MURTHA CULLINA LLP
ATTORNEYS AT LAW

99 HIGH STREET
BOSTON, MASSACHUSETTS 02110-2320
TELEPHONE (617) 457-4000
FACSIMILE (617) 482-3868
www.murthalaw.com

July 8, 2005

Via USPS Certified Mail, Return Receipt Requested
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: CERCLA Section 106(b) Petition
Centredale Manor Restoration Project Superfund Site

Dear Sir/Madam:

I enclose Brook Village Associates Limited Partnership's CERCLA Section 106(b) Petition for Reimbursement concerning response activities at the Centredale Manor Restoration Project Superfund Site. This petition is filed in connection with United States Environmental Protection Unilateral Administrative Order Docket No. CERCLA-1-2001-0032.

Sincerely,
Howard J. Castleman
Howard J. Castleman

cc: Eve Vaudo, Esq.

additional copies requested on 7/11/05 Rec'd copies on 7/14/05, ed

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In Re:	)
BROOK VILLAGE ASSOCIATES LIMITED PARTNERSHIP,	)
Petitioner,	)

PETITION FOR REIMBURSEMENT

A. INTRODUCTION AND BACKGROUND INFORMATION

Pursuant to Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), Brook Village Associates Limited Partnership ("Brook Village") hereby petitions the EAB for reimbursement of the reasonable costs, plus interest, of compliance with EPA's Unilateral Administrative Order, Docket No. CERCLA-1-2001-0032 (the "UAO") relating to removal activities at the Centredale Manor Superfund Site in North Providence, Rhode Island (the "Site").[1] A copy of the UAO is included in the Appendix to this petition as Exhibit 1. The UAO required Brook Village, a provider of affordable housing for the elderly (located on 3.5 acres at the northern tip of the 55-acre Site) to participate in over $2 million of "non-time critical" removal activities at the Site. These activities included removal of 340 tons of contaminated soil and sediment from the southern portion of the Site, and complete restoration of a dam almost a mile from Brook Village. None of the removal activities was performed on the Brook Village Property. Brook Village complied with the UAO, working

[1] Brook Village's business address is "Brook Village Associates Limited Partnership, c/o WinnResidential, 6 Faneuil Hall Marketplace, Boston, MA 02109." The full name of the facility at which the response action was implemented is the Centerdale Manor Restoration Project Superfund Site, located in North Providence, RI.

with three responding potentially responsible parties ("PRPs"), including the industrial companies and their successors that, according to EPA, had historically caused the contamination. Brook Village incurred $575,000 in response costs to comply with the UAO. Under the relevant provisions of CERCLA, Brook Village was not allowed to challenge the UAO; rather, it was required to perform the required work, and seek reimbursement of its compliance costs when the work was completed. On May 13, 2005, EPA approved the completed work.

Brook Village now seeks reimbursement of its $575,000 in compliance costs, plus interest. As discussed more fully below, Brook Village is not liable under CERCLA for EPA's response costs at the Site because Brook Village qualifies for CERCLA's Innocent Landowner Defense, 42 U.S.C. §§ 9607(b)(3), 9601(35). The hazardous substances were disposed of at the Site – not by Brook Village – but by unrelated third parties who stopped their activities at the Site years before Brook Village even existed. In October 1976, Brook Village did not know, and had no reason to know, what a legion of professionals -- including those in Congress, EPA, HUD, RIDEM, RIHMFC, the RI Department of Health, and local officials -- did not know themselves at the time: that historic industrial uses of the Site along the Woonasquatucket River, and the related legal land disposal of substances on that property, might result in a release of hazardous substances creating a risk to human health and the environment. Under these circumstances, Brook Village is an innocent landowner and entitled to reimbursement under Section 106(b) of CERCLA.

B. STATUTORY PREREQUISITES FOR OBTAINING REVIEW

Brook Village satisfies all four statutory prerequisites for obtaining review of its Reimbursement Petition. *See* EAB's November 10, 2004 Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (the "EAB 106(b) Guidance") (identifying the four statutory prerequisites established by CERCLA).

1) Brook Village has Complied with the UAO.

Shortly after EPA issued the UAO in March 2001, Brook Village entered into a cooperation agreement with several of the other PRPs named in the Order, which agreement was designed to accomplish the removal activities required by the UAO. Among other things, Brook Village and the other responding PRPs hired an experienced environmental engineering company, Louriero Engineering Associates ("LEA"), to perform the remedial work. Brook Village paid $575,000 into an escrow account created in order to fund the work. In addition, Brook Village participated in periodic meetings and discussions with EPA and with the other responding PRPS in order to ensure that the work was performed as required by the UAO.

2) EPA Has Approved the Completed Work

LEA submitted its Completion of Work Report on April 7, 2005. In a letter dated May 13th, EPA formally approved the completed work. A copy of the EPA approval letter is attached hereto as Exhibit 2.

3) Timeliness of the Petition

Brook Village has filed its Reimbursement Petition within 60 days of EPA's approval of the Completion of Work Report, as required under Section 106(b) and the EAB Revised Guidance.

4) Incurrence of Costs

Brook Village incurred $575,000 in costs in complying with the UAO. Copies of the Brook Village checks, made out to the PRP Escrow Account created by the responding PRPs to pay for the work required by the UAO, and copies of the payments to LEA are attached hereto as Exhibit 3.

C. STATEMENT OF GROUNDS FOR REIMBURSEMENT

Section 106(b) allows any person who has complied with an administrative order issued by EPA under Section 106(a) to petition for reimbursement of the reasonable costs incurred in complying with the order, plus interest. To establish a claim for reimbursement, a petition must demonstrate that it was not liable for the response costs under CERCLA Section 107(a). As set forth below, Brook Village is not liable for the response costs under CERCLA Section 107(a) because it qualifies for the innocent landowner defense provided by CERCLA Sections 107(b) and 101(35), 42 U.S. §§ 9607(b) and 9601(35).

FACTUAL BACKGROUND

Brook Village submits that the following facts are true and not challenged by EPA:

1. On or about October 20, 1976, Brook Village acquired title to approximately 3.5 acres of real estate abutting the Woonasquatucket River in North Providence, Rhode Island in order to develop affordable housing for the elderly (the "Brook Village Property" or simply the "Property"). UAO, ¶ 15.

2. Historically, the Property had been used for industrial purposes. From the 1930s to the late 1960s, a company that used and manufactured chemicals and also a barrel cleaning facility operated on the Property and the adjacent land. During this time, these

companies legally disposed of wastes from the production of hexachlorophene (containing dioxins, and other chemicals) on the Property and the adjacent land by pouring them onto the ground or in pits. *See* UAO, ¶ 14.

3. The companies left the area before 1972 at which time a fire destroyed most of the remaining structures, and the land was cleared for development. *Id.* Local officials, including the Mayor of North Providence and a state urban planner based in North Providence, considered the site of the former chemical companies to be particularly well-suited for the development of residential housing. *See* Statement of Jeffrey A. Gofton, former North Providence-based planner for the state Department of Community, Exhibit 4; Excerpts from the Town of North Providence Housing Assistance Plan ("HAP"), Exhibit 5.

4. Throughout the 1970s, neither EPA, local officials, nor citizens and businesses understood that prior land disposals of hexachlorophene wastes containing dioxins, or other chemicals, posed a threat to human health and the environment. *See* Report of Russell Train, EPA Administrator, 1973 to 1977, Exhibit 6 ; Report of John McGlennon, EPA Regional Administrator for Region 1, 1971 to 1977, Exhibit 7.

