FEBRUARY 2009

Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Please Route to:

__ _____
__ _____
__ _____
__ _____
__ _____
__ _____
__ _____

Inside This Issue

Revised WB-5 Commercial Listing and Seller Disclosure Report

Wisconsin real estate licensees now have a revised commercial listing that became mandatory for use on January 1, 2009. The newly revised WB-5 Commercial Listing Contract should be easy to use because it is substantially based on the revised WB-1 Residential Listing Contract and the 2000 version of the commercial listing contract.

Naturally there are some differences between the commercial forms and their residential, condominium, farm and vacant land counterparts. A commercial property generally is purchased for use in a retail, manufacturing, industrial or other business enterprise, not as a personal residence and not for farming operations.

This *Legal Update* addresses environmental and commercial issues encountered when selling a commercial property using the revised versions of the WB-5 Commercial Listing Contract and the Wisconsin REALTORS® Association Seller Disclosure Report – Commercial (CR). The WRA updated and revised the CR for use together with the updated commercial listing. The CR is not a Wis. Stat. § 709.02 Real Estate Condition Report (RECR) for real property including one to four dwelling units. It is intended for commercial, not residential, transactions.

This *Legal Update* reviews the changes made to the WB-5 Commercial Listing Contract – Exclusive Right to Sell. The discussion distinguishes between commercial and business properties, points out some of the changes adopted by the Department of Regulation and Licensing, key issues to discuss with the seller and practice tips for getting the best results with the new version of the WB-5. The *Update* also discusses some of the disclosure items in the CR that are associated with commercial properties and critical for purchasers in the retail/industrial arena. The *Update* concludes with Legal Hotline questions and answers regarding important commercial considerations.

Commercial vs. Business Transactions

Commercial transactions involve real estate used for retail, office, industrial, manufacturing, recreational and other non-residential purposes. These transactions vary tremendously, running the gamut from the sale of a small retail shop to the purchase of a gas station, to the acquisition of a major shopping center or golf course. It is impossible to include in preprinted forms all of the provisions that might be needed or desirable in all of these different types of deals. Accordingly, the approved commercial listing is very basic. Transaction-specific provisions need to be included in the Additional Provisions section or on addenda.

Commercial transactions must also be distinguished from business transactions. When a business opportunity or ongoing business is being sold, the proper forms to use are the WB-6 Business Listing Contract, WB-16 Business Offer to Purchase and WB-17 Business Offer to Purchase without

Contacts

EDITORIAL STAFF

Authors
Debbi Conrad

Production
Emily Zampardi

ASSOCIATION MANAGEMENT

Chairman
Michael J. Mulleady, GRI

President
William E. Malkasian, CAE

ADDRESS/PHONE

Wisconsin REALTORS® Association,
4801 Forest Run Road,
Suite 201
Madison, WI 53704-7337
(608) 241-2047
(800) 279-1972

LEGAL HOTLINE:

Ph (608) 242-2296
Fax (608) 242-2279
Web: www.wra.org

Real Estate. These transactions will tend to include business assets such as inventory, equipment, furniture, accounts receivable, goodwill, trade names, licenses, personal or real property leases, etc. These assets will be offered for sale, either with or without an accompanying ownership interest in real estate. A commercial transaction, on the other hand, will involve the sale of primarily real estate alone. Granted some items of personal property may be included, just as in residential and other transactions, but the main focus is the real estate. Thus the sale of a vacant warehouse is handled as a commercial transaction.

For example, the sale of a supper club is a business transaction if it includes the kitchen equipment, furniture, liquor inventory, a hand-off of the liquor and restaurant licenses, goodwill in the club's name, etc. It is a commercial transaction, on the other hand, if it involves only the sale of the supper club building and lot.

Obviously, the distinctions between a business and a commercial transaction may not always be so neat and tidy. If the buyer intends to use the property for a purpose different from the current use, that is generally a commercial transaction. When assets like licenses, leases, equipment, inventory and goodwill are being included, that is generally a business transaction. If there are no clear defining features, licensees should use whichever DRL-approved form best matches the transaction with the fewest number of changes or modifications.

WB-5 Commercial Listing Contract – Exclusive Right to Sell

The revised commercial listing contract is based, in large part, on the residential listing contract. The two contracts have essentially the same procedural provisions for functions such as description of property included in list price, marketing, occupancy, cooperation with other brokers, exclusions and protected buyers, commission, broker duties and agency representation options, and other core processes involved when listing real estate.

Uniform DRL Listing Revisions

In the big picture, the DRL-approved listing contracts have not undergone any major substantive changes other than the incorporation of the Broker Disclosure to Clients material into the listing contract forms. This has been successfully accomplished so REALTORS® will no longer need to use the separate Broker Disclosure to Clients form along with the WB-5; REALTORS® will be able to go back to using just the WB-5 listing without a supplemental disclosure form. The DRL has made additional changes to update, improve and make the forms a bit more understandable for consumers and licensees.

Many of the changes to the WB-5 commercial listing contract echo the revisions to the WB-1 Residential Listing Contract – Exclusive Right to Sell. The DRL intends to keep the various listing contracts for different property types as uniform as possible. Many provisions are identical and appear in substantially the same order in each listing contract. For that reason, this *Legal Update* will overview a few uniform provisions and highlight selected provisions specific to commercial listings or deserving of particular emphasis. For a detailed discussion of the standard listing provisions found in the various DRL listing contracts, see the October 2007 *Legal Update*, "WB-1 Listing Contract – 2008 Revisions," online at www.wra.org/LU0710; the September 2008 *Legal Update*, "WB-2 Farm Listing and Farm Real Estate Condition Report – 2008 Revisions," online at www.wra.org/LU0809; the November 2008 *Legal Update*, "WB-3 Vacant Land Listing and Seller Disclosure Report

– 2008 Revisions," online at www.wra.org/LU0811; and the January 2009 *Legal Update*, "Revised WB-4 Residential Condominium Listing and Condominium Addenda," online at www.wra.org/LU0901.

The clarifications to the WB-5 are a by-product of eight years of experience with these forms. Many of the revisions are based, to a large extent, upon the input of WRA members who have served on WRA committees or called the WRA Legal Hotline with comments and suggestions.

A sample copy of the revised WB-5 Commercial Listing Contract appears on Pages 20-24 of this issue. In the following discussions, the existing WB-5 (mandatory-use date September 1, 2000) will be referred to as the "2000 listing," and the newly revised WB-5 will be referred to as the "2009 listing."

Included in Purchase Price (2009 Listing, Page 1)

As the seller and the broker complete and review the commercial listing, they have just set the list price at line 5 and are now specifying what is included in that list price on lines 6-9. "Seller is including in the list price the Property, all Fixtures not excluded on lines 11-14, and the following items: ___."

1. **Property.** "Property" is defined on line 213 as the real estate described on lines 2-4.
2. **Fixtures Not Excluded.** The list price also includes all fixtures that are not specifically excluded, that is, all fixtures except those listed in the Not Included in List Price section.

A "fixture" is defined in the Merriam-Webster Online Dictionary (online at www.merriam-webster.com/dictionary/fixture) as "something that is fixed or attached (as to a building) as a permanent appendage or as a structural part <a plumbing fixture> … an item of movable property so incorporated into real property that it may be regarded as legally a part of it"

"Fixtures" are also similarly defined on Page 4 of the 2009 listing at lines 194-204: "A 'fixture' is an item of property which is physically attached to or so closely associated with land or buildings so as to be treated as part of the real estate, including, without limitation, physically attached items not easily removable without damage to the premises, items specifically adapted to the premises, and items customarily treated as fixtures." A list of examples of fixtures is given – basically the same list that appears in the residential, farm, vacant land and condominium listing contracts. The WB-5 "fixture" definition section is different in one important way with regard to the exclusion of "tenant trade fixtures" from the definition of "fixtures." Lines 202-203 provide, "A 'fixture' does not include trade fixtures owned by tenants of the Property."

3. **Items Listed.** The third aspect of the property included in the list price is the items inserted on the blank lines. These presumably will be personal property items. For example, the seller is including movable restaurant appliances that are not considered fixtures like a stove and refrigerator.

Although the terms of the offer to purchase will determine what property is ultimately included or excluded in the transaction, it may be helpful for the sellers to think more about what items will be removed and what items can be left behind. Any items that a buyer might think of as "detachable" should be considered by the seller and listed in the Included or the Not Included section.

REALTOR® Practice Tips: If the seller writes down what is staying and what is going in the listing, then the listing broker can check the listing inclusions and exclusions against those in any submitted offer and thus help safeguard against inadvertent errors.

Not Included in List Price (2009 Listing, Page 1)

This section on lines 10-17 instructs the seller to identify items that the seller is excluding from the sale or removing from the property or that are rented and thus not owned by the seller.

1. **Property the Seller is Taking.** The seller is to list fixtures that the seller is taking with him or her when he or she moves out, for example, the seller's prize rose bushes.
2. **Rented Fixtures.** The caution in this section reminds the seller to list fixtures that are rented by the seller and that are accordingly owned by someone else; the seller has no right or authority to sell an item belonging to another, for example, the rented LP gas tank.

Line 11 references the fixtures definition on lines 194-204. The boldface fixtures definition caution on lines 203-204 warns, "CAUTION: Exclude fixtures not owned by Seller such as rented fixtures and tenant's trade fixtures." Clearly it is important to identify fixtures that will no longer be on the property after the sale, such as rented fixtures and tenant's trade fixtures, as early on as possible to help avoid misunderstandings down the line.

Tenant Trade Fixtures

Trade fixtures are fixtures installed by tenants in business premises such as offices, factories or stores. It is generally presumed in the law that the tenant does not intend to leave them for the landlord and Wis. Stat. § 704.05(4) permits the tenant to remove them prior to the end of the tenancy.

Tenant's Fixtures. At the termination of the tenancy, the tenant may remove any fixtures installed by the tenant if the tenant either restores the premises

to their condition prior to the installation or pays to the landlord the cost of such restoration. Where such fixtures were installed to replace similar fixtures that were part of the premises at the time of the commencement of the tenancy, and the original fixtures cannot be restored, the tenant may remove fixtures installed by the tenant only if the tenant replaces them with fixtures at least comparable in condition and value to the original fixtures. The tenant's right to remove fixtures is not lost by an extension or renewal of a lease without reservation of such right to remove.

This subsection applies to any fixtures added by the tenant for convenience as well as those added for purposes of trade, agriculture or business; but this subsection does not govern the rights of parties other than the landlord and tenant.

Common law teaches that trade fixtures are items of personal property that a tenant places or affixes to leased property for the purposes of conducting his or her business during the term of the lease. A trade fixture retains its classification as personal property to the extent that it can be removed without substantial injury to the premises. In fact, trade fixtures are generally classified as personal property for taxation purposes.

Trade fixtures are ordinarily installed or attached to the premises by the tenant for his own use and for the purpose of promoting his business, and with no intention that the trade fixtures will become a part of the premises. Certain circumstances, however, can alter that outcome.

Abandoned Trade Fixtures Become Lessor's Property

In ***Bence v. Spinato***, 196 Wis.2d 398, 538 N.W.2d 614 (Ct. App. 1995), Bence owned property that he leased to others for the operation of a car wash. Pursuant to a 1969 lease, Edick Laboratories, Inc., agreed to install all equipment necessary for the operation of a car wash and the sale of petroleum products. Spinato operated the car wash pursuant to a sublease with Edick. Spinato also entered into an installment agreement for the purchase of the car wash equipment.

The underground storage tanks (USTs) and gas pumping equipment were already installed when Spinato took occupancy of the car wash. Spinato believed that Edick either owned the USTs or had contracted with Mobil to install the USTs and then leased them from Mobil.

In 1971 Edick went bankrupt and Spinato took over the car wash equipment. Mobil stopped providing gas and removed its pumps, but not the USTs. Spinato contracted with Union 76 to provide gas and pumps, and entered into a 20-year lease with Bence for the car wash premises. In 1983 the car wash was subleased to another party who continued selling gas until 1988. The local fire department notified the sublessee that the abandoned USTs had to be removed according to Wisconsin law.

In 1991 Bence filed an action to evict Spinato and the sublessee and to recover delinquent property taxes and sewer and water bills, and the costs of removing the USTs, including environmental clean-up and site restoration expenses. The trial court awarded Bence judgment for the taxes and water and sewer bills, but denied Bence any damages for the UST removal, concluding that Bence owned the USTs. Bence appealed.

