

HOMES ON CLOSED LANDFILLS IN CALIFORNIA: DOES THE SELLER OWE A DUTY TO DISCLOSE?

By
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I. INTRODUCTION

Ask any knowledgeable real estate broker what types of facts she must disclose about a property she is selling. More likely than not, she will answer, "material facts affecting the value of the property." Then ask, "What is a 'material fact?'" She will probably respond with a laundry list of items which constitute a nuisance, impair the stability of the ground, or impair the physical integrity of any structures on the property. But what if a condition primarily affects a property through reputation? For instance, what if a developer-seller knowingly built homes on a former dump which still contains waste fifteen years later? If the developer states that it removed all unsuitable materials from the area and obtained state agency approval to close the dump, is it justified in failing to disclose the existence of the dump?

In December 1997, the residents of Rose Drive in Benicia, California presented this very question to the Solano County Superior Court. Their claim: Southampton, the company that developed their land and built and sold them their homes, failed to disclose the existence of hazardous and toxic materials on or near their property. Southampton maintained that since it removed all visible refuse and developed the land so that no structural defects existed on the property, it did not need to disclose. Although current California rules for real estate transactions instruct brokers to disclose such conditions, these regulations were not in force at the time the homes were sold.

At the time of publication, the case was still in litigation. This article investigates, in the absence of a legislated rule, the residents' possible arguments in favor of holding Southampton liable for its failure to disclose the existence of the dump.

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II. THE DUMP

Some time around 1955, Mr. Urban Braitto opened the Solano County Landfill in the unincorporated agricultural lands he owned just east of Vallejo and across Highway I-780 above Benicia, California.¹ The dump was arranged in an "L" shaped configuration. The base of the "L" was an area called the East Canyon and served as the local landfill—a place where area residents could bring typical household waste and refuse for disposal. The upright portion of the "L" was called the North Canyon; this area is the subject of this discussion. The canyon was steep and narrow, covering about six acres. A small creek drained to the bottom of the canyon.²

From the dump's opening until 1978, Braitto used the North Canyon for the less savory aspects of his operation. These operations included open pit burning of tires and other refuse,³ a mountainous scrap metal salvage heap,⁴ disposal of tannery wastes (saturated with hexavalent chromium, a Type 1 hazardous waste),⁵ refinery wastes,⁶ sewage sludge,⁷ and bay dredging spoils.⁸ Claims also allege that Mare Island Naval Base deposited barrels and tanks containing unidentified materials.⁹ Because few government controls existed on land-

¹ CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCE CONTROL [hereinafter DTSC], OLD BRAITTO LANDFILL/ROSE DRIVE PROJECT TEAM, INTERIM REPORT (August 30, 1992).

² DTSC, *supra* note 1, at 2.

³ *Id.* ("Prior to August 1958, any wastes disposed in the North Canyon were probably burned and landfilled [CC]. In August 1958, SCDEM [the Solano County Department of Environmental Management] required that Mr. Braitto dispose of garbage by the trench and fill method and burn only combustible materials excluding tires, asphalt material and the like [C]. However according to SCDEM, burning of garbage together with combustible material continued periodically through at least 1968 [CC].") Numerous references to letters, memos and inspection reports documenting violations of regulations of the California Department of Health and Safety and SCDEM are cited throughout this section of the report.

⁴ J. Phyllis Fox, *An Historical Overview of Environmental Conditions at the North Canyon Area of the Former Solano County Sanitary Landfill* (Oct. 29, 1991) (stating that objects observed on site included wrecked cars, sinks, tubs, water heaters, electric motors, electric wiring, radio parts, and batteries).

⁵ *Id.* at 5.

⁶ *Id.*; see also DTSC, *supra* note 1, at 4. In April of 1969, a report of a telephone conversation between the Department of Public Health and company called Oscar Erickson, Inc. indicated that for the prior eight months refinery wastes had been dumped at the site without permission from Solano County or the State. Although Mr. Braitto had applied for such permits in 1968, they were withdrawn at a public hearing in January of 1969.

⁷ Fox, *supra* note 4, at 5 (affirming that RWQCB [Regional Water Quality Control Board] approved disposal of up to 150,000 gallons of sludge from City of Benicia digester).

⁸ DTSC, *supra* note 1, at 5.