5. From May 1975 and prior to the purchase in October 1976, representatives of Brook Village performed visual inspections of the Property on more than one occasion. At the time of the visual inspections, there were fewer than 5 drums present on the ground of the Brook Village Property, with some additional drums scattered on the adjacent property. Exhibits 8 and 9. The Brook Village property appeared "unremarkable" as a former industrial site. Statement by Donald Perron, ¶ 3 (crew chief of the 1975 survey team for Waterman Engineering Company), Exhibit 10.

6. Local newspapers during 1975 and 1976 contained no references to pollution or contamination at the site of the former chemical companies or to any concern regarding the development of elderly housing on the site. Report of Seth Magaw, Exhibit 11 (reviewing all Providence and North Providence newspapers published during 1975 and 1976).

7. Construction of the Brook Village apartments was completed in the fall of 1977. In addition to the support from local officials, Brook Village was built with the approval of Rhode Island Housing and Mortgage Finance Corporation, which provided the financing, and HUD which retained a non-delegable duty for environmental assessment of the housing units. HUD Handbook 1390.1 and 4010.1, discussed *infra* pp. 33-34.

8. In 1986, approximately 10 years later, EPA began investigating the possibility that hazardous substances may have been released in connection with prior industrial operations on the Property and the adjacent land. In 1999, after 13 years of investigation, EPA concluded that dioxin and other hazardous substances were present in sufficient levels to warrant a response action. *See* UAO, ¶¶ 18, 19.

9. Dioxin is the primary contaminant of concern at the site, and it is the reason why EPA has listed it on the National Priorities List. EPA testing, however, has revealed that there are also several other hazardous substances that are the subject of a release or threatened release, including VOCs, SVOCs (including PAHs) and metals. See UAO, ¶ 35. Dioxin and these other hazardous substances hereinafter are collectively referred to as the "On-Site Hazardous Substances."

10. At the time of its acquisition in 1976, Brook Village did not actually know that dioxin and the other One-Site Hazardous Substances were present at the Brook Village Property as soil residues.

11. Brook Village's pre-purchase inquiry was consistent with "good commercial and customary practices" involving land transfers at the time. *See* Report of Norman Byrnes, Exhibit 12; Statement by Lawrence Goldman, Exhibit 13.

12. Prior to the closing, Brook Village could not have detected dioxin and the other On-Site Hazardous Substances even if it had tried. In 1976, commercially available technology did not exist to detect dioxin and the other On-Site Hazardous Substances at the levels now known to be present. *See* Report by Thomas E. Roy (entitled, "Lack of Public Knowledge and Commercial Unavailability of Technologies and Methodologies for Detecting 'Hazardous Substances' in Soil during the 1970s"), Exhibit 14.

13. Brook Village had no reason to know that dioxin and the other On-Site Hazardous Substances posed a threat to human health and the environment if present as residuals in soil. In 1976, "citizens and businesses were not yet conscious of the consequences of land disposal of industrial wastes, both in terms of potential harm to the environment, as well as future exposure to liability." *See* Report of Russell Train, EPA Administrator, 1973 to 1977, Exhibit 6.

14. During the 1970s, "EPA Region I (a) did not recognize that the disposal of chemicals and other industrial wastes in the soil would eventually pose a hazard to human health and the environment or give rise to liability; (b) did not recognize that dioxin in the soil posed any danger to human health or the environment; and (c) did not have the technical ability to detect dioxin at one part per billion." *See* Report of John McGlennon, EPA Regional Administrator for Region 1, 1971 to 1977, Exhibit 7.

15. During 1976, "a real estate developer who purchased a former industrial site, including one that used or manufactured chemicals, would not have understood that past

disposal activities at the site would have resulted in environmental 'contamination.'" Statement of John Quarles, EPA Deputy Administrator, 1973 to 1977, Exhibit 15; *See also* 1975 Congressional Testimony of John Quarles discussed, *infra*, p. 15 (testifying that the land disposal of industrial wastes was the most common legal disposal practice at the time).

As discussed more fully below, under these circumstances Brook Village qualifies for Innocent Landowner status, and is entitled to reimbursement under Section 106(b).

ANALYSIS

I. BROOK VILLAGE MEETS THE REQUIREMENTS OF THE INNOCENT LANDOWNER DEFENSE

Brook Village is not liable under CERCLA because it meets the requirements of the "Innocent Landowner Defense." *See* 42 U.S.C. § 9601(35)(A)(i)-(iii). In 1986, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act ("SARA"). *See* Pub. L. No. 99-499, 100 Stat. 1614 (codified, until subsequent amendment at, 42 U.S.C. §§ 9601-9675). "In these amendments, Congress provided an affirmative defense for landowners who, innocently and in good faith, purchase property without knowledge that a predecessor in the chain of title had allowed hazardous substances to be disposed on the property." *United States* v. *Domenic Lombardi Realty, Inc.*, 290 F. Supp. 2d 198, 209 (D.R.I., 2003) (*citing* See Allan J. Topol and Rebecca Snow, Superfund Law and Procedure § 5.6 (1992). The defense, called the innocent landowner defense, provides a statutory defense to liability where the release of hazardous substances was due to "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission

occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . ." 42 U.S.C. § 9607(b)(3)[2].

In order to assert this defense, the statute provided that a party must demonstrate, by a preponderance of the evidence the following:

(1) The contamination was caused by third parties prior to the defendant's purchase of the land;

(2) The defendant had "no reason to know" that the property was contaminated;

(3) The defendant took "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice"; and

(4) Once the contamination was discovered, the defendant exercised due care with respect to the hazardous substances concerned.

United States v. *Domenic Lombardi Realty, Inc.*, 290 F. Supp. 2d at 209 (*citing* 42 U.S.C. § 9607(b)(3); 42 U.S.C. § 9601(35)(A)-(B)).[3] As discussed more fully below, Brook Village satisfies each of the requirements for the Innocent Landowner Defense.

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[2] As discussed below, pp. 36 through 39, these Innocent Landowner provisions were further amended by the Brownfields Amendments in 2002. Brook Village submits that the version enacted in 1986, excerpted in Exhibit 16, governs this matter.

[3] The defense is created by the following definition of "contractual relationship":

> The term "contractual relationship" ... includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substances on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> > (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substances which is the subject of the release or threatened release was disposed of on, in, or at the facility.
> > (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer ...
> > (iii) The defendant acquired the facility by inheritance or bequest.
>
> 42 U.S.C. § 9601(35)(A).

1. The Contamination Was Caused by Unrelated Third Parties Before Brook Village Purchased the Property

According to EPA's own investigation, the hazardous substances were released at the Site in connection with the industrial activities of the textile mills, chemical companies and a barrel cleaning facility which occupied the Site from the early 1900s through the 1960s. The textile mills apparently used dyes and electric transformers containing PCBs in connection with the mill operations. The chemical companies (including Crown-Metro and related companies) operated at the Site from 1943 to approximately 1971-72. The barrel cleaning company, New England Containers, operated at the Site from 1952 to 1969. All operations at the Site had ceased long before 1972, when a fire destroyed many of the abandoned buildings at the Site. UAO, ¶¶ 14, 15.

