of the protest.

4. Consistent with that position, on July 30, 1990, the Division issued a new letter of intent to Petitioner which, based on Quinlan's apparent improvement of its position in the area, reduced the scope of the dealership it still agreed to approve in volume from 1,360 new cars and trucks to 1,175 vehicles, and reduced the total size of the facility to 141,000 square feet. These changes were initiated by Chevrolet Division.

5. It is recognized that the process of design and construction of a dealership cannot be started until the facility size has been decided upon. This also impacts on the procurement of local construction permits and zoning permits, and consistent with this reduction in size, Petitioner's ownership met with its builder in June, 1990, after the appellate court's favorable ruling, to discuss the size of the dealership. Even before the Court's action, however,

and thereafter, continuing through 1990, Petitioner was in a process of continuing negotiation with the Division regarding various types of financial assistance it was seeking from the Division. These negotiations were unresolved until just shortly before the hearing.

6. If Petitioner had filed a site plan with Pinellas County for construction of its permanent facility at the time of the appellate court action, or, for that matter, any time prior to March 1991, it would not have faced the "concurrency" problems it subsequently encountered in seeking permission from the county to construct its facility at the intended site. Nonetheless, Petitioner did not begin construction at the site during 1990 nor did it file any site plan with the county until much later. Instead, it chose to continue to seek to obtain a better financial arrangement with the Division for itself. When the site plan was finally filed with the County, concurrency problems were encountered.

7. Regarding the negotiations between Petitioner and the Division, both prior and subsequent to the appellate court's decision, Petitioner has incurred in excess of $1 million in additional carrying costs for the real estate on which the facility was to be located. This includes the time of the original protest hearing and appeal therefrom. After the size of the operation was reduced by the Division, Petitioner continued to seek financial assistance from the Division. Part of this related to a potential sale of the property to the Division, and in addition, Morse sought further reductions in facilities commitments for the dealership. Whereas Petitioner wanted the Division to buy the property outright, the Division offered only to buy the property and hold it only until construction of the facility at which time it would be sold back to Petitioner at even cost. Nonetheless, these negotiations were nonproductive, and on or about January 17, 1991, Petitioner and the Division reached an impasse point at which Morse committed to proceed without further concessions from Chevrolet. It is Morse's position that because site planning must await final determination of dealership size and facility requirements, it could not reasonably begin site plan work until its negotiations with Chevrolet had been concluded in January, 1991.

8. When the negotiations between Morse and the Division finally concluded in January, 1991, Morse, which contends it fully intended to proceed with the establishment of a dealership all along, with only the size in issue, contacted the Department's representative, Mr. Noxtine, on January 25, 1991 and requested that the Department extend the time for issuance of the Morse license to December, 1991. In his letter to Mr. Noxtine, Mr. MacInnes pointed out it was the continuing intention of the Petitioner to start construction of the dealership immediately and to complete it by December, 1991, assuming no additional unforseen delays were encountered.

9. When Mr. Noxtine received this request, he contacted the Department's General Counsel and was advised that the Department should and could treat Petitioner the same way it had treated the Chevrolet World application, a somewhat analogous situation, previously. Thereafter, Mr. Noxtine contacted Mr. MacInnes and advised him that the Department would issue a license to the Petitioner if the Petitioner constructed a temporary facility on the property consisting of display space and a mobile office facility.

10. Apparently nothing was said in these conversations regarding the Department not issuing a license unless permanent dealership facilities were substantially complete, or unless a "good faith" effort toward completion was underway by June 17, 1991.

11. Thereafter, Morse had site plans prepared and permitted, and constructed and completed a facility on the site which, it contends, satisfies the conditions and facilities which Mr. Noxtine represented would result in the Department's issuing the license on a temporary basis. This temporary facility cost approximately $185,000.00.

12. In March, 1991, however, Morse learned that concurrence issues affected the zoning of its property as a result of the induction of Park Boulevard into transportation deferral status. At that time, Morse petitioned Pinellas County for vested rights to construct the dealership, waived all its vested rights to develop the property for any other commercial use, and, over the opposition of Intervenor, Quinlan, obtained a final order vesting Morse's rights to construct its dealership on the site, and eliminating any other vested rights to construct anything other than an automobile dealership there. That being achieved, Morse began planning, permitting of its permanent facility. Morse claims now that had it been advised that the Department's Director would require a showing of "good faith" effort to construct permanent facilities, it could have accelerated its work on the permanent facility and completed sufficient planning, permitting, and construction to satisfy the Director's position, all before June 17, 1991. The fact is, however, that no such action was taken.

