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# Shipton V. Barfield: Duties Of Subdivision Developers To Lot Purchasers

# *SHIPTON V. BARFIELD:* DUTIES OF SUBDIVISION DEVELOPERS TO LOT PURCHASERS

Common law rules such as the doctrine of caveat emptor and the strictures of the Statute of Frauds have traditionally governed the relationship between real estate vendors and purchasers. Many courts adhere to the strict common law precedents, but some recent limitations of the old doctrines indicate a desirable trend toward a more purchaser-protective attitude by the courts.[1] This development, however, has been neither rapid nor universal. As a result, many real estate subdivision purchasers have been frustrated by unenforceable promises and unfulfilled expectations.

Judicial reluctance to recognize the developments protecting real estate purchasers was manifested in the North Carolina case of *Shipton v. Barfield*.[2] In that case, homeowners sought damages against the developer of the subdivision in which their property was located for refusing to seek reformation of a mistake in one restrictive covenant and for failing to enforce another restriction contained in the deed to an adjoining lot.[3] Deeds from the developer, the Starmount Company, to purchasers in the "Friendly Acres" subdivision routinely contained a covenant that no building would be constructed within 125 feet of the property line on the street abutting the front of a lot.[4] Starmount used form deeds in conveying the lots, completing the building setback restricion by typing "125" into a blank space in the applicable covenants. However, the blank in the deed to the lot adjoining the plaintiffs', owned by the co-defendants Barfield, was nonsensically completed with the word "their" rather than a number.[5] That lot remained unimproved for decades while homes were constructed on neighboring properties in conformance with the 125-foot building line. In 1972 the Barfields commenced construction of a residence fifty feet from the front property line of their lot. The

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[1] *See* text accompanying notes 41-58 *infra*.

[2] 23 N.C. App. 58, 208 S.E.2d 210, *cert. denied*, 286 N.C. 212, 209 S.E.2d 316 (1974).

[3] The plaintiffs also sued the adjoining landowners, but this issue was not considered by the court in this decision.

[4] Brief for Appellant at 5, Shipton v. Barfield, 23 N.C. App. 58, 208 S.E.2d 210 (1974) [hereinafter cited as Brief for Appellant].

[5] The co-defendants Barfield derived title to their lot through mesne conveyances from the developer. The setback restrictions in this deed to the Barfields' predecessor in title reads: "No building shall be erected or allowed to remain on said property within *their* feet of the property line on the street or road abutting the front of said property . . . ." 23 N.C. App. at 59, 208 S.E.2d at 212 (emphasis added).

plaintiffs notified Starmount of the apparent mistake in the covenant in the Barfields' chain of title, but the developer refused to reform the error.[6]

The plaintiffs also sought damages for the developer's failure to enforce a building plan approval covenant. One of Starmount's restrictions on the Barfields' lot prohibited construction until the plans for the proposed structure had been submitted to and approved by the developer. Starmount did not demand submission of the Barfields' plans before construction began, and thereafter approved them even though both the appearance and the location of the structure did not conform to the common neighborhood scheme.[7] The plaintiffs claimed damages of $12,000 to the value of their property as a result of the non-conformity of the Barfield house to the general subdivision plan.[8] The trial court granted Starmount's motion to dismiss for failure to state a claim upon which relief could be granted.[9] Affirming the dismissal, the North Carolina Court of Appeals found neither factual nor legal bases for imposing a duty to the plaintiffs on the Starmount Company.[10]

The appellate court, relying on *Hege v. Sellers,*[11] held that only the parties to a deed, or those claiming under them in "privity," have standing to maintain an action for reformation.[12] In *Hege,* subdivision homeowners had sought reformation of a deed from the developer to another lot purchaser to include a restriction found in the deeds to all other lots in the subdivision. The plaintiffs alleged that the restriction had been omitted from the purchaser's deed by mutal mistake of the parties. The North Carolina Supreme Court held that the plaintiffs lacked standing because they were not in "privity"[13] with the original parties to the deed. Thus, the *Hege* rule requires plaintiffs seeking reformation of a deed to be in the chain of title.[14]

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[6] Brief for Appellant, *supra* note 4, at 5-6.

