

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EL SOL TRADING, INC. AND ECO)
GREEN MACHINE, LLC,)
)
Petitioners,)
)
vs.) Case No. 10-7996
)
SEMINOLE SCOOTERS, INC.)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2010) before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on November 9, 2010, by video teleconference at sites in St. Petersburg and Tallahassee, Florida.

APPEARANCES

For Petitioner El Sol Trading, Inc:

No Appearance

For Petitioner Eco Green Machine, LLC:

Lindsey Park
Eco Green Machine, LLC
7000 Park Boulevard, Suite A
Pinellas Park, Florida 33781

For Respondent Seminole Scooters, Inc.:

David Dubin
Seminole Scooters, Inc.
6239 Park Boulevard
Pinellas Park, Florida 33781

STATEMENT OF THE ISSUE

Whether El Sol Trading, Inc. (El Sol) should be permitted, over Respondent's protest, to establish an additional dealership for the sale of motorcycles manufactured by Taizhou Zhongneng Motorcycle Co., Ltd. (ZHNG Motorcycles) at 7000 Park Boulevard, Pinellas Park, Florida.

PRELIMINARY STATEMENT

On August 6, 2010, a notice was published in the Florida Administrative Weekly that El Sol intended "to allow the establishment of Eco Green Machine LLC, d/b/a Eco Green Machine, LLC, as a dealership for the sale of motorcycles manufactured by Taizhou Zhongneng Motorcycle Co., Ltd. at 7000 Park Boulevard, Pinellas Park, Florida" On August 18, 2010, Respondent filed with the Department of Highway Safety and Motor Vehicles (Department) a letter protesting the establishment of this additional dealership. On August 20, 2010, the matter was referred to DOAH to "be heard by an Administrative Law Judge."

The final hearing was then scheduled for November 9, 2010. Petitioners and Respondent were provided with written notice of

the scheduled hearing in accordance with Section 120.569(2)(b), Florida Statutes (2010).

As noted above, the final hearing was held, as scheduled, on November 9, 2010. Petitioner Eco Green Machine LLC, d/b/a Eco Green Machine and Respondent appeared at the hearing through their respective representatives. Petitioner El Sol, on the other hand, made no appearance.

One witness, David Dubin, Respondent's secretary and business manager, testified at the hearing. In addition to Mr. Dubin's testimony, one exhibit (Respondent's Exhibit 1) was offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced on the record that, if the parties desired to file proposed recommended orders, they were required to do so no later than November 15, 2010. Later that same day, the undersigned issued a written order advising that the deadline for the filing of proposed recommended orders was November 15, 2010 (as had been announced at the final hearing).

The proposed recommended order filing deadline passed without any party having filed a proposed recommended order.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is an existing franchised dealer of ZHNG Motorcycles.

2. Its dealership is located at 6239 Park Boulevard, Pinellas Park, Florida.

3. The driving distance between Respondent's dealership and the location of the new dealership El Sol proposes to establish at 7000 Park Boulevard, Pinellas Park, Florida, is roughly one mile.

CONCLUSIONS OF LAW

4. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes (2010).

5. El Sol is seeking the Department's approval of a proposal to establish a new dealership for the sale of ZHNG Motorcycles at 7000 Park Boulevard, Pinellas Park, Florida. It is seeking such approval pursuant to Section 320.642, Florida Statutes (2010).

6. Subsection (2) (a) of Section 320.642, Florida Statutes (2010), provides that such approval shall be denied if:

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.

7. Pursuant to Subsection (3)(b)1. of Section 320.642, Florida Statutes (2010), "if the proposed additional . . . motor vehicle dealer is to be located in a county with a population of more than 300,000," such as in the instant case, "[a]ny existing motor vehicle dealer or dealers of the same line-make hav[ing] a licensed franchise location within a radius of 12.5 miles of the location of the proposed additional . . . motor vehicle dealer" has standing to file a "protest," within the meaning of Subsection (2)(a)1. of the statute.

8. To be timely, the protest "must be filed within 30 days following the date of publication of the notice [of the proposed new dealership] in the Florida Administrative Weekly." § 320.642(1), Fla. Stat. (2010).

9. With respect to the proposed new dealership in the instant case (notice of which was given in the August 6, 2010, publication of Florida Administrative Weekly), Respondent is an "existing motor vehicle dealer" who has standing to file a protest.

10. By timely filing its protest (on August 18, 2010) and establishing (through its evidentiary presentation at hearing)

its standing to file this protest, Respondent effectively imposed upon El Sol, by operation of the provisions of Subsection (2)(a)2. of Section 320.642, Florida Statutes (2010), the burden of proving there is "inadequate representation" in the community or territory of the proposed new dealership.

11. Having presented no evidence at the final hearing, El Sol failed to meet this burden of proof.

12. The approval that El Sol is seeking in the instant case must therefore be denied.

RECOMMENDATION

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

RECOMMENDED that the Department of Highway Safety and Motor Vehicles issue a Final Order denying El Sol approval to establish a new ZHNG Motorcycle dealership at 7000 Park Boulevard, Pinellas Park, Florida.

DONE AND ENTERED this 18th day of November, 2010, in
Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of November, 2010.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTION

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.