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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Inside This Issue

Form Revisions

As the practice of real estate evolves, the forms used by real estate licensees must change to keep abreast of new developments and the standards of competent practice. This *Legal Update* discusses several new and revised forms that have been developed as part of that process.

Two new forms are the WB-40 Amendment to Offer to Purchase and the WB-41 Notice Relating to Offer to Purchase, resulting from the splitting of the existing WB-43 into separate amendment and notice forms. The WB-44 Counter-Offer has been revised, and the WB-46 Multiple Counter-Offer has evolved into the WB-46 Multiple Counter-Proposal, in an attempt to make the terminology in the form more accurately reflect the actual process when a seller concurrently responds to multiple offers. The other revised forms discussed in the *Update* are the WB-2 Farm Listing Contract and the WB-12 Farm Offer To Purchase, and the WB-3 Vacant Land Listing Contract and the WB-13 Vacant Land Offer To Purchase.

The revisions made by Department of Regulation and Licensing (DRL) Forms Council to all of the forms discussed in this *Update* were intended to fine-tune the existing approved forms, which have been in effect for several years. All DRL revisions are predominantly intended to clarify and improve the provisions already in place, and make few substantive changes. These clarifications are a by-product of many years of experience with these forms, with an eye to eliminating difficulties that have been experienced by licensees using the forms, and by the parties, their attorneys, and the courts in attempting to interpret the forms. Most of the revisions provide further explanation of provisions already in place and are largely procedural in nature.

WB-40 Amendment to Offer to Purchase

WB-41 Notice Relating to Offer to Purchase

WB-44 Counter-Offer

WB-46 Multiple Counter-Proposal

WB-2 Farm Listing Contract

WB-12 Farm Offer to Purchase

WB-13 Vacant Land Listing Contract

WB-13 Vacant Land Offer to Purchase

All of the forms discussed in this *Update* have an optional use date of July 1, 1999, and a mandatory use date of January 1, 2000. It is not expected that these forms will be available as of July 1, 1999 since the Real Estate Board only gave its final approval to most of these forms on June 24, 1999. Every effort is being made to bring them to members as soon as the printers complete their work, hopefully sometime in July or August. REALTORS® should watch their REALTOR® publications for form availability details.

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This *Legal Update* will review these revised forms, the significant changes made in them, and some of the features that make them distinctive. A sample copy of the new WB-40 Amendment to Offer to Purchase appears on page 14, a sample copy of the new WB-41 Notice Relating to Offer to Purchase appears on page 15, a sample copy of the revised WB-44 Counter-Offer appears on page 16, and a sample copy of the revised WB-46 Multiple Counter-Proposal appears on page 17. A sample copy of the updated WB-13 Vacant Land Offer to Purchase appears on pages 18- 22. These sample forms are final drafts, which may or may not end up being identical to the final forms. They are, however, substantially the same as the final forms.

Form Format

All of the forms discussed in this *Update* are on letter-sized paper. The DRL is changing to letter-sized paper for all new approved forms to facilitate the faxing and computer printing of documents.

All blank lines and provisions requiring that a selection be stricken or written in have been grouped together and appear on the first and last pages of the listings and offers and on page three of those forms with more than four pages. Consequently, the listing and offer forms have been reorganized, basically in the same fashion and order as was employed in the revisions to the WB-1 Residential Listing Contract and the WB-11 Residential Offer to Purchase. Many of the provisions from the previous forms have been reordered, and some new explanatory material and definitions have been added.

WB-40 Amendment to Offer to Purchase & WB-41 Notice Relating to Offer to Purchase

The WB-43 Amendment to Contract of Sale/Notice Relating to Contract of Sale has been split into two separate forms with two separate functions: the top portion of the WB-43 has become the WB-40 Amendment to Offer to Purchase and the bottom portion of the WB-43 has become the WB-41 Notice Relating to Offer to Purchase. The decision to split the WB-43 into two forms was based on the opinion of an overwhelming majority of members who responded to requests for feedback. As is stated in the caution at the top of each form, licensees are to use a WB-40 Amendment if both parties will be agreeing to modify the terms of an accepted offer, and the WB-41 Notice if one party is giving a notice which does not require the other party's agreement.

WB-40 Amendment to Offer to Purchase

Licensees should use the WB-40 Amendment form when both parties mutually agree to change one or more of the terms or conditions of an accepted offer. An amendment should be used, for instance, to change the price or closing date, to extend the deadline on an inspection contingency, or to document any other new agreement made by both parties to change or add to the terms and conditions of an accepted offer.

The contents and format of the WB-40 remain much the same as the material that appears on the top portion of the WB-43. The only new provisions are those for indicating the licensee and firm that drafted the amendment (includes the date) as well as the licensee and firm who presented the amendment to the second party (again includes the date). These new provisions appear right above the parties' signature lines.

Some of the same issues present in analyzing whether a binding offer to purchase has been formed will be relevant to the determination of whether a binding amendment has been formed under the WB-40. Delivery of an accepted amendment may be made by using any method specified in the offer to purchase. It sometimes is necessary to prove when an accepted amendment was actually mailed. This may be documented by obtaining a mailing receipt from the post office, or by having someone witness the mailing. Since most fax machines indicate the date and time on transmissions made, this generally should not be an issue with faxed acceptances. Licensees should also remember that a mailed or faxed acceptance need only be sent or transmitted by the deadline. Amendments delivered by personal delivery to the party offering the amendment, on the other hand, must actually be received by the stated acceptance deadline.

WB-41
Notice Relating to Offer to Purchase

Licensees should use the WB-41 Notice form when one party unilaterally is giving a notice to the other party relating to an accepted offer to purchase. A WB-41 should be used, for instance, to give notice that a party's attorney has approved the offer, to give a bump notice, to give a notice of defects, or to notify the other party that a contingency has been satisfied.