Brook Village, a developer of elderly housing, did not even exist until 1976, and had nothing to do with the generation, transportation, or disposal of any such substances at the Site. Accordingly, any release or threat of a release of hazardous substances at the Site was solely caused by acts or omissions by third-parties, and not Brook Village.[4]

2. Brook Village Did Not Know And Had No Reason To Know Hazardous Substances Had Been Disposed Of At The Site.

At the time of the purchase in October 1976, Brook Village did not know that third parties had previously contaminated the Property with dioxin and other hazardous materials. In addition, Brook Village had "no reason to know" that the Property was contaminated – both in the everyday sense of the phrase *as well as* within the meaning of the Superfund statute. Under Section 9601(35)(B), a purchaser of land establishes that he had no reason to

[4] It cannot be said that, by moving earth during construction of the elderly housing, Brook Village may have caused a release of hazardous materials at the Site. Such basic construction activity cannot render an otherwise

know that there were hazardous substances on the property if, at the time of the acquisition, he made "all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice" at the time of transfer. 42 U.S.C. § 9601(35)(B). While the phrase "good commercial or customary practice" is not defined by CERCLA, the statute provides that "the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by the appropriate inspection."

a. Brook Village Undertook "All Appropriate Inquiry" Into The Previous Ownership And Uses Of The Property, Consistent With Good Commercial Or Customary Practice At The Time Of The Transfer.

Brook Village undertook "all appropriate inquiry' into the previous ownership and uses of the Property consistent with good commercial or customary practice at the time of the transfer. First, as discussed more fully below, EPA must acknowledge that Brook Village's duty to inquire is to be viewed in light of what little was known in the mid-1970s about the dangers posed by hazardous substances buried in the soil. Second, it is clear that in 1976, the "good commercial and customary practice" by purchasers of real estate did not involve conducting investigations into previous ownership and uses of property designed to assess the possibility of the presence of hazardous substances buried in the soil. Indeed, at the time of the October 1976 purchase the dangers of land disposal of hazardous substances

innocent purchaser liable under Superfund. Otherwise, all purchasers would be precluded from qualifying for the Innocent Landowner Defense, rendering the statutory defense a nullity.

was not understood by the public, and was not yet regulated by Congress or EPA. Accordingly, under the circumstances, Brook Village's inquiry into the previous ownership and uses of the Property – while limited when compared to year 2005 standards – was fully consistent with good commercial or customary practice at the time of transfer.

Moreover, Brook Village did not have at the time of the October 1976 purchase (which was before the enactment of RCRA or CERCLA) any specialized knowledge of or experience in chemistry or hazardous substances such that it should be held to a high standard of inquiry to determine whether there was contamination on the Property at the time of purchase. The Property was not sold at a discount because of the prior industrial uses of the Property. Moreover, Brook Village's inquiry must be deemed reasonable in light of the fact that the presence of contamination on the Brook Village Property was not apparent to government officials, whose job it is to look for contamination, including RIDEM and EPA, until 1999 – despite the fact that RIDEM had been investigating reports on the neighboring Lot 250 since at least 1977 and EPA had been testing soil and sediments along the Woonasquatucket River in North Providence since at least 1986. Finally Brook Village's inquiry at the time was reasonable in light of the fact that HUD regulations put the responsibility for environmental assessments on HUD, which approved the project, and not Brook Village as the program sponsor and developer. Under these circumstances, Brook Village clearly made "all appropriate inquiry" within the meaning of the statute.

1. Brook Village's Duty to Inquire Must Be Evaluated in View of the Fact That Little Was Known in the Mid-1970s About the Dangers Posed By Land Disposal of Hazardous Substances and That Land Disposal Was a Common Practice Unregulated by Congress or EPA.

Under CERCLA, Brook Village's duty to inquire must be viewed in light of what little was known in the mid-1970s about the hazards posed by hazardous substances buried in the soil. Indeed, it must be acknowledged that, during the mid-1970s, the disposal of hazardous substances on land was an accepted practice unregulated by Congress or EPA. In reality, no one, including EPA and Congress, was aware in 1976 of the risks posed by the placement of hazardous substances on and in the land.

In the Conference Report accompanying the 1986 Superfund amendments, Congress warned EPA not to apply current inquiry standards in judging past conduct:

> The duty to inquire under this provision shall be judged as of the time of acquisition. Defendants shall be held to a higher standard as public awareness of the hazards associated with hazardous substances releases has grown, as reflected by this Act, the 1980 Act and the other Federal and State statutes.

Cong. Rep. No. 962, 99th Cong 2d Sess., at 187.

The legislative history of CERCLA also reflects that, at the time that RCRA was enacted in October 1976, Congress itself -- as well as EPA -- did not appreciate the problems associated with hazardous waste disposal sites:

> A new issue has arisen which was not evident in 1976: the problem of abandoned hazardous waste disposal sites. This discovery led to an increased awareness of the gaps in RCRA under Subtitle C . . . .

H.R. Rep. No. 96-191, at 4 (May 15, 1979). During Joint Congressional Hearings on the Superfund, EPA concurred in this view:

> Unfortunately, the magnitude of this problem [land disposal of hazardous waste] was not well perceived by EPA or the Congress at the time that the Resource Conservation and Recovery Act, or RCRA, was enacted [1976].

Hazardous and Toxic Waste Disposal: Joint Hearings on S. 1341 and S. 1480 before the Subcommittees on Environmental Pollution and Resource Protection of the Environment and Public Works Committee, 96th Cong. 42-43 (1979) (Statement of Thomas C. Jorling, Ass't. Admin. Water and Waste Mgmt. U.S.E.P.A.)

Indeed, at the time of the October 1976 Closing, land disposal of hazardous waste was a common practice, unregulated by Congress or EPA. Although difficult to imagine today, in 1976, hazardous wastes were routinely disposed of on land, in surface impoundments and through other land disposal techniques. Congress had not recognized the dangers posed by such techniques, and had not even provided EPA with the authority to regulate placement of hazardous wastes in the ground. There was no RCRA or its state counterpart. No "hazardous substances" or hazardous wastes had yet been designated by EPA. Regulation of land disposal of hazardous wastes would not be implemented by EPA for four years.

Not only were there no regulatory or enforcement programs regarding placement of hazardous substances in the ground, EPA regulations under the Clean Air Act and Clean Water Act actually encouraged industry to use surface impoundments for sludges and other materials generated by the new pollution control technologies. Nobody, not Congress nor EPA - the Agency charged with protecting public health and the environment - had yet recognized the now obvious dangers of land treatment of hazardous wastes.

The legislative history of the 1976 enactment of RCRA contains instructive reminders of the common, accepted, and legal means of waste disposal in that time period. That year, John Quarles, EPA's deputy Administrator, testified about the various proposals to regulate

hazardous wastes. In response to written questions submitted by Representative Rooney, Mr. Quarles provided the following answers:

> **Question No. 4.** How are these [hazardous] wastes currently being disposed?
>
> **Answer.** By far, the most common disposal practice for industrial wastes is disposal into or on the land. Depending on the form of each waste (i.e., solid, sludge, slurry, or liquid), wastes are either piled or dumped on the surface, ponded, lagooned, landfilled or spread on the land. . . . On-site disposal is frequently characterized by simply filling large lagoons with semi-liquid wastes or by the stockpiling of solid (dry) wastes. This practice is constrained only by the availability of space. The trend for new factories, therefore, is to buy increasingly large amounts of land for disposal.

Waste Control Act of 1975: Hearings on H.R. 5487 and H.R. 406 (and similarly situated bills) before the Subcommittee on Transportation and Commerce of the Interstate and Foreign Commerce Committee, 94th Congress 775 (April 14, 1975), Extended Remarks of Deputy Administrator Quarles.