[7] 23 N.C. App. at 60, 208 S.E.2d at 212. The Barfields' residence was constructed 50 feet from the front property line, and the lot failed to meet the minimum width restriction contained in the deed. *Id.*

[8] Brief for Appellant, *supra* note 4, at 6.

[9] 23 N.C. App. at 61, 208 S.E.2d at 212. The defendant's motion was pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

[10] 23 N.C. App. at 61-63, 208 S.E.2d at 212-14.

[11] 241 N.C. 240, 84 S.E.2d 892 (1954).

[12] 23 N.C. App. at 61, 208 S.E.2d at 213.

[13] 241 N.C. at 246, 84 S.E.2d at 897. The court relied on Sills v. Ford, 171 N.C. 733, 88 S.E. 636 (1916), which held that only a party with a mutual or successive interest in the same rights of property as the original party is in privity of estate.

[14] 241 N.C. at 246, 84 S.E.2d at 897. To be in the "chain of title," the plaintiffs must trace their ownership back to the deed in question. The property of the plaintiffs

The *Shipton* court, by relying on *Hege,* failed to distinguish an action seeking reformation from a suit for damages based on the developer's refusal to reform. At issue in Shipton was not whether the plaintiffs had standing to seek reformation[15] but rather whether Starmount was liable for damages for failing to reform the erroneous deed. Thus, the *Hege* precedent concerning standing in an action for reformation is arguably inapposite.

In disposing of the plaintiffs' second claim, the *Shipton* court considered the developer's responsibility for enforcing restrictive covenants. The plaintiffs had contended that Starmount breached its obligation by failing to demand submission of the Barfields' plans before construction began and by subsequently approving the proposed house even though it was in violation of certain restrictions in the deed.[16] However, the court held that a duty to enforce could arise only by a further covenant, express or implied, between the developer and the plaintiff. Generalizing that restrictive covenants are not favored by the law and finding no basis for a covenant to enforce in the language of the deed, or in the "presumed intention of the parties,"[17] the court held that the developer was not obligated to enforce the common scheme of restrictions.[18] The court found rather that the plan approval restriction "appears to be . . . intended for the sole benefit of the defendant Starmount Company."[19]

However, the plaintiffs alleged that both of the covenants in question were at least partly for their benefit. The final paragraph of restrictions in the Starmount deed to the Barfields' predecessor in title provided that the setback restriction could be waived only with the consent of the adjoining property owners. This waiver provided the basis for the plaintiffs' argument that they were third party beneficiaries of the covenant,[20] and decisions from other jurisdictions support their contention.[21] As third party beneficiaries, the plaintiffs should have been entitled to protect their interests[22] from deprivation

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must have been conveyed by the deed sought to be reformed. For a discussion of privity of estate, see C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 111-15 (2d ed. 1947).

[15] The plaintiffs' claims were limited to damages. Brief for Appellant, *supra* note 4, at 2.

[16] 23 N.C. App. at 60, 208 S.E.2d at 212.

[17] *Id.* at 62, 208 S.E.2d at 213.

[18] *Id.* at 62-63, 208 S.E.2d at 213-14.

[19] *Id.* at 63, 208 S.E.2d at 214.

[20] Brief for Appellant, *supra* note 4, at 13-14. *See* Lamica v. Gerdes, 270 N.C. 85, 153 S.E.2d 814, 818 (1967).

[21] *See, e.g.,* Minner v. City of Lynchburg, 204 Va. 180, 129 S.E.2d 673 (1963).

