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No. 74353-8-I

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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JONATHAN DEEGAN and ALICE O'GRADY,

Plaintiffs/Appellants,

v.

WINDERMERE REAL ESTATE/CENTER-ISLE, INC., a Washington  
corporation; and ACORN PROPERTIES, INC. dba RE/MAX ACORN  
PROPERTIES, INC., a Washington Corporation,

Defendants/Respondents.

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RESPONDENTS' OPENING BRIEF

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. RESPONSE TO ASSIGNMENTS OF ERROR.....1

III. STATEMENT OF THE CASE .....2

IV. ARGUMENT.....7

    A. *Visser* Establishes that Plaintiffs’ Complaint Fails to Satisfy the “Deceptive Practice” Element of a Consumer Protection Act Claim.....7

    B. The Trial Court Did Not Err in Determining Defendants’ Actions Were Not Deceptive as a Matter of Law. ....13

        1. Form 22W Triggered Plaintiffs’ Duty to Inquire, Hence Plaintiffs Could Not Be Deceived. ....15

    C. The Trial Court’s Application of *Visser* Did Not Alter Plaintiffs’ Required Showing for their Home Defect CPA Claim. ....18

    D. Plaintiffs Cannot Establish a Per Se Violation Under the CPA Because the Island County Code Did Not Incorporate RCW 19.86.....20

    E. The Trial Court Did Not Make Factual Findings to Justify Dismissal of Plaintiffs’ Complaint.....21

    F. Plaintiffs’ Authorities are Distinguishable Because they Dealt With Non-Disclosures Instead of Extent of Defect Disclosures.....22

    G. The Trial Court Was Permitted to Take Judicial Notice.....25

    H. Agents Raised Alternative Grounds for Affirming Dismissal.....26

1.	The Legislature Declared that Residential Disclosure Statements are Not Matters Affecting the Public Interest for Purposes of RCW 19.86. ....	26
2.	Violation of the Island County Codes Do Not Trigger CPA Liability. ....	28
I.	The Statute of Limitations Barred Mr. Deegan’s Claims. ....	30
V.	CONCLUSION. ....	34

## TABLE OF AUTHORITIES

### State Cases

<i>Allen v. State</i> , 118 Wn.2d 753, 826 P.2d 200 (1992).....	31
<i>Austin v. Ettl</i> , 171 Wn. App. 82, 286 P.3d 85 (Div. 2, 2012).....	15, 19
<i>Berge v. Gorton</i> , 88 Wn.2d 756, 567 P.2d 187 (1977).....	25
<i>Brown v. City of Yakima</i> , 116 Wn.2d 556, 807 P.2d 353 (1991).....	29
<i>Davis v. Rogers</i> , 128 Wn. 231, 222 P.499 (1924).....	22, 32
<i>Douglas v. Visser</i> , 173 Wn. App. 823, 295 P.3d 800 (Div. 1, 2013).....	passim
<i>Eckert v. Skagit Corp.</i> , 20 Wn. App. 849, 583 P.2d 1239 (1978).....	30
<i>Griffith v. Centex Real Estate Corp.</i> , 93 Wn. App. 202, 969 P.2d 486 (Div. 1, 1998).....	19, 23
<i>Gross v. City of Lynnwood</i> , 90 Wn.2d 395, 583 P.2d 1197 (1978).....	26
<i>Guy F. Atkinson Co. v. State</i> , 66 Wn.2d 570, 403 P.2d 880 (1965).....	30
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	20

<i>Holiday Resort Comm. Ass'n. v. Echo Lake Assocs. LLC,</i> 134 Wn. App. 210, 135 P.3d 499 (Div. 1, 2006).....	20
<i>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.,</i> 162 Wn.2d 59, 170 P.3d 10 (2007).....	7, 14
<i>Irwin v. Holbrook,</i> 32 Wn. 349, 73 P. 360 (1903).....	33
<i>Jackson v. Quality Loan Serv. Corp.,</i> 181 Wn. App. 838, 347 P.3d 487 (Div. 1, 2015).....	25
<i>Jackowski v. Borchelt,</i> 174 Wn.2d 720, 278 P.3d 1100 (2012) .....	14, 18
<i>Keyes v. Bollinger,</i> 31 Wn. App. 286, 640 P.2d 1077 (Div. 1, 1982).....	13
<i>Klem v. Wash. Mut. Bank,</i> 176 Wn.2d 771, 295 P.3d 1179 (2013).....	16, 19
<i>Leingang v. Pierce County Medical Bureau,</i> 131 Wn.2d 133, 930 P.2d 288 (1997).....	14
<i>McKown v. Simon Prop. Grp. Inc.,</i> 182 Wn.2d 752, 344 P.3d 661 (2015).....	21
<i>Mellon v. Reg'l Tr. Servs. Corp.,</i> 182 Wn. App. 476, 334 P.3d 1120 (Div. 3, 2014).....	18, 19
<i>Murphy v. Grass,</i> 164 Wn. App. 584, 267 P.3d 376 (Div. 1, 2011).....	31
<i>O'Neil v. Estate of Murtha,</i> 89 Wn. App. 67, 947 P.2d 1252 (Div. 1, 1997).....	30
<i>Panag v. Farmers Ins. Co.,</i> 166 Wn.2d 27, 204 P.3d 885 (2009).....	13, 16

