

**Tony Evers, Governor Dawn B. Crim, Secretary** 

## REAL ESTATE CONTRACTUAL FORMS ADVISORY COUNCIL Room N208, 4822 Madison Yards Way, 2<sup>nd</sup> Floor, Madison, WI 53705 Contact: Christian Albouras (608) 266-2112 April 3<sup>rd</sup>, 2019

The following agenda describes the issues that the Council 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 Council.

# AGENDA

# 9:30 A.M.

# **OPEN SESSION – CALL TO ORDER – ROLL CALL**

- A. Adoption of Agenda (1)
- **B.** Approval of Minutes of February 13, 2019 (2)
- C. Administrative Matters
  - 1. Department Updates
  - 2. Real Estate Examining Board Update
- **D.** Recommendations to Update the Current Form Revision Process (3)

# E. Review of Real Estate Contractual Forms for Revision

# 1. WB-11– Residential Offer to Purchase (4-57)

- a. Review of Proposed Revisions and Memo
- b. Proposed Revisions to Offer to Purchase Forms Balance of Purchase Price
- c. Proposed Revisions to Foreign Investment in Real Property Tax Act (FIRPTA) Provision
- d. Proposed Revisions to the Current Title Evidence Provisions by the Wisconsin Land Title Association

# F. Public Comments

# ADJOURNMENT

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MEETINGS AND HEARINGS ARE OPEN TO THE PUBLIC, AND MAY BE CANCELLED WITHOUT NOTICE.

Times listed for meeting items are approximate and depend on the length of discussion and voting. All meetings are held at 4822 Madison Yards Way, Madison, Wisconsin, unless otherwise noted. In order to confirm a meeting or to request a complete copy of the board's agenda, please call the listed contact person. The board may also consider materials or items filed after the transmission of this notice. Times listed for the commencement of disciplinary hearings may be changed by the examiner for the convenience of the parties. Interpreters for the hearing impaired provided upon request by contacting the Affirmative Action Officer, 608-266-2112.

# REAL ESTATE CONTRACTUAL FORMS ADVISORY COUNCIL MEETING MINUTES FEBRUARY 13, 2019

- PRESENT: Joseph Busch (via teleconference and excused at 1:00 p.m.), Casey Clickner, Debra Conrad, John Drzewiecki (arrived at 9:52 a.m.), Michael Gordon, Cori Lamont (excused at 11:49 a.m.), Richard Marino, Kim Moermond (arrived at 9:56 a.m.), Laura Peck, Jonathan Sayas, Thomas Weber, Jr., Robert Webster (via teleconference and excused at 11:14 a.m.), Pamela Widen
- **EXCUSED:** Gary Tritz
- **STAFF:** Tom Ryan, Executive Director; Kate Stolarzyk, Bureau Assistant; and other DSPS Staff

# CALL TO ORDER

Richard Marino, Chair, called the meeting to order at 9:48 a.m. A quorum of eleven (11) members was confirmed.

# ADOPTION OF AGENDA

**MOTION:** Cori Lamont moved, seconded by Pamela Widen, to adopt the agenda as published. Motion carried unanimously.

# **APPROVAL OF MINUTES FROM JANUARY 23, 2019**

**MOTION:** Debra Conrad moved, seconded by Laura Peck, to approve the minutes of January 23, 2019 as published. Motion carried unanimously.

# ADJOURNMENT

**MOTION:** Michael Gordon moved, seconded by Pamela Widen, to adjourn the meeting. Motion carried unanimously.

The meeting adjourned at 2:33 p.m.

# State of Wisconsin Department of Safety & Professional Services

1) Name and Title of Person Submitting the Request:			:	2) Date When Request Submitted:	
Erin Karow, Executive Director				1/2/2019	
					red late if submitted after 12:00 p.m. on the deadline ess days before the meeting
3) Name of Board, Comr	nittee, Co	ouncil, Sections:			
Real Estate Contractual	Forms A	dvisory Council			
4) Meeting Date:	e: 5) Attachments: 6) How should the item be titled on the agenda page?				
1/23/2019	🖂 Ye		Real Est	tate Examining Board Matters – Discussion and Consideration	
	□ No		1)	1) Recommendations to Update the Current Form Revision Process	
7) Place Item in:		8) Is an appearance	ce before	the Board being	9) Name of Case Advisor(s), if required:
Open Session		scheduled?			None
Closed Session		Yes			
10) Describe the issue a	nd action	http://www.com/com/com/com/com/com/com/com/com/com/	Iroccod'		
				want was seen veleting	to WD form multiple and refertfally making
a recommendation to es					g to WB form revisions, and potentially making Board.
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11)		A	uthorizat	tion	
Erin Karow					1/2/2019
Signature of person mal	king this I	request			Date
Supervisor (if required) Date					
Executive Director signa	Executive Director signature (indicates approval to add post agenda deadline item to agenda) Date				
Directions for including supporting documents:					
1. This form should be attached to any documents submitted to the agenda.					
2. Post Agenda Deadlin	2. Post Agenda Deadline items must be authorized by a Supervisor and the Policy Development Executive Director.				
3. If necessary, provide original documents needing Board Chairperson signature to the Bureau Assistant prior to the start of a					
meeting.	neeting.				

# AGENDA REQUEST FORM

#### **OFFER TO PURCHASE REVISIONS**

To: DSPS Real Estate Contractual Forms Advisory Committee

From: WRA Forms Committee

Date: March 27, 2019

RE: WB-11 Residential Offer to Purchase

The 20190314WB-11-PostWRAMeeting draft that accompanies this memo shows the result of the discussion of the discussion of the WRA Forms Committee on March 14, 2019 and the DSPS Real Estate Contractual Forms Advisory Committee at its meeting on February 13, 2019, as well as proposed provisions that are there for discussion purposes. This draft has accepted many of the changes made a few meetings ago and thus has a bit less tracking.

# **WB-11 Residential Offer to Purchase**

# **Formatting Suggestions**

We have received feedback and suggestions from various WRA members. One comment is for there to be a longer line in the form. For instance, some want a longer line for the property description to include tax parcel numbers; some want longer lines for deadlines like in the Financing Commitment Contingency and the Appraisal Contingency so that they can write in a specific date, "by 12/31/19." Another one is at the end of the offer where there are blank lines for the sellers to initial and date if the are rejecting or countering – not enough room if using electronic platforms if there are multiple sellers. These areas of the form have been highlighted in green on the form with the thought that they are primarily formatting issues for a possible discussion later on.

# Earnest Money Proposed Change, Lines 10-16:

The WRA Forms Committee received a comment that earnest money is frequently, at least in some areas, not held by listing firms. The Committee discussed that there is a long blank line at line 12 where it can be written in if somebody other than the listing firm will hold the earnest money but it was felt that agents are not very vigilant about completing that line and that requires that the buyer's agent have been notified in advance that the listing firm was not holding the money. There was a suggestion for check boxes, but the Committee instead proposed to move the Caution from the Earnest Money section to the front page: CAUTION: Should persons other than a Firm hold earnest money, an escrow agreement should be drafted by the Parties or an attorney.

