STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
Petitioner,	)	
vs.	)	**CASE NO. 96-3191**
DODGE CITY PONY AND KIDDIE RIDES, INC., a Florida Corporation,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on February 26, 1997, in Miami, Florida.

APPEARANCES

For Petitioner: Isadore Rommes, Esquire
Department of Agriculture and Consumer Services
515 Mayo Building
Tallahassee, Florida 32399-0800

For Respondent: Thomas J. McCausland, Esquire
Law Office of Bohdan Neswiacheny
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STATEMENT OF THE ISSUES

At issue is whether respondent committed the offenses alleged in the administrative complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By a three count administrative complaint dated June 6, 1996, petitioner charged respondent with violating the provisions of Section 616.242, Florida Statutes. Count I alleged that a "Dinomania" (a temporary amusement device or attraction, as defined by section 616.242) had been operated by respondent in the State of Florida from November 6, 1993, through February 10, 1996, on 136 separate occasions without a permit or the required inspections, in violation of Section 616.242(4)(a), (5)(a), (6) and (24)(a), Florida Statutes. Count II alleged that on January 22, 1995, at Florida Bible Church, respondent operated for public use six temporary amusement devices or attractions which were not permitted or inspected, in violation of Section 616.242(4)(a), (5)(a), (6), and (24)(a), Florida Statutes. Count III alleged that on May 18, 1996, respondent operated a temporary amusement device or attraction (a "Super Slide") at Midway Ford, Miami, Florida, which was not permitted or inspected, and while an Imminent Danger-Stop Operation Order (a "red tag") was in effect, in violation of Section 616.242(4)(a), (5)(a) and (h), and (6), Florida Statutes.

Respondent filed its answer to the complaint contesting certain factual allegations and alleged, as a defense to the claimed violations, by avoidance or estoppel, that various agency inspectors had, during the period of 1993 through August 1995, stated that temporary amusement devices used at "private functions" did not require a permit or inspection. Respondent further averred that the agency inspectors did not have authority to "red tag" the Super Slide. Consequently, on July 8, 1996, petitioner referred the matter to the Division of Administrative Hearings to conduct a formal hearing pursuant to Section 120.57(1), Florida Statutes.

At hearing, petitioner called Ronald Stafford, Carols Corvo, Ronald Brooks, Wallace Stevens, Randy Glenn, and Bradford Mosher, as witnesses. Petitioner's exhibits 1-9 were received into evidence. Respondent called Wallace Stevens, Thomas Maxwell, Jeannine Stacy Young, Mitchell Williams, and Randy Glenn, as witnesses. Respondent's exhibits 1-9 were received into evidence at hearing and respondent's exhibit 10 (the deposition of Dean A. Bennett taken March 12, 1997) was received into evidence post-hearing.[1]

The transcript of hearing was filed March 13, 1997, and the parties were accorded, at their request, until April 3, 1997, to file proposed recommended orders. Consequently, the parties waived the requirement that a recommended order be rendered

within thirty days after the transcript has been filed. Rule 60Q-2.031, Florida Administrative Code. The parties elected to file such proposals, and they have been duly considered in the preparation of this recommended order.

FINDINGS OF FACT

The parties

1. Petitioner, Department of Agriculture and Consumer Services (Department), is a state agency charged with the duty and responsibility of regulating, permitting, and inspecting, inter alia, amusement devices and attractions, and the prosecution of administrative complaints pursuant to the laws of the State of Florida, in particular Section 616.242, Florida Statutes, Chapter 120, Florida Statutes, and the rules promulgated pursuant thereto.

2. Respondent, Dodge City Kiddie and Pony Rides, Inc., is a Florida corporation, with its principal place of business at 16330 Southwest 147th Avenue, Miami, Dade County, Florida.[2]

3. Respondent owns, operates, and rents temporary amusement devices and attractions which are subject to inspection, testing and permitting by the Department, pursuant to Section 616.242, Florida Statutes. Such devices consist primarily of small "kiddie" rides, although respondent does own, operate and rent larger amusement devices such as the Super Slide. These amusements are principally provided for private

events, such as birthday parties, company picnics and school carnivals, which are not open to the general public and at which no admission is charged. Occasionally, however, respondent provides amusement devices for "fund raiser type carnival" events that are open to the general public.