The contents and format of the WB-41 remain much the same as the material that appears on the bottom portion of the WB-43. The only new provisions are those for indicating the licensee and firm that drafted the notice (includes the date), the name, method of delivery, and date and time that the notice was delivered to the other party, as well as the licensee and firm who presented the notice to the second party (again includes the date). This will help members keep track of the movement of notices between licensees and parties — this may become important in situations where the timing is close and determinative of a party's rights.

The DRL elected to not insert a "receipt acknowledgement" on the WB-41 because many time periods run from the time of delivery rather than the time of actual receipt. However, when licensees are giving a notice like a bump notice, where the exact time of the other party's actual receipt is important, it may be prudent to have the party receiving the notice note the time of receipt on a copy of the notice and initial it.

Inspection Contingency Scenarios

A good illustration of the distinction between the use of the WB-40 Amendment and the WB-41 Notice can be found when implementing the inspection contingencies in many of the approved offers to purchase. With respect to those items that are defects, e.g., no smoke detectors, the buyer may consider giving a notice of defects. If the seller has the right to cure, the seller may choose, in his or her discretion, whether to cure the listed defects or let the offer become null and void. If the seller has another more desirable offer, one may assume that the seller will let the offer die. Accordingly, the buyer may not wish to give a notice of defects unless the defects are "deal breakers" which must be fixed if the buyer is to continue with the offer.

A notice of defects may be prepared on the WB-41 Notice. This is a unilateral notice that does not require the agreement of the seller. The WB-41 should specify that "this is a notice of defects. The buyer objects to the following defects listed in the attached copy of the inspection report of XYZ" The defects are then listed in the notice and the inspection report is attached. The seller will also use the WB-41 Notice if the seller has the right to cure and gives the buyer a notice of the seller's election to cure (or not to cure) the defects.

On the other hand, the buyer may propose an amendment for repairs on the WB-40 Amendment instead of giving a notice of defects. Such an amendment may state that "this is not a notice of defects. Seller agrees to (perform the following repairs)(give the following credit at closing)(establish the following repair escrow): give details, time frames, etc. The Inspection Contingency at lines x — x of the offer is hereby deleted." An attachment may be required for this. The seller then has the option to accept or reject the buyer's proposed amendment or propose a different amendment.

The buyer's proposal must go on the amendment form because the buyer is trying to get the seller to change the terms of the accepted offer by eliminating the procedures for a notice of defects/election to cure, etc. and substituting a different provision for repairs in its place. This change has no effect unless the seller agrees and signs the amendment that was proposed by and signed by the buyer. If the seller declines to sign, this has no effect on the accepted offer. All that has happened is that a change was proposed and there was no mutual agreement so the offer remains as it was before.

WB-44 Counter-Offer and WB-46 Multiple Counter-Proposal

The WB-44 Counter-Offer and the WB-46 Multiple Counter-Offer have been revised and shortened to fit on letter-sized paper and to clarify the terminology and processes involved.

WB-44 Counter-Offer

A counter-offer can be understood as a new offer that is being issued by a party who has previously received an unacceptable offer. The legal effect of writing and delivering a counter-offer is the same as the rejection of the pre-

vious offer and the presentation of a new offer to the party who had submitted the previous offer. The reason we don't reject the offer and write a whole new offer is simply to avoid the unnecessary drafting of an offer whose terms are 95% identical to an offer previously written. By using the counter-offer form, only the terms that vary from the original offer are written out and all terms remaining the same from the original offer are incorporated by reference. This approach helps keep some sense of continuity in the negotiations and saves time.

In the simplest situation, a seller counters the buyer's offer. After buyer's receipt of seller's counter-offer, seller attempts to withdraw the counter-offer so that the original offer can be accepted (with time remaining for acceptance). In this situation, seller clearly would be unable to accept buyer's initial offer because seller's counter-offer acted as a rejection. A rejected offer is null and void and cannot be accepted.

The date for binding acceptance in the previous offer (or counter-offer) is immaterial to the counter-offer. The acceptance deadline in the offer applies only if a party is accepting the offer (note that the heading in the offer where this date appears is labeled "Binding Acceptance"). The counter-offer may be written after expiration of the acceptance deadline in the offer without any reference to that date. The only relevant deadline for acceptance in the counter-offer is the acceptance date stated in the counter-offer itself.

Most of the content and format of the WB-44 remains the same as before, but some changes have been made and additional information has been included. Instead of specifically listing the different methods of delivery that may be employed to create a binding acceptance, the revised WB-44 simply states that the delivery of the accepted counter-offer may be made in any manner specified in the offer. The bottom of the form following the signature lines is also different: there is a line to specify who presented the counter-offer, if the counter was rejected or countered, and some notations giving directions to the parties.

Provisions from a previous counter-offer are included by reproducing the entire provision in the subsequent counter-offer or by incorporation by reference: the subsequent counter-offer may refer to the number of the provision in the previous counter-offer or to the line numbers of the provision that is being carried forward. If there is more than one counter-offer, they should be numbered sequentially with reference to the entire transaction, not just by party, e.g., Counter-Offer No. 1 by Seller, Counter-Offer No. 2 by Buyer, etc.

WB-46 Multiple Counter-Proposal

The WB-46 Multiple Counter-Offer has been revised in response to concerns over what some feel is confusing terminology in the present form and some general uncertainty about the correct way to use the form. Real estate licensees and attorneys have expressed concern that the present form's use of the term "multiple counter-offer' is confusing. Others have had problems understanding that the WB-46 is a non-binding proposal until accepted by the buyer and confirmed by the seller. Accordingly, changes have been made that do not alter the process but do change the terminology employed.

The changes to the WB-46 start with the name of the form itself — the WB-46 is now the "Multiple Counter-Proposal." In fact, the three stages in the process have been renamed: seller's proposal, buyer's approval, and seller's binding acceptance. The lines appearing directly below the title explain that the multiple counter-proposal is a proposal used by a seller to negotiate with a group of buyers who have submitted offers to purchase. These lines remind everyone that the WB-46 does not become a binding contract unless it is approved by a buyer and then accepted by the seller and delivered back to the buyer (binding acceptance).