<i>Pickett v. Holland Am. Line-Westours, Inc.</i> , 101 Wn. App. 901, 6 P.3d 63 (Div. 1, 2000).....	32
<i>Puget Sound Service Corp., v. Dalarna Management Corp.</i> 51 Wn. App. 209, P.2d 1353 (Div. 1, 1988).....	passim
<i>Robinson v. Avis Rent A Car Systems, Inc.</i> , 106 Wn. App. 104, 22 P.3d 818 (Div. 1, 2001).....	23, 24
<i>Rodriguez v. Loudeye Corp.</i> , 144 Wn. App. 709, 189 P.3d 168 (Div. 1, 2008).....	25
<i>Samuelson v. Comm. Coll. Dist. No. 2 (Grays Harbor Coll.)</i> , 75 Wn. App. 340, 877 P.2d 734 (Div. 2, 1994).....	31
<i>Saunders v. Lloyd's of London</i> , 113 Wn.2d 330, 779 P.2d 249 (1989).....	17
<i>Shepard v. Holmes</i> , 185 Wn. App. 730, 345 P.3d 786 (Div. 3, 2014).....	22, 32
<i>Sorrell v. Young</i> , 6 Wn. App. 220, 491 P.2d 1312 (Div. 1, 1971).....	12
<i>Strong v. Clark</i> , 56 Wn.2d 230, 352 P.2d 183 (1960).....	33
<i>Svendsen v. Stock</i> , 143 Wn.2d 546, 23 P.3d 455 (2001).....	13, 27, 28
<i>Testo v. Russ Dunmire Oldsmobile, Inc.</i> , 16 Wn. App. 39, 554 P.2d 349 (Div. 2, 1976).....	23
<i>U.S. Oil &amp; Ref. Co. v. State Dep't of Ecology</i> , 96 Wn.2d 85, 633 P.2d 1329 (1981).....	30, 31
<i>W. Wash. Laborers-Emp'rs Health &amp; Sec. Tr. Fund v. Harold Jordan Co., Inc.</i> , 52 Wn. App. 387, 760 P.2d 382 (Div. 1, 1988).....	33

**Foreign Cases**

*Davis v. HSBC Bank Nev., N.A.*,  
691 F.3d 1152 (9th Cir. 2012) ..... 19-20

*Resort Car Rental Sys., Inc. v. FTC*,  
518 F.2d 962 (9th Cir. 1975) .....25

**Statutes**

RCW § 19.86.120 .....30

RCW § 64.06.020 .....12, 15, 26, 27

RCW § 64.06.021 .....27

RCW § 64.06.022 .....27

RCW § 64.06.060 .....27, 29

15 U.S.C. § 45(n).....19

**Rules**

ER 201 ..... 25

## I. INTRODUCTION

“When prospective homebuyers discover evidence of a defect, the buyers must beware. They are on notice of the defect and have a duty to make further inquiries.” *Douglas v. Visser*, 173 Wn. App. 823, 825, 295 P.3d 800 (Div. 1, 2013). The trial court correctly applied *Visser* when deciding the written disclosures Defendants Windermere and Acorn (“Agents”) provided to Plaintiffs were not unfair or deceptive as a matter of law. In an effort to skirt this fatal flaw in their case, Plaintiffs argue that alleging a Consumer Protection Act (“CPA”) claim years later excuses their failure to investigate significant airport noise disclosed to them before they purchased their property on Whidbey Island. In doing so, Plaintiffs ignore that *Visser* dismissed a CPA claim for failing to satisfy that duty. This Court should affirm dismissal.

## II. RESPONSE TO ASSIGNMENTS OF ERROR

Agents disagree with Plaintiffs’ phrasing of the first two assignments of error because, as framed, they ignore the specific context of this case which arises from disclosures of airport noise defects relating to real estate. Thus, the issue for this Court to decide is whether Plaintiffs’ case survives *Visser*. With that context, Agents propose the following rewording of the assigned errors.

**Assignment of Error No. 1**

Did the trial court err by ruling that Plaintiffs had a duty of inquiry after Agents put them on notice of the defect, and therefore no “unfair or deceptive act” occurred for purposes of the CPA?

**Assignment of Error No. 2**

Did the trial court make a finding of fact by deciding Plaintiffs had a duty to inquire or investigate once they received Form 22W disclosing significant airport noise?

**Assignment of Error No. 3**

Agents agree with Plaintiffs’ framing of this assigned error.

**III. STATEMENT OF THE CASE**

Plaintiffs seek to represent a putative class of Whidbey Island residents suffering the impact of loud airport noise against Agents. They do not seek relief against the sellers of the properties. Plaintiffs allege that noise from airport operations are harming their property. Specifically, “[t]he current flight activity has depressed the value of properties in the Impacted Areas.”<sup>1</sup> Simply put, Plaintiffs allege the airport noise is a defect affecting their real property.

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<sup>1</sup> CP 69 at ¶ 8.

The Naval Air Station on Whidbey Island has continually operated since 1942.<sup>2</sup> It is comprised of a seaplane base on the eastern shore of the island at the edge of Oak Harbor, and at Ault Field which is northwest of the seaplane base.<sup>3</sup> In addition, the Station operates training flights at Outlying Landing Field near Coupeville.<sup>4</sup> General aviation activities also occur at the Oak Harbor Airpark, South Whidbey Airpark, and the Camano Airpark.<sup>5</sup> In 1992, the Island County Board of Commissioners enacted Island County Code § 9.44.050 (“ICC 9.44.050”), which developed a specific disclosure statement for sellers and their agents to provide buyers advising them of the airport noise.<sup>6</sup>

A year later, the Commissioners enacted the Noise Level Reduction Ordinance, establishing requirements for new construction.<sup>7</sup> The Ordinance also created its own disclosure statement.<sup>8</sup> Agents used an industry-crafted

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<sup>2</sup> CP 71.

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

<sup>4</sup> *Id.*

<sup>5</sup> CP 72-73.

<sup>6</sup> CP 71.

<sup>7</sup> CP 73.

<sup>8</sup> CP 74.

disclosure form to satisfy the Ordinance requirement, known as NWMLS 2001 Form 22W (“Form 22W”), which read:

**ISLAND COUNTY, WASHINGTON**  
**AIRPORT AND AIRCRAFT OPERATIONS NOISE DISCLOSURE**

...

