



NOVEMBER 2008

# Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Please Route to:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

## Inside This Issue

2

**WB-3 Vacant Land Listing Contract – Exclusive Right to Sell**

12

**WRA Seller Disclosure Report – Vacant Land**

21

**Addendum W – Wetlands**

23

**Hotline Questions and Answers – Vacant Land**

27

**WB-3 Vacant Land Listing Contract**

32

**Seller Disclosure Report – Vacant Land**

34

**Addendum W – Wetlands**

## WB-3 Vacant Land Listing and Seller Disclosure Report – 2008 Revisions

A buyer contemplating the purchase and development of vacant land evaluates numerous factors. A buyer planning to develop the property or use it for a purpose other than its current use needs to ensure that the proposed new use will be workable. The buyer's focus may be the suitability of the parcel as a building site for residential, retail, commercial or other development.

The seller should be prepared to provide a wide range of information that may be of interest to a prospective purchaser, depending upon what the buyer plans to do with the property. The buyer may intend to farm the land or use it for hunting. The buyer may be buying a lot in a subdivision where the buyer will build his home or a certified survey map lot in an industrial park where a factory or retail center will be constructed. The buyer may want to know about:

- zoning; recorded restrictions; and covenants, easements and wetlands;
- subsoil conditions, burial sites, prior orchards and endangered species; or
- utility connections, special assessments, public road access, impact fees and use-value assessments.

The vacant land forms recognize that a buyer may purchase the land with the intention of building a house or some other sort of building, creating a subdivision or condominium or constructing a commercial development project.

The land that is the subject of a vacant land listing may be employed in

agricultural pursuits. Thus it is not surprising that the vacant land forms share many provisions in common with the farm forms because a large part of what ordinarily comprises a farm is vacant land.

This *Legal Update* addresses building and development issues encountered when selling vacant land using the revised versions of the WB-3 Vacant Land Listing Contract and the Wisconsin REALTORS® Association Seller Disclosure Report – Vacant Land (VLR). The Department of Regulation and Licensing has made its final substantive revisions to the WB-3 Vacant Land Listing Contract – Exclusive Right to Sell. The optional-use date for the revised WB-3 was October 1, 2008, and the mandatory-use date is January 1, 2009.

At the same time, the WRA has updated and revised the VLR, for use together with the updated vacant land listing. The VLR 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 vacant land, not residential, transactions.

In addition, the WRA worked together with the Department of Natural Resources and Wisconsin Wetland Association to develop new tools to help property buyers identify whether there are wetlands on a property. State and federal laws prevent building or making other "improvements" on or near wetlands unless the property owner can show it is unavoidable and obtains the necessary permits. These tools include the Addendum

## 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](http://www.wra.org)

*The information contained herein is believed accurate as of 10/28/2008. The information is of a general nature and should not be considered by any member or subscriber as advice on a particular fact situation. Members should contact the WRA Legal Hotline with specific questions or for current developments.*

*Reproduction, use or inclusion of this material in other publications, products, services or Web sites is not permitted without prior written permission from the Wisconsin REALTORS® Association or its Legal Department.*

**WRA** Wisconsin  
REALTORS®  
Association  
WRA Legal Update © 2008

W – Wetlands that may be used with an offer to purchase or other real estate contracts. This addendum is also discussed in this *Update*.

This *Legal Update* reviews the changes made to the WB-3 Vacant Land Listing Contract – Exclusive Right to Sell. The discussion points out some of the changes adopted by the DRL, key issues to discuss with the seller and practice tips for getting the best results with the new version of the WB-3. The *Update* also discusses many of the disclosure items in the VLR that are associated with vacant land and critical for purchasers with an eye toward development. The Addendum W for wetlands is also reviewed, followed by Legal Hotline questions and answers regarding important vacant land considerations.

### WB-3 Vacant Land Listing Contract – Exclusive Right to Sell

The revised vacant land 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.

There also are differences between the vacant land listing contract and its residential counterpart. These differences result from the fact that typically there is no residential structure involved in a vacant land listing. Instead, the seller often needs to stand ready to furnish development information about any utility connections, zoning, use-value and land conservation programs, sub-soil conditions, easements and restrictions, and wetlands and burial sites.

### 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. There is nothing drastically new or different. The DRL has made additional changes to update, improve and make the forms a bit more understandable for consumers and licensees. Other DRL revisions are predominantly intended to clarify and improve the provisions already in place and do not make any major substantive changes.

The primary focus of the DRL revisions to the listing contracts was to incorporate the statutory “Broker Disclosure to Clients” language into the forms, which has been successfully accomplished. REALTORS® will no longer need to use the separate Broker Disclosure to Clients form along with the WB-3 – REALTORS® will be able to go back to using just the WB-3 listing without a supplemental disclosure form.

Many of the changes to the WB-3 vacant land 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 some uniform provisions and highlight selected provisions specific to vacant land 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](http://www.wra.org/LU0710), and the September 2008 *Legal Update*, “WB-2 Farm Listing and Farm Real Estate


Condition Report – 2008 Revisions,” online at [www.wra.org/LU0809](http://www.wra.org/LU0809).

The clarifications to the WB-3 are a by-product of eight years of experience with these forms, with an eye to eliminating difficulties that have been experienced by licensees using the forms, and by the parties, their attorneys and the courts as they have attempted to interpret the 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-3 Vacant Land Listing Contract appears on Pages 27-31 of this issue. In the following discussions, the existing WB-3 (mandatory-use date January 1, 2000) will be referred to as the “2000 listing,” and the newly revised WB-3 will be referred to as the “2009 listing.”

### **Property Description (2009 Listing, Page 1)**

The blanks in this section ask for the property's street address, which will generally be a sufficient description. If the street address does not, however, adequately describe the property, a complete legal description will be necessary to make the contract enforceable. Any additional description, such as a legal description, should be placed in the blank lines of the Additional Provisions section or in an addendum.

 **REALTOR® Practice Tips:** DO NOT insert “Legal description to follow” in the lines where the street address or a legal description would be provided. If there is no sufficient real estate description the contract will be void under Wis. Stat. § 240.10(1) and the seller will not have to pay commission.

### **Included in List Price (2009 Listing, Page 1)**

List Price is the price that will be

used for marketing and determines the price component of a full-price offer that may earn the broker the commission even if the seller does not accept the offer. As the seller and the broker complete and review the listing, they are specifying what is included in the list price:

1. **Property.** “Property” is defined on the Definitions section on Page 4 of the 2009 listing as the real estate described in the Property Description section.
2. **Fixtures Not Excluded.** The list price also includes all fixtures except those listed in the “Not Included in List Price” section. In other words, all items included in the definition of “fixtures” on the fourth page of the 2009 WB-3 are included in the sale unless specifically excluded. In the case of vacant land, this will likely be a very short list.

“A ‘fixture’ is an item of property that 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.” Fixtures also include perennial crops. Perennial crops such as raspberries or apples, as well as trees, bushes and grass that do not require annual planting and cultivation are classified as fructus naturales (fruits of nature) and are included as part of the real estate unless excluded.

On the other hand, annual crops that have to be planted each year such as wheat and corn are classified as fructus industriales (fruits of industry) and are generally considered personal property. Annual crops must be specifically listed as “Included in List Price” on lines 6-8 on Page 1 of the WB-3 if they are to be included in the sale.

3. **Items Listed.** The third aspect of the property included in the list price is

the items inserted on the blank lines in the “Included in List Price” section. These presumably will be personal property items. For example, the seller may include a tractor or mower. Annual crops are not part of the purchase price unless otherwise agreed.

### **Governmental and Conservation Programs (2009 Listing, Page 1)**

The 2009 WB-3 includes a series of sections not found in the residential listing contract. The first one on lines 12-15 asks the seller to disclose whether the seller is participating in, or whether part or all of the property is enrolled in or subject to, any federal, state or local farmland preservation, environmental, conservation or similar use-restricting programs. For example, the property may be subject to the Conservation Reserve Program, the Farmland Preservation Credit Program, the Forest Crop Tax and Managed Forest Programs, or conservation easements. This information is important because these programs typically involve requirements that the owner must meet and penalty provisions are often triggered by early withdrawal from the program or conveyances in violation of program rules.

These programs and easements are discussed in detail on Pages 4-6 of the September 2008 *Legal Update*, “WB-2 Farm Listing and Farm Real Estate Condition Report – 2008 Revisions,” online at [www.wra.org/LU0809](http://www.wra.org/LU0809). While a farm purchaser may be more likely to remain enrolled in these types of programs, the vacant land purchaser may be more ambitious and intent on development and other purposes inconsistent with farmland preservation. These buyers, accordingly, must be sure they identify all such applicable programs and fully understand any restrictions and monetary penalties they will face if they endeavor to change the land use.

## Use-Value Assessment (2009 Listing, Page 1)

The 2009 WB-3 asks the seller to represent whether any of the listed property has been assessed as agricultural property under the use-value system. This should also remind the listing agent to make sure that the seller makes the three-part use-value disclosure required by the Wisconsin statutes. These disclosures are included in the VLR and all other WRA seller disclosure reports and RECRs. It is extremely important for the seller to make these disclosures because the consequences can be immensely expensive.


Under the use-value assessment method, Wisconsin farmland is assessed for property tax purposes based upon its agricultural productivity rather than its fair market value or potential for development. If the use of land assessed under the use-value system is changed to a nonagricultural use, the then-current owner must pay a “conversion charge” (previously referred to as a penalty). In other words, if a buyer

changes the use of the land assessed under the use-value system, the buyer may have to pay a conversion charge that captures between 5 and 10 percent of the property tax savings that occurred when the land was taxed as agricultural land in the year before the conversion. If the use changed before the sale, the seller would be responsible for the conversion charge.

With respect to real estate sales, Wis. Stat. § 74.485 requires sellers to notify the buyer of three things:

1. that the land has been assessed as agricultural land under the use-value law;
2. whether the seller has been assessed a conversion charge; and
3. if so, whether the conversion charge has been deferred.

These notices appear in the WRARECR forms and in Item 30 of the VLR.

 **REALTOR® Practice Tips:**  
Although not specifically required by the use-value law, sellers and REALTORS® should also disclose

that buyers who purchase and change the use of agricultural property assessed under the use-value system may be subject to a potentially substantial conversion charge, given that such a charge would likely be considered a defect or material adverse fact. The WRA has updated its RECR and seller condition reports to include this recommended information.


## Special Assessments (2009 Listing, Page 1)

Special assessments are charges levied by local governments against real property to defray the costs of public work or improvements that benefit such property. Special assessments are flexible. They can be used to pay for street construction, curb and gutter, sidewalks, storm and sanitary sewer improvements, water mains and facilities, tree removal, park land condemnation and many other public improvements. Only those properties that specially benefit from the improvement bear the cost of the improvement. Special assessments allocate the cost of the improvement proportionately among the benefitted properties and create liens on those properties.


Special assessments are a necessary part of any infrastructure project being built within the community that involves amenities such as curb and gutter, blacktop, sand and gravel, storm sewer, sewer and water, sidewalks, lights, excavating, removal of unsuitable materials, professional service costs for surveying, inspection, engineering, etc. Such public improvements – that allow for development of homes, schools, parks, churches, industries, commercial businesses and the like – add to the physical makeup of the community. Such public improvements allow for delivery of various public and private sector services – police, fire, ambulance, telephone, snowplowing, cable television, electricity,

### Government and Conservation Programs Information


 Conservation Reserve Program (USDA Farm Service Agency): [www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp-sp](http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp-sp)


 Farmland Preservation Credit Program (Wisconsin Department of Revenue Publication 503): [www.revenue.wi.gov/pubs/pb503.pdf](http://www.revenue.wi.gov/pubs/pb503.pdf); Community Planning in Wisconsin (Brian W. Ohm), Chapter 11: “Agriculture,” [www.lic.wisc.edu/shapingdane/resources/planning/library/book/chapter11/chap11\\_1-1.htm](http://www.lic.wisc.edu/shapingdane/resources/planning/library/book/chapter11/chap11_1-1.htm)


 Managed Forest Programs (DNR): <http://dnr.wi.gov/forestry/ftax/mfl.htm>

 Conservation Easements: Pages 4-5 of *Legal Update 00.08*, “Express Easements,” [www.wra.org/LU0008](http://www.wra.org/LU0008)

### Use-Value Assessment and Conversion Charge Information

 Summary of the *Thomas v. Pringle* case where the seller lost because he used an older RECR form: “Full Disclosure – Real Estate Tax Penalties,” February 2007 edition of the *Wisconsin Real Estate Magazine*, [www.news.wra.org/story.asp?a=663](http://www.news.wra.org/story.asp?a=663)

 June 2008 *Broker Supervision Newsletter*, “Use-Value Assessment of Agricultural Land,” [www.wra.org/online\\_pubs/broker\\_supervision/2008/br0806.asp](http://www.wra.org/online_pubs/broker_supervision/2008/br0806.asp)

 Wisconsin Department of Revenue Use-Value Assessment FAQs: [www.dor.state.wi.us/faqs/slf/useassmt.html](http://www.dor.state.wi.us/faqs/slf/useassmt.html); and Use-Value Conversion Charge FAQs: [www.dor.state.wi.us/faqs/slf/usevalue.html](http://www.dor.state.wi.us/faqs/slf/usevalue.html)

postal delivery and many others.

Obviously a vacant land purchaser will want to know as early as possible about any special assessment charges that have been levied against the property because they need to be included in any cost projections with regard to the purchase and any future improvements and development. The seller should be aware of any special assessments levied against the property. Property owners receive written notice once the municipality has passed a resolution imposing the special assessments and the special assessments appear on the owner's property tax bill. Lines 18-19 of the 2009 WB-3 ask the seller to list all known special assessment to ensure that they are appropriately disclosed to purchasers in the VLR or otherwise. The seller may also wish to note any improvements the community is discussing but that have not yet resulted in the imposition of special assessments.

### **Special Zoning, Land-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. A buyer may 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, 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.

### **Title Issues**

The Condition of Title and Title Evidence sections from the 2000 listing were eliminated from the 2009

WB-3. While the seller should be prompted to list possible title defects that will be listed in the offer and ultimately as exceptions to the warranty of title in the deed, the listing contract is not the place to require a comprehensive list. That does not mean that the seller cannot be informed that such a list will be needed later on and that it would be helpful for the seller to start thinking about such issues.

#### **REALTOR® Practice**

**Tips:** While the WB-3 no longer requires the seller to list exceptions to title, that does not mean that the listing broker should not still 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](http://www.wra.org/LU0309), and discussed in the February 2004 *Legal Update*, "Listing Procedures for the Prudent Broker," online at [www.wra.org/LU0402](http://www.wra.org/LU0402). Early familiarity with all liens and encumbrances will be critical in short sale situations.

### **Cooperation, Access to Property or Offer Presentation (2009 Listing, Page 1)**

In this section, the seller agrees that the broker will cooperate and work with other agents in marketing the property, including subagents (redefined to be consistent with the 2006 agency law revisions) and buyer's brokers, except as specified in the blank line near the end of this section. This is consistent with Article 3 of the Code of Ethics, which provides that REALTORS® shall cooperate with other brokers unless cooperation is not in the seller's best interests.

