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# When Daylight Reveals Neighborhood Nightmares: The Duty of Builders and Developers to Disclose Off-Site Environmental Conditions

Serena M Williams

# When Daylight Reveals Neighborhood Nightmares: The Duty of Builders and Developers to Disclose Off-Site Environmental Conditions

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In 1987, Mark Holt discovered that his "Home-Sweet-Home" was not so sweet when the Georgia Environmental Protection Division detected low levels of methane gas on one of the lots in his subdivision.<sup>1</sup> The testing was performed because the subdivision in which he had purchased his home was adjacent to a landfill which the City of Warner Robins, Georgia, had previously operated and then shut down in 1977.<sup>2</sup> In 1989, an engineering firm hired by the city concluded that a portion of the closed landfill was encroaching on lots in the subdivision, including Holt's.<sup>3</sup> The fill material was generating methane gas which could threaten the homes.<sup>4</sup> Because the removal of the fill material was costly, the engineer recommended that the fill material be left intact, rendering the homes uninhabitable.<sup>5</sup> When engineers hired by Holt found methane gas on his property in 1990, Holt had to move out of his house.<sup>6</sup> He found out the hard way that buying a house in a subdivision

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<sup>1</sup> *City of Warner Robins v. Holt*, 470 S.E.2d 238, 240 (Ga. Ct. App. 1996).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Methane is a naturally occurring gas produced by decay during the decomposition process. It is a concern in landfills due to its explosive characteristics. Methane gas also kills vegetation by displacing oxygen from the root zone. See RACHEL'S HAZARDOUS WASTE NEWS #226, March 27, 1991, at 1.

<sup>5</sup> *City of Warner Robins*, 470 S.E.2d at 240.

<sup>6</sup> Mark Holt subsequently filed suit against the city asserting claims of trespass, abatable and permanent nuisance, and emotional distress. He was awarded \$59,000 for diminution of market value of his house, which the jury indicated represented the full market value of the property, and \$52,000 for emotional distress or for loss of peace, happiness or enjoyment. The city

adjacent to a landfill, even one no longer in operation, could be as harmful as buying a home directly on the surface of one.

Under the doctrine of caveat emptor, "let the buyer beware," neither the builder nor developer of the homes in a subdivision would have a duty to disclose to Mr. Holt (or any other prospective purchaser) that the homes were built near the site of a closed landfill.<sup>7</sup> The doctrine of caveat emptor, however, has grown into disfavor as courts and legislative bodies have become more protective of consumers' rights in the area of residential real estate sales.<sup>8</sup> As a result, a seller's duty to disclose material defects in the property being sold has greatly expanded. Sellers have been found liable for failure to disclose conditions ranging from a leaking roof<sup>9</sup> to termite infestation<sup>10</sup> to the use of a banned substance for insulation.<sup>11</sup> Sellers have also been found liable for failing to disclose that a home was the site of a multiple murder ten years prior to the sale<sup>12</sup> and for failing to disclose that a home had a reputation for being haunted.<sup>13</sup> In all these cases, however, the defect in the home was an on-site condition impacting either the physical integrity of the structure or the psychological well-being of the inhabitants. Thus, even in a jurisdiction that requires disclosure, the professional seller of Mark Holt's home would not have had a duty to disclose the proximity of the subdivision to a landfill since the duty has not generally been expanded to require disclosure of potentially harmful

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lost its appeal on these two issues. *Id.* at 241.

<sup>7</sup> Other recent events indicate a desire by home buyers to seek relief from developers who fail to disclose information about landfills in the vicinity of a community. In Greensboro, North Carolina, the City Council agreed to buy back houses in a subdivision—developed as a public-private partnership to provide affordable homes to first-time buyers—to end a dispute with the residents, who claimed the developer failed to disclose that a landfill across the street from their property would be expanded. The city was buying back the houses in the community from residents who could not get a fair market value for their property. Kelly Simmons, *City Won't Buy Nealtown Home*, GREENSBORO NEWS AND REC., October 24, 1996, at BG2.

<sup>8</sup> Paula C. Murray, *Aids, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689, 690 (1992); see also Margaret A. Morgan, Note, *When the Walls Come Tumbling Down: Theories of Recovery for Defective Housing*, 56 ST. JOHN'S L. REV. 670, 682-93 (1982) (discussing the trend away from caveat emptor).

<sup>9</sup> *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985); *Posner v. Davis*, 395 N.E.2d 133 (Ill. App. 1979).

<sup>10</sup> *Godfrey v. Steinpress*, 180 Cal. Rptr. 95 (Ct. App. 1982); *Obde v. Schlemeyer*, 353 P.2d 672 (Wash. 1960).

<sup>11</sup> *Roberts v. Estate of Barbagallo*, 531 A.2d 1125 (Pa. Super. Ct. 1987).

<sup>12</sup> *Reed v. King*, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983).

<sup>13</sup> *Stamovsky v. Ackley*, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).

off-site environmental conditions.<sup>14</sup>

Thousands of facilities in the nation generate industrial and household wastes and other pollutants that may pose health threats to the residents of the communities in which these facilities are located. In spite of this potential threat, builders and developers construct homes in close proximity to these potentially harmful facilities. These homeowners may be able to bring a tort action, e.g., in nuisance, against the facility.<sup>15</sup> However, for the homeowners to bring an action against the builder or developer who “brought” them to the nuisance, i.e., the landfill, without disclosing its existence, the builder-developer must first be found to have a duty to disclose the off-site environmental condition. This Article discusses whether the builders and developers of residential homes should have a duty to disclose off-site environmental conditions such as landfills and incinerators to home buyers. Part I of this Article traces the general development of a seller’s duty to disclose on-site conditions. The duty developed into one which requires the seller to disclose on-site defects that materially affect the value and desirability of the property which are known to him but not to the buyer. Part II describes how the duty to disclose has been expanded by courts and legislative bodies to include a duty to disclose off-site conditions. The courts consider a variety of factors when finding a duty to disclose on-site environmental conditions. Part III of this Article discusses these factors within the context of off-site environmental conditions. The Article concludes with a discussion of parameters on the duty to disclose off-site conditions, a duty of honesty and fair dealing required in a modern society.

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<sup>14</sup> *But see* Strawn v. Canuso, 657 A.2d 420 (N.J. 1995) (seller had the duty to disclose that a landfill was near the home); Alexander v. McKnight, 9 Cal. Rptr. 453 (Cal. Ct. App. 1992) (sellers had a duty to disclose offensive and noisy activities of neighbors which were determined to be a nuisance).

<sup>15</sup> *See, e.g.,* Blair v. Anderson, 570 N.E.2d 1337 (Ind. Ct. App. 1991) (owners of property adjacent to landfill who suffered a special injury of water flow blockage to a creek on their property had standing to bring a private right of action for abatement); Wayne County v. Tennessee Solid Waste Disposal Board, 756 S.W.2d 274 (Tenn. Ct. App. 1988) (holding that farm owners could bring a private nuisance action against neighboring landfill which caused contamination of their well water).

## I. DEVELOPMENT OF THE DUTY TO DISCLOSE ON-SITE CONDITIONS

Discussions of the seller's duty to disclose usually begin with a historical analysis of the doctrine of caveat emptor.<sup>16</sup> The doctrine first appeared in England sometime in the Sixteenth Century<sup>17</sup> and came to the United States through the common law where it was subsequently applied to real property conveyances.<sup>18</sup> Under the doctrine, the seller of real property had no duty to disclose facts unknown to the buyer in an arm's length transaction.<sup>19</sup> Instead, the buyer had a duty to obtain the information necessary, usually by inspection, to judge the value of the property offered for sale.<sup>20</sup> The doctrine of caveat emptor, however, began to erode when modern courts and legislatures began to impose greater duties of fairness and reasonableness first on sellers of goods and then later on sellers of real property in order to inject a sense of fair play into the marketplace. Although a disclosure duty is often viewed as a modern concept, these courts were actually applying ancient ideas: "[C]aveat emptor is not to be found among the reputable ideas of the Middle Ages."<sup>21</sup>

### A. Looking for Roots of a Duty to Disclose: The Words of Saint Thomas Aquinas

The arguments for implementing a duty to disclose on sellers of goods has been traced to the thirteenth century writings of Saint Thomas Aquinas.<sup>22</sup> The rationale which underlies Aquinas' arguments for a duty

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<sup>16</sup> For a complete discussion of the history of caveat emptor, see Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

<sup>17</sup> *Id.* Hamilton writes that the expression first appeared in print in a legal discussion referring to horse trading. A buyer is cautioned "to make sure of the goodness of his bargain in horse-flesh while yet there is time, if the horse be sold without a warranty, it is 'at the other's peril, for his eyes and his taste ought to be his judges' in that case." *Id.* at 1164 (citation omitted). The Supreme Court of New Jersey noted in its opinion expanding the duty to disclose that, "Legal historians will continue to debate whether the doctrine of caveat emptor was the creation of the laissez-faire judges or merely a rule of legal convenience reflecting the fact that most land transactions involved vacant land." *Strawn v. Canuso*, 657 A.2d 420, 425 (N.J. 1995).

<sup>18</sup> Richard M. Jones, *Risk Allocation and the Sale of Defective Used Housing in Ohio—Should Silence Be Golden?*, 20 CAP. U.L. REV. 215 (1991).

<sup>19</sup> *Id.* at 217.

<sup>20</sup> Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381 (1995).

<sup>21</sup> Hamilton, *supra* note 16, at 1136 (emphasis omitted).

