

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOROTHY BROWN-ALFARO AND
AMILCAR ALFARO,

Petitioners,

vs.

Case No. 15-6014CM

WHITE ROCK QUARRIES,

Respondent.

FINAL ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing on May 25 and 26, 2016, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioners: Dorothy Brown-Alfaro, pro se
14699 Southwest 47th Street
Miramar, Florida 33027

For Respondent: Miguel A. De Grandy, Esquire
Pedro Gasant, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent's use of explosives in connection with construction materials mining activities caused damages to

Petitioners' home, and, if so, the amount of damages to which Petitioners are entitled.

PRELIMINARY STATEMENT

On October 23, 2015, Petitioners, Dorothy Brown-Alfaro and Amilcar Alfaro (referred to herein as "Petitioners," Mrs. Alfaro, or Mr. Alfaro), pro se, filed with DOAH a Petition Under the Florida Construction Materials Mining Activities Administrative Recovery Act, alleging that Respondent, White Rock Quarries ("Respondent"), caused damages to their home through the use of explosives in connection with construction materials mining activities. This case was initially assigned to Administrative Law Judge Cathy M. Sellers. On October 27, 2015, Judge Sellers entered an Order Requiring Mediation. On October 28, 2015, this case was transferred to the undersigned for all further proceedings.

On December 14, 2015, Petitioners, through counsel, filed an Amended Petition. On February 29, 2016, the parties mediated this case and reached an impasse. On March 11, 2016, Respondent's Report on Mediation was filed.

On March 15, 2016, Respondent noticed Petitioners' depositions for April 26, 2016. On March 17, 2016, the undersigned set this matter for final hearing in Fort Lauderdale on May 25 and 26, 2016. On April 26, 2016, Petitioners failed to appear for their depositions. On April 26, 2016, Respondent

filed a motion for sanctions or to strike the Amended Petition based on Petitioners' failure to appear for their depositions.

On May 3, 2016, Petitioners' counsel filed a motion to withdraw as counsel for Petitioners. On May 4, 2016, the undersigned entered an Order Allowing Withdrawal as Counsel.

On May 12, 2016, a telephonic hearing on Respondent's motions and a status conference was held with counsel for Respondent and Mrs. Alfaro participating in the conference. Based on Mrs. Alfaro's representation in the telephonic conference that Mr. Alfaro suffered a stroke, has a heart condition, and is unable to testify and give a deposition, Mr. Alfaro was precluded from testifying at the final hearing. As to Mrs. Alfaro, she was compelled to appear for deposition at the law offices of Respondent's counsel at 10:00 a.m. on May 20, 2016, which she did. During the telephonic conference, the undersigned also denied Mrs. Alfaro's ore tenus motion for a continuance of the final hearing. That same day, the undersigned entered an Order memorializing the rulings from the telephone conference and denying the motions.

The final hearing commenced as scheduled on May 25, 2016, and concluded on May 26, 2016, with counsel for Respondent and Mrs. Alfaro present. At the hearing, Mrs. Alfaro testified on her own behalf and presented the additional testimony of Barbara Hagan, Paul Ingelmo, and Ismailia Rashid. Petitioners'

Exhibits 1 through 6, and 8 were received into evidence.

Respondent presented the testimony of Jeffrey A. Straw, David L. Teasdale, and Michael Schraeger. Respondent's Exhibits 1 through 15 were received into evidence.

At hearing, the parties agreed to file their proposed final orders within 30 days after the filing of the final transcript at DOAH. The five-volume final hearing Transcript was filed at DOAH on June 27, 2016. The parties timely filed their proposed final orders, which were given consideration in the preparation of this Final Order.

Unless otherwise stated, all statutory and rule references are to the statutes and rules in effect at the time of the alleged violations.

FINDINGS OF FACT

The Parties

1. Petitioners reside in a single-family, one-story home located at 14699 Southwest 47th Street, Miramar, Broward County, Florida 33027. Petitioners are the third owners of the home, which was built in 1981. Petitioners have resided in the home since 1998. The home is approximately 3,000 square feet "under air," and is composed of concrete block with stucco finishes, a shallow slab-on-grade foundation system, wood-framed interior walls, and ceramic tile flooring.