The idea is that this will be a better reminder, with the placement near the beginning of the offer rather than near the end, to write in if the title company or some other party is holding the earnest money and that an escrow agreement will be needed.

#### > The DSPS went farther with this suggestion and proposed as follows:

EARNEST MONEY of \$ \_\_\_\_\_\_accompanies this Offer and earnest money of \$ \_\_\_\_\_\_will be mailed, or commercially or personally delivered within \_\_\_\_\_\_\_days ("five" if left blank) of acceptance to (listing Firm) (Buyer agent's Firm) (third party identified as \_\_\_\_\_\_) STRIKE THOSE NOT APPLICABLE (listing Firm if none chosen; if no listing Firm, then Buyer agent's Firm; then Seller's account).

CAUTION: Should persons other than a <u>Firm</u> hold earnest money, an escrow agreement should be drafted by the Parties or an attorney. See lines XXX to XXX for additional provisions regarding disbursements unless a third-party escrow agreement supersedes such provisions.

# > The WRA Forms Committee agreed with this concept and proposes the following additional modifications which are also shown in the draft:

EARNEST MONEY of \$accompanies this Offer and earnest money of \$	
will be mailed, or commercially or personally delivered within days ("five" if left blan	۱k)
of acceptance to (listing Firm) (Buyer's agent's Firm) (third party:) STRIKE AN	٩D
COMPLETE AS APPLICABLE (listing Firm if none chosen; if no listing Firm, then Buyer's agent's Firm; if	no
Firm, <mark>then Seller</mark> ).	

CAUTION: Should persons other than a Firm hold earnest money, an escrow agreement should be drafted by the Parties or an attorney. See lines XXX to XXX for earnest money disbursement provisions unless a third-party escrow agreement supersedes such provisions.

> The DSPS Committee made a tweak saying money delivered to Seller rather than Seller's account within the default and the WRA Forms Committee agreed.

# Actual Receipt – Lines 64-65, 72-74 -- General discussion:

- > The WRA Forms Committee made several observations on this issue:
- One can prove when a document is sent but not when it was forwarded to the party
- There is a growing trend for transaction coordinators to not work on weekends, so language is being added to contracts that no delivery on weekends
- Actual receipt relies on the party's admission
- Opening an email does not necessarily mean you can open the attachment
- Drop box attachments make people leery of scams and fraud virus, etc.
- If send a notice asking for a receipt the recipient has the ability to block such requests
- Should the standard be receipt by the party, in accordance with § 137.23?

#### The following is the definition has been approved by both committees:

• <u>ACTUAL RECEIPT</u>: "Actual Receipt" means that a Party, not the Party's recipient for delivery, if any, has the document or written notice physically in the Party's possession, regardless of the method of delivery. If the document or written notice is electronically delivered, Actual Receipt shall occur when the Party opens the electronic transmission.

# Financing Commitment Contingency overall – Lines 247-282:

# BE AWARE THAT PARTICULARLY COMMERCIAL LENDERS ARE NO LONGER PROVIDING LOAN COMMITMENTS AND THAT A CHANGE MAY BE COMING TO RESIDENTIAL AS WELL!

# **Financing Commitment Contingency – Seller Termination Rights – Lines 277-**279

After much back and forth discussion the following in the provision both committee have agreed to:

■ <u>SELLER TERMINATION RIGHTS</u>: If Buyer does not deliver a loan commitment on or before the Deadline on line xxx, Seller may terminate this Offer if Seller delivers a written notice of termination to Buyer prior to Seller's

Actual Receipt of written loan commitment from Buyer.

## Appraisal Contingency – Lines 290-305:

After much discussion back and forth, this version was discussed at the last Forms Council meeting and the modifications adopted are shown below and in the draft in tracking:

APPRAISAL CONTINGENCY: This Offer is contingent upon Buyer or Buyer's lender having the Property appraised at Buyer's expense by a Wisconsin licensed or certified independent appraiser who issues an appraisal report dated subsequent to the date stated on line 1, indicating an appraised value for the Property equal to or greater than the agreed upon purchase price. This contingency shall be deemed satisfied unless Buyer, within \_\_\_\_\_\_ days of acceptance, delivers to Seller a copy of the appraisal report indicating an appraised value not equal to or greater than the agreed upon purchase price, and a written notice objecting to the appraised value.
<u>RIGHT TO CURE:</u> Seller (shall) (shall not) <u>STRIKE ONE</u> ("shall" if neither is stricken) have a right to cure. If Seller has the right to cure, Seller may satisfy this contingency by delivering written notice to Buyer adjusting the purchase price to the value shown on the appraisal report within \_\_\_\_\_("three" if left blank) days of Buyer's delivery of the appraisal report and the notice objecting to the appraised value. Seller and Buyer agrees to promptly execute any amendment initiated by Buyer either Party after delivery of Seller's notice, solely to reflect the adjusted purchase price. within five days of delivery of Seller's notice.

This Offer shall be null and void with any earnest money returned to Buyer if Buyer makes timely delivery of the notice objecting to appraised value and the written appraisal report and: (1) Seller does not have a right to cure or (2) Seller has a right to cure but: (a) Seller delivers written notice that Seller will not adjust the purchase price or (b) Seller does not timely deliver the written notice adjusting the purchase price to the value shown on the appraisal report.

Some on the WRA Forms Committee thought this provision sends the message that the seller must reduce the purchase price, and some thought the default should be "shall not." Others thought this was better than the old "drop dead" version and the process is consistent with the Inspection Contingency; licensees can be trained to use an amendment for a different price/result as is done in the Inspection Contingency.

A couple DSPS Committee members were amenable to a "shall not" default but most of the group was satisfied to leave the default as "shall" to mirror the inspection contingency process/pattern. The right to cure section now reads as follows after the DSPS Committee review and a change of the default to five days instead of three days:

Seller (shall) (shall not) STRIKE ONE ("shall" if neither is stricken) have a right to cure. If Seller has the right to cure, Seller may satisfy this contingency by delivering written notice to Buyer adjusting the purchase price to the value shown on the appraisal report within \_\_\_\_\_\_ ("five" if left blank) days of Buyer's delivery of the appraisal report and the notice objecting to the appraised value. Seller and Buyer agree to promptly execute an amendment initiated by either party after delivery of Seller's notice, solely to reflect the adjusted purchase price.

