



REAL ESTATE CONTRACTUAL FORMS ADVISORY COUNCIL
Room 121A, 1400 East Washington Avenue, Madison
Contact: Brittany Lewin (608) 266-2112
September 30, 2015

The following agenda describes the issues that the Board plans to consider at the meeting. At the time of the meeting, items may be removed from the agenda. Please consult the meeting minutes for a record of the actions and deliberations of the Board.

AGENDA

9:30 A.M.

OPEN SESSION – CALL TO ORDER – ROLL CALL

- A. Adoption of Agenda (1)**
- B. Approval of Minutes from July 23, 2015 (2)**
- C. Administrative Updates**
 - 1) Staff updates
- D. Review of Real Estate Contractual Forms for Revision:**
 - 1) **WB-1 Residential Listing Contract – Exclusive Right to Sell**
 - a) Original Document **(3-9)**
 - b) Review of WRA Forms Committee Memo with Proposed Revisions to WB-1 **(10-18)**
 - c) WRA Memo Regarding Commission Issues – Ash Park Case **(19-20)**
 - 2) **WB-42 Amendment to Listing Contract**
 - a) Original Document
- E. Public Comments**

ADJOURNMENT

**REAL ESTATE CONTRACTUAL FORMS ADVISORY COUNCIL
MEETING MINUTES
July 23, 2015**

PRESENT: Debra Conrad, Jack Drzewiecki, Michael Gordon, Cori Lamont, Scott Minter, Kim Moermond, Jonathan Sayas, Michael Sewell, Gary Tritz, Thomas Weber

EXCUSED: Stephen Beers, Casey Clickner, Richard Petershack, Pamela Widen

STAFF: Brittany Lewin - Executive Director; Nilajah Madison-Head - Bureau Assistant

CALL TO ORDER

Gary Tritz called the meeting to order at 9:35 a.m. A quorum of Ten (10) members was confirmed.

ADOPTION OF AGENDA

MOTION: Cori Lamont moved, seconded by Thomas Weber, to adopt the agenda as published. Motion carried unanimously.

APPROVAL OF MINUTES OF MAY 27, 2015

MOTION: Debra Conrad moved, seconded by Thomas Weber, to approve the minutes of May 27, 2015 as published. Motion carried unanimously.

REVIEW OF CONTRACTUAL FORMS FOR REVISION

MOTION: Jack Drzewiecki moved, seconded by Michael Gordon, to recommend the Real Estate Examining Board adopt the following forms and delegate authority to Stephen Beers to make any modifications and to report the revisions and recommendations to the Real Estate Examining Board:

1. WB-40 Amendment to Offer to Purchase
2. WB-41 Notice Relating to Offer to Purchase
3. WB-42 Amendment to Listing Contract
4. WB-44 Counter Offer
5. WB-45 Cancellation Agreement & Mutual Release

Motion carried.

ADJOURNMENT

MOTION: Michael Gordon moved, seconded by Cori Lamont, to adjourn the meeting. Motion carried unanimously.

The meeting adjourned at 1:28 p.m.

WB-1 RESIDENTIAL LISTING CONTRACT - EXCLUSIVE RIGHT TO SELL

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

1 ■ **PROPERTY DESCRIPTION:** Street address is: _____

2 in the _____ of _____, County of _____, Wisconsin. Insert additional
3 description, if any, at lines 242-250xxx-xxx or attach as an addendum per lines 251-254xxx-xxx.

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

5 ■ **INCLUDED IN LIST PRICE:** Seller is including in the list price the Property, all Fixtures not excluded on lines 11-
6 14xx-xx, and the following items: _____

7 ■ **NOT INCLUDED IN LIST PRICE:** ~~CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will
8 continue to be owned by the lessor. (See lines 199-210);~~

9 **CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will continue to be owned by the
10 lessor. (See lines xxx-xxx).**

11 ■ **MARKETING:** Seller authorizes and ~~Broker the Firm~~ agrees to use reasonable efforts to ~~find procure~~ a buyer for the
12 Property. Seller agrees that ~~the Firm Broker~~ may market Seller's personal property identified on lines 7-9 during the term
13 of this Listing. ~~The Firm Broker's~~ marketing may include: _____

14 ~~Broker The Firm~~ may advertise the following special financing and incentives offered by Seller: _____

15 Seller has a duty to cooperate with ~~the Firm Broker's~~ marketing efforts. See lines 74-80xx-xx regarding ~~the Firm Broker's~~
16 role as marketing agent and Seller's duty to notify ~~the Firm Broker~~ of any potential buyer known to Seller. Seller agrees
17 that ~~the Firm Broker~~ may market other properties during the term of this Listing.

18 ■ **DELIVERY OF DOCUMENTS AND WRITTEN NOTICES:** ~~Unless otherwise stated in this Listing Offer, delivery of
19 documents and written notices to a Party shall be effective only when accomplished by one of the methods specified at
20 lines xx-xx.~~

21 (1) ~~Personal Delivery: giving the document or written notice personally to the Party, or the Party's recipient for delivery
22 if named at line xx or xx.~~

23 Seller's recipient for delivery (optional): _____

24 Firm's recipient for delivery (optional): _____

25 (2) ~~Fax: fax transmission of the document or written notice to the following telephone number:
26 Seller: () Firm: ()~~

27 (3) ~~Commercial Delivery: depositing the document or written notice fees prepaid or charged to an account with a
28 commercial delivery service, addressed either to the Party, or to the Party's recipient for delivery if named at line 38 or
29 39, for delivery to the Party's delivery address at line xx or xx.~~

30 (4) ~~U.S. Mail: depositing the document or written notice postage prepaid in the U.S. Mail, addressed either to the
31 Party, or to the Party's recipient for delivery if named at line xx or xx, for delivery to the Party's delivery address at line
32 xx or xx.~~

33 Delivery address for Seller: _____

34 Delivery address for Firm: _____

35 (5) ~~E-Mail: electronically transmitting the document or written notice to the Party's e-mail address, if given below at
36 line xx or xx. If this is a consumer transaction where the property being purchased or the sale proceeds are used
37 primarily for personal, family or household purposes, each consumer providing an e-mail address below has first
38 consented electronically as required by federal law.~~

39 E-Mail address for Seller: _____

40 E-Mail address for Firm: _____

41 ■ ~~DELIVERY/ACTUAL RECEIPT Delivery to, or Actual Receipt by, any named Seller constitutes delivery to, or Actual
42 Receipt by, all Sellers. Delivery to, or receipt by, any agent of the Firm constitutes delivery to, or receipt by, the Firm.~~

