Docket No. CERCLA-03-2019-0111LL FILED August 17, 2020 2:28 PM U.S. EPA Region III, Regional Hearing Clerk

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August 17, 2020

Joseph J. Lisa, Esquire
REGIONAL JUDICIAL AND PRESIDING OFFICER
U.S. ENVIRONMENTAL PROTECTION AGENCY
1650 Arch Street
Philadelphia, Pennsylvania 19103

Re: Docket No. CERCLA 03-2019-0111LL
Turog Properties, Ltd., Pre-Hearing (Pre-Meeting) Brief

Dear Presiding Officer Lisa:

Enclosed is the pre-hearing Brief submitted by and for Turog Properties, Ltd., in advance of the upcoming hearing/meeting in this matter.

Thank you for your cooperation and patience as I entered into this matter last month and undertook this initial task.

Very truly yours,

RONALD L. CLEVER

Enclosure: TUROG PROPERTIES, LTD., BRIEF SUBMITTED PRE-HEARING (PRE-MEETING)

cc (with enclosure): Ms. Bevin Esposito

cc (with enclosure): Andrew S. Goldman, Esq.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

IN RE: Turog Properties, Ltd.	Docket No. CERCLA 03-2019-0111LL

CERTIFICATE OF SERVICE

On August 17, 2020, I am e-mailing a copy of the "TUROG PROPERTIES, LTD., BRIEF SUBMITTED PRE-HEARING (PRE-MEETING)" to Andrew S. Goldman, Esquire.

RONALD L. CLEVER
Attorney for Turog Properties, Ltd.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

IN RE: Turog Properties, Ltd.	Docket No. CERCLA 03-2019-0111LL

TUROG PROPERTIES, LTD., BRIEF SUBMITTED PRE-HEARING (PRE-MEETING)

Turog Properties, Ltd., hereby submits, to the Agency neutral official in the aforementioned lien matter, the instant Brief, submitted in advance of the hearing and/or meeting to be held by said officer.

PROCEDURAL POSTURE. This matter comes before the Regional Judicial and Presiding Officer for a hearing and/or meeting, the purpose of which is so that the Regional Judicial and Presiding Officer can recommend to Regional Counsel whether or not to perfect a lien upon the property. The instant Brief is submitted in advance of the hearing and/or meeting to be held pursuant to the *Supplemental Guidance on Federal Superfund Liens* (1993). No lien should be perfected.

FACTS (*including some argument*). Beginning in the 1980s, EPA did, and eventually completed, a cleanup at the property.

Then, the property lay dormant for years.

Then, due to unpaid taxes, the property was sold by the Bucks County Tax Claim Bureau.

Pursuant to Pennsylvania statutes, it was sold at a tax sale; the type of sale was an Upset Sale.

When a property is listed for a tax sale, neither Bucks County, nor any other governmental agency, is legally authorized to permit prospective bidders to go onto the property.

The Upset Sale, conducted as a public auction, was held in September of 1998. At that Upset Sale, 300 N. Broad Street, Ltd., bought the property; the deed was issued in 1999. Eight years later, in 2006, pursuant to a deed in lieu of foreclosure, Turog Properties Limited became the owner. (Mr. Heywood Becker is the principal manager of both entities.)

There is no mechanism for legally going onto a property merely because the property is on the Upset Sale list. Therefore (and however), Mr. Heywood Becker, the principal manager of 300 N. Broad Street, Ltd., without being able to lawfully enter the property, did extensive due diligence prior to bidding at the Upset Sale. This due diligence is described more fully, *infra*. But first, here are some of the pre-purchase facts.

The EPA had obtained court orders and/or search warrants, and otherwise had authority, to enter, investigate, and remediate the site. All of this occurred prior to the said tax sale.

The EPA spent a considerable amount of money remediating the property. During at least one investigation and/or remediation operation, news reports placed as many as 50-75 federal personnel at the site.

Diligently investigating, as a member of the public, whether the cleanup had been finished, 300 N. Broad Street, Ltd., relied on the public declarations and statements of and from the EPA. These statement and declarations said that the EPA had possession of the property on two separate occasions over the years, that the EPA had removed all of the hazardous materials, contaminants, and chemicals from the property, that the Site had been remediated, and that the property no longer contained hazardous materials, chemicals, nor contaminants known to the

EPA.