The seller's proposal to the buyers includes an expiration deadline. If a buyer does not approve of the seller's non-binding proposal and deliver it back to the seller by the stated deadline, the multiple counter-proposal expires. This does not mean that the seller must wait until the expiration deadline before accepting or taking other action on any approved multiple counter-proposals or other counter-offers that the seller may receive. The seller need not wait until the deadline and is often likely to act quickly. Some sellers immediately accept the first approved multiple counter-proposal to be returned.

As before, the form emphasizes that if the buyer does not approve the seller's proposal, but rather wishes to make a counter-offer to the seller's proposal, a WB-44 Counter-Offer form or a new offer to purchase form must be used. The WB-46 can be used by the buyer only to agree with the seller's proposal - any response to the seller's WB-46 proposal that suggests terms different from the WB-46 cannot be written up on the Multiple Counter-Proposal. This is reinforced by the spaces where the buyer can initial to indicate if the Multiple Counter-Proposal is being rejected or countered.

In the Acceptance by Seller section, the WB-46 indicates that if the seller accepts a WB-46 proposal which has been approved by the buyer, binding acceptance on the terms and conditions specified on the WB-46 is created upon delivery by the seller to the buyer using one of the delivery methods specified in the offer.

If a seller were dealing with only one buyer, the WB-46 Multiple Counter-Proposal would not ordinarily be appropriate. A standard counter-offer would be used in most cases. If for any reason a seller wished to submit a non-binding proposal to just one buyer, a WB-46 could be used if it was modified to eliminate all references to multiple buyers, particularly in the title and in the first paragraph of the form. Striking the word "multiple" throughout the form and using an affirmative statement that only one counter-proposal is being issued is also advisable. A licensee involved in such a transaction could be subject to liability for misrepresentation if the buyer wasn't clearly informed in writing that only one buyer was receiving the seller's nonbinding counter-proposal.

The Revised Vacant Land and Farm Listing Contracts

The WB-2 Farm Listing Contract and the WB-3 Vacant Land Listing Contract are substantially the same as the WB-1 Residential Listing Contract. The following provisions in these listing contracts are basically the same:

- Property description,
- Property inclusions and exclusions,
- Condition of title,
- Cooperation with other brokers,
- Exclusions,
- Commission,
- Extension of listing (listing protection),
- Termination of listing,
- Internet publication of listings (seller cooperation with marketing efforts),
- Agency disclosures
- Consents to multiple representation.

Accordingly, a detailed discussion of these "in-common" can be found in the discussion of the residential listing contract in *Legal Update 99.01*.

The farm and residential listings also share the same provisions for the Real Estate Condition Report, appraisers and inspectors (open house and showing responsibilities), and items included in the definition of "conditions affecting the Property of transaction," because residential properties and farm properties both include residential dwellings. The vacant land listing, on the other hand, has a seller's condition report section because no mandatory Chapter 709 Real Estate Condition Report is required if there are no dwellings; all that is needed is an optional seller's condition report. The vacant land listing has a provision for showing responsibilities (no open house because no dwellings).

The unique components which make a farm listing distinctive and which distinguish a vacant land listing from the other listing contracts are features that were included in the previous versions of these listing contracts [WB-2 Farm Listing Contract (mandatory use date 7-1-95) & WB-3 Vacant Land Listing Contract (mandatory use date 4-7-95)]. These features are included in the discussions of farm forms and vacant land forms on pages 6 - 12 of this *Update*.

The Revised Vacant Land and Farm Offers to Purchase

The WB-12 Farm Offer to Purchase and the WB-13 Vacant Land Offer to Purchase are substantially the same as the WB-11 Residential Offer to Purchase. The following provisions in these offers to purchase are basically the same:

- Property description,
- Property inclusions and exclusions,
- Acceptance,
- Binding acceptance,
- Delivery of documents and notices,
- Occupancy,
- Property condition provisions *(although the lists of items included in the definition of "conditions affecting the Property or transaction" are a bit different for the three different types of property)*,
- Time is of the essence,
- Dates and deadlines,
- Financing contingency,
- Delivery / receipt,
- Earnest money.

Accordingly, a detailed discussion of these "in-common" provisions can be found in the discussion of the residential offer to purchase in *Legal Update 99.02*.

The farm and residential offers also share the same provisions for the Real Estate Condition Report, rental weatherization, and the items included in the definition of "conditions affecting the Property of transaction," because residential properties and farm properties both include residential dwellings. The vacant land offer, on the other hand, has a seller's condition report section because no mandatory Chapter 709 Real Estate Condition Report is required if there are no dwellings; all that is needed is an optional seller's condition report. The vacant land offer has contingencies for well water, well system inspection, private sanitary system inspection, and a defects evaluation and inspection provision, while the farm offer has a contingency for soils testing, a proposed use contingency for documents affecting property development, permits, approvals, licenses, and utility connections, a map of the property contingency, and an inspection contingency relating to hazardous substances and health and safety risks.

The unique components which make a farm offer to purchase distinctive and which distinguish a vacant land offer from the other offers are features that were included in the previous versions of these offer to purchase forms [WB-12 Farm Offer to Purchase (mandatory use date 7-1-95) & WB-13 Vacant Land Offer to

Purchase (mandatory use date 4-7-95)]. These features are included in the discussions of farm forms and vacant land forms on pages 6 - 12 of this *Update*.

Farm Forms

The new farm forms are based in large part upon the residential listing contract and offer to purchase. As far as subject matter, the farm forms include features from both the residential and vacant land forms. Farms typically include a farmhouse, which brings into play the considerations of the residential offer concerning the purchase of a residence. Farms also typically include numerous acres of vacant land, which trigger a great many of the issues addressed in the vacant land forms, such as crop provisions and land conservation programs. In addition, farms often include outbuildings and equipment unique to farming operations such as barns, silos, milking systems and feeding equipment. Thus the farm forms are hybrids which contain provisions from the residential and vacant land forms but which also contain features unique to the operation of a farm.