The Court of Appeals analyzed the fact that the USTs were abandoned within the context of landlord/tenant law, noting that underground fuel tanks installed by a lessee constitute trade fixtures. Trade fixtures ordinarily belong to the lessee and are removable by the tenant at the expiration of the lease term. If a lessee fails to remove the trade fixtures within a reasonable time after termination of the agreement, it is presumed under common law that the tenant has abandoned them and the fixtures become part of the property owned by the lessor. Accordingly, the Court of Appeals concluded that the USTs became Bence's property after they were abandoned by either Edick or Mobil. Bence owned the USTs and had to pay for the UST removal and clean-up.

> **REALTOR® Practice Tips:** It is important for property owners to consistently exclude tenant trade fixtures in listing contracts and other documents and always make it clear that the trade fixtures belong to the tenant, or the owners may end up being liable for another's problem.

Bill of Sale

Line 15 of the 2009 WB-5 indicates that the, "Seller shall convey the personal property by Bill of Sale, free and clear of all liens and encumbrances except: _____." The DRL commercial listing specifically requires that all personal property included in the purchase price shall be conveyed at closing by bill of sale.

A bill of sale is a document used to transfer title to personal property. The WB-25 Bill of Sale is the DRL-approved form that licensees should use for this purpose. The WB-25 warrants free and clear title to the personal property (except for any liens and encumbrances that are made exceptions). It does not, however, provide any warranties regarding the condition of the personal property. If such warranties are desired, the parties must provide for them in the contract.

Personal property that is being transferred as part of a real estate closing — all personal property included in the purchase price — should be conveyed at closing by bill of sale. If a schedule of personal property has been prepared

as part of the offer to purchase, as in a commercial offer, rental property offer or business offer, the schedule may simply be attached to the updated WB-25 and referenced at line 26.

Seller Authority to Sell (2009 Listing, Page 1)

When dealing with a company or business entity, a decision to sell an asset such as a commercial building often requires that specific procedures be followed to obtain the appropriate authorization, and may involve several individuals. The process involved will vary depending upon whether the business entity is a corporation, limited liability company (LLC), general partnership, limited partnership, or some other type of entity.

Lines 18-20 of the 2009 WB-5 provide, "SELLER AUTHORITY TO SELL: Seller represents that Seller has authority to convey the Property. If the Property's owner is an entity, Seller agrees, within ten days of the execution of this Listing, to provide Broker with a copy of documents evidencing that the sale of the Property has been properly authorized." REALTORS® should be familiar with the types of documentation that may be provided, but should never attempt to make a legal decision with regard to what documentation is or is not acceptable or appropriate. That is a decision for the title company or an attorney.

> **REALTOR® Practice Tips:** Prudent practice suggests submitting the sellers' sale authorization documentation to the title company. The title company will have to accept the authorization before it can issue a title policy on the sale of the commercial property.

Different types of legal entities have different legal requirements for the sale of real estate. In any given situation, the real estate may be the entity's major or only asset, or the company may own many properties and frequently buy and sell them.

Corporations

Wis. Stat. § 706.03(2) and (3) provide that any one officer of a corporation is authorized to sign conveyances in the corporate name, unless a different authorization appears in the corporation's articles of incorporation or in a certified corporate resolution that has been recorded with the register of deeds office in the county where the conveyance is occurring. A recorded resolution may specify by name or by title one or more persons who are authorized to execute conveyances in the name and on behalf of the corporation. The named persons do not have to be officers of the corporation. If such a corporate resolution has been recorded, the resolution overrides any other authorizations until another resolution amending or revoking the first resolution is properly adopted and recorded. Only those persons authorized in the recorded resolution may execute any conveyances on behalf of the corporation. A provision in such a recorded resolution or in the articles of incorporation may contain limitations on the officers' authority to sign, for example, "in the ordinary course of business."

With a corporation, the proper authority to sell depends on whether the sale of the property is or is not in the regular course of business. If it is part of the corporation's normal business to sell real property, Wis. Stat. § 180.1201 provides that the sale must be on the terms and conditions and for the price determined by the corporation's board of directors.

If, on the other hand, the sale is not in the regular course of business, or the sale is of all or substantially all of the corporation's assets, the sale again must be on the terms and conditions and for the price determined by the corporation's board of directors. In addition, Wis. Stat. § 180.1202 requires a resolution of the board of directors approving the proposed transaction and approval by a majority vote of the corporate shareholders. The vote is held at a shareholders' meeting that requires a minimum of 20 days' notice, so obtaining the needed approvals in this situation will take some time.

For example, if a development corporation were selling vacant lots in a subdivision, this would appear to be in the ordinary course of business. The board of directors would determine the terms of the sale. If a manufacturing company was selling its entire facility, however, one would assume that this is not in the regular course of business and that the transaction will require approval by the board of directors in a corporate resolution and by a majority vote of the shareholders.

"Substantially All" Assets Not Measured Just in Dollars

In ***Sterman v. Hornbeck***, 156 Wis. 2d 556, 457 N.W.2d 874 (Ct. App. 1990), Wisconsin Electronics Supply Co., Inc. (WES), transferred the corporate name, inventory, shop equipment, vehicles, accounts receivable, accounts payable, office equipment and leasehold improvements to Hornbeck and Deutsch (purchasers) for $300,000. WES changed its name and retained four cars, a tractor, a boat, a trailer and a motor, and $190,000 in corporate loans to Harris Sterman's two sons. One of the sons, Daniel Sterman, signed the sale documentation after representing that he was the president and sole stockholder of WES.

Harris believed that that the business had been grossly undersold. Daniel unsuccessfully tried to buy back the corporate assets. Harris and Daniel then sued to rescind the sale, Daniel alleging that his alcohol abuse rendered him incompetent at the time of the sale, but his claim was later dismissed. Harris alleged that he was a WES stockholder and that WES had sold substantially all of its assets without shareholder notice or approval in violation of Wisconsin law. The trial court found that the price was not

grossly inadequate, the fair market value was $350,000, the purchasers were bona fide and "all or substantially all" of the corporate assets were not sold. The court reasoned that while approximately $350,000 in assets were sold, $190,000 in corporate loans – roughly one-third of the corporate assets – were not sold. Harris appealed to the Court of Appeals.

The purchasers argued that the proper analysis was the quantitative inquiry engaged in by the trial court. Harris argued that the monetary standards were insufficient and that the inquiry should be a qualitative one: can the corporation meaningfully continue the corporate enterprise after the sale? The Court of Appeals noted that the phrase "substantially all" had been interpreted to mean "nearly all," and had also been found applicable to the sale of major assets that change the nature of the corporate business or purpose, or destroy the fundamental purpose for which the corporation was organized. Thus even when large sums of monetary assets are retained, the sale may still be of "substantially all" the corporate assets.

The Court of Appeals noted that WES was organized to retail electronic parts and equipment and that this purpose had been eliminated by the sale – an ongoing retail operation had been changed into a passive holder of corporate notes. Therefore the Court concluded that the sale had involved "substantially all" of the corporate assets and accordingly reversed the trial court decision.

REALTOR® Practice Tips: In determining whether "substantially all" corporate assets are transferred within the meaning of § 180.1202, more than dollar values must be considered. The determinative factor is whether the sale changes the nature of corporate activity. Prudent practice suggests that REALTORS® should leave the determination of whether "substantially all" assets are being sold to attorneys and other qualified professionals.

Limited Liability Companies

The authority of a limited liability company (LLC) to transfer its property depends on whether the LLC is member-managed or centrally managed.

Member-Managed LLC. In a member-managed LLC, Wis. Stat. § 183.0301 provides that each member is an agent of the LLC. A member may sign documents and bind the LLC if the member is apparently carrying on the ordinary course of business for the LLC, unless the member has no authority to act and the person he is dealing is aware of his lack of authority. Under § 183.0702, the property of the LLC that is held in the name of the LLC may be transferred by a conveyance executed by any member in the name of the LLC.

Centrally or Manager-Managed LLC. If one or more managers centrally manage the LLC, a member is not an agent of the LLC and cannot bind the LLC. Rather, each manager is an agent of the LLC and can execute documents and bind the LLC per § 183.0301. If there are one or more managers, property that is held in the name of the LLC may be transferred only by a conveyance executed by a manager in the name of the LLC; LLC members will have no authority to transfer title.

REALTOR® Practice Tips: It may be wise to ask for the LLC's operating agreement and/or other documents and/or other affirmative representations that authorize the member or manager to sell the real estate on behalf of the LLC.

General Partnerships

With a general partnership, prudent practice calls for documentation indicating which partner or partners are authorized to sell the real estate and execute the offer and deed.

General partnerships are different from corporations and LLCs because they do not have any organizational documents that are required to be filed with any agency or recorded with the register of deeds. Wis. Stat. § 178.06 provides that every partner

is an agent of the partnership and may execute documents, including conveyances, in the partnership name and bind the partnership, unless the partner has no actual authority to act for the partnership and the person with whom the partner is dealing knows that the partner has no such authority. On the other hand, an act of a partner that is not apparently for the purpose of carrying on the partnership's usual business does not bind the partnership unless authorized by the other partners.

Where real estate is in the partnership name, any partner may convey title to the property by a conveyance (offer, deed) executed in the partnership name. However, the partnership may recover the property under Wis. Stat. § 178.07 if the conveyance was not in the apparent usual course of the partnership's business, or if the person dealing with the partner knew that the partner was not actually authorized to act on behalf of the partnership. Authorization documentation would not be required, however, if all partners were to sign, provided it was clear who all the partners were.

Limited Partnerships

With a limited partnership, Wis. Stat. § 179.065 provides that if the real estate is in the name of the limited partnership, a general partner may convey title to the real estate unless the certificate of limited partnership (filed with the Department of Financial Institutions) indicates otherwise. Limited partners do not have this authority. Accordingly, the key authorization usually will be found in the certificate of limited partnership. If the limited partnership's real estate is not titled in the name of the limited partnership, the rules in Wis. Stat.§ 178.07 for general partnerships will apply with respect to the general partners of the limited partnership. This means that the partnership will be able to recover the property if the general partner or partners signing the conveyance were not actually authorized to do so.

Certificate of Limited Partnership the Key

In ***Wyss v. Albee***, 193 Wis. 2d 101, 532 N.W.2d 444 (1995), a seller entered into a land contract with Co-Jems Farms, an Iowa partnership. Although this was intended to be a limited partnership, a certificate of limited partnership was never filed with the Department of Financial Institutions. The two partners who signed the land contract on behalf of Co-Jems were actually limited partners who did not have authority to bind the limited partnership.

The failure to record the limited partnership certificate made the limited partners potentially liable for the land contract as general partners because the seller believed that Co-Jems was a general partnership and that the signing partners were authorized general partners. When the seller sued for the enforcement of the land contract, the seller argued that the partnership was still liable under the contract because Wis. Stat. § 178.06 states that a partner is an agent of the partnership and that a partner with apparent authority acting in the partnership name may bind the partnership. The partnership believed that they should not be bound because Wis. Stat. § 706.03 states that an agent needs express authority to bind his principal in a real estate conveyance. The Wisconsin Supreme Court held that the seller was entitled to rely upon the apparent authority of the partners per Wis. Stat. § 178.06. The Court believed that this was a better result than requiring a third party like the seller to investigate the partnership and determine who had authority to convey real estate.

Zoning (2009 Listing, Page 1)

The commercial listing contract contains an item at line 21 where the seller represents the property's zoning.

A property's value is determined largely by how it may be used. Zoning ordinances generally recognize two types of uses for property – permitted uses, which are allowed as a matter of right without any required proceedings, and conditional uses, which are discretionary and require a special permit from the community. A conditional use is designed to cope with situations in which a particular use creates special problems or hazards

if allowed to develop and locate as a matter of right. Because conditional uses are discretionary, a property owner is not guaranteed to be able to use the property for that purpose.

For example, the permitted uses in a commercial district (C1) may include office buildings, banks and clinics. Conditional uses, on the other hand, generally require the property owner to obtain a conditional-use permit (CUP) before that use is sanctioned under the zoning code. Conditional uses in a commercial district may include warehouses and bus terminals. If a use is classified as a conditional use or special exception, the landowner must first seek approval from the plan commission or other governmental authority before he or she is permitted to use the property for the desired purpose.