Industry regulation

4. Prior to July 1, 1992, Section 616.091(2), Florida Statutes, prohibited the operation of temporary amusement devices, such as those operated by respondent, without a "permit" and a "certificate to operate."

5. At the time, there was apparently some disagreement as to whether the law was intended to cover companies, such as respondent, who engaged in the rental of amusement devices or attractions to predominantly small private events. Indeed, as discussed more fully infra, the Department apparently interpreted the law at the time as not requiring permits or inspections of amusements operated by companies, such as respondent. Moreover, the requirement that the Department inspect each device after setup, incident to the issuance of a "certificate to operate," was apparently impractical given the number of such events and the Department's limited personnel.[3]

6. Consequently, effective July 1, 1992, Chapter 92-291, Section 91, Laws of Florida, created Subsection 616.0915(24), Florida Statutes, now codified at subsection 616.242(24).[4] That

subsection expressly addressed the permitting and inspection requirements placed on rental companies, such as respondent, as follows:

> (24) This subsection establishes permitting and inspection procedures for companies engaged in the rental of amusement devices and amusement attractions.
>
> (a) All companies engaged in the rental of amusement devices and amusement attractions shall make application to the department for permits to operate pursuant to this section. Once the annual inspection is completed and the application is approved, amusement devices and amusement attractions owned or operated by rental companies shall be subject to inspection and regulation as specified in paragraphs (b) and (c).
>
> (b) Rental companies operating amusement devices or amusement attractions singularly, or jointly with an amusement device or amusement attraction company, at a public event are subject to onsite inspections and issuance of a certificate to operate, pursuant to this section, at that particular event when there are at the event more than three amusement devices or amusement attractions or any combination of both, or when the capacity of any amusement device or amusement attraction at the event exceeds eight persons.
>
> (c) Any amusement device or amusement attraction used at a private event for which no admission is charged must comply with all requirements of this section. However, such amusement device or amusement attraction does not have to be inspected by the department at the time of setup.

With such amendment, the Legislature clearly expressed its intent that all amusement devices operated by companies, such as respondent, must comply with the "permit" requirements of

section 616.242, but were excused or exempt, under certain circumstances, from the requirements for a "setup" inspection and a "certificate to operate" at each event.

The violations

7. From November 6, 1993, through February 10, 1996, on 136 separate occasions (separate days or events), respondent rented and operated a temporary amusement device or attraction known as Dinomania that was not permitted as required by law, and that had not undergone the inspection required for permitting. Additionally, the Dinomania had not undergone an onsite inspection following setup and had not been issued a certificate to operate; however, the proof demonstrates, more likely than not, that its use on each occasions was at a private event for which no admission was charged.

8. On January 22, 1995, respondent rented and operated five temporary amusement devices or attractions that were not permitted as required by law, and that had not undergone the inspection required for permitting. The devices or attractions were also not inspected following setup and had not been issued a certificate to operate; however, again, the occasion was most likely a private event at which no admission was charged.

9. On May 3, 1996, Department inspectors, at respondent's request, appeared at respondent's premises to permit a temporary amusement known as a "Super Slide," USA ID Number 264. At the

time, inspection revealed certain defects or deficiencies, and an "Imminent Danger - Stop Operation Order" ("red tag") was issued and attached to the attraction. The order provided:

> The above identified amusement device or amusement attraction is not in compliance with Section 616.242(5)(h) F.S., manufacturer's specifications or ASTM Standards. The amusement device or amusement attraction failed to pass inspection for the above reasons and must be reinspected by the department prior to opening to the public.

Subsection 616.242(5)(h), further provides: "[s]uch order may not be removed until the device or amusement attraction is made safe, and may be removed only by the department."

10. On May 18, 1996, respondent, pursuant to a contract with Midway Ford, rented and operated the Super Slide, USA ID Number 264, at 8155 West Flagler Street, Miami, Florida. At the time, the Super Slide was not permitted, had not been reinspected by the Department, and someone, other than the Department, had removed the "red tag." The Super Slide had also not been inspected following setup and had not been issued a certificate to operate before operations began; however, although the event was open to the public, the proof failed to demonstrate that there were "three or more amusement devices or amusement attractions or any combination of both, or . . . the capacity of any amusement device or amusement attraction at the event exceeds eight persons."