<sup>22</sup> Hamilton, *supra* note 16, at 1138.

to disclose defects in the sale of goods provides a framework for twentieth century arguments to expand the disclosure duty in the sale of real property. The focus of both is on the concepts of justice and fair dealing.

Aquinas' writings discuss standards of conduct for trade dealings in medieval times, positing that a seller ought to manifest defects in the goods sold. Aquinas declared that a seller ought to reveal to the buyer defects in the item where the defects are substantial, i.e., where they affect the substance of the item, and where the defect would render the item harmful or not useful for the known intention of the buyer.<sup>23</sup> Furthermore, the seller should reveal hidden defects which go to the quality of the item if there is some danger of serious harm from the defect.<sup>24</sup>

Aquinas' rationale for a seller's disclosure of a defect in an item sold is found in the development of his answer to his question, "Is the seller bound to declare any defect in the thing sold?"<sup>25</sup> A negative reply to the question raises four objections to disclosure of the defect by the seller: 1) The seller should not be responsible for any mistake a buyer may make by being rash and failing to make due inquiries; 2) Someone who points out the flaws in an object he is selling is acting foolishly by doing something that hampers his activity; 3) A man is not bound to counsel another or to tell him the truth, although no one is entitled to tell lies; and 4) The only reason for disclosing flaws in an object for sale is to lower the price.<sup>26</sup>

In support of an affirmative reply to the question of whether a seller should disclose a defect, Aquinas answers by first explaining that a person is never entitled to put another in the way of danger or loss, although neither is one obligated to give another assistance which would

<sup>23</sup> BENEDICT HENRY MERKELBACH, *SUMMA THEOLOGIAE MORALIS*, (9th ed.), Belgium: Desclée de Brouwer et Cie, 1954, Vol. II, pp. 542-44.

<sup>24</sup> *Id.* See also SAINT THOMAS AQUINAS, *QUAESTIONES DISPUTATE*, II, q.5, a.2, Rome: Marietti, 8th ed., 1949. Raymond Spiazzi, O.P., editor, p. 32-3.

<sup>25</sup> SAINT THOMAS AQUINAS, *SUMMA THEOLOGIAE*, IIa, IIæ, q. 77, a.3, p. 221 (Blackfriars 1975). Aquinas wrote the *SUMMA THEOLOGIAE* between 1259 and 1269. *THE CAMBRIDGE COMPANION TO AQUINAS* 18 (Norman Kretzmann and Eleonore Stump eds., 1993). It is constructed entirely of questions demanding an affirmative or negative reply, thus presenting an issue with two sides. *Id.* at 15. The questions are subdivided into subquestions called articles. The development of the article's question consists of four parts that begin with fixed formulas: 1) the introduction to arguments supporting the negative reply; 2) the introduction to arguments supporting the opposite reply; 3) the beginning of the writer's own doctrinal explanation; 4) rejoinders to the objections that were raised at the beginning. *Id.* at 18-9.

<sup>26</sup> AQUINAS, *SUMMA THEOLOGIAE*, *supra* note 25, at 222-23.

promote the other's advantage.<sup>27</sup> A seller places a buyer in a position of danger or loss by offering him defective goods where the flaw makes the use of the thing sold difficult or harmful. Aquinas concludes that if such defects are not obvious and the seller does not disclose them, the sale is fraudulent and the seller is bound to make restitution.<sup>28</sup> On the other hand, where the flaw is obvious and where the seller sufficiently discounts the price, he is not bound to disclose the defect.<sup>29</sup>

Saint Thomas Aquinas closes by replying to the objections to defect disclosure by the seller. He retorts that since a man judges of what he knows, a buyer is not in a position to make a judgment unless the defects are disclosed by the seller. However, a seller need not advertise his flaws by public crier, since to do so would frighten off potential buyers before they have had a chance to examine the good qualities of the item for sale. Thus Aquinas posits a seller is bound to privately inform every interested buyer who is in a position to assess the good and bad points, since a thing can be defective in one respect but very useful in others.<sup>30</sup>

In his rejoinder to the objection that a man is not bound to counsel another, Aquinas replies that such an obligation exists where failure to disclose might endanger another.<sup>31</sup> A member of the Thomastic Institute explained Aquinas' rejoinder:

Is it enough for him to cut down the price and say nothing? Hardly. The drop in price will take care of any damage that might otherwise have come to the buyer in the sale itself; but it will not take care of the gun later exploding in the buyer's face, nor [in the case of a flawed diamond] of the explosion of wrath from his fiancée who happens to be a jeweler's daughter.<sup>32</sup>

Those modern courts which find a duty to disclose substantial and harmful defects in the sale of real property are merely applying the centuries-old notion of fair dealing in the marketplace. The protection offered to the buyers of the defective gun and the flawed diamond

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<sup>27</sup> *Id.* at 223.

<sup>28</sup> *Id.* at 225.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> WALTER FARRELL, III, A COMPANION TO THE SUMMA 237 (1940).

should likewise be offered to home buyers. To rephrase Aquinas' rejoinder, where a "duty to speak exists, the failure to speak constitutes unfair conduct likely to cause harm."<sup>33</sup>

## B. Development of the Duty to Disclose in Residential Real Estate Sales

Centuries after Aquinas' discourse, the general rule regarding disclosure was that an action would not lie for tacit nondisclosure; mere silence or a passive failure to disclose facts of which the defendant had knowledge could not serve as grounds for a tort action.<sup>34</sup> This rule reflected the old tort notion that no liability exists for nonfeasance or merely doing nothing.<sup>35</sup> The rule was considered to have been properly applied where the defect undisclosed was patent or where plaintiff had equal opportunity to obtain information which he might be expected to use.<sup>36</sup>

Over time, exceptions to the general rule developed. For example, when the parties stand in some confidential or fiduciary relation to one another, full disclosure of all material facts might be required.<sup>37</sup> Other factors considered in creating exceptions include the relation of the parties to each other, the nature of the fact not disclosed, the importance of the fact not disclosed, and the general class to which the person who is concealing the information belongs.<sup>38</sup> A duty to speak also arises when what is not disclosed makes other representations misleading or when a statement honestly made is later discovered to be false.<sup>39</sup>

In the context of the sale of residential real estate, the duty to

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<sup>33</sup> *Strawn v. Canuso*, 638 A.2d 141, 149 (N.J. Super. Ct. 1994).

<sup>34</sup> W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 106 (5th ed. 1984).

<sup>35</sup> For further discussion of nonfeasance and misfeasance, see Jean Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807 (1995).

<sup>36</sup> KEETON ET AL., *supra* note 34, § 106.

<sup>37</sup> *Id.* at 738. The Restatement also provides for liability for nondisclosure in certain circumstances. A duty to disclose is found where the parties have a fiduciary or other similar relation of trust and confidence between them. RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1977). A person is required to disclose only those matters that he has reason to know will be regarded by the other as important in determining his course of action in the transaction in hand. *Id.* at cmt. c.

<sup>38</sup> KEETON ET AL., *supra* note 34, § 106.

<sup>39</sup> CLARENCE MORRIS & C. ROBERT MORRIS, JR., *MORRIS ON TORTS* 307 (2d ed. 1980) (citing *Bergeron v. Dupont*, 359 A.2d 627 (N.H. 1976) and *Fischer v. Kletz*, 266 F. Supp. 180 (S.D.N.Y. 1967)).



disclose was not adopted as quickly as it was with regard to the sale of goods. The law, at one point, was said to offer "greater protection to the purchaser of a seventy-nine cent dog leash than it does to the purchase of a 40,000-dollar house."<sup>40</sup> Nevertheless, courts did begin to extend the doctrine to circumstances where a latent defect in the property or in the physical structure threatened the residents with harm.

The latent defect in these cases usually related to the physical structure of the property. For example, an action for fraud in the sale of real property was upheld in a 1960 California case where the subdivider knew, but failed to disclose, that the lot sold to a couple was in the vicinity of an ancient landslide, in an area of underground water, and that the house was constructed on fill placed on the lot without adequate compaction.<sup>41</sup> The court found that, "[u]nder these circumstances, [the subdivider's] duty of disclosure is clear," even though the couple made no examination of the premises other than viewing it.<sup>42</sup> The subdivider was under a duty to disclose facts that materially affect the value and desirability of the property which were known to him but not to the buyer, particularly where the buyer was not competent to judge the facts without expert advice.<sup>43</sup>

That same year, the Supreme Court of the State of Washington affirmed a lower court decision finding that a seller was under a duty to disclose termite infestation to the buyers of a frame house.<sup>44</sup> Termite infestation of a frame building was considered by the court to be "manifestly a serious and dangerous condition" that, if not checked, could cause a complete collapse of the building.<sup>45</sup> Furthermore, at the time of the sale, the condition was latent, and not readily observable upon reasonable inspection, since all surface evidence of the termite infestation had been removed by the pest control specialist.<sup>46</sup>

The seller's duty to disclose in real estate sales developed into a duty to disclose material facts which are not readily observable and are not known to the buyer. Material facts are on-site defects affecting the

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<sup>40</sup> Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 633 (1965).

<sup>41</sup> Buist v. Dudley De Velbiss Corp., 6 Cal. Rptr. 259, 262 (Cal. Ct. App. 1960).

<sup>42</sup> *Id.* at 263.

<sup>43</sup> *Id.* at 264.

<sup>44</sup> Obde v. Schlemeyer, 353 P.2d 672 (Wash. 1960).

<sup>45</sup> *Id.* at 675.

