

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GATEWAY ESTATES PARK CONDOMINIUM
ASSOCIATION,

Petitioner,

vs.

Case No. 16-1025CM

SDI QUARRY, a/k/a ATLANTIC
CIVIL, INC.,

Respondent.

_____ /

FINAL ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on November 14, 2016, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Dale C. Glassford, Esquire
Dale C. Glassford, P.A.
12908 Southwest 133rd Court
Miami, Florida 33186

For Respondent: John Edward Herndon, Esquire
Conroy Simberg
Atrium Building, Suite 105
325 John Knox Road
Tallahassee, Florida 32303

STATEMENT OF THE ISSUES

Whether the use of explosives at Respondent's quarry has caused damage to the shore of Petitioner's lake; and, if so,

whether (and what amount of) compensatory damages should be paid by Respondent to Petitioner.

PRELIMINARY STATEMENT

On February 22, 2016, Petitioner Gateway Estates Park Condominium Association filed, with the Division of Administrative Hearings, a Petition Under the Florida Construction Materials Mining Activities Administrative Recovery Act alleging that Respondent SDI Quarry, a/k/a Atlantic Civil, Inc., had caused damage to the South Lake on its property through the use of explosives in connection with construction materials mining.

The case was assigned to an administrative law judge who, on February 24, 2016, issued an Order Requiring Mediation in accordance with section 553.40(4), Florida Statutes. The parties participated in a mediation conference on September 27, 2016, and failed to reach a settlement. Accordingly, pursuant to section 552.40(5), Florida Statutes, the undersigned noticed the final hearing for November 14, 2016.

The final hearing took place as scheduled, with both parties present. In its case-in-chief, Petitioner presented as witnesses Grace Connors and James R. McNew, and later, on rebuttal, called Brian Reynolds. Petitioner's Exhibits 1 through 6 were received in evidence as well.^{1/} Respondent called Theodore Tabor, Steven

Black, Grace Connors, Eric Stern, and Jeffrey Straw to testify. Additionally, Respondent's Exhibits 1 through 17 were admitted.

The final hearing transcript was filed on January 27, 2017. Each party timely submitted a Proposed Final Order on or before the deadline established in the January 19, 2017, Order Granting Enlargement of Time for Filing Proposed Final Orders, which was February 3, 2017.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2016.

FINDINGS OF FACT

1. Petitioner Gateway Estates Park Condominium Association (the "Association") is a condominium association organized under chapter 718, Florida Statutes. The Association oversees the Gateway Estates Park mobile home community ("Gateway Estates"), a condominium, which consists of 220 mobile homes and two vacant lots. Although the lots and mobile homes are owned by the individual owners, the Association holds title to a number of common elements, including two lakes—the South Lake (which is the subject of these proceedings) and the North Lake.

2. Respondent SDI Quarry, a/k/a Atlantic Civil, Inc. ("SDI Quarry"), a mining company, uses explosives to extract construction materials such as limestone from quarries that are located in southwest Miami-Dade County. SDI Quarry has three

mines that are near the South Lake; the closest of these is located approximately 7,000 feet from Gateway Estates.

3. In 2005, SDI Quarry began blasting in the vicinity of Gateway Estates, and such activity has continued from that time until the present (i.e., as of the final hearing in this case). SDI Quarry operates the only mines at which blasting is conducted within close proximity to the subject community.

4. The evidence does not establish the number of blasts conducted near Gateway Estates during the roughly dozen years leading up to this litigation. Between July 1, 2015, and October 17, 2016, however, SDI Quarry performed 25 blasts, and neither party suggested that this frequency of activity was unusually high or low relative to SDI Quarry's past performance. The undersigned draws the reasonable inference that the number of historical blasts affecting Gateway Estates is in the range of 200 to 250.

5. The state regulates the use of explosives in conjunction with the extraction of materials such as sand and limestone. A mine operator must obtain a permit before commencing blasting activities. Among other things, a permit holder must comply with the statewide ground vibration limits established by the State Fire Marshal. These limits are set forth in Florida Administrative Code Rule 69A-2.024(4), which states that "[g]round vibration shall not exceed the limits of particle

velocity and frequencies established by the U.S. Bureau of Mines Report of Investigations, No. 8507 Ground Vibration, Frequency Limits." The pertinent U.S. Bureau of Mines Report is incorporated by reference in the rule.