⁹ *Id.*

fill operations in the 1950s and 1960s, "it may ultimately not be possible to unambiguously identify sources" of toxic and hazardous wastes actually deposited in the area.¹⁰

III. THE DEVELOPER

Beginning in the early 1960s, just a few years after Braitto commenced his entrepreneurial venture, development of a single-family housing subdivision began on the Benicia hillsides a few miles to the east of Braitto's dump. The first developer on the housing project encountered budget overruns in the initial phases of development. As a result, Citizens Savings and Loan, the bank financing the project, unexpectedly found itself holding a large tract of land prime for development.

Shortly thereafter, the bank formed a joint partnership with the Channing Group, a partnership of real estate brokers looking for a large development project to manage. The Southampton Company was "born" and construction of housing on the Benicia hillside resumed. The project began in the easternmost section of land owned by the bank and proceeded toward the west—on a direct collision course with Braitto's dump.

Southampton and Citizens had a very close-knit relationship. The bank provided all of the land and the financing for the development of the project. Southampton provided the know-how; it created the specifications for the project, obtained necessary agency and City approvals, developed the land, built the houses and acted as the exclusive real estate agent for the area. The bank provided the loans to the homebuyers.

The housing market in the East Bay moved rapidly in the late 1960s and early 1970s. By 1974, Southampton was coming close to the western boundaries of the bank's holdings. Spirits were high, profits were good, and neither group wanted to see this lucrative business come to an end. In 1974, the bank signed an exclusive option agreement with Braitto to purchase his land—and the dump.

Citizens and Southampton also faced a practical concern; as they approached the western boundary of their own property, the houses they built were getting closer to the dump. Who would want to buy a house next door to the local landfill? And for how much?

¹⁰ *Id.*

In 1977, Citizens exercised its option on the land and became the owner of Braitto's dump. Southampton managed the land for the bank, but development did not begin immediately. Instead, Southampton allowed Braitto to continue his operation for another two years. In fact, Southampton allowed the City to dump the Benicia Marina dredge spoils and sewer sludge in the North Canyon while it owned the land.

IV. THE "REMOVAL" OF THE WASTE

Between 1958 and 1975, Braitto's dump received a long list of citations for violating environmental regulations. Improper burning activities,¹¹ inadequate garbage cover and compaction,¹² refuse in contact with water,¹³ and other nuisance abatement notices were common.¹⁴ On a few occasions, government agencies shut down the facility's operations in response to flagrant disregard of environmental regulations.¹⁵ In 1975, the Regional Water Quality Control Board Region II (RWQCBII) instituted a suit against Braitto for failure to correct deficiencies in the operation of the facility.¹⁶

Leachate from the North Canyon contained hazardous levels of hexavalent chromium. This prompted RWQCBII's order to remove all leather and tannery wastes and to install drainage control measures in the North Canyon.¹⁷ Although the RWQCBII eventually signed off on the clean-up operation in 1979 (during which time Citizens owned the land and Southampton was managing it), nobody could verify where the wastes were redeposited.¹⁸ By 1979, the scrap metal hillside had mysteriously vanished. Aerial photographs taken from 1975 through 1981 provide evidence that the scrap pile was no longer visible by that time.¹⁹

Southampton hired ENGEO, a soils engineering firm, to prepare a study for removal of the wastes from the North Canyon prior to construction of homes in the area. ENGEO's investigations included examination of aerial photographs,

¹¹ Fox, *supra* note 4, at 4.

¹² DTSC, *supra* note 1, at 5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 2.

¹⁶ *Id.* (acknowledging that Braitto ultimately was able to sufficiently comply with RWQCBII demands and suit was retracted).

¹⁷ Fox, *supra* note 4, at 7.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 2.

borings, and test trenches. Eight of the nine test trenches ENGEO dug resulted in visible refuse,²⁰ which Southampton subsequently removed to the East Canyon. The only trench with no visible refuse was dug outside the "footprint" of Braitto's dump.

Following this investigation, ENGEO recommended to Southampton that refuse material be removed from the North Canyon area as development progressed. ENGEO later supervised these operations on Southampton's behalf. Between June 1980 and March 1981, approximately 30,000 cubic yards of visible refuse materials were removed from the North Canyon. Approximately 10,000 cubic yards of waste material stayed behind in a cul-de-sac called Blake Court.²¹ ENGEO later confirmed in reports to government agencies that all solid waste refuse fill underlying all lots on Rose Drive [the main access into the North Canyon] was removed prior to mass grading and the only place where waste landfill was not removed was in the area of Blake Court.²² Based on these reports, Southampton claims the North Canyon operation was officially declared closed.²³ Other than the Blake Court refuse, no chemical testing or other scientific analysis was performed on the soils left behind.