Similarly, Wis. Admin. Code § RL 24.13(2)(a) provides that listing brokers shall permit all buyers and their

agents access to a listed property for showings unless such access is contrary to the seller's specific written instructions, and § RL 24.13(1) indicates that licensees should draft and submit all offers to the owner unless "contrary to the specific instructions of the owner." Any seller exceptions to universal cooperation are to be listed on lines 39-40.

### Exclusions (2009 Listing, Page 1)

This section states, "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." "Protected buyer" is defined in the Page 4 Definitions section of the 2009 listing.

#### REALTOR® Practice Tips:

The prudent broker will talk to the seller about any prospective buyers and ask the seller to see any correspondence received from the prior listing broker, if the seller is willing. While the WB-3 no longer contains the caution to remind listing brokers to check with the prior listing broker for the names of protected buyers, that does not mean that a broker listing a property that was previously listed should still not immediately submit a written request to the prior listing broker for a list of all protected buyers and ask the seller to forward a copy of the list immediately upon receipt, as discussed in the February 2004 *Legal Update*, "Listing Procedures for the Prudent Broker," online at [www.wra.org/LU0402](http://www.wra.org/LU0402).

As before, in addition to protected buyers from a prior listing, the seller may name certain buyers who are excluded from the listing until the stated date. This provision is intended to permit sellers to exclude

their family members, neighbors and other potential buyers with whom the seller has previously negotiated.

### Compensation to Others (2009 Listing, Page 1)


A new provision appearing at the bottom of Page 1 of the 2009 listing provides, "Broker offers the following commission to cooperating brokers: \_\_\_\_\_ (Exceptions if any): \_\_\_\_\_." This is a consumer protection provision that endeavors to let the seller know what cooperative commission the listing broker is going to offer to other brokers. The provision is also consistent with Standard of Practice 1-12 from the REALTOR® Code of Ethics.

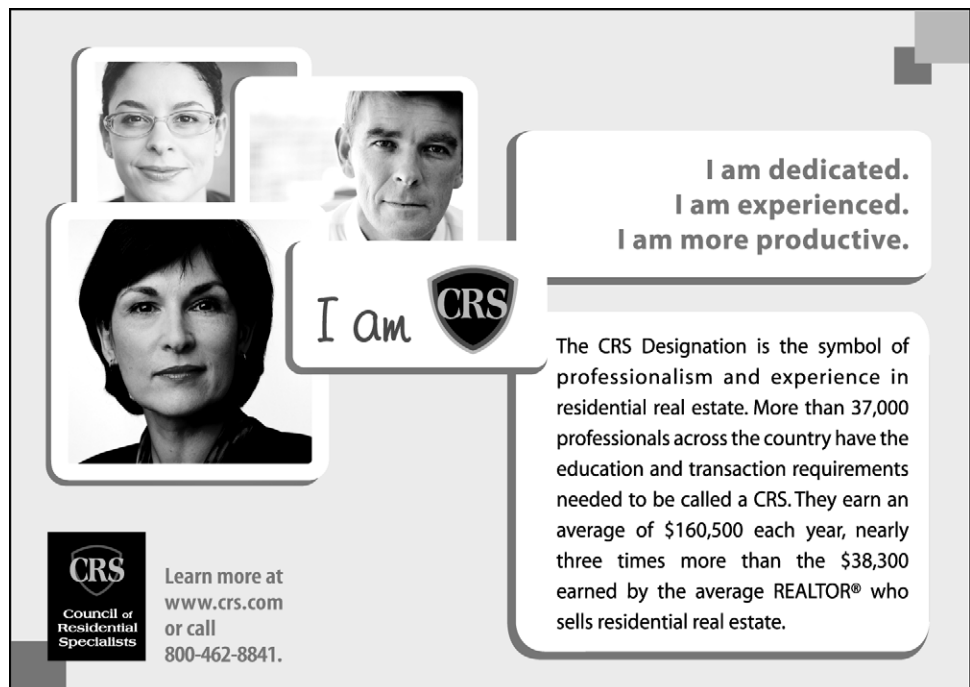
Standard of Practice 1-12 provides that when entering into listing contracts, REALTORS® must advise the seller/client about the REALTORS® company policies regarding cooperation with other brokers and amount of compensation that will be offered to subagents and buyer's agents. The presumption is that sellers are entitled to know whether the compensation being offered will trigger the desired level of interest and market

exposure. Prudent listing brokers should disclose their MLS compensation splits, disclose if they have policy letter compensation agreements with any brokers and let the seller see a copy of policy letters upon request.


The challenge in this provision is the seller questions that may be prompted by the provision, for example, "Is that the highest rate?" "Is that the normal rate?" or "Shouldn't you give them more to make sure this house sells?" All REALTORS® must exercise great care when responding to such questions so as to avoid any suggestion of commission rate price-fixing.

REALTORS® should strictly observe the following guidelines:


 **REALTOR® Practice Tips:**  
All decisions concerning commissions or fees must be unilateral, independent business decisions made solely within the broker's office, without consultation or discussion with anyone from other real estate brokerage firms. However, a broker may make pricing decisions based upon the prices charged by competitors.





I am dedicated.  
I am experienced.  
I am more productive.

I am 

The CRS Designation is the symbol of professionalism and experience in residential real estate. More than 37,000 professionals across the country have the education and transaction requirements needed to be called a CRS. They earn an average of \$160,500 each year, nearly three times more than the \$38,300 earned by the average REALTOR® who sells residential real estate.

 Learn more at [www.crs.com](http://www.crs.com) or call 800-462-8841.

 **REALTOR® Practice Tips:** REALTORS® must always avoid all communications and discussions with other brokers that relate in any way to the commission rates charged to sellers and buyers, the rates paid to other brokers for cooperative commissions and the compensation paid to salespersons.

 **REALTOR® Practice Tips:** All brokers, sales agents and other staff must be trained to explain the commissions and fees charged by the company in terms of independent decisions and competitive market forces and avoid giving the appearance of collusion among competing companies. Agents should never refer to the pricing policies of other companies, and never make statements like, “This is the rate every firm charges,” or “Commission rates are pretty standard.”

Further discussion of antitrust law concerns is found in the March 2004 *Legal Update*, “Antitrust Primer for Real Estate Practice,” online at [www.wra.org/LU0403](http://www.wra.org/LU0403).

### **Commission (2009 Listing, Pages 1-2)**

The overall structure and substance of the commission section in the 2009 listing remain unchanged. Line 51 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 dollar amount or another compensation description.

The 2009 listing provides that the listing broker’s commission is earned if “A transaction occurs which causes an effective change in ownership or control of all or any part of the Property.” Thus if a corporation, LLC, or some other business entity or organization owns the property and the majority corporate stockholder or LLC member sells to another person, the effect is the same as if

the property owned by the entity has been sold. The person or persons with voting control over the disposition of the property has changed.

In terms of changes to the Commission section, a provision at the end of the Commission section states, “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.” This applies to the real estate only, not to any personal property items included in the list price. “Property” is defined in the Page 4 definitions section as the real estate described at lines 2-4.

### **Extension of Listing (2009 Listing, Page 2)**

The Extension of Listing section near the top of Page 2 of the 2009 listing is remarkably brief and to the point once the definition of Protected Buyer is extracted and placed in the Definitions section on Page 4 of the 2009 listing: “The Listing term is extended for a period of one year as to any Protected Buyer.” See pages 8-10 of the February 2004 *Legal Update*, “Listing Procedures for the Prudent Broker,” online at [www.wra.org/LU0402](http://www.wra.org/LU0402), for discussion of listing protection procedures and issues.

### **Termination of Listing (2009 Listing, Page 2)**

Both the 2000 and the 2009 WB-3 listing contracts say, “Neither Seller nor Broker have the legal right to unilaterally terminate this listing absent a material breach of contract by the other Party.” However, the *power* to revoke or cancel the listing contract must be distinguished from the *right* to revoke or cancel the listing contract. The seller always has the power to cancel the listing contract, but may not have the right to do so.

A listing contract is a personal services contract that establishes a fiduciary relationship of trust and confidence between the seller and the broker.

An agency contract, such as a listing, is a personal service contract based upon a special fiduciary relationship of trust and confidence in the broker. Because the contract reflects an agency relationship, the seller possesses the power to revoke or terminate the listing contract at any time. A seller (the principal) cannot be compelled to remain in the agency relationship with a broker (the agent) with whom the seller no longer wishes to work.

Canceling the listing before its expiration date will typically constitute a breach of the contract terms and thus violate the broker’s rights. The broker may then demand compensation for the damages sustained and reimbursement for out of pocket expenses as a result of the early listing termination. The broker cannot, however, sue the seller for specific performance because of the agency relationship. In other words, the broker cannot compel the seller to remain in the relationship or as a party to the listing contract.

The broker’s damages, in general terms, might include the costs of advertising, reimbursement for other expenses incurred by the broker in the process of listing and marketing the property, and the value of services rendered, assuming the broker can sufficiently prove this. Commission will be due only if the broker can prove that the broker had procured a buyer ready, willing and able to purchase the property upon the terms and conditions specified in the listing contract or on terms otherwise acceptable to the seller.

The seller may cancel the listing without risk of damages if the termination is for cause or based upon a material breach of contract by the listing broker. For example, if the listing broker fails to perform according to the terms of the listing contract or otherwise fails to act in good faith, then the seller will have the legal right, not just the power, to terminate the listing. Then the broker cannot claim any

damages based upon the early termination because the broker was in breach.

### **Agents Lack Authority to End Contract or Change Commission**

Both the 2000 and 2009 listing contracts also provide that, "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." This provision alerts the seller that the listing agent has no authority to terminate the listing, shorten the listing term or change the commission amount without the written consent of the agent's supervising broker.


### **Early Termination Notices Must be in Writing**

A new provision on lines 80-83 indicates, "Seller and Broker agree that any termination of this Listing by either Party before the date stated on line 269 shall be indicated to the other Party in writing and shall not be effective until delivered to the other Party in accordance with lines 206-211. CAUTION: Early termination of this Listing may be a breach of contract, causing the terminating Party to potentially be liable for damages."

Under the 2000 listing, the seller could terminate the listing by verbal notice, by written letter or notice, or by amendment of the listing contract (changing the expiration date to a current date). The 2009 listing eliminates the option to terminate verbally and requires that any written termination notice be delivered in accordance with the definition of delivery found on Page 4 of the 2009 listing. The termination notice will be effective upon delivery, which should substantially diminish the

common problem of trying to determine the exact date of termination.

Once a seller has delivered written notice to the broker that the listing is terminated, the listing broker may wish to officially document this by amending the listing contract to change the end of the contract term to the effective date of the termination notice, or by submitting a Cancellation Agreement and Mutual Release (CAMR).

 **REALTOR® Practice Tips:** Brokers intending to establish listing protection should not use a CAMR because this waives all rights under the listing contract, including the right to assert listing protection. For more information about seller termination issues, see the September 2006 issue of the *Broker Supervision Newsletter*, "Early Termination of Listing Contracts," online at [www.wra.org/BSNSept06](http://www.wra.org/BSNSept06).

### **Broker Disclosure to Clients (2009 Listing, Pages 2-3)**

With the content of the WRA Broker Disclosure to Clients incorporated into the 2009 listing, REALTORS® will no longer need to use the separate Broker Disclosure to Clients form when they use the 2009 WB-3.

This section reviews the duties a broker owes to all parties and the duties owed to a client. These duties include a broker's duty to provide information and advice when requested by the client regarding matters that are material to the client's transaction and within the scope of the knowledge, skills and training required by Wis. Stat. chapter 452. A broker can provide information and objective guidance to a customer, while the advice given to a client can favor the client's interests over those of the other party. Therefore it is perfectly appropriate to tell a buyer/client that a property is overpriced, but it would not be appropriate to share that

observation with a buyer/customer.

This section also gives a detailed explanation of multiple representation relationships with and without designated agency before asking the seller to select an agency relationship. Agents should be prepared to discuss this information with the prospective client and explain how the relationship will operate in various situations. It is also important that the consumer understand all the options and make a choice that is comfortable for him or her.

The fullest range of representation in all transactions will be available with multiple representation with designated agency. In a multiple representation with designated agency, both clients are entitled to full advice and negotiation services so that the agents working with the buyer and the seller, respectively, each can give his or her client advice on how to gain advantages in the negotiations even if this advice is not in the best interests of the other client.

If one client refuses to allow multiple representation with designated agency, or, if in the middle of negotiations one client withdraws the consent to multiple representation with designated agency, the agents will then practice as they would have under the old law in a "dual agency" situation. In other words, this would be basic multiple representation without designated agency.

For further information about multiple representation and agency relationships, review the June 2006 *Legal Update*, "Revised Agency Law Implementation," online at [www.wra.org/LU0606](http://www.wra.org/LU0606) and the "Working with Multiple Representation Transactions" article in the October 2008 edition of the *Wisconsin Real Estate Magazine*, online at [www.news.wra.org/story.asp?a=989](http://www.news.wra.org/story.asp?a=989).

The statutory Broker Disclosure to

Clients section ends with an explanation of subagency and a reminder to the consumer that licensees are not attorneys or professional inspectors and that appropriate professionals and inspectors should be consulted within their areas of expertise throughout the transaction. This is followed by a section regarding confidentiality that is substantially similar to the section that appears in the old agency disclosure forms.


### **Seller's Disclosure Report (2009 Listing, Page 3)**

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 critical because this is the only property condition disclosure that the seller is asked to make in the WB-3. With vacant land, no Wis. Stat. Chapter 709 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 VLR nicely fits the bill. The seller also agrees to amend the VLR 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 VLR 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 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 important document is forgotten or overlooked.

### **Seller Representations Regarding Defects (2009 Listing, Page 4)**

The Seller Representations Regarding Defects section on lines 180-185 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 VLR 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 – Vacant Land (VLR). The VLR 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 of 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 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 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.

### **Definitions (2009 Listing, Page 4)**

The 2009 listing defines "Adverse Fact," "Deadlines – Days," "Delivery," "Fixtures," "Material Adverse Fact," "Procure," "Property" and "Protected Buyer" on Page 4.

- The "Deadlines – Days" specifies the formula for counting the days

to a deadline, for example, the three days after the expiration of the listing contract used in listing protection. This formulation is based upon the language in the offer to purchase.


- The definition of "Procure" had been modified to require an enforceable, instead of a valid and binding contract of sale, to specify that a full-price offer must be submitted to the seller or listing broker, and to substitute the term "buyer" in place of the word "purchaser."
- The definition of "Delivery" was modified to add "or 4)" as otherwise agreed in additional provisions on lines 254-261 or in an addendum to this Listing" to the end of the list of authorized means of delivery. A specific authorization for e-mail delivery was not included, although it appears that an e-mail delivery provision will be included in the upcoming revisions to the offer to purchase forms.

