

**STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
DIVISION OF SAFETY AND BUSINESS HEARINGS**

LUXURY CARS OF BAYSIDE INC.,
Dealer/ Franchisee,

v.

BMW OF NORTH AMERICA
Franchisor.

Case No. FMD2020-02
Administrative Law Judge:
Maria Sotolongo

Pursuant to Article 17-A of the New York State Vehicle and Traffic Law, the Franchised Motor Vehicle Dealer Act (hereafter "FMVDA"), Luxury Cars of Bayside Inc., d/b/a BMW of Bayside ("Bayside") seeks to challenge the franchisor BMW of North America's (hereinafter "BMW") refusal to approve Bayside's relocation request in a notice dated November 18, 2020 (the "Rejection Notice"). This case was begun in accordance with Vehicle and Traffic Law Section 471-a, and 15 N.Y.C.R.R., Part 127.13.

Section 463(2)(dd) of the FMVDA prohibits franchisors from unreasonably rejecting dealer relocations to sites within a dealer's "relevant market area" (or "RMA"), as that term is defined in the FMVDA. BMW's Rejection Notice states three grounds for rejecting Bayside's request (1) the proposed relocation site is outside of Bayside's contractual PMA (Primary Market Area) (2) encroaches into the market area that for many years, has been assigned to, and effectively covered by an adjacent BMW dealer, Rallye BMW ("Rallye") (3) removes Bayside from its existing location, leaving consumers with less convenient access to BMW products and services.

In its Request for Adjudicatory Proceeding that initiated this case, Bayside claims that BMW's rejection is unreasonable: the prohibitions of the FMVDA govern "notwithstanding the terms of any franchise contract" [FMVDA§ 463(2)]; that Bayside is not within Rallye's RMA as defined by the FMVDA §462 (15)(a); BMW rejected the proposed relocation in order to favor Rallye at Bayside's expense: consumers would benefit from the

relocation since the new location is proximate to the current location of Bayside' service facility; is not significantly further away from the current Bayside location (2.8 air miles for the New Car Showroom; 3.8 air miles for the used car showroom) and would provide ample parking and enable customers and employees to socially distance.

BMW was represented by Caleb J. Schillinger, William N. Berkowitz and Alison K. Eggers of Seyfarth Shaw LLP. Bayside was represented by Russell P. McRory and Taniel E. Anderson, David Yearwood and Daisy Sexton of Arent Fox, LLP.

The witnesses for BMW included: Thomas Shanley, Regional Vice President, BMW Eastern Region; Jay Lytle, Analytical Services Director at Urban Science Applications, Inc; and Ray Costello, General Manager of Rallye Lexus.

The witnesses who testified for Bayside are: Douglas Foss, General Manager of Bayside BMW; Todd Berko, partner, Bel Air Partners; Dina Burns, Vice President of the Burns Motor Company; Ted Stockton, Vice President and Director for The Fontana Group, Inc.

The hearing to address these issues was held via the WEBEX teleconferencing Platform at the NYS Department of Motor Vehicles, Safety Hearings Bureau at the Garden City location on April 12, April 13, and April 14 of 2021. BMW's Exhibits 1 through 47 and Bayside's Exhibits 1-36, as well as all cross exhibits were received and marked into evidence during the hearing.

FINDINGS OF FACT

Bayside is a New York Corporation and a licensed and authorized BMW dealer with facilities in Queens and Nassau County, with its principal place of business at 247-21 Northern Boulevard, Douglaston NY 11362. Bayside is a "franchised motor vehicle dealer" as defined in the FMVDA (alternatively, "Dealer Act"), § 462(7). BMW is a limited liability company organized and existing under the laws of the State of New Jersey with its principal

place of business in Woodcliff Lake, New Jersey. BMW is a "Franchisor" under FMVDA §462 (8).