6. SDI Quarry has complied with its obligations under rule 69A-2.024 to engage the services of an independent seismologist to measure and record, for every blast, the peak particle velocity ("PPV")—a value that reflects the maximum speed at which a particle vibrates due to a passing wave of seismic energy—at the location of the building nearest to the blast site that is not owned by the permit holder, and to report this information in writing to the State Fire Marshal.

7. The PPV limit in the state of Florida is 0.5 inches per second. This particular standard derives from research conducted by the U.S. Bureau of Mines to determine the ground vibration threshold for damage to structures such as buildings and homes. The state has not adopted a PPV limit dedicated to the protection of shorelines around lakes and ponds. Neither party identified any such standard having the force of law in any jurisdiction in the United States.

8. There is no evidence that any of SDI Quarry's blasts reached or exceeded the 0.5 inch-per-second PPV limit. Moreover, at the location of Gateway Estates, most blasts caused a PPV of

approximately 0.1 inches per second or less, and none led to a PPV in excess of 0.2 inches per second.

9. In short, based on the current record, the undersigned determines that SDI Quarry was, at all relevant times, operating in compliance with the state laws regulating mining operations involving explosives. Because, however, as will be discussed below, blasting is an ultrahazardous activity, SDI Quarry is absolutely liable, as a matter of law, for damages caused by its use of explosives, regardless of fault. Therefore, SDI Quarry's regulatory compliance, per se, is irrelevant; that said, the PPV measurements obtained in the course of such compliance have probative value to the extent they bear on the issue of causation.

10. The South Lake is a man-made body. It was excavated sometime before 1975, which was the year the Association was organized. From the waterline, the lake's shore slopes upward and levels off to a flat bank circling the water; beyond the bank are the backyards of the homes on the lake. Until 2011, when the slope began to lose stability and fail, the horizontal area of the South Lake's bank was approximately four to five feet wide, making it possible for residents to walk around the entire perimeter of the lake and engage in activities such as fishing.

11. In 2011, about five or six years after SDI Quarry began blasting near Gateway Estates, the shore of the South Lake began

to destabilize, and the saturated soil at the edges of the lake, consisting of silt or marl, began to slough and slump into the water. This opened up fissures in the slope, which undermined the upward bank. In time, holes appeared in the bank, and pieces of the once level surface fell off, resulting in the narrowing of the horizontal area, from roughly five feet or so, to about a foot and a half. Residents have observed the ground falling into the water in close temporal proximity to the blasting. One testified credibly that "after the blasting on January 20th, [2016,] the ground [in one section of the lake] actually separated and dropped into the water." Tr. 32.

12. Because of the deterioration of the lakeshore, residents can no longer walk around the bank, or stand upon it and fish as in the past; the shore is too steep, and there are holes in the ground that render such activities unsafe. The stability of the slope has continued to worsen, and, as of the final hearing, the deterioration of the lakeshore, like the blasting, was ongoing.

13. The Association has suffered property damage in the form of the deterioration of the shore and bank around the South Lake. There is, further, no dispute that from 2005 through the time of the final hearing, SDI Quarry has used explosives in connection with mining activities in the vicinity of Gateway Estates. The only genuine dispute of material fact relating to

SDI Quarry's liability to the Association is whether the use of explosives caused the Association's loss—whether, in other words, the existing property damage at the South Lake would not have occurred but for SDI Quarry's blasting.