# > The WRA Forms Committee found this to be acceptable – the Committees are in agreement.

# If This Offer Is Not Contingent On Financing – Lines 306-313:

The DSPS Committee moved this provision so it now follows the Appraisal Contingency and modified it slightly:

■ IF THIS OFFER IS NOT CONTINGENT ON FINANCING: Within <del>7seven</del> days of acceptance, a financial institution or third party in control of Buyer's funds shall provide Seller with reasonable written verification that Buyer has, at the time of verification, sufficient funds to close. If such written verification is not provided, Seller has the right to terminate this Offer by delivering written notice to Buyer prior to Seller's Actual Receipt of a copy of Buyer's written verification. Buyer may or may not obtain mortgage financing but does not need the protection of a financing contingency. Seller agrees to allow Buyer's appraiser access to the Property for purposes of an appraisal. Buyer understands and agrees that this Offer is not subject to the appraisal meeting any particular value, unless this Offer is subject to an appraisal contingency, nor does the right of access for an appraisal constitute a financing contingency.

#### Both Forms Committees are satisfied with this.

**NEW:** There was a late proposal to add an "Other" blank in the "cash offer" provision for verification of funds so that parties can negotiate whatever they wish to use to for "proof of funds." Sample language for that is:

IF THIS OFFER IS NOT CONTINGENT ON FINANCING: Within 7 days of acceptance: (a) a financial institution or third party in control of Buyer's funds shall provide Seller with reasonable written verification that Buyer has, at the time of verification, sufficient funds to close; or (b) Buyer shall provide Seller with:

[Specify documentation intended (required?) to verify availability of funds]....

The reason for the proposal is that existing language might embody an "ideal" proof of funds scenario, but parties and agents should not be limited to that, particularly if it is so easily subject to potential dispute. They should have a ready-available option to avoid that complexity, be simpler, and get a clear, negotiated result. In most cases the buyers will likely have in mind what they'd intend to send when they confront that provision when writing the offer. If that's so, they should have the easy option of specifying up front exactly what they intend to send. If the seller doesn't like it, the seller counters. If the parties agree, who are we to say what they agreed to is somehow "wrong"? If they agree to something, regardless what it is, both parties (and agents) will then know exactly what to expect and won't have to interpret or argue about anything.

The WRA Forms Committee indicated that some buyers do cross this out and some write in that funds will come from the sale of buyer's property or say a loan commitment will be the proof. That option remains. The WRA Forms Committee believed the provision should remain as it is to require proof of funds within 7 days of acceptance, which timeframe would not likely be met for a sale of buyer's property or a loan commitment. The Committee wishes to preserve the purpose of the provision to give the seller some assurance there will be money for a closing without having to wait until the end of the transaction.

> The WRA Forms Committee was not in favor of this change. Is this acceptable or are there other suggestions and ideas?

# Request for FIRPTA Provision – Lines 314-324; 535-553:

The disposition of a U.S. real property interest by a foreign person (the transferor) (for example, a nonresident alien) is subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) income tax withholding. Persons purchasing U.S. real property interests (transferees) from foreign persons, certain purchasers' agents, and settlement officers are required to withhold 15% of the amount realized on the disposition (special rules for foreign corporations). <u>https://www.irs.gov/individuals/international-taxpayers/firpta-withholding</u>

Exceptions to FIRPTA withholding: <u>https://www.irs.gov/individuals/international-taxpayers/exceptions-from-firpta-withholding</u> includes residential property purchased for less than \$300,000 and used as a home.

> Both Committees have agreed they will work from Option #5 below.

#### **Option #1:**

FEDERAL TAX REQUIREMENT: If Seller is a "foreign person", as defined by applicable law, or if Seller fails to deliver an affidavit that Seller is not a "foreign person", then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service together with appropriate tax form.

The Wisconsin Land Title Association has also requested that a FIRPTA provision be included. This is based on the Minnesota provision and perhaps too detailed, but it does make the point that the parties will need to complete an affidavit and provide their Social Security numbers on or before closing: <u>Option #2</u>:

**FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA):** Section 1445 of the Internal Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must be notified in writing and must withhold tax if the transferor (Seller) is a foreign person and no exceptions from FIRPTA withholding apply. Buyer and Seller agree to comply with FIRPTA requirements under IRC § 1445. Seller shall represent and warrant, under penalties of perjury, whether Seller is a "foreign person," as defined in FIRPTA, prior to closing. Any representations made by Seller with respect to this issue shall survive the closing and delivery of the deed. Buyer and Seller shall complete, execute, and deliver, on or before closing, any instrument, affidavit, or statement reasonably necessary to comply with the FIRPTA requirements, including delivery of their respective federal taxpayer identification numbers or Social Security numbers. Due to the complexity and potential risks of failing to comply with FIRPTA, including Buyer's responsibility for withholding the applicable tax, Buyer and Seller should seek appropriate legal and tax advice regarding FIRPTA compliance, as the respective licensees representing or assisting either party will be unable to assure either party whether the transaction is exempt from FIRPTA withholding requirements.

Another version: **Option #3:** 

**Compliance with Foreign Investment in Real Property Tax Act of 1980 (FIRPTA):** The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) requires persons purchasing U.S. real property interests (transferees) from foreign persons, certain purchasers' agents, and settlement officers to withhold 15% of the amount realized on the disposition (special rules for foreign corporations). <u>https://www.irs.gov/individuals/international-taxpayers/firpta-withholding</u>. Exceptions to this withholding include residential property used as a home that sells for less than \$300,000. <u>https://www.irs.gov/individuals/international-taxpayers/exceptions-from-firpta-withholding</u>.

Section 1445 of the Internal Revenue Code (IRC) provides a transferee (Buyer) of a United States real property interest must be notified in writing and must withhold tax if the transferor (Seller) is a foreign person and no exceptions from FIRPTA withholding apply.

The Parties agree to comply with FIRPTA requirements under IRC § 1445. Seller shall represent and warrant, under penalties of perjury, whether Seller is a "foreign person," as defined in FIRPTA, prior to closing. Any representations made by Seller with respect to this issue shall survive the closing and delivery of the deed. The Parties shall complete, execute, and deliver, on or before closing, any instrument, affidavit, or statement reasonably necessary to comply with the FIRPTA requirements, including delivery of their respective federal taxpayer identification numbers or Social Security numbers.

Due to the complexity and potential risks of failing to comply with FIRPTA, including Buyer's responsibility for withholding the applicable tax, the Parties should seek appropriate legal and tax advice regarding FIRPTA compliance, as the respective firm and its agent are unable to assure either Party whether the transaction is exempt from FIRPTA withholding requirements.

#### Another version: **Option #4:**

**FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA):** Section 1445 of the Internal Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must deduct and withhold a 15% tax on the total Amount Realized in the transaction if the transferor (Seller) is a Foreign Person and no exception from FIRPTA withholding applies. A Foreign Person is a nonresident alien individual, foreign corporation that has not made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. The Amount Realized is the sum of the cash paid, the fair market value of other property transferred, and the amount of any liability assumed by Buyer.