Petitioner Bayside currently operates under lease from at least three widely separated facilities; the new car sales location at 247-21 Northern Boulevard in Bayside; the used car facility at 214-27 Northern Boulevard and parts and service at 266 E. Shore Road in Great Neck. There is also a pre-display prep and storage center on 73rd Street for new and used vehicles. The Queens showroom locations are not within easy walking distance of each other, nor is it a simple matter to drive back and forth between facilities in this highly congested area of Queens with heavy traffic volume all along Northern Boulevard. Parking is a scarce commodity here, forcing prospective customers to either circle around hoping to find a spot or double park and risk a parking ticket. Bayside Center Director Dina Burns testified that their more than 120 employees carpool in and park at various satellite lots; from there, the employees must shuttle into the two sales facilities or the prep center. General Manager for Bayside, Doug Foss described a daily logistical nightmare in having to jockey around inventory between their lots. The situation is even worse at their present used car facility; the police precinct located opposite the showroom is a no-parking zone reserved for police impoundment where often badly mangled wrecks are prominently displayed. The sales facilities themselves are cramped, outdated and inadequate for the proper demonstration of the numerous different models manufactured by BMW.

In contrast, Bayside's service facility is state-of-the art, spacious and relatively new. Significantly, BMW approved the relocation of Bayside's service facility from Bayside, Queens to its current location which is in Great Neck in Nassau county. The service facility sits on property owned by the Burns family; it is located 2.5 miles to the east from the current New Car Showroom. BMW approved the relocation request submitted for the service facility after completion of a market study—notwithstanding that the distance involved is very close to the proposed showroom relocation.

Dina Burns, Center Director of Bayside testified how her family had been searching for over 12 years without success for a more suitable sales location with an intent towards ownership, with greater freedom to expand, redesign and renovate when necessary. Recently, Bayside located a nearly ideal lot in Manhasset, 2.8 miles east with enough space for a glittering new sales facility—in close proximity to their service center—featuring plenty of parking for customers and employees. A LIRR train station is within a short walking distance for added convenience and accessibility.

Competitors are clustered together in that area along Northern Boulevard in contrast to the current facility which stands alone—including competitors owned by the Rallye Group— creating greater opportunity for conquest sales. T 190:7-18. Bayside's customers located in Queens and Great Neck (Nassau County) tend to travel eastward towards the Americana Mall in Manhasset for shopping, healthcare and dining. T 61; 1-11, See also, Exhibits R-32, R-33 showing a general eastward pattern for BMW shoppers for both Bayside and Rallye BMW.

BMW, as franchisor, promulgates showroom and facility appearance standards for their dealers and incentivizes compliance with the CORA standard:

- The current sales facility for Bayside does not meet CORA standards.
- The dealer was granted an extension to comply with CORA; a construction letter of intent (LOI) concerning the building of a brand-new car showroom at Bayside's current location concedes that relocation may be inevitable due to the lack of suitable real estate and zoning regulations. Ex P Cross G.
- Non-compliant dealers may have incentive program payouts (AVP) withheld and placed in escrow until the facilities are compliant. AVP payouts are forfeited if the facility continues to be non-compliant. Ex R-08.

Such measures pose a financial hardship to Bayside according to witness Douglas Foss: "Without AVP, the dealership couldn't exist—it couldn't make any money—it would be a hole in the ground." T 131: 22-24.

The Burns family proposes to invest 14 million dollars in the proposed new facility, located at 1285 Northern Boulevard in Manhasset. Right now, the petitioner is paying carrying costs for the parcel while the transaction is pending pursuant to a "gentleman's agreement."

In disregard of the benefits of relocation as stated by petitioner, BMW opposes the proposed relocation. BMW markets and distributes new passenger cars and light trucks as well as other related products in the U.S under the "BMW" brand name through a nationwide network of independently owned and operated dealers. To join this network and become an authorized BMW dealer, the dealer must enter into a Center Agreement with BMW. Bayside's Center Agreement was first executed in 1992 and has been subsequently renewed, including most recently in January 2020. See Petitioner Ex A (Jan. 2020 Center Agreement). Under its Center Agreement each dealer (including Bayside) agrees to represent a PMA (Primary Market Area)¹ assigned to it by BMW; BMW may unilaterally adjust the PMA "at any time" in the best exercise of its best business judgment. The Center Agreement reads "Center (the dealer) agrees that it has no right or interest in any primary market area."