Additional information about zoning is found in the November 2005 *Legal Update*, "Zoning Law Developments," online at www.wra.org/LU0511.

Zoning Ordinance with No Permitted Uses Unconstitutional

In ***Town of Rhine v. Bizzell***, 2008 WI 76, the Wisconsin Supreme Court ruled that a zoning ordinance that does not permit any use of property without a conditional-use permit is unconstitutional.

Bizzell and the other members of an off-road motor vehicle club purchased an abandoned quarry in which to ride motorcycles, snowmobiles and all-terrain vehicles. The neighbors complained about the noise and tried to prevent further riding of recreational vehicles in the quarry. The town sued the property owners, citing several zoning code violations, including the fact that the property owners did not obtain a conditional-use permit authorizing their use of the property.

The Court found the zoning ordinance unconstitutional because there were no permitted uses of the property, just several conditional uses. In other words, owners of property within this zoning classification could not use their property for any purpose (recreation, hunting, etc.) unless they first applied for and obtained a conditional-use permit.

In declaring the zoning ordinance unconstitutional, the Supreme Court said, "zoning that restricts the land such that the landowner has no permitted use as a right must bear a substantial relation to the health, safety, morals or general welfare of the public in order to withstand constitutional scrutiny," which did not occur in this case. The Court noted that a more common and acceptable practice for zoning ordinances is to allow some permitted uses as a matter of right, and then to allow other uses by obtaining a conditional-use permit. Lastly, the Court stated "[n]o reasonable justification exists for such excessive government control and restriction – especially when that government control is set against land-use rights, and the control bears no substantial relation to the public health, safety, morals or general welfare."

Parking Commercial Vehicles Not Permitted By Agricultural-Residential Zoning

In ***St. Croix County v. Bettendorf*** (Ct. App. 2000), a property owner attempted to use property zoned agricultural-residential for commercial purposes. Bettendorf owns property that is zoned agricultural-residential except for a 350-foot-by-600-foot parcel zoned commercial. He operates a trucking business, including a truck repair shop and transfer point, freight trailer warehouse, parking lot and trailer staging yard, and turnaround area for semi tractor-trailer units. He parks semi trailers and allows his employees to park on the adjacent agricultural-residential property. The trial court concluded that parking these vehicles in an area not zoned for commercial use violated the zoning ordinances. Bettendorf appealed.

The Court of Appeals observed that a zoning ordinance enumerates the permitted uses within each of the districts. All other uses are necessarily prohibited. Storing or parking semi trailers and employees' vehicles on agricultural-residential property is not included in the authorized activities enumerated in the ordinance. The only reasonable construction of the ordinance is that parking and storage related to commercial operations are allowed on commercial property and not allowed on agricultural-residential property. Allowing these commercial activities to spill over onto adjacent agricultural-residential property is not allowed by the ordinance.

Zoning Variances, Nonconforming Use or Development Restrictions (2009 Listing, Page 1)

Restrictive covenants, deed restrictions and subdivision restrictions are tools to accomplish private land use or planning goals. Generally, once recorded, the restrictions run with the land in perpetuity. It is important that the seller list all known land-use and development restrictions so that they may be disclosed to prospective buyers on lines 22-25 of the WB-5, or in the Additional Provisions section or in an addendum if there is not enough room. A buyer will want to investigate whether the buyer's planned use is permitted under current restrictive covenants, deed restrictions, subdivision restrictions and other restrictions on land use and development; whether any of the restrictions can be changed or varied; or whether the buyer's plans may prove to not be feasible on the seller's property. Knowledge of all such limitations may also help the broker to more successfully market the property to the proper target audience.

Plat or subdivision restrictions are to

be strictly construed in favor of unencumbered and free use of property. Any restriction on free use must be expressed in clear and unambiguous terms. Restrictive covenants can be brief and simple or long and complicated; it depends on the planning objectives of the land developer. For example, at one end of the spectrum, it is possible through covenants to set up virtually a private municipal government by creating a neighborhood association and giving it power to police residential and other use restrictions, maintain streets, provide water or render other services, and assess charges against the benefited lots to finance the services. At the other end of the spectrum, the restriction may be only a few words long, for example, a short sentence limiting use to single-family residential use.

Common restrictions imposed by subdivision developers deal with (a) residential use; (b) setback, side-yard and backyard requirements; (c) prohibition of unattached accessory buildings; (d) prohibition of noxious uses; (e) minimum house size; and (f) architectural control requiring approval of exterior plans before construction of homes can begin. There are many others in use.

Under certain conditions recorded covenants and deed restrictions may be released if all the benefited property owners agree. For a subdivision, this would mean that all of the lot owners (and possibly others) must agree and sign a document that would be recorded to release the restriction. An owner may also claim that there has been a change in the character of the neighborhood and the restrictions no longer are enforceable, but this may require a lawsuit.

When it comes to zoning, there are procedures in place for case-by-case modifications to the zoning requirements. Sometimes a relaxation of dimensional standards such as area, height or setback, known as an area variance, may be required to protect private property rights, while at the same time continuing to protect public interests. Local boards of adjustment (boards of appeals in cities and villages) grant variances on a case-by-case basis. A variance allows an owner to use the land in a manner not permitted by the current zoning ordinance when the ordinance itself has created the problem and the applicant can show hardship. The variance cannot conflict with the purpose of the zoning ordinance and should not be granted in cases where the proposed use would be detrimental to the neighborhood. Variances will usually specify exactly how the land can be developed.

Area Variance Standards

In ***Town of Bass Lake v. Sawyer County Bd. of Appeals*** (Ct. App. 2004), the town of Bass Lake appealed circuit court judgments upholding variances granted to two applicants. The Board of Adjustment granted variances allowing the applicants to remove dilapidated buildings and replace them with new buildings that violated the lot size and setback restrictions contained in the Sawyer County Zoning Ordinances. The town argued that the applicants failed to prove that there was "no reasonable use" of the land without a variance, that the property was unique and that the variance was not contrary to the public interest.

Upon appeal, the Court of Appeals noted that after the parties filed their briefs in this appeal, the Wisconsin Supreme Court issued two decisions that significantly impact the law relative to variances. In ***Ziervogel v. Washington County Bd. of Adj.***, 2004 WI 23, the Court concluded that the "no reasonable use of the property" standard for unnecessary hardship no longer applies to area variances. Instead the applicant must establish a hardship that is unique to the property rather than the property owner and that is not self-created. In ***State v. Waushara County Bd. of Adj.***, 2004 WI 56, the Court indicated that the board's decision is presumed correct and the reviewing court should focus on the purpose of the zoning ordinance. The facts should be analyzed in light of the purpose and the board must be afforded enough flexibility to appropriately exercise its discretion. The board's decision should be overruled by the reviewing court only if it is unreasonable or irrational.

In the ***Town of Bass Lake*** case the Court upheld the Board of Adjustment decision to grant the variances because it was not unreasonable or irrational. The Court observed that properties are very small and irregularly shaped and subject to setback restrictions from each direction that would prohibit building any reasonably sized structure. These conditions are unique to the property rather than the owners and are not self-created.

The purpose of the ordinance was primarily to promote aesthetics. Because the dilapidated buildings could not be substantially repaired without expending more than 50 percent of the structures' current estimated fair market value, which is prohibited under Sawyer County Wis. Zoning Code § 10.21 (2003), the buildings would remain dilapidated unless the variances were granted. The new buildings would improve the appearance of the area, increase the property values and tax assessments, and, in one case, would be set back further from the lake and a public easement. Accordingly, the Court concluded that the variances are beneficial to the public interest.

Commission (2009 Listing, Pages 1-2)

The overall structure and substance of the commission section in the 2009 listing remain unchanged. The first line of the section is improved and simplified by simply stating, "Broker's commission shall be ____," leaving to

the broker whether to state a percentage of the purchase price, a set amount or other compensation description. For example, a listing broker offering variable-rate commissions must specify the commission structure in the listing contract and disclose this information pursuant to the Code of Ethics, Standard of Practice 3-4. To illustrate, a broker might take a listing with a 3-percent commission for an in-house sale and a 5-percent commission for a co-broke sale.

Once a commission has been fairly set, a buyer is found and an offer is accepted, the listing broker plans for a successful closing. The broker, however, also may wish to take steps to ensure that the commission established on lines 54-63 of the 2009 WB-5 will be paid at closing. One way of doing this is to lay the groundwork for a commercial commission lien per Wis. Stat. § 779.32.

Commercial Commission Lien

A broker lien is used in a commercial sale transaction to secure the listing broker's commission. The lien is not available for residential properties with less than nine units or properties zoned residential or agricultural. Thus, a broker lien could be used with a WB-5 Commercial Listing Contract, a WB-6 Business Listing Contract, a WB-3 Vacant Land Listing Contract (if the land is not zoned for residential or agricultural purposes) or a WB-1 Residential Listing Contract (if the property contains nine or more units).

Sample Fact Situation: Sale of a Commercial Warehouse

On November 1, 2009, Broker C enters into a WB-5 Commercial Listing Contract with Seller W to sell her commercial warehouse facility. The warehouse is listed for $1,650,000, and the broker's commission is 5 percent.

The broker's commission is earned, per the 2009 WB-5, if during the term of the listing (1) the seller sells or accepts an offer that creates an enforceable contract for the sale of all or any part of the property, (2) the seller grants an option to purchase all or any part of the property that is subsequently exercised, (3) the seller exchanges or enters into a binding exchange agreement for all or any part of the property, (4) a transaction occurs that causes an effective change in the ownership or control of all or any part of the property or (5) a buyer is procured at no less than the price and on substantially the same terms and conditions set forth in the WB-5 and in the standard provisions of the WB-15 Commercial Offer, even if the seller does not accept the offer. Once earned, the commission is due and payable in full at the earlier of closing or the date set for closing.

Seller W enters into a WB-15 Commercial Offer to Purchase with Buyer A for $1,585,000 on March 14, 2010. The closing is scheduled for June 1, 2010. The financing and environmental evaluation contingencies in the offer have a deadline of May 14, 2010.

Wis. Stat. § 779.32 provides that if a listing broker has earned a commission under a written commercial real estate listing contract, the listing broker will have an effective commercial commission lien if (1) the broker files or records a Notice of Intent to Claim Broker Lien, (2) the broker files the Notice of Broker Lien, (3) the commission is earned and (4) the commission is due. The commission need not be earned at the time when the Notice of Broker Lien is filed.

Notice of Intent to Claim Broker Lien for Listing Broker

The first step in establishing a broker lien for Broker C is to file or record a Notice of Intent to Claim Broker Lien at the office of the register of deeds. A completed copy of the form also must be delivered to the seller at least 30 days before the conveyance (at least 30 days before closing). Broker C must file or record a Notice of Intent with the register of deeds and deliver a copy to Seller W no later than May 2, 2010 (30 days before June 1). In the event that there is any chance of an early closing, the Notice of Intent to File Broker Lien should be filed even earlier.

When completing the Notice of Intent to Claim Broker Lien, Broker C uses the WRA Notice of Intent to Claim Broker Lien form. Broker C fills in her company name as the Broker Lien Claimant, the date of the WB-5 listing (November 1, 2009) as the Date of the Agreement and the other requested information. Broker C signs and dates the form before a notary, makes copies of the completed form, files or records the original with the register of deeds and delivers a copy to Seller W.

Notice of Broker Lien for Listing Broker

The next step is to perfect the lien by filing a Notice of Broker Lien with the register of deeds. Broker C again chooses the WRA form. This is a bit tricky because the Notice of Broker Lien must be filed at the office of the register of deeds at least three days before the documents conveying the warehouse are recorded (at least three days before closing) and a copy of the form must be mailed to the seller within 72 hours after the form is filed. So Broker C must file a Notice of Broker Lien with the register of deeds no later than May 29, 2010, and mail a copy to Seller W within 72 hours of the filing.