13. With regard to the temporary facility, Pinellas County notified the public by public advertisements, prior to March 1, 1991, that effective that date, the County's concurrency statement would be amended to reflect deferral status on that portion of Park Boulevard adjacent to the parcel of land owned by Morse for its dealership. The advertisements were published in January and February of 1991. When these advertisements were published, Autobuilders of South Florida, Inc., a construction firm which had been hired by Morse to serve as project manager and general contractor for the construction of its facility, advised Morse that the concurrency problem existed and that because of it, the permanent dealership construction should be begun as soon as possible. Though a site plan had been previously approved by the County for the facility, sometime prior to March, 1991, this site plan expired because Morse had taken no action to begin construction or to acquire permits, and because of the expiration of that prior issued site plan and the new concurrency problems which arose in March, 1991, Morse could not submit a new site plan for approval and, therefore, could not go forward with construction.

14. Autobuilders retained Anclote Engineering to draw the site plan for the temporary facility based around a mobile home, and to work with the County on the concurrency problems which were preventing the construction of the permanent dealership on Park Boulevard. A decision was made to place the temporary facility in the northwest corner of the site, a location which would not be used for the permanent construction later to come. The site for the temporary facility was a portion of the site adjacent to the proposed permanent facility. The temporary site was an out parcel. If construction were started on a permanent facility, the traffic and congestion caused by that construction would not interfere with the conduct of business at the temporary site.

15. Nonetheless, Anclote informed Mr. Morse that construction on the permanent facility could not begin until the concurrency problem was resolved. Morse did not notify the Department that the problem existed and that it could not go forward with the construction of the permanent facility even though discussion with Mr. Noxtine clearly indicated that a permanent facility within a

12 month period was a sine qua non, to the issuance of the permit based on the temporary facility.

16. After substantial negotiation, Mr. Vernon, Anclote's representative, in March, 1991, met with Pinellas County zoning personnel and a site plan for the temporary facility on the out parcel was filed on April 16, 1991. This site plan was approved. Mr. Vernon represented to the County at that time that Morse was prepared to submit an overall site plan, including the permanent facility, as soon as the Planning Board determined that Morse had vested rights under concurrency and could develop the property as a dealership. This was not received until later, however.

17. The temporary facility site plan calls for a 200 by 200 square foot parcel at the northwest corner of the overall site. A mobile home was to be placed on the site for an office use, and vehicles were to be displayed on the property surrounding it.

18. Subsequent to the approval of the out parcel site plan, Mr. Les Stracher wrote to the Department on behalf of the Petitioner seeking a clarification or extension of time for Morse to obtain its license. In his letter, Mr. Stracher asserted that Morse had been "working diligently and in good faith" to construct a dealership, and that the site became subject to the concurrency ordinance before Morse could submit its site plan for the permanent dealership. He noted that Morse was seeking relief from the concurrency problem and that unless such relief was granted, Morse might be required to revise entirely its plan for the site because of those problems.

19. Even before this, however, Mr. MacInnes had notified the Department in his January 25, 1991 letter that delay in the approval process had caused problems in the start-up of the construction of the dealership with a portion of the delay related to the ongoing negotiations between Morse and the Division. However, even Mr. MacInnes indicated at the hearing that the only delay which prevented Morse from beginning construction back in June, 1990, when the appellate court decision came down supporting its license, was the continuing negotiations between Morse and the Division wherein Morse was seeking a more advantageous financial position.

20. In May, 1991, the Division approved a temporary facility for Morse on this site, conditioned upon the submittal to it of a plan for a final, permanent facility, and its subsequent approval by the Division. There was no doubt remaining that at that time the Division envisioned that site preparation and ground breaking for the permanent facility would take place with due dispatch.

21. Nonetheless, no permanent facility plan was submitted to the Division until October 1, 1991, and as of the date of the hearing, neither site preparation, ground breaking, nor any other incident of construction of the permanent facility has taken place at the site.

22. Documentation relative to the agreement between the Division and Petitioner, dated May, 31, 1991, recognizes that the Department's failure to issue the license to Petitioner, for whatever reason, would be a material breach of the dealer sales and service agreement and would constitute cause for termination thereof under Florida law. In that same addendum, Petitioner agreed to voluntarily terminate the agreement if the Department were to fail to issue, or to revoke or suspend, its license to conduct operations at that site.