14. The issue of causation in this case is a close one, and there is competent, substantial evidence on both sides. The Association offered the opinion testimony of James R. McNew, who is a construction consultant. Although Mr. McNew is not licensed as a professional engineer, he holds a bachelor's degree in mechanical engineering, awarded in 1972, and during the course of a 50-plus-year career has been involved as a consultant or project manager on a number of marine projects, including the construction of 27 bridges in South Florida, all of which had earthwork abutments and adjoining bodies of water. Some of the projects Mr. McNew supervised involved drilling and blasting operations. As a result, Mr. McNew has acquired specialized knowledge relating to the use of explosives in or around saturated and submerged soils from long practical experience, which in addition to his formal education and training qualified him to testify as an expert on causation in this case.^{2/}

15. Mr. McNew's opinion is that vibrations from SDI Quarry's blasting acted upon the soft layer of silt atop the shore and bank of the South Lake, causing the liquefaction of this saturated soil, which extends down from the surface, to

distances of up to eight feet. This led, in Mr. McNew's opinion, to the compaction of the loose, wet soil around the edges of the lake, opening up cracks and holes and weakening the slope, which began to erode and fail. Mr. McNew stated that there are no specific legal standards in Florida or elsewhere serving to establish PPV thresholds above which lakeshore slope instability would be expected under the stress of blast-related vibrations.^{3/} He opined that existing limits based on structure responses to ground vibrations are inapplicable, because buildings are designed and constructed to resist the stresses of seismic energy, in contrast to saturated silt on the shore of a lake. He explained that, consequently, lower levels of energy would suffice to cause damage to the bank of the South Lake, than would be expected to damage, e.g., a house at the same location.

16. SDI Quarry's principal expert witness on causation was Steven E. Black, a Florida-licensed professional engineer who specializes in geotechnical engineering and has been practicing in the field since 1970.^{4/} In addition to these credentials, Mr. Black holds a bachelor's degree in civil engineering. At hearing, Mr. Black explained that there is a layer of calcareous silt that underlies the mobile home park and is exposed at the lakeshore. Mr. Black testified that this silt layer has been eroded over time by the action of wind, waves, and rainwater

percolating down and through the ground, pulling the silt from the bank and resulting in the deterioration of the property.

17. According to Mr. Black, the blasting carried out by SDI Quarry is not close enough to Gateway Estates to impart sufficient energy to affect the soil around the South Lake.^{5/} In his opinion, SDI Quarry's blasting activities did not cause, as he described it, "the sloughing of the edges of the lake."

18. Yet, interestingly, Mr. Black agreed with Mr. McNew that heavy truck traffic could definitely affect the silt layer of the lakeshore over a continuous period of time. Tr. 145. (Mr. McNew expressed the opinion that ground vibrations from heavy equipment could cause damage to a lakeshore "if you [had] a haul road going around the lake." Tr. 77. He offered this comment while making the point that other sources of seismic energy besides blasting, e.g., heavy construction traffic, could be ruled out as causes of the damage to the South Lake because none have been known to occur.)

19. The undersigned finds this concession of Mr. Black's to be significant because, while there is no evidence in the record establishing the typical levels of ground-borne vibration from heavy trucks or construction equipment traveling over a roadway, common knowledge and ordinary experience are sufficient to permit the fact-finder to infer that such levels would be lower by orders of magnitude, at the source, than those caused by the use

of explosives to mine limestone. We know this because in ordinary experience, while we might feel some vibrations under foot when a large truck drives by, especially if the road surface is uneven, we can easily see—because the road remains intact—that the truck has not suddenly released tremendous gas pressure inside the ground, producing enough energy to break rock, as occurs when explosives are placed in holes and detonated in a limestone quarry.

20. As it happens, there are homes and other structures standing between the South Lake and the nearest streets, so any ground-borne seismic energy from passing trucks necessarily would be attenuated before reaching the lakeshore, just as the seismic energy from SDI Quarry's blasting is attenuated as it travels the one and one-third miles from the mine to the lake. As found above, by the time the energy wave from a blast reaches the South Lake, the PPV is typically 0.1 inches per second or less (although occasionally the level is higher), but obviously the PPV at the source of any given blast is far greater than that. Energy from a passing truck would not need to travel as far, to be sure, but it would be much weaker at the source than a construction mining blast. The undersigned does not have enough evidence before him to make a finding as to what levels of PPV would be expected at the South Lake as heavy trucks drove past the property, but he can reasonably infer that the seismic energy

from nearby vehicular traffic would not likely exceed that of SDI Quarry's blasting, and indeed would likely be much lower.