## E-Mail Delivery and E-Commerce

In non-consumer transactions in which the broker is willing to use electronic documents and the party working with the broker consents to use electronic documents, that party may receive electronic copies of documents from the broker, sign them electronically and return them electronically to the broker. When both parties consent to use electronic documents, they will be able to receive, sign and deliver transaction documents, such as offers, counter-offers and other documents, electronically. In non-consumer transactions, Wisconsin law only requires brokers and parties to consent to do business electronically by their actions.

However, Wisconsin real estate license law and the Code of Ethics says that agreements between parties need to be in writing, so the parties' agreement to use e-mail delivery should be in writing in an offer to purchase, for example, just like the authorization to use fax delivery is in

writing in the contract. REALTORS® working in non-consumer transactions – commercial, business or vacant land transactions in which neither party is a consumer – are required to indicate in their offers to purchase if they will use e-mail as a method of delivery of notices and documents. This may be indicated in Additional Provisions or by using the WRA's Addendum D – Electronic Document Delivery, a copy of which is available on the E-Commerce REALTOR® Resource page, online at [www.wra.org/ecommerce](http://www.wra.org/ecommerce).

 **REALTOR® Practice Tips:** Addendum D (or language excerpted therefrom) may be used alone in cases where the consent to the use of electronic documents, electronic signatures and e-mail delivery is based on the parties' actions and conduct only when neither party is a consumer. If either party is a consumer, then an additional step must be taken before Addendum D or similar language authorizing e-commerce in a real estate transaction may be used with respect to a consumer.

A consumer (for these purposes) is an individual who obtains, in a transaction, real estate, real estate brokerage services or proceeds that are used primarily for personal, family or household purposes. If there is a consumer in the transaction, the two-step process involving the electronic consumer consent plus the Addendum D will be needed. For example, electronic consumer consent requirements apply to most transactions in which individuals are buying or selling residential properties because they will be using the property or the proceeds for personal, family or household purposes.

Transactions that are strictly commercial or involve two businesses as parties are not consumer transactions and are not subject to the electronic consumer consent requirements. For example, a developer buying a house to tear it down and to use the land for

a large condominium development is not a consumer, so the electronic consumer consent is not required. It may be less obvious in other transactions whether they are for personal, family or household purposes, or for business or commercial purposes. When transactions do not neatly fall into one category, prudent practice will dictate complying with the electronic consumer consent requirements by using the two-step process.

### Two-Step Process

1. In the first step, the broker copies and pastes an electronic consumer consent form into an e-mail that is sent to the consumer. After reading this information, the consumer clicks on "reply," types in his or her name in the signature space and sends it back to the broker. The first step is now done and that consumer now may receive and send transaction documents via e-mail.
  2. The second step is to place language authorizing e-mail delivery into the relevant contracts because REALTORS® are required to put agreements into writing. Thus the WRA Addendum D – or the language from that form or similar language – needs to be added to the listing contract, buyer agency agreement, offer to purchase, etc.
- Consent for Use of Electronic Documents and Signatures in Consumer Real Estate Transactions: [www.wra.org/Resources/resource\\_pages/File\\_samples/electconsent2.doc](http://www.wra.org/Resources/resource_pages/File_samples/electconsent2.doc).
  - Addendum D – Electronic Document Delivery: [www.wra.org/Resources/resource\\_pages/File\\_samples/AddendumE08.doc](http://www.wra.org/Resources/resource_pages/File_samples/AddendumE08.doc).

For further discussion of e-mail delivery, see the May 2008 edition of the *Wisconsin Real Estate Magazine*, "E-Mail Delivery: Working with Consumer Consents to Deliver Electronic Documents," online at <http://news.wra.org/story.asp?a=922>, and the February

2008 *Legal Update*, “Electronic Commerce and E-Mail Delivery,” online at [www.wra.org/LU0802](http://www.wra.org/LU0802).

### Utility Availability (2009 Listing, Page 5)

On lines 249-252 of the WB-3, the seller looks at the availability of utility connections such as electric, gas, municipal sewer and water, and telephone, and represents which types of connections are present and how close they come to the potential property building site, for example, onto the property, to the lot line, across the street, etc. “Seller represents that the following utility connections are located as follows: (e.g. at the lot line, on the property, across the street, unknown, etc.): electricity \_\_\_\_\_; gas \_\_\_\_\_; municipal sewer \_\_\_\_\_; municipal water \_\_\_\_\_; telephone \_\_\_\_\_; other \_\_\_\_\_; [STRIKE AND COMPLETE AS APPLICABLE]”

When the listing is completed, these lines are a starting point for utility availability. The listing broker would not want to advertise the location of these utilities in a data sheet based on the seller’s representations unless the broker attributes the information to the seller or unless the information is independently confirmed with the appropriate authorities and attributed to those sources. The buyer may seek confirmation of these points from the proper authorities later on in the offer to purchase.

### Zoning (2009 Listing, Page 5)

Unlike the residential listing contract, the vacant land listing contains an item at line 253 where the seller represents the property’s zoning. Although the applicable zoning is generally important in all real estate transactions, it will be far more important in transactions where vacant land is purchased for construction or development. The buyer may want to investigate whether the buyer’s planned use is permitted under current zoning or whether a conditional-use permit or a variance may be needed. If that is the case, the buyer may want to factor the time and resources that will be involved

into the purchase price that will be offered and even into the decision of whether to pursue the seller’s property at all.

For each zoning classification, there are generally two categories of uses: permitted and conditional. Permitted uses are allowed without any further required proceedings. 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.

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 where the proposed use would be detrimental to the neighborhood. Variances will usually specify exactly how the land can be developed.

The distinctions between variances and CUPs often appear to confuse both local communities and the courts. Unlike a variance, no specific requirements are provided in the statutes as prerequisite to the granting of a CUP. The ability to grant CUPs provides communities with flexibility and may be used to grant relief from both dimensional requirements and use restrictions. Unlike variances, there is

## Subscribe

**This *Legal Update* and other Updates beginning with 92.01 can be found in the members-only legal section of the WRA Web site at: [www.wra.org](http://www.wra.org).**

A subscription to the *Legal Update* is included in all association Designated REALTOR® dues. Designated REALTORS® receive a monthly publication package including the *Legal Update*, and other industry-related materials.

REALTORS® and Affiliate members may subscribe to the Designated REALTOR® publication package for \$30 annually. Non-member subscription rate for the package is \$130 annually. Member subscription price for the *Legal Update* is \$25, non-member price is \$75. Each subscription includes 12 monthly issues.

**Contact the Wisconsin REALTORS® Association to subscribe:**

4801 Forest Run Road,  
Suite 201  
Madison, WI, 53704-7337

(608) 241-2047  
(800) 279-1972

[www.wra.org](http://www.wra.org)



no “unnecessary hardship” or “practical difficulty” standard that must be met, unless it is specifically stated in the local zoning ordinance. The showing of a hardship is not required.

Additional information about zoning is found in the November 2005 *Legal Update*, “Zoning Law Developments,” online at [www.wra.org/LU0511](http://www.wra.org/LU0511).

## Notice about Sex Offender Registry (2009 Listing, Page 5)

While REALTORS® have been using WRA forms that had been modified to include a notice about the sex offender registry, this notice is now a part of the approved form. The Megan’s Law disclosure in the listing contracts provides the broker with immunity regarding disclosure to sellers per Wis. Stat. § 452.24.

## WRA Seller Disclosure Report – Vacant Land

The *Update* now turns to a review of the updated WRA Seller Disclosure Report – Vacant Land (VLR), intended for use together with the updated vacant land listing. The VLR is not a Wis. Stat. § 709.02 RECR for real property including one to four dwelling units. Instead, the VLR addresses issues that have been listed on prior versions of the WB-3 vacant land listing as “conditions affecting the property or transaction,” and has been supplemented to bring in additional disclosure items pertinent to the purchase of vacant land with an eye toward improvement and development.

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 vacant land inspection and seller inquiry obligations, and fulfills the seller’s promise made in the Seller’s Disclosure Report section in the WB-3 to complete a seller’s disclosure report.

A sample copy of the revised VLR appears on Pages 32-33 of this *Update*.

The following discussion overviews many of the vacant land-related items in the VLR 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](http://www.wra.org/LU0809). The Farm RECR and the VLR share many items in common.

The VLR 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 VLR 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. 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 VLR and 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 I

*Planned or Commenced Public Improvements which May Result in Special Assessments or Otherwise Materially Affect the Property or the Present Use of the Property?*

Wis. Stat. § 66.0703(1)(a) authorizes a town to collect special assessments upon property in a limited and determinable area for special benefits conferred upon the property by a municipal work or improvement. Special assessments can be levied only for local improvements; the costs of water and sewer mains typically are specially assessed to adjacent properties. While beneficial for future development, the immediate cost can be substantial.

### Sewer Special Assessment Costly for Farmland

In *Haase v. Town of Menasha Utility District* (2007AP2463, Ct. App. 2008), the Haases appealed the circuit decision that a special assessment imposed for a sanitary sewer extension provided a special benefit to the Haases’ property and was reasonable. In the exercise of its police power, the Town extended sewer services to an approximately 970-acre area by

installing a large sewer main called an interceptor. The special assessment imposed was \$934.39 per acre.

The Haases own six parcels of land in the assessed area and four of the six are farmland. The farmland assessments are deferred as long as agricultural use continues under Wis. Stat. § 66.0721. The Haases' land is serviced by a well and septic tank and had not been serviced by municipal sewer and water before. The Haases indicated they are content with their private septic system and will have to sell some of their land to pay for the assessments.

The Haases objected to the special assessment on grounds that the improvement actually was general in nature and should be funded by general taxes, and that the interceptor would not substantially benefit all subject property owners within a reasonable amount of time.

The circuit court concluded the interceptor was required to service all of the properties; the property owners have the option to hook up to the sewer service now or in the future, to defer payment on their agricultural parcels and to pass on the cost to a buyer or developer; the interceptor will dramatically increase property values; there was both a special and local benefit; and the assessment was reasonable. The Town already had approved rezoning of the subject property and the official change from agricultural to residential would occur upon individual landowner request. The fact that property will receive no present benefit in the sense of actual use of the improvement will not defeat the assessment if benefits are sure to be realized in a reasonable time in the future. The circuit court accordingly concluded that the Haases have realized a special benefit in the form of municipal water and sewer service and increased property value, and the Wisconsin Court of Appeals concurred.

#### Item 4

##### *A Portion of the Property in a Floodplain, Wetland or Shoreland Zoning Area under Local, State or Federal Regulations?*

#### Floodplains

Floods are the most common natural disaster in the United States, and Wisconsin is 10th in the nation in documented flood damage. Floodplains are typically lowland areas adjacent to lakes, wetlands and rivers that are covered by water during a flood. For floodplain management purposes, the floodplain is the area covered by a flood that has a 1-percent chance of occurring in any given year, or the 100-year flood. In Wisconsin, the floodplain is officially mapped as the floodway and the flood fringe.

The floodway is the channel of a river or stream and those portions of the floodplain adjoining the channel required to carry the regional flood discharge. The floodway is the most dangerous part of the floodplain – it is associated with moving water. New development is prohibited in floodway areas due to the water depth and velocity during flood events. Anyone purchasing a lot along a watercourse should check to ensure that there is a buildable area outside the floodway.

The flood fringe is the portion of the floodplain outside of the floodway, which is covered by floodwater during the regional flood. The term “flood fringe” is generally associated with standing water rather than flowing water. It is also that part of the floodplain in which development is allowed, subject to floodplain development standards.

Wisconsin flood fringe development standards for new construction include the following basic requirements (local ordinances may be more restrictive):

- Lowest floor elevated on fill must be 2 feet or more above the Regional Flood Elevation (RFE) (basement floor can be at RFE).

- Fill must be 1 foot or more above RFE and must extend 15 feet beyond the structure.
- Structures must have dry-land access.

A structure located in a flood zone (also referred to as a Special Flood Hazard Area, or SFHA) has a 26-percent chance of being damaged by a flood over a 30-year mortgage. Lenders require flood insurance as a condition of receiving loans for SFHA property. Standard property/casualty insurance policies do not cover damage caused by flooding. However, any property owner or renter in a community that participates in the National Flood Insurance Program can purchase flood insurance, whether or not the property is in the floodplain.

For additional information about floodplains, review the February 2007 *Legal Update*, “Water’s Edge: Floodplains and the Ordinary High Water Mark,” online at [www.wra.org/LU0702](http://www.wra.org/LU0702).

#### Wetlands

See the discussion of wetlands and the Addendum W – Wetlands on Pages 21-22 of this *Update*.

#### Shoreland Zoning

Shoreland includes lands within 1,000 feet of the Ordinary High Water Mark (OHWM) of navigable lakes, ponds and flowages, and lands either within the floodplain or within 300 feet of the OHWM, whichever is greater, of navigable rivers and streams.

Under Wisconsin law, all counties are required to adopt shoreland-zoning ordinances that meet or exceed the minimum requirements established in Wis. Admin. Code Chap. NR 115. The current version of NR 115 ([www.legis.state.wi.us/rsb/code/nr/nr115.pdf](http://www.legis.state.wi.us/rsb/code/nr/nr115.pdf)) establishes minimum regulatory standards for building setbacks, cutting trees and shrubs, lot sizes and nonconforming structures. However, the minimum standards for shoreland zoning ordinances

have been undergoing revision at the Department of Natural Resources for over six years and the DNR has proposed numerous drafts. The following have been among the DNR proposals:

**Nonconforming Structures:** Proposals regarding nonconforming structures would allow unlimited maintenance and repair of a nonconforming principal structure, and permit principal structures to be torn down and replaced if the lot has an area of at least 7,000 square feet, the structure is replaced on the existing foundation, the structure is not moved closer to the water, no part of the structure is located closer than 35 feet from the OHWM, building height is not increased, and mitigation requirements are met. In addition, “minimal” expansion would be allowed if the entire structure were located at least 35 feet from the OHWM.

**Minimum Lot Sizes:** All new shoreland lots created in the future must be a minimum of 20,000 square feet (not including land underneath navigable streams) with 100 feet of frontage. Current law allows lots to be a minimum size of 10,000 square feet with 60 feet of frontage if serviced by public sewer.

**Limits on Impervious Surfaces:** Impervious surfaces are any hard surfaces that prevent water from soaking into the soil or that let water flow off of it. This proposal places a limit on the amount of rooftops, roadways, driveways and other hard surfaces that may be built within 300 feet of a shoreline. These limits do not apply to existing properties unless the building, driveway, etc., is replaced, structurally altered or expanded (unlimited repair of existing structures is allowed). The limit is 10 percent of the lot area, but can be increased to 20 percent if the property owner agrees to revegetate the shoreline and prevent any storm water from running off the site (a very high standard).

The limit is different for lots with existing structures. The initial limit is 15 percent, with the option to go to 20 percent if the property owner agrees to revegetation and runoff prevention. To put this area limit in perspective, a typical (2,000 square-foot) home with a driveway, patio, and a portion of the road would not be allowed on a minimum-sized lakefront lot (20,000 square-foot) without expensive mitigation. Even with mitigation, the maximum limit of 20 percent places severe restrictions on property usage. (After taking away for the road and driveway, the home, garage, patio and any other structure could not occupy more than a 23-by-50-foot area.)