<sup>46</sup> *Id.* See also Maguire v. Masino, 325 So. 2d 844 (La. Ct. App. 1975).

habitability, value, and desirability of the property.<sup>47</sup> Examples of material facts include a leaking roof,<sup>48</sup> sewage back-up,<sup>49</sup> water under the foundation footers,<sup>50</sup> and landslides.<sup>51</sup>

A few courts have extended the duty to disclose material facts to conditions affecting the inhabitants of property that may psychologically affect a substantial number of buyers.<sup>52</sup> The California case, *Reed v. King*,<sup>53</sup> was the first to hold that a seller must disclose to the buyer a fact not impacting the physical structure, but instead impacting the psychological well-being of the inhabitants.<sup>54</sup> In *Reed*, the seller and his real estate agent knew that a brutal multiple murder had occurred a decade before in the house, but failed to disclose it to the buyer. The seller even asked a neighbor not to inform the buyer of the event, but after the buyer moved in the neighbors informed her that no one was interested in purchasing the house because of the stigma of the multiple murder.<sup>55</sup>

In holding that the purchaser stated a cause of action, the court held that murder is not a fact for which a duty of inquiry and discovery can sensibly be imposed upon the buyer since murder is not such a common occurrence that buyers should be charged with discovering this possibility.<sup>56</sup> Recognizing that reputation and history can have a significant effect on property values, the court noted that the reputation that "George Washington slept here" can increase property values; conversely, ill-repute may depress property values.<sup>57</sup> Arguably, permitting such an "irrational" and subjective consideration as a basis for an action in fraudulent nondisclosure undermines the stability of all conveyances. However, the court did not view its decision as endorsing

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<sup>47</sup> See *Johnson v. Davis*, 480 So. 2d, 625, 628 (Fla. 1985); *Easton v. Strassburger*, 199 Cal. Rptr. 383 (Cal. Ct. App. 1984).

<sup>48</sup> *Johnson*, 480 So. 2d at 625.

<sup>49</sup> *Shane v. Hoffman*, 324 A.2d 532 (Pa. Super Ct. 1974).

<sup>50</sup> *Thacker v. Tyree*, 297 S.E.2d 885, 886 (W. Va. 1982).

<sup>51</sup> *Barnhouse v. City of Pinole*, 183 Cal. Rptr. 881 (Cal. Ct. App. 1982).

<sup>52</sup> Paula C. Murray, *What Constitutes a Defect in Real Property?*, 22 REAL EST. L.J. 61 (1993).

<sup>53</sup> 193 Cal. Rptr. 130 (Cal. Ct. App. 1983).

<sup>54</sup> Murray, *supra* note 50, at 61.

<sup>55</sup> *Reed v. King*, 193 Cal. Rptr. 130, 131 (Cal. Ct. App. 1983).

<sup>56</sup> *Id.* at 133.

<sup>57</sup> *Id.*

the materiality of facts predicated on insubstantial or fancied harms.<sup>58</sup>

Perhaps the most unusual case finding a duty of disclosure for a situation impacting the psychological well-being of the inhabitants of real property is *Stambovsky v. Ackley*,<sup>59</sup> in which a New York court held that a seller had a duty to disclose that a house had a reputation for being haunted.<sup>60</sup> In a pun-filled decision,<sup>61</sup> the court allowed the buyer to rescind the contract and recover the down payment even though New York followed the strict rule of caveat emptor.<sup>62</sup> Although the decision is often criticized and it has been suggested that it is "preposterous,"<sup>63</sup> the court's analysis followed traditional rationales to find a duty to disclose.

The doctrine of caveat emptor requires that a buyer assess the fitness and value of his purchase. Buyers often meet this obligation by inspecting the property and searching public records. However, the court found that even the most meticulous inspection and search would not reveal the presence of ghosts on the premises or the house's reputation as being haunted.<sup>64</sup> The court found no public policy for denying the buyer relief for failure to discover a condition which even the most prudent purchaser could not be expected to contemplate.<sup>65</sup>

That the seller had reported the presence of the ghosts in publications and had placed the home on the village's walking tour indicated that the seller deliberately fostered the public belief that her home was possessed.<sup>66</sup> Focusing on that fact, the court declared that "[h]aving undertaken to inform the public at large, to whom she had no legal relationship, about the supernatural occurrences on her property, she

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<sup>58</sup> *Id.* One commentator noted that, rationally or not, a substantial number of buyers would not want to live in a house in which a violent death has occurred, reducing the pool of potential buyers and thus the value of the property. The information must be disclosed even if the buyer may not be acting rationally. Murray, *supra* note 50, at 48.

<sup>59</sup> 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).

<sup>60</sup> *Id.* at 673.

<sup>61</sup> In one paragraph, the court wrote the following:

While I agree with Supreme Court that . . . in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn't a *ghost* of a chance, I am nevertheless moved by the *spirit* of equity to allow the buyer to seek rescission of the contract of sale and recovery of his down payment

*Id.* at 674-75 (emphasis added).

<sup>62</sup> *Id.* at 675.

<sup>63</sup> James D. Lawlor, *Burden of Disclosing Defects Shifting to Sellers*, 78 A.B.A.J. 90 (Aug.1992).

<sup>64</sup> *Stambovsky*, 572 N.Y.S.2d at 676.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 674.

may be said to owe no less of a duty to [the buyer of that home].”<sup>67</sup> The court was offended that the seller was not only attempting to take advantage of the buyer’s ignorance, but that the seller had “created and perpetuated” a condition about which a buyer is unlikely to inquire.<sup>68</sup> Thus, the court carved out a narrow exception to New York’s rule of caveat emptor using factors normally considered when finding liability for non-disclosure, as in the case of a defect that is not readily observable to the buyer.

## II. DEVELOPMENT OF THE DUTY TO DISCLOSE OFF-SITE CONDITIONS

The duty to disclose defects in the sale of real property has generally been limited to on-site conditions which materially affect the value and desirability of the property. In 1995, the New Jersey Supreme Court expanded the disclosure duty to include an off-site condition.<sup>69</sup> The court held that a builder-developer of new homes and the brokers marketing those homes had a duty to disclose to prospective buyers that the homes had been constructed near an abandoned hazardous waste dump. However, within months of that decision, the New Jersey legislature passed a statute limiting it.<sup>70</sup> Evaluation of the *Strawn v. Canuso* decision and of statutory duties to disclose reveals a struggle to strike a balance between protecting the buyer from harm and protecting the builder/developer from limitless liability. New Jersey, however, is not the first state to require some disclosure of neighborhood conditions. A few states have mandated disclosure of some off-site conditions through legislation.

### A. Judicially Created Duty to Disclose Off-Site Environmental Conditions

On April 25, 1995, the Supreme Court of New Jersey established a duty on the part of residential builder/developers and their brokers to disclose off-site physical conditions both known and unknown, “and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and therefore, render the property substantially less

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<sup>67</sup> *Id.* at 677.

<sup>68</sup> *Id.*

<sup>69</sup> *Strawn v. Canuso*, 657 A.2d 420 (N.J. 1995).

<sup>70</sup> NEW JERSEY ST. ANN. S 46: 3C-1 through 3C-10 (West 1997).

desirable or valuable to the objectively reasonable buyer.”<sup>71</sup> The lawsuit was a class action filed on behalf of 150 to 200 families who bought homes in a development near a closed landfill that contained toxic wastes. Noting that “location is the universal benchmark of the value and desirability of property,” the court deemed that professional sellers have the duty to disclose to home buyers the location of any off-site physical condition that an objectively reasonable and informed buyer would deem material to the transaction.<sup>72</sup>

### 1. The Facts

The circumstances of *Strawn v. Canuso*<sup>73</sup> presented the court with an excellent opportunity to expand the duty to disclose to off-site environmental hazards. A professional builder knew of the existence of a landfill and had been warned of the possible hazards of building in such close proximity to a landfill leaking hazardous wastes. Despite the warning the builder proceeded with plans to develop a subdivision near the site of the off-site environmental hazard. When marketing the subdivision, the builder-developer advertised only the desirable off-site conditions. A sense of fair dealing and honesty led the court to hold that the builder-developer should have also disclosed undesirable off-site conditions.

#### a. The Buzby Landfill

The Buzby Landfill consisted of two tracts of property, a 19-acre portion owned by RCA and a contiguous 37-acre parcel owned by the Voorhees Township. A landfill was operated on the site from 1966 to 1978.<sup>74</sup> The landfill was not licensed to receive liquid industrial or chemical wastes; nevertheless, it received large amounts of such wastes.<sup>75</sup>

Toxic wastes dumped into the Buzby Landfill began to escape into the ground due to the lack of a liner or cap on the landfill. Leachate

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<sup>71</sup> *Strawn v. Canuso*, 657 A.2d 420, 431 (N.J. 1995).

<sup>72</sup> *Id.* at 431-32.

<sup>73</sup> 657 A.2d 420 (N.J. 1995).

<sup>74</sup> *Id.* at 423.