If Seller (is)(is not) STRIKE ONE a foreign person, and Seller shall provide a sworn affidavit under penalties of perjury prior to closing confirming this status and furnishing Seller's Social Security number or taxpayer identification number. If Seller is a Foreign Person and Buyer fails to withhold, Buyer may be held liable for the tax.

> The DSPS made the modifications shown above in tracking.

#### Option #5.

The WRA Forms Committee suggested the following to provide more protection for the buyer and the DSPS Committee also favored this version – they made additional modifications to the language:

> The WRA wants there to be no choices to be made in the provision so this was further modified and now appears in the draft at lines 315-325:

**FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA):** Section 1445 of the Internal Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must deduct and withhold a 15% tax on the total Amount Realized in the transaction if the transferor (Seller) is a Foreign Person and no exception from FIRPTA withholding applies. A Foreign Person is a nonresident alien individual, foreign corporation that has not made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. The Amount Realized is the sum of the cash paid, the fair market value of other property transferred, and the amount of any liability assumed by Buyer.

Seller warrants and represents Seller (is)(is not) STRIKE ONE ("is not" if neither is stricken) a foreign person. If Seller (is)(is not) STRIKE ONE a foreign person, and Seller shall provide a sworn affidavit under penalties of perjury prior to closing confirming this Seller's status in conformance with IRC §

<u>1445(b)(2)</u>and furnishing Seller's Social Security number or taxpayer identification number. If Seller is a Foreign Person and Buyer fails to withhold, Buyer may be held liable for the tax. Firms or real estate agents are not responsible for determining whether FIRPTA applies. The Parties may wish to consult independent legal counsel or tax advisors.

- The DSPS Committee discussed who would provide the affidavit and who is responsible to see that it is done. Many title companies will not and certainly it should not be the licensees buyer's attorney perhaps? There was also discussion of whether the WRA should offer a form for this purpose. Would we want this done? There are forms available online from title companies and other sources that are essentially the same. The DSPS Committee intends to discuss this more at their next meeting on January 23. They were interested in knowing what was done in other states. See, for instance, Knight Barry's Minnesota forms at <u>https://www.knightbarry.com/Forms/MN-Forms.aspx</u>
- > The WRA Forms Committee also discussed whether the WRA should have a form for the Certificate of Non-Foreign Status. Many are uneasy with the form, in part because it includes a TIN/Social Security number, but if the language above is adopted there may be no other reliable way for the Sellers to complete and submit the form before closing because not all title companies are on board to work with this.
- On January 23 the DSPS Committee elected to pass this until next time based on the conversation from that committee that they thought there were other ways to handle this in other states, etc. Those DSPS Committee members will be responsible to bring forward their other proposals and the WRA Forms Committee is not expected to do anything further. However, please note the significant comments that were made:

1. The suggestion was made to move this provision above the signature lines so it would not be missed by the parties.

2. The affidavit of the seller needs to be submitted to the closing agent/title company BEFORE closing so there are no last-minute surprises. If the seller is a foreign person additional paperwork needs to be done.

**3.** The latest word from the WLTA attorneys is they would prefer an affirmative statement in the offer as to whether the seller is or is not a foreign person. This would provide a heads-up as to what was coming and what would be required for closing.

Another suggestion for review from Arizona: Option #6:

**FOREIGN SELLERS:** The Foreign Investment in Real Property Tax Act ("FIRPTA") is applicable if Seller is a non-resident alien individual, foreign corporation, foreign partnership, foreign trust or foreign estate ("Foreign Person"). Seller agrees to complete, sign, and deliver to Escrow Company a certificate indicating whether Seller is a Foreign Person. FIRPTA requires that a foreign seller may have federal income taxes up to 15% of the purchase price withheld, unless an exception applies. Seller is responsible for obtaining independent legal and tax advice.

#### Another suggestion: **Option #7:**

**FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA):** Section 1445 of the Internal Revenue Code (IRC) applies to certain transactions where the Seller is a "Foreign Person," who under that law is a nonresident alien individual, foreign corporation that has not made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or

foreign estate, and requires the transferee (Buyer) to pay or withhold a 15% tax on the total Amount Realized in the transaction if the transferor (Seller) is a Foreign Person and no exception from FIRPTA withholding applies. The Amount Realized is the sum of the cash paid, the fair market value of other property transferred, and the amount of any liability assumed by Buyer.

**CAUTION:** Under this law if Seller is a Foreign Person, and Buyer does not pay or withhold the tax amount, Buyer may be held directly liable by the United States Internal Revenue Service for the unpaid tax and a tax lien may be placed upon the Property. Seller agrees to provide a sworn affidavit, or equivalent document, under penalty of perjury, prior to closing confirming whether or not Seller is a Foreign Person and furnish identification as necessary to any closing entity to confirm same, and Buyer agrees to pay or cause to be withheld at closing the amount, if any, as may be required under FIRPTA. Firms or real estate agents are not responsible for determining whether FIRPTA applies. The parties may wish to consult independent legal counsel or tax advisors.

#### FIRPTA Proposed by Jonathan Sayas (different from the WLTA proposals following below!)

**FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA):** Section 1445 of the Internal Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must deduct and withhold a tax on the total Amount Realized in the transaction if the transferor (Seller) is a Foreign Person and no exception from FIRPTA withholding applies. The Amount Realized is the sum of the cash paid, the fair market value of other property transferred, and the amount of any liability assumed by Buyer. A Foreign Person is a nonresident alien individual, foreign corporation that has not made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate.

Seller agrees to provide Buyer <u>at-before</u> closing, a qualifying Certification of Non-Foreign Status or other evidence that this transaction is exempt from FIRPTA withholding. In the event this transaction is not exempt, the parties agree to execute the necessary documentation and IRS tax forms to comply with FIRPTA and agrees the required withholding funds shall be paid to the IRS at closing. Firms or real estate agents are not responsible for determining whether FIRPTA applies. The Parties may wish to consult independent legal counsel or tax advisors.

CAUTION: Under this law if Seller is a Foreign Person and transaction is not exempt from withholding, and Buyer does not pay or withhold the tax amount, Buyer may be held directly liable by the United States Internal Revenue Service for the unpaid tax and a tax lien may be placed upon the Property.

# <u>3 drafts of FIRPTA REVISIONS: to be placed at end of offer above signature lines</u>

#### 1<sup>st</sup> Draft:

This Offer is made by Buyer with the express understanding and condition that Seller is not a Foreign person, is not a nonresident alien individual and is not a foreign corporation that has made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If any of the above representations are not true, seller MUST counter this offer and agrees that proceeds of this transaction may be subject to FIRPTA withholding.

The above statement is true. \_\_\_\_\_

The above statement is not true, this Offer is countered.