**Structures Height Limits:** Any new structure within 300 feet of the water must be less than 35 feet in height. Current law does not include structure height restrictions, but many county shoreland zoning ordinances contain a 35-foot height limitation.

**Expansion of Near-Water Buildings Prohibited:** Buildings and other structures located completely or partially within the primary buffer (35-foot minimum, counties may require more) cannot be expanded in any dimension.

**Expansion of Other Buildings Allowed:** Buildings and other structures that are behind the primary buffer line but closer than 75 feet may be expanded, provided the expansion does not bring the structure closer to the water. The expansion is subject to the impervious surface limit and mitigation must be performed.

For a complete copy of the current proposed revisions to NR 115 and an update on its status, visit <http://dnr.wi.gov/org/water/wm/dsfm/shore/news.htm>. Clearly, anyone working with property within shoreland zoning areas must monitor the progress of the new requirements, their enactment by the counties and the application to a specific property.

## Item 10

*A Defect or Contamination Caused by Unsafe Concentrations of, or Unsafe Conditions Relating to, Pesticides, Herbicides, Fertilizer, Radon, Radium in Water Supplies, Lead or Arsenic in Soil, or Other Potentially Hazardous or Toxic Substances on the Premises?*

### **Old Orchards May Be Contaminated by Lead Arsenate Pesticides**


Lead and arsenic compounds were used as pesticides on apple and cherry orchards from the late-1800s to the mid-1900s. Lead arsenate was a popular insecticide used for moth control in commercial orchards, and in smaller but still substantial amounts in home gardens and orchards for mosquito control. These compounds do not break down and are not very mobile, so they are often still found in the soil today. Higher concentrations tend to occur where the former trees stood; lower concentrations appear between the former tree sites. Chemical analysis of soil will determine if there are any elevated concentrations of lead or arsenic.

Lead and arsenic enter the human body primarily by ingestion. Preschool-age children are the most vulnerable because children play in soil and are likely to place their hands and other objects into their mouths, they absorb lead and arsenic more readily than adults and they are likely to have nutrient deficiencies that may facilitate lead and arsenic absorption. In other words, this is very similar to the dangers to children posed by lead-based paint (LBP).

Allowing children to play in the soils around the outside of the house may be dangerous if lead and arsenic from pesticides or LBP is in the soil. Childhood exposure to lead can cause developmental and nervous system problems and high levels can also affect the nervous system and kidneys

of adults. Long-term exposure to arsenic can cause several types of cancer.

The WRA worked cooperatively with the DNR and the Department of Agriculture, Trade and Consumer Protection in 2002 to develop a special Lead/Arsenic Pesticide Addendum. This addendum prompts the seller to disclose any information the seller has about use of the property as an orchard prior to 1960 and about any use of lead- or arsenic-based pesticides. The addendum also gives the buyer the opportunity to test for residual levels of pesticides in the soils.


 **REALTOR® Practice Tips:** REALTORS® should be sure that they are aware of the Lead/Arsenic Pesticide Addendum and use it regularly with sites that have been orchards. The Lead/Arsenic Pesticide Addendum is available online at [www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/pdf/lead\\_arsenic\\_addendum.pdf](http://www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/pdf/lead_arsenic_addendum.pdf) and in WRA ZipForm.


## Item 11


*Production of Methamphetamine or Other Hazardous or Toxic Substances on the Property?*

### Meth Labs


#### Lead Arsenate Pesticides in Former Orchards


 “The Apple Bites Back,” August 2006 issue of *Environmental Health Perspectives*: [www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/lead\\_arsenate/pdf/TheAppleBitesBack.pdf](http://www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/lead_arsenate/pdf/TheAppleBitesBack.pdf)

 “Lawsuit Targets Horseshoe Bay Farms in Egg Harbor, Developer: Property failed to disclose lead contamination”: [www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/lead\\_arsenate/pdf/NewspaperArticle.pdf](http://www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/lead_arsenate/pdf/NewspaperArticle.pdf)

 DATCP lead arsenate facts sheets and information: [www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/lead\\_arsenate/factsheets.jsp](http://www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/lead_arsenate/factsheets.jsp)

#### Methamphetamine Lab Information

 “Cleaning Up Hazardous Chemicals at Methamphetamine Labs” fact sheet: <http://dhs.wisconsin.gov/eh/ChemFS/pdf/MethFS.pdf>

 Minnesota Department of Health meth and meth lab clean up information: [www.health.state.mn.us/divs/eh/meth/](http://www.health.state.mn.us/divs/eh/meth/)

 National Association of REALTORS® Field Guide to Meth Labs: [www.realtor.org/library/library/fg324](http://www.realtor.org/library/library/fg324)

Methamphetamine (meth) is a man-made amphetamine, produced and sold illegally in the form of pills, powder or chunks. Common street names for meth include speed, crank, ice, glass and crystal. Homemade meth is produced in makeshift labs set up in homes, apartments, hotel rooms, mobile homes or other buildings. Although the ingredients used to produce meth are readily available products, many of the chemicals used in the “cooking” process can be harmful. Short-term exposure to high concentrations of chemical vapors in a functioning meth lab can cause severe health problems or even death. For this reason, meth “cookers,” their families and first responders are at highest risk of acute health effects including lung damage and chemical burns to different parts of the body. Unsuspecting people can also touch meth residues and have symptoms similar to those experienced by meth users. All contamination needs to be cleaned up, and any sanitation, electrical and other safety hazards must be addressed.

Once the main chemicals related to the former lab have been removed, the health department is typically

called in to assess the property for hazards and long-term exposure risks from residual chemicals. The DNR also may be called in to assess any environmental impacts from chemical spills or improper waste disposal. The broker should see if any reports from these agencies are available to use as a disclosure document. There are no predetermined, acceptable levels of clean-up inside a building or home for the many chemicals associated with meth labs. Thus, testing can be done after clean-up, but at this time the Department of Health and Family Services does not recommend it.

If, however, the seller does not disclose the property’s history and the steps taken for remediation of the property, REALTORS® should disclose this in writing as information suggesting the possibility of a material adverse fact.

## Item 15

*Subsoil Conditions which Would Significantly Increase the Cost of Development Including, but not Limited to, Subsurface Foundations or Waste Material; Organic or Non-Organic Fill; Dumpsites Where Pesticides, Herbicides, Fertilizer or Other Toxic or Hazardous Materials or Containers for these Materials Were Disposed of in Violation of Manufacturer's or Government Guidelines, or Other Laws Regulating Said Disposal; High Groundwater; Adverse Soil Conditions (e.g., Low Load Bearing Capacity, Earth or Soil Movement, Slides); or Excessive Rocks or Rock Formations?*

### Subsoil Conditions

Adverse subsoil conditions such as buried foundations or construction materials, organic or non-organic fill, dumpsite use, buried containers containing hazardous or toxic materials, high groundwater tables, soils with a low load-bearing capacity or excessive rock may impede or increase the costs of development.

## Hazardous Dumpsites

Obviously illegal disposal of toxic and hazardous substances can have potentially severe consequences in terms of soil, groundwater and other contamination. If hazardous dumping has been present, the owner may wish to take advantage of the Agricultural Chemical Cleanup Program. This program was enacted in response to growing concern over increasingly frequent discoveries of pesticides, herbicides, fertilizers and other agricultural chemicals in groundwater. The program, which closely resembles the Petroleum Environmental Cleanup Fund Award program, is established in Wis. Stat. § 94.73.

See *Legal Update 95.10*, "Environmental Contamination Issues," at [www.wra.org/LU9510](http://www.wra.org/LU9510) or [www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/index.jsp](http://www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/index.jsp) for additional information.

## Item 17

### *Legal Vehicular Access to the Property from Public Roads?*

There are parcels located in Wisconsin that do not have access to a public road. These parcels are commonly known as landlocked parcels, which, as the name implies, cannot be accessed without crossing private property owned by another. Landlocked parcels are not illegal. They can be bought and sold just like any other real property. From a transactional perspective, the only additional requirement is a disclosure duty on the part of the seller and real estate licensee to inform potential buyers of the limitation.

Landlocked owners do not have an absolute legal right to public access. They do, however, have the statutory right to petition the government for access provided the landlocked owner has first attempted to purchase access rights through private negotiations.

The private negotiation process may result in the purchasing of additional

land and the building of a private driveway. It is also possible the landlocked owner could purchase private road easement rights. This would permit the landlocked owner to build and maintain a private road on the neighbor's property. Private road easements should be drafted by an attorney and recorded with the register of deeds. The easement should address issues such as the type of road to be installed, the allocation of expense and maintenance fees and the limitations, if any, concerning use and access of the road.

In some instances access rights could be established by prescriptive easement, also known as easement by adverse possession. A prescriptive easement is created when a person uses land without permission (such as road access) in a manner that is hostile, visible and open in a continuous and uninterrupted way for a period of at least 20 years. In order to establish and enforce prescriptive easement rights, a landlocked owner would need to commence an action in circuit court. A claim of prescriptive easement is generally restricted to privately owned land. Except in limited circumstances, adverse possession claims are not permitted against government-owned land.

If a landlocked owner cannot obtain access rights through private initiative, the landlocked owner can petition the government pursuant to Wis. Stat. § 80.13. This statute provides a procedure whereby the landlocked owner may seek town approval to build a public road to the landlocked property. The property owner starts this process by filing an affidavit with the township. The affidavit must state that the property is landlocked and that the owner is unable to purchase or acquire access rights from an owner of the adjoining real estate or that the purchase price to gain access is at an exorbitant price.

Upon receipt of the affidavit, the township is required to hold a public

hearing on the request within 30 days. The town must publish a class two notice informing the public as to the time and date of the hearing, along with personally serving the notice on the property owner. The decision to build a public road to the landlocked parcel is at the total discretion of the town. If the town board feels that a road is not in the public interest, they may deny the request of the property owner and the property owner remains landlocked.

If the request is approved, the town board shall assess the damages to the owners of the real estate to be acquired by the town and pay just compensation. The landlocked property owner will be assessed an "advantage" assessment to pay for the road construction and cost of acquisition. Advantages are deemed to occur because it is assumed the property is more valuable with road access. In addition to the advantage assessment, the landlocked property owner is also responsible for the town's attorney fees, survey costs and valuation expert fees. The costs and fees will be assessed to the landlocked owner regardless of whether or not the town approves the road construction.

From a practical standpoint, it is usually more economical and beneficial to the landlocked owner to obtain access right through private negotiations. If the town creates a public road, anyone can travel upon it. On the other hand, a driveway or private road easement can limit access and control the traffic. Furthermore, the acquisition cost, public road construction, and related fees and costs are usually far more expensive than the cost to purchase the land privately. If, however, the landlocked owner cannot obtain access rights through private negotiations, the statutory remedy is available.

## Item 18

### *Homeowners' Associations, Common Areas Shared or Co-Owned with*

*Others, Zoning Violations or Nonconforming Uses, Conservation Easements, Restrictive Covenants, Rights-Of-Way, Easements, Easement Maintenance Agreements or Use of a Part of Property by Non-Owners Other than Recorded Utility Easements?*

### **Nonconforming Use**

A nonconforming use is an active and actual use of land and buildings that existed prior to the commencement of the zoning ordinance and that has continued in the same or a related use until the present. A valid nonconforming use of land may be continued despite its being contrary to present zoning. However, because the spirit of zoning is to restrict a nonconforming use and to eliminate such uses as quickly as possible, the law does not tolerate the continuance of nonconforming uses if the use is changed. The law will not condone an activity simply because it takes place on the premises. Thus, even if an original use of land is a legal nonconforming use, the violation of the nonconforming use by expansion or enlargement that changes the use invalidates the legal nonconforming use as well as the illegal change.

### **Distinguishing Between Nonconforming Structures and Nonconforming Uses:**

In *Hillis v. Village of Fox Point*, 2005 WI App 106, the McGees purchased a home in the village of Fox Point in 1995. The house was originally built in 1927 and violates a bluff setback line that was established approximately 30 years after the home was built. The home is located in an area zoned for residential uses.

The McGees applied for a building permit to construct an addition to the side of the home, away from the bluff. The proposed addition would not violate any ordinances related to the residential use, front or side setbacks, or the ratio of floor area to lot size. However, Hillis, the next-door neighbor, objected to the addition,

maintaining it would violate the village's ordinance, which limits the expansion of nonconforming uses to 50 percent of the value of the structure.

The village rejected the Hillis claim and refused to apply the nonconforming use provision to the expansion of the McGees' home on the basis that the home was located on a lot properly zoned for residential uses and thus was not a nonconforming use. The circuit court agreed.

The Court of Appeals also rejected Hillis' claim that the McGees' home was a nonconforming use. In doing so, the Court of Appeals considered the purpose of the statutes limiting repairs and improvements to structures used in a nonconforming use to a total of 50 percent of the structure's assessed value.

The Court reasoned that the purpose was to "force the phase-out of uses that do not conform with the zoning plan (e.g., a tavern in a residential area) by limiting the repairs and structural modifications permitted to buildings in which the nonconforming use is taking place." However, a home located in an area zoned for residential use is not a nonconforming use simply because it violates a bluff setback requirement. In rejecting the claim that this home is somehow a nonconforming use, the Court stated that the home "was a residence when it was built, it was a residence when the bluff setback ordinance was adopted, and it remains a residence today in a geographic area that was and is zoned for residential use."

This case rejects the notion that homes in violation of a setback or other dimensional requirements are considered "nonconforming uses" and may be subject to the 50 percent rule. Such homes or structures that do not conform to setbacks or other dimensional requirements are referred to as "nonconforming structures." For further discussion of the distinction between

nonconforming uses and nonconforming structures, read Pages 8-10 of the November 2005 *Legal Update*, "Zoning Law Developments," online at [www.wra.org/LU0511](http://www.wra.org/LU0511).

### **REALTOR® Practice Tips:**

The purchaser of a property that has a present nonconforming use must recognize that the nonconforming use regulations prohibit the alteration, addition to or repair of a nonconforming use property in excess of 50 percent of assessed value, and that the buyer may only change the use of the property if the new use conforms with current zoning.

### **Covenants and Restrictions**

Public policy favors the free and unrestricted use of property, and deed restrictions must be strictly construed to favor the unencumbered use of property. Restrictions and covenants must be stated in clear and unequivocal terms. When the meaning of a restrictive covenant is doubtful, all doubt should be resolved in favor of the property owner's free use of his or her land for all lawful purposes. However, a restrictive covenant need not expressly prohibit the specific activity in question in order to be enforceable. If the intent of the restrictive covenant can be clearly ascertained from the covenant itself, the restrictions are enforceable. The language in a restrictive covenant is ambiguous when it is capable of more than one reasonable interpretation.