23. In addition to the erection of the trailer on the out parcel, Morse has entered into a lease agreement with another dealership in the area, by agreement dated June 17, 1991, which provides it with two service stalls and vehicle lifts. The initial period of the lease is for 90 days, with provision for continuation on a month to month basis. These stalls would be used for pre-delivery inspection and service and warranty service on new and used vehicles sold by Petitioner at its out parcel temporary facility. The terms of this agreement provide it will not become effective until Morse has obtained all its approvals and has satisfied all requirements to operate a Chevrolet new car franchise at its Seminole location.

24. There is no question that the temporary facility located on the out parcel, and the satellite service facility if implemented, falls below the requirements of the Division for a dealership. However, the evidence is equally clear that under some pressure, the Division has reluctantly agreed to allow Petitioner to operate a temporary dealership under the circumstances as appear to be provided for here, on a temporary basis.

25. The Pinellas County Administrator entered a final order in July, 1991, which conditionally approved Morse's vested rights to develop the property, providing a site plan was filed within 6 months and providing construction of a permanent facility had begun at that time. The order also states that the temporary facility will be removed once the permanent facility is open for business. Morse has reviewed these conditions and represents they are acceptable. Thereafter, in September, 1991, Morse filed site plans for the permanent facility with the County, but as of the date of the hearing, these plans had not been approved. As of October, 1991, no construction had begun on a permanent facility.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

27. By its denial letter dated June 17, 1991, the Department had indicated its intent to deny issuance of a dealership franchise license to Petitioner on the basis that the letter of intent issued by the Division on May 31, 1991, to allow Petitioner to operate a dealership out of a temporary facility so long as good faith effort is made toward the construction and establishment of a permanent facility, is a subterfuge designed to circumvent the requirements of Section 320.642, Florida Statutes. The Department claims that the Division was without authority to issue such a franchise agreement because the Petitioner does not have, and is not likely to have, the service facilities necessary for the conduct of proper service to vehicles as required, and was, therefore, in violation of section 320.64(10), Florida Statutes.

28. The Department also bases its denial on the basis that Petitioner cannot establish when adequate permanent facilities will be constructed or if the construction, when realized, will be at the location approved in the preliminary filing, and, therefore, the Department cannot determine that the proposed location is a "suitable" location where the applicant can, in good faith, carry on the business of an automobile dealership as is required by Section 320.27(3), Florida Statutes.

29. As applicant for a license here, Petitioner has the burden to establish by a preponderance of the evidence that it is a proper applicant and

that it meets all relevant statutory and rule requirements for the granting of such a license.

30. The evidence of record establishes that approval of the Petitioner's original application for this dealership was granted by the Department in 1987 but that, due to protests by at least one of the Intervenors herein, the final approval of that grant was delayed until the mandate of the Court of Appeals, in June, 1990, sustaining it. As of that time, Petitioner had approval to begin, and could have begun, construction of its dealership at the site already owned by it, which is the site in issue here.

31. At that time, there were no problems with the zoning requirements of Pinellas County and there is no evidence that any obstacles existed legally to Petitioner's commencement of construction of its facility.

32. The evidence also indicates, however, that at that time, Petitioner was engaged in negotiations with Chevrolet Division for possibly more advantageous financial terms for its construction program. The evidence shows that Petitioner proposed that the Division purchase the property from it, and taken together, the evidence indicates that at that time, Petitioner did not demonstrate a firm resolve to proceed with actual construction of its facility, the license for which had been previously approved.

33. Under the provisions of Rule 15C-1.008, F.A.C., an applicant is obliged to begin construction within 12 months from the date of final approval of his application, (the determination of the Department that Petitioner satisfied the Section 320.642 requirements was effective "for a period of 12 months from the date of the Director's Order, or date of judicial determination in the event of an appeal, unless for good cause a different period is set by the Director in his order of determination.")

34. Petitioner did not initiate any efforts toward beginning construction of its permanent facility during that time. It delayed for one reason or another, primarily because of its continuing financial negotiations with the Division, until such time as the zoning status of the property had changed and Petitioner found it could no longer rely on the availability of that property for the construction of its facility.