**NOTICE**

**TO: BUYER**

The Property is located within an Airport Noise Zone 2 or 3 impacted area. Persons on the premises may be exposed to a significant noise level as a result of airport operations. Island County has placed certain restrictions on construction of property within airport noise zones. Before purchasing or leasing the above property, you should consult the Island County Noise Level Reduction Ordinance to determine the restrictions which have been placed on this Property, if any.<sup>9</sup>

Sixty four years after the Naval Air Station started operating, Jonathan Deegan purchased his home in Coupeville.<sup>10</sup> Mr. Deegan entered a Purchase and Sale Agreement dated July 2, 2006.<sup>11</sup> He signed Form 22W

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<sup>9</sup> CP 49.

<sup>10</sup> CP 70.

<sup>11</sup> CP 49.

the same day.<sup>12</sup> Alice O’Grady purchased her home in Coupeville in October of 2011.<sup>13</sup> Ms. O’Grady entered a Purchase and Sale Agreement on August 29, 2011.<sup>14</sup> She too signed Form 22W the same day.<sup>15</sup>

A year before Mr. Deegan purchased his home, and six years before Ms. O’Grady purchased her home, the Navy introduced the EA-18G Growler jet to Whidbey Island in 2005.<sup>16</sup> This led to very loud touch-and-go landings at the Naval Air Station.<sup>17</sup> “Over the following several years, complaints by community members about the noise of the jets increased, with many citing an increase in the frequency of flights, the fact that operations regularly ran well past midnight, and that the Growlers fly lower and are louder than the Prowler jets that preceded them.”<sup>18</sup> Plaintiffs allege that the Naval Air Station has seen increased activity “[i]n recent years.”<sup>19</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> CP 70.

<sup>14</sup> CP 51.

<sup>15</sup> *Id.*

<sup>16</sup> CP 75.

<sup>17</sup> CP 68.

<sup>18</sup> CP 75.

<sup>19</sup> CP 68.

In 2013—two and seven years after Plaintiffs purchased their homes—an auditory study indicated the airport noise could reach 134.2 dba.<sup>20</sup>

Plaintiffs concede that Agents provided notice of significant airport noise, but claim that Agents failed to disclose the extent of the defect, specifically the details from ICC 9.44.050 regarding location of airports, times of flights, and decibel levels.<sup>21</sup> Plaintiffs allege that “the additional information required by Island County Code 9.44.050, including the fact that a single flyover of a military jet could exceed 100 dba, and that military flight operations would occur both at night and during the day, substantially adversely affected the value of their homes on Whidbey Island.”<sup>22</sup>

The ICC 9.44.050 disclosure that Plaintiffs contend Agents should have provided was developed in 1992 and so makes no reference to the Growler, at what elevation the Growler flies, the frequency at which it flies, nor that it is louder than the Prowler.

Judge Needy applied this Court’s decision in *Douglas v. Visser* to determine Relators did not engage in a deceptive act or practice when they

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<sup>20</sup> CP 75.

<sup>21</sup> CP 70, at ¶¶ 9–10; CP 74, at ¶ 22; CP 79.

<sup>22</sup> CP 80–81, at ¶¶ 41, 50.

disclosed the alleged defect—significant airport noise—to Plaintiffs through the incorrect Form 22W. Judge Needy explained:

... I do believe the Consumer Protection Act and the cases that follow give us the guidelines of a person simply needs to be put on notice of the defect; in this case, the extreme noise level. And that once that defect is known, they have a duty under our cases to inquire further. ...<sup>23</sup>

#### IV. ARGUMENT

**A. *Visser* Establishes that Plaintiffs’ Complaint Fails to Satisfy the “Deceptive Practice” Element of a Consumer Protection Act Claim.**

A violation of the Consumer Protection Act occurs when there is (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) with a public interest impact, (4) that proximately causes, (5) injury to a plaintiff in his or her business or property. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 73–74, 170 P.3d 10 (2007). Plaintiffs’ CPA claim fails on the first element. No unfair or deceptive act occurred because Agents disclosed the airport noise defect to Plaintiffs. Failing to provide the precise language about the extent of the defect

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<sup>23</sup> RP 41.

contained in ICC 9.44.050 does not render the disclosure unfair or deceptive.

The controlling authority is this Court's opinion in *Visser*. *Visser* involved egregious non-disclosures and active concealment of defects by sellers of a home. 173 Wn. App. 823. The sellers of the home (one of whom was also the selling realtor) covered up rot by nailing boards onto wood so soft it would not hold the nails. The sellers instructed their contractor to conceal rot and damage with unsuitable trim, siding, and caulk. Despite these known defects, the sellers provided Form 17 disclosures stating they were unaware of any structural concerns, or simply failed to answer many of the questions. The buyers learned of potential problems through their own home inspection. Despite receiving unsatisfactory answers from the sellers in response to their concerns, the buyers purchased the home anyway. The homebuyers later learned the defects were so severe that the house had to be razed. The buyers sued the sellers for fraudulent concealment, negligent misrepresentation, and violation of the CPA. The buyers argued they had no idea of the extent of rot and damage to the home when they purchased it. After a bench trial, the trial court agreed and entered judgement in the plaintiffs' favor on all claims, including their CPA

claim.<sup>24</sup> The trial court found that the defects were unknown and not discoverable by a careful and reasonable inspection. *Id.* at 830. In reversing the trial court, this Court stated:

Once a buyer discovers evidence of a defect, they are on notice and have a duty to make further inquiries. They cannot succeed when the extent of the defect is greater than anticipated, even when it is magnitudes greater.

*Id.* at 832.

*Visser* repeated: “When a buyer is on notice of a defect, it must make further inquiries of the seller.” *Id.* at 830. After reciting the elements of a CPA claim (and other causes of action), this Court remarked two paragraphs later: “the law retains a duty on a buyer to beware, to inspect, and to question.” *Id.* at 834. As a result, this Court found no unfair or deceptive act to support a CPA claim despite the sellers’ “egregious” concealment of defects. *Id.* at 831–32.