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

58 ■ **COOPERATION, ACCESS TO PROPERTY OR OFFER PRESENTATION:** The parties agree that ~~Broker-the Firm~~
59 will work and cooperate with other ~~brokers-firms~~ in marketing the Property, including ~~brokers from other~~ firms acting as
60 subagents (~~agents from other companies-firms~~ engaged by ~~Broker-the Firm~~ - See lines 138xxx-144xxx) and ~~brokers~~
61 ~~firms~~ representing buyers. Cooperation includes providing access to the Property for showing purposes and presenting
62 offers and other proposals from these ~~brokers-firms~~ to Seller. Note any ~~brokers-firms~~ with whom ~~Broker-the Firm~~ shall
63 not cooperate, any ~~brokers-firms~~ or buyers who shall not be allowed to attend showings, and the specific terms of offers
64 which should not be submitted to Seller: _____

65 _____ **CAUTION: Limiting ~~Broker's-the Firm's~~ cooperation with other**
66 **~~brokers-firms~~ may reduce the marketability of the Property.**

67 ■ **EXCLUSIONS:** All persons who may acquire an interest in the Property ~~as-who are~~ Protected Buyers under a prior
68 listing contract are excluded from this Listing to the extent of the prior ~~broker's-firm's~~ legal rights, unless otherwise agreed to
69 in writing. Within seven days of the date of this Listing, Seller agrees to deliver to ~~Broker-the Firm~~ a written list of all such
70 ~~prospective-Protected B~~buyers. **NOTE: If Seller fails to timely deliver this list to the Firm, then no Protected Buyers are**
71 **excluded from this Listing and Seller may potentially face paying commission to two listing firms.** The following other buyers

72 _____
73 _____ are excluded from this Listing until _____ [INSERT DATE]:
74 _____
75 _____

76 These other buyers are no longer excluded from this Listing after the specified date unless, on or before the specified date,
77 Seller has either accepted ~~a~~ **written** offer from the buyer or sold the Property to the buyer.

78 ■ **COMMISSION:** ~~Broker's-The Firm's~~ commission shall be _____
79 _____
80 _____

81 Seller shall pay ~~Broker's-the Firm's~~ commission, which shall be earned, if, during the term of this Listing:

- 83 1) Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property;
- 84 2) Seller grants an option to purchase all or any part of the Property which is subsequently exercised;
- 85 3) Seller exchanges or enters into a binding exchange agreement on all or any part of the Property;
- 86 4) A transaction occurs which causes an effective change in ownership or control of all or any part of the Property;
- 87 4)5) ~~Seller enters into lease(s) involving all or any part of the Property during the term of this Listing, other than in the~~
88 ~~ordinary course of business; or~~
- 89 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~~
90 ~~substantially the same terms set forth in this Listing and in the standard provisions of the current WB-11~~
91 ~~RESIDENTIAL OFFER TO PURCHASE, even if Seller does not accept this buyer's offer. (See lines 215-218~~
92 ~~regarding procurement.)~~
- 93 6) ~~One owner of the Property sells, conveys, exchanges or options an interest in all or any part of the Property to~~
94 ~~another owner, except by divorce judgment.~~

95 ~~Once earned, the Firm's commission is due and payable in full at the earlier of closing or the date set for closing, unless~~
96 ~~otherwise agreed in writing.~~

97 **NOTE (or CAUTION??): Seller's acceptance of an enforceable contract could result in a commission being due**
98 **even if the transaction does not close (if all contingencies resolved).**

99 A percentage commission, if applicable, shall be calculated based on the purchase price if commission is earned under 1),
100 2) or 26) above, or calculated based on the list price under 3), 4) or 5). A percentage commission shall be calculated on the fair
101 market value of the Property exchanged under 3) if the exchange involves less than the entire Property or on the fair
102 market value of the Property to which an effective change in ownership or control takes place, under 4) if the transaction
103 involves less than the entire Property. ~~Once earned, Broker's commission is due and payable in full at the earlier of closing~~
104 ~~or the date set for closing, unless otherwise agreed in writing. Broker's commission shall be earned if, during the term of the~~
105 ~~Listing, one owner of the Property sells, conveys, exchanges or options an interest in all or any part of the Property to~~
106 ~~another owner, except by divorce judgment.~~

107 ~~The Firm's commission shall also be due if a ready, willing and able buyer submits to Seller or Firm a written offer for the~~
108 ~~Property at the price and on substantially the same terms set forth in this Listing and in the standard provisions of the~~
109 ~~current WB-11 RESIDENTIAL OFFER TO PURCHASE, even if Seller does not accept this buyer's offer. A buyer is ready,~~
110 ~~willing and able when the buyer submitting the written offer at that time has the ability to complete the buyer's obligations~~
111 ~~under the written offer.~~

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

114 ■ **COMPENSATION TO OTHERS:** ~~Broker-The Firm~~ offers the following commission to cooperating ~~brokers-firms~~: _____
115 _____ (Exceptions if any): _____

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

121 ■ **TERMINATION OF LISTING:** Neither Seller nor ~~Broker-the Firm~~ has the legal right to unilaterally terminate this Listing
122 absent a material breach of contract by the other party. Seller understands that the parties to the Listing are Seller and the
123 ~~Broker (Firm)~~. Agents (~~salespersons~~) for ~~Broker-the (Firm)~~ do not have the authority to enter into a mutual agreement to
124 terminate the Listing, amend the commission amount or shorten the term of this Listing, without the written consent of the

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125 agent(s)' supervising broker. Seller and Broker the Firm agree that any termination of this Listing by either party before
126 the date stated on lines ~~259-xxx-xxx~~ shall be indicated to the other party in writing and shall not be effective until
127 delivered to the other Party in accordance with lines ~~493-498xxx-xxx~~. CAUTION: Early termination of this Listing may
128 be a breach of contract, causing the terminating party to potentially be liable for damages.

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

136 ■ **LEASED PROPERTY:** If Property is currently leased and lease(s) will extend beyond closing, Seller shall assign Seller's
137 rights under the lease(s) and transfer all security deposits and prepaid rents (subject to agreed upon prorations) thereunder
138 to buyer at closing. Seller acknowledges that Seller remains liable under the lease(s) unless released by tenants.

139 **CAUTION: Seller should consider obtaining an indemnification agreement from buyer for liabilities under the**
140 **lease(s) unless released by tenants.**

141 ■ **BROKER DISCLOSURE TO CLIENTS:**

142 **UNDER WISCONSIN LAW, A BROKERAGE FIRM (HEREINAFTER FIRM) AND ITS BROKERS AND**
143 **SALESPERSONS (HEREINAFTER AGENTS) OWES CERTAIN DUTIES TO ALL PARTIES TO A TRANSACTION:**

- 144 (a) The duty to provide brokerage services to you fairly and honestly.
145 (b) The duty to exercise reasonable skill and care in providing brokerage services to you.
146 (c) The duty to provide you with accurate information about market conditions within a reasonable time if you request
147 it, unless disclosure of the information is prohibited by law.
148 (d) The duty to disclose to you in writing certain material adverse fact Adverse Facts about a property, unless
149 disclosure of the information is prohibited by law. (See Lines ~~211-214xxx-xxx~~)
150 (e) The duty to protect your confidentiality. Unless the law requires it, the broker will not disclose your confidential
151 information or the confidential information of other parties. (See Lines ~~447-463xxx-xxx~~)
152 (f) The duty to safeguard trust funds and other property the broker firm or its agents holds.
153 The duty, when negotiating, to present contract proposals in an objective and unbiased manner and disclose the
154 advantages and disadvantages of the proposals.