35. Petitioner was able to secure approval for the construction of a temporary facility on an out parcel at the property after it had negotiated with the Department for approval to procure its license beyond the one year period on the basis of a temporary facility. The Department ultimately granted authority to Petitioner to construct a temporary facility, and this was the genesis, supposedly, for ultimate construction of a permanent facility.

36. Petitioner claims that because the Department indicated its tentative approval of a temporary facility, the Department is now estopped from denying that a license for a temporary facility envisioning the construction of a permanent facility on site further down the line should now be granted.

37. Approval of Petitioner's temporary license would extend the provisions of Rule 15C-1.008, F.A.C.. The Department has taken the position here, by virtue of its most recent denial, that the Rule's 12 month provision is jurisdictional and that the Department's director has no authority to issue a license at any point after 12 months from the date of the regulatory qualification determination.

38. The evidence indicates, however, that the Department has done just that on at least two occasions, but in both cases, the fact situation was remarkably different from the instant case, and notwithstanding Petitioner's claim that the Director's determination that it should be treated as other exceptions were treated now prevents the Department from denying it a license, this is just not so. Parenthetically, it would appear the Department has amended the provisions of Rule 15C-1.008, F.A.C. to allow an applicant a total of 24 months from the date of final determination to construct its permanent facility but this 24 month period is not pertinent here.

39. The instances of application of the doctrine of equitable estoppel against the state are rare and the doctrine is invoked against such an entity only under very exceptional circumstances. North American Company v. Green, 120 So2d 603 (Fla. 1960); Bryant v. Peppe, 238 So2d. 836 (Fla. 1970). Here, the Petitioner has not shown any exceptional circumstances to justify the application of equitable estoppel against the Department.

40. Even if Mr. Noxtine had had authority to commit the Department, of which evidence is certainly not clear, the remedy of equitable estoppel may not be claimed by one who does not seek it with clean hands. From the very beginning, the evidence shows, Morse delayed construction of its facility even when it could have done so in 1990 without any impediment. Thereafter, even when negotiating with the State and with the Division for additional time and for the franchise and licensing on the basis of a temporary facility, Morse was still deliberating and negotiating with the Division for the resolution of other financial considerations which impacted on its clear intention to establish the dealership. In short, it appears that Morse apparently wanted to have the best of all possible worlds: to preserve its potential for developing a dealership if and when it chose to do so under economic terms most favorable to it. Morse referred to "no more unforseen delays", but the evidence clearly tends to indicate that the majority of the delay encountered by Morse here was occasioned by its actions and could have been both forseen and avoided. Consequently, the doctrine of equitable estoppel is not applicable here.

41. There is some question as to whether the Department's action here is governed by the circumstances which existed at the time of the proposed decision or at the time of the hearing. Recognizing that the hearing before the Division of Administrative Hearings is a de novo proceeding and not merely a vehicle to review actions taken earlier, (Mcdonald v. Department of Banking and Finance, 346 Sod 569, 584 (Fla. Da 1977); Beverly Enterprises v. Department of Health and Rehabilitative Services, 573 So2d 19, 23 (Fla. 1DCA 1990)); and realizing that consistent with the decision in Mcdonald, supra, the Hearing Officer may properly permit evidence relating to changes in circumstances between the initial agency action and the hearing, nothing in the evidence presented at this hearing is sufficient to override the conclusions drawn by the Department that Petitioner's failure to initiate the construction of, and show good progress toward the completion of, its permanent structure within the 12 month period after final approval defeats its eligibility for licensure.

42. In the instant case, the Department has based its action on a limitation on the period for which a license proposed under Section 320.642, Florida Statutes, as delineated in Rule 15C- 1.008, F.A.C.. From the time that Morse could freely proceed with the construction of its permanent facility, June, 1990 when the appellate court's favorable decision was entered, the operative period in issue was one year. Taken together, the evidence of Petitioner's failure to proceed for its own purposes which led to the additional delay caused by the concurrency problem, which can be laid directly at

Petitioner's feet, indicates the delay is directly attributable to it's failure to act in a timely manner when it could and, therefore, it must bear the consequences of that failure to act. It made certain informed choices and must now live with the consequences of those choices.

43. Even more, the temporary facility envisioned by Petitioner is not yet in operation. Even overlooking the potential that because of the concurrency problem Petitioner cannot guarantee that the facility will be built at the location proposed, there are other problems regarding this facility.