Because the Douglasses were on notice of the defect and had a duty to make further inquiry, it cannot be said that the defect was unknown to the Douglasses, that it could not have been discovered by a reasonable inspection, that the

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<sup>24</sup> Plaintiffs are incorrect in stating that the trial court in *Visser* found “there was readily observable damage that warranted further inspection or inquiries.” That quotation was testimony from a witness named “Juneau,” which the trial court rejected. *Id.* at 829.

Douglasses justifiably relied on the Vissers' misrepresentations, or that the Vissers committed an unfair or deceptive act that caused the Douglasses' injury.

*Id.* at 834 (emphasis added). Unlike *Visser*, there was no attempt to conceal the noise defect here. Yet, like *Visser*, once Plaintiffs were put on notice of significant aircraft noise by Form 22W, they had a duty to make further inquiry. It is not a question of fact as to whether the airport noise was “readily observable”—Agents disclosed the defect. Nor does it matter that the Growlers’ noise was magnitudes greater than Plaintiffs anticipated. Under *Visser*, Agents’ provision of Form 22W instead of the language of ICC 9.44.050 cannot be considered unfair or deceptive because the notice disclosed the defect.

The trial court’s ruling does not impose a new duty of inquiry to Plaintiffs’ CPA claim. Rather, Plaintiffs’ duty of inquiry under Washington real property law causes their CPA claim to fail on the first element, because a disclosed real property defect cannot as a matter of law constitute an “unfair or deceptive act.”

*Visser* was no aberration, but simply the latest in a line of cases holding that a defect known to the buyer cannot form the basis of a claim against the seller, even when the extent of the defect was far greater than

disclosed. In *Puget Sound Service Corp. v. Dalarna Management Corp.*, this Court refused imposing liability for the sellers' failure to disclose the *extent* of a defect. 51 Wn. App. 209, 752 P.2d 1353 (Div. 1, 1988). In *Puget Sound*, the buyer observed evidence of prior water leakage during the inspection process. After purchasing the property, the buyer learned of the building's chronic history of water intrusion. Despite conceding the seller disclosed water leakage, the buyer argued the seller's failure to disclose "extreme, chronic water leakage," constituted constructive fraud. This Court held that where an actual inspection demonstrates "some evidence" of water penetration, the buyer must make inquiries of the seller. "Through such questioning, the extent of the problem could have been readily ascertained." *Id.* at 215. This Court repeated that the buyer could readily ascertain the extent of the defect "by simply making inquiries." *Id.*

Although *Puget Sound* was not a CPA case, its articulation of public policy laid the foundation for *Visser*:

Thus far, constructive fraud has been limited to situations where no evidence of the defect is apparent. As it presently exists, the law in Washington balances the harshness of the former rule of caveat emptor with the equally undesirable alternative of the courts standing in loco parentis to parties transacting business.

*Id.* at 214–15 (citing *Sorrell v. Young*, 6 Wn. App. 220, 223, 491 P.2d 1312 (Div. 1, 1971)). Thus, Washington has not abandoned caveat emptor in real estate sales.

This policy of balancing risk between the buyer and seller and their agents is consistent with the Legislative intent shown in RCW § 64.06.020, which requires sellers provide a Form 17 disclosure. The Form 17 disclosure is to list “at a minimum,” certain statutorily-specified information known to the seller. The Legislature included Section II in Form 17 to require the buyer acknowledge that “Buyer has a duty to pay diligent attention to any material defects that are known to Buyer or can be known to Buyer by utilizing diligent attention and observation.” *Id.* Further, RCW § 64.06.060 exempts a realtor from CPA liability for written disclosures. All of this reflects the Legislature’s intent that once put on notice of a defect, buyers cannot sidestep their duty to inquire by asserting a CPA claim. Nor can Plaintiffs do so here.

**B. The Trial Court Did Not Err in Determining Defendants' Actions Were Not Deceptive as a Matter of Law.**

Consistent with *Visser*, the trial court found Agents' actions were not deceptive, as a matter of law, because Form 22W provided Plaintiffs notice of significant airport noise—which is the alleged defect. Plaintiffs err in arguing the trial court improperly dismissed their claim by making a finding of fact. The fact of disclosure is not in dispute, and the trial court's ruling was not a factual finding on reliance. “[T]he question of whether particular actions gave rise to a violation of the Consumer Protection Act is reviewable as a question of law.” *Svensen v. Stock*, 143 Wn.2d 546, 553, 23 P.3d 455 (2001)(quoting *Keyes v. Bollinger*, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982)). Thus, the trial court was within its right to make this finding, because “[w]hether a particular act or practice is ‘unfair or deceptive’ is a question of law.” *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009)(emphasis added). This is to be distinguished from the federal authorities applying the FTC, which suggest the first element is a factual issue.

Contrary to Plaintiffs' argument, *Indoor Billboard* does not stand for the proposition that what is deceptive or has the capacity to deceive is a question of fact. *Indoor Billboard* held that acts in that case were deceptive

as a matter of law. The question of fact was the causal link between those deceptive acts and the plaintiff's claimed injury. 162 Wn.2d 59, 64, 170 P.3d 10 (2007). In the present case, the trial court dismissed Plaintiffs' complaint because they failed to show, as a matter of law under *Visser*, that Agents committed a deceptive practice by providing Form 22W.

Similarly, *Jackowski v. Borchelt* does not stand for the proposition that whether an act has the capacity to deceive is a factual question. *Jackowski* was not a CPA case, and its factual dispute addressed whether the homebuyers were ever provided sellers' amended Form 17. 174 Wn.2d 720, 738, 278 P.3d 1100 (2012). Here, the Complaint concedes Plaintiffs received Form 22W. Similarly, *Leingang v. Pierce County Medical Bureau, Inc.* does not state a CPA claim may only be decided as a matter of law when the underlying facts are undisputed. Instead, *Leingang* states that "whether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law." 131 Wn.2d 133, 150, 930 P.2d 288 (1997). In *Leingang*, the parties' actions were not disputed. So too here. This issue comes before the Court on a CR 12(b)(6) motion, and so the facts are construed as admitted and there is no factual dispute.