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

- 157 (a) The broker firm or one of its agents will provide, at your request, information and advice on real estate matters that
158 affect your transaction, unless you release the broker firm from this duty.
159 (b) The broker firm or one of its agents must provide you with all material facts affecting the transaction, not just
160 Adverse Facts.
161 (c) The broker firm and its agents will fulfill the broker's firm's obligations under the agency agreement and fulfill your
162 lawful requests that are within the scope of the agency agreement.
163 (d) The broker firm and its agents will negotiate for you, unless you release them broker from this duty.
164 (e) The broker firm and its agents will not place their broker's interests ahead of your interests. The broker firm and its
165 agents will not, unless required by law, give information or advice to other parties who are not the broker's firm's clients,
166 if giving the information or advice is contrary to your interests.
167 (f) If you become involved in a transaction in which another party is also the broker's firm's client (a "multiple
168 representation relationship"), different duties may apply.

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

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

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

181 ■ If a designated agency relationship is not in effect authorized by you or other clients in the transaction you may still
182 authorize or reject a different type of multiple representation relationship. If you authorize a multiple representation
183 relationship in which the broker firm may provide brokerage services to more than one client in a transaction but neither
184 the broker firm nor any of the broker's salespersons its agents may assist any client with information, opinions, and
185 advice which may favor the interests of one client over any other client. If you do not consent to a multiple
186 representation relationship the broker will not be allowed to provide brokerage services to more than one client in the
187 transaction. Under this neutral approach, the same agent may represent more than one client in a transaction.

188 ■ If you do not consent to a multiple representation relationship the firm will not be allowed to provide brokerage
189 services to more than one client in the transaction.

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

191 I consent to The same firm may represent me and the other party as long as the same agent is not

191 ~~representing us both. (multiple representation relationship with designated agency).~~

192 ~~I consent to The same firm may represent me and the other party, but the firm must remain neutral~~
193 ~~regardless if one or more different agents are involved. (multiple representation relationships, but I do not consent~~
194 ~~to without designated agency).~~

195 ~~The same firm cannot represent both me and the other party in the same transaction. (I reject multiple~~
196 ~~representation relationships).~~

197 **NOTE: You may withdraw this consent by written notice to the firm at any time. Your firm is required to**
198 **disclose to you in your agency agreement the commission or fees that you may owe to your firm. If you have**
199 **any questions about the commission or fees that you may owe based upon the type of agency relationship you**
200 **select with your firm, you should ask your firm before signing the agency agreement. YOU MAY WITHDRAW**
201 **YOUR CONSENT TO DESIGNATED AGENCY OR TO MULTIPLE REPRESENTATION RELATIONSHIPS BY**
202 **WRITTEN NOTICE TO THE BROKER AT ANY TIME. YOUR BROKER IS REQUIRED TO DISCLOSE TO YOU IN**
203 **YOUR AGENCY AGREEMENT THE COMMISSION OR FEES THAT YOU MAY OWE TO YOUR BROKER. IF YOU**
204 **HAVE ANY QUESTIONS ABOUT THE COMMISSION OR FEES THAT YOU MAY OWE BASED UPON THE TYPE**
205 **OF AGENCY RELATIONSHIP YOU SELECT WITH YOUR BROKER YOU SHOULD ASK YOUR BROKER BEFORE**
206 **SIGNING THE AGENCY AGREEMENT.**

207 **■ SUBAGENCY:** ~~The broker~~ Your firm may, with your authorization in the agency agreement, engage other ~~brokers-firms~~
208 ~~(subagent firms) to who~~ assist your ~~broker-firm~~ by providing brokerage services for your benefit. A subagent ~~firm and the~~
209 ~~agents with the subagent firm~~ will not put the ~~subagent's~~ their own interests ahead of your interests. A subagent ~~firm~~ will not,
210 unless required by law, provide advice or opinions to other parties if doing so is contrary to your interests.

211 **PLEASE REVIEW THIS INFORMATION CAREFULLY. An broker or salesperson agent can answer your questions**
212 **about brokerage services, but if you need legal advice, tax advice, or a professional home inspection, contact an**
213 **attorney, tax advisor, or home inspector. This disclosure is required by section 452.135 of the Wisconsin statutes**
214 **and is for information only. It is a plain language summary of a broker's the duties owed to you under section**
215 **452.133 (2) of the Wisconsin statutes.**

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

221 The following information is required to be disclosed by law:

- 222 1) Material ~~A~~adverse ~~F~~facts, as defined in section 452.01 (5g) of the Wisconsin statutes (lines 211-214xxx-xxx).
- 223 2) Any facts known by the ~~Broker-Firm~~ that contradict any information included in a written inspection report on the
224 property or real estate that is the subject of the transaction.

225 To ensure that the ~~Broker-Firm~~ is aware of what specific information you consider confidential, you may list that
226 information below (see lines 458-460xxx-xxx). At a later time, you may also provide the ~~Broker-Firm~~ with other
227 information you consider to be confidential.

228 **CONFIDENTIAL INFORMATION:** _____

229 _____

230 _____

231 **NON-CONFIDENTIAL INFORMATION** (The following may be disclosed by ~~Broker-the Firm~~): _____

232 _____

233 _____

234 **■ REAL ESTATE CONDITION REPORT:** Seller agrees to complete the real estate condition report provided by ~~Broker~~
235 ~~the Firm~~ to the best of Seller's knowledge. Seller agrees to amend the report should Seller learn of any ~~Defect(s)~~ after
236 completion of the report but before acceptance of a buyer's offer to purchase. Seller authorizes ~~Broker-the Firm~~ to
237 distribute the report to all interested parties and agents inquiring about the Property. Seller acknowledges that ~~Broker-the~~
238 ~~Firm~~ has a duty to disclose all ~~M~~material ~~A~~adverse ~~F~~facts as required by law.

239 **■ SELLER REPRESENTATIONS REGARDING DEFECTS:** Seller represents to ~~Broker-the Firm~~ that as of the date of
240 this Listing, Seller has no notice or knowledge of any ~~Defects~~ affecting the Property other than those noted on the real
241 estate condition report.