<sup>75</sup> Plaintiffs state in their brief that one well-known toxic waste hauler disposed of over 280,000 gallons of chemical waste liquid at the landfill in the year 1974. Brief for Appellants at 5, *Strawn v. Canuso*, 638 A.2d 141 (No. A-4764-91) (N.J. Super. Ct. App. Div. 1992), *aff'd*, 657 A.2d 672 (N.J. 1995).

was seeping into a downstream lake and into the groundwater. Tests performed by the New Jersey Department of Environmental Protection and Energy (DEPE) indicated the presence of hazardous waste in groundwater, in marsh sediments taken from the landfill, and in lakes southeast of the landfill.<sup>76</sup> Hazardous gases also emanated from the landfill. The federal Environmental Protection Agency confirmed that residents' complaints about odors and associated physical symptoms were consistent with expected reactions to exposure to gases from landfills.<sup>77</sup>

The Buzby Landfill appeared to be a disaster-in-waiting with regard to the surrounding community. In support of such an assertion, the plaintiffs cited to a report by the federal government's Agency for Toxic Substances Disease Registry (ATSDR) assessing the impact of the Buzby Landfill on the health of the residents of the surrounding community. The report concluded that the releases of contaminants into groundwater and the potential for such releases to migrate off-site posed a potential threat to human health and the environment.<sup>78</sup> ATSDR also cited a 1980 study by EPA warning that the proposed housing development had the potential of developing into a "future Love Canal" if construction was permitted.<sup>79</sup>

The ATSDR recommended that the EPA evaluate the releases of contaminants from the landfill under the Hazardous Ranking System (HRS) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)<sup>80</sup> to determine whether the landfill should be included on the National Priorities List.<sup>81</sup> Inclusion on the National Priorities List would have targeted Buzby Landfill for remedial action under CERCLA and thus for clean-up funded by the federal government.<sup>82</sup>

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<sup>76</sup> *Strawn*, 657 A.2d at 422.

<sup>77</sup> *Id.*

<sup>78</sup> Appellant's Brief at 8, *Canuso* (No. A-4764-91).

<sup>79</sup> *Id.*

<sup>80</sup> 42 U.S.C. §§ 9601-75 (1994).

<sup>81</sup> *Strawn v. Canuso*, 638 A.2d 141, 146 (N.J. Super. Ct. App. Div. 1994), *aff'd*, 657 A.2d 420 (N.J. 1995).

<sup>82</sup> 42 U.S.C. § 9605(a)(8)(A) (1994). Remedial action includes such actions as storage or confinement of hazardous substances using dikes, trenches, or ditches; replacement of leaking containers; incineration; off-site transport of hazardous wastes; and provision of alternative water supplies. 42 U.S.C. § 9601(23). It also includes the costs of permanent relocation of residents and businesses and community facilities where relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, or destruction of hazardous substances. *Id.*

The Buzby Landfill did not qualify for inclusion on the National Priorities List. Plaintiffs declared that the reason that Buzby was not included on list was the small population in the vicinity of the landfill at the time the ATSDR study was done.<sup>83</sup> One of the factors utilized in the HRS formula is the population within a one-mile radius. At the time the study was performed in 1985, only 97 homes were located within that radius.<sup>84</sup> The population, of course, increased once defendants developed the subdivision, but the HRS was not repeated, leading plaintiffs to conclude that the 1985 HRS did not mean that the site would fail to qualify for the NPL if it were ranked again at the time of the lawsuit. Furthermore, plaintiffs pointed out that listing on the NPL was important only because it would make the site eligible for federal funding; the state had been able to impose those costs on the site owners.<sup>85</sup>

b. Knowledge of Builder-Developer and Its Agent

Plaintiffs alleged that the Canusos, a father-son builder-developer company, knew about the presence of the landfill when they considered the site for residential development. As evidence of this fact, a search of Canuso's files revealed a copy of a 1980 EPA report warning that the site could become a "future Love Canal" if developed.<sup>86</sup> Defendants also met with employees from DEPE to discuss the prospects of building homes near the landfill.

A marketing director of the brokerage firm acting as the selling agent for the development urged his firm and the Canusos to disclose the existence of the landfill to prospective home buyers. Both parties refused and instead followed a policy of nondisclosure.<sup>87</sup> This policy continued even after early purchasers complained about odors from the landfill. The Canusos instructed their representatives never to disclose the proximity of the landfill.<sup>88</sup> One of Canuso's sales managers spoke with DEPE representative who warned of problems associated with building a large development near a landfill. The sales manager wrote

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<sup>83</sup> Appellant's Brief at 5, *Incollingo* (No. A-4764-91) (Incollingo was joined with Strawn as a plaintiff in *Strawn v. Canuso*.).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 6.

<sup>86</sup> *Strawn v. Canuso*, 657 A.2d 421, 423 (N.J. 1995).

<sup>87</sup> *Id.* at 424.

<sup>88</sup> *Id.*

a memorandum repeating those warnings and placed it with related papers in the “hazardous waste” file maintained by defendants. The Canusos discussed the memorandum, but still refused to inform potential buyers of the landfill.<sup>89</sup>

Furthermore, when the New Jersey Real Estate Commission became aware that homes were going to be built near a potential hazardous waste site, it made known that it required full disclosure by selling brokers. On December 14, 1983, the Real Estate Commission wrote to the Camden County Board of Realtors, stating that the location of property near a hazardous waste site is information that should be supplied to potential buyers because of the potential effects on health and on the value of property.<sup>90</sup>

c. Advertisements for the Subdivision

None of the plaintiffs knew of the existence of the landfill at the time they purchased their homes and nothing in the sales literature alluded to its proximity. Instead, the sales literature described the development, the Woods of Voorhees, as being in the “midst of a heavily treed forest.”<sup>91</sup> During the spring of 1985, one newspaper carried an advertisement for the Woods depicting “two children running toward a home” with the description underneath: “You can enjoy the contentment and satisfaction of knowing your children are growing in the healthy, fresh, country air of this ideal wooded community.”<sup>92</sup> The brochures emphasized the existence of off-site amenities such as country clubs and shopping malls. Not surprisingly, the advertisements and brochures failed to mention the existence of a landfill half a mile from some of the homes.<sup>93</sup>

The second development, known as Las Brisas, was described as a development of “large gracious homes in harmony with the rolling, wooded terrain.” The environment was enhanced “by preserving and unifying the inherent beauty of the forest.”<sup>94</sup> Each buyer asserted that he had relied on the brochures and advertisements when deciding to

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<sup>89</sup> *Id.* at 424.

<sup>90</sup> *Strawn v. Canuso*, 638 A.2d 141, 147 (N.J. Super. Ct. App. Div. 1994).

<sup>91</sup> *Id.* at 144.

<sup>92</sup> *Id.* at 145.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 144-45.



purchase his home.<sup>95</sup>

## 2. The Decision of the Lower Court

On May 5, 1987, the home owners in the Woods of Voorhees and Las Brisas developments filed a class action complaint on behalf of between 150 and 200 families who purchased the homes near the closed landfill. The complaint alleged that the market value of the homes was diminished at the time of purchase due to their close proximity to the closed Buzby Landfill, suspected of containing toxic waste. The complaint also alleged common law fraud, negligent misrepresentations and concealment, and violations of the New Jersey Consumer Fraud Act.<sup>96</sup>

The judge in the Superior Court, Law Division, Camden County, granted summary judgments dismissing all claims of the homeowners because he found that the homebuilders and home-selling brokers had no duty to disclose the existence of the off-tract landfill to the homeowners when they were prospective purchasers.<sup>97</sup> However, on appeal, the judges of the Superior Court, Appellate Division, focused on the "modern" concepts of justice and fair dealing to conclude:

Consistent with the doctrine of justice and fair dealing, caveat emptor, which is part of our common law, can no longer be immutable or inflexible in certain circumstances. One of the great virtues of our common law is 'its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court.' Application of caveat emptor in the present case would work an injustice.<sup>98</sup>

The court found support for its holding that the builder-developer had a duty to disclose within several older decisions sustaining a cause of action for affirmative fraudulent misrepresentations by sellers and their agents to buyers respecting off-site conditions which affect the value of land involved in the transaction. In one case cited, the seller

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<sup>95</sup> *Strawn v. Canuso*, 638 A.2d 141, 145 (N.J. 1994).

<sup>96</sup> *Id.* at 144.

<sup>97</sup> *Id.* at 147.

<sup>98</sup> *Id.* (citations omitted). The court cited to the decision by the New Jersey Supreme Court in *Weintraub v. Krobatsch*, 64 N.J. 445, 456, 317 A.2d 68 (N.J. 1974), which held that a seller had a duty to disclose the existence of roach infestation unknown to the buyers.

made misrepresentations that the purchase of a lake front cottage would make the purchaser eligible for membership in a country club;<sup>99</sup> in another, the seller made misrepresentations about the existence of a street.<sup>100</sup> The case before the court, however, was not one of affirmative misrepresentation since statements respecting landfills were allegedly made to only two of the plaintiffs.

An analogy was drawn by the court to a lower court opinion in *Tobin v. Paprone Construction Co.*<sup>101</sup> In that case, the court found that a developer's silence was a fraudulent representation where the residential home developer failed to disclose to a purchaser that an adjoining lot owner intended to construct a tennis court with a ten-foot high fence within one foot of the common boundary line.<sup>102</sup> The court did not read *Tobin* to be limited to "situations in which a developer makes false verbal representations about the environment surrounding the premises involved in a particular transaction."<sup>103</sup>

Further support for the court's finding that justice and fair dealing required that the seller disclose the existence of the landfill was found in the comments to section 551(2)(e) of the Restatement (Second) of Torts. The court focused on the discussion in the comment concerning the changing ethical attitudes in modern business and thus the increasing duty to use reasonable care to disclose facts basic to the transaction.<sup>104</sup> Statements in the brochures and advertisements concerning the off-site amenities also support a finding of a duty to disclose. Those brochures and advertisements made the off-site environmental conditions relevant by stating that the area was one safe for hiking, one where children could grow up with fresh, country air, and one close to country clubs and shopping malls. One exception to the traditional duty of nondisclosure is that one who elects to speak must tell the truth when it is apparent that another may reasonably rely on the statements made. Since the seller used off-site environmental conditions to induce sales, the seller was then obligated to disclose the existence of a landfill which could have a substantial negative impact upon the value and desirability of homes in the area.<sup>105</sup> The nearby

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<sup>99</sup> *Landriani v. Lake Mohawk Country Club*, 97 A.2d 511 (N.J. Super. Ct. App. Div. 1953).