**1. Form 22W Triggered Plaintiffs' Duty to Inquire, Hence Plaintiffs Could Not Be Deceived.**

Form 22W's disclosure of a significant airport noise defect was above the "minimum" required by RCW § 64.06.020 (Form 17). That disclosure triggered Plaintiffs' "duty to pay diligent attention to any material defects" raised to them. *Austin v. Ettl*, 171 Wn. App. 82, 90–91, 286 P.3d 85 (Div. 2, 2012)(Finding that "a buyer is not justified in failing to exercise due diligence after receiving the disclosure" of a LID when the information was easily discoverable). Therefore, under *Visser*, Agents' disclosure of the noise defects through Form 22W triggered a duty to inquire.

Plaintiffs are correct that ICC 9.44.050 provides a disclosure statement to be provided in connection with the sale of homes. However, Plaintiffs' argument ignores that ICC 9.44.050 states that seller should provide "notice substantially as follows." The Code does not state that the specific disclosure statement itself is required, only substantially similar notice.

Form 22W informed potential buyers that the property was "within an Airport Zone 2 or 3 Impacted area. Persons on the premises may be

exposed to a significant noise level as a result of airport operations.”<sup>25</sup> The notice also encouraged buyers to “consult the Island County Noise Level Reduction Ordinance to determine the restrictions which have been placed on the property, if any.”<sup>26</sup> ICC 9.44.050 provides additional details regarding that defect, such as the noise levels “may exceed 100 DBA” and “[p]ractice sessions are routinely scheduled during day and night periods.”

Plaintiffs must show that Agents’ use of Form 22W instead of the 9.44.050 disclosure had the capacity to deceive a substantial portion of the public. *Panag*, 166 Wn.2d at 47. That is the standard in Washington, not the “objective reasonableness standard,” or a “reasonable consumer” standard that Plaintiffs advocate for. Neither the Complaint nor any consistent, hypothetical facts could show that a substantial portion of the populace was deceived by receiving Form 22W under *Visser*’s duty of inquiry.

Determining what is deceptive under the CPA is part of a “gradual process of judicial inclusion and exclusion.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 785, 295 P.3d 1179 (2013)(citing *Saunders v. Lloyd’s of*

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<sup>25</sup> CP 73–74.

<sup>26</sup> *Id.*

*London*, 113 Wn.2d 330, 344, 779 P.2d 249 (1989)). *Visser* already determined that when Plaintiffs are put on notice then the sellers' disclosure cannot be "deceptive" under the CPA.

Plaintiffs claim they were "not informed of the *intensity* and *frequency* of flights they would suffer from, day and night."<sup>27</sup> In other words, Plaintiffs knew about the jet noise defect, but not its extent. However, this is precisely the type of "extent of defect" claim that *Visser* and *Puget Sound* rejected. Indeed, even if Plaintiffs were provided the ICC 9.44.050 disclosure, they would not have been advised of the extent of the defect because ICC 9.44.050 was developed 13 years before the Growler was introduced to Whidbey Island, and so it too did not disclose the Growler's noise, frequency, or flight altitudes. Consequently, Agents could not deceive a substantial portion of the populace by providing Form 22W instead of ICC 9.44.050.

That Form 22W referenced building codes related to the noise does not render it deceptive. *Visser* does not carve out an exception to a buyer's duty of inquiry based on how the disclosure is made. Indeed, in *Visser*, the sellers made *no* disclosure of the defects and Plaintiffs learned about the

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<sup>27</sup> *Id.* (emphasis added).

defects through their own pre-purchase inspection. That was enough to trigger their duty. Here, Agents disclosed the noise. Additionally, common sense dictates that a homebuyer learning that aircraft noise is so significant as to require its own set of additional building codes should inquire just how loud the noise is, or how often the noise arises.

**C. The Trial Court’s Application of *Visser* Did Not Alter Plaintiffs’ Required Showing for their Home Defect CPA Claim.**

Plaintiffs contend that by imposing a duty to inquire, the trial court engrafted a new element to a CPA claim. That is not true. The trial court simply reconciled the deceptive element of a CPA claim with the context-specific case law for home defect cases, just as this Court already did in *Visser*. This is appropriate for CPA cases. Division 3 observed: “If a defendant’s act or practice is not per se unfair or deceptive, the plaintiff must show the conduct is ‘unfair’ or ‘deceptive’ under a case-specific analysis of those terms.” *Mellon v. Reg’l Tr. Servs. Corp.*, 182 Wn. App. 476, 489, 334 P.3d 1120 (Div. 3, 2014). In other words, a CPA claim cannot be considered in a vacuum.

In the home defect context, the buyer has a duty to investigate defects that are made known to him. *Jackowski v. Borchelt*, 174 Wn.2d 720, 739, 278 P.3d 1100 (2012)(“We have held that a ‘vendor’s duty to

speaking arises where . . . the defect would not be disclosed by a careful, reasonable inspection by the purchaser”); *Austin v. Ettl*, 171 Wn. App. 82, 89, 286 P.3d 85 (Div. 2, 2012)(Seller has no duty to disclose not-yet-extant encumbrances, and buyer’s failure to research potential costs of proposed LID identified in Form 17 was unreasonable). Even *Griffith v. Centex Real Estate Corp.*, which Plaintiffs rely upon, noted that the duty of disclosure owed by the home-builder was to disclose material adverse facts “*not easily discoverable by the buyers.*” 93 Wn. App. 202, 215, 969 P.2d 486 (Div. 1, 1998) (emphasis added). Plaintiffs are not excused from their duty of inquiry because they filed under the CPA instead of the usual claims of fraudulent concealment or negligent misrepresentation.