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

244 **■ OPEN HOUSE AND SHOWING RESPONSIBILITIES:** Seller is aware that there is a potential risk of injury, damage
245 and/or theft involving persons attending an "individual showing" or an "open house." Seller accepts responsibility for
246 preparing the Property to minimize the likelihood of injury, damage and/or loss of personal property. Seller agrees to
247 hold ~~Broker-the Firm~~ harmless for any losses or liability resulting from personal injury, property damage, or theft
248 occurring during "individual showings" or "open houses" other than those caused by ~~Broker's-the Firm's~~ negligence or
249 intentional wrongdoing. Seller acknowledges that individual showings and open houses may be conducted by licensees
250 other than ~~Broker-the Firm~~, that appraisers and inspectors may conduct appraisals and inspections without being
251 accompanied by ~~Broker-the Firm~~ or other licensees, and that buyers or licensees may be present at all inspections and
252 testing and may photograph or videotape Property unless otherwise provided for in additional provisions at lines ~~xxx-~~
253 ~~xxx~~ or in an addendum per lines ~~xxx-xxx~~.

254 **■ DEFINITIONS:**

255 **ADVERSE FACT:** An "Adverse Fact" means any of the following:

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

257 1) Significantly and adversely affecting the value of the Property;
258 2) significantly reducing the structural integrity of improvements to real estate; or
259 3) presenting a significant health risk to occupants of the Property.
260 (b) Information that indicates that a party to a transaction is not able to or does not intend to meet his or her
261 obligations under a contract or agreement made concerning the transaction.
262 **DEADLINES – DAYS:** Deadlines expressed as a number of "days" from an event are calculated by excluding the day the
263 event occurred and by counting subsequent calendar days.
264 **DELIVERY:** ~~Delivery of documents or written notices related to this Listing may only be accomplished by:~~
265 ~~1) giving the document or written notice personally to the party;~~
266 ~~2) depositing the document or written notice postage or fees prepaid or charged to an account in the U.S. Mail or a~~
267 ~~commercial delivery system, addressed to the party, at the party's address (See lines 266, 271 and 277.);~~
268 ~~3) electronically transmitting the document or written notice to the party's fax number (See lines 267, 273 and 279.); and,~~
269 ~~4) as otherwise agreed in additional provisions on lines 242-250 or in an addendum to this Listing.~~
270 **DEFECT:** "Defect" means a condition that would have a significant adverse effect on the value of the Property; that
271 would significantly impair the health or safety of future occupants of the Property; or that if not repaired, removed or
272 replaced would significantly shorten or adversely affect the expected normal life of the premises.
273 **FIRM:** "Firm" means a licensed sole proprietor broker or a licensed broker business entity, and as appropriate in
274 context, licensees associated with the Firm.
275 **FIXTURES:** A "Fixture" is an item of property which is physically attached to or so closely associated with land or
276 buildings so as to be treated as part of the real estate, including, without limitation, physically attached items not easily
277 removable without damage to the premises, items specifically adapted to the premises, and items customarily treated
278 as fixtures, including, but not limited to, all: garden bulbs; plants; shrubs and trees; screen and storm doors and
279 windows; electric lighting fixtures; window shades; curtain and traverse rods; blinds and shutters; central heating and
280 cooling units and attached equipment; water heaters and treatment systems; sump pumps; attached or fitted floor
281 coverings; awnings; attached antennas, garage door openers and remote controls; installed security systems; central
282 vacuum systems and accessories; in-ground sprinkler systems and component parts; built-in appliances; ceiling fans;
283 fences; storage buildings on permanent foundations and docks/piers on permanent foundations.
284 **CAUTION: Exclude any Fixtures to be retained by Seller or which are rented (e.g., water softener or other water**
285 **conditioning systems, home entertainment and satellite dish components, L.P. tanks, etc.) on lines 44-44xx-xx**
286 **and in the offer to purchase.**
287 **MATERIAL ADVERSE FACT:** A "Material Adverse Fact" means an ~~A~~adverse ~~F~~fact that a party indicates is of such
288 significance, or that is generally recognized by a competent licensee as being of such significance to a reasonable
289 party, that it affects or would affect the party's decision to enter into a contract or agreement concerning a transaction or
290 affects or would affect the party's decision about the terms of such a contract or agreement.
291 **PERSON ACTING ON BEHALF OF BUYER:** "Person Acting on Behalf of Buyer" shall mean any person joined in interest
292 with buyer, or otherwise acting on behalf of buyer, including but not limited to buyer's immediate family, agents, servants,
293 employees, directors, managers, members, officers, owners, partners, incorporators and organizers, as well as any and all
294 corporations, partnerships, limited liability companies, trusts or other entities created or controlled by, affiliated with or
295 owned by buyer, in whole or in part whether created before or after expiration of this Listing.
296 **PROCURE:** ~~A buyer is procured when, during the term of the Listing, an enforceable contract of sale is entered into between~~
297 ~~the Seller and the buyer or when a ready, willing and able buyer submits to the Seller or the Listing Broker a written offer at~~
298 ~~the price and on substantially the terms specified in this Listing. A buyer is ready, willing and able when the buyer submitting~~
299 ~~the written offer has the ability to complete the buyer's obligations under the written offer. (See lines 46-49)~~
300 **PROPERTY:** Unless otherwise stated, "Property", means all property included in the list price as described on lines x-xx~~the~~
301 ~~real estate described at lines 2-4.~~
302 **PROTECTED BUYER:** Means a buyer who personally, or through any ~~P~~erson ~~A~~ acting on Behalf of ~~for such B~~uyer,
303 during the term of this Listing: 1) delivers to Seller or ~~Broker-the Firm~~ a written offer to purchase, exchange or option on the
304 ~~Property during the term of this Listing;~~ 2) views the Property with Seller or negotiates directly with Seller by discussing
305 communicating with Seller ~~the regarding~~ potential terms upon which buyer might acquire an interest in the Property; or 3)
306 attends an individual showing of the Property or discusses with ~~Broker-the Firm~~ or cooperating ~~brokers-firms~~ the potential
307 terms upon which buyer might acquire an interest in the Property, but only if ~~Broker-the Firm~~ delivers the buyer's name to
308 Seller, in writing, no later than three days after the expiration of the Listing. The requirement in 3), to deliver the buyer's name to
309 Seller in writing, may be fulfilled as follows: a) If the Listing is effective only as to certain individuals who are identified in the
310 Listing, by the identification of the individuals in the Listing; or, b) if a buyer has requested that the buyer's identity remain
311 confidential, by delivery of a written notice identifying the ~~broker-firm~~ with whom the buyer negotiated and the date(s) of any
312 showings or other negotiations. A Protected Buyer also includes any Person Acting on Behalf of Buyer joined in interest with
313 or otherwise acting on behalf of a Protected Buyer, who acquires an interest in the Property during the extension of listing
314 period as noted on lines xxx-xxx.
315 ■ **FAIR HOUSING:** Seller and ~~Broker-the Firm~~ agree that they will not discriminate against any prospective
316 buyer on account of race, color, sex, sexual orientation as defined in Wisconsin Statutes, Section 111.32 (13m),
317 disability, religion, national origin, marital status, lawful source of income, age, ancestry, familial-family status,
318 status as a victim of domestic abuse, sexual assault, or stalking, or in any other unlawful manner.
319 ■ **EARNEST MONEY:** If ~~Broker-the Firm~~ holds trust funds in connection with the transaction, they shall be retained by ~~Broker~~
320 ~~the Firm in Broker's-the Firm's~~ trust account. ~~Broker-The Firm~~ may refuse to hold earnest money or other trust funds. Should
321 ~~Broker-the Firm~~ hold the earnest money, the Firm shall hold and disburse earnest money funds in accordance with Wis. Stat.
322 Ch. 452 and Wis. Admin. Code Ch. REEB 18. Seller authorizes Broker to disburse the earnest money as directed in a written
323 earnest money disbursement agreement signed by or on behalf of all parties having an interest in the trust funds. If the
324 transaction fails to close and the earnest money is disbursed to Seller, then upon disbursement to Seller the earnest money
325 shall be paid first to reimburse Broker for cash advances made by Broker on behalf of Seller and one half of the balance, but