Prior to the tax sale in 1998, the property was completely fenced in on all four sides. There was a high chain-link steel fence. The fence was opaque (there were slats between the chain links). No physical examination inside the fence could have been lawfully conducted by 300 N. Broad Street, Ltd. (nor by any prospective purchaser, for that matter).

The general public is left, as a source of information, with whatever is available to the general public.

The EPA discovered one underground storage tank (UST) at the site. Of course, during their remediation, the UST and its surrounding area were among the many areas that were cleaned up. In the public record of EPA documents, which Mr. Becker was able to access at the offices of Doylestown Borough (where the EPA had lodged a publicly available set of documents) **there was no mention made**, by EPA nor my anyone else, in those records, **of any discovered leak of chromic acid** from the said UST.

Likewise, **no mention was made in those public records**, by EPA nor by anyone else, of any **deep-aquifer chromate contamination** of the Site. The records said that all known contamination had been cleaned up. The records said that their cleanup was completed.

Because the EPA did not know about it, this tax-sale Buyer had absolutely no ability to learn, nor to know of the alleged deep-aquifer chromate contamination that apparently was discovered years later (but which was attributable solely to the activities of Chem-Fab, the owner from 1967 to 1998). Likewise, both the EPA (and therefore the 1998 tax-sale buyer) were 100% unaware, in the 1990s, of the VOC sub-slab contamination (also discovered years later, and also attributable to Chem-Fab).

No potential tax-sale bidder had any legal right to enter the site, prior to the county tax

sale, pursuant to state law.

300 N. Broad Street, Ltd.'s research into the possible contamination of the subject site, prior to bidding on the property at the county tax sale, included studying the reports and statements of the EPA, and statements and reports of EPA's officials and agents, regarding the subject site. These included and are not limited to statements and reports published in newspapers, and statements and reports included in the documents lodged in the Doylestown Borough offices.

These facts contradict all of pages 24-25 of Filed *Document No. 5*, filed by the Agency on October 2, 2019, in the filed record of instant matter.

The new owner never did, nor is even accused of doing, any contamination.

The property had been owned by Chem-Fab since 1967. In or before the 1990s, Chem-Fab went out of business, and the EPA cleanup was started, and finished, in the 1990s. It was completed several years prior to the 1998 Upset Sale (tax sale).

Thus, when 300 N. Broad Street purchased the property: (***a***) the EPA cleanup had been completed; (***b***) the EPA reported, both publicly and privately, that the cleanup had been completed; and (***c***) Mr. Becker, on behalf of 300 N. Broad Street, Ltd., had done extensive due diligence, in order to assure himself, and the 300 N. Broad Street entity, that there was not going to be any further cleanup needed at the property.

After receiving its 1999 Tax Claim Bureau deed (the deed, from its having been the successful bidder for the property at the 1998 Upset Sale), 300 N. Broad Street, Ltd., participated in the "Brownfields" program.

In particular, 300 N. Broad Street, Ltd., entered into a settlement and release agreement with the Pennsylvania Department of Environmental Protection (PADEP). Under that

agreement, 300 N. Broad Street, Ltd., and PADEP provided for PADEP to do testing and future remediation of the site. In connection with making that Brownfields agreement, PADEP represented to 300 N. Broad Street, Ltd., that PADEP was in partnership with the EPA for all such work to be done by PADEP at the property.

The Tax Claim Bureau deed issued in 1999, as a result of the 1998 tax sale, was NOT a contractual relationship between the old owner (Chem-Fab) and the new owner (300 N. Broad). A tax sale is a statutory creation, and the Tax Claim Bureau issues the deed, under statutory powers.

This fact contradicts all of page 22 of *Filed Document No. 5*, filed by the Agency on October 2, 2019, in the filed record of instant matter.