### **Restrictive Covenants Cannot be Ignored**

In *Pietrowski v. Dufrane*, 2001 WI App 175, one resident won her cause of action to enforce a restrictive covenant, which she claimed prohibited her neighbors from constructing a second garage on their property. Once the garage construction was completed, the resident sued to enforce the restrictive covenant, asking the court to order that the garage be razed. The defendant alleged that other property

owners in the subdivision, including the resident bringing the lawsuit, had constructed sheds and other buildings on their property in addition to the permitted single-family residence and garage. The circuit court granted the first resident's claim and ordered the neighbor to raze the garage.

The Wisconsin Court of Appeals found that the restrictions clearly prohibit the construction of any building in addition to a single-family dwelling and a private garage and upheld the order to raze the garage. Despite the neighbor's contention, nothing in the covenant language suggested that the restrictive covenants were invalid once the architectural control committee was dissolved.

 **REALTOR® Practice Tips:**

This case is a reminder to those who believe that restrictive covenants can be ignored – they can be and are enforced in court, even if other neighboring property owners have themselves violated the covenants.

**Homeowners Association Covenants Must be Strictly Construed**

In *Concerned Neighbors of Lotus Lake Estates, Inc., v. Lotus Lake Estates Home Owner's Association* (Ct. App. No. 2006CV206, 2008), a group of homeowners banded together to challenge a homeowners association that was exceeding its given power.

Concerned Neighbors of Lotus Lake, Inc., a Wisconsin non-stock corporation consisting of residents of Lotus Lake Estates, commenced this action. Concerned Neighbors was formed to challenge certain policies and actions of Lotus Lake Estates Home Owner's Association, the subdivision homeowners association, and its board. Concerned Neighbors alleged the Association's board had adopted a policy whereby the board imposed "fines" on property owners who violated terms of restrictive covenants pertinent to the subdivision. The board

authorized its secretary to patrol the neighborhoods and issue noncompliance notices and fines. Concerned Neighbors questioned the board's authority to impose fines, were upset at the petty infractions being cited and alleged the fines were imposed selectively. The most common infraction was parking a car in a driveway overnight, for which some residents have incurred thousands of dollars in fines. Outstanding fines imposed against residents totaled \$65,090. The fined residents were not afforded a hearing, appeal rights or any other due process.

The Association appealed the circuit court judgment, which declared the Association lacked authority to impose fines on homeowners as a means of enforcing restrictive real estate covenants and to assess homeowners the expenses attributable to its enforcement efforts.

Restrictive covenants, the Court of Appeals noted, must be clearly stated and strictly construed because public policy favors the free and unrestricted use of property. In this case, the covenants do not explicitly authorize the imposition of fines. The Association contends the authority to impose fines is consistent with the covenants' purpose, but the covenants themselves authorize enforcement of the covenants through a court action for damages or injunctive relief, not through the imposition of fines. Absent a restriction imposed by express language, or a purpose clearly discernable from the covenants' terms, the Association had no authority to impose fines. The covenants also expressly limit the Association's rule-making authority to easements and the common lands and facilities, and do not extend the power to impose fines for violations of the covenants on private property. Similarly, the covenants' language limits the Association's power to impose assessments to the construction and maintenance of common-area lands and facilities; there is

no authority to impose assessments for non-common area expenditures.

Accordingly, the Wisconsin Court of Appeals affirmed the decision of the circuit court.

 **REALTOR® Practice Tips:**

Restrictive covenants must be strictly interpreted and implemented, and do not offer the opportunity for overreaching by the organization charged with covenant enforcement.

**Neighbors Want Deck Violating 125 Foot Lake Setback Covenant Razed**

In *Hall v. Liebovich Living Trust*, 2007 WI App 112, Liebovich purchased lakefront property, tore down the property's existing house and built a new one. The neighbors complained that the new house was several feet too close to the lake, in violation of a restrictive covenant shared by the area's lakefront properties. The trial court agreed, but refused to issue an injunction ordering Liebovich to tear down the offending part of his house, and instead awarded monetary damages to the neighbors. The neighbors appealed this remedy to the Wisconsin Court of Appeals, arguing that they are entitled as a matter of law to have Liebovich's deck razed and that they are entitled to attorney fees.

All of the property owners live on the shore of Geneva Lake, and each of their properties is subject to a covenant requiring that no home be built within 125 feet of the "low water line," creating a uniform 125-foot setback for some distance along the lake.

When Liebovich purchased the property, his attorney received a title commitment that referred to the restrictions in the recorded deed. Liebovich later received both his deed and his title policy, which both referred to the restrictions in the recorded deed. When Liebovich tore down the existing house, a property owner in the neighborhood called Liebovich's architect

and warned him about the restriction. Liebovich spoke with his attorney, but decided to continue the construction.

A neighbor made some measurements and concluded that Liebovich's house was closer than 125 feet to the shore. Two neighbors had an attorney write letters to Liebovich complaining. Liebovich talked to his surveyor, who told Liebovich that he did not know anything about "low water line." Liebovich concluded by reference to fixed objects that his house was farther from the lake than the previous house had been and that it conformed to the setback and decided to keep building.

The two neighbors filed suit, requesting an injunction and other remedies. The court found that parts of Liebovich's second-story deck violate the setback restriction because a survey prepared by the neighbors' expert properly showed that Liebovich's house was only 106 feet from the low water line at its closest point. The court found that the portions of Liebovich's house that encroach on the setback "interfere with the uniformity of the neighborhood, restrict views and natural scenery from the neighboring properties and interfere with privacy for one neighbor. The court found that Liebovich's breach of the setback deprived the neighbors of "a real interest in property."

Nevertheless, the court denied the neighbors' request for an injunction requiring Liebovich to tear down his deck, which would cost between \$100,000 and \$200,000 and destroy the central feature of his house. This, the court found, would outweigh any benefit to the neighbors from having the offending portions of Liebovich's house removed. The court also found that Liebovich had made an honest mistake and that his belief that he was in compliance with the deed restriction was reasonable. The court did enjoin Liebovich from further violating the restriction by extending or enclosing his deck,

and ordered that if the deck were ever removed, it could not be rebuilt.

The neighbors argued to the Court of Appeals that the court applied an incorrect legal standard when it weighed the hardships that would result from the grant or denial of an injunction, and contended that the circuit court was compelled to order the razing of the Liebovich deck, but the Court of Appeals found these arguments to be without merit.



#### **REALTOR® Practice Tips:**

Clearly any property purchaser building a home or other structure should use a surveyor in areas where there are zoning and restriction covenants limiting structure placement. Not every property owner will always be as lucky as Liebovich and escape a razing injunction.

#### **Private Use Restrictions**

In *Diamondback Funding, LLC, v. Chili's of Wisconsin, Inc.*, 2004 WI App 161, Diamondback Funding, LLC, appealed a summary judgment dismissing its complaint against Chili's of Wisconsin, Inc. Diamondback was seeking to prohibit Chili's from building and operating a Chili's Grill and Bar on an outlot next to a lot owned by Diamondback on which Diamondback's corporate affiliate operates a Tumbleweed Southwest Mesquite Grill and Bar.

When Diamondback bought the lot in 1999 the seller agreed to deed restrict the adjoining outlot to prohibit the operation of any casual theme-type restaurants specializing in Mexican food. When the outlot was sold, a Restrictive Covenants Agreement provided that no portion of the outlot may be leased, used or occupied as or for a Mexican restaurant or any other restaurant (except for a fast food restaurant not serving primarily Mexican food). The agreement specifically recited that all the restrictive covenants "shall run with the land and be binding upon the buyer and each

of the buyer's tenants, subtenants and other occupants, and its and their respective successors and assigns."

In May 2002, the seller and the outlot buyer purported to modify the restrictive covenant to clarify that the establishment and operation of a Chili's Grill and Bar was a permitted use of the outlot and to delete the prior language from the Restrictive Covenants Agreement, and, in its place, substitute "or any casual theme-type restaurant specializing in Mexican food." Diamondback was not a party to the purported modifications. The seller sold the outlot to Chili's in July 2002, and Diamondback sued Chili's.


The trial court granted summary judgment to Chili's and dismissed Diamondback's complaint, ruling that the "specializing in Mexican food" language was ambiguous on its face and, therefore, not enforceable. The trial court explained it did not know how to quantify the concept or explain it to a jury.

The Court of Appeals noted that it is black-letter law that a contract provision designed to benefit a third party may not either be rescinded or modified without consent of that third party, and Diamondback did not consent to the purported May 2002 modification. Accordingly, the May 2002 modification could not change Diamondback's rights in the original restrictive covenant and it was a nullity to the extent that it might permit a restaurant barred by the original restrictive covenant.

The parties agree that Chili's is a "casual theme-type restaurant." The rule in Wisconsin is that the language in a restrictive covenant is ambiguous if it is susceptible to more than one reasonable interpretation. However, if the intent of a restrictive covenant can be clearly ascertained from the covenant itself, the restrictions will be enforced. Chili's contended, however, that a restrictive covenant may not

be enforced unless it is expressed in clear, unambiguous and peremptory terms. The Court of Appeals found that the restrictive covenants here are clear, unambiguous and peremptory. The Court held that neither “specializing in” something nor “primarily” is ambiguous, citing various dictionary definitions and other case decisions.

The parties disputed whether Chili's is a “Mexican restaurant,” a restaurant that serves “primarily Mexican food,” or is a restaurant “specializing in Mexican food.” This, the Court of Appeals observed, must be decided by a fact-finder. In order to get an injunction, Diamondback must show that Chili's will injuriously violate Diamondback's rights by maintaining a restaurant on the lot that either serves “primarily Mexican food,” or is a restaurant “specializing in Mexican food,” or is a “Mexican restaurant,” and that its injury is irreparable and not adequately compensable in damages. Accordingly, the Court of Appeals remanded the case to the circuit court.

 **REALTOR® Practice Tips:**  
Surprisingly what appears to be a clear restriction can still be challenged in court, although it is hard to believe that Diamondback would not prevail in this case.

## Item 19

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

2007 Wis. Act 121 ([www.legis.state.wi.us/2007/data/acts/07Act121.pdf](http://www.legis.state.wi.us/2007/data/acts/07Act121.pdf)) includes numerous provisions relating to drainage districts. Many changes are designed to make sure property owners and buyers are made aware when a property is in a drainage district. The Act:

- Requires the Department of Agriculture, Trade and Consumer Protection, in cooperation with the state drainage engineer, to produce an

educational pamphlet that describes the function of drainage districts, costs that may be assessed to a person whose property is located in a drainage district and contact information for the state drainage engineer. The pamphlet shall be distributed to anyone who requests the pamphlet, and is to be produced once every three years, beginning in 2009.

- Requires a drainage board in existence on April 4, 2008, to meet by July 1, 2008, to develop a plan to notify, in writing, every person who owns land that is located within the drainage district that such land is in the district and provide contact information for the district.
- Requires a drainage board to notify each person who owns land in the drainage district every three years that such land is in the district, beginning in 2009.
- Requires a drainage board to provide the clerk of each taxation district in which the drainage district is located with a list of the assessments issued by the board each year, and requires each property tax bill for parcels in the district to indicate the amount of the assessment issued on that property.
- Requires that an item C.24m be added to the Wis. Stat. chap. 709 RECR, effective November 1, 2008, that states, “I am aware that the property is located within a special purpose district, such as a drainage district, that has the authority to impose assessments against the real property located within the district.” A property owner who has furnished an RECR to a buyer before November 1, 2008, does not need to amend the RECR to add this disclosure. This provision also appears as Item 19 in the VLR.

## Item 23

*Burial Sites, Archeological Artifacts, Mineral Rights, Orchards or Endangered Species?*

People have been living in Wisconsin for perhaps 13,000 years, and

throughout that time have been burying their dead in its soil. For all but the last 350 years, those people have been Native Americans. Between roughly 600-1200 A.D., some Native Americans were buried in the geometric and animal-shaped mounds of the Effigy Mound Culture. Perhaps more than 15,000 mounds once dotted southern and central Wisconsin. Burial sites are the most sensitive of cultural resources (i.e., archaeological, architectural, and historical sites and structures) and the most protected. While many of these have been destroyed, thousands have survived in what are now public lands and private residential properties.

In Wisconsin, burial sites include any place where human remains are below the surface, including all Native American mounds. The burial sites law (Wis. Stat. § 157.70) applies to any property, regardless of ownership or the activities conducted. It applies to a developer creating a new subdivision, or a property owner excavating for a pool or a house foundation. REALTORS® may become involved with such sites in the course of representing their clients.

A property may contain an alleged burial, such as the report of a burial mound that had been leveled (but where the burial may still survive), or an old town cemetery, long ago abandoned. When such information comes to light, it is wise to suggest at least some minimal investigation of historical records (maps, local histories, state archaeological site files). If substantial evidence of a burial site is found, it is important that this information be disclosed to a potential buyer. If human remains are found during earth-moving activities, the property owner must cease activity and contact the Burial Sites Office of the Wisconsin Historical Society at 608-264-6503. A permit will be required to disturb the remains.

A request to disturb the remains

will require an application for a permit to disturb from its director. If an individual or group on a list of "interested parties" expresses concern with the proposed disturbance, the director can require that the remains be excavated and analyzed by qualified professionals, which can be both time-consuming and costly to the property owner. The owner has the option to avoid disturbing the site and provide a five-foot buffer around its location. Wis. Stat. § 157.70(8) provides penalties for an individual who intentionally disturbs a burial site without prior authorization from the Wisconsin Historical Society.

If a property contains a previously identified cemetery or mound, it may have been catalogued per § 157.70(1)(c). If a catalogued site is to be disturbed, an application must be submitted to the Historical Society, which may deny the application and the proposed activity.

When there is reason to suspect that such a site is located on a property, this information should be disclosed to potential buyers. Such information can prevent potentially expensive delays during projects or legal penalties. The consultation process associated with such sites is designed to help preserve them or allow for their responsible relocation, with as little impact or inconvenience to the property owner as possible.

For questions about Wisconsin's burial sites statutes, call the Burial Sites Preservation Office at the Wisconsin Historical Society at 608-264-6502, or Phil Salkin at the WRA at 608-241-2047.

## Item 29

*Impact Fees or Other Conditions or Occurrences that Would Significantly Increase Development Costs or Reduce the Value of the Property to a Reasonable Person with Knowledge of the Nature and Scope of the Condition or Occurrence?*

Impact fees are fees assessed by municipalities against developers to offset the cost of facilities and services, such as parks and sewers, that become necessary due to the resulting expansion of the community. Current impact fee law in Wis. Stat. § 66.0617 (Page 63 of [www.legis.state.wi.us/statutes/Stat0066.pdf](http://www.legis.state.wi.us/statutes/Stat0066.pdf)) permits a city, village or town to impose an impact fee on a developer to pay capital costs to construct certain public facilities that are necessary to accommodate land development. Such public facilities include highways; facilities for treating sewage, storm water and surface water; facilities for pumping, storing and distributing water; parks, playgrounds and athletic fields; fire protection, emergency medical and law enforcement facilities; and libraries. Impact fees may not be used to fund schools, vehicles and recreational facilities, and may not be imposed by counties.

