STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FERMAN MOTOR CAR COMPANY, INC., d/b/a FERMAN CHEVROLET AND GORDON STEWART CHEVROLET, INC., d/b/a GORDON CHEVROLET,	)	
Petitioners,	)	
vs.	)	Case No. 11-3389
GENERAL MOTORS, LLC AND DANIELS CHEVROLET, INC., d/b/a DANIELS CHEVROLET,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, on October 18 and 19, 2011, a formal hearing in this cause was held in Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Petitioners: John W. Forehand, Esquire
R. Craig Spickard, Esquire
Kurkin Forehand Brandes, LLP
800 North Calhoun Street, Suite 1B
Tallahassee, Florida 32303

For Respondents: J. Andrew Bertron, Esquire
Nelson, Mullins, Riley & Scarborough, LLP
3600 Maclay Boulevard South, Suite 202
Tallahassee, Florida 32312

Eric Scott Adams, Esquire
Shutts & Bowen, LLP
4301 West Boy Scout Boulevard, Suite 300
Tampa, Florida 33607

STATEMENT OF THE ISSUES

Whether Daniels Chevrolet, Inc., is a successor dealer within the meaning of section 320.642, Florida Statutes (2010),[1/] and whether Daniels Chevrolet, Inc., and General Motors, LLC, are in compliance with the requirements of section 320.645.

PRELIMINARY STATEMENT

In April 2011, Respondent, General Motors, LLC (GM), informed the Department of Highway Safety and Motor Vehicles, Division of Motor Vehicles (Department), that Respondent, Daniels Chevrolet, Inc. (Daniels Chevrolet), had been appointed as successor dealer to University Chevrolet, Inc. (University Chevrolet), and that the appointment of the said dealer was exempt from protest pursuant to section 320.642(5)(a)1. Within days of GM contacting the Department, Petitioners, Ferman Chevrolet and Gordon Chevrolet (Petitioners), filed notice (protest notice) with the Department advising that they wished to protest the appointment of Daniels Chevrolet as a successor to University Chevrolet. Subsequent to the filing of the protest notice by Petitioners, Daniels Chevrolet submitted to the Department an application for license to operate as a motor vehicle dealer at the location previously occupied by University Chevrolet. Because of the protest notice filed by Petitioners, the Department placed Daniels Chevrolet's pending application in abeyance and referred the matter to the Division of

Administrative Hearings for a disputed fact hearing and the issuance of a recommended order.

A Notice of Hearing was issued setting the case for formal hearing on October 18 and 19, 2011. At the hearing, Petitioners presented the testimony of Albert Parziale, Preston Farrior, and Gordon Stewart. Petitioners' Exhibits 15, 19, and 57 were admitted into evidence. Respondents presented the testimony of Nalini Vinayak, Garrett Dvorsky, William J. Reineck, Piermichele Robazza, and Roland C. Daniels. Respondents' Exhibits 1, 3, 6, 7, 10 through 15, 23, 24, 30, 32 through 38, 40 through 42, 44 through 46, 48 through 50, 52 through 54, 56, 58, 60 through 62, 62a, and 77 were admitted into evidence.

A four-volume Transcript of the proceeding was filed with the Division of Administrative Hearings on November 3, 2011. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioners and Respondents stipulate to the following facts as set forth in this paragraph:

(A) Petitioners, Ferman Chevrolet and Gordon Chevrolet, are licensed motor vehicle dealers in Tampa, Florida, and are authorized to sell and service Chevrolet motor vehicles.

(B) GM is a licensed manufacturer and distributor of Chevrolet motor vehicles. GM owns 81.9 percent of Daniels Chevrolet.

(C) Roland C. Daniels (Mr. Daniels) is an African-American and owns 18.1 percent of Daniels Chevrolet.

(D) University Chevrolet was previously licensed as a motor vehicle dealer at 11300 North Florida Avenue, Tampa, Florida (Florida Avenue Location), and was authorized to sell and service Chevrolet motor vehicles.

(E) On April 19, 2010, University Chevrolet filed articles of dissolution with the Florida Department of State, stating "the date of dissolution: April 6, 2010."

(F) On May 12, 2010, the Dealer Sales and Service agreements between University Chevrolet and GM were terminated.

(G) On June 30, 2010, University Chevrolet submitted a Voluntary Relinquishment of License form to the Department.

(H) On July 1, 2010, the Department entered a Final Order cancelling University Chevrolet's motor vehicle dealer license, effective July 2, 2011.

(I) On April 27, 2011, GM sent a letter to the Department giving notice that GM was approving the appointment of Daniels Chevrolet, Inc., d/b/a Summit Chevrolet, as a Chevrolet dealer at the Florida Avenue Location and that the dealership was exempt from notice and protest pursuant to section 320.642(5)(a)1.

(J) On May 4, 2011, counsel for Petitioners sent a letter to the Department asserting, among other things, that the establishment of Daniels Chevrolet was not exempt and that Petitioners were entitled to notice and an opportunity to protest. The Department treated the May 4, 2011, letter as a request for administrative hearing and forwarded the letter to the Division of Administrative Hearings, where the matter was assigned DOAH Case Nos. 11-2273 and 11-2274. On June 22, 2011, Administrative Law Judge William Quattlebaum entered an Order Granting Motion to Relinquish Jurisdiction and Closing Files on the basis that there was no dispute as to any material facts.