CPA cases in other contexts also reference a duty on consumers to investigate information they are provided. In *Klem v. Wash. Mutual Bank*, Washington’s Supreme Court remarked “[c]urrent federal law suggests a ‘practice is unfair [if it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits.’” 176 Wn.2d 771, 787, 295 P.3d 1179 (2013) (citing 15 U.S.C. § 45(n))(emphasis added); *see also Mellon v. Reg’l Tr. Servs.*, 182 Wn. App. at 489–90; *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168–69 (9th Cir. 2012)(finding that consumer

could have avoided a fee disclosed in the terms and conditions, and therefore the advertisements at issue were not unfair under section 5 of the FTC Act). Further, “[i]mplicit in the definition of ‘deceptive’ under the CPA is the understanding that the practice misleads or misrepresents something of material importance.” *Holiday Resort Comm. Ass’n. v. Echo Lake Assocs. LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (Div. 1, 2006). In the present case, Form 22W’s disclosure of “significant” airport noise is not misleading.

**D. Plaintiffs Cannot Establish a Per Se Violation Under the CPA Because the Island County Code Did Not Incorporate RCW 19.86.**

A defendant’s act or practice is *per se* unfair or deceptive if it violates a statute declaring the conduct to be an unfair or deceptive act or practice in trade or commerce. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 786, 719 P.2d 531 (1986). Plaintiffs cannot show a *per se* violation in this case because ICC 9.44.050 is not a statute, and did not declare that failure to provide the specific disclosure is a deceptive act. Nowhere in Isl. County Code Ch. 9.44 does it speak of deceptive acts or practices affecting trade or commerce, nor does it articulate an intent to subject sellers or their agents to CPA liability. As a

result, Plaintiffs cannot satisfy the first element of their CPA claim based on a *per se* violation.

**E. The Trial Court Did Not Make Factual Findings to Justify Dismissal of Plaintiffs' Complaint.**

Plaintiffs attempt to recast the trial court's decision as making factual findings on reliance and whether further investigation was fruitless. That was not the trial court's decision. Although during oral argument Judge Needy pondered aloud factual issues posing serious hurdles to Plaintiffs' claims, the trial court based its ultimate decision on *Visser*. The trial court found "the plaintiffs had a legal duty to investigate the extent of the significant noise level disclosed in the Form 22W."<sup>28</sup> This is consistent with the question of whether Agents' disclosure of significant airplane noise was deceptive. It was not a finding that Plaintiffs unreasonably relied upon Form 22W. Similarly, "[t]he existence of a legal duty is a question of law for the court." *McKown v. Simon Prop. Grp. Inc.*, 182 Wn.2d 752, 762, 344 P.3d 661 (2015). Thus, the trial court appropriately determined that Plaintiffs owed a duty to inquire and investigate as a matter of law, not fact.

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<sup>28</sup> CP 2.

Contrary to their briefing, Plaintiffs' Complaint did not allege they made further inquiry about the noise nor that such inquiry would have been fruitless. Plaintiffs did not allege the noise defect was not "readily observable" or "easily discoverable." Nor could Plaintiffs make such an allegation in good faith because the facts Plaintiffs claim were withheld from them were a matter of public record. Where facts are a matter of public record and are thus "easily ascertainable," the world is on constructive notice. *Shepard v. Holmes*, 185 Wn. App. 730, 740, 345 P.3d 786 (Div. 3, 2014)(citing *Davis v. Rogers*, 128 Wn. 231, 236, 222 P.499 (1924)). ICC 9.44.050 was a matter of public record since 1992. The Naval Air Station continuously operated for over 64 years before Plaintiffs purchased their properties. Plaintiffs could easily ascertain the extent of the noise defect through publicly available information.

**F. Plaintiffs' Authorities are Distinguishable Because they Dealt With Non-Disclosures Instead of Extent of Defect Disclosures.**

Plaintiffs' primary authorities are distinguishable because they confronted scenarios where the defendants failed to disclose a defect at all. Consequently, Plaintiffs' reliance on *Testo v. Russ Dunmire Oldsmobile, Inc.* is misplaced. *Testo* dealt with a scenario where a used car dealership sold a car without disclosing that it was a race car. 16 Wn. App. 39, 554

P.2d 349 (Div. 2, 1976). Much of the opinion addressed disclaimer of warranties under the UCC. Hence, Division 2's reference to trade law having developed to eliminate gamesmanship formerly present in caveat emptor was in the context of the sale of goods, not real estate. As *Puget Sound* shows, Washington has not abandoned caveat emptor in real estate.

Similarly, *Griffith v. Centex* and *McRae v. Bolstad* are distinguishable because they confronted a complete failure by the defendants to disclose facts material to the sales at issue. This is not a failure to disclose case. This is an extent of defect case. For that reason, *Visser* and *Puget Sound* control the analysis.

For similar reasons, *Robinson v. Avis Rent A Car Systems, Inc.* is not applicable. In *Avis*, rental car companies at SeaTac airport allegedly failed to disclose additional, unbundled service charges when initially quoting pricing. 106 Wn. App. 104, 22 P.3d 818 (Div. 1, 2001). This Court observed that “the failure to disclose the concession fee—a material fact—would be deceptive.” *Id.* at 116. The Court went on to note such a practice is deceptive when it “induces contact through deception, even if the consumer later becomes fully informed before entering into the contract.” *Id.*

Plaintiffs contend this passage from *Robinson* requires the Court consider the timing of a practice to determine if it is deceptive. However, Plaintiffs never alleged in this action when the correct disclosure statement should have been given. Instead, they alleged that “on information and belief, Defendants also do not provide Form 22W in a timely fashion to all prospective buyers, as required by the Ordinance. Instead, Defendants typically provide Form 22W only after the property is under cont[ract] and immediately prior to closing.”<sup>29</sup> Yet, the actual document shows Plaintiffs signed the specific Form 22Ws on the same day they entered their respective Purchase-Sales Contracts.<sup>30</sup>

Further, the Complaint does not aver that Form 22W induced Plaintiffs into looking at their prospective homes. Instead, Plaintiffs received and signed Form 22W at the same time they entered their purchase and sale agreements. Thus, the concern of fraudulent inducement from *Robinson* is not present here. Similarly, Plaintiffs cite a Ninth Circuit opinion affirming a FTC cease and desist order for the argument that the public is not under a duty to make reasonable inquiry into the truth of

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<sup>29</sup> CP 69, at ¶ 7.