V. CAVEAT EMPTOR

Once the mass grading land development was complete, Southampton built and sold single-family homes on the finished lots in the North Canyon. The only place it did not build was on Blake Court; Southampton graded and prepared the seven lots for construction, but built no houses there. Sale of houses on Rose Drive commenced in 1980 and finished by 1984. Southampton's real estate agents never provided written disclosures to the new homebuyers that their houses were built on top of a former dumpsite. A few curious homeowners asked why no houses were built on Blake Court, but Southampton's agents only informed them that trace amounts of methane gas were detected, and that Southampton continued to monitor the situation. If further pressed for the source of the methane emissions, Southampton told the buyers that grass clippings and tree stumps were buried there.

²⁰ *Id.* at 9 (showing contamination identified in report as being left behind in Blake Court included tires, concrete, rocks, brick, metal, wood, plastics, burned material and leather scraps).

²¹ *Id.* at 10.

²² *Id.* at 11.

²³ *Id.* at 9 (commenting that it is uncertain if dump was ever closed).

The East Canyon landfill, where no houses were built, was simply identified as "Braitto Park" on aerial development maps found in Southampton's sales office. Southampton provided disclosures to homebuyers bordering that area, stating that once the "park" was fully developed some lighting may be installed which would be visible from their property. Southampton's disclosures never mentioned that the area was formerly a landfill.

VI. THE DECEPTION UNCOVERED

In spring 1991, Tom Busfield walked into the backyard of his house on Rose Drive. Busfield's property was directly adjacent to the Blake Court area, where no houses had yet been built. Noticing a small depression in his lawn where there was none before, he grabbed a shovel and started to dig. He discovered a black pool of viscous ooze just below the surface.

Busfield's discovery set government agencies into investigative action.²⁴ At first Southampton vehemently denied that any refuse existed anywhere in the North Canyon except for some grass clippings and tree stumps left behind in Blake Court.²⁵ As a result of the government's investigative efforts, the ugly truth about the North Canyon descended upon the residents of Rose Drive. When the investigations were complete, SCDEM and DTSC documented the following facts:

- (1) The materials in Blake Court were not "grass clippings" at all, but rather a highly toxic and carcinogenic chemical soup presumably composed of burned tire ash and tannery wastes.
- (2) At Palace Court (another cul-de-sac just below Blake Court) the 50-foot hill behind the houses was a mountainous mass of metal scrap, covered by dirt.
- (3) All along the Rose Drive lots an unidentifiable chemical, its composition resembling jet fuel, contaminated the subsurface layers at various depths and locations.
- (4) Southampton's work crews scattered hazardous and toxic leather scraps and tannery wastes, discovered during the land development process, on the hillside behind Channing Circle, another street branching off Rose Drive to the north of Blake Court.

²⁴ Initially the Solano County Department of Environmental Management (SCDEM) was assigned the lead role in investigating the Rose Drive area. Later, when the extent of the contamination was realized, the California Department of Toxic Substance Control (DTSC) took over the lead agency role.

²⁵ At one town hall meeting, the President of Southampton, Michael Olson, informed the homeowners that Southampton stripped the entire North Canyon area to bedrock and that it used only clean fill for the development.

Property values in the area plummeted. The homeowners, trapped by economic conditions, are concerned that they continue to be exposed to hazardous levels of toxic contamination. However, they are not sure to what extent because testing and exploratory investigations are still ongoing.²⁶ Based on these considerations, approximately 100 residents of the Rose Drive area filed suit against Southampton, its consultants and the bank.

Southampton repurchased and now rents the homes directly adjacent to Blake Court, but the company refuses to provide compensation to other residents in the area. It continues to insist that since the government agencies formally gave their approval on the dump closure (based on information provided to them by Southampton and its engineers), it had no duty to disclose the existence of the dump *at all*. Also, it contends that the devaluation of the properties was not caused by the contamination, but rather by other market conditions, local media attention, and the homeowners' unjustified fears.

VII. DISCUSSION

Easton v. Strassburger, 199 Cal. Rptr. 383 (1984), best articulates the duty of care a real estate broker owes to a buyer. Current law requires a broker to disclose to a buyer material defects known to the broker but unknown to and unobservable by the buyer.²⁷ According to *Cooper v. Jevne*, 128 Cal. Rptr. 724 (1976), where a real estate broker representing the seller knows facts materially affecting the value or the desirability of property offered for sale and these facts are known or accessible only to him and his principal, the broker is under a duty to disclose these facts to the buyer.²⁸ The broker or agent must also know that these facts are not known or within the reach of the diligent attention and observation of the buyer.²⁹ If a broker fails to disclose material facts that are known to him, he is liable for the intentional tort of "fraudulent concealment" or "negative fraud."³⁰

²⁶ As late as 1995, buried tanks were discovered in another area of the North Canyon. Although Southampton insists that the extent of all wastes has now been identified and characterized through its cooperative investigative efforts with various governmental agencies, the residents have little confidence in Southampton's conclusions.

