

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
ADMINISTRATIVE ADJUDICATION DIVISION**

**RE: 75 GOFF AVE REALTY TRUST**

**AAD NO. 16-001/WME**

**NOTICE OF VIOLATION OCI-UST-2014-74-00544**

**DECISION AND ORDER**

This matter came on for Hearing before Hearing Officer David M. Spinella on November 28, 2016 on the appeal filed by the Respondent, 75 Goff Ave. Realty Trust (“Respondent”). The appeal was filed on January 26, 2016 with the Administrative Adjudication Division (“AAD”) of the Department of Environmental Management. Christina A. Hoefsmit, Esquire represented the Rhode Island Department of Environmental Management’s (“DEM”) Office of Compliance and Inspection (“OC&I”). Mr. Johannes Bien, a Trustee of The 75 Goff Ave. Realty Trust, appeared for the Respondent. Mr. Bien is also the operator of the facility. A Stenographer was present. The OC&I filed its Post Hearing Memorandum on December 16, 2016. The Respondent did not file a Post Hearing Memorandum.

The Administrative Adjudication Division (“AAD”) has personal and subject matter jurisdiction over the Respondent and this matter pursuant to the Statutes governing the Administrative Adjudication Division for Environmental Matters (R.I.G.L. §42-17.7-1 et seq.); the Administrative Procedures Act (R.I.G.L. § 42-35-1 et seq.); the Administrative Rules of Practice and Procedure for Department of Environmental Management, Administrative Adjudication Division for Environmental Matters and DEM’s Rules and Regulations for Underground Storage Facilities Used for Petroleum Products and Hazardous Materials (“UST’s”) 2011.

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**I. Exhibits**

The following Exhibits were marked and entered as Full Exhibits during the Hearing:

- OC&I 1-Full Copy of Underground Storage Tank Facility Certificate of Registration, dated December 8, 2014, one (1) page;
- OC&I 2-Full Copy of the Notice of Intent to Prohibit Delivery, dated February 6, 2015, twelve (12) pages;
- OC&I 3-Full Copy of the OCI Inspection Report, dated March 24, 2015, four (4) pages;
- OC&I 4-Full Copy of the Notice of Delivery Prohibition hand delivered to Mr. Bien and affidavit of service dated March 24, 2015, six (6) pages;
- OC&I 5-Full Copy of the Notice of Delivery Prohibition sent to the Trust and Mr. Bien, dated March 26, 2015, nine (9) pages;
- OC&I 6-Full Copy of the OCI Inspection Report, dated August 25, 2015, one (1) page;
- OC&I 7-Full Copy of Notice of Violation and Order, dated January 5, 2016, thirteen (13) pages;
- OC&I 8-Full Copy of the excerpts from the Rules and Regulations for Underground Storage Facilities used for Petroleum Products and Hazardous Materials dated April 2011, twenty (20) pages;
- OC&I 9-Full Copy of the Declaration of Trust for the 75 Goff Avenue Realty Trust dated May 7, 1999, eleven (11) pages;
- OC&I 10-Full Resume of Sean Carney, two (2) pages;
- OC&I 11-Full Resume of Richard LeFebvre, one (1) page;
- OC&I 12-Full Resume of Tracy D'Amadio Tyrrell, two (2) pages.

**II. Burden of Proof**

The parties agreed on the record that the Burden of Proof rests with the DEM to prove the allegations in the Notice of Violation by a preponderance of the evidence.

**III. Hearing Summary**

The OC&I called three witnesses: Mr. Yohannas Bien, a Trustee of the 75 Goff Ave. Realty Trust; Mr. Richard LeFebvre, a Senior Environmental Scientist in the DEM Office of Compliance and Inspection and Ms. Tracey Tyrrell, a Supervising Environmental Scientist in the DEM Office of Compliance and Inspection. Mr. Bien did not present any witnesses.

**A. Johannes Bien**

Mr. Bien presented a Declaration of Trust prior to the Hearing which evidenced the fact he is an authorized Trustee of the Respondent Trust (OC&I Exhibit 9-Full). Mr. Bien did not stipulate to any of the facts in the Notice of Violation ("NOV") but did not contest the facts as presented at the Hearing. He said The Trust owns the subject property at 75 Goff Avenue (OC&I Exhibit 9-Full and Tr. Pg. 8 line 24). The property is a gas station known as "Goff Gas" with three underground storage tanks (Tr. pg. 9 line 6) that were registered with the DEM. On February 6, 2015, the DEM sent the Trust a Notice of Intent to Prohibit Delivery ("NIPD") (OC&I Exhibit 2-Full) because of the fact the tanks and facility were in substantial noncompliance with the UST Regulations and posed a safety issue. Mr. Bien acknowledged receipt of the NIPD (Tr. pg.12 line 6)