2. Respondent engages in construction materials mining activities in Miami-Dade County, Florida. Specifically, Respondent utilizes explosives to procure construction materials (i.e., limestone) from quarries that are located in northwest Miami-Dade County, Florida.

Respondent's Blasting Activities

3. The subject quarries are located within various geographic areas identified by different sections. Of particular relevance to the instant matter are sections 7, 6, and 4/5. Section 7 is approximately 2.6 or 2.7 miles from Petitioners' home. Section 6 is approximately 2.3 or 2.4 miles from Petitioners' home. Section 4/5 is approximately 1.6 miles from Petitioners' home.

4. Each of the sections have been utilized as a discrete location where blasting activities occur in order for Respondent to obtain construction materials. Section 7 was in operation from the mid-1990s through the end of 2015. Currently, no blasting activities occur in section 7.

5. Section 6 was in operation from 2000 through 2015. Currently, no blasting activities occur in section 6.

6. Section 4/5 began blasting operations in the first quarter of 2015 and halted in the fourth quarter while excavation was done. Blasting in section 4/5 resumed in January 2016.

7. To monitor the impact of its blasting activities, Respondent utilizes the firm GeoSonics, Inc. ("GeoSonics"). GeoSonics has performed vibration measurement, evaluation, and reporting to Respondent since 1986.

8. Jeffrey A. Straw is a seismologist with 39 years of experience and is employed by GeoSonics. As a seismologist, Mr. Straw is responsible for monitoring the impacts of vibration from Respondent's blasting activities and analyzing their effects on structures.

9. GeoSonics placed seismographs to monitor the impact of Respondent's blasting activities. Peak particle velocity ("PPV") is the speed at which a particle of ground oscillates as the vibration wave moves through the ground. The seismographs are used to determine if Respondent's blasting activities are within the PPV limit of 0.5 inch per second established by the state of Florida.

10. The seismographs must be located within one mile of each blast location to record the PPV resulting from the blasting activities. The seismographs are monitored and evaluated to ensure that their readings are accurate. The seismograph readings are evaluated by GeoSonics, which provides reports on the readings to Respondent and to the state fire marshall.

11. Each seismograph undergoes testing to ensure that the instrument is working properly and providing effective and

accurate readings. Every time a seismograph provides a reading concerning a blast, it sends a calibration pulse, which indicates whether the seismograph is working properly. Each seismograph instrument has an accompanying certification demonstrating that the instrument has successfully undergone testing and is working in accordance with the industry standards and specifications.

12. There are six seismographs located within the vicinity of Petitioners' home. The further the distance from the blasting location, the lower the blasting intensity. Each seismograph is located closer to the blasting location than Petitioners' home. Thus, the PPV measured by the seismographs are greater than what the blasting intensity would be at Petitioners' home.

13. At no time have any of Respondent's blasting activities reached or exceeded the 0.5 PPV limit.

Petitioners Failed to Prove that Respondent's Blasting Activities Caused Damages to Their Home

14. In the instant case, Petitioners assert that Respondent's quarrying activities caused damages to their home. Petitioners' alleged damages center on "cracks" that exist throughout the home--specifically, cracks throughout the tile flooring inside the home; cracks on the cement flooring of the garage; cracks in the interior and exterior walls and ceilings; cracks in the semi-circular, stamp-concrete driveway and patio; and cracks around the surface of the windows.

15. It is clear that cracks exist in Petitioners' home. However, the issue to be determined in this case is whether the cracks were caused by Respondent's blasting activities. They were not.

16. In support of Petitioners' position, Mrs. Alfaro presented at hearing a home inspection report. The inspection was conducted on April 18, 2016, and was not performed by a general contractor or structural engineer. Although the inspector identified various cracks based on his visual observations, the inspector specifically excluded any opinion regarding the cause of any need for repairs. Petitioners were specifically advised to obtain an opinion from a general contractor or structural engineer as to the cause of the damages.