[22] *Cf.* Bristol v. Woodward, 251 N.Y. 275, 167 N.E. 441 (1929)

resulting from the developer's mistake and subsequent refusal to correct the error. Nevertheless, the court stated that the law of third party beneficiaries as it relates to restrictive covenants provides a remedy only among subdivision lot purchasers. The court did not address the problem faced by a lot owner who cannot enforce an intended covenant because of an error of the subdivider.[23]

The plan approval covenant, like the setback restriction, was partly for the benefit of the plaintiffs. The final paragraph of covenants in the deeds to the "Friendly Acres" lots provided that upon dissolution of the Starmount Company the right to approve or disapprove proposed building plans would pass to a committee of property owners in the subdivision.[24] Thus, if Starmount had been dissolved and the committee of property owners had been appointed, the committee would have enjoyed the right reserved by Starmount to demand submission of the Barfields' plans for approval before construction could begin. By granting the property owners the right to decide the suitability of proposed building plans, Starmount ensured that the restriction would not become inoperative for want of a party with standing to enforce the covenant. Had the approval restriction existed solely for the benefit of Starmount, such a provision would have been unnecessary.

The choice of the property owners as the group to whom this right to approve should pass demonstrates that the developer recognized the substantial interest of the lot owners in maintaining the integrity of the subdivision plan. Such plan approval covenants are at least partly intended to preserve the characteristics of the subdivision, resulting from the scheme of restrictions, which induce purchasers to buy lots in the development. So long as the developer has lots to sell, it has a substantial interest in seeing that the appealing qualities of the subdivision are preserved. If the neighborhood is attractive, the

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[23] North Carolina case law indicates that the plaintiffs would probably be unable to enforce the setback restriction against the Barfields. *See* Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953). The only such restriction in their chain of title was the highly ambiguous covenant set out in note 5 *supra*. A court considering the covenant would construe against restriction of the grantee's land, Long v. Branham, 271 N.C. 264, 156 S.E.2d 235 (1967), so the lot would probably be found unencumbered. Furthermore, the setback requirement would not be implied from the uniformity of the other restrictions, unless the developer expressly covenanted in another deed to a "Friendly Acres" lot that all the property was bound by the setback line. *See* Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957); St. Luke's Episcopal Church v. Berry, 2 N.C. App. 617, 163 S.E.2d 664 (1968). It does not appear that any such express limitation was made by Starmount.

[24] Brief for Appellant, *supra* note 4, at 12.

developer will be able to sell lots more easily and at an enhanced price. After the developer has profited from the sale of all of its lots, the subdivision lot purchasers assume the greatest interest in ensuring that the neighborhood remains an attractive place to live.[25] Thus, lot owners and the developer have a mutual interest in preserving property values which the developer should not be permitted to disregard by arbitrarily approving building plans.

The plaintiffs in *Shipton* argued that Starmount had acted unreasonably by approving plans for a house which failed to conform to the common neighborhood restrictions.[26] The plan approval covenant did not specify what criteria Starmount should apply in deciding upon plans submitted by lot purchasers, but most courts have enforced such covenants, finding they are not void for lack of specific standards.[27] In determining the acceptability of proposed plans, these courts have held that the party empowered to consider the plans must not act arbitrarily, unreasonably or in bad faith.[28] The issue of

[25] Authority exists for the proposition that once a developer has sold all the subdivision lots and is no longer beneficially interested in the scheme of restrictions it will not be allowed to enforce the covenants. *See* Kent v. Koch, 166 Cal. App. 2d 579, 333 P.2d 411 (Dist. Ct. App. 1958); Stegall v. Housing Authority, 278 N.C. 95, 178 S.E.2d 824 (1971); London County Council v. Allen, [1914] 3 K.B. 642. *But see* Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913). The decisions, in holding the covenants unenforceable by the grantor, treat restrictive covenants as "equitable easements" and apply the rule invalidating negative easements in gross. Application of this rule to a case in which the developer had sold all subdivision lots restricted by a plan approval covenant such as that of "Friendly Acres" will produce incongruous results. Assuming the developer no longer owns land benefited by the restriction, it will not be allowed to enforce the approval covenant. Furthermore, the right to approve the plans would pass to the subdivision lot owners, who do possess benefited land, only upon dissolution of the development company. Therefore, the plan approval covenant would be unenforceable in the interim between the sale of the last lot by the developer and the company's dissolution.