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326 not in excess of the agreed commission, shall be paid to Broker as Broker's full commission in connection with said purchase
327 transaction and the balance shall belong to Seller. This payment to Broker shall not terminate this Listing.

328 ■ **ADDITIONAL PROVISIONS:** _____
329 _____
330 _____
331 _____
332 _____
333 _____
334 _____
335 _____
336 _____
337 _____
338 _____
339 _____
340 _____

342 ■ **ADDENDA:** The attached addenda _____
343 _____
344 _____

345 _____ is/are made part of this Listing.
346 ■ **NOTICE ABOUT SEX OFFENDER REGISTRY:** You may obtain information about the sex offender registry and
347 persons registered with the registry by contacting the Wisconsin Department of Corrections on the Internet at
348 <http://www.doc.wi.gov> <http://www.widocoffenders.org> or by telephone at (608)240-5830.

349 ■ **TERM OF THE CONTRACT:** From the _____ day of _____,
350 up to ~~and including~~ the earlier of midnight of the _____ day of _____,
351 _____ or the conveyance of the Property.

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

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

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

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

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

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

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

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

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

372 _____
373 Seller Entity Name (if any): _____

374 _____
375 (x) _____
376 Authorized Signature ▲ Print Name & Title Here ► Date ▲

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

379 _____

380 Broker/Firm Address ▲ Broker/Firm Phone # ▲

381

382

Broker/Firm Fax # ▲

Broker/Firm E-Mail Address ▲

WB-1 REVISIONS

To: DSPS Real Estate Contractual Forms Advisory Committee
From: WRA Forms Committee
Date: September 22, 2015
RE: **WB-1 Residential Listing Contract – Exclusive Right to Sell**

The following are possible revisions to the WB-1 Residential Listing Contract – Exclusive Right to Sell (mandatory use date 7-1-08) suggested by the WRA Forms Committee, as noted below. The line numbers in this memo refer to the line numbers in the accompanying draft of proposed WB-1 modifications, file 20150723 REF WB-1WRARev.

- ◆ Update the top of the form to say Approved by the Wisconsin Real Estate Examining Board.
- ◆ **Chapter 452 Terminology.** The terminology throughout this form is modified in anticipation of the Wis. Stat. chapter 452 revisions wherein the proposed terminology would refer to a Firm to mean either a broker entity or a sole proprietor broker. Those revisions additionally refer to salespersons, licensed individual brokers, and licensed broker entities, but here the choice was to refer to the Firm and the agents of the Firm. We may need to add a definition of “Firm” to make it clear that this includes agents of the Firm acting on behalf of the Firm or something similar – this may need to be decided after working through the form a bit and adjusting to the terminology is selected.

- ◆ **Property Definition (Lines 13-20 & 290-291):**

If we want to have commission computed upon the total sales price we may wish to make it clear that all property – real and personal – is included in the purchase price. The DSPS Real Estate Contractual Forms Advisory Committee chose to do this by modifying the definition of Property on lines 290-291:

PROPERTY: Unless otherwise stated, “Property“, means all property included in the list price as described on lines x-xx~~the real estate described at lines 2-4.~~

In addition, the Not Included in List Price section was modified to move the CAUTION regarding fixtures to the end of the subsection.

~~**NOT INCLUDED IN LIST PRICE: CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will continue to be owned by the lessor. (See lines 199-210):**~~

CAUTION: Identify Fixtures to be excluded by Seller or which are rented and will continue to be owned by the lessor. (See lines xxx-xxx).

- ◆ **Delivery (lines 30-52):** Add in the Delivery of Documents and Written Notices from the WB-6 Business Listing Contract. Delete the Delivery definition from lines 253-258. As shown in tracking on the next page of this memo, one line was removed from the e-mail subsection of the Delivery provisions to simplify the provision and make it more generic without removing the meaning and required action item.

DELIVERY OF DOCUMENTS AND WRITTEN NOTICES: Unless otherwise stated in this ~~Offer Listing~~, delivery of documents and written notices to a Party shall be effective only when accomplished by one of the methods specified at lines xx-xx.

(1) Personal Delivery: giving the document or written notice personally to the Party, or the Party's recipient for delivery if named at line xx or xx.

Seller's recipient for delivery (optional): _____

~~Broker's Firm's~~ recipient for delivery (optional): _____

(2) Fax: fax transmission of the document or written notice to the following telephone number:

Seller: (_____) _____ ~~Broker Firm~~: (_____) _____

(3) Commercial Delivery: depositing the document or written notice fees prepaid or charged to an account with a commercial delivery service, addressed either to the Party, or to the Party's recipient for delivery if named at line 38 or 39, for delivery to the Party's delivery address at line xx or xx.

(4) U.S. Mail: depositing the document or written notice postage prepaid in the U.S. Mail, addressed either to the Party, or to the Party's recipient for delivery if named at line xx or xx, for delivery to the Party's delivery address at line xx or xx.

Delivery address for Seller: _____

Delivery address for ~~Broker Firm~~: _____

(5) E-Mail: electronically transmitting the document or written notice to the Party's e-mail address, if given below at line xx or xx. If this is a consumer transaction where the property being purchased or the sale proceeds are used primarily for personal, family or household purposes, each consumer providing an e-mail address below has first consented electronically ~~to the use of electronic documents, e-mail delivery and electronic signatures in the transaction~~, as required by federal law.