Respondent's defense

11. In response to the showing that respondent rented and operated an unpermitted amusement device or attraction on 136 separate occasions (separate dates or events) between November 6, 1993, and February 10, 1996, as well as five unpermitted amusement devices or attractions at Florida Bible Church on January 22, 1995, petitioner contends it should be excused for such conduct or, stated differently, the Department should be estopped from pursuing such violations, because various Department inspectors had told respondent's principal, Mr. Stevens, on a number of occasions between 1993 and August 1995, that amusement devices and attractions rented or operated for private events did not have to be permitted or inspected. Consequently, according to Mr. Stevens, in reliance on that information, he took no action to permit the amusement devices or attractions he used for private events until August 9, 1995, when he claims the inspectors first advised him that all amusement devices or attractions had to be permitted. The Department denies that any representations suggesting that amusement devices or attractions rented or operated for private events did not require permitting, and contends there is no excuse for respondent's omissions.

12. Regarding the events of August 9, 1995, the proof demonstrates that on that date Department inspectors made an

unannounced inspection of the amusement devices and attractions present at respondent's business location. At the time, a number of items were found to lack current annual inspections or permits and were "red tagged."

13. According to respondent's principal, Mr. Stevens, he protested the Department's action at the time because the equipment was destined for private, as opposed to public events, and he felt it unfair that he was just being advised that all equipment, whether for public or private use, required a permit. According to Mr. Stevens, he could not secure the required inspections and permits until October 1995, and the Department's action would seriously affect his business. Therefore, according to Mr. Stevens, the Department removed the "red tag" and acquiesced in his operation until the end of October 1995. At that time, according to Mr. Stevens, his amusement devices and attractions were properly permitted. The Department denies that it removed the "red tags" and acquiesced in respondent's operation of unpermitted equipment at private events until the end of October 1995, and further denies respondent was in compliance thereafter.

14. Addressing first respondent's compliance post-October 1995, the parties' stipulation and the proof demonstrate otherwise. Rather, the proof demonstrates that from November 5, 1995, through February 10, 1996, on 13 separate occasions

(separate days or events) respondent rented and operated a temporary amusement device or attraction (the "Dinomania") that was not permitted as required by law, and that had not undergone the inspection required for permitting. Also, on May 18, 1996, respondent operated the Super Slide at Midway Ford without a current permit. Given the proof, there is no explanation or excuse for respondent's conduct regarding those events.

15. With regard to respondent's contention that Department inspectors had advised its principal at various times during the years 1993 to August 1995 that amusement devices and attractions destined for private events did not require permitting, as well as its contention that the Department acquiesced in such use through October 1995, it is found that such assurance or conduct post-July 1, 1992, is most unlikely, given the clear wording of the statute regulating those events. Consequently, considering that factor and the testimony, respondent's contention, and the proof offered to support it, is rejected as unpersuasive.[5]

16. Notwithstanding, the proof did demonstrate that prior to the amendment of July 1, 1992, the law was apparently not so clear, and the Department apparently interpreted the law as exempting operators, such as respondent, since Mr. Lowell Parrish, then the Department's Chief, Bureau of Fair Rides Inspecting, advised Mr. Stevens that permits were not required for private events. With the change in the law, and Mr. Ronald

Safford's appointment as Bureau Chief in December 1992, however, permits have been required.

17. Given such proof, and Mr. Steven's apparent sincerity regarding his understanding (until August 9, 1995) of the requirements placed on his operations, a likely explanation for respondent's failure to perceive a need to permit its amusements is misunderstanding. For example, it is possible that inspectors advised Mr. Stevens that the Department did not need to inspect amusements destined for private events. Such advice was accurate, as to setup inspections, but Mr. Stevens may have erroneously assumed, consistent with the practice under the former law, that inspection and permitting was also not required. Whether such was or was not the source of Mr. Stevens understanding is, however, speculative. Moreover, if it occurred, Mr. Stevens reliance or assumption was not well founded.[6]

18. In this regard, it is observed that since at least 1991 the Department, on an annual basis, has provided all traveling amusement operators, including respondent, with permit application forms, a copy of Section 616.242, Florida Statutes, and a copy of Rule 5F-8, Florida Administrative Code. While Mr. Stevens acknowledges receipt of such materials, he frankly admits he never read the law. Such failure by the owner of a regulated business, evidences recklessness or indifference.