[26] Brief for Appellant, *supra* note 4, at 2.

[27] *See, e.g.*, Rhue v. Cheyenne Homes, Inc., 168 Colo. 6, 449 P.2d 361 (1969); Carroll County Dev. Corp. v. Buckworth, 234 Md. 547, 200 A.2d 145 (1964). The only jurisdiction which has refused to enforce plan approval covenants lacking specific standards on the grounds of vagueness is Ohio. Courts in that state have required only compliance with restrictions of record. Carranor Woods Property Owners' Ass'n v. Driscoll, 106 Ohio App. 95, 6 Ohio Op. 2d 361, 153 N.E.2d 681 (Ct. App. 1957). The plaintiffs in *Shipton* argued that the developer failed to require conformity with a restriction of record by approving the Barfields' plans. A covenant in the Barfields' chain of title prohibited construction of lots less than 75 feet wide, a requirement which their lot did not meet.

[28] Bramwell v. Kuhle, 183 Cal. App. 2d 767, 6 Cal. Rptr. 839 (Dist. Ct. App. 1960). In *Bramwell* the subdivider sold all subdivision lots, and appointed a committee to accept or reject proposed plans. The committee disapproved a building proposal but

whether the power to decide on the suitability of a proposed structure has been exercised properly is a question of fact.[29] Generally, it should be determined whether the proposed structure is in conformity with the overall scheme of the subdivision, is in harmony with adjoining buildings, and is in compliance with the specific restrictions set out in the subdivision plan.[30]

Because Starmount's plan approval covenant was partially for the benefit of the plaintiffs while its approval of the Barfields' nonconforming plans was arguably arbitrary, the plaintiffs' claim was viable. The acts and omissions of the developer substantially affected the plaintiffs' property value and provided the plaintiffs with a claim which was not "clearly without merit," as the *Shipton* court held.[31]

The plight of the plaintiffs in *Shipton* typifies that of purchasers who are induced by the restricted development of a subdivision to buy lots with the expectation that mutual restrictions will protect the value of their property.[32] Many courts have recognized that such purchasers are persuaded to acquire land by the creation of a scheme of subdivision restrictions and by assurances that restrictive covenants will prevent undesirable uses of neighboring lots.[33] The issues raised by the purchasers unfulfilled expectations that their property values will be protected by a properly designed and implemented plan of uniform restrictions have been difficult to resolve.

Purchasers often acquire property in reliance on a developer's oral assurances that the subdivision lots are subject to uniform restrictions, learning subsequently that such promises may be unenforceable.[34] As one North Carolina Court of Appeals judge has observed:

> [I]t does not seem equitable for [a developer] to lead [lot owners] into purchasing these lots upon the promise of a restricted residential subdevelopment (and more than likely at inflated prices because of the restrictive covenants); then later

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the developer, with knowledge of the objections of neighboring landowners and without investigating the situation, attempted to approve the plans. The court determined that under the circumstances, because the plans were not in keeping with the common neighborhood restrictions, the developer's approval was arbitrary and ineffective. The court enjoined the proposed construction.

[29] La Vielle v. Seay, 412 S.W.2d 587, 593 (Ky. 1966).

[30] *Id.*

[31] 23 N.C. App. at 63, 208 S.E.2d at 214.

[32] Brief for Appellant, *supra* note 4, at 7.

[33] *See, e.g.*, Hunt v. Del Collo, ___ Del. Ch. ___, 317 A.2d 545 (Ch. 1974); Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949).

[34] *See, e.g.*, St. Luke's Episcopal Church v. Berry, 2 N.C. App. 617, 163 S.E.2d 664 (1968).