Mr. Bien claimed he submitted documentation to DEM which demonstrated that the appropriate tank and tank apparatus tests were conducted in a timely fashion and that the Trust was in compliance with the UST Regulations. He did not offer any documents in support of his claim and DEM officials testified that such documentation was never submitted (Tr. pg. 33 lines 4-18; pg. 35 lines 5-13 and pg. 73 lines 5-8). Mr. Bien acknowledged an inspection with DEM

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officials, including Mr. LeFebvre, at the facility on March 24, 2015. The purpose of this inspection was to close the facility and lock the tanks because the Respondent failed to comply with the requirements of the NIPD of February 6, 2015. During the March 24, 2015 inspection, Mr. Bien signed the report that was prepared by the DEM (OC&I Exhibit 3-Full). The facility was "red-tagged" meaning no gasoline could be delivered nor dispensed any longer due to the facility being in substantial non-compliance with the UST Regulations. This was caused by the Respondent's failure to conduct and submit various required tests and reports demonstrating to the DEM that the registered equipment used to store and dispense gasoline was in proper working order and compliant with the UST Regulations. The DEM issued a Notice of Delivery Prohibition ("NPD") to Mr. Bien personally during this inspection (OC&I Exhibit 4-Full).

Mr. Bien, during his direct examination said that he suffered a dramatic downturn in business; that he always complied with the Regulations and acknowledged meeting with DEM officials (Ms. Tyrrell and Mr. LeFebvre) to try and resolve his difficulties (Tr. pg. 24 lines 6-12; pg. 13 line 17). He also admitted throughout his testimony that he failed to comply with many of the UST testing requirements due to his bad financial condition compounded by the fact the station was closed. (Tr. pg. 15 lines 4-22; pg. 20 line 22 and pg. 21 line 10).

A follow up inspection occurred on August 25, 2015 (OC&I Exhibit 6-Full). Mr. Bien acknowledged meeting with DEM officials again. The station was still closed and pumps locked. No gasoline was being delivered or pumped.

Finally, on January 5, 2016 the OC&I sent a Notice of Violation to the Respondent (OC&I Exhibit 7-Full) which Mr. Bien acknowledged receiving (Tr. pg. 23 line 11).

Mr. Bien appealed the Notice of Violation to the AAD and requested a Hearing on January 26, 2016.

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Mr. Bien alleged that he filed a temporary closure application for the tanks but provided no proof of this allegation (Tr. pg. 24 lines 12-18). He instead argued that he was and is constantly working to lease or sell the facility or to get a loan to keep operating but has not been successful in doing so. (Tr. pg. 24 lines 20-24; and pg. 25 lines 1-24 and pg. 26 lines 1-9).

**B. Richard LeFebvre**

Mr. LeFebvre has been employed at the DEM for 23 years. He is currently a Senior Environmental Scientist in the OC&I. He investigates complaints, does compliance inspections and drafts enforcement actions. He primarily conducts UST inspections and is therefore familiar with the UST Regulations (Tr.pg. 28 lines 1-15).

He has worked on this matter for several years. He stated that the facility at 75 Goff Avenue has a Certificate of Registration listing the three tanks located there. The Certificate of Registration is required to be renewed annually (Tr. pg. 20 lines 1-20). This facility is number 544 (OC&I Exhibit 1-Full). Mr. LeFebvre said he drafted the NIPD in this matter (OC&I Exhibit 2-Full) because the facility was in substantial non-compliance with the UST Regulations for operational control (Tr. pg. 32 lines 1-19). The facility failed to perform certain tank tightness tests; failed to have the proper automatic tank gauging system and do inventory control etc. (Tr. pg. 32 lines 12-19). It is his belief that because the Respondent failed to file documentation regarding those operational controls, that the testing was not performed dating back to 2007. (Tr. pg. 34 lines 12 and 13 and lines 20-22).

He said the NIPD listed 11 remedial actions the Respondent needed to take to prevent

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closure of the facility (Tr. pg. 35 lines 19-24; pg. 36 lines 1-24 and pg. 37 lines 1-8). None of the required remedial actions were performed by the Respondent (Tr. pg. 39 lines 9-12). The Respondent met with other DEM officials and discussed the remedial actions needed to be performed. The Respondent failed to perform so an inspection was conducted on March 24, 2015 (OC&I Exhibit 3-Full) which resulted in closure of the tanks and facility (Tr. pg. 39 lines 6-24 and pg. 40 lines 1-24). At this point, the Respondent had the option to apply for temporary closure of the tanks but an application was never filed (Tr. pg. 40 lines 1-23). Because Respondent did not file an application for temporary closure, the clock started ticking for the tanks to be permanently closed within 6 months. Thus, on August 25, 2015 another inspection of the facility was conducted (OC&I Exhibit 6-Full). Mr. LeFebvre stated that the tanks were still locked and red tagged and no fuel was being dispensed.