Moreover, the provision of section 616.242 relating to respondent's business, subsection (24), is brief, and no reasonable person could read it and fail to grasp its requirements.[7]

19. In response to the showing that respondent rented and operated a Super Slide on May 18, 1996, at Midway Ford that had not been reinspected by the Department following the attachment of an "Imminent Danger - Stop Operation Order" ("red tag"), respondent concedes such conduct violated the provisions of subsection 616.242(5)(h), Florida Statutes. [Respondent's proposed recommended order, at conclusions of law, paragraph 7.][8] However, with regard to the additional violation claimed, that the Super Slide was operated without a current permit, respondent contends it is not guilty of such violation because the Department was without authority to deny its permit on May 3, 1996, the day of the inspection.

20. To support its argument, respondent points to the provisions of subsection 616.242(4)(d), which provides:

> (d) Permits and certificates to operate shall be issued to the owner of an amusement device or amusement attraction when:
> 1. Written application has been made to the department.
> 2. The amusement device has passed all required inspection.
> 3. The liability insurance or bond has been met in the amount prescribed.

Here, respondent contends it had applied for the permit renewal,

the amusement device had passed all "required inspections" [i.e., it had been inspected by a professional engineer and a nondestructive test had been performed, as required by subsection 616.242(5)(c)], and the required insurance or bond had been posted. Consequently, respondent concludes the Department was compelled to issue the permit, notwithstanding the perceived deficiencies, and it should not be considered guilty of having operated the equipment without a permit on May 18, 1996.

21. Having considered respondent's argument, it must be concluded that it is without merit. First, the equipment was not shown to have "passed all required inspections," simply because an affidavit of annual inspection by a professional engineer was presented, as well as evidence of a nondestructive test. Subsection 616.242(5)(c) requires that the inspection performed by the professional engineer "shall, at a minimum, comply with the requirements of the department." Such requirements include the following provisions of Chapter 5F-8, Florida Administrative Code:

> 5F-8.0051 Inspection Standards. For an amusement attraction or amusement device to comply with ASTM Committee F-24 Standards each component or element of the amusement attraction or amusement device must comply with ASTM Committee F-24 Standards. The amusement attraction or amusement device shall not fail to pass inspection solely

> because a nonessential or ornamental component is inoperative or in disrepair.
>
> 5F-8.006 Issuance of Permits. Permits shall be issued when the provisions of s. 616.242(4)(d), Florida Statutes, and this chapter have been met.

Here, the amusement device was found not to comply with section 616.242(5)(h), manufacturer's specifications or ASTM Standards. Consequently, the Department was not obligated to permit the equipment. Indeed, it would be rather incongruous to compel the Department to permit equipment it had found on inspection to "present[] an imminent danger" where the purpose of subsection 616.242 is to "guard against personal injuries in the . . . use of amusement devices."

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.569 and 120.57(1), Florida Statutes (1996 Supp.).

23. Where, as here, the Department proposes to impose an administrative fine, the Department bears the burden of proving the charges contained in the administrative complaint by clear and convincing evident. Section 120.57(1)(h), Florida Statutes (1996 Supp.), and Department of Banking and Finance v. Osborne Stern and Co., 670 So.2d 932 (Fla. 1996). "The evidence must be of such weight that it produces in the mind of the trier of fact

a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

24. Moreover, in determining whether respondent violated the provisions of section 616.242, as alleged in the administrative complaint, one "must bear in mind that it is, in effect, a penal statute . . . This being true, the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it." Lester v. Department of Professional and Occupational Regulation, 348 So.2d 923, 925 (Fla. 1st DCA 1977). Finally, Article I, Section 18, of the Florida Constitution prohibits an administrative agency from imposing a sentence of imprisonment or "any other penalty except as provided by law." Consistent with such provision, "case law reveals that an agency possesses no inherent power to impose sanctions, and that any such power must be expressly delegated by statute." Department of Environmental Regulation v. Puckett Oil Co., 577 So.2d 988, 992 (Fla. 1st DCA 1991).