582 (x)		
583 Seller's Signature ▲ Print Name Here ►	Date 🔺	
584 (x)		
585 Seller's Signature ▲ Print Name Here ►	Date ▲	
586 This Offer was presented to Seller by [Licensee and Firm]		

#### 2<sup>nd</sup> Draft:

This Offer is made by Buyer with the express understanding and condition that Seller is not a Foreign person, is not a nonresident alien individual and is not a foreign corporation that has made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If any of the above representations are not true, seller MUST counter this offer **affirmatively verifying Seller's status with respect to FIRPTA laws** and agrees that proceeds of this transaction may be subject to FIRPTA withholding.

The above statement is true. \_\_\_\_

The above statement is not true, this Offer is countered <u>to include Seller's FIRPTA status with respect</u> to Section 1445 of the Internal Revenue Code (IRC).

582 (x)

583 Seller's Signature ▲ Print Name Here ►	Date
584 (x)	
585 Seller's Signature ▲ Print Name Here ►	Date ▲
586 This Offer was presented to Seller by [Licensee and Firm]	

#### 3<sup>rd</sup> Draft:

This Offer is made by Buyer with the express understanding and condition that Seller is not a Foreign person, is not a nonresident alien individual and is not a foreign corporation that has made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If any of the above representations are not true, seller MUST counter this offer **affirmatively verifying Seller's status with respect to FIRPTA laws** and agrees that proceeds of this transaction may be subject to FIRPTA withholding.

The above statement is true. <u>Seller further agrees to provide certification no later than 3 days prior to</u> <u>closing.</u>\_\_\_\_\_

The above statement is not true, this Offer is countered <u>to include Seller's FIRPTA status with respect</u> to Section 1445 of the Internal Revenue Code (IRC). Seller agrees to provide certification no later than 3 days prior to closing \_\_\_\_\_\_

582 (x)

583 Seller's Signature ▲ Print Name Here ►	Date 🔺
584 (x)	
585 Seller's Signature ▲ Print Name Here ►	Date ▲
586 This Offer was presented to Seller by [Licensee and Firm]	

#### Wisconsin Land Title Most Recent Requests cover letter:

Attorney Conrad -

On behalf of the **WLTA** please see the attached memo regarding the title provisions of the offer to purchase. The WLTA would also request that should any FIRPTA provision be inserted into the offer to purchase:

- 1. That the provision contain a clear representation as to whether the Seller is a non-resident alien, foreign corporation, foreign trust, foreign estate or other foreign entity (as defined in the Internal Revenue Code and Income Tax Regulations).
- 2. That any Certification of Non-Foreign Status be provided in advance of the deadline for closing.
- 3. That the provision clarifies a title agent involved in the transaction, is not required to act as a withholding agent for the Buyer, nor is responsible for compliance with any FIRPTA provision.
- 4. That if the above provisions would <u>not</u> be included in the offer to purchase, the WLTA would be agreeable to having no FIRPTA provision in the offer to purchase (status quo), or in the alternative, a very generic warning that the parties may be subject to FIRPTA and are responsible for compliance with same.

Thank you for considering the feedback from the WLTA.

Jonathan M. Sayas Wisconsin Underwriting Counsel Stewart Title Guaranty Company SEE ATTACHED MEMO REGARDING TITLE ISSUES

So, there are lots of ideas and no clear solutions and not everyone will be happy with any choice that is made!

- **1.** Do nothing
- **2.** Use language proposed for the end of the offer (seller certifications in all transactions)
- **3.** Use warning language only (would have to create because what we have all ends up with the seller agreeing to take action)
- 4. Use one of the options

Most provisions include language that the seller agrees to provide the certification so that means a step would be added to all transactions.

★ The following rough draft provision is based upon the discussion of the WRA Forms Committee on March 14 and assumes the WRA would create a form for sellers to use for the certification of foreign/non-foreign status. The provision would be placed near the end of the form.

**FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA):** Section 1445 of the Internal Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must deduct and withhold a 15% tax on the total amount realized in the transaction if the transferor (Seller) is a

Foreign Person and no exception from FIRPTA withholding applies. A Foreign Person is a nonresident alien individual, foreign corporation that has not made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If Seller is a Foreign Person, and Buyer does not withhold the tax, Buyer may be held directly liable by the United States Internal Revenue Service for the unpaid tax and a tax lien may be placed upon the Property.

This Offer is made with the express understanding that Seller is not a Foreign Person. If Seller is a Foreign Person, Seller must counter this Offer and **affirmatively confirm Seller's status with respect to FIRPTA laws** and Seller acknowledges proceeds of this transaction may be subject to FIRPTA withholding. Firms or real estate agents are not responsible for determining whether FIRPTA applies. The parties may wish to consult independent legal counsel or tax advisors.

Seller is not a Foreign Person. Seller shall provide a qualifying certification of non-foreign status to the closing agent no later than 3 days prior to closing.

 Seller's Initials ▲
 Date ▲
 Seller's Initials ▲
 Date ▲

Seller is a Foreign Person, and this Offer is countered. Seller shall provide a qualifying certification of foreign status to the closing agent no later than 3 days prior to closing.

Seller's Initials

★ The following is an alternate draft with the notion that a counter-offer may not be necessary. It again assumes the WRA would create a form for sellers to use for the certification of foreign/non-foreign status. The provision is shown in the draft near the end of the form:

**FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA):** Section 1445 of the Internal Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must deduct and withhold a 15% tax on the total amount realized in the transaction if the transferor (Seller) is a Foreign Person and no exception from FIRPTA withholding applies. A Foreign Person is a nonresident alien individual, foreign corporation that has not made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If Seller is a Foreign Person, and Buyer does not withhold the tax, Buyer may be held directly liable by the United States Internal Revenue Service for the unpaid tax and a tax lien may be placed upon the Property.

This Offer is made with the express understanding that Seller is not a Foreign Person. If Seller is a Foreign Person <u>or if Seller does not provide certification of Seller's status</u>, Seller acknowledges proceeds of this transaction may be subject to FIRPTA withholding. Firms or real estate agents are not responsible for determining whether FIRPTA applies. The parties may wish to consult independent legal counsel or tax advisors.

Seller is not a Foreign Person. Seller shall provide a qualifying certification of non-foreign status to the closing agent no later than 3 days prior to closing.

Seller's Initials **▲** 

Date 🔺

Seller's Initials **▲** 

Date 🔺

Date

Seller is a Foreign Person. Seller shall provide a qualifying certification of foreign status to the closing agent no later than 3 days prior to closing.

Seller's Initials ▲	Date 🔺	Seller's Initials ▲	Date 🔺

The WRA Forms Committee believes that the process should protect the parties first and the brokers second. It was suggested that the foreign/nonforeign status of sellers should be gathered in the listing contracts.