²⁷ *Cooper v. Jevne*, 128 Cal. Rptr. 724 (1976); *Lingsch v. Savage*, 29 Cal. Rptr. 201 (1963).

²⁸ *Lingsch*, 29 Cal. Rptr. at 201.

²⁹ *Id.*

³⁰ *Easton v. Strassburger*, 199 Cal. Rptr. 383, 387 (1984); *Warner Const. Corp. v City of Los Angeles*, 85 Cal. Rptr. 444 (1970).

The above test is specifically designed for real estate fraud cases,³¹ but the *Easton* court added another cause of action by which a broker may be held liable in an action for negligence. Under a negligence action, the real estate broker has an affirmative duty to conduct a “reasonably competent and diligent inspection” of the property and to “disclose to prospective purchasers all facts materially affecting the value or desirability of the property.”³²

General principles of comparative negligence will otherwise help shield brokers from a failure to “explicitly disclose manifest facts.”³³ When the *Cooper-Lingsch* rule is applied in an action for negligence, it does not need to be proved that the broker had actual knowledge of the material facts in issue, nor that such facts were accessible only to him or his principal.³⁴ For policy reasons,³⁵ the *Easton* court removed the limitation that the material facts are not known to or within the reach of the diligent buyer.³⁶

According to these cases, two avenues exist for holding a broker liable for failure to disclose material facts affecting the value of property. First, an action in real estate fraud is available by the *Cooper-Lingsch* rule when the broker fails to disclose known material facts which are accessible only to the broker and his principle and which are not reasonably accessible to the buyer. Second, an action in negligence is available through the *Easton* rule if the broker fails to disclose unknown material facts due to the lack of a reasonably competent and diligent investigation.

Both actions share the element of a failure to disclose. In the case at hand, neither the nature of the North Canyon dump nor its residues were ever disclosed to any of the residents of the Rose Drive area. Southhampton informed residents that their lots were constructed on certified-clean engineered fill, and that it might illuminate Braitto Park, but it gave no formal notice regarding the

³¹ See *Easton*, 199 Cal. Rptr. at 388.

³² *Id.* at 390.

³³ *Id.* at 391. (“The duty of the seller’s broker to diligently investigate and disclose reasonably discoverable defects to the buyer does not relieve the latter of the duty to exercise reasonable care to protect himself. Cases will undoubtedly arise in which the defect in the property is so clearly apparent that as a matter of law a broker would not be negligent for failure to expressly disclose it, as he could reasonably expect that the buyer’s own inspection of the premises would reveal the flaw. In such a case the buyer’s negligence alone would be the proximate cause of any injury he suffered.”)

³⁴ *Id.* at 390.

³⁵ *Id.* at 391. (“We decline to place a similar limitation on the duty to investigate here articulated. Such a limitation might, first of all, diminish the broker’s incentive to conduct the reasonably competent and diligent inspection which the law seeks to encourage.”)

³⁶ *Id.* at 390.

condition or past uses of the land. Nobody spoke of hazardous tannery wastes, burning tires, scrap metal recycling or dumping sludge and dredgings.

Both actions also require that the undisclosed fact materially affect the value of the property. This presents a threshold issue, which must be addressed before either claim may move forward.

1. Whether the prior use of the North Canyon area as a dump or the existence of the residues left behind was a fact materially affecting the value or desirability of the property purchased by residents of Rose Drive?

We look to all the facts of the specific case to decide whether a particular fact materially affects the value or the desirability of property offered for sale.³⁷ In *Lingsch v. Savage*, the court lists several “material facts” typically considered to affect the value of a property. These include, but are not limited to, a covered lot filled with debris; a lot containing filled ground to a substantial depth; a sold house constructed on filled land; improvements added without a building permit and in violation of zoning regulations; and structures in violation of building codes. The courts held these material facts to be of sufficient substantiality to cause the duty of disclosure to arise.³⁸ These cases represent the most common class of “material facts” (1) where the undisclosed fact related to the physical integrity of the land and its structures; or (2) where a buyer would assume a legal responsibility for undisclosed zoning or building code violations. In either case, the condition affecting the property is located on the property itself.