When completing the Notice of Broker Lien, Broker C again fills in her company name as the Broker Lien Claimant, the date of the WB-5 (November 1, 2009) and the other requested identifying information. Broker C also fills in $79,250 ($1,585,000 x 5 percent) as the amount of the commission secured by the broker lien. Broker C must also fill in the dates when the Notice of Intent to Claim Broker Lien was delivered to Seller W and filed or recorded with the register of deeds, as well as any

document number that was assigned to the Notice of Intent by the register of deeds. Once the form is signed and notarized, Broker C can make copies, file the original form with the register of deeds and mail a copy to Seller W.

Listing Broker's Commission Earned and Due

Note that the broker's commission is not earned until the accepted offer creates an enforceable contract, per line 56 of the 2009 WB-5. The term "enforceable contract" has been problematic because different cases, judges and attorneys interpret this phrase in different ways. There are Wisconsin cases that indicate that a contract like an offer to purchase is not enforceable if there is an unresolved condition or contingency. However, there are also cases that discuss whether a contract is enforceable in terms of whether there are specific, definite contract terms, whether the statute of frauds was violated, etc. Because of all of these different directions that courts may take, the WRA Forms Committee and the DRL Real Estate Contractual Forms Advisory Committee discussed whether the listing might say something other than "enforceable contract" to clarify whether the standard is an enforceable contract with no unresolved conditions and contingencies, an accepted offer with all essential terms stated in a definite manner or something else. The DRL, however, decided to leave the term as is and leave it to the courts to determine what is required for an "enforceable contract" on a case-by-case basis.

Thus it is possible that the broker does not earn his or her commission until closing if there are contingencies that are being satisfied and removed at the last minute. Buyer A, however, drafted his offer using specific, definite provisions and removed all of his contingencies by May 14, 2010, so Broker C's $79,250 commission was earned at that time. The commission is due to Broker C at closing, so that is when the commission lien becomes effective.

Seller Payment of Listing Broker's Commission

A Notice of Intent to Claim Broker's Lien filed or recorded 30 days before closing should appear on the title commitment for the warehouse. The Notice of Lien will be indexed by the register of deeds under Seller W's name or the legal description of the warehouse. Consequently, Seller W will want to pay Broker C's commission at closing to remove any broker's lien from the title. If so, Broker C is obligated to execute and deliver a satisfaction of lien to Seller W. Broker C completes the WRA Satisfaction of Broker Lien form and delivers it to Seller W within 30 days of the earlier of Seller W's request for the satisfaction or Broker C's receipt of the full commission due. Broker C has until July 1, 2010, assuming that the commission was paid or the satisfaction was requested on June 1, 2010.

For more information about commercial commission liens, see the WRA's *Legal Update 98.09*, online at www.wra.org/LU9809. In addition, *Legal Update 98.09*, "Using Commercial Commission Lien and Lease Listing Forms," online at www.wra.org/LU9809, provides additional pointers regarding the broker commission lien process. The WRA broker lien forms are available from the WRA or on Zipform.

Condition of Title and Title Evidence

The Condition of Title and Title Evidence sections from the 2000 listing do not appear in the 2009 listing. It was determined that the listing contract is not the document where such issues should be addressed; this is a matter for the offer to purchase.

REALTOR® Practice Tips: While the WB-5 no longer requires the seller to list exceptions to title, that does not mean that the listing broker should still not immediately seek information about the title of the listed property by ordering a "search and hold" or title report from the title company, and by asking the seller to complete a title issues questionnaire similar to the "Listing Questionnaire Regarding Title Issues," found online at www.wra.org/LU0309, and discussed in the February 2004 *Legal Update*, "Listing Procedures for the Prudent Broker," online at www.wra.org/LU0402.

Seller's Disclosure Report (2009 Listing, Page 4)

This provision provides, "Wisconsin Administrative Code Chapter RL 24 requires listing brokers to make inquiries of the Seller on the condition of the Property and to request that Seller provide a written response to Broker's inquiry. Seller agrees to complete a seller's disclosure report to the best of Seller's knowledge. Seller agrees to amend the report should Seller learn of any defect(s) after completion of the report but before acceptance of a buyer's offer to purchase. Seller authorizes Broker to distribute the report to all interested parties and their agents inquiring about the Property and acknowledges that Broker has a duty to disclose all material adverse facts as required by law."

The seller's agreement to complete "a seller's disclosure report" is important because this is the only property condition disclosure that the seller is asked to make in the WB-5. With commercial property, no Wis. Stat. Chapter 709 residential RECR is required, but Wis. Admin. Code § RL 24.07(1)(b) still requires listing brokers to ask the seller about the property and to provide his or her answers in writing. A condition report like the CR nicely fits the bill. The seller also agrees to amend the CR if he or she learns of any additional defects before the offer is accepted.

While the provision no longer requires

the seller to complete the report provided by the listing broker, as was the case in the 2000 listing, that does not mean that REALTORS® should not make every effort to be ready to hand the seller the CR or whatever other condition report the listing broker would like the seller to use.

> **REALTOR® Practice Tips:** REALTORS® should be ready to provide the seller with copies of their preferred seller's condition report at the listing appointment. Brokers may wish to establish this requirement as a matter of office policy to try to avoid situations where this form is forgotten or overlooked.

Seller Representations Regarding Defects (2009 Listing, Page 4)

The Seller Representations Regarding Defects section on lines 242-246 provides, "Seller represents to Broker that as of the date of this Listing, if a seller's disclosure report or other form of written response to Broker's inquiry regarding the condition of the Property has been made by the Seller, the Seller has no notice or knowledge of any defects affecting the Property other than those noted on Seller's disclosure report or written response. WARNING: IF SELLER REPRESENTATIONS ARE INCORRECT OR INCOMPLETE, SELLER MAY BE LIABLE FOR DAMAGES AND COSTS." The seller thus represents that whatever is disclosed on any CR or other disclosure report that the seller completes for the listing broker is the full extent of the defects about which the seller knows or of which the seller is aware.

> **REALTOR® Practice Tips:** REALTORS® may use the updated WRA Seller Disclosure Report – Commercial (CR). The CR is discussed in detail beginning on Page 12 of this *Update*.

Broker Duties Regarding Property Condition Disclosures

A seller who does not make property condition disclosures increases the burden on the listing broker. The listing broker must still inspect the property and ask the seller about "the condition of the structure, mechanical systems and other relevant aspects of the property as applicable," and request a written response from the seller.

- Wis. Admin. Code § RL 24.07(1)(a) provides: "A licensee, when engaging in real estate practice which involves real estate improved with a structure, shall conduct a reasonably competent and diligent inspection of accessible areas of the structure and immediately surrounding areas of the property to detect observable, material adverse facts. A licensee, when engaging in real estate practice which involves vacant land, shall, if the vacant land is accessible, conduct a reasonably competent and diligent inspection of the vacant land to detect observable material adverse facts."
- § RL 24.07(1)(d) provides: "A reasonably competent and diligent inspection of real estate improved with a structure does not require the operation of mechanical equipment; the opening of panels, doors or covers for access to mechanical systems; or the moving of furniture, boxes or other property; nor does it require a licensee to observe areas of the property for which entry presents an unreasonable risk of injury or areas accessible only by ladder, by crawling or other equivalent means of access. A licensee is not required to retain third party inspectors or investigators to complete a reasonably competent and diligent inspection. A reasonably competent and diligent inspection of vacant land does not require an observation of the entire property, but shall include, if given access, an observation of the property from at least one point on or adjacent to the property."
- § RL 24.07(1)(b) provides: "Listing broker. When listing real estate and prior to execution of the listing contract, a licensee shall inspect the real estate as required by sub. (1), and shall make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property as applicable. The licensee shall request that the seller provide a written response to the licensee's inquiry."

If the seller declines to provide written information, the listing broker will be left to disclose material adverse facts in writing to buyers based upon what the broker observes and what the seller says.

WRA Seller Disclosure Report – Commercial

The *Update* now turns to a brief review of the updated WRA Seller Disclosure Report – Commercial (CR), intended for use together with the updated commercial listing. The CR is not a Wis. Stat. § 709.02 RECR for real property including one to four dwelling units. Instead, the CR addresses issues that have been listed on prior versions of the WB-5 commercial listing as "conditions affecting the property or transaction," and has been supplemented to bring in additional general disclosure items pertinent to the purchase of commercial property. Since commercial property entails such a diverse range of property types, the CR attempts to address important disclosure areas in a general manner rather than address the specifics in every conceivable commercial property type. REALTORS® may wish to use supplementary disclosure reports specific to property type where available.

This is not a DRL-approved form. It is a helpful and useful optional form that facilitates a listing broker's fulfillment of his or her commercial inspection and seller inquiry obligations, and fulfills the seller's promise made in the Seller's Disclosure Report section in the WB-5 to

complete a seller's disclosure report.

A sample copy of the updated CR appears on Pages 25-26 of this *Update*.

The following discussion overviews some of the commercial-related items in the CR that were not discussed relative to the Farm RECR in the September 2008 *Legal Update*, "WB-2 Farm Listing and Farm Real Estate Condition Report – 2008 Revisions," online at www.wra.org/LU0809, or the Seller Disclosure Report – Vacant Land (VLR) in the November 2008 *Legal Update*, "WB-3 Vacant Land Listing and Seller Disclosure Report – 2008 Revisions," online at www.wra.org/LU0811. The Farm RECR, the VLR and the CR share many items in common.

The CR begins with a recitation of the following information:

1. **Licensee Duty to Inspect and Ask Seller for Written Information about the Property:** Wis. Admin. Code § RL 24.07(1)(a) requires listing brokers to inspect the property and to "make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property. The licensee shall request that the seller provide a written response to the licensee's inquiry."

2. **Licensee Duty to Disclose Material Adverse Facts:** Wis. Admin. Code § RL 24.07(2) requires listing brokers to disclose all material adverse facts discovered in Broker's inspection or disclosed by Owner, in writing, in a timely manner, to all parties.

3. **Purpose of Owner's Representations:** The owner's statements are a representation of the owner's knowledge of the property condition. The CR is not a property condition warranty by the owner or any agent of the owner, nor is it a substitute for any inspections or testing the buyer may wish to have done. A buyer may, however, rely upon this information in deciding whether or not, or upon what terms, to purchase the property.

4. **Defect Defined:** "Defect" means a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that, if not repaired, removed or replaced, would significantly shorten or adversely affect the expected normal life of the premises.

5. **Instructions:** In response to the question of whether the owner is aware of any of the numbered items on the property, the owner is to circle "yes," "no" or "unsure," and explain all "yes" and "unsure" answers on blank lines on the second page.

REALTORS® all know that defects such as chemical contamination or health hazards on a property must be disclosed by the seller in the CR. If the seller fails to do so and this is known to the real estate broker, the broker must disclose this as a material adverse fact or information suggesting the possibility of a material adverse fact.

Item 4

A Defect or Contamination Caused by Unsafe Concentrations of, or Unsafe Conditions Relating to, Lead Paint, Asbestos, Radon, Radium in Water Supplies, Mold, Pesticides or other Potentially Hazardous or Toxic Substances on the Premises

In ***State v. Chrysler Outboard Corp.***, 219 Wis.2d 130, 580 N.W.2d 203 (1998), the state of Wisconsin sued a manufacturer of outboard marine engines under the Solid Waste Law (see Wis. Stat. § 289.05 and related provisions) and the Spill Law (Wis. Stat. § 292.11) for the dumping of manufacturing waste.

Chrysler owned and operated an outboard marine engine manufacturing plant in Hartford, Wisconsin, from 1965 to 1984. The manufacturing process generated waste paints, oils and solvents, some of which contained hazardous substances. For approximately six months in 1970, Chrysler contracted with a construction and demolition business to remove the waste, contained in 55-gallon drums, from the Hartford plant for disposal. The waste was hauled to a disposal site where the disposal business dumped the drums and other rubbish and covered the area with fill. The drums were discovered in 1992. Testing revealed that the hazardous wastes from the drums discharged into the ground, resulting in a plume of groundwater chlorinated solvent contamination at least one-half mile long.

The Spill Law, in Wis. Stat. § 292.11(3), provides that, "Persons having possession of or control over a hazardous substance being discharged, or who cause a hazardous discharge, shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from any discharge to the air, lands or waters of this state."