There are several standards that must be met before a municipality imposes an impact fee. Impact fees must be directly related to the need for new or improved public facilities to serve the land development, must be based on actual capital costs or reasonable estimates of costs for public facilities, and must be reduced to compensate for other funds collected by the municipality or moneys received from the federal or state government to pay for public facilities. An impact fee may be reduced or waived for land development that provides low-cost housing.

Municipalities must segregate impact fee revenues and keep them in separate accounts so they cannot be commingled with other general revenues and used for unrelated municipal spending. There must be regular public reporting in the annual municipal budget with regard to impact fees.

Impact fees must be paid within two weeks of the time a building permit or occupancy permit is issued, not when a subdivision plat is approved. Impact fees collected for one purpose

cannot be used for another. Impact fee revenues not used within a reasonable period of time after they are collected shall be refunded to the current owners of the property on which they were imposed.

A municipality, town or county, as a condition of a subdivision or other land division approval, may not impose any fees or other charges to fund the acquisition or improvement of land, infrastructure or other real or personal property. Any land dedication, easement or other public improvement required by a municipality, town or county, as a condition of a subdivision or other land division approval, must bear a rational relationship to a need resulting from the subdivision or other division of land.

## Addendum W – Wetlands

Wis. Stat. § 23.32(1) defines "wetlands" to mean, "area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions." There are dozens of different types of wetlands in Wisconsin including aquatic beds, marshes, wet meadows, forested wetlands and wetlands with woody shrubs. Visit <http://dnr.wi.gov/wetlands/types.html> for some photographs of some of the contrasting types. Wetlands may be found near lakes, along river and stream shorelines, or independent of other major water bodies.

Wetlands are sometimes fairly obvious, but other times the features that cause the property to be categorized as a wetland are subtle.

Wetlands can support an abundance and variety of plants, ranging from duckweed and orchids to black ash. Many animals spend their whole lives in wetlands; for others, wetlands are critical habitat for feeding, breeding, resting, nesting, escape cover or travel corridors. Due to dense

vegetation and location within the landscape, wetlands are important for retaining stormwater from rain and melting snow rushing toward rivers and lakes and floodwater from rising streams. Wetland plants and soils have the capacity to store and filter pollutants ranging from pesticides to animal wastes. Shoreland wetlands act as buffers between land and water.

Wetlands are regulated by the U.S. Army Corps of Engineers; the Wisconsin DNR; and local counties, cities and villages. The excavating or placement of any material in low areas or wetlands requires a DNR approval known as a Water Quality Certification. Wetland permits often are not easy to obtain. Visit <http://dnr.wi.gov/org/water/fhp/waterway/wetlands.html> for the details. There is no doubt that any property purchaser should be 100-percent clear about whether any wetlands are present because wetlands can throw a wrench in the works of any planned development or improvements.

When the DNR designates land as wetland, the county must enact a zoning ordinance in accordance with the designation. Wis. Admin. Code § NR 115.05(2)(b) (1980) places severe use restrictions on shoreland-wetland zoning districts. Shoreland-wetlands are those wetlands that are 5 acres in size or larger, and are located in the shoreland zone. The shoreland zone is land located within 1,000 feet of the OHWM of a lake, pond or flowage; or within 300 feet of the OHWM of a river or stream; or to the landward side of the floodplain, whichever distance is greater. (Wis. Admin. Code § NR 115.05(3) (1980)).

Shoreland-wetland zoning is intended to protect the important functions that wetlands perform, including:

- Filtering pollutants, nutrients and sediments to protect water quality in out lakes, rivers, streams and wells;
- Storing runoff from heavy rains and

snow melt to reduce flood damage;

- Providing essential habitat for fish, waterfowl and a variety of other animals to ensure recreational opportunities;
- Acting as a shoreline buffer to protect against erosion from waves and currents; and
- Providing beautiful open spaces to enhance our quality of life, property values and tourism.

As a consequence, permitted uses in a shoreland-wetland zoning district include only hiking, fishing, hunting, swimming, harvesting of wild crops, construction and maintenance of duck blinds, and construction and maintenance of piers. (Wis. Admin. Code § NR 115.05(3) (c) (1980)). All other uses generally

are prohibited. (Wis. Admin. Code § NR 115.05(3)(d) (1980)).

The DNR continues to improve the resources and maps available on its Web site for determining if a property includes wetlands. See *Locating Wetlands* at <http://dnr.wi.gov/wetlands/locating.html>. Many times, however, it may be necessary to retain the services of a wetlands delineation professional to give a report on whether wetlands are present on a property and exactly where the wetlands lie. That is where the Addendum W – Wetlands, developed by the WRA in collaboration with the DNR and the Wisconsin Wetland Association, may be useful.

Addendum W – Wetlands (available on Pages 34-35 of this *Update*, online

## **Check out the National Association of REALTORS® REALTOR Benefits® Program Partners**

**ABR®/ABRM<sup>sm</sup>**

**American Home Shield**

**Avis**

**Budget**

**eNeighborhooDs**

**Entertainment® Book**

**Dell, Inc.**

**e-PRO®**

**FedEx**

**Geo F. Brown & Sons**

**GotVMail Communications**

**Hertz Corporation**

**Hostway**

**InternetCrusade®**

**Lenovo**

**Liberty Mutual**

**Lowe's**

**Marsh Affinity Group  
Services**

**Pitney Bowes**

**PsPrint**

**REALTOR.com**

**REALTOR Team Store®**

**REALTOR® Platinum  
Visa® through Chase  
Card Services**

**RELAY™ Transaction  
Management**

**Salesgenie.com™ a service  
of InfoUSA®**

**Sentrilock, LLC**

**SRES®**

**Talking House® Listings &  
Leads Program**

**Xerox**

**ZipForm®**

*For more information go to  
[www.realtor.org/realtorbenefits](http://www.realtor.org/realtorbenefits).*

*\*As of 10/08. List Subject to change.*

at <http://dnr.wi.gov/wetlands/addendum.html>, and on Zipform) provides a summary of the development obstacles involved with wetlands, asks the seller to answer three questions about what the seller has observed on the property as far as wetlands and directs the parties to the DNR Wetlands resources on the DNR Web site. These include the wetlands locator maps, video information (“Waking Up to Wetlands”), brochures and information for contacting appropriate professional assistance. Addendum W contains a contingency that allows the buyer to obtain a report from a wetlands delineation professional (visit <http://dnr.wi.gov/wetlands/pro.html>) and attempts to provide a remedy if the property does include wetlands. Thoughtful negotiation may be required to create an appropriate remedy; the form suggests a price reduction or contract rescission as possible consequences, as well as allowing the parties to create and write in their own solution.

## Hotline Questions and Answers – Vacant Land

*The well construction report states that the well is not located in a floodplain. Floodplain maps indicate that the property is in a floodplain. Should the broker investigate further?*

The floodplain maps in many counties have been revised recently, so it may be wise to double check. To learn if a property is in a floodplain, the following people can be contacted:

1. The first place to start is with the community’s local floodplain zoning administrator or building inspector. This person is knowledgeable about the specifics of the community’s floodplain zoning ordinance. The local official should have a copy of the floodplain map and study for the community. These maps and studies are usually the official source of information about whether a structure is located in the regulatory floodplain.

They can determine whether a property is located in the floodway, the flood fringe or the general floodplain area. The local official should also have a copy of any Letters of Map Amendment, Letters of Map Revisions and Elevation Certificates.

2. Insurance agents are good resources because most major insurance companies write flood insurance policies for the National Flood Insurance Program. Insurance agents can quote rates for flood insurance based on the location and elevation of the structure.
3. Lenders are another source of information. If a person is borrowing money to purchase or refinance a property, the lender is responsible for determining whether the property is located in the floodplain for flood insurance purposes and informing the purchaser of the flood zone determination. If a structure is located in a floodplain, flood insurance is required to close the loan unless a Letter of Map Change has been issued.
4. The DNR regional staff person in your area or the DNR floodplain management staff in Madison are also available to answer questions about owning, buying or building a home in the floodplain. Be sure to ask about other rules that may apply to the property, such as shoreland management zoning and public waters/wetland rules. Contact information for DNR regional offices can be found at: [www.dnr.state.wi.us/staffdir/SearchDNREmp.asp](http://www.dnr.state.wi.us/staffdir/SearchDNREmp.asp).

Information about the remapping of floodplains in Wisconsin can be found at: [www.dnr.state.wi.us/org/water/wm/dsfm/flood/mapping.htm](http://www.dnr.state.wi.us/org/water/wm/dsfm/flood/mapping.htm).

*The agent is part owner of a development and the lots are listed with the agent’s company. When putting in roads and waterways, the workmen discovered a pile of trash at the end of a waterway on a residential lot. Is it acceptable for the workmen to take the materials from the dumpsite to the landfill? This property*

*was purchased from an estate and no disclosure was made regarding the dumpsite. Is there liability? How should the agent proceed?*

The agent is referred to a private attorney, the DNR or an environmental assessment company for advice and recommendations on how to proceed regarding the discovery of the dumpsite.

The DNR may be consulted regarding the contents of the dump, its location in relation to the waterways and possible contamination issues. The agent may contact the DNR regional supervisor for information about the DNR Remediation and Redevelopment program, onsite investigation and direction on whether taking the materials to the local landfill is an appropriate solution. The DNR offers assistance in the identification and proper disposal of dump contents. The DNR Waste Program information is available at <http://dnr.wi.gov/org/aw/wm/contacts/regions.htm>, and, if needed, the Remediation and Redevelopment Program information is found at <http://dnr.wi.gov/org/aw/rr/>. In addition to DNR investigation, an independent environmental assessment may be undertaken to determine the content of the site and if any contamination exists.

The results of this investigation will indicate the content of future property condition disclosures for subsequent transactions. The agent may review the property condition provisions of the vacant land offer to purchase with legal counsel, including those provisions regarding subsoil conditions that would significantly increase the cost of the development. The offer requires disclosure of subsurface foundations, organic or non-organic fill, dumpsites or containers on the property that contained or currently contain toxic or hazardous materials, high ground water, and other soil conditions or excessive rocks or rock formations on the property. In addition, any condition that constituted

a significant health or safety hazard for occupants of the property would need to be disclosed. The attorney may also evaluate whether the agent has a claim against the estate regarding the recently discovered dumpsite.

*The licensee has an opportunity to list a property up north. The property has been in her family since 1958. It turns out it is a landlocked property; there are no easements with the surrounding properties, one of which is a paper company. How could the seller or a buyer go about obtaining legal access?*

A landlocked parcel may be sold. However, the owner will not have legal access to the property unless he or she is able to negotiate access via an easement from an adjacent property owner or petition the town for access.

Wis. Stats. § 80.13 sets forth a procedure for owners of landlocked property to seek access from the town, i.e., an affidavit from the property owner, notice and a public hearing. The applicant pays for the costs of the notices for the public hearing. The town is not obligated, however, to provide access if it determines construction of a road is not in the public interest.

Frequently, a private settlement in these matters can be more beneficial to the property owners than the process under the statute. If the town lays a road, anyone will be able to travel upon that road. On the other hand, a private agreement could limit traffic. Further, the town road is likely to involve more land than would be necessary for a private easement. The owner across whose land the town road will be placed will receive “damages” from the town, but this price may be less than the price the landlocked property owner would be willing to pay for private access.

From the landlocked property owner’s view, the laying of a town road also means considerable expense. The town not only can recover the expenses of its attorney (whether or not a

road is ordered), it can also charge back for surveying and appraisal fees, and for the “advantages” to the landlocked property owner. Advantages are deemed to occur because the property should now be worth more with access. The town normally will build the expense of the road construction into the total advantages charged. The town is not required to perform any roadwork until the fees are paid.

*A subdivision's restrictive covenants date back to 1978 and were amended in the 1990s. The subdivision is completely developed and does not have any neighborhood association in place. Are the restrictive covenants still enforceable at this point? A property owner would like to put up a privacy fence and the restrictive covenants state, "no stockade-type of fence shall be erected up on the plat without the express approval of the plat proprietors or their delegates." The developer, who is now 94 years old, still lives adjacent to the property in question and recorded the amended covenants in the 1990s.*

Restrictive covenants contained in a subdivision's declaration of restrictions are usually enforceable by the homeowners association or by any homeowner subject to the restrictions. The members of the homeowners association, the sellers or their attorney should review the recorded declaration of restrictions to determine what enforcement rights are available. In some cases, the change of the character of a neighborhood could render a covenant obsolete. In other cases, the courts have upheld covenants. An owner may attempt to have the covenants released, however this process may be costly as they can be removed only if all interested parties agree. The broker cannot give the seller legal advice, so the seller should be referred to an attorney to review the enforceability of the original covenants and the amended covenants, and, if enforceable, determine the scope

and definition of a stockade fence.

*The broker is going to list a home tomorrow. The neighbors told the sellers that there was a body buried in the backyard. The sellers believe there is a body there. Is this something that needs to be disclosed?*

The seller should make appropriate inquiries and disclosures relating to the possible burial site. All human burial sites, including cemeteries and Indian mounds, are protected under Wis. Stat. § 157.70. The laws apply to both public and private lands. The law is administered by the State Historical Society Burial Sites Program. The buyer may wish to call the Burial Sites Program at the State Historical Society at 608-264-6503. Additionally, the broker may provide the buyer with a copy of § 157.70 (Pages 17-20 of [www.legis.state.wi.us/statutes/Stat0157.pdf](http://www.legis.state.wi.us/statutes/Stat0157.pdf)) regarding burial site preservation.

*The agent is going to list a new subdivision. The gentleman who owns the land wants to cross out, upon his attorney's advice, all disclosure language found at lines 128-154 of the WB-3 Vacant Land Listing Contract (2000) and does not want to fill out any property condition report. After investigating some issues, the agent has learned there are wetlands adjacent to the property that may affect development, impact fees that need to be paid and a forthcoming use-value assessment. What should the agent do?*

A seller has no duty to complete a property condition report for a vacant land sale. However, the seller is asked to make representations regarding the condition of the property in the offer to purchase. The seller is not legally prohibited from deleting these representations from the listing or the offer, but doing so may have a chilling affect on the marketability of his property. However, the agent, as a real estate licensee, has an independent duty to disclose items that he deems to

be material adverse facts or information suggesting material adverse facts, regardless of what the seller wants.

The seller also has affirmative disclosure requirements with respect to use-value assessments. Sellers of agricultural land are required to notify buyers: (1) that the land has been assessed under Wis. Stat. sec. 70.32(2r); (2) whether the seller has been assessed a conversion charge related to the land; and (3) whether the seller has been granted a deferral for the conversion charge. Although not specifically required by the use-value law, sellers and REALTORS® should also disclose that a subsequent change of use by a buyer may result in a conversion charge under the law that may be a significantly large amount – this would likely be considered a material adverse fact.