17. Mrs. Alfaro is an electrical contractor. She is not a licensed general contractor or structural engineer. At hearing, Mrs. Alfaro conceded that she does not have experience as a general contractor or seismologist. She has not had any training in seismology or blasting activities. Mrs. Alfaro's testimony at hearing regarding the purported cause of the cracks is not credited and is unpersuasive.

18. At hearing, Mrs. Alfaro presented the testimony of Barbara Hagan. Ms. Hagan resides in Country Club, Miami-Dade County, Florida, and is retired. She serves as the president of a civic association and secretary and treasurer of her homeowner's

association. She is not a general contractor, engineer, or seismologist. She has no experience in the use of explosives. She has never visited Petitioners' home. At hearing, Ms. Hagan conceded that she has no opinion regarding the cause of any of the damages in Petitioners' home.

19. Mrs. Alfaro also presented the testimony of Paul Ingelmo. Mr. Ingelmo is a structural engineer who performed a visual inspection of Petitioners' residence. Mr. Ingelmo did not review or analyze PPV data relevant to the blasts complained of by Petitioners. Mr. Ingelmo has no training or experience as to the appropriate threshold with respect to blasting activities and PPV. He is not familiar with how a wave behaves from a blast versus a seismic event. Mr. Ingelmo is not familiar with how PPV is measured or calculated. Importantly, Mr. Ingelmo could not give an opinion on whether the damages to Petitioners' home were caused by Respondent's blasting activities. In fact, Mr. Ingelmo conceded that the damages could have been caused by any number of unspecified factors.

20. Finally, Mrs. Alfaro presented the testimony of Ismailia Rashid. Ms. Rashid is a general and roofing contractor. Ms. Rashid visited Petitioners' home, conducted a visual inspection, and observed cracks on the patio, interior floors, and driveway. Ms. Rashid is not familiar with PPV or ground vibration. She has never been in a home where she was present

and there was blasting. Importantly, Ms. Rashid did not offer an opinion on whether the damages to Petitioners' home were caused by Respondent's blasting activities.

21. In sum, Petitioners failed to prove by a preponderance of the evidence that the damages to their home were caused by Respondent's blasting activities.

22. Rather, the preponderance of the evidence presented at hearing demonstrates that the damages to Petitioners' home were not caused by Respondent's blasting activities.

23. In reaching this conclusion, the undersigned credits and finds persuasive the testimony of Respondent's witnesses: Jeffrey A. Straw, David L. Teasdale, and Michael Schraeger.

24. Mr. Straw visited Petitioners' home twice: in April 2006 and January 2016. At those visits, Mr. Straw accompanied Michael Schraeger, a licensed general contractor with Diversified Services, Inc. On both occasions, Mr. Straw brought a camera and notepad with him to catalog the defects identified by Petitioners. Mr. Straw took extensive and comprehensive photographs detailing the cracks throughout Petitioners' home and driveway. Mr. Straw testified that 90 percent of the alleged defects he observed in 2016 were items that he also observed in some format in 2006.^{1/}

25. Mr. Teasdale is a civil structural engineer with Haag Engineering and serves as vice president of engineering and principal field engineer.

26. Mr. Teasdale's specialty focuses on the extent of damage to structures due to ground vibrations, explosions, and earthquakes. He is a licensed engineer in the state of Florida and 34 other states and has been a licensed engineer since 1988. He is extensively familiar with seismographs and has extensive experience installing and using them.

27. Mr. Teasdale was accepted by the undersigned as an expert in structural behavior from ground motion and normal service loads, the influence of construction practices and environmental conditions on building features, soils and hardscape, the causes and conditions documented at the Petitioners' residence, and lot features including the suitability of existing safe blasting standards in the state of Florida.

28. Mr. Teasdale testified that there are substantial differences between an earthquake and quarry blasting. Mr. Teasdale explained that the fundamental difference between an earthquake and a quarry blasting is the amount of energy being released by the activity.

29. Quarry blasting is a localized source event. An earthquake involves a fault line, which can extend for many miles

and become mobilized. There is a direct correlation between the length of a fault line ripped versus the magnitude of an earthquake. Mr. Teasdale also explained that the measurement for quarry blasting, unlike the Richter Scale used for earthquakes, is a direct measurement; meaning that a PPV of 1.0 is twice the impact of a PPV of 0.5.