Chrysler argued that the Spills Law did not apply to them based on the court's decision in ***State v. Mauthe***, 123 Wis.2d 288, 366 N.W.2d 871 (1985). In that case the Department of Natural Resources discovered hazardous substance spills near the site that had been used by Wisconsin Chromium Corporation for chrome electroplating. Tests at and adjacent to the site revealed extensive hexavalent chromium contamination of the soil and groundwater. The court rejected the argument that the Spills Law definition of "discharge" required some kind of human activity that results in contaminant seepage. The court concluded that "discharge" encompasses inactive waste sites from which hazardous substances are flowing, and that although he did not cause the hazardous substance spill, the property owner, Mauthe, could be held responsible for remediation of the spill because he owned the property where contamination was occurring. Chrysler contends that the rationale of ***Mauthe*** does not apply

to Chrysler since Mauthe had actual possession or control of the land while Chrysler has never owned, possessed or controlled their disposal site.

The court disagreed because the Spill Law imposes liability on "[p]ersons having possession of or control over a hazardous substance being discharged, *or who cause a hazardous discharge* ...." (emphasis added). The state does not seek remediation and penalties from Chrysler because it possessed or controlled the hazardous substance after 1978, but because Chrysler caused a hazardous discharge after the Spills Law took effect.

Accordingly, Chrysler was compelled to complete remediation of their disposal site, conduct an investigation to determine the location of any and all other unlicensed sites in Wisconsin at which its solid and hazardous wastes from its Hartford, Wisconsin, plant were disposed and to submit both the results of that investigation and, if necessary, a remediation plan, to the DNR.

DNR Spills Web page: http://dnr.wi.gov/org/aw/rr/spills/index.htm#fact

Clean-up Process for contaminated soils and groundwater: http://dnr.wi.gov/org/aw/rr/cleanup/index.htm

Item 7

Special Purpose District, Such as a Drainage District, that Has the Authority to Impose Assessments Against the Real Property Located within the District

A *Real Estate Disclosure Statements and Drainage Districts* information handout, including a map of the counties where drainage districts are found, is now available online at www.datcp.state.wi.us/arm/agriculture/land-water/ag-impact-stmts/pdf/DrainageDistrictInfoSheet.pdf.

Item 12

Near Airports, Freeways, Railroads or Landfills, or Significant Odor, Noise, Water Intrusion or Other Irritants Emanating from Neighboring Property

Damages for Airport Noise

In ***Krueger v. Mitchell***, 112 Wis. 2d 88, 332 N.W.2d 733 (1983), a lawn and garden supply and equipment store was located across the road from an airport that originally had only grass runways. The airport decided to install a longer paved runway for safety reasons. The new runway, however, altered the flight paths of airplanes using the airport so that they would fly directly over the store. The storeowner sued the airport to stop construction on the basis that the paved runway would create a nuisance because of the increased noise. When the storeowner's attempt for an injunction blocking construction of the paved runway failed, he amended his complaint to request monetary damages for the annoyance, inconvenience and discomfort caused by the airplane noise. The storeowner was awarded $500 for past injury and $2,500 for future injury. The airport appealed to the Court of Appeals, which affirmed the trial court's decision. The airport then appealed to the Wisconsin Supreme Court.

The court first examined federal aviation law and concluded that while federal law preempted the ability of a state or local government to regulate airplane noise, a nuisance action was still permissible if brought by local citizens. Airport owners are responsible for controlling the noise level of the airport with respect to the local needs of the surrounding community. The owner must obtain noise easements and take other measures to regulate aircraft noise or be subject to nuisance actions. The appropriate remedy in such actions, however, is limited to monetary damages; it would violate federal aviation law if a private party were allowed to obtain injunctions to abate aircraft noise nuisances. Thus, the Court held that an airport that unreasonably interferes with the use and enjoyment of adjacent property can constitute a nuisance, even though the airport is operating in conformance with federal and state law; the monetary damages were affirmed.

Surface Water Trespass

In ***State v. Deetz***, 66 Wis. 2d 407, 224 N.W.2d 407 (1974), developers were platting and developing a residential area on the top of a bluff. The subdivision development, including the grading and construction of roads, caused erosion and runoff, which in turn caused sand to wash down the bluff. The resulting silting was so substantial that it created several sand deltas, one of which was over 6,000 square feet. Property owners below the bluff could no longer launch their boats or fish in the area. The construction of the roads at the subdivision site resulted in the flow of surface waters that carried away earth and sand from the top of the bluff to the lakefront property below and to the lake.

This case marked the end of the "common enemy rule" in Wisconsin. Under this doctrine, surface water is considered to be the common enemy that each landowner may fight off or control as he or she pleases – by retention, diversion, repulsion or altered transmission – regardless of the harm or damage that this may cause to others. The Wisconsin Supreme Court instead adopted the reasonable use test. Under the reasonable use test, each landowner is legally privileged to make a reasonable use of his or her land, even if the flow of surface waters is altered and causes some harm to others, but the landowner is liable if the interference with the flow of surface waters is unreasonable. In other words, a landowner has no absolute and unlimited right to change the essential natural character of his land so as to use it for an unnatural purpose that injures the rights of others.

Non-trespassory invasions of a person's interest in the use and enjoyment

of land resulting from another's interference with the flow of surface water may subject the interfering party to liability when the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

The Court observed that the conduct of Deetz continued after they had the knowledge of the consequences of that conduct, so the invasion was found to be intentional. Liability, however, can be imposed only if such intentional conduct is unreasonable. An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the gravity of the harm outweighs the utility of the actor's conduct. In evaluating the conduct in this case, the Court observed that extensive deltas have been formed, the erosion was continuing, and portions of the lakefront and the adjacent waters could no longer be used for swimming, fishing and boating. There was physical damage to the lake, to the roadway and to the below-bluff lands, and the social value associated with those resources was substantial. The burden on the state of Wisconsin, as the trustee of the public trust, and on the private landowners to avoid the harm occasioned by the erosion was substantial.

Thus, the Court found that the harm was very grave, but the gravity of the harm must be weighed against the utility of Deetz' conduct. Land improvement and development have a high social utility for the general welfare. Accordingly, the case was remanded for further proceedings so that the defendants could submit evidence on the social utility of their conduct.

Item 14

Governmental Investigation or Private Assessment/Audit (of Environmental Matters) Being Conducted – When and by Whom

A Phase I Environmental Assessment is an assessment of a site to identify all potential or known areas of environmental contamination. This assessment may include, but is not limited to, reviewing records, interviewing persons and conducting inspections of the site. A Phase II Environmental Assessment is an assessment conducted to physically confirm the presence or absence of environmental contamination in all potential or known areas identified in the Phase I Assessment. The Phase II does not determine the nature and extent of contamination. This assessment may include, but is not limited to, field sampling of media, laboratory analysis of samples and visual confirmation of environmental contamination of the site.

A Phase I identifies environmental conditions of a property, including sources of potential contamination, through an "above ground" assessment, without conducting an intrusive investigation into subsurface soils or groundwater. By comparison, a Phase II environmental investigation consists of a "below ground" investigation such as soil borings and monitoring wells.

Elements of a Phase I

1. **Records review.** A records review is essentially an examination of lists compiled by government agencies that detail environmental hazards. The records are reviewed to determine if the property – or its neighbors – are identified on the lists as having a reported environmental condition.

2. **History of the activities conducted at the property and in the surrounding area.** The history is intended to reveal, for example, whether a gas station or chemical company occupied the property in decades past. A title search or abstracts are often used to provide site history, as well as aerial photographs, fire insurance maps, property tax files, United States Geologic Survey topographic maps and zoning or land use records.

3. **Site visit.** A site visit includes a visual and physical inspection of the property and the interior and exterior of any structures on the property. Information that should be documented includes:

- Factors that limit the inspection such as bodies of water, adjacent buildings, asphalt or other paved areas, and limiting weather conditions.
- Current and past uses at the property, at adjoining properties and in the surrounding area. The type and quantity of hazardous substances treated, used, stored, disposed of or generated should be documented.
- Soil, surface and ground water, and site elevation and slope conditions.
- The drinking water supply and sewage disposal system.
- Aboveground and underground storage tanks, including the content, capacity and age, and associated piping.
- Strong, pungent or noxious odors.
- Pools of liquid.
- Drums, hazardous substance and petroleum product containers, unidentified substance containers and PCB containing electrical or hydraulic equipment.
- The heating and cooling system and related fuel source.
- Stained or corroded pavement or soil.
- Stressed vegetation.
- Drains and sumps.
- Possible waste disposal locations.
- Wastewater and other discharges to a drain, ditch or stream.
- All wells (dry wells, irrigation wells, injection wells, abandoned wells, etc.).

4. **Interviews.** Interviews help compile information about current and past activities at the property and at surrounding properties. Current

and prior owners, key managers and employees, occupants, the local fire department, the local health agency and the local agency having jurisdiction over environmental matters in the area typically are interviewed.

5. **Preparation of the Phase I report.** The report should identify the environmental professional who conducted the Phase I; contain the information obtained from the records review, history, interviews and the site visit; and conclude with the author's findings and recommendations.

The Phase I environmental audit is often required in larger commercial transactions. Depending on the results of the Phase I audit, the prospective parties to the transaction may decide to do further testing. If, for example, the Phase I audit discloses any prior use that is known to be hazardous – for example, the property was once used for a gas station, a machine shop or a dry cleaner – then the parties will typically engage a contractor for a Phase II audit. If the Phase II audit discloses a problem, the problem generally must be removed or remediated before closing.

Item 17

A Structure on the Property Designated as a Historic Building, any Part of the Property Located in a Historic District, or Burial Sites or Archeological Artifacts on the Property

While it may seem that commercial transactions may not often involve historic properties, Wis. Stat. § 452.05(1m) (b) requires that the DRL prepare the commercial offer to purchase form to include a statement in which the seller represents to the buyer that the seller has no notice or knowledge that the commercial real property is a historic building. "Historic building" means a building that fulfills at least one of the following requirements:

a. Is listed on a certified local register of historic property, if that fact is specified in a statement recorded in the office of the register of deeds for the county in which the commercial real estate is located.

b. Is included in a district that is listed on a certified local register of historic property, if that fact is specified in a statement recorded in the office of the register of deeds for the county in which the commercial real estate is located, and has been determined by the city, village, town or county to contribute to the historic significance of the district.

Additional resources regarding historic buildings are available on the State Historical Society Web site at www.wisconsinhistory.org/hp/buildings/.

Hotline Questions and Answers – Commercial Property

The listing agent had a $3.4 million exclusive commercial listing with no named exceptions. The listing agent obtained a full-price, cash offer during the listing term. The only condition in the offer was that the buyer would deposit earnest money into the broker's trust account upon satisfactory review of the condition report. Does the seller owe the listing broker a commission?

Because the offer was conditional and unenforceable as drafted, the listing broker did not earn a commission upon procurement. Because an offer was submitted during the term of the listing contract, the broker still has an opportunity to earn a commission during the listing protection period. This situation emphasizes two basic rules of real estate practice. First, get a condition report prior to signing the listing. Each DRL-approved listing contract contains language that calls for the seller to complete a condition report prior to signing the listing. Secondly, any offer that contains a contingency with a standard based upon the "satisfaction" of one of the parties will likely be considered ambiguous by the courts and cause the entire contract to be found unenforceable.

When is the commission earned on a commercial lease/option?

Line 59 of the 2009 WB-5 Commercial Listing Contract provides that commission will be earned when "a transaction occurs which causes an effective change in ownership or control of all or any part of the Property." Once earned, the commission is due and payable upon closing or the date set for closing, whichever is earlier, as stated on lines 68-69. If signing a lease would effectively transfer control of the property, the commission may be earned at that time, depending upon the lease terms and conditions. If the commercial lease effectively gives control to the tenant, then the commission arguably may be due at the closing of the lease/option.

If the seller merely gave a WB-24 option to purchase the property without any lease, the commission will not be earned until the option is exercised, per line 57. Licensees may wish to alter that language or amend the listing contract if the option period is extensive.

If an agent submits an offer for a commercial building listed by a commercial broker, but the property is not on the MLS, is the agent eligible to receive a commission?

If a property is not listed on the MLS, the cooperating broker will need to determine if there is an offer of compensation made by the listing broker to the cooperating company. An offer of compensation may be made via the MLS, by policy letter or by a separate commission agreement negotiated on a transaction-by-transaction basis. It is prudent to have any commission agreement documented, in writing, including the terms and conditions of the offer of compensation and the standard of performance to earn the commission. See *Legal Update 02.01*, "Getting Paid Outside the MLS," online at www.wra.org/LU0201,

for more information about commissions in non-MLS transactions.