<sup>100</sup> *Curtiss-Warner Corp. v. Thirkettle*, 137 A. 408, 408 (N.J. 1927).

<sup>101</sup> 349 A.2d 574 (N.J. Sper. Ct. Law Div. 1975).

<sup>102</sup> *Id.* at 577-78.

<sup>103</sup> *Strawn v. Canuso*, 638 A.2d 141, 148 (N.J. Super. Ct. App. Div. 1994).

<sup>104</sup> *Id.* at 148.

<sup>105</sup> *Id.* at 149.

landfill did impact the desirability of the homes—twenty-three potential home buyers who did learn of the nearby landfill canceled their offers to purchase.<sup>106</sup>

The subdivision developer claimed that the homeowners should be charged with constructive knowledge of the landfill because its existence was so open and notorious. The court rejected that claim.<sup>107</sup> The seller and broker were experienced people who could have informed the relatively inexperienced buyers of the existence of the landfill; the doctrine of constructive knowledge could not be used as a “shield of protection” by the developer particularly since the purchase of a home is the single most expensive and most important transaction for the average family.<sup>108</sup> Thus, the court found that the builder-developer of those new homes and the brokers marketing those homes had a duty to disclose to prospective buyers that the homes had been constructed near an abandoned hazardous waste dump. The builders and brokers, of course, appealed.

### 3. The Rationale of the New Jersey Supreme Court

The Supreme Court of New Jersey affirmed the lower court’s holding expanding the duty to disclose to off-site conditions, primarily agreeing with the rationale in the lower court’s opinion, but analyzing the facts under more specific factors. The court held that a builder-developer is liable for nondisclosure of off-site physical conditions known to it and unknown and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer.<sup>109</sup> The Supreme Court began with a brief discussion of the doctrine of caveat emptor and its endurance in the law of property. Courts have clung to the doctrine even though the purchase of a home “is almost always the most important transaction [one] will ever undertake.”<sup>110</sup> The court noted that it had “on many occasions” questioned the justification for the doctrine, holding in 1958 in

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 150.

<sup>109</sup> *Strawn v. Canuso*, 657 A.2d 429, 431 (N.J. 1995).

<sup>110</sup> *Id.* at 425 (quoting *In re Opinion No. 26 on the Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995)).

*Michaels v. Brookchester, Inc.*,<sup>111</sup> that it no longer applied to leasehold property interests.<sup>112</sup> Finally, in *Weintraub v. Krobatsch*,<sup>113</sup> the New Jersey Supreme Court ruled that a seller had a duty to disclose, in that case, the existence of a roach infestation unknown to the buyers.<sup>114</sup>

After a discussion of the law in other states, which included a discussion of California's section 1102.6 form, the court framed the issue to be decided: "In the absence of such legislation or other regulatory requirements affecting real estate brokers, the question is whether our common-law precedent would require disclosure of off-site conditions that materially affect the value of property."<sup>115</sup> Two principal factors guided the court in shaping a rule regarding the duty to disclose: 1) "the difference in bargaining power between the professional seller of residential real estate and the purchaser of such housing"; and 2) "the difference in access to information between the seller and the buyer."<sup>116</sup> The first factor caused the court to limit its holding to professional sellers of residential property, i.e., to persons engaged in building or developing of residential housing and the brokers representing them. A person reselling residential property does not have the same advantage of bargaining power as the professional seller.<sup>117</sup> Looking at the second factor, the court found it reasonable to extend the duty to professionals since they enjoy markedly superior access to information.<sup>118</sup>

To establish a claim under this duty to disclose, the buyer must show that the seller failed to disclose a material fact.<sup>119</sup> Whether a fact is of such materiality to affect the habitability, use, or enjoyment and thus the value and desirability of the property will depend on the facts of each case. In addressing the question of whether the nearby presence of a toxic waste dump was a condition materially affecting the value of the property, the court simply answered: "Surely, Lois Gibbs would have wanted to know that the home she was buying in Niagara Falls, New York, was within one-quarter mile of the abandoned Love Canal

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<sup>111</sup> 140 A.2d 199 (1958).

<sup>112</sup> *Strawn*, 657 A.2d at 426.

<sup>113</sup> 317 A.2d 68 (1974).

<sup>114</sup> *Id.* at 68; *Strawn*, 657 A.2d at 426.

<sup>115</sup> *Strawn*, 657 A.2d at 428.

<sup>116</sup> *Id.* at 428.

<sup>117</sup> *Id.* at 428.

<sup>118</sup> *Id.* at 428.

<sup>119</sup> *Id.* at 429.

site.”<sup>120</sup> The physical effects of abandoned landfills are not limited to the confines of the dump. Even without a physical intrusion, a landfill may cause diminution in the fair market value of real property located nearby.<sup>121</sup> The duty established by the Supreme Court of New Jersey was not unlimited. The court explicitly stated that it did not hold that sellers and brokers have a duty to investigate or disclose transient social conditions in the community that arguably affect the value of property. Builders and brokers should not be held to decide whether the changing nature of a neighborhood, the presence of a group home, or the existence of a school in decline are facts material to the transaction: “Rather, we *root* in the *land* the duty to disclose off-site conditions that are material to the transaction.”<sup>122</sup>

The court concluded its discussion of the duty to disclose by noting that location is the universal benchmark of the value and desirability of property. The sophistication of professional builders and brokers enables them to assess the marketability of properties near conditions such as landfills, planned highways, or proposed office complexes. With that superior knowledge, such sellers have a duty to disclose to home buyers the location of off-site physical conditions that an “objectively reasonable” and informed buyer would deem material to the transaction, in the sense that the conditions substantially affect the value or desirability of the property.<sup>123</sup>

## B. Statutorily-Imposed Duty to Disclose

### 1. New Jersey

Subsequent to the *Strawn v. Canuso* decision, the New Jersey state legislature passed the “New Residential Construction Off-Site Conditions Act,”<sup>124</sup> which became effective just five months after the

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<sup>120</sup> *Id.* at 430.

<sup>121</sup> In support of that statement, the court pointed to its decision in *Citizens for Equity v. New Jersey Department of Environmental Protection*, 599 A.2d 507 (N.J. 1987), in which it invalidated a regulation of the New Jersey Department of Environmental Protection that prohibited an award of value-diminution damages to owners of property located more than one-half mile from the landfill area. The court states that “implicit in that regulation” was the recognition that the value of property may be materially affected by adjacent or nearby landfills. *Strawn v. Canuso*, 657 A.2d 420, 430 (N.J. 1995).

<sup>122</sup> *Id.* at 431 (emphasis added).

<sup>123</sup> *Id.* at 432.

<sup>124</sup> *Id.* S 46: 3c-1 through 3C-10.

decision. The legislature found that “the decision to purchase a particular residence requires consideration of a wide range of factors concerning the area in which the residential real estate is located.”<sup>125</sup> The legislature further found that an ambiguity exists concerning the seller’s disclosure duties and, thus, it was in the public interest to define the entirety of the seller’s disclosure duty and to create a public repository of relevant off-site conditions.<sup>126</sup> The statute requires a seller of newly constructed residential real estate to provide the purchaser with a notice of availability of the lists of off-site conditions that every person who owns or maintains any off-site condition is required to file with the municipality where the condition is located.<sup>127</sup> For purposes of the statute, the definition of “off site” is limited to nine conditions:<sup>128</sup>

1) sites listed on the National Priorities List pursuant to the Comprehensive Environmental Response, Compensation and Liability Act;<sup>129</sup>

2) sites known to and confirmed by the New Jersey Department of Environmental Protection;

3) overhead electric utility transmission lines conducting 240,000 volts or more;

4) electrical transformer substations;

5) underground gas transmission lines;

6) sewer pump stations;

7) sanitary landfill facilities;

8) public wastewater treatment facilities; and

9) airport safety zones

Essentially, the law requires that a seller hand the buyer a notice of the availability of the lists filed with the municipality. The statute does not require that the seller actually warn buyers about the existence of any of the nine conditions. The New Jersey Legislature thus limited the duty of the sellers to disclose off-site environmental conditions by narrowly defining off-site conditions and by not requiring a seller to make any affirmative disclosures directly to a buyer.

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<sup>125</sup> *Id.* § 46:3C-1 through C-12 (West Supp. 97).

<sup>126</sup> *Id.* § S 46: 3C-2.

<sup>127</sup> *Id.* § 46: 3C-8.

<sup>128</sup> NEW JERSEY STAT. ANN. S 46:3C-3 (West Supp. 97).

<sup>129</sup> 42 U.S.C. S 9601-75 (1994).