(K) On May 24, 2011, GM sent a letter to the Department substantially identical to its

April 27, 2011, letter, but changing the proposed "d/b/a" to "Daniels Chevrolet."

(L) On May 24, 2011, the Department accepted the license application filed by Daniels Chevrolet.

(M) On June 1, 2011, the Department determined that Daniels Chevrolet's license application was complete.

(N) On June 27, 2011, Petitioners filed an Amended Petition with the Department, which was forwarded to the Division of Administrative Hearings and is the present petition in this case.

2. University Chevrolet, during all times relevant hereto, operated as a Florida limited liability company.

3. By correspondence dated May 24, 2010, University Chevrolet was advised by GM that as of that date, all of the conditions described in the wind-down agreement between GM and University Chevrolet had been satisfied.

4. As part of the process associated with University Chevrolet's petition to voluntarily relinquish its motor vehicle dealer's license, the dealership represented to the Department that: (1) all electronic filing system transactions were finalized at the tag office; (2) there were no outstanding consumer complaints; (3) there were no outstanding sales transactions; (4) there were no pending title and registration

applications pending at the dealership or tag office; (5) there were no unsatisfied vehicle liens on trade-in vehicles; and (6) there was no remaining vehicle inventory as of June 21, 2010 (six critical tasks). Had University Chevrolet not completed these six critical tasks to the satisfaction of the Department, its petition seeking to relinquish its license would have been denied.

5. On May 13, 2011, Mr. Daniels, on behalf of Daniels Chevrolet, attempted to file with the Department an application for a license as a motor vehicle dealer. Acceptance of the application was initially refused by the Department, in part, because of the May 4, 2011, protest letter filed with the Department by Petitioners' counsel.

6. Prior to May 5, 2011, the date upon which Mr. Daniels received a copy of Petitioners' May 4, 2011, protest letter, Daniels Chevrolet hired a general sales manager and service director to assist with dealership operations. Additionally, in anticipation of opening for business by June 15, 2011, Daniels Chevrolet, prior to May 5, 2011, interviewed and selected a general contractor. The basic plan for getting Daniels Chevrolet operational by June 15, 2011, included engaging in cosmetic remodeling activities that could be completed within the timeframe of about a month. The operational plan provided that the portions of the dealership that customers would

interact with the most and that did not require the issuance of any building permits (e.g., painting), would be front-loaded in the remodeling process so as to accommodate the June 15, 2011, targeted opening date.

7. The initial cost to capitalize the operation of Daniels Chevrolet is $2,761,800.00. In order to fund the capital requirements, Mr. Daniels has invested $500,000.00 in Daniels Chevrolet, which represents an initial ownership interest of 18.1 percent. Motors Holding, an entity within GM, has invested $2,261,800.00, which represents initial ownership interests in Daniels Chevrolet of 81.9 percent. For his initial investment, Mr. Daniels received 5,000 shares of common stock from Daniels Chevrolet. For its initial investment, Motors Holding received 22,618 shares of preferred stock from Daniels Chevrolet.

8. As to the issue of stock dividends and the redemption by Mr. Daniels of the preferred stock held by Motors Holding, the terms of the agreement between the parties provide as follows:

> Each quarter, [Daniels Chevrolet] will pay out dividends and redeem preferred stock if earnings are available for that purpose (that is, if earnings are not needed to make up prior losses). Generally, the amount available to pay dividends will be one half of [Daniels Chevrolet's] net after-tax earnings for the quarter. [Daniels Chevrolet] will pay dividends only on its preferred stock, and the amount of the dividend will be a pro rata share of the

> amount available for dividends. All remaining after-tax earnings are available to redeem shares of preferred stock at a price of $100 per share, increasing [Mr. Daniel's] ownership of [Daniels Chevrolet]. There are no dividends paid on the common stock.
>
> When [Daniels Chevrolet] has used its operating earnings to reduce the preferred stock held by Motors Holding to 20% of the originally issued preferred shares, it is required to redeem the remaining preferred shares at a price of $100 per share, using any available source of funds. At this time, the Motors Holding representatives will resign from the board of directors and the company will be owned solely by [Mr. Daniels].

9. The agreement between Mr. Daniels and GM also allows for the expedited purchase of the dealership pursuant to the following contractual terms:

> Notwithstanding any other terms or conditions of the Investment Agreements or any terms or conditions in the GM memorandum dated August 12, 2004, and March 1, 2005, respecting early buyout parameters, Operator [Mr. Daniels] is not precluded from an expedited purchase of the preferred shares using a monetary source other than profits from the dealership's operation. Operator may purchase GM's shares of preferred stock of the Dealer Company [Daniels Chevrolet] using any legal source of funds at any time within ten (10) years after the date that the dealership opens for business with the public, regardless of the percentage of preferred stock that has been redeemed.