What are the current guidelines for referrals to non-licensees? Is the standard for referrals any different for a commercial transaction versus residential?

Fee splitting for referrals to non-party, non-licensees is illegal. Wis. Stat. § 452.19 limits the payment of referral fees, finder fees and commission splits to Wisconsin licensees or persons lawfully and regularly engaged in real estate brokerage in another state. However, incentives may be offered to sellers and/or buyers provided they are documented properly prior to closing. The parties must have a clear, thorough, advance understanding of all the terms and conditions of the incentives. Such incentives may be offered in any amount in order to induce the buyers and sellers to purchase or sell. The same standards apply to both residential and commercial transactions.

An agent had a commercial listing contract with the seller. During the term of the listing, the agent presented an offer to the seller, which he accepted. The transaction did not close and the listing expired. During the year following expiration the property was sold to an LLC of which the previous buyer is a member. If the buyer is now with the LLC, is the LLC a protected buyer?

Buyers may be protected for listing protection in one of four ways. If (1) the buyer submitted a written offer to purchase or (2) negotiated directly with the seller, the listing protection is automatic and the first listing broker would not have been required to perform any additional steps to protect the buyer for the override period. If, during the term of the listing, (3) the buyer attended an individual showing or (4) negotiated with a broker, the buyer will be protected only if the listing broker delivered the buyer's name to the seller no later than three days after the expiration of the first listing contract. "Negotiated," for these purposes, means that the buyer discussed the potential terms upon which the buyer might acquire an interest in the property.

If the buyer were protected under the first listing, the first listing broker would have, in essence, a one-party listing for the protected buyer during the one-year override period. Any offer the buyer writes, accordingly, is to be presented to the seller by the first listing broker. The first listing broker would earn the listing commission if this offer is accepted and closes. See Pages 8-10 of the February 2004 *Legal Update*, "Listing Procedures for the Prudent Broker," online at www.wra.org/LU0402, for further discussion of listing protection issues.

Under lines 74-78 and lines 214-223 of the 2009 WB-5 Commercial Listing, the listing term is extended for a period of one year for any buyer who personally, or through any person acting for such buyer, either negotiated to acquire an interest in the Property or submitted a written offer to purchase, exchange or option during the term of the listing (protected buyer). Therefore, the previous listing broker has an argument that the LLC, even though initially acting through the previous buyer, is the listing broker's protected buyer and a commission is due per the terms of their original listing contract.

An agent has an opportunity to list a commercial office space property that is part of a condominium building. Condominium association fees are charged on a monthly basis. Should the agent list this on a commercial listing contract or a condominium listing contract? Also, the owner would also entertain leasing. Will this affect which contract the agent should use?

There is no mandatory form when a property falls between classifications. The agent should review both listing agreements and choose the one that best fits the listing of that property and incorporate any relevant parts of the other listing contract on an as-needed basis. The agent could do this in an addendum.

The agent should also address the leasing issue in the listing agreement, especially including how the agent will be compensated for an executed lease, as well as any additional marketing efforts needed for attracting that type of tenant. The agent may wish to review the WB-37 lease listing contract for relevant language; a lease listing is definitely required before a broker may be compensated for securing a lease for the owner.

A broker has a commercial listing and a buyer wants the broker to write an offer on the property. If the buyer does not want the seller to know who he is, what is the proper way to put a buyer's name on the contract without disclosing his identity? At what point in the transaction is the buyer's name disclosed?

Under the general principles of agency law, an agent can act for an unidentified principal. In such cases, it is generally inferred that both the agent and the unidentified principal are parties to the contract. The agent and the other party, however, can agree in the contract that the unidentified principal is the real party. This would arguably permit a buyer's agent, upon proper authorization from the buyer in a power of attorney or some other written format, to execute an offer to purchase on behalf of the buyer who would be referenced only as the unidentified principal.

Wis. Stat. §§ 706.02 and 706.03, however, cast substantial doubt on whether this practice would be valid in Wisconsin. Wis. Stat. § 706.03(1) states that, "A conveyance signed by one purporting to act as agent for another shall be ineffective as

against the purported principal unless such agent was expressly authorized, and unless the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgment."

The Wisconsin courts have interpreted this to require that the authorizing principal must be identified in the text of the offer, deed or other conveyance, or in the signature block or acknowledgment section of the conveyance. Wis. Stat. § 706.02(1) also requires that all parties be identified in order for a conveyance such as an offer or deed to be valid. Consequently, an agent who signs an offer as "agent for unidentified principal" risks being held personally liable on the contract. In other words, if the buyer skips to Rio, the agent becomes the proud new owner of the property. There also is a risk that the contract will be found invalid for lack of mutuality, that is, there is no real buyer who is entering into an agreement with the seller. The buyer may then lose the property.

Alternatively, the buyer could find a person to enter into an offer as "straw man and/or assigns." At closing, the offer could be assigned to the buyer who would then take title in his or her own name. The straw man and the buyer may wish to have an underlying agreement stating the straw man's promise to assign the offer to the buyer at closing and perhaps the buyer's promise to protect the straw man from liability.

A second alternative is for the straw man to enter into an offer to purchase in his or her own name and then enter into a second offer to purchase whereby he or she would deed the property to the buyer immediately following the closing with the seller. In both of these alternatives, it generally is not advisable for the agent to be the straw man because there is a substantial risk of liability. The straw man may be forced to purchase the property even if the buyer has backed out of the deal. If the buyer is willing to reveal his or her identity after the seller accepts the offer, a purchase offer may be written with the buyer to be named upon the seller's acceptance. Another idea is to draft an offer to sell with the seller signing first without knowing the buyer's identify. In these cases, the agent could draft these offers as a subagent under the new agency law's confidentiality provisions. A buyer agency would not be necessary.

A subagent or selling agent may proceed to try to write an offer for this buyer without disclosing the buyer's identity. Pursuant to agency law, a buyer working with a selling agent or a subagent may list his or her identity as confidential information. The broker is then obligated to abide by this confidentiality. Perhaps the best way would be to draft an offer to sell. This would be appropriate because the selling agent is an agent of the seller and a subagent of the listing broker. This may be done by modifying the offer to purchase to make it an offer to sell and making the process run backwards from the normal offer to purchase. The seller would sign the offer first, before learning the buyer's identity.

Another strategy to consider may be for the selling agent or subagent to draft an offer to purchase with a contingency that the buyer will be revealed and will sign within so many days after the seller's acceptance. This sort of an offer would not be valid and binding until executed by both parties.

A broker has a commercial building listed for sale. A buyer has the building under contract and is scheduled to close on December 18. The seller is not sharing the offer, title commitment or other closing information with the listing broker, who suspects the seller plans not to pay commission. Collection may be difficult since the seller is an international company based in Sweden. The contracts expired on August 14, but the broker has written confirmation that the buyer wrote the offer in July. Although that offer did not close, the buyer wrote another offer after the listing expired but during the extension period. What is the procedure to file a lien for commission, and can this be done before closing?

The commission lien law is found in Wis. Stat. § 779.32 (www.legis.state.wi.us/statutes/Stat0779.pdf), which provides that a broker may obtain a lien for commission relating to commercial transactions under certain conditions. The lien law requires notices and timely filing to perfect a broker lien. For a sale transaction, the Notice of Intent to File Lien must be filed 30 days before the closing, followed by the Notice of Lien three days prior to closing. A private attorney may be consulted regarding the broker's right to commission based upon the terms and conditions of the listing, the facts and circumstances of the transaction and the timing questions.

Is an Addendum S required for commercial property?

The Addendum S relating to lead-based paint is required for target housing constructed before 1978. It is not necessary for a commercial property unless residential units are included within the property.

Is there a standard confidentiality form to use if a buyer looks at the financials (because it is a commercial listing) to ensure that this information would be kept confidential?

There is no standard confidentiality agreement for use by real estate licensees. Drafting such an agreement would be the practice of law. The seller may be referred to private legal counsel to draft an agreement that meets the needs of the seller in the transaction, given the specific situation.

A gentleman holds a one-half interest in an LLC that owns a 30-40-unit apartment complex. He wants to sell his one-half interest.

Can a real estate broker sell this?

Wis. Stat. § 183.0703 provides that a limited liability company interest is personal property. § 183.0704(1)(a) indicates that, unless otherwise provided in the LLC operating agreement, this interest is assignable in whole or in part. An assignee of an LLC interest may become a member only if the other members unanimously consent, per § 183.0706(1). Under the new § 183.1303, an interest in an LLC may be a security. Accordingly, the sale of a one-half interest in an LLC is a personal property transaction that may involve securities.

A license to act as a real estate broker does not entitle the licensee to negotiate the sale of a business where the sale will be made by the transfer of controlling stock or an LLC interest. Such transactions normally fall within the scope of securities laws, and a registered securities broker-dealer may be needed. The state securities laws were rewritten effective January 1, 2009, and the § 551.02(3)(f) exemption for real estate brokers whose transactions in securities are isolated and incidental to his or her real estate business no longer exists.

The broker should refer the gentleman to his attorney for assistance with this proposed sale. The broker may be able to act as a real estate consultant and assist the gentleman and his attorney in that manner.

Approved by the Wisconsin Department of Regulation and Licensing
10-1-08 (Optional Use Date) **1-1-09** (Mandatory Use Date)

WISCONSIN REALTORS® ASSOCIATION
4801 Forest Run Road
Madison, Wisconsin 53704

WB-5 COMMERCIAL LISTING CONTRACT - EXCLUSIVE RIGHT TO SELL

SELLER GIVES BROKER THE EXCLUSIVE RIGHT TO SELL THE PROPERTY ON THE FOLLOWING TERMS:

■ **PROPERTY DESCRIPTION:** Street address is: _____ _____in the _____ of _____, County of _____, Wisconsin. Insert additional description, if any, at lines 258-270 or attach as an addendum per lines 271-277.

■ **LIST PRICE:** _____ Dollars ($ _____).

■ **INCLUDED IN LIST PRICE**: Seller is including in the list price the Property, all Fixtures not excluded on lines 11-14, and the following items: _____ _____ _____.

■ **NOT INCLUDED IN LIST PRICE:** CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will continue to be owned by the lessor.(See lines 194-204): _____ _____ _____ _____.

■ Seller shall convey the personal property by Bill of Sale, free and clear of all liens and encumbrances except: _____ _____.

■ **SELLER AUTHORITY TO SELL:** Seller represents that Seller has authority to convey the Property. If the Property's owner is an entity, Seller agrees, within ten days of the execution of this Listing, to provide Broker with a copy of documents evidencing that the sale of the Property has been properly authorized.

■ **ZONING:** Seller represents that the Property is zoned: _____.

■ **ZONING VARIANCES, NONCONFORMING USE OR DEVELOPMENT RESTRICTIONS:** Seller represents that the Property is subject to the following special zoning, land use, development restrictions, zoning variances, nonconforming uses or other conditions affecting the Property: _____ _____.

■ **MARKETING:** Seller authorizes and Broker agrees to use reasonable efforts to procure a buyer for the Property. Seller agrees that Broker may market Seller's personal property identified on lines 7-9 during the term of this Listing. Broker's marketing may include: _____. Broker may advertise the following special financing and incentives offered by Seller: _____ _____. Seller has a duty to cooperate with Broker's marketing efforts. See lines 87-93 regarding Broker's role as marketing agent and Seller's duty to notify Broker of any potential buyer known to Seller. Seller agrees that Broker may market other properties during the term of this Listing.

■ **OCCUPANCY:** Unless otherwise provided, Seller agrees to give buyer occupancy of the Property at time of closing and to have the Property in broom swept condition and free of all debris and personal property except for personal property belonging to current tenants, sold to buyer or left with buyer's consent.

■ **COOPERATION, ACCESS TO PROPERTY OR OFFER PRESENTATION:** The parties agree that Broker will work and cooperate with other brokers in marketing the Property, including brokers from other firms acting as subagents (agents from other companies engaged by Broker - See lines 151-154) and brokers representing buyers. Cooperation includes providing access to the Property for showing purposes and presenting offers and other proposals from these brokers to Seller. Note any brokers with whom Broker shall not cooperate, any brokers or buyers who shall not be allowed to attend showings, and the specific terms of offers which should not be submitted to Seller: _____ _____. CAUTION: Limiting Broker's cooperation with other brokers may reduce the marketability of the Property.