As a result of the Respondent's failure to take any corrective action, the DEM issued a Notice of Violation to Respondent on January 6, 2016 (OC&I Exhibit 7-Full). The DEM alleges that the tanks were abandoned since the Respondent did not obtain approval for temporary closure of the tanks; did not comply with the requirements of the NIPD and the NDP and they were out of use for more than 180 days without temporary closure approval. The DEM alleges Respondent violated three Underground Storage Tank Rules and Regulations: (1) Rule 8.21 (H) which requires that UST's not brought into compliance with the Regulations shall be permanently closed within 180 days after a red tag is affixed (2) Rule 13.02(A) which prohibits the abandonment of regulated UST's (abandonments occurs 180 days after tanks are taken out of operation) and (3) Rule 13.05 which requires permanent closure of tanks taken out of operation for more than 180 days without temporary closure approved.

Mr. Bien, while cross examining Mr. LeFebvre, attempted to show that he had two tank

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tests performed but he did not have any documents to prove that fact. He did not recall the years the two tests were performed but thought it was 2003. (Tr. pg. 60 lines 1-24). He also argued that he did not receive notice from the DEM to test the tanks so it was not his fault (Tr. pg. 61 lines 1-4).

In response, Mr. Lefebvre said he did not recall any test results being submitted and pointed out to Mr. Bien that it is his responsibility to know and abide by the UST Regulations (Tr. pg. 64 line 24 and Tr. pg. 65 lines 18-21).

**C. Tracey Tyrrell**

Ms. Tyrrell has been employed by the DEM since 1989. She is a Supervising Environmental Scientist in the OC&I. She participated in the investigation and review of this matter as well as the drafting of the Notice of Violation (Tr. pg. 71 lines 1-22). She succinctly reviewed the chronology of events with respect to the UST's at this facility as was detailed by Mr. Lefebvre. She also pointed out that on several occasions throughout this time she met with Mr. Bien and discussed the options he had regarding the facility and the tanks vis- a- vis the UST Regulations. (Tr. pg. 73 lines 10-24 and pg. 74 lines 1-18).

She reviewed the deadlines and the various options Respondent had and concluded the temporary closure option was best suited because of his financial circumstances. The Respondent failed to pursue any options (Tr. pg. 76 lines 10-24 and pg. 77 lines 1-7).

Ms. Tyrrell further testified that 180 days had passed since the issuance of the NDP and the Respondent did not file a permanent closure application with the DEM (Tr. pg. 78 lines 6-14).

Ms. Tyrrell said there is a danger to the environment when underground tanks are

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abandoned. The danger is that the tanks are not being used daily and are not being regularly observed, tested or monitored which poses a larger threat to the environment if they release gas. (Tr. pg. 79 lines 4-16).

Ms. Tyrrell then explained how the penalty in the Notice of Violation was calculated. The Department assesses administrative penalties by utilizing the factors contained in the Rules and Regulation for the Assessment of Administrative Penalties. It is done on a case by case basis.

In this case the OCI seeks the assessment of an administrative penalty in the amount of Seven Thousand Seven Hundred Ninety-Two (\$7,792) dollars against the Respondent. The NOV states that the penalty was assessed pursuant to RI Gen. Laws 42-17.6-2 and was calculated pursuant to section 12 of the Penalty Regulations. Section 12(c) reads as follows:

In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.

Section 12 (c) requires the OC&I to prove the alleged violation by a preponderance of the evidence. The OC&I has the obligation to then produce evidence of the penalty it seeks to impose and the calculation thereof. The Respondent/Violator then must prove that the penalty and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations. In Re: Richard Fickett, AAD No. 93-014/GWE (1995).

Ms. Tyrrell testified to the manner in which the administrative penalty was calculated. She first determines whether the violation is a Type I, Type II or Type III violation and whether the Deviation from the Standard is Minor, Moderate or Major. (TR. pg. 6 lines. 80-84). Ms. Tyrrell concluded that this case warranted a Type I violation because this violation required some action by the Respondent, which he failed to take, or some type of approval from the DEM,



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which he failed to obtain. (TR. pg. 83 lines 16-24). Deviation from the standard is measured by how far out of compliance the Respondent is from the Regulations. This case warranted a Moderate Deviation Assessment according to Ms. Tyrrell (TR. pg. 83 lines 5-16). Mr. Bein did not rebut Ms. Tyrrell's testimony and offered no evidence on the penalty calculation and/or economic benefit portion of the penalty.