- ★ Note that the certification forms include the seller's TIN/Social Security number and the FIRPTA information seems to indicate the certification would go to the buyer to prove to the buyer they don't have to withhold it is the buyer's insurance policy and there is indication the buyer should hold the certification for 5 years.
- > Is this acceptable or are there other suggestions and ideas?

# **Testing Contingencies**

The WRA Forms Committee had a general, high level discussion on July 19 about testing and inspection contingency provisions:

- There seemed to be some inclination to include a provision for testing but with no attempt to decide whether that should be a general provision, a radon testing contingency, or both.
- The suggestion was made that perhaps whatever testing might be added could share the Contingency Satisfaction/Right to Cure with the Inspection Contingency. In the draft, highlighted in yellow is a combination general testing/radon testing provision that shares Contingency Satisfaction/Right to Cure language.
- The right to cure should state what happens if the seller fails to deliver the reports.
- It was pointed out that a floating deadline is difficult to work with. For example, "The contingency shall be deemed satisfied unless Buyer, within five days of the earlier of 1) Buyer's Actual Receipt of the applicable testing report(s) or 2) the deadline for delivery of said report(s), delivers to Seller a copy of the written report(s) and written notice stating why the report(s) do(es) not satisfy the contingency standard." It can be difficult to prove actual receipt and you can't really calendar the deadline the commenter would prefer just one deadline.

# **RADON TESTING CONTINGENCY, Lines 357-371:**

- > The WRA Forms Committee also tweaked the language regarding the timeframes and the status of the radon mitigation system installed by the seller to cure the defect. The WRA Forms Committee wants the time frames to be the same as they will be in the inspection contingency. They assume the default for the contingency deadline will be 20 days and prefer the time for the seller to respond to buyer's notice be 10 days to match the inspection contingency (as it currently is, if it doesn't get changed). They said there is a psychology to this when working with a seller whereby a licensee addresses inspection contingency and radon testing contingency items and issues in tandem and it is very helpful to <u>not</u> have multiple timelines, even though a radon mitigation issue typically can be resolved quickly.
- The WRA Forms Committee also pushed back with regard to the proposal that a seller who installs a radon mitigation system – or his or her qualified/certified contractor – must do so in conformance with EPA standards. When asked what is meant by this we were directed to

pages 12-13 of the EPA brochure entitled "Consumer's Guide to Radon Reduction – How to Fix Your Home," at <u>https://www.epa.gov/sites/production/files/2016-</u> 12/documents/2016\_consumers\_guide\_to\_radon\_reduction.pdf

There is says:

#### **CHECKING YOUR CONTRACTOR'S WORK**

Below is a list of basic installation requirements that your contractor should meet when installing a radon reduction system in your home. It is important to verify with your contractor that the radon mitigation standards (ASTM E2121 in particular) are properly met to ensure that your radon reduction system will be effective. You also can check with your state radon office to see if there are state requirements that your contractor must meet.

 $\Box$  Radon reduction systems must be clearly labeled. This will avoid accidental changes to the system that could disrupt its function.

 $\Box$  The exhaust pipes of soil suction systems must vent above the surface of the roof and 10 feet or more above the ground, and must be at least 10 feet away from windows, doors or other openings that could allow radon to reenter the home, if the exhaust pipes do not vent at least 2 feet above these openings.

 $\Box$  The exhaust fan must not be located in or below a livable area. For instance, it should be installed in unconditioned space.

□ If installing an exhaust fan outside, the contractor must install a fan that meets local building codes for exterior use.

□ Electrical connections of all active radon reduction systems must be installed according to local electrical codes.

□ A warning device must be installed to alert you if an active system stops working properly. Examples of system failure warning devices are: a liquid gauge, a sound alarm, a light indicator, and a dial, or needle display, gauge. The warning device must be placed where it can be seen or heard easily. Your

contractor should check that the warning device works. Later on, if your monitor shows that the system is not working properly, call a contractor to have it checked.

□ A post-mitigation radon test should be done within 30 days of system installation, but no sooner than 24 hours after your system is in operation with the fan on, if it has one. The contractor may perform a post-mitigation test to check his work and the initial effectiveness of the system; however, it is recommended that you also get an independent follow-up radon measurement. Having an independent tester perform the test, or conducting the measurement yourself, will eliminate any potential conflict of interest. To test the system's effectiveness, a two- to seven-day measurement is recommended. Test conditions: windows and doors must be closed 12 hours before and during the test, except for normal entry and exit.

□ Make sure your contractor completely explains your radon reduction system, demonstrates how it operates and explains how to maintain it. Ask for written operating and maintenance instructions and copies of any warranties.

Other radon mitigation information is found at <u>https://www.dhs.wisconsin.gov/radon/reduce-radon.htm</u> and <u>https://www.wbdg.org/ffc/epa/criteria/epa-402-r-93-078</u> although this is very technical and apparently intended to serve as a model for state radon mitigation standards.

**RADON TESTING CONTINGENCY:** This Offer is contingent upon Buyer obtaining a current written report of the results of a radon test at the Property performed by a qualified third party in a manner consistent with applicable EPA and Wisconsin Department of Health Services (DHS) protocols and standards indicating

the radon level is less than 4.0 picoCuries per liter (pCi/L), at (Buyer's) (Seller's)[STRIKE ONE] ("Buyer's" if neither is stricken) expense. This contingency shall be deemed satisfied unless Buyer, within \_\_\_\_\_\_\_ days ("20" if left blank) of acceptance delivers to Seller a written copy of the radon test results report indicating a radon level of 4.0 pCi/L or higher and written notice objecting to the radon level in the report. **RIGHT TO CURE:** Seller (shall)(shall not) STRIKE ONE] ("shall" if neither is stricken) have the right to cure. If Seller has the right to cure, Seller may satisfy this contingency by (1) delivering a written notice of Seller's election to cure within seven-10 days of delivery of Buyer's notice; and, (2) installing a radon mitigation system in conformance with EPA standards in a good and workmanlike manner and by giving Buyer a report of the work done and a post remediation test report indicating a radon level of less than 4.0 pCi/L no later than three days prior to closing. This Offer shall be null and void if Buyer timely delivers the above written notice and report to Seller and (1) Seller does not have the right to cure; or (2) Seller has a right to cure but: a) Seller delivers written notice that Seller will not cure or b) Seller does not timely deliver the notice of election to cure. If Seller was responsible to provide the report, this Offer shall be null and void if Buyer timely deliver the notice of election to cure. If Seller was responsible to provide the report, this Offer shall be null and void if Buyer delivers notice to Seller within three days of the delivery deadline stating Seller failed to deliver the report.

This is satisfactory to both Committees now.