<sup>30</sup> CP 49, 51.

advertising. *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962 (9th Cir. 1975). As the emphasis shows, though, *Resort Car* dealt with an advertising issue, which is not the case here.

**G. The Trial Court Was Permitted to Take Judicial Notice.**

The trial court's decision was not based on factual determinations. However, it certainly could have properly taken judicial notice when determining as a matter of law that Form 22W was not deceptive. ER 201(b) provides:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

It is permissible for a trial court to take judicial notice on a CR 12(b)(6) motion. *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977); *Jackson v. Quality Loan Serv. Corp.*, 181 Wn. App. 838, 844–45, 347 P.3d 487 (Div. 1, 2015); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725–26, 189 P.3d 168 (Div. 1, 2008). Although unnecessary, the trial court was permitted to take judicial notice that significant aircraft noise was well-known by the entire community on Whidbey Island for purposes of determining whether

inquiry was fruitless. Indeed, as Plaintiffs concede, ICC 9.44.050 reflected the community's recognition of loud airport noise since at least 1992.

**H. Agents Raised Alternative Grounds for Affirming Dismissal.**

Agents' motion to dismiss was not limited to the deceptive element of Plaintiffs' CPA claim. Agents also argued that ICC 9.44.050 does not affect the public interest and cannot form the basis for a private right of action. This Court may consider this as an alternative basis for affirming the trial court. *Gross v. City of Lynnwood*, 90 Wn.2d 395, 400-401, 583 P.2d 1197 (1978) ("we will sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof," and noting that the respondent was not precluded from raising appellants' failure to establish he fell within a protected class).

**1. The Legislature Declared that Residential Disclosure Statements are Not Matters Affecting the Public Interest for Purposes of RCW 19.86.**

Plaintiffs could never show that Isl. County Code Ch. 9.44 intended to subject violators to CPA liability because that would run afoul of the Legislature's policy that real estate disclosure requirements are exempt from the CPA. RCW § 64.06.060 prevents Plaintiffs from establishing the "public interest impact" element of a CPA claim. RCW Chapter 64.06

provides for several disclosures to be made in connection with the sale of residential real property. One is the general disclosure (Form 17) in RCW § 64.06.020, which requires the seller to provide “at a minimum” certain prescribed information. In addition, RCW Chapter 64.06 requires additional disclosures relating to sex offenders in RCW §§ 64.06.020 and .021, and a disclosure about proximity to farmland in RCW § 64.06.022. ICC 9.44.050 provides detail about airport noise in addition to the “minimum” disclosures of Form 17.

Consequently, ICC 9.44.050 is subject to RCW § 64.06.060, which provides: “The legislature finds that the practices covered by this chapter are not matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW.” (Emphasis added). The “practices” are written disclosures of defects relating to the property, which is all ICC 9.44.050 provides. Thus, ICC 9.44.050 falls within RCW 64.06.060 and cannot form the basis of a CPA claim. The Washington Supreme Court determined this statute extends to protect sellers’ real estate agents and brokers as well. *Svendsen*, 143 Wn.2d at

555.<sup>31</sup> Thus, Agents cannot be sued under the CPA for providing Form 22W instead of the ICC 9.44.050 disclosure.

**2. Violation of the Island County Codes Do Not Trigger CPA Liability.**

Nothing in Isl. County Code Ch. 9.44 attempts to create a CPA violation out of a failure to disclose. But even if the Island County Board of Commissioners desired to create CPA liability, it lacked the power to do so. Island County's Board of Commissioners' power to create ordinances such as Code Section 9.44 is found in Const. art. XI, § 11: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." (Emphasis added). Further,

Under [Washington Constitution] article 11, section 11, cities have the right to enact ordinances prohibiting the same acts state law prohibits so long as the state enactment was not intended to be exclusive and the city ordinance does not conflict with the general law of the state. Thus, the ordinance must yield to a statute on the same subject either if the statute preempts the field, leaving no room for

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<sup>31</sup> Plaintiffs give short shrift to *Svendson* in footnote 30. The full analysis shows the Washington Supreme Court found that real estate agents were exempted from CPA violations arising from the disclosure statute, but could still be liable under the CPA for actions arising apart from the disclosure statute. 143 Wn.2d at 558–59.

concurrent jurisdiction, or if a conflict exists such that the two cannot be harmonized.

*Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991)  
(internal citations omitted).

Island County had no authority to create CPA liability through ICC 9.44.050 after Washington's Legislature enacted RCW § 64.06.060 stating that disclosure forms were matters that did not affect the public interest. Thus, Plaintiffs cannot predicate their CPA claim on ICC 9.44.050.

In fact, Island County made clear it did not intend to create a cause of action nor a basis for imposing CPA liability through ICC 9.44.050. ICC 9.44.060 provides:

#### Limitation of Liability

This chapter is not intended to create any class of persons to be benefited or protected nor to create any reliance relationship between Island County and landowners, land purchasers, their successors, occupants, or users of structures built with or without a building permit, or any other persons. This chapter is not intended to create any duty running in favor of particular persons. The obligation to comply with the provisions of this chapter are upon the property owner and their agents. . .<sup>32</sup>

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<sup>32</sup> CP 87 (emphasis added).

In sum, Island County did not have the authority to create a private right of action nor give rise to CPA liability for failing to follow ICC 9.44.050, and expressed no intention of doing so. ICC 9.44.050 cannot form the basis of a CPA claim.

**I. The Statute of Limitations Barred Mr. Deegan's Claims.**

Washington's Consumer Protection Act requires that a plaintiff bring an action for damages "within four years after the cause of action accrues." RCW § 19.86.120. Statutes of limitations are based on "the premise that when an adult person has a justiciable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts." *U.S. Oil & Ref. Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 93, 633 P.2d 1329 (1981) (internal citations and quotations omitted). Generally, a cause of action accrues at the time the plaintiff has the right to seek relief from a court. *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 69–70, 947 P.2d 1252 (1997)(citing *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 851, 583 P.2d 1239 (1978)). The Supreme Court has "long and consistently held that 'the defense of the statute of limitations is not unconscionable, but is entitled to the same consideration as any other defense.'" *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 572, 403 P.2d 880 (1965) (citations omitted).