■ **EXCLUSIONS:** All persons who may acquire an interest in the Property as a Protected Buyer under a prior listing contract are excluded from this Listing to the extent of the prior broker's legal rights, unless otherwise agreed to in writing. Within seven days of the date of this Listing, Seller agrees to deliver to Broker a written list of all such prospective buyers. The following other buyers are excluded from this Listing until _____ INSERT DATE: _____. These other buyers are no longer excluded from this Listing after the specified date unless, on or before the specified date, Seller has either accepted an offer from the buyer or sold the Property to the buyer.

■ **COMPENSATION TO OTHERS:** Broker offers the following commission to cooperating brokers: _____ _____. (Exceptions if any): _____

■ **COMMISSION:** Broker's commission shall be _____.

Seller shall pay Broker's commission, which shall be earned, if, during the term of this Listing:
1) Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property;
2) Seller grants an option to purchase all or any part of the Property which is subsequently exercised;
3) Seller exchanges or enters into a binding exchange agreement on all or any part of the Property;
4) A transaction occurs which causes an effective change in ownership or control of all or any part of the Property; or
5) A buyer is procured for the Property by Broker, by Seller, or by any other person, at no less than the price and on substantially the same terms set forth in this Listing and in the standard provisions of the current WB-15 COMMERCIAL OFFER TO PURCHASE, even if Seller does not accept this buyer's offer. (See lines 209-212 regarding procurement.)

A percentage commission, if applicable, shall be calculated based on the purchase price if commission is earned under 1) or 2) above, or calculated based on the list price under 3), 4) or 5). A percentage commission shall be calculated on the fair market value of the Property exchanged under 3) if the exchange involves less than the entire Property or on the fair market value of the Property to which an effective change in ownership or control takes place, under 4) if the transaction involves less than the entire Property. Once earned, Broker's commission is due and payable in full at the earlier of closing or the date set for closing, unless otherwise agreed in writing. Broker's commission shall be earned if, during the term of the Listing, one owner of the Property sells, conveys, exchanges or options an interest in all or any part of the Property to another owner, except by divorce judgment.

NOTE: A sale, option, exchange or procurement of a buyer for a portion of the Property does not terminate the Listing as to any remaining Property.

■ **EXTENSION OF LISTING:** The Listing term is extended for a period of one year as to any Protected Buyer. Upon receipt of a written request from Seller or a broker who has listed the Property, Broker agrees to promptly deliver to Seller a written list of those buyers known by Broker to whom the extension period applies. Should this Listing be terminated by Seller prior to the expiration of the term stated in this Listing, this Listing shall be extended for Protected Buyers, on the same terms, for one year after the Listing is terminated.

■ **TERMINATION OF LISTING:** Neither Seller nor Broker has the legal right to unilaterally terminate this Listing absent a material breach of contract by the other party. Seller understands that the parties to the Listing are Seller and the Broker (firm). Agents (salespersons) for Broker (firm) do not have the authority to enter into a mutual agreement to terminate the Listing, amend the commission amount or shorten the term of this Listing without the written consent of the agent(s)' supervising broker. Seller and Broker agree that any termination of this Listing by either party before the date stated on line 282 shall be indicated to the other party in writing and shall not be effective until delivered to the other Party in accordance with lines 188-193. CAUTION: Early termination of this Listing may be a breach of contract, causing the terminating party to potentially be liable for damages.

■ **SELLER COOPERATION WITH MARKETING EFFORTS:** Seller agrees to cooperate with Broker in Broker's marketing efforts and to provide Broker with all records, documents and other material in Seller's possession or control which are required in connection with the sale. Seller authorizes Broker to do those acts reasonably necessary to effect a sale and Seller agrees to cooperate fully with these efforts which may include use of a multiple listing service, Internet advertising or a lockbox system on Property. Seller shall promptly notify Broker in writing of any potential buyers with whom Seller negotiates during the term of this Listing and shall promptly refer all persons making inquiries concerning the Property to Broker.

■ **LEASED PROPERTY:** If Property is currently leased and lease(s) will extend beyond closing, Seller shall assign Seller's rights under the lease(s) and transfer all security deposits and prepaid rents (subject to agreed upon prorations) thereunder to buyer at closing. Seller acknowledges that Seller remains liable under the lease(s) unless released by tenant(s). CAUTION: Seller should consider obtaining an indemnification agreement from buyer for liabilities under the lease(s) unless released by tenants.

■ **BROKER DISCLOSURE TO CLIENTS:**

UNDER WISCONSIN LAW, A BROKER OWES CERTAIN DUTIES TO ALL PARTIES TO A TRANSACTION:

(a) The duty to provide brokerage services to you fairly and honestly.
(b) The duty to exercise reasonable skill and care in providing brokerage services to you.
(c) The duty to provide you with accurate information about market conditions within a reasonable time if you request it, unless disclosure of the information is prohibited by law.
(d) The duty to disclose to you in writing certain material adverse facts about a property, unless disclosure of the information is prohibited by law. (See Lines 205-208)
(e) The duty to protect your confidentiality. Unless the law requires it, the broker will not disclose your confidential information or the confidential information of other parties. (See Lines 159-177)
(f) The duty to safeguard trust funds and other property the broker holds.
(g) The duty, when negotiating, to present contract proposals in an objective and unbiased manner and disclose the advantages and disadvantages of the proposals.

■ **BECAUSE YOU HAVE ENTERED INTO AN AGENCY AGREEMENT WITH A BROKER, YOU ARE THE BROKER'S CLIENT. A BROKER OWES ADDITIONAL DUTIES TO A CLIENT:**

(a) The broker will provide, at your request, information and advice on real estate matters that affect your transaction, unless you release the broker from this duty.
(b) The broker must provide you with all material facts affecting the transaction, not just adverse facts.
(c) The broker will fulfill the broker's obligations under the agency agreement and fulfill your lawful requests that are within the scope of the agency agreement.
(d) The broker will negotiate for you, unless you release the broker from this duty.
(e) The broker will not place the broker's interests ahead of your interests. The broker will not, unless required by law, give

information or advice to other parties who are not the broker's clients, if giving the information or advice is contrary to your interests.

(f) If you become involved in a transaction in which another party is also the broker's client (a "multiple representation relationship"), different duties may apply.

■ **MULTIPLE REPRESENTATION RELATIONSHIPS AND DESIGNATED AGENCY:**

■ A multiple representation relationship exists if a broker has an agency agreement with more than one client who is a party in the same transaction. In a multiple representation relationship, if all of the broker's clients in the transaction consent, the broker may provide services to the clients through designated agency.

■ Designated agency means that different salespersons employed by the broker will negotiate on behalf of you and the other client or clients in the transaction, and the broker's duties will remain the same. Each salesperson will provide information, opinions, and advice to the client for whom the salesperson is negotiating, to assist the client in the negotiations. Each client will be able to receive information, opinions, and advice that will assist the client, even if the information, opinions, or advice gives the client advantages in the negotiations over the broker's other clients. A salesperson will not reveal any of your confidential information to another party unless required to do so by law.

■ If a designated agency relationship is not in effect you may authorize or reject a multiple representation relationship. If you authorize a multiple representation relationship the broker may provide brokerage services to more than one client in a transaction but neither the broker nor any of the broker's salespersons may assist any client with information, opinions, and advice which may favor the interests of one client over any other client. If you do not consent to a multiple representation relationship the broker will not be allowed to provide brokerage services to more than one client in the transaction.

INITIAL ONLY ONE OF THE THREE LINES BELOW:

_____I consent to designated agency.

_____I consent to multiple representation relationships, but I do not consent to designated agency.

_____I reject multiple representation relationships.

NOTE: YOU MAY WITHDRAW YOUR CONSENT TO DESIGNATED AGENCY OR TO MULTIPLE REPRESENTATION RELATIONSHIPS BY WRITTEN NOTICE TO THE BROKER AT ANY TIME. YOUR BROKER IS REQUIRED TO DISCLOSE TO YOU IN YOUR AGENCY AGREEMENT THE COMMISSION OR FEES THAT YOU MAY OWE TO YOUR BROKER. IF YOU HAVE ANY QUESTIONS ABOUT THE COMMISSION OR FEES THAT YOU MAY OWE BASED UPON THE TYPE OF AGENCY RELATIONSHIP YOU SELECT WITH YOUR BROKER YOU SHOULD ASK YOUR BROKER BEFORE SIGNING THE AGENCY AGREEMENT.

■ **SUBAGENCY:** The broker may, with your authorization in the agency agreement, engage other brokers who assist your broker by providing brokerage services for your benefit. A subagent will not put the subagent's own interests ahead of your interests. A subagent will not, unless required by law, provide advice or opinions to other parties if doing so is contrary to your interests.

PLEASE REVIEW THIS INFORMATION CAREFULLY. A broker or salesperson can answer your questions about brokerage services, but if you need legal advice, tax advice, or a professional home inspection, contact an attorney, tax advisor, or home inspector. This disclosure is required by section 452.135 of the Wisconsin statutes and is for information only. It is a plain language summary of a broker's duties to you under section 452.133 (2) of the Wisconsin statutes.

■ **CONFIDENTIALITY NOTICE TO CLIENTS:** Broker will keep confidential any information given to Broker in confidence, or any information obtained by Broker that he or she knows a reasonable person would want to be kept confidential, unless the information must be disclosed by law or you authorize Broker to disclose particular information. Broker shall continue to keep the information confidential after Broker is no longer providing brokerage services to you. The following information is required to be disclosed by law:

1) Material adverse facts, as defined in section 452.01 (5g) of the Wisconsin statutes (lines 205-208).
2) Any facts known by the Broker that contradict any information included in a written inspection report on the property or real estate that is the subject of the transaction.

To ensure that the Broker is aware of what specific information you consider confidential, you may list that information below (see lines 170-173). At a later time, you may also provide the Broker with other information you consider to be confidential.

CONFIDENTIAL INFORMATION: _____

_____

_____.

_____.

NON-CONFIDENTIAL INFORMATION (The following may be disclosed by Broker):_____

_____

_____

_____.

■ **DEFINITIONS:**

ADVERSE FACT: An "adverse fact" means any of the following:

(a) A condition or occurrence that is generally recognized by a competent licensee as doing any of the following:
   1) Significantly and adversely affecting the value of the Property;
   2) significantly reducing the structural integrity of improvements to real estate; or
   3) presenting a significant health risk to occupants of the Property.

(b) Information that indicates that a party to a transaction is not able to or does not intend to meet his or her obligations under a contract or agreement made concerning the transaction.

DEADLINES – DAYS: Deadlines expressed as a number of "days" from an event are calculated by excluding the day the event occurred and by counting subsequent calendar days.

DELIVERY: Delivery of documents or written notices related to this Listing may only be accomplished by:

1) giving the document or written notice personally to the party;
2) depositing the document or written notice postage or fees prepaid or charged to an account in the U.S. Mail or a commercial delivery system, addressed to the party, at the party's address (See lines 288, 294 and 300.);
3) electronically transmitting the document or written notice to the party's fax number (See lines 290, 296 and 302.); or,
4) as otherwise agreed in additional provisions on lines 258-270 or in an addendum to this Listing.

FIXTURES: A "fixture" is an item of property which is physically attached to or so closely associated with land or buildings so as to be treated as part of the real estate, including, without limitation, physically attached items not easily removable without damage to the premises, items specifically adapted to the premises, and items customarily treated as fixtures, including, but not limited to, all: garden bulbs; plants; shrubs and trees; screen and storm doors and windows; electric lighting fixtures; window shades; curtain and traverse rods; blinds and shutters; central heating and cooling units and attached equipment; water heaters and treatment systems; sump pumps; attached or fitted floor coverings; awnings; attached antennas, garage door openers and remote controls; installed security systems; central vacuum systems and accessories; in-ground sprinkler systems and component parts; built-in appliances; ceiling fans; fences; storage buildings on permanent foundations and docks/piers on permanent foundations. A "fixture" does not include trade fixtures owned by tenants of the Property. **CAUTION: Exclude fixtures not owned by Seller such as rented fixtures and tenant's trade fixtures.**

MATERIAL ADVERSE FACT: A "material adverse fact" means an adverse fact that a party indicates is of such significance, or that is generally recognized by a competent licensee as being of such significance to a reasonable party, that it affects or would affect the party's decision to enter into a contract or agreement concerning a transaction or affects or would affect the party's decision about the terms of such a contract or agreement.