> convey lots . . . without including the covenants in the deed[s] . . . .[35]

However, in those jurisdictions which analogize equitable restrictions to negative easements,[36] a restrictive covenant is deemed an interest in land and may be subject to the Statute of Frauds and therefore cannot be proven by parol evidence.[37] Although a developer's oral assurances do not impose restrictive covenants on the land, they should bind the developer himself, thereby entitling purchasers to damages for breach of promise. An oral contract binding only a developer personally is not subject to the real estate Statute of Frauds,[38] and verbal promises to include restrictions in subsequent conveyances have been enforced against grantors by several courts.[39]

The issue of the enforceability of oral representations often arises in subdivision cases as a result of a developer's promise to a purchaser that all development lots are uniformly restricted. In some cases when purchasers have relied on these assurances, whether made by oral representations or by display of a subdivision plat indicating a general scheme of restrictions, developers have been required to fulfill their promises. For example, in the Texas case of *Burgess v. Putnam*,[40] a developer was enjoined from conveying subdivision lots by deeds without including restrictions identical to those imposed on lots previously purchased by the plaintiffs. When the plaintiffs had bought their property, the developers' plan for the subdivision prohibited use of the land for mobile home sites. A subsequent change in the real estate market afforded the developers an opportunity to

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[35] *Id.* at 625, 163 S.E.2d at 669-70 (Brock, J., dissenting).

[36] *See, e.g.*, Davis v. Robinson, 189 N.C. 589, 127 S.E. 697 (1925); 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 860 (3d ed. 1939) [hereinafter cited as TIFFANY] and cases cited at note 57 therein.

[37] 3 TIFFANY, *supra* note 36, § 860. Professor Tiffany further suggests that the Statute of Frauds is applicable to equitable restrictions even where they are treated as contracts, rather than as negative easements. He argues that a contract unlimited in duration and controlling the use of land cannot be considered as being capable of performance in one year, and is therefore ineffectual under the Statute of Frauds. *Id.* If it is conceded that equitable restrictions are subject to the Statute of Frauds, Tiffany argues that the three exceptions of part performance, fraud and estoppel are inapplicable to a grantor's oral representations. *Id. But see* Cato v. English, 228 Ga. 120, 184 S.E.2d 161 (1971); Groot, *Annual Survey of Georgia Law—Real Property*, 24 MERCER L. REV. 309, 342-43 (1973); Reno, *The Enforcement of Equitable Servitudes in Land: Part II*, 28 VA. L. REV. 1067, 1093-95 (1942) [hereinafter cited as Reno].

[38] *See* 3 S. WILLISTON, LAW OF CONTRACTS § 439A (3d ed. Jaeger 1960).

[39] *E.g.*, Thornton v. Schobe, 79 Colo. 25, 243 P. 617 (1925); Bristol v. Woodward, 251 N.Y. 275, 167 N.E. 441 (1929).

[40] 464 S.W.2d 698 (Tex. Civ. App. 1971).

realize a ready profit by selling their remaining lots for mobile home use. The homeowners sued to enjoin such sales.

The developers in *Burgess* had made no written promise to restrict uniformly all lots in the subdivision. Restrictions were not recorded with the subdivision plat, but rather were included separately in each deed from the developers to lot purchasers. Furthermore, each deed contained a merger clause to the effect that all representations and covenants affecting the lot were expressed in the written agreement, and that no others should be recognized.[41] The court found that the representations of the developers that no incompatible uses of other lots would be permitted were material in inducing the plaintiffs to purchase restricted lots at an enhanced price. Such material misrepresentations, even in the absence of fraud,[42] established the plaintiff lot owners' "equitable right to compel the [developers] to restrict similarly the use of any remaining subdivision property as a protection of plaintiffs' investment and of the lots they had purchased."[43] The court further held that the importance of protecting purchasers from material misrepresentations of vendors outweighed the advantages of contractual certainty and that the admissibility of parol evidence to prove the misrepresentations of the developer, in spite of the merger clause, was proper.[44]