21. It is true, to be fair, that Mr. Black's opinion—that transportation sources of ground-borne vibration, if present, could affect the lakeshore—was qualified by conditions of frequency ("a lot of heavy truck traffic") and duration ("over a continuous period of time"). His opinion about the blasting, however, was that the energy imparted therefrom was insufficient to damage the lake, *period*—not that the blasting was too infrequent to cause the property damage, or that it had not been conducted for a sufficient period of continuous years to cause such damage. By conceding that the energy imparted from heavy trucks "could definitely affect" the stability of the silt layer, Mr. Black undercut the strongest part of his opinion on causation, namely its certainty that an absolute level of seismic energy, greater than that seen at the lake, is necessary to cause saturated silt to move.

22. On balance, the undersigned finds Mr. McNew's opinion on causation to be more persuasive than the competing view. In addition, the undersigned finds that the circumstantial evidence is consistent with, and supports, Mr. McNew's opinion; indeed, such evidence might have been sufficient, without more, to establish a causal connection between the blasting and the property damage. Consider that the South Lake had existed for at

least 35 years without experiencing the deterioration of the shore and bank that became noticeable within just five or six years after the start of the blasting, and which has worsened over time as the blasting has continued. Add to that the persuasive evidence that visible damage occurs in the wake of individual blasts. Taken together, these facts on the ground have probative value independent of expert opinion.

23. That said, the undersigned credits Mr. Black's testimony to the extent it supports a finding that erosion from wind, wave, and rainwater is a natural cause of some deterioration at the shore of the South Lake. It is further found, however, that this natural erosion is not the sole and independent cause of the Association's property damage. Rather, it is determined that the seismic energy from SDI Quarry's blasting is acting in combination with this natural erosion, and that the blasting, as a concurring cause, is contributing substantially to producing the sloughing of the lakeshore, fissures and holes in the slope, and consequent loss of level area from the bank that have occurred, and continue to occur, at the South Lake.

24. In sum, the Association has proved by a preponderance of the evidence that SDI Quarry's blasting is a legal cause of the property damage for which compensation is being sought.

25. As for the measure of damages, the Association presented evidence of a proposal from Upper Keys Consulting LLC ("Upper Keys"), which is dated July 18, 2015, for restoring the shore of the South Lake and installing preventative devices to protect the shoreline against erosion from future blasting. This proposal included several options, ranging in price from \$840,000.00 to \$1.45 million. The Association seeks to recover \$840,000.00 from SDI Quarry to cover the cost of repairing and protecting its property.

26. SDI Quarry did not present persuasive evidence either challenging the efficacy, or questioning the expense, of the Upper Keys proposal. The undersigned finds, therefore, that an amount of \$840,000.00 is supported by the preponderance of the evidence presented.

27. SDI Quarry contends, as an affirmative defense, that the Association failed to file its petition for relief within 180 days after the occurrence of the alleged damage, as required by section 552.40(1). The petition was filed on February 22, 2016, and SDI Quarry maintains that the damage to the South Lake had already occurred more than 200 days earlier, by July 18, 2015—i.e., the date of the Upper Keys proposal. SDI argues that, as a result, the Association's claim is time barred.

28. The undersigned rejects this argument because, as a matter of fact, the property damage at issue is present and

continuing; the harm to the lakeshore is cumulative, indivisible, and inseparable. The deterioration of the South Lake worsens with each blast, and the blasting was still going on during the 180 days preceding the initiation of this action. The damage, consequently, did not simply occur once in the past. This action is not time barred.

29. Despite finding that SDI Quarry is liable to the Association for the property damage caused by its blasting, the undersigned determines that SDI Quarry's defenses were supported by evidence of material facts; were grounded in existing law; and were not advanced primarily to harass or cause unnecessary delay, for frivolous purposes, or to needlessly increase the cost incurred by the Association. As stated above, the question of causation is close in this case, and there is conflicting evidence on this crucial issue. That the undersigned resolved the evidential conflicts in the Association's favor neither means, nor is meant to imply, that SDI Quarry's position lacked substantial merit.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings ("DOAH") has jurisdiction over the subject matter and parties pursuant to sections 120.569, 120.57(1), and 552.36(1).