Acreage Allocation

The farm listing suggests that the seller include data such as total acreage, and the breakdown of tillable, pasture and wood lot acreage on an addendum to the listing. The listing does not require that allocation of acreage information be given because this type of data becomes unreliable as farm practices, natural influences and classification definitions change over the years. What once may have been tillable acreage may become wetlands or wood lot acreage over time.

Licensees are encouraged to use any good, current acreage allocations. This information may be helpful for pricing purposes, and may be relevant as to acreage in conservation programs. Members should be careful when representing any acreage or acreage allocations to buyers that they make clear the source of such data (per seller, per tax bill, etc.) and perhaps indicate that the data is approximate. This may help protect the licensee from being held responsible for any acreage discrepancies.

Fixtures: Included & Excluded Items

The farm listing states that all items included in the definition of "fixtures" on the third page of the listing contract are included in the sale unless specifically excluded. There also is a caution to address annual and perennial crops, livestock, rented fixtures not owned by the seller, fixtures such as an irrigation system which will not be included in the sale, and equipment like tractors which may be personal property but which will be included in the real estate sale. The seller needs to sort out exactly what will and will not be available to be included in the sale.

The definition of "fixtures" in the farm listing contract and offer defines a fixture to include perennial crops. Perennial crops such as raspberries or apples, as well as trees, bushes, and grass which do not require annual planting and cultivation are classified as fructus naturales (fruits of nature) and are considered part of the real estate — that is, fixtures. On the other hand, annual crops that have to be planted each year such as wheat and corn are classified as fructus industriales (fruits of industry) and are generally considered personal property. Accordingly, such crops must be specifically listed if they are to be included in the sale.

The cautionary note following the definition of fixtures on the fourth page of the farm offer advises that annual crops like wheat or corn are not included unless listed on the first page as additional items included in the list price. The note also suggests that if the seller or the seller's tenants will occupy the property after closing or retain ownership of crops, a special agreement for occupancy, insurance, utilities, maintenance, rights to crops, farm operations and government programs should be considered. If there is a tenant with a crop lease or if the seller will retain crops and the closing will occur before harvest, arrangements will need to be made for caring for and harvesting the crop after the sale of the farm so that the respective rights of the seller, crop tenant and the buyer can be protected. One way to handle this in a farm offer may be to draft a contingency for the seller's attorney to furnish a copy of the crop lease and to prepare an agreement regarding the tenant's and the seller's rights to crops, subject to the approval of the buyers and their attorney within 45 days of acceptance.

Survey & Records Contingencies

On the second page of the farm offer, there is a provision for Property Dimensions and Surveys. The Caution at the end of this section states that the buyer should verify any total square footage formula, total square footage and/or acreage figures, land, room and building dimensions, and acreage allocations, and that the buyer may wish to consider a survey to verify acreage and acreage allocations. Such contingencies would need to drafted and included under additional provisions, or incorporated by the use of an addendum because the farm offer does not include any map or survey contingency. (An example of a map contingency can be found in the Vacant Land Offer).

There also is a Review of Records provision on the second page of the farm offer. This provision cautions the buyer that if surveys, soil analysis, acreage calculations, government program contracts and operating records, including records concerning the use of pesticides and herbicides, are material to the buyer, a contingency for the review of these

records may be advisable. A farmer's practices with respect to animal feedlots, livestock waste storage, land spreading of livestock waste, fertilizer application, handling and storage, pesticide application, handling and storage, and irrigation may have significant impacts upon groundwater and soil quality — mismanagement in any of these areas may cause contamination.

For example, persons involved in the application of pesticides may need to be certified and licensed by the State of Wisconsin, and certain safety procedures should be followed to guard against the possibility of chemical spills. A spill of pesticides or fertilizer which exceeds certain reportable levels (250 pounds of dry fertilizer, 25 gallons of liquid fertilizer, or enough pesticide which would, when diluted per label instructions, cover one acre or more), or which threatens public health, welfare or the environment, must be reported to the Spills Hotline at 800/943-0003. Any information of this nature should appear in the seller's records.

Farm/Crop Leases

Farm leases usually run on an annual basis but are customarily renewed so that the tenant is in possession for a long period. Although this may sound simple, a clear, concise farm lease is nonetheless critical because it may well be a contractual relationship extending over many years. It is important for the parties to come to a full understanding, in advance, of their respective obligations with regard to each other and the use of the land. An experienced farmer may have a standard lease form prepared by an attorney, which would be the recommended practice.

Farm leases vary widely in nature, depending upon what the landlord and tenant are respectively furnishing to the farm enterprise (livestock, equipment, seed, fertilizer, etc.) in addition to land and labor, and upon the parties' allocation of risk, (i.e. who bears the loss if there is a drought, livestock disease, etc). The rent in a farm lease may be: (1) a straight cash rent, usually where the landlord is furnishing only land and buildings, (2) a cash rent, with provision for adjustment based on prices of specified farm products, (3) division of the farm income on "shares" specified by the lease (e.g., 50/50, 60/40), with the lease also detailing the shares or contributions that each party agrees to make in terms of seed, supplies, livestock, machinery, fertilizer, insurance, and other expense items, or (4) a combination of cash rent for buildings and certain parts of the land (such as pasture land) and a share of the more important crops, milk checks, or other produced products.

Sometimes, the owner of farmland will enter into an agreement with the tenant "to work the land on shares." This may look like a share lease, but it is instead a "cropper contract." In this type of agreement, the landowner furnishes all the capital items and retains complete control. Even though the agreement is titled "lease" and the tenant has the "use" of the buildings and grounds, this is actually an employment contract and the tenant is an employee.