10. The agreement between Mr. Daniels and GM also provides as follows:

> Candidate/Operator understands that the performance and profitability of the dealership will be affected by not only the Operator's performance, but also by factors outside the control of the dealership, including without limitation, general and local economic conditions, industry auto sales, General Motors' auto sales, and any and all types of risks affecting businesses of the relevant size and type.
>
> As with any entrepreneurial activity, Candidate/Operator's and GM's investments in the proposed business forecasted here are at risk. Candidate/Operator acknowledges and understands the potential that he or she could lose some or all of Candidate/Operator's investment if he or she invests in an unprofitable dealership.
>
> Candidate/Operator acknowledges and agrees that GM shall have no obligation to provide compensation, payment or reimbursement for any losses, and Candidate/Operator shall have no right to reimbursement for any losses.

11. The revenue projections for Daniels Chevrolet show that during the first year of operations, the dealership is estimating that it will sustain a loss, before deducting for any bonus and taxes, of $130,800.00. In the second year of operations, Daniels Chevrolet is projecting, before deducting for any bonus and taxes, that it will earn a net profit of $110,370.00. In operational years three through ten, Daniels Chevrolet is projecting an average annual net profit, before deducting for any bonus and taxes, of $1,294,050.00. Based upon

these projections, the preferred stock owned by Motors Holding will be redeemed in approximately 6.25 years.

12. Prior to joining the automobile industry, Mr. Daniels worked in a managerial capacity for the Sears Corporation for approximately 17 years. At one point during his career with the Sears Corporation, Mr. Daniels became a national buyer for women's apparel. As a national buyer, Mr. Daniels was responsible for forecasting the women's apparel needs for some 750 stores throughout the United States of America. After leaving the Sears Corporation, Mr. Daniels became involved with the automobile industry in 1985, when he entered GM's dealer development program. After successfully completing the dealer development program, Mr. Daniels, in 1987, became part owner of an automobile dealership in Colorado. The Colorado dealership ceased operations sometime around the latter part of 1988. In 1991, Mr. Daniels relocated to South Florida where for a period of about five years, he worked as general manager for two Saturn dealerships. In his capacity as general manager, Mr. Daniels was involved in managing vehicle inventory issues and developing forecasts regarding future vehicle sales. Subsequently, Mr. Daniels left South Florida and moved to Gainesville, Florida, where he owned and operated a Saturn dealership for more than ten years. When GM ceased manufacturing the Saturn line of vehicles, Mr. Daniels switched to selling Mitsubishi

vehicles until such time as he sold his dealership around March 2011. Mr. Daniels, through training and experience, is skilled at making forecasts regarding the future sales of automobiles.

13. In support of its revenue forecast, Daniels Chevrolet, relying upon the experience of Mr. Daniels and GM, projects that during its first year of operations, it will sell 500 new vehicles. For the second year of operations, Daniels Chevrolet is projecting 600 new vehicle sales. For the remaining relevant operational period, Daniels Chevrolet is projecting that it will average 850 new vehicle sales per year. The number of vehicles sold by Daniels Chevrolet will not reduce the number of new vehicles allocated to Petitioners by GM.

14. What is generically referred to as "additions and deductions" provides another source from which Daniels Chevrolet expects to generate income. Income from additions and deductions can be derived from sources such as insurance recoveries, factory incentive money, and tax adjustments. During its first year of operations, Daniels Chevrolet is projecting $400,000.00 in income from additions and deductions. In its second year of operations, Daniels Chevrolet is projecting that the amount of income derived from additions and deductions will be $851,000.00. Commencing with its third year of operations, Daniels Chevrolet is projecting that its annual

average for income derived from additions and deductions will be $1,099,000.00.

15. For the period January 2001 through November 2009, dealers that occupied the Florida Avenue Location had annual new vehicle sales, not including fleet vehicles, as follows:

Year 2001 – 890 vehicles

Year 2002 – 863 vehicles

Year 2003 – 921 vehicles

Year 2004 – 915 vehicles

Year 2005 – 977 vehicles

Year 2006 – 698 vehicles

Year 2007 – 674 vehicles

Year 2008 – 367 vehicles

1/2009 - 11/2009 – 348 vehicles

16. Mr. Dennis Slater, from 2005 through approximately April 2010, oversaw business operations and served as either chief financial officer or executive manager for University Chevrolet. During this period, Mr. Slater became very familiar with University Chevrolet's day-to-day business operations, as well as the conditions of the market in which University Chevrolet competed. According to Mr. Slater, for the period October 2006 through December 2008, the dealer/operator in charge of University Chevrolet encountered significant self-imposed challenges that compromised the dealer/operator's

ability to successfully manage dealership operations. Those challenges eventually lead to Mr. Slater taking over the day-to-day operation of University Chevrolet in January 2009.

17. After having been affiliated with University Chevrolet for approximately five years, and having worked in the auto industry for more than 35 years, Mr. Slater submitted a proposal to GM to operate the Florida Avenue Location as a successor to University Chevrolet. As a part of his proposal, Mr. Slater estimated that during his first year of operations he could sell 916 new vehicles. During his second year of operations, Mr. Slater projected that he could sell 1,119 new vehicles. Additionally, Mr. Slater projected that during his first year of operations, he would generate $718,998.00 in income from additions and deductions.