But the core and the focus of the Agency's theory for why the current owner—who indisputably is NOT a polluter, since all chemical activity at the property was pre-1998—should be liable (and thus should have an adverse lien perfected) is found, beginning on pages 26 through the top of page 30 of *Filed Document No. 5*. In its discussion of § 107(b)(3), on pages 26 through the top of page 30, the Agency, through counsel, chronicles a list of activities. After this chronicling, *Filed Document No. 5*'s "Section III.B.3" makes the following TRUE conclusions:

- That "[a]fter five months of EPA efforts to secure access for the needed environmental testing, including efforts to address Turog's concerns, Turog had not consented to EPA's request for entry to two of the buildings to conduct the necessary environmental testing."
- That the EPA solved this impasses by "issu[ing] an order under § 104(e)(5)(A) …" (referred to as the "Access Order").
- That "Turog subsequently agreed to comply with the Access Order."

And then, the said Section III.B.3 concludes by making the following FALSE conclusion:

- "[A] failure by Turog, over the course of five months, to consent to entry by EPA to conduct testing … amounts to a failure to '[exercise] due care with respect to the hazardous substance' … within the meaning of [§ 107(b)(3)."

It really all boils down to that: the Agency's entire position depends upon its overreaching idea that a "failure to consent" is a failure to "exercis[e] due care."

The Agency and the property owner were in a disagreement on HOW to proceed. The contractor for EPA wanted to test drill in the middle of the main building's open floor spaces. The owner asked that the drilling, instead, be in closets, or in the corners of rooms, or other locations not in the open floor spaces. The EPA finally decided to do that. *I.e.*, the EPA accommodated the owner's request.

Similarly, the EPA wanted to remove all of the soil down to ten feet around the Main Building. EPA proposed building scaffolding for the office employees and the public to walk on, in order to access the various tenant spaces. The owner was of the opinion that that was an unduly burdensome proposal.

The EPA then announced that the two large, mature trees, in good health, on the Site would be completely removed. The owner asked the EPA to reconsider, but the EPA ignored the owner's request, and cut both trees down, and removed both of the root balls, because of the planned, upcoming soil removal and replacement.

And then, after removing all of the trees on the Site, the EPA didn't excavate the soil! The EPA said that the soil did not have to be removed, after all. Sadly, the only shade trees on the Site had been removed by the EPA, at their cost of thousands of dollars, in anticipation of excavation which the EPA then decided was unneeded.

In the final analysis, the facts relevant at this procedural juncture, with regard to Section III.B.3 of *Filed Document No. 5*, very pointedly focus in on these two things:

- that the Agency wanted to drill in the middle of the floor, and eventually ended up agreeing that it was an acceptable practice, to drill in a nearby closet instead;

- - *and* - -

- that, even though, at all times relevant, the EPA possessed the power and authority

> to issue an Access Order (and actually DID issue an Access Order), and even though the property owner had had a legitimate and honest disagreement with EPA about which part of the concrete floor to drill, merely having that honest and completely viable disagreement (and failing to "consent" to the EPA's demands) somehow constitutes obstruction.

Similarly, Sections III.B.4 through III.B.7 of *Filed Document No. 5* chronicle, first, the EPA's ideas, on the one hand, and then, secondly, on the other hand, the owner's own legitimate and honest differences with, disagreements with, or honest efforts to comply with the Agency's various proposals and ideas.

At no point did the owner obstruct. The owner merely exercised its right to express its own opinions and ideas, and to have them properly considered, before actually consenting. And actual consent was not an actual requirement, since the EPA, at all times relevant, possessed the power and authority to issue its own Access Orders.

At every point, the owner cooperated fully. The reports regarding the fans (*see Filed Document No. 5*, at its Section III.B.4) were, at first, provided frequently by the owner. Then, the EPA asked for them to be given *less* frequently. And then, the EPA complained that they wanted them *more* frequently. And, instead of wanting them to be mailed, the EPA wanted the reports sent electronically, after they had already been mailed. This is not a failure to cooperate fully; it's a situation where the parties were able to arrive at a satisfactory procedure, after both were able to agree on a mutually-agreeable and understandable procedure.

This is not the stuff of a $10-million penalty!

ARGUMENT. The "FACTS" section above contains a certain amount of argument as well. The facts (themselves, as *raw* facts) are largely undisputed.

The procedurally relevant disagreements are conclusions: whether the owner cooperated, whether the owner did pre-purchase due diligence, and whether the owner exercised due care.