Representative Rooney pointed out that land disposal was the increasingly common and accepted practice of disposing of hazardous materials because Congress had regulated disposals of such materials in the air and the water, while continuing to permit the disposals of hazardous materials on land:

> After passage of the Clean Air Act, this nation made its policy to take the pollutants out of the air. Such pollutants were dumped on the land. After passage of the Water Pollution Control Act the Nation's Policy was to take the pollutants out of our waters. Again, such pollutants are dumped on the land. Now we are discovering that dumps and landfills pollute the air and leach into water supplies thereby making the other legislation less effective. Therefore, since the funds and regulations for the other laws are in place, a solid waste or discarded materials act is necessary if the economics and regulations of the other acts are to be effective.

Symposium on Resource Conservation and Recovery, Subcommittee print, Subcommittee on Transportation and Commerce, 94th Cong. 2 (Second Session: The Federal Role in Resource

Conservation and Recovery, Statement of Rep. Rooney) (April 6, 1976). EPA Deputy Assistant Administrator Sheldon Meyers concurred:

> As already mentioned, the various laws and regulations we now have on the books with regard to air pollution control and water pollution control essentially take pollutants out of those particular media. When you take sulfur oxide out of air, when you take certain pollutants out of water, they generally end up either as a solid or a sludge with the ultimate disposal being aimed at the land. We have here a situation where there is an open loophole in the country's pollution control scheme. That is, we have stringent regulations on air and water. We have essentially no national regulations with regard to land disposal.

Symposium on Resource Conservation and Recovery, Subcommittee print, Subcommittee on Transportation and Commerce, 94th Cong. 4 (Second Session: The Federal Role in Resource Conservation and Recovery, Statement of Sheldon Meyers, Dep. Asst. Admin. U.S.E.P.A.).

At the same symposium, Russell Train, the head of EPA, acknowledged that EPA regulations were part of the problem:

> As we regulate disposal in various mediums, if it is air or water, ocean dumping [is] another example, we are increasing the pressure on the use of other alternatives which all too often have been on the land. Likewise, many of our pollution abatement technologies produce their own residuals as in the case of sewage sludge and sludge from various sulfur oxide scrubbing technologies which [ ] add to the nation's solid waste problems. I think it only fair to say that we are not only involved in solutions but also involved at the other end, we are part of the problem too and perhaps give this a particularly valuable perspective from a systems standpoint. The whole problem -- not only are we part of the problem in this solution, but each of our areas of responsibility such as air and water quality are severely impacted by the help of municipalities, of industry, of agriculture to dispose of solid waste.

Symposium on Resource Conservation and Recovery, Subcommittee print, Subcommittee on Transportation and Commerce, 94th Cong. 34 (Second Session: The Federal Role in Resource Conservation and Recovery, Statement of Russell Train, Admin. E.P.A.) (April 16, 1976).

Moreover, in 1979 – more than three years after Brook Village acquired the Property – Congressman St. Germaine of Rhode Island acknowledged that Rhode Island was just beginning to understand the problems associated with the disposal of hazardous substances on land:

> One major issue contained in this legislation relates to hazardous waste and the difficulties surrounding its disposal. As I am certain most of you are aware, this is a problem with a number of very serious long range effects and an impact which we are now just beginning to fully understand. For years, and especially prior to the passage of several measures by the Congress, harmful materials were cast haphazardly into the environment with little regard given to the possible impact. With an emerging awareness of the possible dangers and the introduction of sophisticated equipment we are no[w] at a point where the compelling reasons for quick and decisive action are becoming clear. Primary among these is that the effects of the improper disposal of hazardous waste can easily throw an entire community into chaos and upheaval – a fact that, in Rhode Island, we have come to understand in the past several weeks.

125 Cong. Rec. H11221 (Statement of Rep. St. Germain, Nov. 27, 1979) (emphasis added).

Countless additional portions of legislative history could be cited for the proposition that awareness of the problem of hazardous waste disposal on land was only just beginning in late 1979 – more than three years after Brook Village was developed. EPA, the Agency charged with protecting public health and the environment, certainly cannot hold Brook Village to a higher standard than EPA itself could meet in 1976.

2. At the Time of the October 1976 Closing, Good Commercial and Customary Practice Did Not Require Brook Village to Conduct Any Further Investigation into the Presence of Hazardous Substances on the Property.

There can be no question that, in October 1976, "good commercial and customary practices" involving the purchase of real estate did not include investigation into the

previous ownership or uses of the property designed to determine the likelihood that there may be hazardous substances somewhere on it. Such investigations which are now commonplace are the result of government regulations and public awareness of the dangers posed by land disposal of hazardous substances that occurred long after the October 1976 purchase. Both experienced real estate practitioners as well as former EPA officials active during the mid-1970s attest to that fact. *See* the accompanying Report of Norman Byrnes (an attorney with over 50 years of experience in real estate transactions), attached as Exhibit 12, and the November 16, 2000 letter by Lawrence Goldman (former EPA Region I Enforcement Chief and President of the engineering firm Goldman Environmental Consulting, Inc.), attached as Exhibit 13.

As set forth in the report of Norman Byrnes, during May 1975 to October 1976 (the "Relevant Period"), "good commercial and customary practice for real estate transfers" principally involved performing a title search to insure that the buyer would be receiving good title to the property and to bring to light any easements or other encumbrances which might affect the use and development of the property. Byrnes Report, ¶ 12.

It was not good commercial or customary practice of real estate purchasers or their counsel during the Relevant Period to inquire into the identity of previous owners of the property and the uses they had made of it in order to determine whether there were or might be on the property any substances now considered hazardous. During the Relevant Period, such an inquiry was not part of the "Due Diligence" followed by real estate purchasers and their counsel. Byrnes Report, ¶ 12.

Byrnes also makes clear that during the Relevant Period, the following matters would not have triggered, under the good commercial or customary practices prevailing at the time, any heightened inquiry into the previous ownership and uses of the property:

1. That the property had been used as a site for textile mills.

2. That the property had been used by companies which included the word "chemical" in their names such as "Metro-Atlantic Chemical Company" or "Crown-Metro Chemical Company."

3. That a company had manufactured or used chemicals on the property, including hexachlorophene.

4. That a drum recycling company had been operating on the property or nearby property.

5. That during the Relevant Period, a few drums and other debris had been observed scattered on the property.

6. That additional drums had been observed scattered on neighboring property.

7. That chemical stains were observed on the property, or on neighboring property. (Note, however, that there is no indication that any such stains were observed during the Brook Village inspections).

Byrnes Report, ¶ 13.

In his report, Byrnes explains that, in the year 2000, because of experience the public has gained concerning the nature and significance of hazardous substances over the last twenty years, many of the items on the above list would, in all probability, now trigger an inquiry into the previous ownership and uses of the property. Byrnes Report, ¶ 14. Byrnes explains, however, that during the Relevant Period none of the items on the above list — either by itself or in combination with the others on the list —would have triggered an inquiry into the previous ownership and uses of the property under prevailing commercial or customary practices. Byrnes Report, ¶ 15.

Byrnes also points out that in the year 2000, an owner who seeks to make an inquiry into the previous ownership and uses of the property in order to determine the likely presence of hazardous substances, can retain engineering firms such as Goldman Environmental Consultants, Inc. ("GEC") to conduct such an investigation. In the 1970s, however, during the Relevant Period, such companies did not yet even exist. Nor did any law firms have environmental departments staffed by lawyers specializing in environmental matters. Byrnes Report, ¶ 16.