E-Mail address for Seller ~~(optional)~~: _____

E-Mail address for ~~Broker Firm~~ ~~(optional)~~: _____

***** THIS IS AS FAR AS THE DSPS COMMITTEE WENT LAST TIME *****

◆ **Modifications to Exclusions section (Lines 67-77):**

The Committee was agreeable to the following which warns the seller that failing to give the list of protected buyers from a prior listing could result in double commissions being due:

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

NOTE: If Seller fails to timely deliver this list to the Firm, then no Protected Buyers are excluded from this Listing and Seller may potentially face paying commission to two listing firms. The following other buyers _____ are excluded from this Listing until _____ [INSERT DATE]; _____. These other buyers are no longer excluded from this Listing after the specified date unless, on or before the specified date, Seller has either accepted ~~an~~ written offer from the buyer or sold the Property to the buyer.

◆ **Commission (Lines 78-113)**

The WRA Forms Committee declined to adopt the commission language from the WB-6 Business Listing Contract with respect to a minimum dollar amount and the definition of purchase price. After discussion of minimum commissions, additional commission, administrative fees, etc., the WRA Forms Committee concluded it may be best to simply include a few lines where firms can write in whatever amounts, percentages, formulas, etc. that they may wish to use.

◆ The WRA Forms Committee requested that the commission item for leases from the WB-6 be added to the Commission section list of events that earn commission:

5) Seller enters into lease(s) involving all or any part of the Property during the term of this Listing, other than in the ordinary course of business.

Food for Thought

See the separate commission issues memo.

The *Ash Park* commission case decision by the Wisconsin Supreme Court is favorable, holding the broker is entitled to commission because the parties' offer was an "enforceable contract" within the meaning of the listing contract where an individual can compel observance of the contract by seeking a remedy for a breach (as would be the case with virtually all accepted offers).

However, the concurring opinion by Chief Justice Roggensack raises some potential issues (although not sure her analysis of the case law is correct because she does not seem to take account of the fact that what had to be done to earn the commission varied over time because different listing contracts have different requirements, but nonetheless the sentiment is real). She expresses concern about sellers instead of brokers being responsible for investigating the financial ability of a proposed buyer, especially in residential transactions involving consumers not working with legal counsel. This is disconcerting because other than having a lender pre-approve a buyer or vet the buyer before the offer is entered into, brokers do not perform this function nor are they authorized to perform financial analyses of potential buyers. Having a financing contingency does not appear to solve the issue. *Ash Park* involved a one-party listing so that may be part of the reason for her comment.

She is also concerned that brokers could sue home sellers who have no idea that commission can be due if the home is not sold, per the WB-1 language. What this points out is that once a home seller is in contract with an accepted offer that the commission is earned per the *Ash Park* holding. However, in *Ash Park* the contract had all of its contingencies resolved. If an offer becomes null and void in accordance with the financing contingency, inspection contingency, etc., then there no enforceable contract left so the commission is not earned. But the language in the WB-1 says commission is earned when the seller accepts the offer (an enforceable contract).

See the Wisconsin State Bar article discussing the *Ash Park* decision and the decision at <http://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=143998>. Clearly attorneys who read their publications will be aware of the issues raised and may be very likely to advise all sellers to add language to listing contracts stating that commission is due only if there is a closing and the property is sold. They may also recommend other modifications.

- ❖ Should the listing contract direct the listing Firm to not entertain any offers not accompanied by a pre-approval or at least a pre-qualification?
- ❖ Should the commission language be made clearer – it is complex and convoluted! Should there be caution or warning language for the consumer? See some ideas for clearer language with a note for the seller below.
- ❖ Should the definition of "enforceable contract from the *Ash Park* case be added to the WB-1? An "enforceable contract" is one where an individual can compel observance of the contract by seeking a remedy for a breach.
- ❖ Should the criteria regarding the enforceable contract be modified to state that if an accepted offer becomes null and void later then no commission is due (even though there was initially an enforceable contract)? Commission would be due only if the seller accepts an offer that creates an enforceable contract that remain in force on the date set for closing?

❖ Other ideas?

Here is a reworked COMMISSION section with some ideas to consider (also shown in the attached draft in tracking). In this version, the full price offer item is separated out and placed near the end on the section. In addition, the definition of “Procure” was collapsed into this item and the word “Procure” has otherwise been eliminated from the WB-1 draft. Remaining issues possibly may be do we continue to use the “ready, willing and able” language here, and if so, should it be qualified differently than shown below.

The commission “due and payable” item was taken out of the middle of the paragraph where it was before and placed directly after the commission triggering events which includes the item for when one owner buys out the other, except by divorce judgment. Following that statement is a Note intended to alert the seller that a commission can be due when the offer doesn’t close. This may more appropriately be a Caution keeping within the spirit of how such signals are used in other approved forms.

The Note at the end should be changed to eliminate the reference to “Procurement.” Another alternative might be:

NOTE: A conveyance as described in lines 83-94 or full price offer per lines 107-111 for a portion of the Property does not terminate the Listing as to any remaining Property.

More adjustment may be desired to the sentences describing how a percentage commission is calculated.

■ **COMMISSION:** The Firm's commission shall be _____

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

- 1) Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property;
- 2) Seller grants an option to purchase all or any part of the Property which is subsequently exercised;
- 3) Seller exchanges or enters into a binding exchange agreement on all or any part of the Property;
- 4) A transaction occurs which causes an effective change in ownership or control of all or any part of the Property;
- 5) Seller enters into lease(s) involving all or any part of the Property during the term of this Listing, other than in the ordinary course of business; or
- 6) One owner of the Property sells, conveys, exchanges or options an interest in all or any part of the Property to another owner, except by divorce judgment.

Once earned, the Firm’s commission is due and payable in full at the earlier of closing or the date set for closing, unless otherwise agreed in writing.

NOTE (or CAUTION??): Seller’s acceptance of an enforceable contract could result in a commission being due even if the transaction does not close (if all contingencies resolved).

A percentage commission, if applicable, shall be calculated based on the purchase price if commission is earned under 1), 2) or 6) above, or calculated based on the list price under 3), 4) or 5). A percentage commission shall be calculated on the fair market value of the Property exchanged under 3) if the exchange involves less than the entire Property or on the fair market value of the Property to which an effective change in ownership or control takes place, under 4) if the transaction involves less than the entire Property.

The Firm’s commission shall also be due if a ready, willing and able buyer submits to Seller or Firm a written offer for the Property at the price and on substantially the same terms set forth in this Listing and in the standard provisions of the current WB-11 RESIDENTIAL OFFER TO PURCHASE, even if Seller does not accept this buyer's offer. A buyer is ready, willing and able when the buyer submitting the written offer at that time has the ability to complete the buyer's obligations under the written offer.