31. This proceeding is governed by the Construction Materials Mining Activities Administrative Recovery Act ("Act"),

sections 552.32 through 552.44. The Act provides a specific administrative remedy for complaints related to the use of explosives in construction materials mining activities.

§ 552.40, Fla. Stat. Further, the Act vests DOAH with "exclusive jurisdiction over all claims for damages to real or personal property caused by the use of explosives in connection with construction materials mining activities." § 552.36(1), Fla. Stat. The administrative law judge has final order authority in such cases. § 552.40, Fla. Stat.

32. The burden is on the claimant seeking relief under the Act to prove, by a preponderance of the evidence, that the use of explosives by the respondent caused damages to the claimant's real or personal property. §§ 552.40(7) and (8), Fla. Stat.

33. Under Florida common law, blasting is an ultrahazardous activity for which strict liability is imposed. See Poole v. Lowell Dunn Co., 573 So. 2d 51, 52 (Fla. 3d DCA 1990); see also, Old Island Fumigation, Inc. v. Barbee, 604 So. 2d 1246, 1248 (Fla. 3d DCA 1992); see generally, Cities Serv. Co. v. State, 312 So. 2d 799 (Fla. 2d DCA 1975). Nothing in the Act expressly abrogates this settled principle of the common law, nor is the intent to do so even remotely implied. It is thus concluded that a claimant seeking relief under the Act need not prove that the respondent *negligently* caused its damages, which means that no evidence or findings regarding either a breach of the standard of

care, or the foreseeability of property damage from the nearby use of explosives, are required in a case like this.

34. Where there are concurring causes-in-fact of a claimant's loss, a "defendant is still liable for the consequences of his conduct even though some other cause contributed to the same damage." E.g., Poole, 573 So. 2d at 53. It is not necessary, therefore, for the claimant to prove that the use of explosives was the sole cause of its damages; it is enough to show that "the blasting contributed substantially to producing such loss, injury or damage." Id.

35. The Act is silent as to whether the issue of causation is provable without expert testimony. Generally speaking, "it is not always necessary to prove legal causation by expert testimony if other competent evidence demonstrates causation," such as proof of circumstances which support the reasonable inference of cause and effect. Gant v. Lucy Ho's Bamboo Garden, 460 So. 2d 499, 501 (Fla. 1st DCA 1984); see also, Alton Box Bd. Co. v. Pantya, 236 So. 2d 452, 454 (Fla. 1st DCA 1970) (Where, as in an action for damages from air pollution, the jury is at liberty to reject expert testimony and accept lay testimony as to a question of causation involving facts not within the ordinary experience of members of the jury, then such facts may be proven by lay testimony.). Here, at any rate, the Association offered both expert testimony and circumstantial evidence on the question of

causation, which, operating in tandem, provided ample grounds for the undersigned to find, as a matter of fact, that SDI Quarry's use of explosives more likely than not caused the Association's property damage.

36. The Act authorizes the undersigned to award money damages but affords no other remedies, such as an injunction. The Act, moreover, does not prescribe any particular means of measuring damages. The undersigned concludes that it is reasonable and appropriate in this case to award an amount (\$840,000.00) sufficient to enable the Association to pay for the cost of repairing the lakeshore and installing devices to prevent further erosion. See Gasparilla Inn, Inc. v. Sunset Realty Corp., 358 So. 2d 234, 237 (Fla. 2d DCA 1978).

37. The Association is entitled to recover taxable costs, including reasonable expert witness fees and incidental administrative costs. § 552.40(9), Fla. Stat. The Association is not entitled under the facts of this case, however, to an award of reasonable attorney's fees. Id.