# Closing of Buyer's Property Contingency – Lines 372-378:

In the current offer this provision is as follows:

CLOSING OF BUYER'S PROPERTY CONTINGENCY: This Offer is contingent upon the closing of the sale of Buyer's property located at \_\_\_\_\_\_\_. If Seller accepts a bona fide

\_\_\_\_\_\_, no later than \_\_\_\_\_\_. If Seller accepts a bona fide secondary offer, Seller may give written notice to Buyer of acceptance. If Buyer does not deliver to Seller a written waiver of the Closing of Buyer's Property Contingency and \_\_\_\_\_\_

[INSERT OTHER REQUIREMENTS, IF ANY (e.g., PAYMENT OF ADDITIONAL EARNEST MONEY, WAIVER OF ALL CONTINGENCIES, OR PROVIDING EVIDENCE OF SALE OR BRIDGE LOAN, etc.)] within \_\_\_\_\_ hours of Buyer's Actual Receipt of said notice, this Offer shall be null and void.

In the offer draft and in this memo, for discussion purposes, this provision was split to make the bump clause a separate provision. The draft of the Closing of Buyer's Property Contingency also looks to set a consequence if there is no closing by the deadline. The provision suggests an implementation process.

What is the consequence if the sale of the buyer's property does not close by the deadline? Does it mean the seller can terminate the offer? Does it simply mean the seller cannot enforce the offer against the buyer because the contingency was not fulfilled but the buyer may still choose to go forward (the result of the current language)? There also is a statement the buyer may unilaterally waive the contingency as this has been a point of discussion for some.

An alternative for illustration/discussion:

 This Offer is contingent upon the closing of the sale of Buyer's property located at			
no later than			
Buyer's property is, or shall be within seven days of acceptance of this Offer, listed with			
, at a list price no greater than \$			
If the Buyer's property is not listed within seven days of acceptance of this Offer Seller may deliver written notice of termination. If the sale of Buyer's property does not close on or before the closing date of this Offer or if an offer for Buyer's becomes null and void for any reason, Buyer shall promptly notify Seller in writing, and either Party shall have the right to declare this Offer null and void by written notice delivered to the other Party as per the terms of this Offer.			

If Seller accepts a bona fide secondary offer, Seller may deliver written notice to Buyer of acceptance. This Offer shall be null and void and Buyer shall be deemed conclusively to have forfeited and released any interest in the Property unless Buyer, prior to such notice or within \_\_\_\_\_ hours ("72" if left blank) of Buyer's Actual Receipt of such notice, delivers to Seller one of the following:

- (1) Written notice from Buyer that Buyer is waiving the Closing of Buyer's Property Contingency and all financing contingencies in this Offer, making this a cash offer AND written verification from a financial institution or third party in control of Buyer's funds that Buyer has sufficient funds necessary to close this transaction which are not contingent on the sale of Buyer's property, or;
- (2) A copy of the offer to purchase on Buyers' property which has all contingencies, other than any financing contingencies, properly removed or satisfied AND written verification from a financial institution buyer under said offer to purchase has been pre-approved for financing which may be based on the following minimum criteria: satisfactory credit history, accepted offer terms and buyer debt ratios.

If the Buyer satisfies this requirement using (2) above, this contingency shall be deemed modified and shall be subject only to the successful closing of the sale of Buyer's property on or before the closing date in this Offer.

# NOTE: Buyer may not unilaterally waive this contingency without complying with requirements (1) or (2) above.

The DSPS Committee proposal in rough terms that now appears in the WB-11 draft:

CLOSING OF BUYER'S PROPERTY CONTINGENCY: This Offer is contingent upon the closing of the sale of Buyer's property located at \_\_\_\_\_\_\_, no later than \_\_\_\_\_\_\_, no later than \_\_\_\_\_\_\_, no later than \_\_\_\_\_\_\_, the deadline). Buyer may proceed to closing without satisfaction of this contingency, and may waive this contingency unilaterally, in writing, at any time upon written notice delivered to Seller. If Buyer sells Buyer's property Buyer shall deliver written notice to Seller indicating the contingency is satisfied. But if this contingency is not otherwise timely satisfied or waived by the deadline, Seller may deliver a notice of termination to Buyer, rendering this Offer null and void, except that Buyer may elect to proceed with this Offer if Buyer delivers to Seller a written notice waiving this contingency within \_\_\_\_\_\_ hours after delivery of Seller's notice.

The WRA Forms Committee reviewed the above rough draft of the Closing of Buyer's Property Contingency and proposed the following modification to add a requirement for proof of funds if a buyer is going to be allowed to unilaterally waive. Otherwise the contingency has little meaning in the opinion of the WRA Forms Committee.

□CLOSING OF BUYER'S PROPERTY CONTINGENCY: This Offer is contingent upon the closing of the sale of Buyer's property located at \_\_\_\_\_\_\_\_, no later than \_\_\_\_\_\_\_(the deadline). Buyer may proceed to closing without satisfaction of this contingency, and may waive this contingency unilaterally, in writing, at any time\_upon written notice delivered to Seller accompanied by reasonable written verification from a financial institution or third party in control of Buyer's funds that Buyer has, at the time of verification, sufficient funds to close. If Buyer sells Buyer's property Buyer shall deliver written notice to Seller indicating the contingency is satisfied. But if this contingency is not otherwise timely satisfied or waived by the deadline, Seller may deliver a notice of termination to Buyer, rendering this Offer null and void, except that Buyer may elect to proceed with this Offer if Buyer delivers to Seller a written notice waiving this contingency within \_\_\_\_\_\_ hours after delivery of Seller's notice.

- The DSPS Committee objected to this proposal because it imposes a condition on the buyer's waiver that likely is not there if they waive in response to a bump notice. Not right to make it harder to waive than it is to respond to a bump notice.
- The WRA Forms Committee believes the Seller has no protection and the contingency is meaningless if the buyer can just waive it away and accordingly wants the language to remain. The Seller is relying upon the sale of the Buyer's property in order for the offer to come together. The WRA Forms Committee believes the blank does get filled in and if it does not it is an issue for training emphasis.

The DSPS Committee, per the request of one of their Committee members, is also going to look at the RANW Addendum A provision for discussion purposes:

#### CLOSING OF THE SALE OF BUYER'S PROPERTY CONTINGENCY

This Offer is contingent upon the closing of the sale of Buyer's property located at \_

Buyer's property is, or shall be, within seven (7) days of acceptance of this Offer, listed for sale with at a list price no greater than

\_\_\_\_\_\_. If the closing of the sale of Buyer's property does not occur on or before the closing date for this Offer or if an offer for Buyer's property becomes null and void or terminated for any reason, Buyer shall promptly notify seller in writing, and either Party shall have the right to declare this Offer null and void by written notice thereof delivered to the other Party.

(NOTE: Choose box at line 15 or 28 if box at line 6 is marked).

#### ACCEPTED OFFER TO PURCHASE ON BUYER'S PROPERTY AND NO BUMP

(NOTE: Choose box at line 17 or 18 if box at line 15 is marked)

Seller acknowledges that Buyer has provided Seller a copy of the accepted offer to purchase on Buyer's property.