44. Section 320.64(10), Florida Statutes, requires the dealer to have "proper facilities to provide services to his purchasers of new motor vehicles." Under the present situation, assuming Petitioner initiates sales activity at his temporary location, the two bays leased for service on a 90 day plus extension basis might well not be sufficient to meet the requirements of that statute. The Department has determined it is not and Petitioner has presented no substantial evidence to contradict that determination.

45. Respondent, Department, claims that the location of the temporary facility has not shown to be the same as the location of the future permanent facility. This is clearly not true. To claim otherwise is to unreasonable speculate that county approval will not be forthcoming. Clearly the evidence shows that if a permanent structure is to be constructed, it will be constructed on land contiguous to the current out parcel on which the temporary facility is located. The only portion of Respondent's argument which may bear weight there is that the site and construction plans have not yet been approved by the County and there is no assurance yet that they will be. Taken together, however, it appears clear that Petitioner's application is not appropriate for approval at this point.

46. In summary, the provisions of Section 320.27(3), Florida Statutes, providing that an applicant must be able to certify that the business location is a suitable place where the applicant can in good faith carry on such business, may likely be satisfied. However, the service facilities arrangement is clearly inadequate and, more important, the provisions of Rule 15C-1.008, F.A.C., and the statute upon which it is based, calling for construction of the permanent facility within 12 months, has clearly not been met.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore:

RECOMMENDED that a Final Order be issued denying the application of Ed Morse Chevrolet of Seminole, Inc., for a license as a franchised Chevrolet motor vehicle dealer in Seminole, Pinellas County, Florida.

RECOMMENDED in Tallahassee, Florida this __13th__ day of January, 1992.

ARNOLD H. POLLOCK
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 __13th__ day of January, 1992.

APPENDIX TO RECOMMENDED ORDER

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of fact submitted by the parties to this case.

FOR THE PETITIONER:

1. - 7. Accepted and incorporated herein.
8. & 9. Accepted.
10. Accepted and incorporated herein.
11. Accepted.
12. - 13. Accepted and incorporated herein.
14. Accepted.
15. 1st and 2nd sentence accepted. 3rd sentence rejected.
16. & 17. Accepted and incorporated herein.
18. Accepted and incorporated herein except that Mr. Alderman is Assistant General Counsel.
19. Accepted.
20 (a) & (b). Accepted and incorporated herein.
20(c). 1st sentence accepted and incorporated herein. 2nd sentence rejected as speculation.
21. Rejected. Morse's lengthy negotiations with Chevrolet were initiated by it and the later delays were occasioned by its failure to start construction when the appellate court's decision was handed down.
22. Accepted as to the fact that Petitioner has ultimately progressed with plans to construct its dealership. Next to last and last sentences rejected as speculation.
23. Accepted as position taken, not as lawful position.
24. & 25. Accepted.
26. - 28. Accepted.
29. & 30. Not a Finding of Fact but a comment on the evidence.
31. - 33. Accepted, but considered comments on the evidence, not Findings of Fact.
34. & 35. Accepted.
36. & 37. Accepted.
38. Accepted and incorporated herein.
39. Argument, not a Finding of Fact.
40. 1st sentence rejected as a conclusions and comment on the evidence. Balance accepted but considered more a restatement of position rather than a Finding of Fact.

41. Rejected.
42. Accepted.
43. & 44. Rejected.
45. Accepted.
46. Not a Finding of Fact but a restatement of evidence.
47. Rejected.
48. Accepted and incorporated herein.
49. & 50. Accepted.
51. & 52. Accepted.
53 (a). 1st sentence accepted. 2nd sentence argument. Balance accepted.
53 (b). Accepted.
54. Rejected.
55. - 58. Accepted.
59. Rejected.
60. Rejected.
61. Accepted.