PROCURE: A buyer is procured when, during the term of the Listing, an enforceable contract of sale is entered into between the Seller and the buyer or when a ready, willing and able buyer submits to the Seller or the Listing Broker a written offer at the price and on substantially the terms specified in this Listing. A buyer is ready, willing and able when the buyer submitting the written offer has the ability to complete the buyer's obligations under the written offer. (See lines 60-63)

PROPERTY: Unless otherwise stated, "Property" means the real estate described at lines 2-4.

PROTECTED BUYER: Means a buyer who personally, or through any person acting for such buyer: 1) delivers to Seller or Broker a written offer to purchase, exchange or option on the Property during the term of this Listing; 2) negotiates directly with Seller by discussing with Seller the potential terms upon which buyer might acquire an interest in the Property; or 3) attends an individual showing of the Property or discusses with Broker or cooperating brokers the potential terms upon which buyer might acquire an interest in the Property, but only if Broker delivers the buyer's name to Seller, in writing, no later than three days after the expiration of the Listing. The requirement in 3), to deliver the buyer's name to Seller in writing, may be fulfilled as follows: a) If the Listing is effective only as to certain individuals who are identified in the Listing, by the identification of the individuals in the Listing; or, b) if a buyer has requested that the buyer's identity remain confidential, by delivery of a written notice identifying the broker with whom the buyer negotiated and the date(s) of any showings or other negotiations.

■ **NON-DISCRIMINATION: Seller and Broker agree that they will not discriminate against any prospective buyer on account of race, color, sex, sexual orientation as defined in Wisconsin Statutes, Section 111.32 (13m), disability, religion, national origin, marital status, lawful source of income, age, ancestry, familial status, or in any other unlawful manner.**

■ **EARNEST MONEY:** If Broker holds trust funds in connection with the transaction, they shall be retained by Broker in Broker's trust account. Broker may refuse to hold earnest money or other trust funds. Should Broker hold the earnest money, Seller authorizes Broker to disburse the earnest money as directed in a written earnest money disbursement agreement signed by or on behalf of all parties having an interest in the trust funds. If the transaction fails to close and the earnest money is disbursed to Seller, then upon disbursement to Seller the earnest money shall be paid first to reimburse Broker for cash advances made by Broker on behalf of Seller and one half of the balance, but not in excess of the agreed commission, shall be paid to Broker as Broker's full commission in connection with said purchase transaction and the balance shall belong to Seller. This payment to Broker shall not terminate this Listing.

■ **SELLER'S DISCLOSURE REPORT**: Wisconsin Administrative Code Chapter RL 24 requires listing brokers to make inquiries of the Seller on the condition of the Property and to request that Seller provide a written response to Broker's inquiry. Seller agrees to complete a seller's disclosure report to the best of Seller's knowledge. Seller agrees to amend the report should Seller learn of any defect(s) after completion of the report but before acceptance of a buyer's offer to purchase. Seller authorizes Broker to distribute the report to all interested parties and their agents inquiring about the Property and acknowledges that Broker has a duty to disclose all material adverse facts as required by law.

■ **SELLER REPRESENTATIONS REGARDING DEFECTS:** Seller represents to Broker that as of the date of this Listing, if a seller's disclosure report or other form of written response to Broker's inquiry regarding the condition of the Property has been made by the Seller, the Seller has no notice or knowledge of any defects affecting the Property other than those noted on Seller's disclosure report or written response.

WARNING: IF SELLER REPRESENTATIONS ARE INCORRECT OR INCOMPLETE, SELLER MAY BE LIABLE FOR DAMAGES AND COSTS.

■ **OPEN HOUSE AND SHOWING RESPONSIBILITIES:** Seller is aware that there is a potential risk of injury, damage and/or theft involving persons attending an "individual showing" or an "open house." Seller accepts responsibility for preparing the Property to minimize the likelihood of injury, damage and/or loss of personal property. Seller agrees to hold Broker harmless for any losses or liability resulting from personal injury, property damage, or theft occurring during "individual showings" or "open houses" other than those caused by Broker's negligence or intentional wrongdoing. Seller acknowledges that individual showings and open houses may be conducted by licensees other

than Broker, that appraisers and inspectors may conduct appraisals and inspections without being accompanied by Broker or other licensees, and that buyers or licensees may be present at all inspections and testing and may photograph or videotape Property unless otherwise provided for in additional provisions at lines 258-270 or in an addendum per lines 271-277.

■ **ADDITIONAL PROVISIONS:** _____

■ **ADDENDA:** The attached addenda _____

_____ is/are made part of this Listing.

■ **NOTICE ABOUT SEX OFFENDER REGISTRY:** You may obtain information about the sex offender registry and persons registered with the registry by contacting the Wisconsin Department of Corrections on the Internet at http://www.widocoffenders.org or by telephone at (608)240-5830.

■ **TERM OF THE CONTRACT:** From the _____ day of _____, _____, up to and including midnight of the _____ day of _____, _____.

■ **READING/RECEIPT: BY SIGNING BELOW, SELLER ACKNOWLEDGES RECEIPT OF A COPY OF THIS LISTING CONTRACT AND THAT HE/SHE HAS READ ALL FIVE PAGES AS WELL AS ANY ADDENDA AND ANY OTHER DOCUMENTS INCORPORATED INTO THE LISTING.**

(x)_____ _____ _____
Seller's Signature ▲ Print Name Here: ▲ Date ▲

_____ _____
Seller's Address ▲ Seller's Phone # ▲

_____ _____
Seller's Fax # ▲ Seller's E-Mail Address ▲

(x)_____ _____ _____
Seller's Signature ▲ Print Name Here: ▲ Date ▲

_____ _____
Seller's Address ▲ Seller's Phone # ▲

_____ _____
Seller's Fax # ▲ Seller's E-Mail Address ▲

(x)_____ _____ _____ _____
Agent for Broker ▲ Print Name Here: ▲ Broker/Firm Name ▲ Date ▲

_____ _____
Broker/Firm Address ▲ Broker/Firm Phone # ▲

_____ _____
Broker/Firm Fax # ▲ Broker/Firm E-Mail Address ▲

WISCONSIN REALTORS® ASSOCIATION
4801 Forest Run Road
Madison, WI 53704

SELLER DISCLOSURE REPORT - COMMERCIAL

PROPERTY OWNER:_____

PROPERTY ADDRESS:_____

OWNER HAS OWNED THE PROPERTY FOR _____ YEARS.

Wis. Admin. Code § RL 24.07(1)(a) requires listing brokers to inspect the property and to "make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property. The licensee shall request that the seller provide a written response to the licensee's inquiry." Wis. Admin. Code § RL 24.07(2) requires listing brokers to disclose all material adverse facts discovered in Broker's inspection or disclosed by Owner, in writing, in a timely manner, to all parties. This Seller Disclosure Report is a tool designed to help the licensee fulfill these license law duties. Owner's statements are a representation of Owner's knowledge of the Property's condition. It is not a property condition warranty by the Owner or any agent of the Owner, nor is it a substitute for any inspections or testing buyer may wish to have done. Buyer may, however, rely upon this information in deciding whether or not, or upon what terms, to purchase the Property. In this form, "defect" means a condition that would have a significant adverse effect on the value of the Property; that would significantly impair the health or safety of future occupants of the Property; or that if not repaired, removed or replaced would significantly shorten or adversely affect the expected normal life of the premises.

Are you aware of any of the following with regard to the Property? "Aware" means to have notice or knowledge.

CIRCLE ONE ANSWER: Explain any "yes" or "unsure" answers in the blank lines following item (19).

1. Defects in structural components, e.g. roof, foundation, basement or other walls?	yes	no	unsure
2. Defects in mechanical systems, e.g. HVAC, electrical, plumbing, septic, well, fire safety, security or lighting?	yes	no	unsure
3. Underground or above ground storage tanks presently or previously on the Property for storage of flammable or combustible liquids, including but not limited to gasoline and heating oil?	yes	no	unsure
4. A defect or contamination caused by unsafe concentrations of, or unsafe conditions relating to, lead paint, asbestos, radon, radium in water supplies, mold, pesticides or other potentially hazardous or toxic substances on the premises?	yes	no	unsure
5. Production of or spillage of methamphetamine (meth) or other hazardous or toxic substances on the Property?	yes	no	unsure
6. Zoning or building code violations, nonconforming uses, conservation easements, rights-of-way?	yes	no	unsure
7. Special purpose district, such as a drainage district, that has the authority to impose assessments against the real property located within the district?	yes	no	unsure
8. Proposed, planned or commenced public improvements which may result in special assessments or otherwise materially affect the Property or the present use of the Property?	yes	no	unsure
9. Federal, state or local regulations requiring repairs, alterations or corrections of an existing condition?	yes	no	unsure
10. Flooding, standing water, drainage problems or other water problems on or affecting the Property?	yes	no	unsure
11. Material damage from fire, wind, floods, earthquake, expansive soils, erosion or landslides?	yes	no	unsure
12. Near airports, freeways, railroads or landfills, or significant odor, noise, water intrusion or other irritants emanating from neighboring property?	yes	no	unsure
13. A portion of the Property in a floodplain, wetland or shoreland zoning area under local, state or federal regulations?	yes	no	unsure
14. Governmental investigation or private assessment/audit (of environmental matters) ever being conducted? When and by whom?_____	yes	no	unsure
15. Encroachments; easements, other than recorded utility easements; access restrictions; covenants, conditions and restrictions; shared fences, walls, wells, driveways, signage or other shared usages; or leased parking?	yes	no	unsure

16. High voltage electric (100 KV or greater) or steel natural gas transmission lines located on but not directly serving the Property? yes no unsure

17. A structure on the Property designated as a historic building, any part of the property located in a historic district, or burial sites or archeological artifacts on the Property? yes no unsure

18. Other defects affecting the property? yes no unsure

19. Use Value Assessments: The use value assessment system values agricultural land based on the income that would be generated from its rental for agricultural use rather than its fair market value. When a person converts agricultural land to a non-agricultural use (e.g., residential or commercial development), that person may owe a conversion charge. To obtain more information about the use value law or conversion charge, contact the Wisconsin Department of Revenue's Equalization Section at 608-266-2149 or visit http://www.revenue.wi.gov/faqs/slf/useassmt.html.

    (a) The land has been assessed as agricultural land under Wis. Stat. § 70.32 (2r)? yes no unsure

    (b) The land has been assessed a use-value conversion charge under Wis. Stat. § 74.485(2)? yes no unsure

    (c) The payment of a use-value conversion charge has been deferred under Wis. Stat. § 74.485(4)? yes no unsure

EXPLANATIONS OF "YES" OR "UNSURE" ANSWERS _____

_____

_____

_____

Notice: You may obtain information about the sex offender registry and persons registered with the registry by contacting the Wisconsin Department of Corrections on the Internet at http://www.widocoffenders.org or by phone at 608-240-5830.

The Owner certifies that the information in this report is true and correct to the best of the Owner's knowledge as of the date below.

(X) _____ (X) _____

Signature ▲ Date ▲ Signature ▲ Date ▲

Broker certifies that Broker has inspected the property and that unless otherwise indicated, Broker is not aware of any defects other than those disclosed by this report or of information inconsistent with this report.

(X) _____ (X) _____

Broker ▲ By ▲ Date ▲

I acknowledge receipt of a copy of this report.

(X) _____ (X) _____

Buyer's Signature ▲ Buyer's Signature ▲


Coverage That's
Right For You
Get an E&O Quote
in Minutes!
And Buy Instant
Errors & Omissions
Coverage Online Today!*
PEARL
INSURANCE
WRA
Wisconsin
REALTORS®
Association
(Endorsed Since 1994)
* For qualifying firms.
E&O program underwritten by the XL Insurance companies through Greenwich Insurance Company
and Indian Harbor Insurance Company. (Coverages not available in all jurisdictions.)
071222_03
www.pearlinsurance.com | Protect Yourself With Pearl