In a similar case, *Westhampton, Inc. v. Kehoe,*[45] the Supreme Court of Georgia found that a developer was bound by its parol representations. The developer in *Westhampton* owned a large tract of land which was platted into four sections. The first three sections were developed with identical minimum residence cost and size restrictions imposed upon each lot. Further, the plaintiffs were shown an unrecorded plat indicating that these same restrictions would be impressed upon the fourth section of the subdivision. The court held that the oral promises of the developer, the uniformity of the development scheme of the first three sections of the subdivision and the restrictions in the plaintiff's deed supplied sufficient evidence of an implied reciprocal servitude[46] to support an interlocutory injunction

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[41] *Id.* at 700-01.

[42] RESTATEMENT OF CONTRACTS § 476(1) and comment (b) at 909 (1932).

[43] 464 S.W.2d at 700.

[44] *Id.* at 700-01.

[45] 227 Ga. 642, 182 S.E.2d 430 (1971).

[46] The doctrine of implied reciprocal negative servitudes was restated by the Supreme Court of Michigan:

> If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude

against the sale of lots without the same minimum cost and size covenants.[47]

Other courts have similarly indicated that developers may not abandon a general restriction plan to the detriment of those who purchased lots in reliance on the uniformity of restrictions[48] without express reservation, in deeds to purchasers, of the right to alter the scheme.[49] The introduction of mass production and sales techniques into the field of real estate has resulted in a slow but steady erosion[50] of the doctrine of caveat emptor,[51] which has governed realty transactions for centuries.[52] Several courts recently considering the applica-

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> becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold.

Sanborn v. McLean, 233 Mich. 227, 229-30, 206 N.W. 496, 497 (1925). This doctrine furnishes a basis for enforcement of a general scheme of restrictions against land retained by a developer in those jurisdictions which do not enforce oral agreements to impose restrictive covenants upon land. *See* Reno, *supra* note 37, at 1092. Several cases have held that an implied restrictive covenant on remaining subdivision lots arises when a developer promises a lot purchaser that unsold property will be subject to similar restrictions. *See, e.g.,* Sanborn v. McLean, *supra;* Spicer v. Martin, 14 App. Cas. 12 (1888). The express restrictions in the lot purchasers' deeds, coupled with the developer's promise of similar restrictions upon all lots subsequently sold, provided the implied covenant in these cases. No problems with the Statute of Frauds were perceived by these courts. A reciprocal covenant, the terms of which were embodied in the plaintiff's deed poll signed by the developer, not an oral agreement, was being enforced. Such an analysis obviates the need for a suit against the developer to maintain the uniformity of the subdivision scheme by imposing the restrictions on the property in the development. *See* Reno, *supra* note 37, at 1092-93.

[47] 227 Ga. at 646, 182 S.E.2d at 434.

[48] Williams v. Cone, 249 S.C. 374, 154 S.E.2d 682 (1967) (dictum).

[49] Bave v. Guenveur, 36 Del. Ch. 48, 125 A.2d 256 (Ch. 1956).

[50] This trend eroding caveat emptor has included the recognition of a warranty of habitability in leases, *e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied,* 400 U.S. 925 (1970); a warranty of quality by builder-vendors of new homes, *e.g.,* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); and the regulation of subdivision land sales, *see, e.g.,* Coffey & Welch, *Federal Regulation of Land Sales: Full Disclosures Comes Down to Earth,* 21 CASE W. RES. L. REV. 5 (1969).

[51] *See generally* Hamilton, *The Ancient Maxim Caveat Emptor,* 40 YALE L.J. 1133 (1931).

[52] Caveat emptor has been part of the common law for centuries:

> Note, that by the civill law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse warranty; but the common law bindeth him not, unlesse there be a warranty, either in deed or in law; for caveat emptor . . . .