FOR THE RESPONDENT:

1. & 2. Accepted and inorporated herein.
3. - 6. Accepted.
7. - 10. Accepted and incorporated herein.
11. - 13. Accepted and incorporated herein.
14. & 15. Accepted.
16. - 18. Accepted.
19. - 21. Accepted and incorporated herein.
22. & 23. Accepted.
24. Accepted and incorporated herein.
25. - 27. Accepted.
28. Accepted.
29. - 35. Accepted and incorporated herein.
36. Accepted.
37. Accepted.
38. & 39. Accepted and incorporated herein.
40. Accepted.
41. - 43. Accepted and incorporated herein.
44. Accepted.
45. Accepted and incorporated herein.
46. Accepted and incorporated herein.
47. - 50. Accepted and incorporated herein.
51. & 52. Speculation, not Finding of Fact. Rejected.
53. Accepted.
54. Speculation, not Finding of Fact. Rejected.
55. Accepted and incorporated herein.
56. Accepted and incorporated herein.
57. - 63. Accepted and incorporated herein.
64. - 66. Accepted.
67. Accepted.
68. - 71. Accepted and incorporated herein.
72. & 73. Accepted.
74. Accepted and incorporated herein.
75. Accepted.
76. - 78. Restatements of evidence, not Findings of Fact.
79. Accepted.
80. Accepted and incorporated herein.
81. Accepted and incorporated herein.
82. Accepted.

83. & 84. Accepted and incorporated herein.
85. - 88. Accepted but not probative of any material fact.
89. Accepted.
90. Accepted.
91. & 92. Accepted.
93. - 96. Accepted and incorporated herein.
97. & 98. Accepted and incorporated herein.
99. & 100. Accepted and incorporated herein.
101. & 102. Accepted and incorporated herein.
103. & 104. Accepted.
105. - 108. Accepted and incorporated herein.
109. - 111. Accepted.
112. Accepted and incorporated herein.
113. - 115. Accepted.
116. Accepted.
117. Accepted.
118. Accepted and incorporated herein.
119. & 120. Accepted.
121. - 123. Accepted.
124. - 127. Accepted.
128. & 129. Accepted and incorporated herein.
130. - 132. Accepted.
133. & 134. Accepted.
135. Accepted.
136. & 137. Accepted.

FOR THE INTERVENORS:

1. - 4. Accepted and incorporated herein.
5. Accepted and incorporated herein.
6. Accepted.
7. & 8. Accepted and incorporated herein.
9. & 10. Accepted.
11. - 15. Accepted and incorporated herein.
16. Accepted.
17. & 18. Accepted and incorporated herein.
19. & 20. Accepted and incorporated herein.
21. Accepted.
22. & 23. Accepted.
24. & 25. Accepted.
26. - 28. Accepted.
29. Accepted.
30. Accepted.
31. - 33. Accepted.
34. Accepted and incorporated herein.
35. - 38. Accepted and incorporated herein.
39. - 41. Accepted and incorporated herein.
42. - 45. Accepted and incorporated herein.
46. Accepted.
47. & 48. Accepted in substance and incorporated herein.
49. - 51. Accepted and incorporated herein.
52. - 54. Accepted.
55. & 56. Accepted.
57. & 58. Accepted and incorporated herein.
59. Accepted.
60. & 61. Accepted.
62. - 64. Accepted and incorporated herein.

65. Accepted.
66. Accepted.
67. Accepted.
68. & 69. Accepted.
70. & 71. Accepted.
72. & 73. Accepted.
74. & 75. Accepted and incorporated herein.
76. & 77. Accepted.
78. - 80. Accepted and incorporated herein.
81. - 83. Accepted.

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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 consult with the agency which will issue the Final Order in this case concerning its rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should b e filed with the agency which will issue the Final Order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF HIGHWAY AND SAFETY MOTOR VEHICLES

ED MORSE CHEVROLET OF
SEMINOLE, INC.,

Petitioner,

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

CASE NO.: 91-4315

Respondent,

MAHER CHEVROLET, INC., and
JIM QUINLAN CHEVROLET, INC.,

Intervenors.

_____/

FINAL ORDER

This matter is before the Department pursuant to ss. l20.57(l)(b) 10, 120.59 and 320.642, Fla. Stat., for the purpose of considering the Hearing Officer's Recommended Order (HORO) and Petitioner's Exceptions To Recommended Order. Authority to enter this Final Order is pursuant to the delegation to the Executive Director, Rule 15-1.012, F.A.C., and his designation of the undersigned.

Upon review of the Recommended Order, Petitioner's Exceptions, and after a review of the complete record in this case, the Department makes the following findings and conclusions:

RULINGS ON EXCEPTIONS

1. Petitioner has filed numerous exceptions regarding the rejection of proposed findings of fact in the HORO (pages 1-9 of Exceptions). The Department has compared each of these exceptions with the rulings on proposed findings contained in the HORO. The Department accepts the Hearing Officer's ruling on the Petitioner's proposed findings and, therefore, rejects the exceptions related to the non-acceptance of Petitioner's proposed findings.

