

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ZONGSHEN, INC., AND TROPICAL)
SCOOTERS, LLC,)
)
Petitioners,)
)
vs.) Case No. 09-3223
)
SCOOTER ESCAPES, LLC, d/b/a)
SCOOTER ESCAPES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 20, 2009, an administrative hearing in this case was held by video teleconference in Tallahassee and St. Petersburg, Florida, before William F. Quattlebaum, Administrative Law Judge (ALJ), Division of Administrative Hearings.

APPEARANCES

For Petitioner Zongshen, Inc.:

(No appearance)

For Petitioner Tropical Scooters, LLC:

Michele R. Stanley, Owner
11610 Seminole Boulevard
Largo, Florida 33778

For Respondent: Chris Densmore, Owner
1450 First Avenue, North
St. Petersburg, Florida 33705

STATEMENT OF THE ISSUE

The issue in the case is whether an application for a new point franchise motor vehicle dealership filed by Zongshen, Inc., and Tropical Scooters, LLC, should be approved.

PRELIMINARY STATEMENT

By notice published in the Florida Administrative Weekly (Volume 35, Number 22; June 5, 2009), the Department of Highway Safety and Motor Vehicles (Department) gave notice that Zongshen, Inc. (Zongshen), was seeking to establish a new point motor vehicle dealership in Largo, Pinellas County, Florida, with Tropical Scooters, LLC (Tropical), for the line-make "Zongshen Industrial Group (ZONG)." A challenge to the establishment of the dealership was filed with the Department by an existing motor vehicle dealership, Scooter Escapes, LLC (Respondent).

By letter dated June 16, 2009, the Department forwarded the challenge to the Division of Administrative Hearings. The previously-assigned ALJ issued an Initial Order on June 17, 2009, directing the parties to identify dates upon which the parties were available for hearing. No responses to the Initial Order were filed, but Tropical filed an Answer and moved to dismiss the protest, asserting that the proposed dealership was outside the area served by the Respondent and that the Respondent therefore lacked standing to maintain the protest.

The hearing was thereafter scheduled in accordance with Subsection 320.699(2), Florida Statutes (2009). The hearing was transferred to the undersigned ALJ on October 23, 2009.

Prior to the hearing, both parties filed documents related to the disputed issue of distance between the two locations. At the commencement of the hearing, the parties presented the documents and argument related to the issue. The documents were admitted into the record as composite exhibits of the respective parties and are referenced herein. Neither party presented witnesses at the hearing.

No transcript of the hearing was filed. No Proposed Recommended Orders were filed.

FINDINGS OF FACT

1. Tropical is seeking to establish a new point franchise motor vehicle dealership at 11610 Seminole Boulevard, Largo, in Pinellas County, Florida, for line-make ZONG.

2. The Respondent is an existing franchise dealer for ZONG-manufactured vehicles located at 1450 First Avenue, North, St. Petersburg, in Pinellas County, Florida.

3. The Respondent is located within 12.5 miles of the proposed new point motor vehicle dealership location.

4. The Respondent timely filed a protest of the proposed dealership.

5. The Petitioner presented no evidence that the Respondent is not providing adequate representation within the territory of the motor vehicles at issue in this proceeding.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

7. The Respondent has standing to challenge the application for the new dealership pursuant to Subsection 320.642(3)(b)1., Florida Statutes (2008), which provides as follows:

(3) 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:

* * *

(b) If the proposed additional or relocated motor vehicle dealer is to be located in a county with a population of more 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. 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. . . .

8. Tropical asserted that the measurement between the Respondent's location and the proposed dealership is greater than 12.5 miles and suggested that the Respondent's protest should be dismissed. In support of the argument, Tropical submitted several maps at the commencement of the hearing obtained from various internet mapping sources, showing an assortment of driving routes between the two locations, all of which exceeded 12.5 miles.

9. Section 320.642, Florida Statutes (2008), does not provide any direction as to the manner in which the distance between an existing and a proposed dealership should be measured.

10. The Florida Supreme Court has held that, absent statutory direction to the contrary, such distances are measured as a straight line between the closest points of the relevant parcels. See State ex rel. Fronton Exhibition Co. v. Stein, 144 Fla. 387 (Fla. 1940), involving violation of a statute prohibiting location of a jai alai fronton within 1,000 feet of a public school; and State ex rel. Tourist Attractions, Inc. v. Lechner, 191 So. 2d 555, 557 (Fla. 1966), involving measurement of distance between harness racing tracks.

11. The evidence established that Respondent's location is less than 12.5 miles from the proposed new dealership as measured by a straight line between the two locations.

12. Subsection 320.642(2)(a), Florida Statutes (2008), provides as follows:

An application for a motor vehicle dealer license in any community or territory shall be denied when:

1. A timely protest is filed by a presently existing franchised motor vehicle dealer with standing to protest as defined in subsection (3); and

2. The licensee fails to show that the existing franchised dealer or dealers who register new motor vehicle retail sales or retail leases of the same line-make in the community or territory of the proposed dealership are not providing adequate representation of such line-make motor vehicles in such community or territory. The burden of proof in establishing inadequate representation shall be on the licensee. (Emphasis supplied)

13. The licensees in this case are Petitioners Zongshen and Tropical. See §§ 320.60(8) and 320.61, Fla. Stat. (2008).

14. As the licensees, the Petitioners have the burden of establishing compliance with applicable statutory requirements by a preponderance of the evidence presented at the hearing. See § 320.642(2)(a)2., Fla. Stat. (2008). The Petitioners have failed to establish that the Respondent is not providing adequate representation of the ZONG line-make.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order, denying the Petitioners' application for establishment of the new point franchise motor vehicle dealer franchise.

DONE AND ENTERED this 19th day of November, 2009, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th 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.