Southampton could argue that the undisclosed conditions of the land in the present case did not exhibit any of these qualities, and thus it had no duty to disclose. Other than Tom Busfield’s property near Blake court, no evidence existed of any ground movement or structural instability. Also, for many residents on Rose Drive, their claim is not based on contamination directly located on their property. Rather, they claim that their habitation within the neighborhood creates unwarranted health risks for themselves and their families, and that the area as a whole suffered in the real estate market due to its unsavory reputation.

Thus, two sub-issues present themselves: (a) whether a closed dump or its residues not creating adverse structural conditions falls within the definition of

³⁷ *Saporta v. Barbagelata*, 220 Cal. App. 2d 463, 475 (1963).

³⁸ *Lingsch v. Savage*, 29 Cal. Rptr. 201, 205-06 (1963).

“material facts which adversely affect value;” and (b) whether the adverse condition must be located on the property in order for a duty to disclose to be assigned.

a. Whether a closed dump or its residues, which do not create adverse structural conditions, fall within the definition of “material facts” adversely affecting value?

Although most California decisions involving real estate fraud concern concealment or nondisclosure of known physical defects in a property, a few appellate cases address the issue of other types of “material facts.” For example, in *Reed v. King*, a real estate agent concealed from the buyer the fact that a woman and her four children were murdered in the house ten years before. Following a demurrer at the trial level, the appellate court reversed, declaring the plaintiff’s right to go forward with her claim. The court saw no principled basis for making the duty to disclose turn upon the character of the information when the information known or accessible only to the seller has a significant and measurable effect on market value.³⁹ Physical usefulness is not the sole criterion of valuation.⁴⁰

In describing the kinds of conditions required of such non-physical “material facts” the *Reed* court explained that murder is highly unusual in its potential for so disturbing buyers they may be unable to reside in a home where it occurred. However, this fact may foreseeably deprive a buyer of the intended use of the purchase.⁴¹ In determining what factors would motivate buyers and sellers to reach an agreement as to price, triers of fact may rely upon expert opinion and upon their knowledge and experience shared in common with people generally.⁴²

In the instant case, like murder, finding out that one’s home is built over or adjacent to hazardous waste is also “unusual in its potential for so disturbing buyers” such that it “may foreseeably deprive a buyer of the intended use of the purchase.” Knowledge and experience shared in common with people generally would suggest that having one’s home built in such an area would certainly be a “motivating” factor in any agreement to purchase a home.

³⁹ *Reed v. King*, 193 Cal. Rptr. 130, 133 (1983).

⁴⁰ *Id.* (The court in *Reed* goes on to say, “Reputation and history can have a significant effect on the value of realty. ‘George Washington slept here’ is worth something, however physically inconsequential that consideration may be. Ill-repute or bad will conversely may depress the value of property.”)

⁴¹ *Id.*

⁴² *Id.* at 134.

Under the *Reed* standard, the past use of the land as a dump and the existence of hazardous wastes in the Rose Drive area are “material facts.” If a reasonable jury could believe that a murder ten years in the past—an event with no lingering physical effects—is a material fact, certainly the existence of a closed dump with lingering hazardous material should qualify as well.

b. Whether the adverse condition must be located on the property in order for it to qualify as a material fact affecting the value of the property?

In *Alexander v. McKnight*, 9 Cal. Rptr. 2d 453 (1992), the McKnights built a two-story cabana in their back yard against a recorded declaration of restrictions. They also built a deck without proper building permits, ran a tree chipping business from their home, poured motor oil on their roof, and engaged in various other activities constituting nuisances, all of which were contrary to the declaration of restrictions.⁴³ The Alexanders lived next door to the McKnights and brought a nuisance action against them. The appellate court upheld damages awarded against McKnight because the Alexanders would subsequently be required to disclose to any later buyers that the neighborhood contained an “overtly hostile family who delights in tormenting their neighbors...”⁴⁴

Alexander provides evidence that, in some cases, California courts recognize a seller’s duty to disclose adverse conditions not located on the property for sale. Southampton may argue in response that *Alexander* is distinguishable because a property owner is being held liable to a neighboring property owner. Regardless, other California cases found a duty exists to disclose known material facts relating to structural and physical defects on neighboring property.⁴⁵

Relying on the California rules enunciated in *Cooper, Lingsch and Easton*,⁴⁶ the New Jersey Supreme Court, in a 100 plaintiff class action suit for real estate

⁴³ *Alexander v. McKnight*, 9 Cal. Rptr. 2d 453, 455 (1992).