*The sewer was represented as being in the street on a particular piece of property. The listing agent restated the seller's statements that the sewer was in the street without indicating that the statement was made by the seller and not verified by the broker. The buyer will incur additional costs putting in a sewer lateral. What are the buyer's remedies?*

A Wisconsin licensee can be found liable to a buyer for inaccurate statements made by the broker that appear to the buyer to have been made from the broker's own personal knowledge (strict responsibility). In Wisconsin, the law provides that an inexperienced buyer should be entitled to rely on the factual statements made by a professional. When a broker receives data from the seller, the city treasurer's office or another third party and restates the information in the MLS data sheet or in other advertising as if it were fact, the broker may be responsible for the accuracy of the information. Accordingly, REALTORS® are advised to specifically attribute data used in advertisements, such as acreage, square footage and

assessed values, to its source, and to indicate if the broker has not verified the seller's information.

The buyer should see his attorney to discuss his potential remedies.

*When is it possible to list a vacant lot for a pre-sale? Is it after the final plat map is complete, or do you have to wait for the roads and utilities to be put in?*

Wisconsin's Subdivision Code is found in Wis. Stat. Ch. 236. All lands, wherever located in the state, are subject to the code, which regulations govern only where five or more lots of 1½ acres or less are created within a five-year period for the purpose of sale or building development. In addition, local units of government are authorized to adopt more stringent regulations.

Under the code, any subdivider or his or her agent who offers, contracts to convey or conveys a subdivision lot knowing the final plat has not been recorded is subject to a fine of up to \$500 or imprisonment up to six months, or both. There is one exception in Wis. Stat. § 236.31(1). When a preliminary or final plat has been filed for approval with the town or municipality where the platted land lies, the subdivider/agent may offer to convey or may contract to convey if the offer or contract states on its face that it is contingent on the final plat approval and that it will be void if the plat is not approved.

*The broker is questioning how many contiguous lots can be sold without creating a platted subdivision. What are the subdivision rules regarding number of lots and lot size?*

Subdivision regulations are found in Wis. Stat. Ch. 236. The statute may be found at [www.legis.state.wi.us/statutes/Stat0236.pdf](http://www.legis.state.wi.us/statutes/Stat0236.pdf). Pursuant to Wis. Stat. § 236.02(12), a subdivision is "a division of a lot, parcel or tract of land by the owner thereof or the owner's agent for the purpose

of sale or of building development, where: (a) The act of division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area; or (b) Five or more parcels or building sites of 1 1/2 acres each or less in area are created by successive divisions within a period of 5 years." This definition excludes developments on individual lots and encourages developers to build only a few homes at a time. Condominium developments are not considered to be subdivisions.

In addition, § 236.45(2) provides that, "any municipality, town or county which has established a planning agency may adopt ordinances governing the subdivision or other division of land which are more restrictive than the provisions of this chapter. Such ordinances may include provisions regulating divisions of land into parcels larger than 1 1/2 acres or divisions of land into less than 5 parcels, and may prohibit the division of land in areas where such prohibition will carry out the purposes of this section."

*A cooperating broker wrote an offer and it has been discovered there was information that was not disclosed to the buyer on the property condition report, which disclosed no defects. The offer was contingent on the buyer obtaining a conditional-use permit. During the permit application process, the buyer found out there was a special assessment letter sent to the seller that was not disclosed and there was a grinder pump, owned by Lake Delton, on the property as well as an easement for the septic system. Additionally, the buyer was informed there is going to be road construction and there will be assessments for curb and gutter. The road will be widened and the current owner will be compensated for the land used for the road. How should the buyer proceed?*

The buyer may speak with the municipality to determine when the special assessments were or will be levied. See the offer to purchase

provisions regarding responsibility for special assessments.

The buyer may also speak to someone at Lake Delton regarding the maintenance, repair or removal of the grinder pump.

The title company may also be consulted regarding these issues. If the buyer and seller wish to amend the offer to purchase with respect to purchase price, escrow, or allocation of fees and payments, the brokers may draft the requested amendment. The brokers, however, may not give the parties legal advice. The buyer may work with his attorney to determine how best to proceed given the seller's apparent misrepresentation on the property condition report.

*The financing and inspection contingencies in the accepted offer have been satisfied. Now the buyer, who is a licensee, has called saying she does not like the restrictive covenants and wants to get out of the contract or reduce the price by \$20,000. Can the buyer get out of the contract based on the restrictive covenants? The restrictive covenants state that the developer can make amendments and revisions and can approve something that is a restrictive covenant. The buyer wants to put up a fence, and that is one of the restrictions. However, the developer said he would approve her fence. The buyer says that if someone in the neighborhood complained and took her to court, she would lose.*

Whether the developer has the authority to approve the buyer's fence plan is a question that must be determined by a review of the covenants. The offer includes a warning to buyers to review the covenants. However, the offer does not provide for a contingency if the buyer's intended use does not comply with the recorded covenants. Although the buyer may attempt to renegotiate the terms of the offer with the seller, the seller is not required to amend the offer. The agent may refer

the parties to the default provisions of the offer to purchase if they are unable to reach a mutually agreeable solution and the buyer fails to meet the terms and conditions of the contract.

*Is it still required for adjacent land owners to maintain a fence for cattle or horses for the person on the opposite side of the fence?*

Wis. Stat. Chapt. 90 (available online at [www.legis.state.wi.us/statutes/Stat0090.pdf](http://www.legis.state.wi.us/statutes/Stat0090.pdf)) requires the owners of adjoining land used for farming or grazing to jointly construct and maintain fences between their lands. If one owner fails to build or maintain his or her share of the fence, the neighboring landowner may complain to the fence viewers, who are the town supervisors, city aldermen or village trustees. If the fence viewers determine that the fence has not been properly built or maintained, they direct the delinquent owner to repair or rebuild the fence within a reasonable time. If the owner does not comply, the neighboring owner may repair or rebuild the fence and have the fence viewers determine the delinquent owner's share of the costs. If the delinquent owner does not pay, the neighboring owner can then file a certificate of the fence viewers' determination with the town clerk and receive payment from the town treasury. The town will then place a tax lien on the delinquent owner's property to reimburse the fence repair costs. Disputes concerning rural boundary fence construction and maintenance should be resolved by carefully following the provisions of Wisconsin fence law.

*Does rezoning vacant land from A-1 to A-2 result in a use-value conversion charge?*

A change in zoning will not result in a use-value conversion charge. What causes a use-value conversion charge is a change in the actual use of the land. If the buyer is contemplating a change of use and the land is subject to

a use-value assessment, REALTORS® should disclose that a subsequent change of use by a buyer (e.g., from agricultural to residential) may result in a conversion charge under the law, given that such a conversion charge would likely be considered a material adverse fact. REALTORS® should include the necessary disclosures in the RECR, offer to purchase or other forms related to the transaction.

*What should a buyer consider when buying property that was formerly used as an orchard?*

In the past, certain pesticides used in fruit orchards contained lead and arsenic. Although soils naturally contain traces of these compounds, the application of pesticides for agricultural purposes has resulted in some soils containing contamination that could result in health risks. Soil sampling results will fall into one of three categories. These categories – background, pesticide-use and priority – are described in the DATCP guidance document titled “Identifying and Cleaning up Sites Contaminated with Lead and Arsenic from Historic Pesticide Use.” This document, along with a question and answer sheet that discusses some basic information for homeowners and home buyers, can be found on the DATCP lead arsenate Web page, and more information about orchards and contamination issues is available at [www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/lead\\_arsenate/index.jsp](http://www.datcp.state.wi.us/arm/agriculture/pest-fert/pesticides/accp/lead_arsenate/index.jsp).

**WB-3 VACANT LAND LISTING CONTRACT - EXCLUSIVE RIGHT TO SELL**

Page 1 of 5, WB-3

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

2 ■ **PROPERTY DESCRIPTION:** Street address is: \_\_\_\_\_

3 in Section \_\_\_\_\_ in the \_\_\_\_\_ of \_\_\_\_\_, County of \_\_\_\_\_

4 Wisconsin. Insert additional description, if any, at lines 254-261 or attach as an addendum per lines 262-264.

5 ■ **LIST PRICE:** \_\_\_\_\_ Dollars (\$ \_\_\_\_\_).

6 ■ **INCLUDED IN LIST PRICE:** Seller is including in the list price the Property, all Fixtures not excluded on lines 10-11,  
7 and the following items: \_\_\_\_\_

8 \_\_\_\_\_

9 ■ **NOT INCLUDED IN LIST PRICE:** CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will  
10 continue to be owned by the lessor. (See lines 212-217): \_\_\_\_\_

11 \_\_\_\_\_

12 ■ **GOVERNMENTAL AND CONSERVATION PROGRAMS:** Seller represents that all or some of the Property is  
13 enrolled in the following governmental conservation, farmland, environmental, land use or use restricting programs,  
14 agreements or conservation easements, (county, state or federal): \_\_\_\_\_

15 \_\_\_\_\_

16 ■ **USE VALUE ASSESSMENT:** Seller represents that (all or some of the Property) (none of the Property) STRIKE  
17 ONE has been assessed as agricultural property under use value law.

18 ■ **SPECIAL ASSESSMENTS:** Seller represents that the Property is subject to the following special assessments:

19 \_\_\_\_\_

20 ■ **SPECIAL ZONING, LAND USE OR DEVELOPMENT RESTRICTIONS:** Seller represents that the Property is  
21 subject to the following special zoning, land use, development restrictions or other conditions affecting the Property:

22 \_\_\_\_\_

23 ■ **MARKETING:** Seller authorizes and Broker agrees to use reasonable efforts to procure a buyer for the Property.  
24 Seller agrees that Broker may market Seller's personal property identified on lines 7-8 during the term of this Listing.  
25 Broker's marketing may include: \_\_\_\_\_

26 \_\_\_\_\_

27 Broker may advertise the following special financing and incentives offered by Seller: \_\_\_\_\_

28 \_\_\_\_\_

29 Seller has a duty to cooperate with Broker's marketing  
30 efforts. See lines 84-90 regarding Broker's role as marketing agent and Seller's duty to notify Broker of any potential  
31 buyer known to Seller. Seller agrees that Broker may market other properties during the term of this Listing.

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

35 ■ **COOPERATION, ACCESS TO PROPERTY OR OFFER PRESENTATION:** The parties agree that Broker will work  
36 and cooperate with other brokers in marketing the Property, including brokers from other firms acting as subagents  
37 (agents from other companies engaged by Broker - See lines 148-151) and brokers representing buyers. Cooperation  
38 includes providing access to the Property for showing purposes and presenting offers and other proposals from these  
39 brokers to Seller. Note any brokers with whom Broker shall not cooperate, any brokers or buyers who shall not be  
40 allowed to attend showings, and the specific terms of offers which should not be submitted to Seller: \_\_\_\_\_

41 \_\_\_\_\_

42 CAUTION: Limiting Broker's cooperation with other brokers may reduce the marketability of the Property.

43 ■ **EXCLUSIONS:** All persons who may acquire an interest in the Property as a Protected Buyer under a prior listing  
44 contract are excluded from this Listing to the extent of the prior broker's legal rights, unless otherwise agreed to in writing.  
45 Within seven days of the date of this Listing, Seller agrees to deliver to Broker a written list of all such prospective buyers.

46 The following other buyers are excluded from this Listing until \_\_\_\_\_ **INSERT DATE** :

47 \_\_\_\_\_

48 These other buyers are no longer excluded from this Listing after the specified date unless, on or before the specified date,

49 Seller has either accepted an offer from the buyer or sold the Property to the buyer.

50 ■ **COMPENSATION TO OTHERS:** Broker offers the following commission to cooperating brokers: \_\_\_\_\_

51 \_\_\_\_\_ (Exceptions if any): \_\_\_\_\_

52 ■ **COMMISSION:** Broker's commission shall be \_\_\_\_\_

53 Seller shall pay Broker's commission, which shall be earned, if, during the term of this Listing:

54 1) Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property;

55 2) Seller grants an option to purchase all or any part of the Property which is subsequently exercised;

56 3) Seller exchanges or enters into a binding exchange agreement on all or any part of the Property;

57 4) A transaction occurs which causes an effective change in ownership or control of all or any part of the Property; or

57 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  
 58 substantially the same terms set forth in this Listing and in the standard provisions of the current WB-13 VACANT  
 59 LAND OFFER TO PURCHASE, even if Seller does not accept this buyer's offer. (See lines 222-225 regarding  
 60 procurement.)

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

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

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

76 ■ **TERMINATION OF LISTING:** Neither Seller nor Broker has the legal right to unilaterally terminate this Listing absent a  
 77 material breach of contract by the other party. Seller understands that the parties to the Listing are Seller and the Broker  
 78 (firm). Agents (salespersons) for Broker (firm) do not have the authority to enter into a mutual agreement to terminate the  
 79 Listing, amend the commission amount or shorten the term of this Listing, without the written consent of the agent(s)  
 80 supervising broker. Seller and Broker agree that any termination of this Listing by either party before the date stated on  
 81 line 269 shall be indicated to the other party in writing and shall not be effective until delivered to the other Party in  
 82 accordance with lines 206-211. CAUTION: Early termination of this Listing may be a breach of contract, causing the  
 83 terminating party to potentially be liable for damages.

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

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

96 ■ **BROKER DISCLOSURE TO CLIENTS:**

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

- 98 a) The duty to provide brokerage services to you fairly and honestly.
- 99 b) The duty to exercise reasonable skill and care in providing brokerage services to you.
- 100 c) The duty to provide you with accurate information about market conditions within a reasonable time if you request  
 101 it, unless disclosure of the information is prohibited by law.
- 102 d) The duty to disclose to you in writing certain material adverse facts about a property, unless disclosure of the  
 103 information is prohibited by law. (See Lines 218-221)
- 104 e) The duty to protect your confidentiality. Unless the law requires it, the broker will not disclose your confidential  
 105 information or the confidential information of other parties. (See Lines 157-173)
- 106 f) The duty to safeguard trust funds and other property the broker holds.
- 107 g) The duty, when negotiating, to present contract proposals in an objective and unbiased manner and disclose the  
 108 advantages and disadvantages of the proposals.

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

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

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

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

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

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

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

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

138 **INITIAL ONLY ONE OF THE THREE LINES BELOW:**

139 \_\_\_\_\_ I consent to designated agency.

140 \_\_\_\_\_ I consent to multiple representation relationships, but I do not consent to designated agency.

141 \_\_\_\_\_ I reject multiple representation relationships.

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

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

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

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

162 1) Material adverse facts, as defined in section 452.01 (5g) of the Wisconsin statutes (lines 218-221).

163 2) Any facts known by the Broker that contradict any information included in a written inspection report on the property  
 164 or real estate that is the subject of the transaction.

165 To ensure that the Broker is aware of what specific information you consider confidential, you may list that information  
 166 below (see lines 168-170). At a later time, you may also provide the Broker with other information you consider to be  
 167 confidential.