30. Mr. Teasdale testified that for blasting to cause damage to a structure, distortion must occur. Distortion occurs where the foundation of a structure is accelerated laterally and causes the upper-part of the building to lag in response, which causes the building to shift back-and-forth and mimic a parallelogram shape. He explained that when distortion occurs, cracks will emanate from the corner of the walls and that those cracks will be mirrored on the opposite walls (inside and outside the structure).

31. Mr. Teasdale explained that there was no damage to the foundation of Petitioners' home, and the foundation and floor of a home would not experience distortion at 0.5 PPV or below because those limits are too low to produce the energy necessary to cause a structure to become mobilized.

32. According to Mr. Teasdale, Petitioners' home exhibited a variety of horizontal and vertical cracks and separations in the finishes, which are typical of environmental stresses in those materials. Mr. Teasdale also testified that distortion

causes diagonal cracks, while thermal environmental stresses cause cracks vertically and horizontally. He explained that cracks caused by environmental conditions do not correlate on the inside and outside, while cracks caused by distortion do correlate on the inside and outside. He emphasized that the absence of corresponding cracks on the inside and outside of the structure generally precludes blasting as the cause of damages.

33. Mr. Teasdale explained that from the moment the concrete is cast, it begins to shrink and develop cracks. Mr. Teasdale further explained that stucco, which is essentially the same material as concrete, is also prone to cracks due to normal environmental conditions.

34. Mr. Teasdale testified that at the level in which Respondent has blasted below 0.5 PPV, it is impossible for Respondent's blasting to have caused damages to Petitioners' home.

35. Based on his review and analysis of Petitioners' home, Mr. Teasdale concluded that he would exclude blasting to a reasonable degree of scientific certainty as the cause of damages to Petitioners' home.

36. Mr. Schraeger is a general contractor and building inspector. He is self-employed through his company Diversified Services, Inc., and serves as the owner/operator.

37. Mr. Schraeger has approximately 30 years of experience in commercial and residential construction. He has been licensed as a general contractor for 22 years and specializes in repairs, remodeling, and renovations of commercial and residential structures. He has 20 years of experience performing inspections of buildings relating to determination of material, construction failure, and defects.

38. Mr. Schraeger was accepted by the undersigned as an expert in construction practices and environmental effects on materials and structures.

39. Mr. Schraeger inspected Petitioners' home in 2006 and 2016. He testified that 90 to 95 percent of the alleged defects he observed in Petitioners' home in 2016 existed when he inspected the home in 2006.

40. Mr. Schraeger testified that the cracks that he observed on the tile floor inside Petitioners' home are very typical in a South Florida home because concrete typically cracks within all concrete structures. These types of cracks can be caused by poor installation of the tile or shrinkage of the monolithic slab over time. There was no evidence of foundation damage.^{2/}

41. Mr. Schraeger further testified that in his professional opinion, some of the cracks in Petitioners' home are the result of poor construction practices. For example, he

explained that most of the cracks in the interior of Petitioners' home are due to poor construction practices because of the use of an inappropriate method for finishing the joints in the drywall. During his 2016 inspection, Mr. Schraeger observed tape on some of the joints, which either had no joint compound under them, or the tape was applied after the compound started to dry, causing a bond failure. Some of the cracks generating from the corners of openings appeared to be from improperly secured corner bead.

42. During his 2016 inspection, Mr. Schraeger also observed a crack in the master bedroom approximately eight feet in length, which appeared to be a joint in the drywall. This was apparent to Mr. Schraeger because the crack was visible on both sides of the joint tape, which had failed. According to Mr. Schraeger, the cause of this failure was moisture from a roof leak. Staining due to moisture on the ceiling in the area and a repair of the roof above this area indicated a previous leak. Notably, other areas of the home indicated roof leaks, including stains on the ceiling of the office area and staining around the skylight in the hallway.

43. Mr. Schraeger further testified that the patio tile and driveway lack sufficient control joints, thereby making the stamped-concrete driveway and patio prone to crack.