It is undisputed that the owner was a non-polluter—*i.e.*, that any materials that migrated from the property had been placed there back when Chem-Fab owned the site, from 1967 until it went out of business. Chem-Fab's ownership went back to 1967. And it went out of business before (or during) the environmental cleanup.

The cleanup was completed, years before the Upset Sale.

Before the 21st-century additional cleanup, the owner had converted the place into retail shoppes, with paying tenants. The owner had entered into Brownfields agreements with PADEP.

When it came to subsequent EPA cleanup, the owner: disagreed, in several ways, with the EPA's plans; expressed his opinions and made his own suggestions; and insisted (for example, with regard to the need to drill in the center of the concrete floor, and with regard to similar items) that the EPA should explore, and should use, a better alternative, when available. (Which, indeed, the EPA ended up agreeing was a better idea anyway.)

The gravamen and focus of the Agency's argument is that, merely by exercising its right to express its opinions and to put forth its own ideas, the property owner commits either a "failure to exercise due care …" or a "failure to cooperate …," as those terms are used in § 107(b)(3) and in § 101(35)(A).

While the undersigned does not wish to make this matter into a First Amendment question, the facts do reveal that, by seeking to perfect a lien against a non-polluter in the instant

case, the Agency is electing a punitive use of its statutory lien-perfection rights.

There were some communication mishaps, all of which were solved as a result of better communications. But everything else the Agency is trying to punish the non-polluter for consists of his expressing his own opinion. Making suggestions. Disagreeing. And declining to consent, at a time and in a circumstance in which the Agency, at all times relevant, had the power and authority to exercise its own statutory right to issue an Access Order.

No harm. No obstruction.

Just a citizen, with an opinion/

An opinion, I might add, that is based on 50 years' experience in buying-&-selling neglected properties, many of which were from Sheriff's Sales and Upset Sales, and many of which indeed had some environmental concerns. Or, had some concerns that required construction remediation. Or, had some concerns that required exploring options, using outside-the-box thinking.

Mr. Becker's suggestions were good suggestions. Some were used; some were not. However, in any event, what he's accused of is (***a***) declining to "consent" to whatever the EPA suggested, instead making suggestions that preserved the ongoing landlord/tenant relationship with the retail stores that were paying the rent, which pays the property's expenses; and (***b***) exercising his and the partnership's rights to make such suggestions. In addition, there was some mis-communication about reports, and things like that.

But there was never any obstruction.

And there was never any interference.

And, at all times, EPA and PADEP were admitted to the site, any time they wanted to go there.

CONCLUSION

Many CERCLA lien situations involve placing a lien of several hundred thousand dollars onto a multi-million-dollar property.

However, in the instant case, that is flip-flopped.

I.e., the property is worth less than a million dollars, especially since any prospective buyer (now) knows that, even when the cleanup is certified as having been "completed," it can raise its ugly head again, and again in the future.

And the lien for which perfection is being considered is for over $10,000,000.

That, of course, completely crushes all value.

And, most of all, the landowner DID lots and lots of "due diligence" before bidding at the tax sale, and the landowner DID NOT cause any release of any hazardous substance due to any lapse of "due care," and the owner DID NOT interfere, nor obstruct, nor deny access to EPA. Both EPA and PADEP had access, any time they wanted it.

In the final analysis, it should not be overlooked that, given the due diligence, and the due care, and the cooperation that DID occur, the EPA is most bothered by the fact that their own plans were questioned.

Mr. Becker simply made suggestions, for less intrusive ways of doing things. And some of his suggestions made it into the work project.

I'm not sure that this matter is technically a First Amendment matter, but it is clear, from the facts, that this owner is entitled to be seen (**with regard to** due care) as a non-polluter, and (**with regard to** due diligence) as a good-faith purchaser, and (**with regard to** cooperation) as an owner who may have asked questions, but who neither obstructed nor interfered.

The Agency's plan to perfect a $10,000,000 lien on a property worth less than $1,000,000 should not be executed.

This is so, for the reasons stated in the arguments set forth above.

And this is so, also, because it almost seems retaliatory, retaliating against an owner who—instead of unquestioningly accepting the plans being imposed—made suggestions instead.

The Agency neutral official should recommend that no lien should be perfected.

Respectfully submitted,

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