In this case, Bayside proposes to move just outside its PMA, into the PMA now currently assigned to Rallye BMW. Vice President for BMW Tom Shanley described the proposal to relocate into a neighboring dealer's PMA as "unprecedented" and "detrimental to Rallye BMW's market opportunity." Furthermore, the proposed location moves Bayside away from its own customer base, to the long-term detriment of BMW NA and its

¹ The assignment of a PMA gives the dealer certain marketing and advertising rights within the PMA. In turn, the dealer agrees to properly service customers and promote the sale of BMW products within its PMA

customers. When asked why no market study was done to determine objectively whether the relocation was detrimental or not, he stated that each location stands on its own T p 335 Mr. Shandy explained while "2.8 miles in the scheme of things doesn't seem like it's very far", that a lot of Bayside's customers come from points west, and to remove a BMW dealer from Queens into Nassau would leave a large gap between Manhattan in through Queens. T 309: 24-25, T 310:1-18. He testified that when he was notified of Bayside's intent to relocate, he contacted the owner of the Rallye group, Julia Terian, in order to gauge her reaction before responding to the request. Julia Terian told him essentially that she objected to the move and would fight it. T 307:23-24, 308:1-4. Mr. Shanley defended the decision to allow Rallye to keep the Manhasset PMA when it moved southeast in 2007 from its previous location in Roslyn to Westbury, a distance of 4.7 miles from its previous location.

Jay Lytle, Analytical Services Director of Urban Science, testified as an expert for BMW. He stated that he was employed to evaluate the impact of the proposed relocation by Bayside. Based upon various market studies and computer-generated methodologies, Mr. Lytle concluded that the optimal location for Bayside is considerably further west since most registered sales come from the west. T 381: 18-20. Mr. Lytle also pointed out that the dominant dealer in the Manhasset area is Rallye BMW by a ratio of two to one, reflecting Rallye's twenty-year history within this area and significant investments into their customer base, despite the fact that Rallye BMW is further away from the Manhasset area than is Bayside.² Mr. Lytle pointed out that an "unusual shopping pattern" indicates that BMW customers in the Manhasset zip code prefer traveling a greater distance southeast into Rallye BMW's Westbury showroom. T 418:10-13,

BMW fixes PMA for each dealer based upon driving distance but also consumer shopping behavior. Lytle explained that since convenience matters to consumers, it is

² Ex R-17 "Dominant Dealer Map"

important that dealers be located in close proximity. Once Bayside relocates further away, consumers may turn to BMW's competitors who are closer in distance. As an example, Lytle pointed out that a consumer travelling westward from Douglaston Queens (location of the current Bayside showroom) would have to drive past two Audi dealerships³ before reaching the proposed Manhasset location. T 390: 24-25, 391:1. Lytle insisted that the optimal location would still be to the west of Bayside's current location even if BMW opened a new add-point in Long Island City—a project currently under consideration.⁴ When asked if there were suitable properties in the area that would offer adequate parking and be suitable for a CORA compliant facility, Mr. Lytle suggested that other dealers have opened in that area to the west or "slightly east." T 466:1-3.

Despite being one of the stated reasons for denying the relocation request, Mr. Lytle did not analyze the projected impact of the move on Rallye BMW. When questioned, Lytle replied that it was implied--that Rallye would lose a geographic advantage in simply having Bayside move closer to Rallye. He elaborated that he felt that the main issue was the impact on consumers and the brand; a "lost opportunity" analysis was not performed as is usually done in other relocation cases. T 446:1-3

Mr. Lytle was asked during cross examination, to explain how he derived the calculations used for the dealer dominance map (Ex R-18) used to support the decision to deny relocation and to keep the Manhasset PMA with Rallye. He admitted that he did not make any adjustments to the map based on the practice of brokering which can skew the dealer's numbers.⁵ Douglas Foss, manager for Bayside testified earlier that brokering is a large factor in sales in the boroughs of New York City. However, Mr. Lytle responded by

³ Only Beiner Audi is located on Northern Boulevard; the second Audi dealership is located on College Point Boulevard and not visible to consumers travelling along Northern Boulevard.