## 2. California

In July of 1985, California became the first state to enact legislation governing disclosure of material facts about residential real property.<sup>130</sup> The statute requires the seller and broker to obtain and timely deliver a disclosure statement revealing factual matters regarding the condition of the property being sold that might affect the value of the property.<sup>131</sup> Such factual matters include the following: whether any fuel or chemical storage tanks or contaminated soil or water are located on the property; whether any major damage, such as fire, earthquake, floods, or landslides, has occurred to the property; or whether any flooding, drainage, or grading problems exist.<sup>132</sup>

This legislation was adopted in response to the California decision in *Easton v. Strassburger*,<sup>133</sup> which imposed liability on a real estate broker for failure to disclose facts affecting the value of residential property.<sup>134</sup> The court further imposed upon agents of the seller a duty to inspect for defects.<sup>135</sup> The buyer in *Easton* purchased property that had a history of soil problems and landslides; the buyer was unaware of the problem and was not informed by the seller of the problems.<sup>136</sup> Shortly after purchasing the property, massive earth movements destroyed the driveway. It was later determined that the fill material had been improperly engineered and compacted.<sup>137</sup> The slides destroyed the driveway and caused the foundation of the house to settle, leading to cracking of the walls and warping of the doorways.<sup>138</sup> The seller was represented by two agents who inspected the property prior to sale and noticed evidence of soil problems. However, the agents did not request that the soil stability be tested and did not inform the buyer of the potential soil problems.<sup>139</sup> The sellers were aware of past landslides, but did not tell the agents.<sup>140</sup>

Under California law, the broker was required to disclose to a

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<sup>130</sup> See Washburn, *supra* note 20, at 381.

<sup>131</sup> CAL. CIV. CODE §§ 1102-02.15 (West Supp. 1997).

<sup>132</sup> CAL. CIV. CODE § 1102.6.

<sup>133</sup> 199 Cal. Rptr. 383 (Cal. Ct. App. 1984).

<sup>134</sup> *Id.* at 390.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 385-86.

<sup>137</sup> *Id.* at 385.

<sup>138</sup> *Id.*

<sup>139</sup> *Easton v. Strassburger*, 199 Cal. Rptr. 383, 386 (Cal. Ct. App. 1984).

<sup>140</sup> *Id.*

buyer material defects known to the seller but unknown to and unobservable by the buyer.<sup>141</sup> The court, however, was concerned that the purposes behind the rule would be seriously undermined if the rule did not include a duty to disclose reasonably discoverable defects as well: "If a broker were required to disclose only known defects, but not also those that are reasonably discoverable, he would be shielded by his ignorance of that which he holds himself out to know."<sup>142</sup> The court, in essence, required agents to inspect the property for any defects.

Responding to the decision in *Easton*, the California Association of Realtors sponsored legislation "to provide a framework for formal disclosure of facts relevant to a decision to purchase realty."<sup>143</sup> The statute clarified the agent's duty to inspect for defects by limiting the duty established in *Easton* to a visual inspection of the property which did not include a duty to inspect areas normally inaccessible to a visual inspection.<sup>144</sup>

The statute further required the seller and its authorized agent to make certain disclosures about the property. The information given to the buyer is only a disclosure; the statement is not a warranty and is not intended to be part of any contract between the buyer and the seller.<sup>145</sup> The section 1102.6 form requires a seller to answer either "yes" or "no" to the question, "Are you aware of any of the following?" Among the sixteen categories of property conditions that a seller must answer either affirmatively or negatively as to its existence is one off-site condition—any neighborhood noise problems or other nuisances.<sup>146</sup>

Noise problems were at issue in *Alexander v. McKnight*.<sup>147</sup> There, the plaintiffs brought an action against their neighbors seeking equitable relief and damages because of their neighbor's violation of a subdivision's declaration of restrictions.<sup>148</sup> The court held that where the neighbor's conduct constituted a pattern of offensive and noxious activities, the plaintiffs would have to disclose that fact to potential

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<sup>141</sup> *Id.* at 387.

<sup>142</sup> *Id.* at 388.

<sup>143</sup> *Sweat v. Hollister*, 43 Cal. Rptr. 2d 399, 402 n. 2 (Cal. Ct. App. 1995) (noting that the statute confirmed and clarified the disclosure duty that existed at common law).

<sup>144</sup> See CAL. CIV. CODE § 1102.6. See also Joanna L. Guilfooy, Note, *Home Not-So-Sweet Home: Real Estate Broker Liability In the Sale of Previously Contaminated Residential Property: Has Broker Liability Gone Too Far?*, 21 RUTGERS L.J. 111 (1989).

<sup>145</sup> CAL. CIV. CODE § 1102.6.

<sup>146</sup> *Id.*

<sup>147</sup> 9 Cal. Rptr. 2d 453 (Cal. Ct. App. 1992).

<sup>148</sup> *Id.* at 455.



buyers on the section 1102.6 form if the neighbors were still living in the subdivision at the time of the sale.<sup>149</sup>

The McKnights, the neighbors, operated a tree trimming business from their house, and thus used a noisy tree chipper. Operating the business violated the declaration of restrictions for the subdivision. The McKnights also engaged in other “offensive and noxious activities,” such as playing late-night basketball, parking too many cars on their property, and pouring motor oil on the roof of their house.<sup>150</sup> The McKnights further violated the declaration of restrictions by building a two-story cabana in their backyard and by constructing a deck without a building permit.<sup>151</sup> The trial court ordered the McKnights to reduce the height of the cabana and remove the deck unless a building permit was obtained, and enjoined them from pouring oil on the roof of the house. The court then awarded damages of \$28,000 to compensate for the diminution in the house’s value that would result from the section 1102.6 disclosures—which would require telling potential buyers that the McKnights, if still in their house, were difficult neighbors.<sup>152</sup>

In affirming the lower court’s decision, the appellate court stated the purpose of section 1102.6 requires that the statute be liberally construed such that it requires the seller to fully inform the buyer regarding matters materially affecting the value of the property.<sup>153</sup> The seller must disclose material facts which are known or accessible only to him and which are not known to or within the reach of the diligent attention of the buyer. The presence of hostile neighbors is a fact which will not ordinarily come to the attention of someone viewing the property “at a time carefully selected by the seller to correspond with an anticipated lull in the ‘festivities.’”<sup>154</sup> A seller cannot ignore what has happened in the past in the neighborhood and implicitly represent to a potential buyer that the neighborhood is peaceful. The California Code extended the duty to disclose to certain off-site conditions that would impact the value and desirability of the property—noisy neighbors and nuisances.<sup>155</sup> The condition was not one which affected the physical integrity of the structure but it would affect the psychological

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<sup>149</sup> *Id.* at 456.

<sup>150</sup> *Id.* at 455.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 455.

<sup>153</sup> *Alexander v. McKnight*, 9 Cal. Rptr. 2d 453, 455 (Cal. Ct. App. 1992).

<sup>154</sup> *Id.* at 456.

<sup>155</sup> *See* CAL. CIV. CODE § 1102.6.

well-being and the quiet enjoyment of any buyer who chose to purchase the property.<sup>156</sup>

### 3. Wisconsin

In 1992, the Wisconsin General Assembly approved a property condition disclosure bill. As was the case in California, the Wisconsin bill was originally proposed by the state's realtor association.<sup>157</sup> Under the legislation, in Wisconsin, a seller is obligated within ten days after acceptance of a sales contract to deliver to the prospective buyer a real estate condition report providing information about the property.<sup>158</sup> Certain types of defects must be disclosed if the seller has notice or knowledge of them.<sup>159</sup> "Defect" is defined as a "condition that would have a significant adverse effect on the value of the property, that would significantly impair the health or safety of future occupants of the property, or that if not repaired, removed, or replaced would significantly shorten or adversely affect the expected normal life of the premises."<sup>160</sup> One of the twenty-eight conditions imposed by the legislature requires a seller to disclose whether he is "aware of a defect caused by unsafe concentrations of, unsafe conditions relating to, or storage of hazardous or toxic substances on, neighboring properties."<sup>161</sup> The Wisconsin legislature apparently decided that at least this one particular type of off-site environmental condition must be disclosed in order to protect residents from potential harm.

### III. FACTORS FOR FORMULATING A DUTY TO DISCLOSE OFF-SITE ENVIRONMENTAL CONDITIONS

Several factors are considered in determining whether a seller in a particular case has a duty to disclose on-site defects in property. The objective of these factors is to weigh the bargaining strengths of the parties involved to determine whether one party has an unfair advantage over the other party. These factors include the respective knowledge of

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<sup>156</sup> See generally *id.*

<sup>157</sup> Washburn, *supra* note 20, at 381.

<sup>158</sup> WIS. STAT. ANN. § 709.02 (West Supp. 1996).

<sup>159</sup> WIS. STAT. ANN. § 709.03 (West Supp. 1996).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

the parties and their means of acquiring that knowledge; the relative intelligence of the parties to the transaction; the relationship of the parties to each other; the nature and importance of the fact not disclosed; and, the status of the concealer as either a buyer or a seller.<sup>162</sup> Courts using these factors aim “to set an operable standard of fair conduct in the marketplace.”<sup>163</sup> Although some courts applying these same factors have been reluctant to find a duty to disclose off-site conditions,<sup>164</sup> an analysis of these factors indicates that a duty to disclose off-site environmental hazards could be imposed on builder-developers. Though articulated separately, the factors are “interrelated and overlap.”<sup>165</sup>

#### A. Knowledge of the Parties and Means of Acquiring Knowledge About the Defect

Builders and developers obviously have superior knowledge of the on-site condition of the property sold because they either built the structure or developed the subdivision. The superior knowledge and expertise of these professionals has led several courts to depart from the rule of caveat emptor and find a duty to disclose, particularly where the facts are exclusively within the knowledge of the seller, and the buyer is not in a position to discover the facts for himself.<sup>166</sup> When assessing the quality of property or the structural soundness of a unit, a residential buyer is not on equal footing with a builder or developer because the home building industry has become more and more specialized in modern society. Thus, fair dealing demands disclosure of on-site defects undiscoverable to the buyer.