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

◆ **Marketing Language (Line 21):**

The first sentence of this section says, “Seller authorizes and ~~Broker-the Firm~~ agrees to use reasonable efforts to **Procure** a buyer for the Property.” The definition of “procure” interjects consideration of whether a buyer is “ready, willing and able” and thus brings the consideration of financial ability into the picture. Perhaps this provision should be modified to say the Firm will use reasonable efforts to “find” or “obtain,” “identify,” “secure,” or some other word. The existing language could be seen as suggesting it is part of the Firm’s job to bring only buyers who are financially able to complete the purchase to the table to write offers, meaning that brokers are authorized and capable of assessing a prospect’s financial capability.

◆ **Modifications to Seller Cooperation section (Lines 129-135):**

Should sellers have to tell brokers about all prospects they talk to about the property for sale without the conversation having to meet the standards for “negotiation?”

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

⇒ **Is this acceptable or are there additional changes?**

◆ **Disclosure to Clients (Lines 141-215):**

There will be statutory changes coming to this language to make it more user friendly and understandable for the property owners. This section now shows in tracking the changes expected to be proposed.

◆ **Definitions (Lines 254-314):**

Since the term “defects” is mentioned in lines 234-243, should the definition of “Defects” from the offer be included in the WB-1? Note: the definition below is identical to the one used in the WB-11 Residential Offer to Purchase. It is also the same as the language appearing in the Real Estate Condition Report language laid out in Wis. Stat. § 709.03 but for the initial caps on the word “Property.”

DEFECT: “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.

⇒ **Is this acceptable or are there additional changes?**

Should we add a definition of Firm? As you read through the draft, the language at times may seem like it is referring to agents of the listing Firm rather than the Firm itself.

FIRM: “Firm” means a licensed sole proprietor broker or a licensed broker business entity, and as appropriate in context, licensees associated with the Firm.

⇒ **Is this acceptable or are there additional changes?**

Should we add the definition of Person Acting on Behalf of Buyer and the modified definition of Protected Buyer from the WB-6? As you may recall, those changes were made to try to ward off protected buyers who create an LLC and then purchase the property, claiming that the LLC is not a protected buyer.

PERSON ACTING ON BEHALF OF BUYER: “Person Acting on Behalf of Buyer” shall mean any person joined in interest with buyer, or otherwise acting on behalf of buyer, including but not limited to buyer's immediate family, agents, servants, employees, directors, managers, members, officers, owners, partners, incorporators and organizers, as well as any and all corporations, partnerships, limited liability companies, trusts or other entities created or controlled by, affiliated with or owned by buyer, in whole or in part whether created before or after expiration of this Listing.

⇒ **Is this acceptable or are there additional changes?**

Another thought about the Protected Buyer definition: shouldn't the buyer be considered protected if the seller shows the property to the buyer, for instance, the buyer who drives by and sees the sign and stops in when no broker is around. It would be easier to prove that the buyer saw the house with the seller than it is to establish that they had a conversation meeting the criteria for “negotiation.” If this idea is favored we may need more eloquent language!

PROTECTED BUYER: “Protected Buyer” means a buyer who personally, or through any Person Acting on Behalf of Buyer, during the term of this Listing: 1) delivers to Seller or ~~Broker-the Firm~~ a written offer to purchase, exchange or option on the Property; 2) sees the Property with the Seller or negotiates directly with Seller by discussing with Seller the potential terms upon which buyer might acquire an interest in the Property; or 3) attends an individual showing of the Property or discusses with ~~Broker-the Firm~~ or cooperating ~~brokers-firms~~ the potential terms upon which buyer might acquire an interest in the Property, but only if ~~Broker-the Firm~~ delivers the buyer's name to Seller, in writing, no later than three days after the expiration of the Listing. The requirement in 3), to deliver the buyer's name to Seller in writing, may be fulfilled as follows: a) If the Listing is effective only as to certain individuals who are identified in the Listing, by the identification of the individuals in the Listing; or b) if a buyer has requested that the buyer's identity remain confidential, by delivery of a written notice identifying the ~~broker-firm~~ with whom the buyer negotiated and the date(s) of any showings or other negotiations. A Protected Buyer also includes any Person Acting on Behalf of Buyer joined in interest with or otherwise acting on behalf of a Protected Buyer, who acquires an interest in the Property during the extension of listing period as noted on lines xxx-xxx.

After further discussion during the WRA Forms Committee, below is another alternative. A buyer is protected under three different circumstances: an offer is submitted (seller knows the name of the buyer from the offer), there is seller contact, or there is broker contact (showing or negotiations – broker must give seller the name of the buyer). A word other than “discussing” was wanted to make sure it included email, text or other exchanges – the idea is to not limit this to face-to-face conversations which might be suggested by “discussing.”

PROTECTED BUYER: “Protected Buyer” means a buyer who personally, or through any Person Acting on Behalf of Buyer, during the term of this Listing: 1) delivers to Seller or ~~Broker-the Firm~~ a written offer to purchase, exchange or option on the Property; 2) views the Property with Seller or negotiates directly with Seller by discussing-communicating with Seller ~~the-regarding~~ potential terms upon which buyer might acquire an interest in the Property; or 3) attends an individual showing of the Property or discusses with ~~Broker-the Firm~~ or cooperating ~~brokers-firms~~ the potential terms upon which buyer might acquire an interest in the Property, but only if ~~Broker-the Firm~~ delivers the buyer's name to Seller, in writing, no later than three days after the expiration of the Listing. The requirement in 3), to deliver the buyer's name to Seller in writing, may be fulfilled as follows: a) If the Listing is effective only

as to certain individuals who are identified in the Listing, by the identification of the individuals in the Listing; or b) if a buyer has requested that the buyer's identity remain confidential, by delivery of a written notice identifying the ~~broker-firm~~ with whom the buyer negotiated and the date(s) of any showings or other negotiations. A Protected Buyer also includes any Person Acting on Behalf of Buyer joined in interest with or otherwise acting on behalf of a Protected Buyer, who acquires an interest in the Property during the extension of listing period as noted on lines xxx-xxx.

⇒ **Is this acceptable or are there additional changes?**

The deleted language below in the definition of Procure is redundant with line 78. See lines 83-86 where the term "procure" is used. The added language speaks to the point that brokers should not be responsible to ensure a buyer's financial capability into the future.

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

In the draft part of the definition of "Procure" was folded into the full price commission item and the balance has been eliminated.

⇒ **Is this acceptable or are there additional changes?**

***** THIS IS AS FAR AS THE WRA FORMS COMMITTEE WENT *****

◆ **Fair Housing (Lines 308-311):** the protected class of status as a victim of domestic abuse, sexual assault or stalking was added.

◆ **Earnest Money (Lines 312-320):** This is from the WB-6. The inserted language is broader and refers to license law standards rather than making it sound as if the only way the broker can disburse is with a written earnest money disbursement agreement – there are several safe harbors for disbursement in Wis. Admin. Code § REEB 18.09(1). Also should the other provisions shown as lined out be retained? Are they desirable and do they serve a purpose that benefits any one? Are they often used?