2. Petitioner next takes exception to various of the findings contained in the HORO. The Department finds that these challenged findings are based on competent substantial evidence and therefore, rejects these exceptions.

3. Petitioner also takes exception to the conclusions of law in the HORO, which are dealt and with as follows:

A. Morse could not have began construction of its dealership in June, 1990 -- rejected. Construction could have commenced at that date. The fact that the Chevrolet Division subsequently reduced the sales volume and facility size for Petitioner on July 30, 1990, is irrelevant where Petitioner failed to meet the construction requirements within the one year period.

B. Morse was not obliged to begin construction within 12 months -- rejected. This argument is inconsistent with Rule l5C-l.008, F.A.C., then in effect, and the communications from the Department. (See paragraph 15 of HORO).

C. Morse's situation is similar to the Chevrolet World and Stone Buick applications -- rejected. Those applications are distinguishable on their different facts.

D. DHSMV is equitably estopped from denying Morse's license -- rejected. The Department finds the doctrine of equitable estoppel inapplicable under the facts of this case.

E. DHSMV was obligated to treat Morse as it treated Chevrolet World -- rejected. Chevrolet World was not similarly situated to Petitioner.

F. DHSMV cannot deny Morse's license based on Morse's service facilities - rejected. Adequate service facilities are required by s. 320.64(10), Fla. Stat., and the Department's concerns over their insufficiency in connection with the temporary facility was justified.

FINDINGS OF FACT

1. The Findings of Fact set forth in the Recommended Order of January 13, 1992, are approved and adopted and incorporated herein.

2. There is competent substantial evidence to support the Findings of Fact of the Department.

CONCLUSIONS OF LAW

1. The Department has jurisdiction of this matter pursuant to 55. 12p.57(1) and 320.642, Fla. Stat.

2. The Conclusions of Law set forth in the Recommended Order of January 13, 1992, are approved, adopted and incorporated herein.

DETERMINATION

Based upon the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED AND ADJUDGED that: The application of Ed Morse Chevrolet, of Seminole, Inc., for a license as a franchised Chevrolet motor vehicle dealer in Seminole, Pinellas County, Florida is denied.

DONE AND ORDERED this __31st__ day of __March__, 1992, in Tallahassee, Leon County, Florida.

_____
CHARLES A. BRANTLEY, Director
Division of Motor Vehicles
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
Tallahassee, Florida 32399-0504

Filed with the Clerk of the
Division of Motor Vehicles
this __31__ day of __March__
1992.

NOTICE OF APPEAL RIGHTS

Judicial review of this order may be had pursuant to section 120.68, Florida Statute, in the District Court of Appeal for the First District, State of Florida, or in any other District Court of Appeal of this state in an appellate district where a party resides. In order to initiate such review, one copy of the of the Notice of Appeal must be filed with Department and the other copy of the Notice of Appeal, together with the filing fee, must be filed with the court within thirty days of the filing date of this order as set out above, pursuant to Rule 9.110, Rules of Appellate Procedure.

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Arnold H. Pollock
Hearing Officer
Division of Administrative Hearings
Desoto Building, 1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

==========
AGENCY ACTION
==========

STATE OF FLORIDA
DEPARTMENT OF HIGHWAY AND SAFETY MOTOR VEHICLES

ED MORSE CHEVROLET OF
SEMINOLE, INC.,

Petitioner,

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

CASE NO 91-4315

Respondent,

MAHER CHEVROLET, INC., and
JIM QUINLAN CHEVROLET, INC.,

Intervenors.
_____/

ORDER DENYING REMAND

This matter is before the Department on Petitioner's Motion To Remand Cause To Department of Administrative Hearings For Consideration of New Evidence dated February 4, 1992, and Intervenor's Response. Both items have been fully considered within the context of a completed evidentiary hearing and Recommended Order dated January 13, 1992. Accordingly it is hereby,

ORDERED, that Petitioner's Motion For Remand is denied. DONE AND ORDERED this __31__ day of __March__ 1992, in Tallahassee, Leon County, Florida.

_____
CHARLES J. BRANTLEY, Director
Division of Motor Vehicles
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
Tallahassee, Florida 32399

Filed with the Clerk of the
Division of Motor Vehicles
this __31__ day of __March__
1992.

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