⁴ Once the new Long Island City add-point is in place, a number of zip codes on Bayside's western border will be re-assigned to the new facility. Ex P-25.

stating that he determined that brokering was not an issue; his penetration analysis showed that in comparing sales by each dealership, sales tend to drop the further away from the dealership's assigned territory. Nevertheless, it was pointed out during cross-examination that brokered sales do occur within a dealer's assigned area, which Mr. Lytle did not dispute. Moreover, Mr. Lytle clarified that no adjustment was made for the seven weeks that Bayside had to shut down its operations for COVID-19; petitioner is located within New York City where more drastic shutdown measures were instituted during 2020 as compared to neighboring Nassau County, where Rallye BMW is located.

Ray Costello, current manager of Rallye Lexus and general sales manager of Rallye BMW from September 2018 until January 2021 described the metropolitan area network of BMW dealerships known as Market 12. The network includes Brooklyn-Queens as well as Nassau-Suffolk. He stated that it is a very competitive market with a "lot of brokering from New Jersey into the market." T 492:25, T 493:1. Mr. Costello elaborated that Bayside was a sleeper up until a few years ago and started to sell more cars. In recent years, he noted that Bayside seems to keep moving further east and added "they started in Bayside, went to Douglaston, opened up a service department in Great Neck and now they want to move to Manhasset, which is where Rallye started." T at 493:20-22. During direct, he was asked if he thought that customers would simply start shopping at Bayside instead of Rallye, Mr. Costello said not necessarily but "if you had a flat tire, where would you go? I mean, there little things along the way that would be kind of—that would make it easier for them to steal your customer from you. You know sometimes convenience becomes more important than anything else." T 519:18-25, T 520: 1

Mr. Costello expressed concerns that the salespeople at Bayside are not well-groomed sufficiently to adequately address the needs of the "Manhasset, Garden City

⁵ *Alfredo's Foreign Cars v. FCA US, LLC., Case No FMD2019-01* (NYSDMV Nov 29, 2019) (Zulkoski, W.) p. 6, indicating that brokering is a widespread practice in the New York metropolitan area.

clientele" T 521: 3-20. He further opined that Queens customers would not travel over the Nassau border to shop for cars as the communities of Manhasset, Garden City and Port Washington "is kind of like a line in the sand...Queens is on the other side. T at 523:2-5 Mr. Costello suggested that Bayside exercise its "air rights"; build up multiple levels for more floor space and "dig down for storage." He also stated that he was unaware of zoning regulations in that part of Queens that limit buildings to 35 feet in height. T at p 524:8-14, T 540:19-25, T 541:1-5. When it was pointed out that the proposed relocation would move Bayside alongside Rallye Acura and Rallye Mercedes-Benz, Mr. Costello lamented that "they bought a dealership in Queens—why are they trying to open up in Manhasset? T at 545:18-21.

Ted Stockton of the Fontana Group—expert witness for Bayside— testified in rebuttal to BMW's witnesses, in particular that of Mr. Lytle. In his opinion, BMW unreasonably withheld approval for the relocation in largely based upon faulty analysis, manipulated data, and result-oriented outcomes. First, the reason cited by BMW to justify placing the Manhasset PMA within Rallye despite Rallye's own 4.7 mile march to the east, is contrary to BMW's standard practice to use objective criteria—mainly proximity, unless there are natural barriers. Instead the stated reason was an "unusual shopping pattern," where Manhasset customers are alleged to prefer shopping at least five miles away at Rallye Westbury.⁶ Also, factors attributable to dealer operations (prevalence of sales) are not the general practice. Remarkably, other zip codes within Bayside's PMA show adjoining dealers as prevailing in terms of sales. (Ex R-44).