44. Mr. Schraeger also identified issues of poor maintenance by Petitioners. For example, he noted that the

caulking around the windows was brittle and almost nonexistent. At hearing, Mrs. Alfaro acknowledged that in the 17 years she has owned the home, the windows have never been re-caulked.

45. According to Mr. Schraeger, several cracks were observed on the stucco exterior walls of the home. With the exception of a severe crack on the wing wall on the rear of the patio, all of the cracks in the exterior walls of the home were attributed to common aesthetic cracks caused by the lack of control joints, dissimilar materials, bond failure, and improper maintenance. The crack on the wing wall of the patio, which ran along the bottom of a large tie beam, was attributable to poor construction methods.

CONCLUSIONS OF LAW

46. DOAH has jurisdiction over the subject matter and parties pursuant to sections 120.569, 120.57(1), and 552.40, Florida Statutes.

47. 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. § 552.34(3), Fla. Stat.

48. Pursuant to section 552.36(1), DOAH "has 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.”

49. Petitioners have the burden of proving, by a preponderance of the evidence, that Respondent’s blasting activities caused damages to Petitioners’ home. §§ 552.40(7) and (8), Fla. Stat.

50. The preponderance of the evidence standard requires proof by “the greater weight of the evidence” or evidence that “more likely than not” tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d, 280 n.1 (Fla. 2000).

51. Whether Respondent’s blasting activities caused damages to Petitioners’ home is a question of fact to be determined by the undersigned. Padron v. State, 143 So. 3d 1037, 1040-41 (Fla. 3d DCA 2014).

52. As detailed above, Petitioners failed to prove, by a preponderance of the evidence, that Respondent’s blasting activities caused damages to their home. Rather, the preponderance of the evidence presented at hearing demonstrates that the damages to Petitioners’ home were not caused by Respondent’s blasting activities.^{3/}

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioners’ Amended Petition Under the

Florida Construction Materials Mining Activities Administrative Recovery Act is DENIED.

DONE AND ORDERED this 16th day of August, 2016, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of August, 2016.

ENDNOTES

^{1/} Notably, in August 2006, Petitioners submitted an insurance claim for damages to their home, which they alleged were caused by Respondent's blasting activities. The insurance company denied Petitioners' insurance claim. Subsequently, Petitioners submitted three separate complaints to the Division of State Fire Marshall regarding alleged damages caused to their home due to Respondent's blasting activities. In response, Petitioners received three notices from the Division of State Fire Marshall in October 2007, December 2010, and February 2014. In these notices, Petitioners were advised of their right to submit a petition to DOAH, which has exclusive jurisdiction over such claims for damages occurring due to the use of explosives in connection with construction materials mining activities. However, Petitioners' petition was not filed with DOAH until October 23, 2015.

^{2/} Significantly, in June 2015, Petitioners hired a company to replace some of the tile floors inside the home. At hearing, Mrs. Alfaro testified that the company used quality tile, proper

materials, and properly prepared the cement surface before installing the new tile, in order to properly bond the tile to the slab surface. No cracks have appeared in the new tile, which further belies any notion that Respondent's blasting activities caused damages to the old tile.

^{3/} In its proposed final order, Respondent asserts that Petitioners' claim is also barred by section 552.40(1), which requires that a petition with DOAH be filed "within 180 days after the occurrence of the alleged damage," and section 95.11(3)(f), Florida Statutes, which requires that claims based on a statutory right be brought within four years of the date the cause of action accrued. It is unnecessary for the undersigned to reach these issues because of the evidence which clearly demonstrates that Petitioners cannot prevail on the merits of their claim upon which they have the burden of proof (i.e., causation). Nevertheless, the undersigned has considered Respondent's argument and concludes that Respondent failed to meet its burden of proof of demonstrating that Petitioners' claims are barred by sections 552.40(1) and 95.11(3)(f). See Snyder v. Wernecke, 813 So. 2d 213 (Fla. 4th DCA 2002) (concluding that construction defect claim involving worsening of cracks in home over many years was not barred by the four year statute of limitations found in section 95.11(3)).

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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.