Likewise, builder-developers have superior knowledge of off-site conditions located within the neighborhoods in which they are constructing homes. Builders and developers assess the condition of neighborhoods and the amenities available to residents living in those neighborhoods before deciding where to build homes. They typically become intimately aware of off-site conditions, often marketing

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<sup>162</sup> See *Blaine v. J.E. Jones Construction Co.*, 841 S.W.2d 703, 707 (Mo. Ct. App. 1992).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 709.

<sup>165</sup> *Id.* at 707.

<sup>166</sup> See, e.g., *Buist v. C. Dudley De Velbiss Corp.*, 6 Cal. Rptr. 259 (Cal. Dist. Ct. App. 1960) (holding a defendant subdivider-contractor liable for fraud when it sold a house and lot knowing that the lot was in the area of an ancient landslide and that the house was constructed on fill placed on the lot without adequate compaction).

developments by emphasizing the proximity of off-site amenities such as parks and schools. For example, the builder-developer in the *Strawn* case marketed the development for its proximity to off-site amenities such as a country club and shopping malls. However, it did not mention its proximity to an off-site environmental hazard even though it allegedly knew of the presence of a toxic landfill near the development—a copy of an EPA report warning of the dangers of the landfill was in its file.<sup>167</sup> The builder-developer also met with state employees to discuss the possibility of building homes near the landfill.<sup>168</sup> The builder-developer failed to disclose the existence of the landfill to potential home buyers even though marketing directors urged them to do so<sup>169</sup> and the New Jersey Real Estate Commission made known its requirements of full disclosure because of the impact of the potential effects on health and property values.<sup>170</sup> A builder with this level of knowledge regarding the existence and hazardous nature of an off-site condition should be required to disclose that information unless the buyer shares and understands that same knowledge.

The existence of off-site conditions is often noted in public records. When the buyer has little or no means of acquiring this pertinent information about off-site environmental conditions, the builder's superior knowledge can render the transaction unfair if the builder does not disclose the existence of the site. However, where the information is available and easily accessible to the buyer, the bargaining positions of the parties are not necessarily unbalanced if the builder fails to disclose.<sup>171</sup> In *Blaine v. J.E. Jones Construction Co.*,<sup>172</sup> homeowners raised claims of fraud because the builder did not disclose its intent to build an apartment complex in the subdivision near their homes. The court found that the plaintiffs had access to information about the proposed apartment complex because the existence of multi-family zoning and a proposed layout of the multi-family buildings were a part of public record.<sup>173</sup> The court went on to say that a developer could assume, "quite sensibly and rationally, that a buyer would check the public record or ask the developer to acquire information about the

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<sup>167</sup> *Strawn v. Canuso*, 657 A.2d 420, 423 (N.J. 1995).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Strawn v. Canuso*, 638 A.2d 141, 147 (N.J. Super. Ct. App. Div. 1994).

<sup>171</sup> *See Blaine v. J.E. Jones Construction Co.*, 841 S.W.2d 703, 709 (Mo. Ct. App. 1992).

<sup>172</sup> 841 S.W.2d 703 (Mo. Ct. App. 1992).

<sup>173</sup> *Id.* at 708.

zoning of [the buyer's own property] and of nearby properties."<sup>174</sup>

Public record of an undisclosed fact, however, should not necessarily negate a party's duty to disclose.<sup>175</sup> A residential buyer must have ready access to those public records before a builder's duty to disclose can be negated. Professional sellers of residential housing "enjoy markedly superior access to information."<sup>176</sup> For example, information about the existence and hazardous nature of the landfill in *Strawn* was on public record in EPA reports, in correspondence from the New Jersey Department of Environmental Protection and Energy to the township, and in a health assessment prepared by the U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry.<sup>177</sup> However, to require potential home buyers to exhaustively search through extensive public records, including federal and state documents, for the existence of off-site environmental conditions would be unrealistic in light of a typical residential buyer's lack of training and experience in property development.

Furthermore, a buyer knowledgeable enough to inquire of public officials for information about landfills, incinerators, and other neighborhood sites threatening harm may not have the time or resources to extensively research the meaning of public records, particularly environmental reports, before closing on a home purchase. The average buyer likely lacks the background to competently evaluate the information in the records and again may not have the time or resources to seek expert advice to aid in assessing the technical and scientific information included in the reports prior to closing.

#### B. The Relative Intelligence of the Parties

A greater duty of disclosure is imposed on the intelligent party if the opposing party is unusually ignorant.<sup>178</sup> Presumably, a more intelligent party is more likely to be able to discover undisclosed information.<sup>179</sup> The *Blaine* court found that where all of the parties

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<sup>174</sup> *Id.* at 709.

<sup>175</sup> *Osterberger v. Hites*, 599 S.W.2d 221, 228-29 (Mo. Ct. App. 1980).

<sup>176</sup> *Strawn v. Canuso*, 657 A.2d 420, 428 (N.J. 1995).

<sup>177</sup> *Strawn v. Canuso*, 638 A.2d 141, 145-46 (N.J. Super. Ct. App. Div. 1994).

<sup>178</sup> Nicola Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 174 (1993).

<sup>179</sup> Steven Koslovsky, *To Disclose or Not to Disclose: An Overview of Fraudulent Nondisclosure*, 50 J. MO. B. 161, 162 (1994).

involved were college educated, no party's intelligence could be presumed to be superior to another's.<sup>180</sup> A college education does indicate a certain level of comprehension of information. However, a college education does not equate to expertise and knowledge about residential home building.<sup>181</sup>

### C. The Relationship of the Parties to Each Other

The existence of a confidential or fiduciary relationship between parties makes it more likely that a duty to disclose will be found since the relationship implies a duty of good faith and fair dealing.<sup>182</sup> The party who owes the confidential or fiduciary duty has an obligation to disclose material facts within his knowledge.<sup>183</sup> The relationship between the seller and buyer has not generally been considered a confidential relationship requiring disclosure since the transaction is considered to be at arm's length.<sup>184</sup>

However, the established relationship between a builder-developer and residential buyer should give rise to a duty of disclosure. Such a duty would arise where one party to a transaction, the professional seller, not only knows that the other party, the residential buyer, is acting under a mistake basic to the transaction, but also knows that the buyer, because of the established relationship between them, is reasonably relying upon a disclosure of the unrevealed fact if it exists.<sup>185</sup> Builders and developers are aware that the buyer's lack of training and experience will cause these buyers to look to them for information.<sup>186</sup> Because of the seller's knowledge concerning factors affecting the market value, buyers tend to rely on professional sellers. Good faith and fair dealing require disclosure when this unequal relationship is established.

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<sup>180</sup> *Blaine v. J.E. Jones Construction Co.*, 841 S.W.2d 703, 708 (Mo. Ct. App. 1992).

<sup>181</sup> Even a home buyer with 14 years experience as a realtor was owed a duty by a broker to disclose that sewers in the development had not been accepted by the sewer district when that defect was not discoverable by reasonable care and visible inspection by the experienced realtor. *Seidel v. Gordon A. Gundaker Real Estate Co.*, 904 S.W.2d 357, 362 (Mo. App. Ct. 1995).

<sup>182</sup> *Blaine*, 841 S.W.2d at 708. Relationships of trust and confidence include those of executor of an estate and its beneficiary, a bank and its investing depositor, physician and patient, attorney and client, guardian and ward, and family members. RESTATEMENT (SECOND) OF TORTS § 551 cmt. f (1977).

<sup>183</sup> *Koslovsky*, *supra* note 170, at 127.

<sup>184</sup> *Blaine*, 841 S.W.2d at 708.

<sup>185</sup> RESTATEMENT (SECOND) OF TORTS § 551 cmt. l (1977).

<sup>186</sup> *Osterberger v. Hites*, 599 S.W.2d 221, 228-29 (Mo. Ct. App. 1980).

#### D. The Nature and Importance of the Fact Not Disclosed

The duty to disclose applies to defects materially affecting the value, habitability, and desirability of property.<sup>187</sup> Traditionally, these defects have been latent problems which affect the physical property or the well-being and safety of its inhabitants. A few courts have included as defects those conditions or circumstances that may have a psychological impact on reasonable buyers.<sup>188</sup> In all these cases, the defects required to be disclosed were intrinsic defects, i.e., on-site. The courts reasoned that there is a greater likelihood that a duty to disclose an intrinsic defect will be found than if the fact is extrinsic to the property affecting the market value of the house; an extrinsic fact is not considered by these courts to be a defect in the house itself.<sup>189</sup>

Off-site environmental conditions affect the use, value, and habitability of neighboring property, however, and thus should be considered defects subject to disclosure by builders and developers.<sup>190</sup> Unlike ghosts and twenty-year old murders which have a psychological impact on potential home buyers, landfills and other environmental hazards can have a harmful physical impact on the health and well-being of residents living near them. As the New Jersey Supreme Court noted, the physical effects of "dump sites are not limited to the confines of the dump."<sup>191</sup> The proximity of homes to sites that threaten harm should be disclosed by the builder and developer of these homes.