For these reasons, it is Byrnes's opinion as a real estate practitioner with over 50 years experience, that during the Relevant Period, a buyer of property who became aware of any of the matters listed above, would not, in the exercise of good commercial or customary practices prevailing at the time, have investigated previous uses of the property nor the possible presence of hazardous substances on the property. Byrnes Report, ¶ 17. Moreover, it is Byrnes's opinion that Brook Village's pre-purchase inquiry was consistent with good commercial or customary practice involving real estate transactions during the Relevant Time Period. Byrnes Report, ¶ 18.

Byrnes's opinion is shared by Lawrence Goldman, who was EPA's Region I (New England) Enforcement Branch Chief from 1975 to 1978 and EPA's Enforcement Division Director from 1979 to 1981. Goldman is now President of Goldman Environmental Consultants, Inc., an environmental engineering company ("GEC"). *See* Goldman Letter, ¶ 1. Following the enactment of CERCLA and state environmental laws such as Mass. Gen. Laws. 21E Goldman formed GEC in the mid 1980s to, among other things, enable

real estate purchasers to perform the kind of pre-purchase inquiries contemplated by the 1986 amendments to CERCLA, which created the Innocent Landowner Defense. *Id.*[5]

From his experience as the Enforcement Branch Chief and Division Director Region I during the 1970s, and as the founder of an environmental engineering firm in the 1980s, Goldman unequivocally states that, at the time of the October 1976 Closing, there was no "due diligence" standard regarding soil contamination and there was no industry conducting due diligence site assessments as we have come to know them. Goldman Letter, page 3. According to Goldman, the industry has evolved as the public's knowledge and sensitivity to contamination has increased. Levels of inquiry that would not be acceptable to real estate lenders and environmental consultants today were common and accepted practices in the 1970s and 1980s. *Id.*

Accordingly, when viewed in the correct 1976 historical context, Brook Village's pre-purchase inquiry was fully consistent with good commercial and customary practices involving real estate transfers at the time.

3. Brook Village's Pre-Purchase Activities

As discussed above, prior to the October 1976 Closing, representatives of Brook Village visited the Property on several occasions, conducted a title search of the Property, spoke with the Sellers, and observed the contractors completing test pits and soil borings. At no time did Brook Village observe signs that would have led a reasonable person to believe that substances posing a risk to human health or the environment were present on the Property.

[5] Rhode Island did not enact a statute explicitly establishing liability for contamination until 1995.

For example, on several occasions prior to the October 1976 Closing, Murray Movitz visited what became the Brook Village Property on behalf of Brook Village. Movitz observed a small number of drums (fewer than five) and other debris on the Brook Village Property. Movitz asked the sellers to remove the drums and other debris, which was accomplished prior to the Closing. Movitz also observed the digging of test pits and soil borings on the property, none of which revealed any indication of the presence of buried drums or soil contamination, Exhibit 8.

During this time, Movitz learned from the sellers that the Property had previously been used for industrial operations, including the manufacturing and use of chemicals. The Sellers, however, did not disclose the extent of the operations there, or the names of the chemicals involved. Movitz was not told, for example, that the company was using hexachlorophene (the manufacture of which creates dioxin as a by-product) nor would Movitz or anyone at Brook Village have known to inquire about any use of hexachlorophene at the time. Indeed no one at Brook Village would have understood the link between hexachlorophene and dioxin.[6]

Movitz's recollection regarding the condition of the property prior to October 1976 is corroborated by Donald Perron, the crew chief of the survey team from Waterman Engineering, which surveyed the property in 1975. According Perron, to in 1975 the Brook Village property appeared "unremarkable" as a former industrial site. Statement by Donald Perron, ¶ 3, Exhibit 10. In addition, during the 2 to 3 days he spent on the property, Perron did not see any chemical spills, distressed vegetation, or evidence of contamination of any

[6] Indeed, until at least the early 1980's, hexachlorophene was an EPA-registered pesticide approved for use on food crops. *See* Exhibit 18.

kind, except for the tail race which was "blocked with debris and stagnant." Id. ¶ 4. The only "pollution" Perron observed in the tailrace appeared to be caused by the presence of wooden beams, metal rods, bricks, and the remains of building structure in the water. *Id.* Moreover, at the time of the October 1976 Closing (and during the decades that followed) neither RIDEM nor EPA reported any drums or visible signs of contamination on the Brook Village Property.

In short, Brook Village's pre-purchase activities on the Property, including its title search, the several visits to the property by Movitz, his conversations with the Sellers and his observations and knowledge concerning the results of test pits and soil borings on the Property, were fully consistent with the "good commercial and customary practices" involving the purchase of real estate that prevailed at the time of the October 1976 closing.

4. Brook Village Did Not Have Any Specialized Knowledge Or Experience In Purchasing The Property, Such That It Would Be Held To A High Standard Of Inquiry To Determine Whether There Was Contamination On The Property At The Time Of Purchase.

At the time of the October 1976 Closing, neither Mr. Winn nor Mr. Movitz had any knowledge or experience in chemistry or hazardous substances such that Brook Village would be held to a high standard of inquiry to determine whether there was dioxin or other substances on the property that posed a threat to human health or the environment.

Mr. Winn graduated from Brookline High School in 1957. He attended college at the University of Massachusetts at Amherst, graduating in 1961 with a Bachelor of Arts degree and majoring in Economics. After college, Mr. Winn attended Harvard Business School, graduating in 1964 with a Masters Degree in Business Administration. Mr. Winn's education

at UMass and Harvard concentrated on business and the liberal arts, not the sciences. Exhibit 8.

In 1964, Mr. Winn began working for Druker Real Estate. In 1970, Mr. Winn left Druker and, with a partner Stanley H. Sydney, President and Principal of Sydney Construction Company, formed the Sydney & Winn Development Associates. Over the next several years, Sydney & Winn was involved in the development of affordable housing for the elderly and families with low or moderate income.

In 1975, at the age of 36, Mr. Winn began developing real estate through his own company, Winn Development Company. The Brook Village development in North Providence was his first real estate project, which he developed with the assistance of Murray Movitz, a former colleague from Druker Real Estate, as project manager. Around 1975, Stanton Abrams, a well-respected Rhode Island attorney and real estate broker (who was also a former colleague from Druker) informed Mr. Winn of the possibility of developing affordable housing in North Providence, Rhode Island. Mr. Winn and Mr. Movitz met with officials from HUD and the RIHMFC and the North Providence Mayor's Office, all of whom approved the building of affordable housing on the site of the former Crown-Metro plant. Since Mr. Winn no longer had a general contractor as a partner, upon the recommendation of local officials, he hired Marshall Contractors, Inc. -- an experienced and well-respected Rhode Island contractor -- to serve as the general contractor. Marshall in turn hired C.E. Maguire -- a world-renowned Rhode Island engineering company -- to provide architecture and engineering services. Upon obtaining the approval of HUD and RIHMFC officials to proceed building Brook Village on Lot 200 in this manner, Brook Village purchased the Property and formally entered into the series of contracts and regulatory agreements on October 20, 1976. *Id.*

Mr. Winn did not, prior to October 1976, have any experience in chemicals or hazardous waste clean-up -- in large part because public awareness of environmental consequences from industrial operations had not yet been developed and environmental statutes such as CERCLA and RCRA had not yet been enacted. In addition, on all of Mr. Winn's prior projects, Sydney Construction had been responsible for architectural, engineering and all other construction related matters, and Mr. Winn had been responsible for obtaining necessary financing and government approvals. Under these circumstances, it cannot be said that Arthur Winn or Brook Village had any specialized knowledge or experience in purchasing the Property, such that they would be held to a high standard of inquiry to determine whether there was contamination on the Property at the time of purchase. To conclude otherwise is to hold Brook Village and its principals to a higher standard than the EPA itself could have met in 1976.