⁴⁴ *Id.* at 456.

⁴⁵ See *Barnhouse v. Pinole*, 183 Cal. Rptr. 881 (1982) (developer’s failure to disclose to initial purchaser of house in subdivision existence of seeps, springs, and slides near the property was actionable); *Buist v. C. Dudley De Velbiss Corp.*, 6 Cal. Rptr. 259 (1960) (contractor’s failure to disclose that lot was in area of ancient slide was fraudulent).

⁴⁶ *Lingsch v. Savage*, 29 Cal. Rptr. 201, 209 (Dist. Ct. App. 1963) (“Other jurisdictions have limited the doctrine of caveat emptor. In California, when the seller knows of facts materially affecting the value or desirability of property and the seller also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is subject to a duty to disclose those facts to the buyer.”); see also *Easton v. Strassburger*, 199 Cal. Rptr. 383 (Ct. App. 1984) (imposing duty on broker to

fraud, recently held that such a dump was a material fact.⁴⁷ The New Jersey court held that real estate developer-sellers have an affirmative duty to disclose the existence of closed dumpsites which are rumored to contain hazardous materials, even though the dump is located one-half mile away from the residential property in question. The buyers in *Strawn v. Canuso* were unaware that the closed landfill was near the edge of a residential development. The sellers, however, knew about it, yet they advertised the development as a "tranquil location in the midst of a forest." The court declared that application of caveat emptor in the case would work an injustice.⁴⁸ The New Jersey court prepared a detailed investigation into the types of conditions which might lead to a seller's duty to disclose, including analysis of the California cases *Reed*, *Barnhouse*, and *Buist*, supra, and discussed the special relationship between licensed real estate brokers and their buyers. It concluded that even without physical intrusion a landfill may cause diminution in the fair market value of real property located nearby.⁴⁹

In the instant case, following the *Strawn* analysis, the facts would strongly support a finding that the dump, whether closed properly or not, was a material fact affecting the value of the property. If the court adopts the holding in *Strawn*, the burden of proof on the residents of Rose Drive will be substantially relaxed in proving their case for real estate fraud. After finding that existence of the off-site dump was a "material factor" which could foreseeably affect value of nearby property, the *Strawn* court held that:

inspect property listed for sale to determine whether settlement or erosion problems are likely to occur and to disclose such information to prospective purchasers). In *Lingsch*, the court determined that the real estate agent or broker representing the seller is a party to the business transaction. It stated:

In most instances [the broker] has a personal interest in [the transaction] and derives a profit from it. Where such agent or broker possesses, along with the seller, the requisite knowledge according to the foregoing decisions, whether [the broker] acquires it from, or independently of, [the] principal, [the broker] is under the same duty of disclosure. [The broker] is a party connected with the fraud and if the other parties to the transaction make no disclosure at all to the buyer, such agent or broker becomes jointly and severally liable with the seller for the full amount of the damages. [29 Cal. Rptr. 205 (footnote omitted).] *Strawn v. Canuso*, 140 N.J. 43, 56-57, 657 A.2d 420, 426-27 (S. Ct. 1995).

⁴⁷ *Strawn v. Canuso*, 140 N.J. 43, 657 A.2d 420 (S. Ct. 1995).

⁴⁸ TIMOTHY J. MULDOWNY AND KENDALL W. HARRISON, STIGMA DAMAGES: PROPERTY DAMAGE AND THE FEAR OF RISK, DEFENSE COUNSEL JOURNAL *525 (Oct. 1995) examining *Strawn v. Canuso*, 638 A.2d 141 (N.J. Super 1994), *aff'd*, 657 A.2d 420 (N.J. 1995).

⁴⁹ *Strawn*, 140 N.J. at 430.

The developer-seller of residential housing in multi-home developments and their agents have a duty to disclose the existence of off-site conditions which (1) are unknown to the buyers; (2) are known or should have been known to the seller and/or its broker; and (3) based on reasonable foreseeability, might materially affect the value or the desirability of the property involved in the transaction.⁵⁰

In the case at hand, the existence of the closed dump was likewise (1) unknown to the buyers; (2) known to Southampton; and (3) reasonably foreseeable that the use of this parcel of land as a dump prior to the construction of homes might materially affect its value or desirability. Like the defendants in *Strawn*, Southampton was fully aware of the closed dump. Unlike the defendant in *Strawn*, Southampton actually owned the dump. It would be ironic to tell the Rose Drive residents that New Jersey real estate agents are held to a duty to disclose a nearby closed dump based on the rules enunciated in California caselaw, but that these same cases are not sufficient to establish a similar duty in the State where they are binding precedent.