ORDER

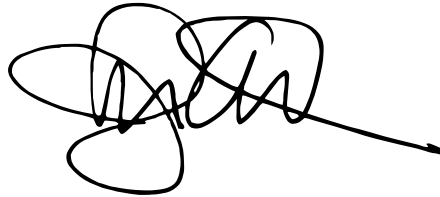
Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

A. Unless judicial review is timely sought, SDI Quarry shall, within 30 days after the date hereof, pay the Association the sum of \$840,000.00 as compensation for the property damage

caused by SDI Quarry's use of explosives in connection with mining for construction materials. If SDI Quarry appeals this Final Order pursuant to section 552.42, then payment of the award to the Association shall be made (unless reversed) within 30 days after the entry of an appellate mandate affirming this Order or as otherwise provided by the court.

B. Within 30 days after the date hereof, the Association shall file its motion to tax costs.

DONE AND ORDERED this 28th day of February, 2017, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2017.

ENDNOTES

^{1/} Petitioner's Exhibit 5, the curriculum vitae of James R. McNew, was received in evidence without objection. Tr. 63. Petitioner filed a copy of this exhibit on February 22, 2017.

Respondent's Objection to Notice of Filing, dated February 23, 2017, is overruled.

^{2/} "A witness may be qualified as an expert through specialized knowledge, training, or education, which is not limited to academic, scientific, or technical knowledge. An expert witness may acquire this specialized knowledge through an occupation or business or frequent interaction with the subject matter." Chavez v. State, 12 So. 3d 199, 205 (Fla. 2009).

^{3/} Again, neither party has cited such a legal standard.

^{4/} SDI Quarry also presented the brief testimony of Eric J. Stern, a professional engineer employed by the same firm for which Mr. Black works. His opinion was the same as Mr. Black's, but without nearly as much explanation or elaboration. Because Mr. Stern's testimony was a subset of the testimony given by Mr. Black, it added nothing to the overall persuasive force of SDI Quarry's evidence.

^{5/} Some additional testimony to this effect was given by Jeffrey A. Straw of GeoSonics, Inc., which is the firm that serves as SDI Quarry's independent seismologist for purposes of regulatory compliance. He testified about two studies which, he claimed, purport to show that soil consolidation occurs only at PPV levels above the range of 1.0 inch to 3.0 inches per second, which are very high numbers, and then only when the soil is "within a very close proximity to the source." Tr. 183. SDI Quarry did not offer any of these studies into evidence. The undersigned finds this testimony to be relatively unpersuasive, for several reasons.

First, while an expert witness may rely upon undisclosed facts and data in forming his own opinions, there is a difference between using data to form one's own opinion, and merely passing along the opinion of another. Mr. Straw's testimony about the scientific literature he had read, even if accurate, did little but convey the conclusions of the authors of those studies. If the hearsay rule were not a bar to such testimony, the contents of those studies, at a minimum, should have been proven with copies of the publications, see § 90.953, Fla. Stat., not via Mr. Straw's recollection of the contents.

Second, authoritative literature is supposed to be used in *cross-examination* of an expert witness, not to bolster his opinion testimony. See § 90.706, Fla. Stat. While it *might* be permissible, under section 120.57(1)(c), Florida Statutes, to

supplement or explain an expert witness's testimony *about* an authoritative publication *with* the authoritative publication, the proper way to do that would be to introduce the publication as proof of its contents. Without the publication itself, there is nothing to supplement or explain the witness's *memory* of the publication's contents, which by itself is not terribly persuasive proof of a scientific study, quite apart from the questions concerning admissibility.

Third, the notion that soil consolidation would not occur at PPV levels below 1.0 inch per second is inconsistent with Mr. Black's testimony, discussed infra in the text, that ground-borne vibration from heavy trucks could cause soil erosion at the lakeshore.

Not all of Mr. Straw's testimony was unpersuasive. Mr. Straw performed a regression analysis using data from SDI Quarry's blasting records to project vibration levels at the South Lake because that location has not actually been monitored for vibration. The undersigned accepted, and has made findings of fact reflecting, Mr. Straw's testimony concerning the PPV levels likely occurring at the lakeshore as a result of SDI Quarry's use of explosives.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.