In addition to not conducting an analysis of the projected impact of Bayside's move on Rallye BMW, one chart, labeled Impact Assessment Detail (Ex R-43) shows projected

⁶ BMW insists that the customers within the Queens area will find it inconvenient to travel east to Manhasset, which is approximately half the distance from Manhasset to Rallye BMW and along the same road (Northern Boulevard) as the current facility. T at 418:10-13. Irrespective, both sides agreed that general shopping patterns are to the east.

sales by Bayside but keeping Bayside in its current Douglaston location. In essence, this chart shows Bayside drawing customers differently from the same location with presumably different operations and calculating how many sales would have occurred. T at 578:9-16. In another exhibit (Ex R-44), prepared by Mr. Lytle, labeled Impact Assessment Summary, the exhibit facially purports to assess the impact on Rallye but instead merely imputes the characteristics of Rallye BMW onto Bayside on both locations. A plainly doubtful conclusion is reached in the summary: it shows Bayside losing sales at the new location in a brand-new showroom. T 580: 11-20.⁷ Mr. Stockton determined that this value was skewed by the greater population density of the Douglaston area compared to the Manhasset location. T 581:2-6

Mr. Stockton also explained that at least one of respondent's exhibits— in particular, Ex R-36— is flawed by a "baked in bias," where both Rallye and Bayside are graphically broken out separately but only Rally is aggregated back into the average, bringing down Bayside in comparison:

Q: So, in this green bar average Mr. Lytle decided to add Rallye but not add Bayside?

A: Yes, you can do one or the other. You can have the average include both, or if you are going to break them out, it should include neither, but including one and not the other in the average is unsound. T 588; 17-23.

The most significant departure from the standard analysis done by Urban Science for dealer relocations is the lack of an impact analysis. Mr. Stockton pointed out that when BMW supported a relocation in a Florida case⁸, an incremental registrations analysis was performed. When asked if Urban Sciences typically performs such an analysis, Mr. Stockton replied "Typically may not even be a strong enough word. Yes—they do. T 596:17-18.

⁷ Generally, consumers prefer a new showroom. *Bowser Cadillac LLC v. General Motors LLC*, Docket No 0359-60 2012 (PA State Board of Vehicle Manufacturers, Dealers and Salespersons) at 31.

⁸ *Braman Motors Inc., et al v. BMW of North America LLC* 1:17-CV-23360 DPG

Finally, Mr. Stockton pointed out that every relocation involves leaving some of the customer base behind, while moving closer to a new set of customers.

It is inherent in any relocation in a contested market that there are spatial changes. If a dealer moves, it's going to become closer to some customers and some dealers and farther away from others. There is going to be impact from a relocation....that would always apply, and it would always facilitate the denial if that were the desired outcome. T 257: 15-23.

DISCUSSION

§463 (2): Unfair business practices by franchisors

It shall be unlawful for any franchisor, notwithstanding the terms of any franchise agreement:

dd) to unreasonably prevent or refuse to approve the relocation of a dealership to another site within that dealership's relevant market area.

According to §462 (15)(a) of the FMVDA, the relevant market area is defined as a six-mile radius around the intended site of the relocated dealer.

Here, petitioner seeks to relocate to another location 2.8 miles east, well within its relevant market area (RMA), while remaining more than 7 miles distance from Rallye BMW. Petitioner timely notified the franchisor, BMW North America, with prior written notice on September 23, 2020 (Ex P1) as required by 463(2) dd. On November 18, 2020, BMW denied the request (Ex P2). Subsequently, petitioner filed an action with the NYS Department of Motor Vehicles (hereinafter, the Department) with a demand to find that BMW's approval was unreasonably withheld, and the issuance of an order approving Bayside's relocation to the proposed site.

The Franchised Motor Vehicle Dealer Act (the FMVDA or Dealer Act) §462.8-a requires honesty-in-fact and the observation of reasonable commercial standards of fair dealing in the trade. Alfredo's Foreign Cars, supra. While "reasonableness" is not

specifically defined with regard to approval of new location, the overarching good faith requirement provides some guidance in determining whether BMW unreasonably denied permission for Bayside to move to a location 2.8 miles away (driving distance) described by the petitioner as “superior.”