5. Brook Village's Inquiry Into Past Ownership And Uses Was Reasonable In Light Of The Relationship Of The Purchase Price To Market Value If Uncontaminated.

Brook Village Property was acquired in October 1976 at a purchase price of $176,500. The property was not purchased at a discount because of the prior industrial uses of the Property. *See* Report of Thomas Andolfo, MAI, Exhibit 19. Indeed, according to the historical real estate market analysis performed by Thomas Andolfo, Brook Village paid a higer than average cost for its property when compared to other area parcels, not part of any Superfund Site, that were developed as multi-family housing at approximately the same time as Brook Village. More specifically, the Brook Village acquisition price $176,500 reflected a per square foot cost of $1.16 and a per unit cost of $1,748. According to Andolfo's analysis, however, the mean per square foot cost from comparable sales was $0.85 and the mean per

unit cost was $1,348. Exhibit 19. Accordingly, the purchase price of the Property did not, and could not, place Brook Village on notice that the Property previously had been contaminated with hazardous substances.

6. Brook Village's Inquiry Was Reasonable In Light Of The Fact That The Presence Of Contamination on the Property Was Not Apparent To Government Officials, Including RIDEM and EPA.

Brook Village has learned, but did not know at the time, that RIDEM and then EPA had been active on neighboring properties investigating soil and subsoil conditions from at least 1977 through 1999. During this time period, neither RIDEM nor EPA was aware of the presence of dioxin or other hazardous substances on the Brook Village Property. Indeed, during this time period, with respect to the Site as a whole, neither regulatory agency ever perceived a threat sufficient to commence time-critical removal activities or HRS scoring for possible placement on the National Priorities List. Moreover, neither RIDEM nor EPA had informed Brook Village that either of these environmental agencies had found drums and hazardous substances on the adjacent property.

In particular, although EPA began investigating the Site in 1986, it did not discover the presence of dioxin on or near the Brook Village Property until 1998. For example, after RIDEM removed the barrels from other portions of the Site in the early 1980s, EPA and its contractors were active on the Site during the 1980s and the 1990s -- conducting a Preliminary Assessment in 1986, a Subsurface Soil Investigation in 1990, and a SIP investigation and additional testing in 1996. Despite over 12 years of active investigation, however, EPA did not detect the presence of dioxin or any substances it considered worthy of action until 1998. EPA cannot contend that, at the time of the October 1976 Closing, Brook

Village "should have known" what RIDEM and EPA did not discover for themselves until many, many years later.

7. Brook Village's Inquiry Was Reasonable In Light Of Commonly Known Or Reasonably Ascertainable Information About The Property

For these reasons, Brook Village's inquiry was also reasonable in light of commonly known or reasonably ascertainable information about the property. There is no basis for arguing that Brook Village "should have known" of the presence of hazardous substances because historically it had been well known in the neighborhood that the chemical companies at the Site had been sloppy -- dumping chemicals in pits or washing drums out with hoses. First, as real estate expert Norman Byrnes explains in his report, pre-purchase inquiry of neighbors regarding disposal practices was not, back in 1976, part of "good commercial and customary practices."

In any event, to describe the operations of the companies as sloppy improperly characterizes 1950s and 1960s behavior in light today's standards. As the EPA Guidance recognizes, however, contemporary standards at the time of acquisition must be used to evaluate qualification for Innocent Landowner Status. Exhibit 17, p. 7 n. 11. *See also 1325 "G" Street Associates, LP* v. *Rockwood Pigments NA, Inc.*, 2004 U.S. Dist. LEXIS 19178 (D. MD. 2004) (proper standards for court to apply in "all appropriate inquiry" analysis "must be those which were in effect at the time of the purchase").

By the mid-1970s, "land disposal was the most common – and accepted – method of disposing of industrial wastes. Indeed, many EPA regulations required land disposal of these wastes." Report of Russell Train, ¶ 3. The prevailing view was that the earth could attenuate wastes "by a combination of filtration, adsorption and biodegradation." *Id.*, ¶ 4.

Consequently, in the mid-1970s, "companies and municipalities that disposed of chemicals and other industrial wastes on land were not thought to be 'contaminating' the land. Rather land disposal was seen as a method of containing and treating wastes." Report of Russell Train, ¶ 4. Accordingly, disposing of chemicals in pits or pouring them on the ground would not have – in the 1970s – led one to believe that the soil was contaminated. Similarly, the presence of drums and soil staining on a former industrial site was thought during the 1970s to be incidental to the use and disposal of chemicals there, and would have not lead one to believe that the land had been contaminated. Not surprisingly, the surveyor who observed the sheen on the stagnant water and the small fire on the site considered the Brook Village Property to be "unremarkable" as a former industrial site and did not report these observations to the prospective purchaser (Brook Village) or to anyone else at the time. *See* Exhibit 11.

8. Brook Village's Inquiry Was Reasonable In Light Of The Obviousness Of The Presence Or Likely Presence Of Contamination At The Property, And The Ability To Detect Such Contamination By The Appropriate Inspection

At the time of Brook Village's October 1976 purchase, the public did not recognize hexachlorophene or dioxin as substances harmful to the environment. Report of Thomas Roy, P.E., P.G., L.S.P, Exhibit 19, p. 2, ¶ 2. Prior to 1976, "hexachlorophene was a widely advertised ingredient in face soap," and "the general public was virtually unaware of even the existence of dioxin." *Id.* Similarly, in 1976, "the general public would not have recognized VOCs, PCBs and the other substances recently found on the Brook Village Property as hazardous substances when present as soil constituents." *Id.*, ¶ 4.

Notably, in 1976, "even EPA did not fully appreciate dioxin's toxicity and did not fully understand the connection between hexachlorophene and dioxin." Roy Report, p. 2, ¶ 3.

In 1976, EPA registered pesticides containing hexachlorophene for use on spraying food crops. Thus, even if prior to Brook Village's purchase, analytical testing had revealed the presence of hexachlorophene, dioxin, or the other substances now known to be the site, Brook Village would not have known – in light of contemporary knowledge – that the property had been contaminated with any substance then known to pose a threat to human health and the environment.

Even if it had tried, however, Brook Village would not have been able in 1976 to test for and detect any the hazardous substances that are the subject of the government's response action. As explained by Thomas Roy, in 1976 none of the relevant technologies and methodologies were yet commercially available. Roy Report, pp. 3-5 (in 1976, "technologies and methodologies were not commercially available to detect dioxin, PCBs, VOCs, and SVOCs on the Brook Village Property in either the soil or the groundwater"). There is thus no basis for stating that Brook Village "should have known" that these materials were present on the Site at the time of acquisition.

b. Brook Village's Purchase of Property Previously Used for Industrial Purposes Does not Preclude Its Status as an Innocent Landowner

One cannot tenably argue that a person who purchased a former industrial site in 1976 is automatically disqualified from innocent landowner status. As explained by Mike Deland former EPA Regional Administrator for Region I from 1983 to 1989, one of the purposes of the innocent landowner provision "was to ensure that those who acquired former industrial sites prior to the transformation of our environmental standards would not be unfairly subjected to liability." Deland Statement, ¶ 3, Exhibit20.