Landfills, like other off-site environmental hazards, threaten a host of problems for homeowners living in proximity to the sites. One of the most obvious concerns is odor. The decay of garbage produces a variety of gases responsible for objectionable landfill odors which degrade the quality of life even if the odors are not harmful to human health.<sup>192</sup> Objectionable odors can constitute a nuisance.<sup>193</sup> Likewise,

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<sup>187</sup> See *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985); *Reed v. King*, 193 Cal. Rptr. 130, 131 (Cal. Ct. App. 1983); *Thacker v. Tyree*, 297 S.E.2d 885, 888 (W. Va. 1982).

<sup>188</sup> See Paula C. Murray, *What Constitutes A Defect In Real Property?*, 22 REAL EST. L. J. 61 (1993) (discussing a seller's duty to disclose violent occurrences on the property, supernatural occurrences on the property, and the presence of inhabitants with AIDS on the property).

<sup>189</sup> *Blaine v. J.E. Jones Construction Co.*, 841 S.W.2d 703, 708 (Mo. Ct. App. 1992).

<sup>190</sup> *Strawn v. Canuso*, 657 A.2d 420, 431-32 (N.J. 1995).

<sup>191</sup> *Id.* at 430.

<sup>192</sup> HOMER A. NEAL & J.R. SCHUBEL, SOLID WASTE MANAGEMENT AND THE ENVIRONMENT 56 (1987) [hereinafter SOLID WASTE MANAGEMENT].

<sup>193</sup> *Southeast Arkansas Landfill, Inc. v. State*, 858 S.W.2d 665, 668 (Ark. 1993) (citing *Ozark Bi-Products, Inc. v. Bohannon*, 271 S.E.2d 354 (Ark. 1954) where court enjoined operation of a rendering plant which processed and disposed of the offal of slaughtered chickens because the

the presence of rodents and insects, including flies, mosquitoes, cockroaches, ticks, and mites can constitute a nuisance. These rodents and other pests are carriers of potentially unsafe human health conditions.<sup>194</sup> Certainly, the presence of rodents and objectionable odors due to nearby landfills and other undesirable land uses impacts the desirability, value, and habitability of property.

One of the greatest environmental problems associated with landfills is the potential for leakage of contaminants into the groundwater supply.<sup>195</sup> This contamination poses a threat to human health since residents in many areas of the country rely on groundwater for drinking.<sup>196</sup> Like the residents living in the newly developed subdivision in Voorhees Township, homeowners living near landfills have brought cases alleging that the nearby landfill caused pollution to or had the potential to pollute their water supply.<sup>197</sup> These cases demonstrate why the average buyer would lack the desire to live near a landfill or other similar environmental hazard that could bring objectionable odors, rodents, and the threat of a contaminated water supply into his neighborhood. These conditions are defects that materially affect the desirability, habitability, and value of property.

#### E. Status of the Concealer

A seller is more likely to have a duty to disclose than a buyer.<sup>198</sup> Builders and developers should have this duty to disclose because of their knowledge, expertise and superior access to information. Furthermore, the modern builder may be analogized to the manufacturer of goods—both have an intimate knowledge of the product because they designed and constructed them; both are in a better position to discover defects; and both are in the best position to reduce the incidence of defects through careful construction.<sup>199</sup> The builder, like the manufac-

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residents living nearby claimed the plants emitted odors and attracted flies).

<sup>194</sup> SOLID WASTE MANAGEMENT, *supra* note 192, at 56.

<sup>195</sup> *Id.* at 50. For example, Atlantic City once had to move its water wells to avoid toxic chemicals seeping from a landfill area about a mile away from the city; the tap water had turned yellow. O.P. KHARBARDA & E.A. STALLWORTHY, WASTE MANAGEMENT 55 (1990).

<sup>196</sup> SOLID WASTE MANAGEMENT, *supra* note 192, at 50.

<sup>197</sup> See, e.g., *New York v. Ferro*, 592 N.Y.S.2d 516 (App. Div. 1993); *DeSario v. Industrial Excess Landfill, Inc.*, 587 N.E.2d 454 (Ohio Ct. App. 1991); *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274 (Tenn. Ct. App. 1988).

<sup>198</sup> KEETON ET AL., *supra* note 34, § 106; *Blaine v. J.E. Jones Construction Co.*, 841 S.W.2d 703, 708 (Mo. Ct. App. 1992).

<sup>199</sup> *Blake v. John Doe 1*, 623 N.E.2d 1229, 1232 (Ohio Ct. App. 1993).



turer of goods, is in the superior bargaining position; fair dealing thus requires him to disclose.

### CONCLUSION

The duty to disclose off-site conditions should not be limitless—it should not act as a “straightjacket”<sup>200</sup> saddling builder-developers with an unrealistic obligation to potential buyers and thus inhibiting the construction of homes in particular neighborhoods. Neither should the duty relieve a home buyer of the obligation to reasonably assess a neighborhood before deciding to purchase a home there. However, the duty must acknowledge the expertise and sophistication of professional builders and acknowledge the potentially detrimental effects of living in close proximity to harmful off-site environmental conditions. The parameters listed below seek to balance all of these concerns.

1. The off-site environmental condition must be of a permanent physical nature.

The *Strawn* court stated that the duty to disclose off-site condition was “root[ed] in the land.”<sup>201</sup> Thus, sellers would only be required to disclose conditions which are of a permanent physical nature. In addition to landfills, those conditions could include a planned super-highway or an office complex approved for construction.<sup>202</sup> Builders and developers should not be required to determine which transient social conditions in a community will be material to a transaction. Such social conditions would include the changing nature of a community, the presence of a group home, or the existence of a school.<sup>203</sup> To hold otherwise would require builder-developers to extensively assess a neighborhood for “subjective and emotional”<sup>204</sup> conditions and leave them with little or no guidance of what to disclose.

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<sup>200</sup> *Blaine*, 841 S.W.2d at 709.

<sup>201</sup> *Strawn v. Canuso*, 657 A.2d 420, 431 (N.J. 1995).

<sup>202</sup> *Id.* at 432.

<sup>203</sup> *Id.* at 431. There is some discussion in New Jersey about whether sellers who know that their neighbor is a sex offender must warn potential home buyers pursuant to Megan’s Law. Robert Schwaneberg, *Megan’s Law May Force Home Sellers to Notify Buyers About Sex Offenders*, NEWARK STAR LEDGER, July 22, 1996, at A1.

<sup>204</sup> See John s. Baen & Hugh O. Nourse, *AIDS and the Broker’s Quandry*, 19 REAL EST. REV. 81 (1990).

2. The presence of the off-site condition must be disclosed when it potentially threatens the habitability of the homes or the health of the residents of those homes.

Because of the potential effects on health and safety, the proximity of residential property to a landfill or other similar land uses should be disclosed to potential purchasers. The doctrine of caveat emptor has been eroded as courts have begun to acknowledge that the health and safety of homeowners should not be threatened by dangerous conditions, such as termite infestation and leaking roofs, on the property. Likewise, the health and safety of homeowners should not be threatened by hazardous off-site conditions. The threatened harm must be more than of a speculative nature.

3. The existence and nature of the off-site environmental condition should be reasonably ascertainable to professional builder and developers.

The resources and sophistication of the professional builder or developer place them in a superior position to obtain information about the presence of a site within a community and its potentially hazardous nature. However, builders and developers should not be held to an unreasonable standard. Thus, the duty to disclose should be limited to disclosure of information about the existence and nature of off-site conditions when the information is readily ascertainable to professional builders and developers. Builders and developers should not be forced to exhaust all sources of information before constructing. "Reasonably ascertainable records" should include all the federal, state, and local public records and other sources that professional builders and developers normally assess when determining whether to build in a particular area.

4. The duty should be owed to residential buyers.

The level of sophistication of the commercial real estate purchasers usually exceeds that of the average home buyer. Commercial purchasers bargain with builder and developers from a more balanced position and have far better access to information than residential buyers. Thus, a duty to disclose is an obligation owed only to residential buyers because of their lack of expertise and unequal bargaining position.

5. The location of the site and its condition should be unknown and unobservable to the buyer.

If a buyer knows of the existence and the condition of the site, then a developer does not have a duty of disclosure. However, when a buyer is unaware of the existence of a site, or is aware of the site but ignorant of its hazardous nature, and information about the site is not reasonably obtainable and understandable, then the builder has a duty to disclose the condition. Buyers should not be charged with constructive knowledge of landfills.

An old adage states, "The three most important factors in real estate are location, location, and location."<sup>205</sup> Builders and developers are acutely aware of this. They seek to derive benefits from off-site amenities of a neighborhood and will choose to build where the amenities are located in the vicinity. They market developments by referring to the positive environmental attributes of a community such as parks and other green spaces. Fair dealing in the market place requires that they also disclose the existence of nearby environmental conditions that threaten the health and safety of a community's residents. Since a man judges of what he knows, a buyer is not in a position to make a judgment unless the defects are disclosed by the seller.<sup>206</sup> Thus, a homeowner should only elect to be in harm's way if he or she knowingly decides to do so based on the builder's full disclosure.

In an increasingly complex and technological society in which the average person lacks the specialized skills necessary to construct homes and appraise their value and soundness, the average home buyer does not have equal bargaining power with builders and developers. Imposing on these builders and developers a duty to disclose off-site environmental conditions merely imposes on them a duty of good faith in the bargaining process.

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<sup>205</sup> The New Jersey Supreme Court offered this phrasing: "Location is the Universal benchmark of the value and desirability of property." *Strawn v. Canuso*, 657 A.2d 420, 432 (N.J. 1995).

<sup>206</sup> AQUINAS, *SUMMA THEOLOGIAE*, *supra* note 23, at 225.