Even if the court does not adopt the holding in *Strawn*, the reasoning in California's own case law—*Reed*, *Alexander*, *Barnhouse* and *Buist*—still shows that the residents of Rose Drive have a reasonably grounded claim that the conditions of the North Canyon constitute a material fact. Having shown the issue of non-disclosure to be satisfied, the remaining analysis will explore whether the residents of Rose Drive can hold Southampton liable for real estate fraud based on the *Cooper-Lingsch* rule and, if not, whether they can hold Southampton liable for negligence based on the *Easton* rule.

2. Whether Southampton is liable for real estate fraud for its failure to disclose the closed dump or its remaining residues to the residents of Rose Drive?

The above analysis showed that the existence of the closed dump or its remaining residues are probably material facts affecting the value of the property and that no disclosure of these facts occurred. The only questions remaining in a real estate fraud action based on the *Cooper-Lingsch* rule are (a) whether Southampton knew of the material facts, and (b) whether this knowledge was accessible only to Southampton, and not reasonably accessible to the buyers on Rose Drive.

⁵⁰ MULDOWNNEY & HARRISON, *supra* note 48.

a Whether Southampton knew of the material facts affecting the value of the Rose Drive properties?

If the court accepts the *Strawn* argument, that the mere existence of a closed dump in proximity to a residential property constitutes a material fact, this issue is immediately resolved. Southampton clearly knew of the closed dump—they closed it. If the court is only willing to extend “material fact” status to the remaining residues, strong evidence still exists that Southampton had knowledge. Southampton granted permission for sewage sludge and bay dredgings to be deposited in the area. Southampton owned the land for nearly a year while Braitto continued his operation. And, during construction, Southampton’s field manager ordered his crews to scatter leather scraps contaminated with hexavalent chromium on the hillside behind Channing Circle.

b. Whether knowledge of the closed dump and its residues was accessible only to Southampton and was not reasonably accessible to the buyers on Rose Drive?

As owner of the dump, Southampton was the focal point for information regarding the North Canyon. Southampton, ENGEO or Southampton’s other contractors undertook all field activities to prepare the site for development. Because it chose to withhold information on the existence of the North Canyon dump from the residents, Southampton effectively concealed material facts concerning the North Canyon. It is probable that Southampton knew of the dump’s potential impact on the value of property. Southampton negotiated an option contract with Braitto for a very favorable price on the property, presumably based on Southampton’s knowledge that Braitto used the area as a dump. Yet, nothing indicates that Southampton sold the houses on Rose Drive for less than those further from the dump. This situation provides additional circumstantial evidence that Southampton knew and took advantage of material facts which it withheld from reasonable discovery by its clients.

In response, Southampton may reply that it did file required closure documents with State agencies and that the buyers had access to information through those channels. However, *Reed v. King* indicates that buyers are not held to a burden of discovering every possible fact about a given property. Murder is not

such a common occurrence that buyers should be charged with anticipating and discovering this disquieting possibility. Accordingly, the fact is not one for which a duty of inquiry and discovery can sensibly be imposed upon the buyer.⁵¹ In the instant case, the residents should likewise be able to effectively argue that building homes in the vicinity of toxic materials is not a common occurrence which buyers should be charged with anticipating.

3. *Whether Southhampton is liable for negligence for its failure to disclose the closed dump or its remaining residues to the residents of Rose Drive?*

The residents of Rose Drive may still be able to state a successful claim for negligence based on the rule enunciated in *Easton v. Strassburger*. This course of action is available should the court find that the dump was a material fact but still declines to hold Southhampton liable under the preceding argument due to a lack of knowledge about its existence. Unlike the previous arguments, residents do not need to show that the seller knew the material fact or that it was not accessible to the buyer. Rather, once shown that a material fact affecting the value of the property exists, the only question remaining is whether the seller undertook a reasonable investigation to discover the previously unknown fact.