Almost all farm leases begin and end in the spring, typically on March 1 or April 1. Many farm or crop leases are not written but rather are verbal "handshake" agreements. Because nothing is in writing, the parties may have different recollections of their agreement, making disputes more difficult to resolve. These verbal leases will typically be year-to-year periodic tenancies that are automatically renewed each year and that require 90 days' written notice by either party for termination per Wis. Stat. § 704.19(3). The 90 days' notice is designed to give the tenant an opportunity to locate a new farm and/or the landlord time to find a new tenant. (Of course, if a real estate licensee is negotiating the agreement, he or she must put the agreement in writing per § RL 24.08).

If there is a written lease, the common lease term is one year, usually with a provision for automatic renewal for additional one-year terms unless 90 days' written notice is given by either party prior to the end of any year. If there is no renewal provision, the lease will automatically terminate at the end of the stated term. If the tenant holds over at the end of the stated lease term, the tenant is legally considered to be a trespasser and the farmer has the legal right to evict the tenant in small claims court. If the farmer does not remove the tenant, a year-to-year tenancy is created if the initial written lease was for one year or longer per Wis. Stat. § 704.25(2)(a). Again the year-to-year periodic tenancy may be terminated only upon 90 days' written notice.

Obviously, the termination of any farm or crop lease may be problematic if the farm is being sold. A 90 days' notice to terminate these leases must be at least 90 days before the end of the year term, which usually means it must be given no later than the beginning of January.

Well Water, Well System, Private Sanitary System & Inspection/ EvaluationContingencies

The Well Water Contingency, Well System Inspection Contingency, Private Sanitary System Inspection Contingency, and Inspection/-Evaluation Contingency on page 3 of the farm offer are optional provisions that must be marked in order to be included in the offer to purchase. The Contingency Satisfaction/Right to Cure provision is automatically included in the offer unless struck or lined out. These provisions are substantially the same as those found in the WRA Addendum B and are discussed in *Legal Update 99.04*.

Given the potential for groundwater contamination associated with live-

stock waste and the application of fertilizers, herbicides and pesticides, it is especially critical that the well water be tested. This would include the standard test for coliform bacteria typically performed on all wells, but may also include testing for nitrates, atrazine, and other pesticides. High levels of nitrates in drinking water poses an acute health threat for infants less than six months of age because nitrates interfere with the ability of a baby's blood to carry oxygen, leading to symptoms of suffocation or blue baby syndrome. This problem generally does not affect older children or adults. On a farm, nitrates can originate from fertilizer infiltration and animal feedlots.

Fourteen types of pesticides and herbicides have been found in Wisconsin water supplies. Atrazine (used to control weeds in corn) is by far the most frequently detected pesticide and is considered to be a possible cancer causing substance by the United States Environmental Protection Agency. In areas where corn has been planted, any wells contaminated with pesticides almost always contain some level of atrazine making the test for atrazine the best indicator of possible pesticide contamination. An atrazine test is readily available and inexpensive. In areas where atrazine has not been used, it may be prudent to test for other pesticides and chemicals. The farm's operational records will hopefully indicate what chemicals have been used.

Wells near underground gas tanks and old landfills should also be tested for volatile organic chemicals (VOC) which can harm the kidneys, liver, and central nervous system, and cause cancer and reproductive system problems.

The Inspection / Evaluation Contingency authorizes inspections for defects, but not testing. A defect, for the purposes of this provision, is defined to be a structural, mechanical or other condition or determination that would have a significant adverse effect on the property (including the operating equipment included in the purchase); pose a significant threat to the health or safety of persons occupying or working on the property; significantly shorten or have a significant adverse effect on the normal life of the property or a component if not repaired, removed, or replaced; or evidence of contamination from the use, storage or disposal of hazardous or toxic substances on the property.

Conveyance of Title Warning

At the bottom of the third page of the farm offer is a warning that states: "Municipal and zoning ordinances, recorded building and use restrictions, covenants and easements may prohibit certain improvements or uses and therefore should be reviewed, particularly if Buyer is considering development of the Property or a use other than the current use. If Buyer is considering development of the Property, Buyer should consider restrictions on development if Property is zoned agricultural. Buyer should consider the need for feasibility studies, estimates for utility and infrastructure installations and zoning variances, which may be required before certain future development may be possible. Contingencies may be added to this Offer to address these development requirements, is applicable."

Although this warning alerts a buyer considering development to many crucial concerns, the first issue to consider may be zoning. In Wisconsin, there are many different types of agricultural zoning. The most restrictive zoning classification is Exclusive Agricultural zoning. Exclusive Agricultural Zoning generally provides that farmland cannot be developed and that no residences can be built unless occupied by the farmer, the farmer's parents or children, or a person working on the farm. The minimum parcel size for building a farm residence is 35 acres. The landowner must demonstrate "substantial income" from farming to be allowed to build a home, otherwise the land must be rezoned to a residential district. Other allowable uses, such as a farm implement dealer or a roadside stand, must be compatible with farming. Special assessments for sanitary sewers, water, lights or nonfarm drainage typically cannot be imposed upon land zoned for exclusive agricultural use.

Other categories of agricultural zoning will generally allow single-family residences on one-half acre lots as a permitted use. Members should note that the specific line item where the type of zoning is written in does not appear in the 1999 version of the farm listing and offer to purchase, as it did in the previous versions of these forms. Accordingly, members should take care that zoning is addressed under the Additional Provisions section, or in an addendum to the offer if zoning will be a consideration for the buyer's plans.

Vacant Land Forms

The vacant land forms share some provisions in common with the farm forms because a large part of what ordinarily comprises a farm is vacant land, even though with a farm the land is typically employed for crop production or livestock pasturing. The land that is the subject of a vacant land listing or offer may be land employed in agricultural pursuits. The vacant land forms, however, also recognize that the subject land may not be agricultural land, and may be purchased because the buyer intends to develop the land by building a house or some other sort of buildings, by creating a subdivision or condominium, or by engaging in some other development project.