**IV. Analysis**

It is undisputed that the USTs remain on the Property and have not been closed pursuant to the UST Regulations. Mr. Bein testified on multiple occasions at the hearing that he does not have the money to comply with the UST Regulations be it fixing the system or permanently closing the Facility. (TR. pg. 13 Lines 11-17; pg. 14 Lines 6-24; pg. 15 Lines 1-6 and pg. 25, Lines 17-20). Mr. Bein further testified that he does not want to permanently close the Facility. (TR. pg. 24 Lines 20-24 and pg. 25 Lines 1-3). Testimony from Mr. LeFebvre revealed that a permanent closure application had not been submitted as of the date of the NOV. The NDP clearly required the respondent to permanently close the USTs if the USTs had not been brought into compliance with 180 days of the issuance of the NDP. (OC&I Exhibit 5- Full). Ms. Tyrrell testified that despite several meetings with Mr. Bein as of the date of the NOV they had not received any documentation from Mr. Bein. (TR. pg. 73 Lines 9-24 pg. 74 Lines 1-18; pg. 76 Lines 7-24 and pg. 77 Lines 1-7). Mr. Bein's defense to the NOV essentially boils down to an inability to pay the costs and expenses necessary to maintain the Facility's compliance with the UST Regulations and that his financial condition excuses his

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non-compliance. Throughout the hearing Mr. Bein testified that due to financial constraints he simply does not have the money to address the issues at the Facility. (TR. pg. 13 Lines 11-17; pg. 14 Lines 6-24 pg. 15 Lines 1-6 and pg. 25, Lines 17-20). The testimony from Mr. Lefebvre and Ms. Tyrrell make it clear that the DEM understood the Respondent's financial condition and the DEM staff attempted to work with the Respondent to prevent this exact situation. Ms. Tyrrell testified that on at least two occasions she had a meeting with Mr. Bein to explain the options available to address the issues at the Facility in light of Mr. Bein's financial constraints, including the option of a temporary closure of the tanks (TR. pg. 73 Lines 9-24; pg. 74 Lines 1-18; pg. 76 Lines 7-24; and pg. 77 Lines 1-7). However, to date, DEM has not received documentation of any type from Mr. Bein nor has he attempted to resolve this issue with the DEM.

For the reasons set forth herein, I find that the OC&I has proven, by a preponderance of the evidence all of the facts alleged in Section B of the NOV.

I also find that the penalty amount and its calculation was assessed properly by The OC&I and that the Respondent failed to meet its burden of proving that the penalty and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations.

**CONCLUSION**

The OCI proved, by a preponderance of the evidence, the facts alleged in the NOV; the violations of UST Regulations Rules 8.21(H), 13.02(A), and 13.05 as set forth in the NOV; and the administrative penalty in the amount of \$7,792 which was calculated in accordance with the applicable regulations and statutes.

**IV. Findings of Fact**

- (1) The property at issue is located at 42 Dexter Street (a/k/a 75 Goff Avenue), Assessor's Plat 44, Lot 493, in the city of Pawtucket, Rhode Island (the "Property").
- (2) The Property includes a service station and three underground storage tanks (the "Facility").
- (3) 75 Goff Avenue Realty Trust (the "Trust") is the owner of the Property and has owned the property since 1999.
- (4) Johannes Bien is one of the Trustees of the Trust and is authorized to act on behalf of the Trust.
- (5) The Facility is registered with the DEM as Goff Gas and is identified as UST Facility No. 00544.
- (6) The USTs that are registered with the DEM at the Facility are:

<u>UST ID No.</u>	<u>Date Installed</u>	<u>Capacity</u>	<u>Product Stored</u>
002	unknown	5000 gallons	Diesel
004	unknown	8000 gallons	Gasoline
006	unknown	8000 gallons	Gasoline

- (7) On February 6, 2015, DEM issued a Notice of Intent to Prohibit Delivery ("NIPD") to the Trust and Mr. Bien. The NIPD highlighted numerous violations of the UST Regulations.
- (8) On March 11, 2015, Mr. Bien, who identified himself as the property owner, met with DEM and stated that he had a lease with a Facility operator but that the Facility was not open and was not dispensing any gasoline.
- (9) The Trust and Mr. Bien failed to comply with NIPD.
- (10) On March 24, 2015, DEM inspected the Facility and spoke with Mr. Bien at the time of inspection. The inspection revealed that the Facility was not in compliance with the UST Regulations.
- (11) During the March 24, 2015 inspection DEM inspectors: installed red tags

and locks on the fill ports for the USTs prohibiting delivery of gasoline to the USTs; provided Mr. Bien with a Notice of Delivery Prohibition ("NDP"); and notified Respondent that he was required to permanently close the USTs in accordance with DEM's UST Regulations unless he complied with the NDP within 180 days.