In addition, "an interpretation of the innocent landowner defense which disqualifies a pre-purchaser simply on the basis that there were then-common place indications of earlier

industrial use (such as stained soil or reports of drum storage) would undercut the defense and appears to be inconsistent with the purpose of the provision." Deland Statement, ¶ 4. See also Statement of William Kane Reilly, EPA Administrator, January 1989 to January 1993 (stating that "it would be inconsistent with the innocent landowner provision to contend that a party who acquired a parcel in 1976 or earlier is liable simply because it knew or should have known that the site had previously been occupied by a cannery, a chemical facility or a manufacturing plant which may have disposed of its wastes in the ground."); Statement of F. Henry Habicht II, Assistant Attorney General for Land and Natural Resources, 1983 to 1987 and EPA Deputy Administrator, 1989 to 1993 (recalling, in connection with deliberations leading to the creation of the innocent landowner provision in 1986, no "discussions or language providing that commercial real estate developers or other purchasers of former industrial sites should be excluded from consideration for innocent landowner status."), Exhibits 21 and 22.

"The SARA amendments provided that landowners were to be treated differently than other types of PRPs. Generators and transporters of hazardous substances remained liable even if they did not know that their method of waste disposal was hazardous to the environment." Statement of John Quarles, former EPA Deputy Administrator, ¶ 7. Landowners, on the other hand, were determined by Congress to be exempt from liability under CERCLA if, among other things, they had no reason to know that there were "hazardous substances" on the property at the time of purchase. *Id.* ¶ 8. Accordingly, "in determining the innocent landowner status of a purchaser of land in the 1970s, one must apply contemporary standards to determine the appropriate level of inquiry as well as to determine whether a person in the 1970s should have understood the results of that inquiry." Statement

of Donald Stever, former Environmental Defense Section Chief for the United States Department of Justice, ¶ 5, Exhibit 23.

There is also no basis for stating that Brook Village does not qualify for innocent landowner status because it "should have known" that hazardous substances – other than those that are actually present at the Site and form the basis of the government's response action – might have been present because the Site had formerly been used for industrial purposes. As EPA's Guidance on Settling with Innocent Landowner explains, "EPA interprets the phrase "any hazardous substance" in the context of actual or constructive knowledge to mean a hazardous substance which is the subject of the release or threat of release:

> The Agency interprets the phrase "any hazardous substance" to mean a hazardous substance which is the subject of the release or threat of release. Interpreting "any hazardous substance" more broadly would make the de minimis landowner settlement provisions unavailable to essentially every party. It is clear that Section 122(g) is concerned with a de minimis party's connection to the activities giving rise to the release that is the subject of the response action.

EPA Guidance, p. 5 nn. 6 and 7, Exhibit 17.

In summary, the evidence presented by Brook Village demonstrates that, at the time it purchased its property in 1976, Brook Village did no know, and had no reason to know, of the presence of the hazardous substances that are the subject of the government response action. Brook Village clearly meets the requirements of the Innocent Landowner provision as set forth in the statutory language.

c. At the time Brook Village acquired the Property, HUD regulations placed the responsibility for environmental investigation on HUD, and not Brook Village as the program sponsor and developer.

Finally, Brook Village's inquiry at the time was appropriate for yet another reason: At the time Brook Village acquired the Property in connection with a HUD development program, HUD regulations explicitly placed the responsibility for environmental assessments on HUD, and not on Brook Village as the program sponsor and developer. Moreover, at the time of the October 1976 Closing, HUD did not require its own officials to perform the kind of site investigation that it requires them to do today.

The Brook Village elderly housing was developed pursuant to Section 8 of the United States Housing Act of 1937. The Rhode Island Housing and Mortgage Corporation ("RIHMC"), a state Housing Finance Agency, issued tax-exempt bonds to provide funds for the development, and HUD provided rent subsidies for persons meeting certain low income requirements.

As a federally subsidized program, the development was required to meet a comprehensive set of federal regulations, including environmental requirements. Compliance by HUD with the requirements in place in 1976 -- the year Brook Village was developed -- must by itself be deemed "appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice" and render the developer an "innocent landowner" pursuant to Section 101(35)(A) of CERCLA. Further, as noted below, HUD procedures placed the burden of complying with environmental matters squarely on the shoulders of HUD itself, not the developer.

A review of contemporaneous HUD materials demonstrates that, in 1976, HUD was not more aware of the dangers posed by land disposal than was EPA. The federal requirements applicable to subsidized housing are found in HUD regulations, HUD handbooks, guidebooks, and notices which are published in the Federal Register. At the time Brook Village was developed, there existed two primary HUD documents providing guidance to HUD officials regarding environmental assessments for federally assisted housing projects. Procedures announced in the Federal Register of July 18, 1973 (38 Fed. Reg. 19182) entitled "Protection and Enhancement of Environmental Quality" set forth procedures for HUD officials applicable to all HUD subsidized programs. The procedures are comprehensive for their time, but do not require an environmental assessment of the type common today. It bears repeating that this was before RCRA regulations and Superfund liability -- that is, before EPA regulated land disposal of hazard waste and before a party could be liable for such disposal.

Importantly, responsibility for assuring environmental compliance is with HUD not the developer. HUD Handbook 1390.1, referenced in the July 18, 1973 Federal Register, also does not require HUD or its delegate to perform the kind of assessment that might have revealed subsurface evidence of environmental problems. HUD Handbook 4010.1 is even more specific as to who is responsible for environmental reviews:

> NORMAL AND SPECIAL ENVIRONMENTAL CLEARANCE PROCESSING. Processing will be initiated in every instance by the appraiser assigned to process the SAMA [Site Appraisal and Market Analysis] application or other initial project application or ASP-1 Subdivision Application. The appraiser will analyze the Site in accordance with outstanding processing instructions and will utilize environmental criteria in preparing the Normal and Special Environmental Clearance. The appraiser will request and obtain interdisciplinary assistance as needed. Additional information may also be requested from the sponsor, but the burden of assessing environmental impact is with the

> HUD office and not with the sponsor. Requests for additional information should be limited to those instances involving information which is not obtainable by HUD technical personnel.

Id. (emphasis supplied). The responsibility for assuring the absence of environmental problems was with HUD's delegate, who, in this case, was sufficiently satisfied to move the project forward, subsidized by federal funds.

In 1974, HUD proposed but never finalized 24 CFR Part 50: Protection and Enhancement of Environmental Quality. 39 Fed. Reg. 6816 (February 22, 1974). This proposed HUD regulation did not require HUD to conduct subsurface environmental assessments. These proposed regulations reference the two handbooks mentioned above, but do not otherwise set forth any additional requirements for HUD to meet. Handbook 1390.1 was amended on several other occasions through the mid-1970s. In 1979, HUD published an interim rule found at 24 C.F.R. 50 codifying and replacing all prior guidance. This interim rule was again revised in 1982. Even the 1979 and 1982 changes to 24 CFR Part 50 -- three and six years after Brook Village was developed, respectively -- did not require HUD to perform environmental assessment of the type common today. See 44 Fed. Reg. 67906 (November 27, 1979) and 47 Fed. Reg. 56266 (December 15, 1982).

It was not until the mid-1990s that HUD regulations determined for the first time that "appropriate inquiry" might include consideration of whether the development might be on or near former landfills or industrial sites. See existing 24 CFR Parts 50 and 51 (in particular Sections 50.3; 50.3(i)(3) and (4)7 as well as Sections 50.31 and 51.200(b)).[8] It was not until

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[7] Those sections provide as follows: "(3) Particular attention should be given to any proposed site on or in the general proximity of such areas as dumps, landfills, industrial sites or other locations that contain hazardous wastes" and " (4) HUD shall require the use of current techniques by qualified professionals to undertake investigations determined necessary."

1994 that HUD published a guidebook specifically addressing the issue: "Siting of HUD-Assisted Projects Near Hazardous Facilities."