18. Albert E. Parziale, CPA, CFF, CFE, Petitioners' expert, testified that in his opinion, Daniels Chevrolet would not be able to achieve profits sufficient to allow the dealership to obtain full ownership of the company within ten years of commencing operations. In reaching his conclusion, Mr. Parziale looked at new vehicle sales data in the aggregate for the Florida Avenue Location for the years 2001 through 2009. Mr. Parziale then "averaged" the data and determined that the Florida Avenue Location annually averaged 740 new vehicle sales during the period in question. Mr. Parziale also analyzed the

new vehicle sales data for a narrower period of time (2006 through 2009) and found that the Florida Avenue Location during these later years annually averaged 521 new vehicle sales.[2/]

19. Mr. Parziale also noted that during the broader period between 2001 and 2009, previous operators at the Florida Avenue Location averaged $1,194,717 in income from additions and deductions, but it would be unreasonable for Respondent Daniels Chevrolet to rely on this income source to meet its buy-out obligation to Motors Holding because of the erratic nature of income flow derived from this source.[3/] Currently, the average Chevrolet dealer in the Southeastern region of the United States, which includes Tampa, Florida, receives 1.1 million annually in net income from additions and deductions and the average Chevrolet dealer in the Tampa market receives $914,000.00 annually in net income from additions and deductions. Mr. Parziale acknowledges that it would not be unreasonable for Respondents to project that Daniels Chevrolet will average $1,099,000.00 in income from additions and deductions for the next ten years.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2011).

A. Burden of Proof

21. At the commencement of the final hearing in this matter, the parties advised that there was disagreement as to which party bears the ultimate burden of persuasion and the initial burden of going forward with the evidence. By stipulation, the parties agreed that they would argue the issue in their respective proposed recommended orders and, in order to facilitate the orderly presentation of evidence during the final hearing, Respondent would go first with the presentation of its evidence. As set forth in the Amended Petition, there are two primary issues in the case. The first issue concerns section 320.642(5) and the second issue concerns section 320.645. Both sections are silent as to which party carries the burden of proof.

22. When a licensee proposes to establish an additional motor vehicle dealership or relocate an existing dealership "to a location within a community or territory where the same line-make vehicle is presently represented by a franchised motor vehicle dealer or dealers," the licensee is required to give written notice of its intention to the Department so that existing motor vehicle dealers with standing may, if they so desire, protest the establishment or relocation of the dealership.[4/] § 320.642. Section 320.642(5), however,

establishes an exemption from the general protest process, and it is upon this exemption that Respondents rely.

23. Section 320.642(5)(a) provides as follows:

> The opening or reopening of the same or a successor motor vehicle dealer within 12 months is not considered an additional motor vehicle dealer subject to protest within the meaning of this section, if:
>
> 1. The opening or reopening is within the same or an adjacent county and is within 2 miles of the former motor vehicle dealer location;
>
> 2. There is no dealer within 25 miles of the proposed location or the proposed location is further from each existing dealer of the same line-make than the prior location is from each dealer of the same line-make within 25 miles of the new location;
>
> 3. The opening or reopening is within 6 miles of the prior location and, if any existing motor vehicle dealer of the same line-make is located within 15 miles of the former location, the proposed location is no closer to any existing dealer of the same line-make within 15 miles of the proposed location; or
>
> 4. The opening or reopening is within 6 miles of the prior location and, if all existing motor vehicle dealers of the same line-make are beyond 15 miles of the former location, the proposed location is further than 15 miles from any existing motor vehicle dealer of the same line-make.
>
> (b) Any other such opening or reopening shall constitute an additional motor vehicle dealer within the meaning of this section.

> (c) If a motor vehicle dealer has been opened or reopened pursuant to this subsection, the licensee may not propose a motor vehicle dealer of the same line-make to be located within 4 miles of the previous location of such dealer for 2 years after the date the relocated dealership opens.

24. According to the Amended Petition, subparagraphs 1 through 4 of paragraph (a), and paragraph (c) of section 320.642(5), are not at issue in the instant case. What is at issue are the predicate requirements set forth in paragraph (a), subsection 5, of section 320.642, to wit: whether the planned opening of Daniels Chevrolet was scheduled to occur within 12 months of the closing of University Chevrolet.[5/]

25. The general rule is that "the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977). Also, as a general rule, "an applicant for a license or permit carries the 'ultimate burden of persuasion' of entitlement through all proceedings, of whatever nature, until such time as final action has been taken by the agency." Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

26. On or about May 13, 2011, Daniels Chevrolet, pursuant to section 320.27, submitted to the Department a preliminary application for licensure as a motor vehicle dealer. Daniels Chevrolet's application was supplemented by correspondence from

GM to the Department wherein GM advised that Daniels Chevrolet "is exempt from protest under Section 320.642(5)(a)1., Florida Statutes."[6/] Clearly, GM and Daniels Chevrolet are affirmatively asserting entitlement to the cited exemption as part and parcel of the preliminary application for licensure as a motor vehicle dealer. In accordance with Balino and J.W.C. Co., Respondents, therefore, have the burden of proof as to this issue.

27. With respect to section 320.645, Petitioners allege the following:

> Upon information and belief, there is no reasonable basis to expect that dealership profits will be sufficient to permit the independent investor in Daniels to purchase full ownership of the dealership within 10 years. Additionally, upon information and belief, the independent investor in Daniels has not made a significant investment in the dealership.