The first of three reasons stated by BMW is that the new location is outside Bayside’s PMA, which is the dealership’s contractually assigned area of responsibility. Testimony during the hearing established that the criteria for assignment of a PMA should be “objective and defensible in court⁹” and accordingly, properly based primarily on geographic distance. However, in this instance the Manhasset PMA was based on the alleged discernment of an “unusual shopping pattern” where shoppers in the Manhasset PMA prefer to travel the substantially longer distance to Rallye BMW in Westbury. Rallye BMW retained the Manhasset PMA despite its own move in 2007, 4.7 miles to the east—more than the distance contemplated by Bayside.¹⁰ Moreover, the terms of the franchise contract provide that BMW can adjust or change “at any time” a dealer’s PMA in accordance with BMW’s best business judgment based on the facts and circumstances at the time. Center agreement further states that “the dealer has no right to any assigned territory.” (Ex P-3) These unilateral contractual terms indicate the potential for territory to be arbitrarily assigned, which has been found to be unlawful under the FMVDA. Beck Chevrolet Co., Inc v. General Motors LLC, 27 N.Y.3d 379 (2016)

BMW’s response is that the Section 463 preamble, “notwithstanding the terms of any franchise contract” is inapplicable; business decisions involving franchisees are not the domain of the courts. In passing the FMVDA, the legislature expanded protection for dealers in derogation of common law contract rules, statutorily overriding agreement provisions that were unfair to dealers. *Beck, id.*, makes clear that BMW cannot insulate

⁹ Ex P Cross E, “Building Blocks of Effective Market Representation” Urban Science Power Point Slide #13.

itself from judicial review of their decision by pointing to provisions in the franchise agreement, like those assigning market territory. In addition, if the preamble did not apply to this and other cases, manufacturers may circumvent the provisions of §463 (2) (dd) by assigning market territory with an eye towards preventing any unwanted dealer relocations and effectively foreclosing any right of appeal under the FMVDA. Clearly, such subterfuges and workarounds are not the result intended by the legislature in passing the FMDVA.¹¹ The respondent's unilateral—and at least in this instance—inconsistent and arbitrary practices in assigning market territory may not simultaneously serve to block the proposed relocation.

As pointed out by petitioner, there is no mention of PMA or other similar franchisor defined territory in the Dealer Act. There is no dispute that the contemplated move is within Bayside's RMA; this tribunal therefore need not consider the "good cause factors" enumerated under §463(2)(cc). The dealer proposing a relocation within the facility's RMA only is required to submit an address and a floor plan. There was a great deal of testimony based upon these good cause factors such as: the investment of Rallye into marketing the Manhasset PMA; statistics comparing the demographics of the current Douglaston location and the proposed Manhasset location; whether or not the public would benefit from the relocation and comparisons between the levels of service provided by Bayside v. Rallye, including an observation that the salespeople employed by Bayside may not be sufficiently well-groomed to effectively serve the Manhasset clientele. None of the above are applicable in this case.

Moreover, BMW's decision to deny the relocation cannot be deemed reasonable when based upon manipulated data, spurious non-factual observations, conclusions that do not conform to reality or inconsistent statements or practices. Manufacturers are bound by statutory provisions to deal with franchisees with honesty and in good faith. See *Beck, id.*

¹⁰ The 2007 relocation by Rallye to the east also placed Rallye BMW within 5.8 miles of another BMW dealer: BMW of Oyster Bay.

¹¹ NY Bill Jacket, 2008 S.B. 8678 Ch. 490, at p.34

Also see Rohrich Cadillac, Inc. v. Bureau of Professional and Occupational Affairs, State Board of Vehicle Manufacturers, Dealers and Salespersons, 73 A3d 652 (PA Commonwealth Court, 2013). (Reasons given for the denial to relocate were not genuine and therefore lacking in good faith and honesty).