Property Development Contingencies

One distinctive feature of the WB-13 Vacant Land Offer to Purchase is the optional Proposed Use Contingency

section and the Inspection Contingency found on the last page of the vacant land offer. These topics addressed in these contingencies are introduced in the property development issues warning found on the second page of the offer.

The Issues Related to Property Development section warns a buyer planning to develop the property – or use the property for a purpose different from the current use – to ensure that the proposed new use will be workable. The buyer is encouraged to check zoning, recorded restrictions and covenants, easements and environmental conditions; the availability of building permits, zoning variances and architectural control committee approvals; and the costs for utility connections, special assessments, road or utility installations, environmental audits and subsoil tests. The buyer is provided with the opportunity to investigate these and other development issues in the optional contingencies found on the last page of the vacant land offer, or by adding contingencies, as needed, in addenda to the offer.

For buyers purchasing vacant land where they intend to construct a home or other structure, it may be advisable to include a contingency confirming all utility connection and other municipal charges and fees, and provide that the buyer may void the offer if the total of all such charges exceeds a certain amount. It is a common problem to have buyers purchase land only to find out that there are significant fees and charges that they were not made aware of.

Proposed Use Contingency Procedures

The optional Proposed Use Contingency is comprised of a list of contingencies for subsoil conditions hindering development; subsoil conditions suitable for a septic system; easements, covenants and restrictions; permits, licenses, and approvals; and utility connections. At the beginning of this contingency, the buyer states his or her proposed use of the property and is instructed to check the optional contingency items which apply. For each contingency item that is selected, the contingency is deemed satisfied unless the buyer, within a specified number of days after acceptance, gives the seller written notice of the items which have not been satisfied. The buyer must also give the seller written evidence showing why the contingency item(s) cannot be satisfied. The seller is not provided with a right to cure in the vacant land offer, so if the parties desire such a provision, it will have to be added in an addendum.

Subsoil Condition Contingency

This contingency permits the buyer to obtain written evidence from a qualified soils expert that the property is free of any subsoil conditions which would prevent the proposed use of the property or significantly increase the costs of development. Examples of the types of conditions that may be of concern are listed as item (n) under the definition of "conditions affecting the Property or transaction" on the second page of the offer. These include conditions such as organic or non-organic fill, buried containers of hazardous or toxic substances, low load-bearing capacity, high groundwater, and excessive rocks. The offer must indicate whether the seller or the buyer will pick up the cost of obtaining this evidence. If any soils samples reveal contamination, the inspector may be required to report this to the Department of Natural Resources.

Septic System Suitability

This contingency permits the buyer to obtain written evidence from a certified soils tester (or other qualified expert) that the soils and other conditions meet the applicable code requirements for the installation of an "acceptable private septic system" that satisfies the buyer's proposed property use. The proposed use, such as a three-bedroom single-family house, would be specified in the contingency. The drafter must indicate whether this information will be obtained at the seller or buyer's cost. The contingency states that an "acceptable system" will not include holding tanks, privies, or composting or chemical toilets, or any other type of septic system designated in the offer as not acceptable. Such a designation will have to be stated under Additional Provisions or in an addendum to the offer.

Easements and Restrictions

This optional contingency gives the buyer the opportunity to obtain copies of all easements, covenants and restrictions affecting the property, and an opinion from a qualified independent third party that none of these will prevent, significantly delay, or significantly increase the cost of the buyer's proposed use. The qualified third party will most often be an attorney. The drafter again indicates whether this will be at the seller's or the buyer's expense.

Permit Contingency

There is a contingency for permits, licenses and other approvals required for the buyer's specified proposed development. If this optional contingency is selected, the offer is contingent on the buyer obtaining the needed permits, approvals and licenses, or on the final discretionary action of the granting authority. However, a buyer who relies on the authority's final action without having the final document in hand may be taking a risk. For example, there may be a mix-up or some previously overlooked requirement which hasn't been met and which may ultimately cause the permit to not be issued or delayed. Accordingly, a buyer may wish to consider whether to take the expedited route and rely on the authority's action or whether to modify the contingency to require

that the actual permit or license be issued in its final form. The buyer must specify what types of permits and approvals related to the buyer's proposed development are subject to the contingency, for example, a liquor license, a building permit, or a certified survey map.

Utility Connection Location Contingency

Both the vacant land listing contract and offer address the availability of utility connections such as electricity, gas, municipal sewer and water, and telephone. Even if the seller represents in the listing which types of connections are present and how close they come to the potential property building site, (for example, onto the property, to the lot line, across the street, etc.), the listing agent may not want to advertise the location of these utilities in the data sheet based on the seller's representations – unless the broker attributes the information to the seller, or unless the information is independently confirmed with the appropriate authorities and attributed to those sources.

On the last page of the vacant land offer, there is an optional contingency for the buyer to obtain written evidence confirming the location of the existing utility connections. Licensees may be prudent to also include a contingency confirming the costs involved for the buyer to connect to these utilities.

Map Contingency

The Map of the Property contingency is different from the map provision found in the 1995 WB-13 Vacant Land Offer to Purchase. Rather than picking a boundary map, a mortgage inspection map, or a survey map, the parties simply select the map components and features that are desired. The parties may strike out any of the pre-listed basic map features that don't apply to their situation, and write in additional features that will be helpful to them - the map provision suggests some additional features that prove to be helpful in some transactions. The emphasis is upon tailoring a map that meets the individual circumstances rather than producing a map with unnecessary features and information.

The parties also are cautioned to consider the cost and the real need for the various map features before selecting them. If there is any uncertainty, it may be best for the parties to confer with a surveyor about costs before completing the offer. The parties may also wish to consult with an attorney or a title company as far as evaluating what features are and are not necessary under the circumstances.