Amended Petition, ¶ 25.

28. Section 320.645(1) provides as follows:

> No licensee, distributor, manufacturer, or agent of a manufacturer or distributor, or any parent, subsidiary, common entity, or officer or representative of the licensee shall own or operate, either directly or indirectly, a motor vehicle dealership in this state for the sale or service of motor vehicles which have been or are offered for sale under a franchise agreement with a motor vehicle dealer in this state. A licensee may not be issued a motor vehicle dealer license pursuant to s. 320.27. However, no such licensee will be deemed to be in violation of this section:

(a) When operating a motor vehicle dealership for a temporary period, not to exceed 1 year, during the transition from one owner of the motor vehicle dealership to another;

(b) When operating a motor vehicle dealership temporarily for a reasonable period for the exclusive purpose of broadening the diversity of its dealer body and enhancing opportunities for qualified persons who are part of a group that has historically been underrepresented in its dealer body, or for other qualified persons who the licensee deems lack the resources to purchase or capitalize the dealership outright, in a bona fide relationship with an independent person, other than a licensee or its agent or affiliate, who has made a significant investment that is subject to loss in the dealership within the dealership's first year of operation and who can reasonably expect to acquire full ownership of the dealership on reasonable terms and conditions; or

(c) If the department determines, after a hearing on the matter, pursuant to chapter 120, at the request of any person, that there is no independent person available in the community or territory to own and operate the motor vehicle dealership in a manner consistent with the public interest.

In any such case, the licensee must continue to make the motor vehicle dealership available for sale to an independent person at a fair and reasonable price. Approval of the sale of such a motor vehicle dealership to a proposed motor vehicle dealer shall not be unreasonably withheld.

29. In Bayview Buick-GM Truck, Inc. v. General Motors Co., 597 So. 2d 887, 889-90 (Fla. 1st DCA 1992), the court noted,

with respect to section 320.645(1), that "[t]he first two exceptions apply to the temporary operation--not ownership--of a dealership, and the third exception applies only when there is no independent person available to own the dealership."[7/] In the instant case, the thrust of Petitioners' challenge, as set forth in the Amended Petition, focuses on paragraph (b) of section 320.645(1).

30. Because paragraph (b) of section 320.645(1) addresses the temporary operation of a dealership by a licensee, like GM, it is reasonable to conclude that the Legislature intended for the provisions governing the temporary operation of a dealership to be self-executing and requiring intervention by the Department only in instances where a manufacturer temporarily operates a dealership outside of the parameters established by the statute.[8/] This determination is supported by paragraph (c) of section 320.645(1), which, unlike the other paragraphs found in subsection (1), expressly provides for a chapter 120 hearing in instances where there is no independent person available to "permanently own" a dealership. By expressly providing for a chapter 120 hearing in one paragraph while not expressly providing for a similar process in other paragraphs found in the same subsection, it is reasonable to conclude that the Legislature intended for issues related to the temporary operation of a dealership to be treated differently from those

related to permanent ownership. Accordingly, in light of the statutory framework in which section 320.645(1)(b) is found, the undersigned concludes that Petitioners, by alleging that GM and Daniels Chevrolet are not in compliance with the requirements of section 320.645(1)(b), are asserting the affirmative. See generally Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 835 (Fla. 1993)("While the instant case involves a development permit, we find that the statutory framework . . . distinguishes this case from J.W.C." and the Department, as the party asserting the affirmative, has the ultimate burden of persuasion and the initial burden of going forward.). Therefore, in accordance with Balino, Petitioners have the ultimate burden of persuasion with respect to issues related to section 320.645(1) and the temporary operation of the subject dealership.

B. Section 320.642

31. Section 320.642(5)(a) provides, in relevant part, that the opening of a successor motor vehicle dealer within 12 months is not considered an additional motor vehicle dealer subject to protest if certain enumerated conditions are satisfied. Florida Administrative Code Rule 15C-7.004(4)(a), as it relates to the instant matter, clarifies that the successor motor vehicle dealer must submit "an application for a license to permit the opening of . . . a successor dealer within 12 months of the license revocation or surrender" by the previous franchised

motor vehicle dealer. University Chevrolet is the previous franchised motor vehicle dealer.

32. On April 19, 2010, University Chevrolet filed Articles of Dissolution for a limited liability company (Articles) with the Florida Department of State, Division of Corporations. The Articles provide that April 6, 2010, is the date of dissolution for University Chevrolet. On June 30, 2010, University Chevrolet filed with the Department, a petition of voluntary relinquishment of license. On July 1, 2010, the Department issued a Final Order wherein it granted University Chevrolet's petition for voluntary relinquishment.

33. Petitioners contend that because April 6, 2010, is the date upon which University Chevrolet ceased to exist as a corporate entity, this date, as a matter of law, should, therefore, be the start date for calculating the 12-month period provided for in section 320.642. Petitioners' argument in this regard is unfounded in light of section 608.4431, Florida Statutes, which provides, in part, that "[a] dissolved limited liability company continues its existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including . . . [d]oing every other act necessary to wind up and liquidate its business and affairs." (emphasis added).