■ **EARNEST MONEY** If ~~Broker-the Firm~~ holds trust funds in connection with the transaction, they shall be retained by ~~Broker-the Firm~~ in ~~Broker's-the Firm's~~ trust account. ~~Broker-The Firm~~ may refuse to hold earnest money or other trust funds. Should ~~Broker-the Firm~~ hold the earnest money, ~~Broker-the Firm shall hold and disburse earnest money funds in accordance with Wis. Stat. Ch. 452 and Wis. Admin. Code Ch. REEB 18. If the transaction fails to close and the earnest money is disbursed to Seller, then upon disbursement to Seller the earnest money shall be paid first to reimburse Broker for cash advances made by Broker on behalf of Seller and one half of the balance, but not in excess of the agreed commission, shall be paid to Broker as Broker's full commission in connection with said purchase transaction and the balance shall belong to Seller. This payment to Broker shall not terminate this Listing.~~

⇒ **Is this acceptable or are there additional changes?**

◆ **Notice About Sex Offender Registry (Lines 339-341):** The corrected web address should be inserted:

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

⇒ **Is this acceptable or are there additional changes?**

◆ **Term of the Contract (Lines 342-344):** Language was added to try to clarify that the listing contract ends once the property is conveyed, in other words, upon closing. At present this is not addressed and may be helpful when dealing with consumers or in court.

◆ **Signature block:** This should be modified because the contact information need not be here – it has been replaced with the delivery information in the Delivery section. Is it helpful to include the firm’s contact information for any reason? Would seem it is not necessary in our world of technology – what do you think? Should there be spaces for sellers who are entities?

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

 Seller's Address ▲ Seller's Phone # ▲

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

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

 Seller's Address ▲ Seller's Phone # ▲

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

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

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

Seller Entity Name (if any): _____

(x) _____
 Authorized Signature ▲ Print Name & Title Here ▶ Date ▲

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

Broker/Firm Address ▲

Broker/Firm Phone # ▲

Broker/Firm Fax # ▲

Broker/Firm E-Mail Address ▲

⇒ **Is this acceptable or are there additional changes?**

◆ **Attorney Fees Provision?** There used to be attorney's fees provisions in many of the Department listings years ago. That provision was removed from the other listing contracts when they were updated in 2008-2009. Should an attorney's fees provision be added again, such as "In the event either party hereto shall commence legal proceedings against the other to enforce the terms hereof, or to declare rights hereunder, as a result of a breach of any covenant or condition of this Contract, the prevailing party in any such proceeding shall be entitled to recover from the losing party its costs of suit, including reasonable attorney's fees, as may be fixed by the court." The prior provision in the 1999 listing said: "ATTORNEY FEES: SHOULD LITIGATION ARISE BETWEEN THE PARTIES IN CONNECTION WITH THIS LISTING, THE PREVAILING PARTY SHALL HAVE THE RIGHT TO RECOVER REASONABLE ATTORNEY FEES." **NOTE:** We should keep attuned to the legislature because there is a bill that would effectively remove the ability to make the seller responsible to pay the broker's attorney's fees. See 2015 Senate Bill 61, proposed § 134.495(2)(b) at <http://docs.legis.wisconsin.gov/2015/related/proposals/sb61>

What other changes should be made to the WB-1?

NOTE: We also need to proof the WB-1 to make sure that all defined terms have initial caps, as has become the custom of this Committee.

WB1RevisionsDPS9-30-15



When is Commission Earned?

The issues were discussed by the WRA Forms Committee along with some invited guests such that it was a de facto task force, as was requested by the WRA Public Policy Committee. These results will also be reported to that group, which has the authority to provide an official policy position on behalf of the WRA.

Issue

Under what circumstances should a commission be due under the listing contract? (Please read the accompanying State Bar article regarding the *Ash Park* decision.)

Discussion

In the WB-1 listing, for example, commission is due if, "Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property." The *Ash Park* decision held that a contract is enforceable if there is a remedy available for a breach, which would be true of REEB offers. The commission is due regardless of whether that offer closes, per *Ash Park*.

The oral argument before the Wisconsin Supreme Court in the *Ash Park* case and the concurring opinion of Chief Justice Roggensack raised some potential issues regarding what brokers do to earn commission. She is concerned that under the court's decision brokers could sue home sellers when there is no closing and these consumers would not be aware that this could happen under the current WB-1 language. She also appears to believe that agents must procure buyers who are financially able to purchase the property in order to receive commission. This sheds light on the disconnect between what license law says a broker does versus what the public as well as the legal profession believe happens when a broker is hired to sell a property.

- ❖ Full price offer: Should the broker earn commission for a full-price, contingency free offer even if the seller does not accept it? **Absolutely!** Must there be a "ready, willing and able buyer" as the WB-1 now states? This implies the broker will financially qualify the buyer, but that is not a brokerage service. **Language to be reworked such that a broker not required to financially prequalify the buyer and this commission item to be set apart to discourage judiciary's and attorneys' tendencies to blur commission triggering standards together.**
- ❖ Enforceable Contract: Should the broker be due commission when there is an accepted offer (an enforceable contract) regardless of whether it closes? This is the *Ash Park* standard under the current WB-1 language. **Yes.**
- ❖ Offer Null and Void: Should the commission standard say that if an accepted offer later becomes null and void then no commission is due (even though the accepted offer was an enforceable contract)? For example, an accepted offer may become null and void per the financing or inspection contingency. The offer is contingent upon a condition precedent that fails. The buyer does not get financing or the inspection contingency is not satisfied; the buyer is not obligated to proceed and there is no closing. Is commission due? **No. Except if the buyer and the seller agree to void the contract for reasons unrelated to contingencies, then the commission should be due (not clear how that would be stated).**
- ❖ Offer Closes: Should commission be due only if the seller accepts an offer that creates an enforceable contract that remains in force on the date set for closing and closes? This is more in line with the public perception that the broker's job is to get the property sold and the brokers undertake the risk they will

not be paid if the transaction does not close for whatever reason. **No. Commission due if offer closes, but not only if the offer closes.**

- ❖ Notice to Sellers: Should there be a notice or other cautionary language in the commission section of the listing contract warning that a commission can be due even if there is no closing and that the seller should confer with his attorney if he has any questions? **Yes. Something to the effect of saying that an enforceable contract could result in commission being due even if the transaction does not close. Commission language to be moved around a bit to place this next to existing sentence that is presently a bit buried: "Once earned, ~~Broker's~~ the Firm's commission is due and payable in full at the earlier of closing or the date set for closing, unless otherwise agreed in writing."** This may lead to more sellers with attorneys modifying the commission language although this may happen to some extent any way due to the high awareness of this case in the legal community.
- ❖ Uniform or Varying Standards: Should the standards for earning commission be different for residential transactions as opposed to commercial or should there be just one standard? **No.**