The parties also designate whether the buyer or seller will be responsible for providing the map; whether the seller or the buyer will pay for the map; and the deadline for the provision of the map, in terms of number of days after acceptance of the offer. The offer is contingent upon the provision of a map with the selected features, which shows no significant encroachments or information that is materially inconsistent with any prior representations, by the stated deadline.

If the buyer receives the map on or before the deadline, the buyer has five days to determine whether the map shows any significant encroachments or changes in information. The contingency fails if the buyer delivers a copy of the map and written notice identifying any encroachment or material inconsistency to the seller and the listing broker, if any, within the five days. If the buyer does not deliver a notice and a copy of the map within five days of receipt of the map, or the deadline for the map (whichever comes first), the contingency is deemed satisfied.

It may be unwise for a buyer to have the seller obtain the map because if the seller does not produce the map by the deadline, the buyer's five days in which to give notice runs from the deadline. If the seller does not produce the map within five days of the deadline, the buyer will be unable to provide a copy of the map along with the notice. The seller may then argue that the contingency is deemed satisfied on its face because the buyer will have been unable to give and furnish a copy of the map. Therefore the contingency arguably fails if the seller does not deliver the map. The seller also may be in breach of the duty to proceed with due diligence and in good faith in completing the terms and conditions of the offer. However, the potential dispute and delay may be disadvantageous for the buyer. The buyer may want to consider engaging the surveyor and obtaining the map him or herself, and having the seller pay for it. That way the buyer has more control over the workings of the contingency.

Inspection Contingency

Unlike the broad-based structural inspection contingency in the residential and condominium offers, the inspection contingency in the vacant land offer could just as easily be called the health and safety contingency. This contingency calls for an inspection by a qualified inspector of the property and any specific features listed by the buyer in the provision. The inspection contingency is deemed satisfied unless the buyer within a specified number of days after acceptance of the offer gives the seller written notice of defects found and a copy of the inspector's report. The seller has no right to cure given in the provision, and the provision authorizes inspections only, not testing. A "defect" is defined as any condition constituting a significant health or safety threat to property occupants or indicating any material use, storage, or disposal of hazardous or toxic substances on the property.

Zoning

Although the applicable zoning is generally important in all real estate transactions, it will be far more important in transactions where vacant land is purchased for construction or development. The seller's representation of the current zoning for the property is filled in on the first page of the listing and the offer.

Conditions Affecting Property or Transaction

The definition of "conditions affecting the Property or transaction" in the vacant land forms is quite different than the one appearing in the residential or condominium forms, but many of the items appearing in the vacant land forms also appear in the farm forms. In both sets of forms, the seller is asked to state whether he or she has notice or knowledge concerning many new and perhaps unfamiliar programs, laws, and items which appear in the definition, such as: Farmland Preservation and other conservation-related programs; abandoned wells, cisterns, and septic tanks; subsoil conditions increasing development costs; access; and the Agricultural Chemical Cleanup Program. Some of the items that are distinctive to the vacant land and farm forms are discussed below.

Farmland Preservation Program

The purpose of the Farmland Preservation Program is to help local governments preserve farmland through local planning and zoning, and to provide tax relief to participating farmers. Farmers qualify for tax credits if they sign a contract agreeing not to develop their land during the contract period or if their land is zoned exclusive agricultural. The amount of the tax credit depends upon the farmer's household income. The land must be at least 35 acres, and must be kept in agricultural use; only farm structures can be built; and conditional uses and special exceptions are limited to agricultural-related, religious, utility, institutional and government uses. The land must be farmed in compliance with county soil and water conservation standards.

The land may be sold at any time if the buyer continues to abide by the farmland preservation agreement and uses the property for the permitted agricultural uses. The seller must notify the Department of Agriculture, Trade, and Consumer Protection of any sale or transfer. If the owner dies or becomes disabled, the land may be released from the agreement, but it will then become subject to a payback lien.

If the land is zoned out of exclusive agricultural zoning, granted a non-agricultural purpose conditional use permit or special exception, or otherwise taken out of the program, a payback of the tax credits received over the last 10 years is required. If the tax credits are not repaid upon notification of the amount due, a payback lien is recorded and 6 percent compound interest is assessed. If the land is sold to anyone other than the owner's child or converted to a non-agricultural use, the payback lien becomes due.

Forest Crop, Woodland Tax and Managed Forest Programs

These three private forest management programs offer owners tax incentives in return for sound forestry practices and the production of future forest crops for commercial use. The Forest Croplands program applies to properties of at least 40 acres of adjoining forest land. The Woodlands Tax program applies to forest real estate of 10 or more acres. The Forest Croplands and Woodland Tax programs were combined in 1985 into the Managed Forest Land program and are being phased out. After 1985, all new forest management petitions and renewals must be for the Managed Forest Land program.

In all of these programs, application is made by petition to the Department of Natural Resources (DNR) which, after a public hearing, may grant or deny the petition. If the DNR grants the petition, the order granting the owner's request is recorded and becomes a contract between the state and the owner that runs with the land. The contract term is for 25 or 50 years for Forest Croplands and Managed Forest Lands, and 15 years for Woodland Tax lands. Lands in all of these programs may be sold without penalty if the buyer agrees to continue with the program for the time remaining in the respective program. The seller must report the land transfer to the DNR within 10 days, and the buyer generally must certify that he or she will comply with the existing contract.

In the Forest Croplands and Managed Forest Lands programs, there is a severance or yield tax due on any timber that is cut. The severance or tax is a lien on the cut timber – there is no automatic lien on the real estate. Advance notice of cutting must be given to the DNR, and unauthorized cutting is subject to a maximum fine of $1,000. In addition, there are stiff penalties for early withdrawal of lands from these programs. The owner is personally liable for these penalties and taxes.