34. In order to determine what constitutes appropriate "wind-up" activity, consideration must be given to the context in which the purported wind-up activity occurs. In the context of the 12-month period provided for in section 320.642(5)(a) and rule 15C-7.004(4)(a), as applied in the instant case, there are six wind-up activities that are critical to the analysis. As previously noted, University Chevrolet, in support of its petition to voluntarily relinquish its motor vehicle license, represented to the Department that it completed the required six critical tasks. University Chevrolet was engaged in wind-up activity as it completed each of the six critical tasks, and it was also engaged in wind-up activity when it filed its petition for relinquishment with the Department on June 30, 2010. The Department's Final Order of July 1, 2010, granting University's petition for relinquishment was the last "wind-up" activity associated with the dissolution of University Chevrolet as contemplated by sections 320.642(5)(a) and 608.4431. Accordingly, July 1, 2010, is the start date for purposes of calculating the 12-month time frame provided for in section 320.642(5)(a).

35. On or about May 13, 2011, Daniels Chevrolet attempted to file with the Department a preliminary application for licensure as a motor vehicle dealer. Acceptance of Daniels Chevrolet's application was initially refused by the Department

because of a preemptive letter submitted on or about May 4, 2011, to the Department by Petitioners' counsel. However, on or about May 26, 2011, the Department, upon further consideration of the matter, accepted for filing Daniels Chevrolet's preliminary application, but stayed processing of the same in light of Petitioners' instant challenge.

36. Petitioners argue that because Daniels Chevrolet was not open for business within the statutory 12-month window, it should not be considered a successor dealer. It is disingenuous of Petitioners to suggest that Daniels Chevrolet failed to open for business within 12 months of the closing of University Chevrolet when the uncontroverted evidence shows that the only reason why Daniels Chevrolet did not open for business by June 30, 2011, was because of Petitioners' instant challenge. As was the case in Young, 625 So. 2d at 835, Petitioners' challenge in the instant case had the practical effect of staying the issuance of Daniels Chevrolet's motor vehicle license, thereby, preventing the dealership from opening its business within 12 months of the closing of University Chevrolet. Petitioners cannot complain about the non-occurrence of an event that was occasioned as a direct result of its actions.

37. Respondents have carried their burden of proving that Daniels Chevrolet, as contemplated by section 320.642(5)(a), is

a successor motor vehicle dealer. Accordingly, the planned opening of Daniels Chevrolet is not subject to protest within the meaning of section 320.642.

C. Sections 320.699, 320.645, and Standing

38. Section 320.699, provides as follows:

> (1) A motor vehicle dealer, or person with entitlements to or in a motor vehicle dealer, who is directly and adversely affected by the action or conduct of an applicant or licensee which is alleged to be in violation of any provision of ss. 320.60-320.70, may seek a declaration and adjudication of its rights with respect to the alleged action or conduct of the applicant or licensee by:
>
> (a) Filing with the department a request for a proceeding and an administrative hearing which conforms substantially with the requirements of ss. 120.569 and 120.57; or
>
> (b) Filing with the department a written objection or notice of protest pursuant to s. 320.642.
>
> (2) If a written objection or notice of protest is filed with the department under paragraph (1)(b), a hearing shall be held not sooner than 180 days nor later than 240 days from the date of filing of the first objection or notice of protest, unless the time is extended by the administrative law judge for good cause shown. This subsection shall govern the schedule of hearings in lieu of any other provision of law with respect to administrative hearings conducted by the Department of Highway Safety and Motor Vehicles or the Division of Administrative Hearings, including performance standards of state agencies,

> which may be included in current and future appropriations acts. (emphasis added).

39. In Braman Cadillac, Inc. v. Department of Highway Safety and Motor Vehicle, 584 So. 2d 1047, 1050-1051 (Fla. 1st DCA 1991), the court held that section 320.699 provides "standing to any directly and adversely affected party who can assert a violation of Sections 320.60-320.70 which is substantive in nature."[9/]

40. Because Daniels Chevrolet is a successor dealer whose planned dealership is not subject to protest, it can reasonably be said that Daniels Chevrolet is in essence "stepping into the competitive shoes" of its predecessor, University Chevrolet. By Daniels Chevrolet donning the competitive shoes previously worn by University Chevrolet, Petitioners, by having to compete with Daniels Chevrolet for customers, would be in no worse position than they were when they had to compete with University Chevrolet. Consequently, issues related to "competition dynamics" are not necessarily material to a determination regarding whether Petitioners will be directly and adversely affected by Respondents' alleged non-compliance with section 320.645.