According to the standard enunciated in *Easton*, Southhampton's actions most certainly amounted to a breach of their affirmative duty to conduct a reasonably competent and diligent inspection of the residential property. Even without expert testimony, it is likely that any jury would find Southhampton's meager efforts of discovery as neither reasonably competent nor diligent. Southhampton's investigation consisted of sending a field supervisor to review county documents for a few hours one afternoon and removing anything looking like garbage as development progressed. Nobody asked where the metal hillside went. Nobody mentioned the tannery wastes. Nobody mentioned the burned tires. Nobody conducted chemical testing prior to or during construction other than in Blake Court. While it owned the land, Southhampton authorized the dumping of sewage sludge and bay dredgings in the North Canyon and scattered contaminated tannery wastes on the property. Any reasonable person, especially a professional land developer, would realize that mere visual inspection under these conditions would be insufficient to discover the true extent of contamination on the property.

⁵¹ *Reed v. King*, 193 Cal. Rptr. 130, 133 (1983).

In sum, Southampton will have great difficulty in showing that it reasonably and diligently investigated the existence of the dump, its residues and its impacts on the value of the property. This may be true even if the Court agrees with Southampton that mere knowledge of the closed dump's existence was not enough to establish a duty to disclose. Without such evidence, Southampton will probably be held liable for this breach.

VIII. CONCLUSION

The broad issue presented by this case is whether Southampton, as the owner-developer of residential property, had a duty to disclose the existence of a closed dump and its residues located on or in the neighborhood of the properties which it sold to the residents of Rose Drive. Given California Appellate Court decisions, the residents have two possible causes of action, one based in real estate fraud and the other in negligence.

For either charge to progress, the residents of Rose Drive will have to show that the dump or its residues are material facts which affect the value of their property. However, Southampton can distinguish most of the case law in California because, in this case, the material fact is not one which affects the structural integrity of the property and, in some instances, the material fact is not located on the owner's property. However, other California precedent suggests that the facts of the individual case may still permit a finding that the condition constitutes a material fact necessitating disclosure.

A recent New Jersey Supreme Court decision, based largely on such California precedent, concluded that owner-developers owe a positive duty to disclose the existence of a known closed dump which is rumored to contain hazardous waste, even though the property sold was located one-half mile away from the closed dump. If the California courts decide to follow this reasoning, Southampton will almost certainly be held liable for real estate fraud.

Even if the court does not accept the New Jersey standard for real estate fraud, residents of Southampton may still prevail under existing California standards. If the court agrees that Southampton's lack of investigations of residues from the North Canyon operation was unreasonable, and if the court agrees that such contamination constitutes a material factor which affects the value of the

property, the residents of Southampton will be able to state a strong negligence case against Southampton. Furthermore, if the residents can additionally prove that Southampton had actual knowledge of the dump or its residues, the action against Southampton may be raised to real estate fraud.

Escalating the charge to real estate fraud is of primary importance to the residents of Rose Drive because it affects available damages. In a case for simple negligence, punitive damages are generally not available.⁵² However, in an action for real estate fraud, punitive damages may be assessed.⁵³ This is particularly important to the residents of Rose Drive, considering the economics of this case. The original complaint was filed in 1991. Southampton managed to stall the case for seven years. In the meantime, the plaintiffs hired soils engineers and real estate appraisal experts, as well as conducted a monolithic effort in depositions and other discovery. Should the residents only recover in negligence—and thus be limited to claiming the diminution in the value of their property—it is likely that damages awarded will merely be sufficient to cover the residents' cost of litigation. On the other hand, with an action in real estate fraud, recovery may be enhanced through the availability of punitive damages, thus more equitably shifting the burden of Southampton's procedural delays.

⁵² Mere negligence, even gross negligence, is not sufficient to justify an award of punitive damages. *See, e.g.,* *Read v. Turner*, 48 Cal. Rptr. 919 (1966); *Ellis v. City Council*, 35 Cal. Rptr. 317 (1963); *Gombos v. Ashe*, 158 Cal.App.2d 517, 526-27, 322 P.2d 933 (1958); *Ebaugh v. Rabkin*, 99 Cal. Rptr. 706, 708-09 (1972).

⁵³ "Section 3294 of the Civil Code provides: 'In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.' The words, 'oppression, fraud, or malice' are in the disjunctive and any of them may be 'express or implied.' Fraud alone is an adequate basis for awarding punitive damages." *Spencer v. Harmon Enterprises, Inc.*, 44 Cal. Rptr. 683 (1965); *Bate v. Marsteller*, 43 Cal. Rptr. 149 (1965); *Austin v. Duggan*, 162 Cal.App.2d 580, 584, 328 P.2d 224 (1958); *Lawson v. Town & Country Shops, Inc.*, 159 Cal.App.2d 196, 204, 323 P.2d 843 (1958); *Oakes v. McCarthy Company*, 73 Cal. Rptr. 127, 146 (1968).