- (12) On March 26, 2015, a copy of the NDP provided to Mr. Bien at the March 24, 2015 inspection was sent to the Trust and to Mr. Bien.
- (13) The Trust and Mr. Bien failed to request an administrative hearing on the NDP.
- (14) The NDP became a final agency order due to the failure of the Trust and Mr. Bien to request an administrative hearing.
- (15) On August 25, 2015, DEM inspected the Facility and spoke with Mr. Bien at the time of the inspection. The inspection revealed that the red tags and locks were still affixed on the fill ports for the USTs.
- (16) On January 5, 2016, DEM issued a NOV citing the Respondent with violations of the UST Regulations at the Property. The NOV ordered Respondent to assessed an administrative penalty of seven thousand, seven hundred and ninety two dollars (\$7,792) against the Respondents.
- (17) The facility has not been dispensing gas since late 2014.
- (18) The UST's have been out of service since late 2014.
- (19) The UST's have been abandoned since at least August 25, 2015.
- (20) The UST's remain on the Property.
- (21) The UST's have not been permanently closed in accordance with the UST Regulations.

**VII. Conclusions of Law**

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:

1. The AAD has personal and subject matter jurisdiction over the Respondent and this matter pursuant to the statutes governing the *Administrative Adjudication Division for Environmental Matters* (RI Gen. Laws §42-17.7-1 et. seq.); the *Administrative Procedures Act* (RI Gen. Laws §42-35-1 et seq.); and the *Administrative Rules of Practice and Procedure of the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters* ("AAD Rules") and the *DEM's Rules and Regulations for Underground Storage Facilities used for Petroleum Products and Hazardous Materials* ("UST's") 2011.
2. The Rhode Island Department of Environmental management has proved, by a preponderance of the evidence, the allegations in the Notice of Violation dated January 5, 2016, against Respondent 75 Goff Ave Realty Trust.
3. The Respondent violated Rule 8.21(H) of the UST Regulations as set forth in Violation 1 of the NOV.
4. The Respondent violated Rule 13.02(A) of the UST Regulations as set forth in Violation 2 of the NOV.
5. The Respondent violated Rule 13.05 of the UST Regulations as set forth in Violation 3 of the NOV.
6. The Rhode Island Department of Environmental Management met its burden of proving, by a preponderance of the evidence, the penalty amount of seven thousand seven hundred and ninety-two dollars (\$7,792) against the Respondent.
7. The assessment of an administrative penalty in the amount of \$7,792.00 against Respondent is not excessive and in accordance with the applicable administrative penalty regulations.
8. The Respondent failed to demonstrate that the administrative penalty was not properly assessed in accordance with the penalty regulations.

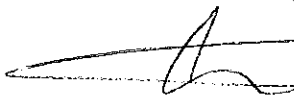
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Based upon the above Findings of Fact and Conclusions of Law, the Order and Administrative Penalty set forth in the January 5, 2016 Notice of Violation are hereby upheld.

Wherefore it is hereby **ORDERED** that;

1. Respondent's Appeal is hereby **Denied and Dismissed**.
2. The Notice of Violation is **Affirmed and Upheld**.

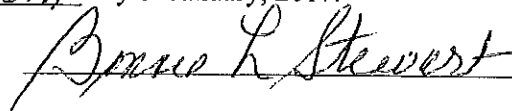
Entered as an Administrative Order this 26<sup>th</sup> day of January, 2017.



David M. Spinella  
Hearing Officer  
Administrative Adjudication Division  
One Capitol Hill, 2<sup>nd</sup> Floor  
Providence, RI 02908  
(401) 574-8600

**CERTIFICATION**

I hereby certify that I caused a true copy of the within Final Decision and Order to be forwarded by first-class mail to: 75 Goff Ave Realty Trust, c/o Johannes Bien, 75 Goff Avenue, Pawtucket, RI 02860; via interoffice mail to Christina A. Hoefsmit, Esquire, DEM Office of Legal Services and David Chopy, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908 on this 26<sup>th</sup> day of January, 2017.



**NOTICE OF APPELLATE RIGHTS**

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.