41. In reviewing the Amended Petition, it is alleged, with respect to section 320.645, that "there is no reasonable basis to expect that dealership profits will be sufficient to permit

the independent investor in Daniels to purchase full ownership of the dealership within 10 years" and that "the independent investor in Daniels has not made a significant investment in the dealership." (Amended Petition, ¶ 25). Assuming that these allegations concern matters that are substantive in nature, Petitioners have neither alleged, nor have they offered any proof as to how Daniels Chevrolet's purported inability to purchase the dealership in ten years, or the alleged failure to make a significant investment in the dealership, will "directly and adversely" affect their business interests. Petitioners suggest that if Respondents are allowed to open the dealership in question, then the opening of the same will impact Petitioners' ability to secure new vehicles from GM. Contrary to Petitioners' assertion, new vehicle allocations from GM to Petitioners will not be diminished as a result of the establishment of Daniels Chevrolet as a successor dealership. This assertion by Petitioners is pure speculation and is insufficient to establish a direct and adverse affect on Petitioners' business operations.[10/] Also, if Petitioners' doomsday forecasts regarding Daniels Chevrolet's inability to meet its revenue projections prove accurate, then Daniels Chevrolet will be out of business in a relatively short period of time, and Petitioners will arguably benefit from the demise of Daniels Chevrolet by having one less competitor to contend

with. This hardly seems like an "adverse" impact on Petitioners' business interests.

42. Petitioners have failed to prove that Respondents alleged conduct "directly and adversely" affects their business interests and, therefore, Petitioners lack standing to challenge the proposed temporary operation of Daniels Chevrolet by Respondents.

43. Notwithstanding the above, even if Petitioners were able to successfully overcome the issue of standing and otherwise demonstrate entitlement to a hearing pursuant to chapter 120, their cause would nevertheless fail because the evidence does not establish that Respondents are in non-compliance with the requirements of section 320.645. Petitioners contend that GM has not "entered into a bona fide relationship with an independent person with respect to Daniels[.]" Section 320.645(2)(a) provides that an "'[i]ndependent person' is a person who is not an officer, director, or employee of the licensee." Petitioners offered no evidence to support their allegations that the contractual relationship between Mr. Daniels and GM is not bona fide or that Mr. Daniels is an officer, director, or employee of GM.[11/] Accordingly, Petitioners have not satisfied their burden of proof as to this issue.

44. Next, Petitioners contend that Mr. Daniels has not "made a significant investment in Daniels [Chevrolet] that is subject to loss within the dealership's first year of operation." Section 320.645(2)(c) provides that a "'[s]ignificant investment' means a reasonable amount, considering the reasonable capital requirements of the dealership, acquired and obtained from sources other than the licensee or any of its affiliates and not encumbered by the person's interest in the dealership." Mr. Daniels has committed $500,000.00 of his personal resources towards the operation of Daniels Chevrolet. This amount represents 18.1 percent of the capitalization requirements for Daniels Chevrolet. This investment of 18.1 percent by Mr. Daniels towards the capital requirements of Daniels Chevrolet represents a significant investment. Additionally, Mr. Daniels' agreement with GM clearly provides that his entire initial investment is subject to loss during Daniel Chevrolet's first year of operation.

45. Petitioners also contend that "profits from the dealership [cannot] be reasonably expected to be sufficient to allow full ownership of Daniels [Chevrolet] by the independent person within a reasonable time period not to exceed ten years[.]" Petitioners' expert testified that for years 2001 to 2009, University Chevrolet sold an average of 740 vehicles.

According to the expert, Respondents' projection, showing annual vehicle sales averaging 850 units, is unreasonable because between years 2001 and 2009, none of the other dealers that occupied the North Florida Avenue Location performed at this level. However, a review of yearly sales data from University Chevrolet shows the following: in 2001, the dealer sold 890 units; in 2002, it sold 863 units; in 2003, it sold 921 units; in 2004, it sold 915 units; and in 2005, it sold 977 units. Though past performance is not an indicator of future success, it is certainly within the realm of reasonable possibility that Daniels Chevrolet can produce a yearly average of 850 new vehicles sold for eight of the next ten years. If Daniels Chevrolet meets or exceeds its projections then, through the use of profits, it will be able to secure full ownership of the dealership in approximately six and a-half years. Obviously if it fails to hit its mark, then it will take longer. However, it cannot be said that Respondents' projections are so far afield as to be deemed unreasonable within the meaning of section 320.645(1)(b).

46. Finally, Petitioners contend that "[Mr. Daniels is] excluded from expediting the purchase of full ownership of Daniels [Chevrolet] using a monetary source other than profits from the dealership's operations[.]" Contrary to Petitioners' allegation, the agreement between Roland C. Daniels and General

Motors, LLC, expressly provides that Mr. Daniels "is not precluded from an expedited purchase of the preferred [stock] shares using a monetary source other than profits from the dealership's operation."

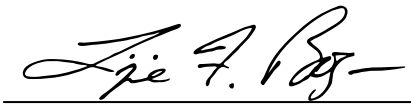
47. The greater weight of the competent and substantial evidence establishes that the terms and conditions of the contract between Mr. Daniels, GM, and Daniels Chevrolet, comply with the requirements of section 320.645.

RECOMMENDATION

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

RECOMMENDED that the Department of Highway Safety and Motor Vehicles, Division of Motor Vehicles, enter a final order granting Respondent, Daniels Chevrolet's, licensure application to operate as a successor motor vehicle dealer at 11300 North Florida Avenue, Tampa, Florida, and denying the relief sought by Petitioners, Ferman Chevrolet and Gordon Chevrolet, in their Amended Petition.

DONE AND ENTERED this 1st day of December, 2011, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of December, 2011.

ENDNOTES

[1/] All references to Florida Statutes are to the 2010 edition, unless otherwise indicated.

