

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUNL GROUP, INC., and XLILR8ING)
ENTERPRISES, LLC,)
)
Petitioners,)
)
vs.) Case No. 07-0431
)
WEST COAST MOTORCYCLES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on March 8, 2007, in St. Petersburg, Florida.

APPEARANCES

For Petitioner SunL Group, Inc.:

No appearance

For Petitioner XLILR8ING Enterprises, LLC:

Thomas R. Malin, III
909 49th Street South
Gulfport, Florida 33707

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue is whether the Department of Highway Safety and Motor Vehicles should approve the establishment of a proposed dealership by SunL Group, Inc., in Gulfport, Florida.

PRELIMINARY STATEMENT

The Department of Highway Safety and Motor Vehicles (Department) published notice in the December 22, 2006, volume of the Florida Administrative Weekly that SunL Group, Inc. (SunL), intends to establish a dealership in Gulfport, Florida. The proposed dealer is XLILR8ING Enterprises, LLC d/b/a TRM Rides (TRM), and the vehicles to be sold by the dealership are "China Qingqi (QING), Taizhou Chunal (CHUA), American Lifan (CHOL), Shanghai Meitian (MEIT), Shanghai JMSTAR (JMST) motorcycles."

On January 18, 2007, the Department received a letter from West Coast Motorcycles (West Coast) protesting the establishment of the proposed dealership. On January 23, 2007, the Department referred the matter to the Division of Administrative Hearings (DOAH) for a hearing.

Only TRM appeared at the final hearing. TRM presented the testimony of Thomas R. Malin, III. No exhibits were offered into evidence.

The hearing was transcribed by a court reporter, but no transcript of the hearing was filed with DOAH. TRM waived the filing of a proposed recommended order.

FINDINGS OF FACT

1. TRM is in the business of selling motor scooters in Gulfport, which is in Pinellas County. TRM is owned by Thomas R. Malin, III.

2. TRM is currently an authorized dealer of scooters manufactured and/or imported by Carter Brothers and Tank Sports. Those scooters sell in the \$2,000 to \$3,000 price range.

3. TRM is seeking through this proceeding to become an authorized dealer of scooters imported by SunL.¹ Those scooters sell in the \$1,450 to \$1,995 price range.

4. No evidence was presented at the hearing regarding the location or products sold by West Coast, and there is no evidence that West Coast sells SunL scooters.

5. There are no dealers selling SunL scooters in the Pinellas County area, according to Mr. Malin.

6. West Coast was provided due notice of the date, time, and location of the final hearing in this case.

7. No representative of West Coast appeared at the final hearing.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 320.699, Florida Statutes (2006).²

9. West Coast's failure to appear at the final hearing could be considered a withdrawal of its protest, and the protest could be dismissed on that ground. Alternatively, as discussed below, the protest should be dismissed because West Coast failed to prove that it has standing to protest TRM's proposed dealership.

10. West Coast has the burden of proof on the issue of its standing. See generally Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981) (burden of proof is on the party asserting the affirmative of the issue).

11. Standing to protest the establishment of TRM's proposed dealership is governed by Section 320.642(3)(b), Florida Statutes. Pursuant to that statute, standing is limited to:

1. Any existing motor vehicle dealer or dealers of the same line-make have a licensed franchise location within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer; or

2. Any existing motor vehicle dealer or dealers of the same line-make can establish that during any 12-month period of the 36-month period preceding the filing of the licensee's application for the proposed dealership, such dealer or its predecessor made 25 percent of its retail sales of new motor vehicles to persons whose registered household addresses were located within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer; provided such existing

dealer is located in the same county or any county contiguous to the county where the additional or relocated dealer is proposed to be located.

12. Section 320.60(14), Florida Statutes, defines "[l]ine-make vehicles" to include "those motor vehicles which are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the manufacturer of same."

13. West Coast failed to prove its standing. There is no evidence that West Coast sells the same line-make vehicles as those at issue in this case and, to the contrary, Mr. Malin testified that there are no SunL scooter dealers in the Pinellas County area. Moreover, no evidence was presented regarding the location of West Coast in relation to TRM's proposed dealership or the percentage of sales made by West Coast in the relevant vicinity of TRM's proposed dealership.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department issue a final order dismissing West Coast's protest and approving TRM's proposed SunL dealership in Gulfport.

DONE AND ENTERED this 12th day of March, 2007, in
Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of March, 2007.

ENDNOTES

^{1/} The SunL scooters are considered "motorcycles" under Florida law because their engines exceed 50 cubic centimeters. See §§ 320.01(27) and (28), 320.27(1)(b), Fla. Stat. Motorcycles are included in the definition of "motor vehicle" for purposes of the Motor Vehicle Dealer's Act in Sections 320.60 through 320.70, Florida Statutes. See § 320.60(10), Florida Statutes. See also Forehand, Motor Vehicle Dealers and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace, 29 Fla. State U. L. Rev. 1057, 1066-67 (2002) (discussing the scope of the Motor Vehicle Dealer's Act as it relates to scooters).

^{2/} All statutory references are to the 2006 version of the Florida Statutes.

COPIES FURNISHED:

Fred O. Dickinson, III, Executive Director
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

Judson M. Chapman, General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

Michael J. Alderman, Esquire
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-432
2900 Apalachee Parkway
Tallahassee, Florida 32399-0635

Marion H. Hooper
West Coast Motorcycles
6814 46th Avenue North
St. Petersburg, Florida 33709-4706

Mei Zhou
SunL Group, Inc.
8551 Ester Boulevard
Irving, Texas 75063

Tom Malin
909 49th Street South
Gulfport, Florida 33707

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.