25. Pertinent to this case, operation of any temporary amusement device or attraction in the state without a "permit" issued by the Department and without a "certificate to operate" is, except as hereafter discussed, prohibited. Section 616.242(4)(a), Florida Statutes, "Permit" means "that document

which signifies that the amusement device or amusement attraction has undergone and passed its annual inspection." Section 616.242(3)(e), Florida Statutes. "Certificate to operate" means "that document which indicates that the temporary amusement device has undergone the inspection required after setup." Section 616.242(3)(f), Florida Statutes.

26. The only exception to the foregoing requirement is established by subsection 616.242(24) which establishes the permitting and inspection procedures for companies, such as respondent, as follows:

> (24) This subsection establishes permitting and inspection procedures for companies engaged in the rental of amusement devices and amusement attractions.
> (a) All companies engaged in the rental of amusement devices and amusement attractions shall make application to the department for permits to operate pursuant to this section. Once the annual inspection is completed and the application is approved, amusement devices and amusement attractions owned or operated by rental companies shall be subject to inspection and regulation as specified in paragraphs (b) and (c).
> (b) Rental companies operating amusement devices or amusement attractions singularly, or jointly with an amusement device or amusement attraction company, at a public event are subject to onsite inspections and issuance of a certificate to operate, pursuant to this section, at that particular event when there are at the event more than three amusement devices or amusement attractions or any combination of both, or

> when the capacity of any amusement device or amusement attraction at the event exceeds eight persons.
>
> (c) Any amusement device or amusement attraction used at a private event for which no admission is charged must comply with all requirements of this section. However, such amusement device or amusement attraction does not have to be inspected by the department at the time of setup.

27. Also pertinent to this case, subsection 616.242(5)(g) and (h) provide:

> (g) Upon proper presentation of credentials, an authorized employee of the department may enter unannounced and inspect amusement devices at any time and in a reasonable manner and has the right to question any owner, manager, or agent of the owner; to inspect, investigate, photograph, and sample all pertinent places, areas, and devices; and to examine and reproduce all pertinent documents and records for the purpose of enforcing this chapter. . . .
>
> (h) An amusement device or an amusement attraction that fails to pass an inspection may not be operated for public use until it has passed a subsequent inspection. If the department or manager finds that an amusement device or amusement attraction presents an imminent danger, the department shall issue an imminent danger order and shall issue and attach a stop operation order prohibiting the use of the device or attraction. Such order may not be removed until the device or attraction is made safe, and may be removed only by the department.

28. Here, the proof demonstrated with the requisite degree of certainty that, contrary to the provisions of subsections 616.242(4)(a), (5)(a), (6), and (24)(a), respondent operated a temporary amusement device or attraction in the state on 136

separate occasions from November 6, 1993, through February 10, 1996, without a permit and without the inspections required for a permit. Respondent's failure to request an inspection at the time of setup (the "certificate to operate") was not, however, shown to be contrary to the provisions of section 616.242 since, as heretofore noted, the amusements were "used at a private event for which no admission was charged." Section 616.242(24)(c), Florida Statutes.

29. The proof further demonstrated that, contrary to the same provisions of law, respondent operated five temporary amusement devices or attractions in the state, at Florida Bible Church on January 22, 1995, without a permit and without the inspections required for a permit. Respondent's failure to request an inspection at the time of setup was not, however, shown to be contrary to law since it was "a private event for which no admission was charged." Section 616.242(24)(c), Florida Statutes.

30. Finally, the proof demonstrated that, contrary to the same provisions of law and subsection 616.242(5)(h), respondent operated a temporary amusement device or attraction in the state, at Midway Ford on May 18, 1996, without a permit, without having passed the inspection required for a permit, and without reinspection by the Department following issuance of a stop operation order. Respondent's failure to request an inspection

at the time of setup was not, however, shown to be contrary to law since, although a public event, there were not "more than three amusement devices or amusement attractions or any combination of both, or . . . the capacity of any amusement device or amusement attraction at the event [did not] exceed[] eight persons." Section 616.242(24)(b), Florida Statutes.

31. Having concluded that respondent failed to comply with the prerequisites of section 616.242 prior to operation of amusement devices or attractions in the state, it is necessary to address what penalties, if any, may be imposed. In this regard, subsection 616.242(4) accords the Department the following

authority to impose sanctions:[9]

> (e) The department shall revoke any permit issued under this chapter or impose an administrative fine of up to $500 per violation per day if it finds that the amusement device or amusement attraction for which it is issued is:
> 1. Being operated without the inspections required by this section. . . .