[2/] The average for this period is somewhat skewed by the fact that effective May 2009, University Chevrolet was no longer able to buy cars from GM and, accordingly, annual sales data for year 2009 only covers 11 months.

[3/] The high amount of $2,187,741.00 was received by University Chevrolet in additions and deductions in the year 2001. Conversely, in year 2008, University Chevrolet received only $562,182.00 in additions and deductions.

[4/] Section 320.60 defines a licensee as "any person licensed or required to be licensed under section 320.61." Section 320.61 establishes certain licensing requirements for a "manufacturer, factory branch, distributor, or importer." Therefore, unless otherwise indicated, a licensee, for purposes of section 320.645, is a manufacturer, factory branch, distributor, or importer.

[5/] Rule 15C-7.004(4)(a) provides that:

> If the license of an existing franchised motor vehicle dealer is revoked for any reason, or surrendered, an application for a license to permit the reopening of the same dealer or a successor dealer within twelve months of the license revocation or surrender shall not be considered the establishment of an additional dealership if one of the conditions set forth in Section 320.642(5), Florida Statutes, is met by the proposed dealer.

[6/] Rule 15C-7.004(4)(b) requires that in the application for successor dealership, "[t]he dealer shall indicate which provision of section 320.642(5), Florida Statutes, if any, it contends exempts the proposed location from consideration as an additional dealership." Additionally, rule 15C-7.004(4)(c) requires that "[a]n application for a dealership intended as a successor dealership shall be accompanied by a letter from the licensee clearly stating that the applicant is intended as a successor dealership and shall identify the prior dealership to be replaced."

[7/] Section 320.645 has been amended subsequent to 1991, the year that Bayview Buick-GM Truck was decided. The amendments do not, however, affect the instant analysis.

[8/] Nalini Vinayak is the Department's administrator for the dealer license section. Ms. Vinayak testified, with respect to section 320.645, that when a manufacturer, like GM, asserts that it is involved in the temporary operation of a dealership, the Department accepts the manufacturer's representation as true, and does not investigate the accuracy of the manufacturer's representations.

[9/] Generally, if there is an alleged substantive violation of sections 320.60 through 320.70, section 320.699, subject to standing, allows for either "an administrative hearing which conforms substantially with the requirements of section 120.569 and 120.57" or, after "filing with the department a written objection or notice of protest," a challenge proceeding pursuant to section 320.642. As applied to the instant case, it may reasonably be suggested that section 320.699 creates a presumption in favor of a chapter 120 hearing. However, when considering the language found in section 320.645(1)(c), which

deals with the permanent ownership of a dealership and provides expressly for chapter 120 review, and comparing it to language found in 320.645(1)(a) and (b), which make no specific reference to chapter 120, a question remains as to whether the Legislature intended for entities other than temporary dealership operators to have access to a chapter 120 hearing when the provisions of section 320.645(1)(a) and (b) are at issue. Inclusio unius est exclusion alterius is the Latin maxim which instructs that the inclusion of one thing implies the exclusion of another. Smith v. State, 982 So. 2d 69, 70 (Fla. 1st DCA 2008)(citing Rivera v. Singletary, 707 So. 2d 326 (Fla. 1988)). Furthermore, "[i]t is axiomatic that statutes must be read with other related statutes and other related portions of the same statute." State v. Negrin, 306 So. 2d 606, 607 (Fla. 1st DCA 1975). In light of the fact that Petitioners have failed to show that they have standing to proceed under section 320.645, and that a disputed fact hearing was actually held in the instant matter, the undersigned has determined that this issue need not be addressed in the instant proceeding. See The City of Delray Beach, Fla. v. Dharma Prop., Inc., 809 So. 2d 35 (Fla. 4th DCA 2002)(A court lacks subject matter jurisdiction once a determination is made that a party lacks standing to proceed.).

[10/] Section 320.64(18) provides a mechanism for challenging issues related to the equitable allocation of new vehicles by an automobile manufacturer.

[11/] Chapter 320 does not define the phrase "bona fide." According to Black's Law Dictionary, the phrase means "in or with good faith; honestly, openly, and sincerely; without deceit or fraud." Black's Law Dictionary, pg. 160 (5th ed. 1979)

COPIES FURNISHED:

Sandra C. Lambert, Director
Division of Motor Vehicles
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room B-439
2900 Apalachee Parkway
Tallahassee, Florida 32399-0635

Steve Hurm, General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

J. Andrew Bertron, Esquire
Nelson, Mullins, Riley,
and Scarborough, LLP
3600 Maclay Boulevard South, Suite 202
Tallahassee, Florida 32312

John W. Forehand, Esquire
R. Craig Spickard, Esquire
Kurkin Forehand Brandes, LLP
800 North Calhoun Street, Suite 1B
Tallahassee, Florida 32303

James K. Fisher, Esquire
Department of Highway Safety
and Motor Vehicles
2900 Apalachee Parkway, Room A430
Mail Station 61
Tallahassee, Florida 32399

Eric Scott Adams, Esquire
Shutts & Bowen, LLP
4301 West Boy Scout Boulevard, Suite 300
Tampa, Florida 33607

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.