In limited cases, courts may apply the “discovery rule,” which provides that a statute of limitations does not run “until the plaintiff, using reasonable diligence, would have discovered the cause of action.” *U.S. Oil*, 96 Wn.2d at 92. When tolled, the action accrues at the time when the plaintiff knew or should have known the relevant facts to his or her claim. *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). Whether the plaintiff also knew those facts supported a legal claim is irrelevant: “[w]ere the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney.” *Id.* Here, Mr. Deegan knew the predicate facts of his claim when he took possession of the property because he alleged the Growler flights began one year earlier (not in 2013 as he now argues on appeal).<sup>33</sup>

The cases Plaintiffs rely on to argue for discovery tolling addressed tort actions. *Murphy v. Grass*, 164 Wn. App. 584, 267 P.3d 376 (Div. 1, 2011)(negligent preparation of state tax returns, i.e., accounting malpractice); *Samuelson v. Comm. Coll. Dist. No. 2 (Grays Harbor Coll.)*, 75 Wn. App. 340, 877 P.2d 734 (Div. 2, 1994)(addressing claims of negligence and negligent misrepresentation). Those cases did not involve

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<sup>33</sup> CP 75, at ¶ 25.

fact patterns where the plaintiffs were given notice of a defect, like Mr. Deegan. Although the discovery rule can apply to CPA claims,<sup>34</sup> it is generally only in narrow circumstances not applicable here.

The statute of limitations will not be tolled when the predicate facts of the claim are public knowledge, as they are here. In *Shepard v. Holmes*, Division 3 declined to toll the statute of limitations for a homebuyer who brought a CPA claim against the sellers and real estate agents for allegedly misrepresenting the title of the property purchased. 185 Wn. App. 730, 345 P.3d 786 (Div. 3, 2014). The Court of Appeals explained that the title issue involved—whether four lots had been consolidated—was a matter of public record because there was a consolidation deed recorded. Therefore, the homebuyer had constructive notice of the consolidation deed, and the mere fact that the plaintiff did not learn of that consolidation deed until years later did not toll the statute of limitations. Where facts are a matter of public record and are thus “easily ascertainable,” the public record serves as constructive notice to all the world of its contents. *Id.* at 740 (citing *Davis v. Rogers*, 128 Wn.2d 231, 236, 222 P.499 (1924)).

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<sup>34</sup> See, e.g., *Pickett v. Holland Am. Line-Westours, Inc.*, 101 Wn. App. 901, 913, 6 P.3d 63 (Div. 1, 2000), *rev'd on other grounds*, 145 Wn.2d 178.

It is well established in Washington that a public filing will create constructive notice:

When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument.

*Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960)(recording of deed to real property gave constructive notice sufficient to start statute of limitations); *see also W. Wash. Laborers-Emp'rs Health & Sec. Tr. Fund v. Harold Jordan Co., Inc.*, 52 Wn. App. 387, 391, 760 P.2d 382 (Div. 1, 1988)(filing of UCC financing statement provided constructive notice to aggrieved party and started the statute of limitation in fraudulent conveyance action); *Irwin v. Holbrook*, 32 Wn. 349, 73 P. 360 (1903).

The Complaint alleges that Mr. Deegan's home is located within an area impacted by airplane noise, per an Island County ordinance passed in 1992 relating to the noise.<sup>35</sup> These areas are ones that, per the ordinance, are "significantly affected by airport noise."<sup>36</sup> The facts which Mr. Deegan

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<sup>35</sup> CP 70, at ¶¶ 9, 16.

<sup>36</sup> CP 72, at ¶ 18.

claims were withheld from him were public knowledge. Thus, Mr. Deegan was on constructive notice of the disclosure in ICC 9.44.050 when he purchased his home in July 2006. Moreover, he was provided Form 22W which advised him of significant airport noise and referred him to the Island County Noise Level Reduction Ordinance. The facts underlying Mr. Deegan's claim were susceptible of but one reasonable interpretation: his CPA claim accrued no later than July 2006, when he purchased his home.<sup>37</sup> Mr. Deegan filed his Complaint more than *eight years* after purchasing his home. Therefore, the trial court properly held, as a matter of law, that Mr. Deegan's claim is time-barred by the four year statute of limitations.

## V. CONCLUSION

Plaintiffs allege that significant airplane noise is a defect affecting their homes. However, their Complaint also alleges they were provided Form 22W, which disclosed that defect. Therefore, *Visser* and *Puget Sound* apply, and Plaintiffs had a duty to inquire. That the extent of the defect turns out to be much greater than anticipated does not excuse this duty. This duty comports with the public policy in this state in balancing the risks between buyers and sellers of real estate. Plaintiffs should not be able to

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<sup>37</sup> CP 70, at ¶ 9.

skirt their duty in this case by framing their cause of action under the Consumer Protection Act. The case law for CPA claims makes clear that what is considered deceptive is a matter of law, to be gradually shaped by the courts based on the specifics of the case. Here, the context is that of a home defect, and so *Visser* controls. Therefore, the Court should find Agents committed no deceptive act, and affirm dismissal of this case.

DATED this 9<sup>th</sup> day of June, 2016.

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**CERTIFICATE OF SERVICE**

I, Jane Mrozek, hereby certify that on the 10th day of June, 2016, I caused to be served true and correct copies of the foregoing to the following individuals in the manner indicated below:

Beth Terrell Terrell Marshall Law Group 936 North 34 <sup>th</sup> Street #300 Seattle WA 98103-8869	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Courier <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 10th day of June, 2016, at Seattle, Washington.

  
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Jane Mrozek, Legal Assistant

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