To be eligible for the Managed Forest Land program, a parcel must be at least 10 acres, 80 percent of the land must be capable of producing at least 20 cubic feet of timber per acre, per year. The owner must permit public access to the land for hunting, fishing, hiking, sight-seeing and cross-country skiing. However, the owner may designate one area of up to 80 acres as a closed area. He or she may also restrict public access to areas within 300 feet of buildings, and prohibit motor vehicles and snowmobiles. Grazing is prohibited. The tax on managed forest land is 85 cents per acre, plus $2 per acre of closed

lands, subject to rate adjustments every five years. Further information about these programs may be obtained by contacting the Department of Natural Resources.

Conservation Reserve Program

The Conservation Reserve Program (CRP) encourages farmers, through contracts with the US Department of Agriculture (USDA), to stop growing crops on highly erodible or environmentally sensitive land and instead plant a protective cover of grass or trees.

Landowners bid competitively to enroll their land in CRP. Bids are accepted only during designated sign-up periods and are ranked according to established criteria. The CRP contracts for land accepted into the program run for 10-15 years, and the owners receive an annual rent plus one-half of the cost of establishing permanent ground cover on the accepted acreage.

The owners may receive up to $50,000 per year under these contracts, but all annual payments are to be fairly allocated among the owner and any tenants and sharecroppers. A bidding process among applicant owners establishes the payment amounts. A conservation plan, approved by the local conservation district, is incorporated into the contract.

A buyer purchasing land subject to a CRP contract may become a successor to the existing contract or may enter into a new CRP contract under the same terms and conditions as the existing contract. Annual rent payments for the year of sale are prorated between the buyer and the seller. If an owner subject to a CRP contract sells the land and the buyer does not continue in the program, the seller forfeits all rights to future payments, must refund all payments already made, plus interest, and pay liquidated damages in the amount of 25 percent of the annual rent rate.

Wells Required to be Abandoned; Abandoned Cisterns and Septic Tanks

Section NR 112.26 of the Wisconsin Administrative Code requires that all unused wells be properly abandoned by permanent filling. For more information about abandoned wells, contact the DNR or the WRA's Legal Hotline. Unused and improperly abandoned wells and cisterns may pose safety hazards because someone might fall into them, or trip and sustain an injury. Cisterns are large tanks or receptacles, often underground, for collecting or storing water. Unused wells and septic tanks may also threaten groundwater, and wells, cisterns and septic tanks can pose obstacles during excavation.

Agricultural Chemical Cleanup Program

The Agricultural Chemical Cleanup Program was enacted in response to growing concern over increasingly frequent discoveries of pesticides, herbicides, fertilizers and other agricultural chemicals in groundwater. The program, which closely resembles the PECFA program, is found in Wis. Stat. § 94.73, and went into effect on Aug. 11, 1993.

A "responsible party," such as the person who owns or controls the spilled chemical, the person causing the spill or the owner of the property where the spill has occurred, is eligible to apply for reimbursement of eligible cleanup costs incurred after Jan. 1, 1989. Eligible reimbursable costs include lab testing, environmental consulting fees, monitoring wells, soil borings and costs to remove or treat contaminated soil or groundwater.

Maximum payment eligibility is on a "per discharge site" basis, rather than on a "per claimant" or "per incident" basis. Thus, persons buying properties which have been the site of an agricultural chemical spill and cleanup may wish to check whether any claims have been previously paid from the fund for that site. Reimbursement is limited on a second corrective action claim for the same site.

The emphasis of the Agricultural Chemical Cleanup Program is to investigate and remediate the entire site all at once. Therefore, an applicant must notify all other known potential claimants to give them a chance to submit any claims along with the applicant's claims — all costs are expected to be on one application. Further information about this reimbursement program may be obtained by calling (608) 224-4522.

Conclusion

Member input is critical to the WRA as we strive to make improvements that make a positive difference in the daily practice of REALTORS®. The revisions to the WB-2 Farm Listing Contract, the WB-3 Vacant Land Listing Contract, the WB-12 Farm Offer To Purchase, and the WB-13 Vacant Land Offer To Purchase embody this effort. The same is true with the two new forms, the WB-40 Amendment to Offer to Purchase and the WB-41 Notice Relating to Offer to Purchase, and the revisions to the WB-44 Counter-Offer and the WB-46 Multiple Counter-Proposal.

Notes

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This *Legal Update* and other *Updates* beginning with 92.01 can be found in the members' section of the WRA Web site at: http://www.wra.org/realtor.

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WRA E&O Insurance Program Benefit Enhancements

John P. Pearl & Associates, Ltd., marketer and administrator of the Wisconsin REALTORS® Association-sponsored Errors and Omissions Liability Insurance program, is pleased to announce that several new benefit enhancements and time-saving services were recently added to the program.

Pearl's errors and omissions program, underwritten by St. Paul Fire and Marine Insurance Company, has the sponsorship of more than 35 state REALTOR® associations, and offers quality benefits such as First Dollar Defense, Pollution Coverage, Personal Injury, Defense of Regulatory Complaints and many more. Recent benefit enhancements to the program include:

- Availability of a zero deductible for qualified firms
- Higher discrimination coverage limits – options of $100,000, $150,000, and $250,000
- Automatic renewals for small firms (1-3 agents)
- Automatic coverage for the sale of owned residences / investment purposes covered by endorsement for qualified firms
- Availability of an aggregate (annual) deductible for qualified firms
- Availability of mortgage brokerage coverage
- Business brokerage coverage included automatically up to 5% of real estate firm's revenues.

Pearls' REALTOR® Errors and Omissions program offers competitive premiums, and because of the unique premium rating structure, insureds may receive substantial discounts based on total number of salespeople, professional designations, use of an approved Home Warranty program or Seller's Disclosure, and more.

For more information regarding the WRA-sponsored Errors and Omissions Liability insurance program, or the new plan enhancements, contact John P. Pearl Associates, Ltd., toll-free at 1-800-289-8170, or send a fax to (309) 688-5820. We also invite you to visit the Pearl Web site at www.pearlins.com

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