BMW's expert witness, Mr. Lytle failed to perform step six—Impact Analysis—of Urban Science's eight step analysis outlined in similar cases; both South Beach¹² and Bowser¹³ involved dealer relocations within their RMA. Ex P Cross E. Notably, no impact analysis was performed for Rallye BMW where one of the stated reasons for the BMW's denial was a negative impact on Rallye. Mr. Stockton then performed his own lost opportunity analysis for Rallye and concluded that the impact on Rallye in terms of lost opportunity was not significant. T 600:23-604:23, P-8R. At any rate, no credible evidence was produced by BMW indicating that Rallye would be damaged by the relocation. In addition, BMW did not perform a standard market study in this instance even while BMW's Vice President Tom Shanley testified that it was standard procedure to conduct market studies where a facility proposes to relocate. This omission is all the more glaring because BMW conducted a market study when Bayside requested to move its service center to Great Neck in 2007.

BMW insists that the optimal location for Bayside is to the west, for the greater convenience of its Queens customers. Convenience was defined by Mr. Lytle as simply proximity; franchisees best serve their clientele from a nearby location. No consideration was given, however, to easy access to the facility—there is no convenience in a densely populated, heavily trafficked, compressed urban area without ample free parking. It is highly inconvenient to wait around in a cramped showroom during a pandemic for the desired vehicle to be produced from one of several satellite lots. The fact that Bayside has

¹² *Braman Motors Inc., et al, supra.*

¹³ *Bowser Cadillac LLC v. General Motors LLC, supra.*

been profitable despite all the shortcomings of the current facility described by Dina Burns and Douglas Foss should not be used to restrict petitioner to their Queens location.

By refusing to allow the relocation, respondent BMW is placing Bayside into a double bind—the current showrooms fail to meet BMW CORA standards. Once the extension previously granted by BMW for non-compliance lapses, Bayside will risk suffering a devastating economic sanction; funds payable to Bayside under the AVP program will be placed in escrow until a new compliant facility is built. Respondent BMW did concede that relocation may be necessary to achieve compliance. T 321:13-24, See also P-Cross G. Regardless, now that petitioner has located an adequate site for new CORA-compliant construction, respondent is adamant that Bayside stay where it is or move further west into a densely compacted area where parking is even more scarce¹⁴ and suitable real estate is unavailable. Under the circumstances, this is not a reasonable position on the part of BMW, nor does it demonstrate good-faith and honesty.

DISPOSITION

N.Y. Vehicle and Traffic law §463 (2) (dd) prohibits the respondent from unreasonably preventing or refusing to approve the relocation of petitioner Bayside to another site within Bayside's relevant market area. Accordingly, I find that respondent's refusal to approve Bayside's request to relocate to the proposed location is unreasonable, by a preponderance of the evidence adduced at the hearing. Respondent BMW shall permit the petitioner to relocate to the proposed site.

Wherefore, the Department enters the following Order:

¹⁴ BMW's optimal location for Bayside-Star Hyundai—as suggested by Mr. Lytle conspicuously displays a bus stop in front and a vehicle mounted on the sidewalk; both strongly indicating a lack of parking. See Ex P Cross W.

**STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
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LUXURY CARS OF BAYSIDE INC.,
Dealer/ Franchisee,

Case No. FMD2020-02

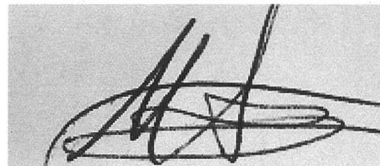
v.
BMW OF NORTH AMERICA
Franchisor.

FINAL ORDER

AND NOW, this 2nd day of July, 2021, having duly convened and considered the entire record, and based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, the Department hereby **SUSTAINS** the petition of Luxury Cars of Bayside, Inc., and directs BMW of North America to approve the relocation request to 1285 Northern Boulevard, Manhasset, New York 11030.

BY ORDER:

**DEPARTMENT OF MOTOR VEHICLES
SAFETY AND BUSINESS HEARINGS**



MARIA SOTOLONGO
ADMINISTRATIVE LAW JUDGE

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