

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCOOTERS MANAGEMENT, LLC and)
GATOR MOTO, LLC,)
)
Petitioners,)
)
vs.) Case No. 09-1918
)
SWAMP CYCLE, LLC,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on October 27, 2009, in Gainesville, Florida.

APPEARANCES

For Petitioner: No appearance

For Respondent: Shawn Glasser
Swamp Cycles, LLC
633 Northwest 13th Street
Gainesville, Florida 32601

STATEMENT OF THE ISSUE

The issue is whether Petitioner's location for the sale of ZHNG motorcycles is lawful pursuant to Section 320.642, Florida Statutes.

PRELIMINARY STATEMENT

Scooters Management, LLC, of Houston, Texas, announced through publication in the Florida Administrative Weekly, that it intended to allow the establishment of Gator Moto, LLC, (Gator) as a dealership for the sale of motorcycles manufactured by Taizhou Zhongneng Motorcycle Co. Ltd. (ZHNG), in Alachua County, Florida. Swamp Cycle, LLC (Swamp) an existing ZHNG motorcycle dealer in Alachua County, Florida, timely protested the establishment of another dealership in Alachua County in a filing with the Florida Department of Highway Safety and Motor Vehicles (Department), on April 13, 2009.

The matter was forwarded to the Division of Administrative Hearings by the Department and was filed April 15, 2009. Pursuant to Subsection 320.699(2), Florida Statutes, 180 days must elapse prior to the scheduling of a hearing on these types of cases. Accordingly, the case was set for hearing on October 27, 2009, more than 180 days from the time of the objection. The case was heard as scheduled.

At the hearing, Swamp presented the testimony of its principal Shawn Glasser.

References to statutes are to Florida Statutes (2008) unless otherwise noted.

FINDINGS OF FACT

1. Swamp is an established, licensed dealer in the sale of ZHNG motorcycles. Its place of business is located at 633 Northwest 13th Street, Gainesville, Alachua County, Florida.

2. Gator sought to establish a dealership, also for the sale of ZHNG motorcycles, at 7065 Northwest 22nd Street, Suite A, Gainesville, Alachua County, Florida.

3. The distance between 633 Northwest 13th Street and 7065 Northwest 22nd Street, Gainesville, Alachua County, Florida, is substantially less than 20 miles.

4. Alachua County, Florida, has a population of less than 300,000 people, according to the latest population estimates of the University of Florida, Bureau of Economic and Business Research.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. (2009).

6. Swamp has standing to protest the establishment of a new dealership because Subsection 620.342(6), Florida Statutes, provides that:

(6) An existing franchised motor vehicle dealer or dealers shall have standing to protest a proposed additional or relocated motor vehicle dealer when the existing motor vehicle dealer or dealers have a franchise

agreement for the same line-make vehicle to be sold or serviced by the proposed additional or relocated motor vehicle dealer and are physically located so as to meet or satisfy any of the following requirements or conditions:

(a) If the proposed additional or relocated motor vehicle dealer is to be located in a county with a population of less than 300,000 according to the most recent data of the United States Census Bureau or the data of the Bureau of Economic and Business Research of the University of Florida:

1. The proposed additional or relocated motor vehicle dealer is to be located in the area designated or described as the area of responsibility, or such similarly designated area, including the entire area designated as a multiple-point area, in the franchise agreement or in any related document or commitment with the existing motor vehicle dealer or dealers of the same line-make as such agreement existed upon October 1, 1988;

2. The existing motor vehicle dealer or dealers of the same line-make have a licensed franchise location within a radius of 20 miles of the location of the proposed additional or relocated motor vehicle dealer; or

3. 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, the 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 20 miles of the location of the proposed additional or relocated motor vehicle dealer; provided the 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.

(b) The addition or relocation of a service-only dealership shall not be subject to protest if:

1. The applicant for the service-only dealership location is an existing motor vehicle dealer of the same line-make as the proposed additional or relocated service-only dealership;
2. There is no existing dealer of the same line-make closer than the applicant to the proposed location of the additional or relocated service-only dealership; and
3. The proposed location of the additional or relocated service-only dealership is at least 7 miles from all existing motor vehicle dealerships of the same line-make, other than motor vehicle dealerships owned by the applicant.

(c) In determining whether existing franchised motor vehicle dealers are providing adequate representations in the community or territory for the line-make in question in a protest of the proposed addition or relocation of a service-only dealership, the department may consider the elements set forth in paragraph (2)(b), provided:

1. With respect to subparagraph (2)(b)1., only the impact as it relates to service may be considered;
2. Subparagraph (2)(b)3. shall not be considered;
3. With respect to subparagraph (2)(b)9., only service facilities shall be considered; and
4. With respect to subparagraph (2)(b)11., only the volume of service business transacted shall be considered.

(d) If an application for a service-only dealership is granted, the department shall issue a license which permits only service, as defined in s. 320.60(16), and does not permit the selling or leasing of new motor vehicles, as defined in s. 320.60(15). If a service-only dealership subsequently seeks to sell new motor vehicles at its location, the notice and protest provisions of this section shall apply.

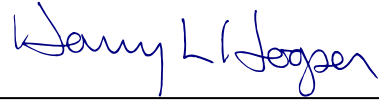
7. Subsection 320.642(2)(a), Florida Statutes, provides that once standing is established pursuant to Subsection 620.342(6), Florida Statutes, it is up to the applicant for a license to demonstrate inadequate representation of the particular make of motor vehicle in question. In this case, the applicant, Moto, failed to appear, and thus failed to demonstrate inadequate representation. Accordingly, Moto may not be licensed as a dealer for the sale of ZHNG motorcycles.

RECOMMENDATION

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

RECOMMENDED that the Department of Highway Safety and Motor Vehicles issue a final order disapproving the establishment of another ZHNG motorcycle dealership in Alachua County, Florida.

DONE AND ENTERED this 5th day of November, 2009, in
Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of November, 2009.

COPIES FURNISHED:

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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.