168 **CONFIDENTIAL INFORMATION:** \_\_\_\_\_

169 \_\_\_\_\_

170 \_\_\_\_\_

171 **NON-CONFIDENTIAL INFORMATION (The following may be disclosed by Broker):** \_\_\_\_\_

172 \_\_\_\_\_

173 \_\_\_\_\_

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

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

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

186 ■ **OPEN HOUSE AND SHOWING RESPONSIBILITIES:** Seller is aware that there is a potential risk of injury, damage  
187 and/or theft involving persons attending an "individual showing" or an "open house." Seller accepts responsibility for  
188 preparing the Property to minimize the likelihood of injury, damage and/or loss of personal property. Seller agrees to  
189 hold Broker harmless for any losses or liability resulting from personal injury, property damage, or theft occurring  
190 during "individual showings" or "open houses" other than those caused by Broker's negligence or intentional  
191 wrongdoing. Seller acknowledges that individual showings and open houses may be conducted by licensees other  
192 than Broker, that appraisers and inspectors may conduct appraisals and inspections without being accompanied by  
193 Broker or other licensees, and that buyers or licensees may be present at all inspections and testing and may  
194 photograph or videotape Property unless otherwise provided for in additional provisions at lines 254-261 or in an  
195 addendum per lines 262-264.

196 ■ **DEFINITIONS:**

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

198 a) A condition or occurrence that is generally recognized by a competent licensee as doing any of the following:

- 199 1) Significantly and adversely affecting the value of the Property;
- 200 2) significantly reducing the structural integrity of improvements to real estate; or
- 201 3) presenting a significant health risk to occupants of the Property.

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

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

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

- 207 1) giving the document or written notice personally to the party;
- 208 2) depositing the document or written notice postage or fees prepaid or charged to an account in the U.S. Mail or a  
209 commercial delivery system, addressed to the party, at the party's address (See lines 275, 281 and 287.);
- 210 3) electronically transmitting the document or written notice to the party's fax number (See lines 277, 283 and 289.); or,
- 211 4) as otherwise agreed in additional provisions on lines 254-261 or in an addendum to this Listing.

212 **FIXTURES:** A "fixture" is an item of property which is physically attached to or so closely associated with land so as to  
213 be treated as part of the real estate, including, without limitation, physically attached items not easily removable  
214 without damage to the premises, items specifically adapted to the premises, and items customarily treated as fixtures,  
215 including, but not limited to, all: perennial crops; garden bulbs; plants; shrubs and trees; and fences; storage buildings  
216 on permanent foundations and docks/piers on permanent foundations.

217 **CAUTION: Annual crops are not part of the purchase price unless otherwise agreed.**

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

222 **PROCURE:** A buyer is procured when, during the term of the Listing, an enforceable contract of sale is entered into  
223 between the Seller and the buyer or when a ready, willing and able buyer submits to the Seller or the Listing Broker a written  
224 offer at the price and on substantially the terms specified in this Listing. A buyer is ready, willing and able when the buyer  
225 submitting the written offer has the ability to complete the buyer's obligations under the written offer. (See lines 57-60)

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

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

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

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

249 ■ **UTILITY AVAILABILITY:** Seller represents that the following utility connections are located as follows: (e.g. at the  
 250 lot line, on the property, across the street, unknown, etc.): electricity \_\_\_\_\_; gas \_\_\_\_\_;  
 251 municipal sewer \_\_\_\_\_; municipal water \_\_\_\_\_; telephone \_\_\_\_\_;  
 252 other \_\_\_\_\_; [STRIKE AND COMPLETE AS APPLICABLE]

253 ■ **ZONING:** Seller represents that the property is zoned: \_\_\_\_\_.

254 ■ **ADDITIONAL PROVISIONS:** \_\_\_\_\_

255 \_\_\_\_\_

256 \_\_\_\_\_

257 \_\_\_\_\_

258 \_\_\_\_\_

259 \_\_\_\_\_

260 \_\_\_\_\_

261 \_\_\_\_\_

262 ■ **ADDENDA:** The attached addenda \_\_\_\_\_

263 \_\_\_\_\_

264 \_\_\_\_\_ is/are made part of this Listing.

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

268 ■ **TERM OF THE CONTRACT:** From the \_\_\_\_\_ day of \_\_\_\_\_,  
 269 up to and including midnight of the \_\_\_\_\_ day of \_\_\_\_\_.

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

273 (x) \_\_\_\_\_

274 Seller's Signature ▲ \_\_\_\_\_ Print Name Here: ▲ \_\_\_\_\_ Date ▲ \_\_\_\_\_

275 \_\_\_\_\_

276 Seller's Address ▲ \_\_\_\_\_ Seller's Phone # ▲ \_\_\_\_\_

277 \_\_\_\_\_

278 Seller's Fax # ▲ \_\_\_\_\_ Seller's E-Mail Address ▲ \_\_\_\_\_

279 (x) \_\_\_\_\_

280 Seller's Signature ▲ \_\_\_\_\_ Print Name Here: ▲ \_\_\_\_\_ Date ▲ \_\_\_\_\_

281 \_\_\_\_\_

282 Seller's Address ▲ \_\_\_\_\_ Seller's Phone # ▲ \_\_\_\_\_

283 \_\_\_\_\_

284 Seller's Fax # ▲ \_\_\_\_\_ Seller's E-Mail Address ▲ \_\_\_\_\_

285 (x) \_\_\_\_\_

286 Agent for Broker ▲ \_\_\_\_\_ Print Name Here: ▲ \_\_\_\_\_ Broker/Firm Name ▲ \_\_\_\_\_ Date ▲ \_\_\_\_\_

287 \_\_\_\_\_

288 Broker/Firm Address ▲ \_\_\_\_\_ Broker/Firm Phone # ▲ \_\_\_\_\_

289 \_\_\_\_\_

290 Broker/Firm Fax # ▲ \_\_\_\_\_ Broker/Firm E-Mail Address ▲ \_\_\_\_\_

**SELLER DISCLOSURE REPORT - VACANT LAND**

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 (31).

- |   |     |    |        |
|---|-----|----|--------|
| 1. 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 |
| 2. Government agency or court order requiring repair, alteration or correction of any existing condition?   | yes | no | unsure |
| 3. Land division or subdivision for which required state or local approvals were not obtained?  | yes | no | unsure |
| 4. A portion of the Property in a floodplain, wetland or shoreland zoning area under local, state or federal regulations?   | yes | no | unsure |
| 5. A portion of the Property being subject to, or in violation of, a Farmland Preservation Agreement under a County Farmland Preservation Plan, or enrolled in, or in violation of, a Forest Crop, Managed Forest, Conservation Reserve or comparable program?  | yes | no | unsure |
| 6. Boundary or lot disputes, encroachments or encumbrances, a joint driveway or violation of fence laws (Wis. Stat. ch. 90) (where one or both of the properties is used and occupied for farming or grazing)?  | yes | no | unsure |
| 7. Material violations of environmental rules or other rules or agreements regulating the use of the Property?  | yes | no | unsure |
| 8. Conditions constituting a significant health risk or safety hazard for occupants of the Property?  | yes | no | unsure |
| 9. Underground 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 |
| 10. A defect or contamination caused by unsafe concentrations of, or unsafe conditions relating to, pesticides, herbicides, fertilizer, radon, radium in water supplies, lead or arsenic in soil or other potentially hazardous or toxic substances on the premises?  | yes | no | unsure |
| 11. Production of methamphetamine (meth) or other hazardous or toxic substances on the Property?  | yes | no | unsure |
| 12. High voltage electric (100 kV or greater) or steel natural gas transmission lines located on but not directly serving the Property?   | yes | no | unsure |
| 13. Defects in any well, including unsafe well water due to contaminants such as coliform, nitrates and atrazine, and out-of-service wells and cisterns required to be abandoned (Wis. Adm. Code § NR 812.26) but that are not closed/abandoned according to applicable regulations?  | yes | no | unsure |
| 14. Defects in any septic system or other sanitary disposal system on the Property or out-of-service septic systems not closed/abandoned according to applicable regulations?   | yes | no | unsure |
| 15. Subsoil conditions which would significantly increase the cost of development including, but not limited to, subsurface foundations or waste material; organic or non-organic fill; dumpsites where pesticides, herbicides, fertilizer or other toxic or hazardous materials or containers for these materials were disposed of in violation of manufacturer's or government guidelines or other laws regulating said disposal; high groundwater; adverse soil conditions (e.g. low load bearing capacity, earth or soil movement, slides) or excessive rocks or rock formations? | yes | no | unsure |
| 16. Brownfields (abandoned, idled or under-used land which may be subject to environmental contamination) or other contaminated land, or soils contamination remediated under PECFA, the DNR Remediation and Redevelopment Program, the Agricultural Chemical Cleanup Program or other similar program?   | yes | no | unsure |
| 17. Legal vehicular access to the Property from public roads?   | yes | no | unsure |
| 18. Homeowners' associations, common areas shared or co-owned with others, zoning violations or non-conforming uses, conservation easements, restrictive covenants, rights-of-way, easements, easement maintenance agreements, or use of a part of Property by non-owners, other than recorded utility easements?   | yes | no | unsure |

- 19. 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
- 20. Proposed construction of a public project that may affect the use of the Property? yes no unsure
- 21. Federal, state or local regulations requiring repairs, alterations or corrections of an existing condition? yes no unsure
- 22. Property tax increases, other than normal annual increases; completed or pending property tax reassessment of the Property, or proposed or pending special assessments? yes no unsure
- 23. Burial sites, archeological artifacts, mineral rights, orchards or endangered species? yes no unsure
- 24. Flooding, standing water, drainage problems or other water problems on or affecting the Property? yes no unsure
- 25. Material damage from fire, wind, floods, earthquake, expansive soils, erosion or landslides? yes no unsure
- 26. Significant odor, noise, water intrusion or other irritants emanating from neighboring property? yes no unsure
- 27. Substantial crop damage from disease, insects, soil contamination, wildlife or other causes; diseased trees, or substantial injuries or disease in livestock on the Property or neighboring properties? yes no unsure
- 28. Existing or abandoned manure storage facilities on the Property? yes no unsure
- 29. Impact fees, or other conditions or occurrences that would significantly increase development costs or reduce the value of the Property to a reasonable person with knowledge of the nature and scope of the condition or occurrence? yes no unsure
- 30. **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) All or part of the land has been assessed as agricultural land under Wis. Stat. § 70.32 (2r)? yes no unsure
  - (b) The owner 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
- 31. Utility Connections: the Property is connected to the following utilities on the Property or at the lot line:
 

a. Electricity? <span style="float: right;">yes no unsure</span>	b. Municipal water? <span style="float: right;">yes no unsure</span>	c. Telephone? <span style="float: right;">yes no unsure</span>
d. Cable? <span style="float: right;">yes no unsure</span>	e. Gas? <span style="float: right;">yes no unsure</span>	f. Municipal sewer? <span style="float: right;">yes no unsure</span>

**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 ▲

**ADDENDUM W - WETLANDS**

1 USE FOR SALE OR LEASE OF PROPERTY THAT CONTAINS OR MAY CONTAIN WETLANDS.  
2 This Addendum is attached to and made part of the Offer to Purchase/Lease dated \_\_\_\_\_  
3 made by the Buyer, \_\_\_\_\_ with respect to the property at  
4 \_\_\_\_\_, Wisconsin (Property).

5 ■ **WETLANDS NOTICE:** It is in the Buyer's best interest to determine if the Property contains wetlands **prior** to the  
6 purchase or lease of the Property because:

- 7 • **Wetlands are not suitable for development.**  
8 Building in wetlands is not recommended because it increases the likelihood of flooding and structural failures.
- 9 • **State and federal laws require permits before wetlands can be built upon or impacted.**

10 State wetland permit information from the Wisconsin Department of Natural Resources can be found at  
11 <http://dnr.wi.gov/wetlands/programs.html>. Federal wetland permit information from the U.S. Army Corps of  
12 Engineers can be found at <http://www.mvp.usace.army.mil/regulatory/>. Also, check for local permits. Note, not all  
13 projects will be eligible for permits. Construction in wetlands without permits will result in enforcement action -  
14 requiring removal of structures, wetland restoration, and potential fines.

15 **To determine if a property contains wetlands.** Wetlands are identified based on the presence of three  
16 characteristics: hydric soils (soils indicative of wet conditions), wetland plants, and seasonal water; however, many  
17 wetlands do not have standing water for much of the year. Buyer can review maps and other resources for *Locating*  
18 *Wetlands* at <http://dnr.wi.gov/wetlands/locating.html>. Professional assistance is often needed to verify the presence or  
19 absence of wetlands (see <http://dnr.wi.gov/wetlands/delineation.html> for information).

20 **Wisconsin Wetlands.** Wetlands may be perceived as an amenity or a liability depending upon the desired use of the  
21 property, however all wetlands provide important ecological functions. Wisconsin has 12 types of wetlands including:  
22 marshes, meadows, wooded swamps, bogs, fens and others. Descriptions and photographs can be found at  
23 <http://www.wisconsinwetlands.org/wetlofwisc.htm>.

24 ■ **SELLER INFORMATION**

- 25 Buyer has inquired of Seller who has indicated that Seller (check one):
- 26 1.  Does  Does not have notice or knowledge that the Property contains wetlands.
  - 27 2.  Does  Does not have notice or knowledge that the Property contains lakes, ponds, streams, or drainage  
28 ditches.
  - 29 3.  Does  Does not have notice or knowledge that the Property contains standing water or areas where water  
30 collects at or near the soil surface between March-November in most years.

31 **Note:** Seller's lack of knowledge does not confirm the absence of wetlands.

32 **THE WETLAND EVALUATION CONTINGENCY IS PART OF THIS ADDENDUM IF THE BOX PRECEDING THE**  
33 **CONTINGENCY IS MARKED, SUCH AS WITH AN "X". IT IS NOT PART OF THIS ADDENDUM IF THE BOX IS**  
34 **MARKED N/A OR LEFT BLANK.**

35  **WETLAND EVALUATION CONTINGENCY:** This Offer is contingent upon Buyer obtaining a written report which  
36 determines if there are wetlands at the Property within \_\_\_\_\_ days of acceptance of this Offer. Buyer shall arrange  
37 for a wetland delineation professional to conduct an on-site evaluation of the Property and prepare a written report, at  
38 buyer's cost, unless otherwise agreed in writing. This contingency shall be deemed satisfied unless Buyer delivers a  
39 copy of a wetland delineation report to Seller, and the listing broker if Property is listed, which shows the presence of  
40 wetlands on the property, within five days of the earlier of: 1) Buyer's receipt of the report or 2) the deadline for Buyer  
41 obtaining said report. If the report shows wetlands on the Property (Seller shall provide Buyer with a credit of  
42 \$ \_\_\_\_\_ /wetland acre at closing) (Buyer may rescind this Offer) (  
43 \_\_\_\_\_ )  
44 \_\_\_\_\_ ) **STRIKE AND COMPLETE AS APPLICABLE.**

45 By initialing and dating below, the Parties acknowledge that they have received and read a copy of this Addendum.

46 \_\_\_\_\_  
47 Buyer(s) Initials Date Seller(s) Initials Date

# Coverage That's Right For You

Get an E&O Quote  
*in Minutes!*

*And Buy Instant  
Errors & Omissions  
Coverage Online Today!\**



**P** E A R L

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](http://www.pearlinsurance.com) | *Protect Yourself With Pearl*