32. Here, the proof demonstrated that the amusements respondent operated on November 6, 1993, through February 10, 1996, on January 22, 1995, at Florida Bible Church, and on May 18, 1996, at Midway Ford, were operated without having undergone and passed the inspection required by section 616.242 for issuance of a permit.[10] The proof further demonstrated that the

amusement operated on May 18, 1996, at Midway Ford was operated without the reinspection required by section 616.242 when a stop operation order was in effect. Consequently, respondent has been shown to have operated without the inspections required by section 616.242 on each such occasion.

33. For the foregoing violations, the Department proposes an administrative fine of $500 per violation per day for a total fine of $71,500. Such fine is derived as follows: 136 violations based on the 136 separate occasions amusements were operated on November 6, 1993, through February 10, 1995; 5 violations based on the five amusements that were operated on January 22, 1995, at Florida Bible Church; and 2 violations based on the operation of the amusement on May 18, 1996, at Midway Ford, without having passed the inspection required for issuance of a permit and without the reinspection.

34. The penalty proposed by the Department is within the permissible range established by subsection 616.242(4)(e), and given the record in this case has not been shown to be arbitrary, capricious, or an abuse of the Department's discretion. See, Florida Real Estate Commission v. Webb, 367 So.2d 201 (Fla. 1978), and Lee v. Division of Florida Land Sales and Condominiums, 474 So.2d 282 (Fla. 5th DCA 1985). Notwithstanding, based on the considerations which follow, it is recommended that a penalty at less than the maximum allowed by

law be imposed.

35. With regard to the violations which occurred after August 9, 1995, following respondent's admitted knowledge of the requirements of law, an administrative fine of $500 per violation per day is appropriate. Those violations total 23 in number, and warrant an administrative fine of $11,500.

36. With regard to the remaining violations, which precede that date and total 120 in number, a fine of $100 per violation is more appropriate. Such assessment balances the Department's need to assure compliance and to deter others in the industry from similar activities, with the acceptance that, notwithstanding respondent's failure to familiarize itself with the law, every error does not warrant the extraction of the maximum penalty. Consequently, for these violations, an administrative fine of $12,000 is appropriate.

RECOMMENDATION

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

RECOMMENDED that a final order be rendered adopting the foregoing findings of fact and conclusions of law, and imposing an administrative fine against respondent in the sum of $23,500.

DONE AND ENTERED this 1st day of May, 1997, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of May, 1997.

ENDNOTES

1/ Respondent's exhibits 3, 4, 5, and 6 were offered as affidavits of inspection by Thomas Maxwell, P.E., of certain amusement devices or attractions owned by respondent in September 1993 (exhibit 3), September 1994 (exhibit 4), May 1995 (exhibit 5), and September and October 1995 (exhibit 6). Respondent's exhibit 5 does not, however, relate to respondent but to another entity (Carnival USA).

2/ Mr. Wallace Stevens is the president, chief operating officer and majority shareholder (90 percent) of respondent corporation. Although respondent was incorporated in approximately 1989, Mr. Stevens has been operating such business, apparently under a different form of ownership, for approximately 33 years. [Tr. pages 132 and 138.]

3/ Regarding the number of such events, the proof demonstrates that respondent typically conducts 20 to 30 such events a day on weekends, and, therefore, up to 60 inspections would be required each weekend for that company alone.

4/ Section 616.091(2), Florida Statutes (1991), was recodified at Section 616.0915, Florida Statutes, by Chapter 92-291, Section 91, Laws of Florida. Section 616.0915 was subsequently codified at section 616.242.

5/ Moreover, were the conclusion to the contrary, the state would still not be estopped from pursuing the violations. Austin v. Austin, 350 So.2d 102, 105 (Fla. 1st DCA 1977), ("Administrative officers of the state cannot estop the state through mistaken statements of the law."); and, Greenhut Construction Co., Inc. v. Henry A. Knott, Inc., 247 So.2d 517, 524 (Fla. 1st DCA 1971), ("Under no circumstances may the state be estopped by the unauthorized acts or representations of its officers"). Such proof might, however, be germane, if credited, to an assessment of the appropriate penalty to be assessed.