2 COKE, LITTLETON 102(a), c.7, § 145 (17th ed. 1817). Thus, in Louisiana there is no doctrine of caveat emptor in the law of sales or personalty or realty. LA. CIV. CODE ANN. art. 2520 (West. 1952).

tion of caveat emptor to the sale of new houses have limited the doctrine.[53] Home buyers, with increasing frequency, have prevailed against builder-vendors on claims for faulty construction on the theories of implied warranty, express warranty, warranty of marketable title, fraud and negligence.[54] Furthermore, legislation regulating subdivision sales has been enacted on both national and state levels to protect purchasers from unfair real estate sales practices.[55]

Although caveat emptor still predominates in real estate law,[56] the need for protection of land purchasers has created a desriable trend away from the doctrine. The enforcement of developers' promises to restrict subdivision lots in accordance with a general neighborhood plan of covenants is equitable. The recognition of similar duties to enforce covenants which will preserve the neighborhood plan and benefit subdivision lot owners, and to draft, transcribe and record properly the common restrictions so that they will be enforceable, is equally reasonable. This "warranty of quality" will fulfill purchasers' expectations that the significant protections provided consumers of personal property[57] apply to transactions as important as subdivision property sales.[58] The protections afforded subdivision lot purchasers should not be limited to the old common law doctrines of reciprocal

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[53] See, e.g., Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113. *See* Bearman, *Caveat Emptor In Sales of Realty—Recent Assaults Upon the Rule,* 14 VAND. L. REV. 541 (1961) [hereinafter cited as Bearman]; Note, *The Doctrine of Caveat Emptor As Applied To Both The Leasing And Sale of Real Property: The Need For Reappraisal And Reform,* 2 RUTGERS-CAMDEN L.J. 120 (1970).

[54] *See generally* Bearman, *supra* note 53; Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property,* 53 GEO. L.J. 633, 638-48 (1965) [hereinafter cited as Haskell]; Note, *Commerical Law—Implied Warranties in Sales of Real Estate—The Trend to Abolish Caveat Emptor,* 22 DE PAUL L.J. 510, 516-21 (1972); Note, *S.275—The Interstate Land Sales Full Disclosure Act,* 21 RUTGERS L. REV. 714, 717-19 (1967).

[55] The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720 (1970), requires a developer which uses the mails or interstate communications in land sales to provide potential purchasers and the Securities and Exchange Commission with information concerning both the property and the developer itself. Failure to comply with the requirements of the Act may permit purchasers to rescind the transaction or to collect damages. The states have also moved to protect consumers in subdivision transactions by enacting disclosure laws similar to the federal act. *See, e.g.,* GA. CODE ANN. §§ 84-6101 *et seq.* (Supp. 1974); N.J. REV. STAT. §§ 45:15-:16.1 (Supp. 1974)g N.Y. REAL PROP. LAW §§ 337-339(c) (McKinney 1968).

[56] Haskell, *supra* note 54, at 655.

[57] The implied warranties applicable to sales of goods are contained in UNIFORM COMMERCIAL CODE § 2-314, 2-315.

[58] *See* Bearman, *supra* note 53.

negative easements,[59] fraud,[60] the strained warranty liability of new home builders and the disclosure requirements. Purchasers should be allowed the protection of an implied warranty of quality of the subdivision land which they purchase,[61] for the unenforceability of a restrictive covenant can cause as much economic damage to a lot purchaser as a construction defect does to a homeowner. In either event, the purchaser is harmed because the vendor failed to exercise care in developing the subdivision. Purchasers could be protected adequately if a warranty of quality analogous to those found in the Uniform Commercial Code[62] were applied to sales of real estate.