Under these circumstances, Brook Village's pre-purchase inquiry was fully consistent with "good commercial and customary practices" involving the purchase of real estate in October 1976 and satisfies the "appropriate inquiry" requirements of CERCLA's Innocent Landowner Defense.

3. Brook Village Exercised Due Care With Respect To The Hazardous Substances and Did Not Fail to Take Any Precautionary Measures Against the Foreseeable Acts of Third Parties

Starting in 1998, when it first learned of the presence of hazardous wastes at the site, Brook Village has exercised due care with respect to the substances and has fully cooperated with EPA. In October 1998, Brook Village had hired Goldman Environmental Consultants, Inc. ("GEC") to assist in the removal of an underground storage tank. In 1999, after EPA indicated that dioxin might be present on the Brook Village Property, Brook Village immediately instructed GEC to work closely and cooperatively with EPA. Exhibits 8 and 9. In addition, GEC tailored its scope of work to include investigating the presence of dioxin. Among other things, GEC made available to EPA all of its analytical data, field reports, and historical data to facilitate EPA's investigations. Brook Village also encouraged GEC to assist EPA's on-scene coordinator in whatever way possible, including the acquisition of data. *Id.* In particular, GEC has conducted subsurface investigations with test borings and well-installations and has shared all test results with EPA. Brook Village has also participated in completing EPA's interim cap on a portion of the Brook Village Property. Brook Village has

[8] The purpose of this subpart C was to: "(b) Alert those responsible for the siting of HUD-assisted projects to the inherent potential dangers when such projects are located in the vicinity of such hazardous operations."

also fully cooperated with EPA in complying with the three EPA orders issued to date concerning the Centerdale Manor Site. Under these circumstances, Brook Village clearly has exercised due care with respect to the hazardous substances found on its Property.

Moreover, Brook Village did not fail to take any "precautionary measures" against the foreseeable actions of third parties who disposed of the hazardous substances on the Site. Brook Village is not aware of any acts by third parties that occurred after Brook Village purchased the property on October 20, 1976. Moreover, EPA has never provided Brook Village with any suggestion that any such acts occurred after October 20, 1976 or that Brook Village failed to take any precautionary measure with respect thereto. Under these circumstances, it cannot be said that Brook Village does not qualify for the Innocent Landowner Defense because it failed to take any required "precautionary measures" against any foreseeable acts of third parties.

II. BROOK VILLAGE ALSO MEETS THE REQUIREMENTS OF THE INNOCENT LANDOWNER DEFENSE ADDED BY THE BROWNFIELD AMENDMENTS

After EPA issued the UAO, and after Brook Village began compliance, Congress enacted the Small Business Relief and Brownfields Revitalization Act (the "Act" or "Brownfields Amendments"), which altered elements of CERCLA's innocent landowner defense. See Pub. L. No. 107-118, 115 Stat. 2356 (2001). In part, this Act was intended to encourage the purchase and development of "brownfields" by attempting to eliminate the fear of CERCLA liability often associated with the purchase of such land. *See* S. Rep. No. 107-2, at 2 (2001). The Act altered CERCLA's innocent landowner defense in three ways. First, the Act modified the "all appropriate inquiries" standard from one that must be "consistent with

good commercial or customary practice" to one that must be "in accordance with generally accepted good commercial and customary standards and practices." 42 U.S.C. § 9601(35)(B)(i)(I). Second, it established criteria for determining whether a defendant has made "all appropriate inquiries" regarding the past ownership and usage of a property. Third, a party must now demonstrate to the court that it cooperated with persons authorized to conduct response activities and that it took reasonable steps to stop any continuing release, prevent any future release, and prevent or limit exposure to any previously released hazardous substance. 42 U.S.C. § 9601(35)(B)(i)(II)(aa)-(cc).

The federal courts addressing the issue, however, have ruled that the Brownfield Amendments concerning the innocent landowner defense should not be applied retroactively. Rather the version of the innocent landowner defense in effect at the time the underlying facts in this case occurred should control. *See, e.g., United States* v. *Domenic Lombardi Realty, Inc.*, 290 F. Supp. 2d 198, 210 (D.R.I., 2003) ("Because of this retroactive impact and the lack of clear congressional intent favoring such a result, this Court concludes that the innocent landowner defense, as it existed at the time the underlying events in this case occurred, is the appropriate standard to be applied in this case."). *See also In Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994) (recognizing the traditional presumption against retroactive application because "considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly").

As discussed above, Brook Village meets the requirements of the innocent landowner defense that existed at the time at the time EPA issued the UAO in March 2001 and Brook Village began its compliance. But even if they do apply, Brook

Village also satisfies the requirements added by the Brownfield amendments. First, the supporting materials, including the statement by Norman Byrnes, demonstrate that Brook Village's pre-purchase inquiries were in accordance with the Act's modified standard of "generally accepted good commercial and customary standards and practices." 42 U.S.C. § 9601(35)(B)(i)(I) (phrase modified from "good commercial or customary practice").

Second, while the Act charged the EPA with the obligation to establish standards and practices for the purpose of satisfying the "all appropriate inquiries" requirement within two years of the Act's enactment, See 42 U.S.C. § 9601(35)(B)(ii), it also established interim standards that courts are to apply until the EPA adopts its regulations. For property purchased before May 31, 1997, those standards and practices are identical to the standards employed by the innocent landowner defense prior to the Act's enactment. *Lombardi Realty, Inc.*, 290 F. Supp. 2d 198 at 208-211 (citing 42 U.S.C. § 9601(35)(B)(iv)). As discussed above, Brook Village has meet those standards and practices that existed prior to the passage of the Brownfield Amendments.

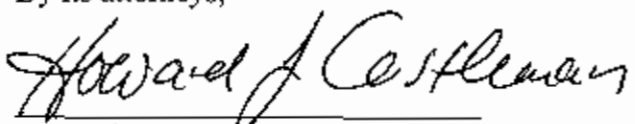
Finally, there is no question that Brook Village has "provided full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility," 42 U.S.C. § 9601(35)(A) and that, once notified of the releases and threatened releases at the Site, Brook Village has taken reasonable steps to stop any continuing release, prevent any future release, and prevent or limit exposure to any previously released hazardous substance, 42 U.S.C. § 9601(35)(B)(i)(II)(aa)-(cc). As discussed above, Brook Village has provided EPA with full access to its property, provided available technical data, and fully participated in the UAO which is the subject of this petition as well as two other

administrative orders issued by EPA with respect to the Site. Under these circumstances, Brook Village would satisfy the requirements of the innocent landowner defense added by the Brownfield Amendments, even if they applied retroactively in this case.

CONCLUSION

Brook Village, a provider of elderly housing, is not responsible for the EPA's response costs arising out industrial activity at the Site that stopped long before Brook Village was even formed. It is an innocent landowner which did not know, and had no reason to know, what EPA, state and local officials *themselves* did not know at the time: that historic industrial uses of the Site along the Woonasquatucket River, and the related legal land disposals of substances on that property, might result in a release of hazardous substances creating a risk to human health and the environment. Brook Village has fully cooperated with EPA's response activities at the Site, and it is now entitled to reimbursement of its compliance costs, plus interest, under Section 106(b).

BROOK VILLAGE ASSOCIATES
LIMITED PARTNERSHIP,
By its attorneys,



Howard J. Castleman
Murtha Cullina, LLP
99 High Street
Boston, MA 02110
(617) 457-4130

Of Counsel:
Colburn T. Cherney
Ropes & Gray
700 12th Street, NW, Suite 900
Washington, DC 20005-3948

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