6/ See endnote 5. Moreover, operators of a regulated business, such as respondent, are charged with knowledge of the requirements, as well as the prohibitions, of the laws to which they are subject. See, Florida Board of Pharmacy v. Levin, 190 So.2d 768 (Fla. 1966), and Walden v. Department of Professional Regulation, 568 So.2d 975 (Fla. 3d DCA 1990).

7/ In reaching the foregoing conclusion, that post-July 1, 1992, there was no uncertainty in the Department regarding the requirement that all temporary amusement devices and attractions, whether destined for public or private events, must be permitted, the testimony of Thomas Maxwell, and the deposition testimony of Judy Sweeney, Peter Herzig, Sandra Phillips and Dean Bennett has not been overlooked. With regard to Mr. Maxwell and Mr. Bennett, it appears the source of their information was Mr. Stevens and not a reading of the law or contact with the Department. Moreover, Mr. Bennett, who was most similarly situated in terms of his business operations to respondent than the other operators, apparently had his equipment inspected and permitted through his insurance company, but did not have setup inspections for private events. [Respondent's exhibit 10, pages 13-16, 19 and 20.] Such conduct was consistent with the law. As for Ms. Sweeney, Mr. Herzig and Ms. Phillips, they were not similarly situated to respondent, could offer no specific instances of comments by Department employees post-July 1, 1992, that would create confusion, as suggested by respondent, and apparently never read the law. If they were confused or there was any "confusion in the industry" it resulted from ignorance or lack of inquiry, as the provisions of 616.242(24) are clear and unambiguous, and not from any representations of the Department or its employees.

8/ In respondent's proposed findings of fact, at paragraph 8, it suggests that "[o]n May 3, 1996, the Super Slide should not have been inspected by [Department inspectors]." Such finding is apparently proposed to support respondent's position, at hearing,

that the inspection was improper, therefore, the "red tag" was unauthorized and hence there could be no "red tag" violation for operating the equipment at Midway Ford. Given respondent's concession in its conclusions of law, it has apparently reevaluated its prior position. Indeed, given the provisions of subsection 616.242(5)(g) and (h), such position was unsound.

Respondent also suggests in its proposed findings of fact that all deficiencies discovered on the May 3, 1996, inspection had been repaired/corrected prior to the May 18, 1996, event at Midway Ford. The proof is to the contrary; however, it is not germane to the charges at issue.

9/ The full authority for the Department to impose sanctions, as established by subsection 616.242(4), is as follows:

> (e) The department shall revoke any permit issued under this chapter or impose an administrative fine of up to $500 per violation per day if it finds that the amusement device or amusement attraction for which it is issued is:
>
> 1. Being operated without the inspections required by this section;
>
> 2. Being operated without the insurance required by this section;
>
> 3. Being operated with a mechanical, structural, or electrical defect which presents a risk of serious injury to passengers; or
>
> 4. Being operated after the device or attraction has been involved in an accident resulting in a death or serious injury.
>
> (f) Any other violation of this section may result in a revocation of the permit or certificate to operate or both, or imposition of an administrative fine of up to $500 per violation per day, if written notice of noncompliance is served upon the owner specifying the violation and directing the owner to correct the violations within 30 days after receipt of the notice. If the owner and the department fail to agree that the violation referred to in this paragraph has in fact been corrected, the department shall give notice of and provide a hearing for the owner to determine whether compliance has in fact been met.

However, subsections 616.242(4)(e)2-4 and (f) are not pertinent, or were not shown to be pertinent, to the charges in this case.

10/ As heretofore noted, subsection 616.242(4) prohibits the operation of any temporary amusement device or attraction in the state without a "permit" issued by the Department. A prerequisite to the issuance of such permit is the requirement that the amusement undergo and pass an inspection. Sections 616.242(1)(e), (4)(d), (5), and (24)(a), Florida Statutes. Consequently, it cannot be subject to serious debate that the Legislature intended that inspection was required before any amusement could operate in the state. Under subsections 616.242(4)(e), it is the failure to undergo and pass such inspection that subjects the operator to penalties not, per se, the failure to secure a permit.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.