The warranty of quality implied in subdivision lot sales would assure the purchaser that the property and protective restrictions bought are fit for the residential purposes for which they are intended, and that the purchaser will not be deprived of the value of his land as a result of the misfeasance or nonfeasance of the vendor. While a purchaser may expect a developer, especially a commercial realtor or subdivider, to possess the competence to devise a subdivision scheme which will be effective, the lot owner in a residential subdivision is primarily interested in maintaining the neighborhood as an enjoyable place to live, and in preserving the value of his property.

Developers uniformly restrict subdivision land to procure the highest possible price for individual lots. Purchasers pay enhanced prices because they expect restricted subdivisions to be orderly and high quality. While an implied warranty should not be construed as an absolute guarantee that lot purchasers will always receive all that they expect, it should ensure purchasers that they will not be denied their reasonable expectations.

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[59] This doctrine is not accepted in several states. *See* 3 TIFFANY, *supra* note 36, § 860.

[60] A potential plaintiff may experience substantial difficulty in proving the scienter necessary to make a prima facie case of misrepresentation, particularly if the plaintiff's case is based on a mistake of the developer which renders a covenant unenforceable, as in *Shipton*. For the elements of a prima facie case of fraud, see 12 S. WILLISTON LAW OF CONTRACTS § 1487 (3d ed. Jaeger 1970).

[61] Haskell, *supra* note 54, at 648-55.

[62] The implied warranties of §§ 2-314 and 2-315 of the Uniform Commercial Code require that goods be reasonably fit for the purpose for which they are sold. Moreover, if the seller has reason to know of a particular purpose for which the buyer intends to use the goods and the buyer relies on the seller's skill and judgment, the warranty extends to that specific use. The developer of a subdivision would have reason to know that lot purchasers planned to use their property as restricted high quality homesites, and the purchasers in turn may rely on the developer's judgment in devising an effective and enforceable scheme of restrictions to protect their lots.

The burden of ascertaining that the restriction of the subdivision lots have been properly implemented should fall on the developers rather than on each individual purchaser. Developers enjoy substantial flexibility in planning subdivisions. They are in a position to employ knowledgeable legal counsel and expert planners in developing their land to insure that the subdivision scheme is both effective and enforceable. Further, subdividers can allocate the cost of such expert advice to each purchaser by including the consultants' fees in the cost of the development and by apportioning the charge among the lots.[63]

The developer formulates the restrictions applicable to a subdivision and can either make all covenants enforceable by lot purchasers, or retain certain enforcement rights. If a developer wishes to retain the power to enforce the common restrictions which benefit all lot owners, it may do so. However, the developer should not be allowed to deprive lot owners of the benefit of the restrictions and adversely affect their property values by retaining exclusive power to enforce covenants, and then failing to enforce them. The warranty of quality should not only require that the covenants be diligently transcribed, but should also protect the lot owners in their particular uses of the land, either by providing purchasers with the right to enforce or by assuring the lot owners that the developer will protect their interests.

The warranty of quality will not deprive developers of the power to utilize their land as they wish. It will, however, require an express disclaimer of warranty[64] if the developer intends to reserve the right to alter the common scheme of restrictions and the character of the subdivision. The developer need only plan in advance and inform potential purchasers of the disclaimer, and the purchasers will be on notice that they may not rely on the uniformity of the subdivision plan. If buyers, such as the plaintiffs in *Shipton,* are forewarned, they will not be misled by appearances or expectations and can bargain accordingly.

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[63] A developer's warranty that all restrictive covenants have been completed correctly may also aid in limiting the necessary extent of title searches. If each lot purchaser bears the risk of erroneous covenants in deeds to other lots, an extensive title search requiring the reading of all covenants in all subdivision deeds will be necessary for the buyer's protection of his property. In large subdivisions such deed examination could be very expensive and time consuming.

[64] See the disclaimer provisions in § 2-316 of the Uniform Commercial Code. Under a "warranty of quality" the developer would not be required to impose uniform restrictions or enforce all covenants for the benefit of its grantees. It would, however, be obligated to inform subdivision purchasers of its intention not to be bound by the implied warranty of quality.