Buyer shall deliver to Seller, within three (3) days of acceptance of this Offer a copy of the accepted offer to purchase on Buyer's property

(NOTE: Choose one of the two options on line 21 or 23 if box at line 18 is marked)

with written proof that all contingencies are satisfied or removed, and which has a closing date prior to the closing

in this Offer.

which is subject to financing and \_\_\_\_\_, and which has a closing

date prior to the closing in this Offer.

If Buyer does not make timely delivery of the accepted offer on Buyer's property that is consistent with the representation(s) above, Seller may terminate this Offer by delivering a written notice of termination to Buyer prior to (Buyer's delivery) (Seller's Actual Receipt) STRIKE ONE ("Buyer's delivery" if neither is stricken) of a copy of the accepted offer on Buyer's property.

#### **CONTINUED MARKETING – WITH BUMP CLAUSE**

If Seller accepts a bona fide secondary offer, Seller may give written notice to Buyer of such acceptance. This Offer shall be null and void and Buyer shall be deemed conclusively to have forfeited and released any interest in the Property unless Buyer, prior to such notice or within \_\_\_\_\_ hours of Buyer's Actual Receipt of such notice, delivers to Seller one of the following:

(1) written notice from Buyer that Buyer is waiving the Closing of the Sale of Buyer's Property Contingency and all financing contingencies in this Offer, making this a cash offer AND written verification from a financial institution or a third party in control of Buyer's funds that Buyer has sufficient funds necessary to close this transaction which are not contingent on the sale of Buyer's property; or

(2) a copy of the offer to purchase on Buyer's property which has all contingencies, other than any financing contingencies, properly removed or satisfied AND written verification from a financial institution that buyer under said offer to purchase has been pre-approved for financing, which then will modify this Closing of the Sale of Buyer's Property contingency making this Offer subject to the successful closing of the sale of Buyer's property described on lines 7-8 above, on or before the closing date in the Offer. **NOTE: A financing pre-approval is NOT considered a loan commitment.** 

If Buyer accepts a bona fide offer for the purchase of Buyer's property prior to receiving written notice from Seller that Seller has accepted a bona fide secondary offer, Buyer shall promptly notify Seller of such acceptance. Such notification does NOT modify **lines 6-53 of this Addendum** (the Closing of the Sale of Buyer's Property Contingency).

Unless Seller has given Buyer notice of a bona fide secondary offer, once Buyer has an accepted offer on Buyer's property that complies with requirement (2) above, the Buyer shall promptly deliver to Seller a copy of such offer and this Closing of the Sale of Buyer's Property Contingency shall be deemed modified and subject to the closing of the sale of Buyer's property. Other than the deadlines for Buyer Financing Pre-approval letter, if applicable, payment of Earnest Money and \_\_\_\_\_\_

, all deadlines in this Offer which run from acceptance shall run from the time Buyer has complied with requirement (1) above or from the time Buyer has an accepted offer for the purchase of Buyer's property that complies with requirement (2) above.

NOTE: Buyer may not unilaterally waive this contingency without compliance with (1) or (2) above.

> Does this work or are there other suggestions and ideas?

# ★ Looking at this provision caused the DSPS Committee launch into a discussion of when and if the buyer could provide a copy of the offer on the buyer's house to the buyer's seller. What does that mean with regard to the confidentiality protections in license law?

Does it mean any provisions where you talk about delivering a copy of an offer to some else, even if not a buyer in competition for the buyer's property, would need to include language similar to the following?

Buyer and Seller are aware that Wis. Admin. Code § REEB 24.12 prohibits a licensed real estate agent from disclosing any of the terms of one prospective buyer's offer to purchase, exchange agreement or option contract proposal to any other prospective buyer or to any person with the intent that this information be disclosed to any other prospective buyer. Buyer and Seller understand that delivery of other bona fide offers must be conducted solely between Buyer and Seller and cannot involve their respective agents.

A proposal was made to include standard language in the Distribution of Information provision to have parties automatically authorize agents to provide copies of offers in situations like a Closing of Sale of Buyer's Property Contingency:

DISTRIBUTION OF INFORMATION. Buyer and Seller authorize the agents of Buyer and Seller to: (i) distribute copies of the Offer to Buyer's lender, appraisers, title insurance companies and any other settlement service providers for the transaction as defined by the Real Estate Settlement Procedures Act (RESPA); (ii) report sales and financing concession data to multiple listing service sold databases; (iii) provide active listing, pending sale, closed sale and financing concession information and data, and related information regarding seller contributions, incentives or assistance, and third party gifts, to appraisers researching comparable sales, market conditions and listings, upon inquiry; and (iv) distribute copies of this Offer for Seller to obtain an accepted offer on any property Seller intends to purchase, or for either party to meet or satisfy obligations as required under the terms of another offer to purchase.

This causes concerns under the license law provisions concerning confidentiality.

#### 452.133 Duties of licensees; prohibitions.

(1) Duties to all parties to a transaction. A firm providing brokerage services to a party to a transaction owes all of the following duties to the party:

- (a) The duty to provide brokerage services honestly and fairly.
- (b) The duty to provide brokerage services with reasonable skill and care.

(c) The duty to timely disclose in writing all material adverse facts that the firm knows and that the party does not know or cannot discover through reasonably vigilant observation, unless the disclosure of a material adverse fact is prohibited by law.

(d) The duty to keep confidential any information given to the firm in confidence, or any information obtained by the firm that the firm knows a reasonable person would want to be kept confidential, unless the information must be disclosed by law or the person whose interests may be adversely affected by the disclosure specifically authorizes the disclosure of particular information. The firm shall continue to keep the information confidential after the transaction is complete and after the firm is no longer providing brokerage services to the party.

(6) Waiver of duties. The duties imposed by subs. (1), (2) (a), (am), (b), and (c), (4), and (5) may not be waived.

#### **REEB 24.12** Confidentiality of offers.

(1) Except as provided in sub. (2), a licensee acting as a principal or an agent in a real estate or business opportunity transaction shall not disclose any of the terms of one prospective buyer's offer to purchase, exchange agreement or option contract proposal to any other prospective buyer or to any person with the intent that this information be disclosed to any other prospective buyer. Licensees shall encourage all prospective buyers to submit their best offers. A licensee may, but is not required to, disclose information known by the licensee regarding the existence of other offers on the property, the fact that a seller has accepted an offer, that the offer is subject to contingencies and that the offer is subject to a clause requiring removal of certain contingencies upon the occurrence of an event such as receipt, acceptance or conditional acceptance of another offer.

(2) As used in this subsection, "right of first refusal" means the right of a person to have the first opportunity to purchase or lease real property. "Right of first refusal" does not mean a so-called "bump clause" which is a contingency provision in a purchase agreement that requires the prospective buyer to remove certain contingencies in the buyer's purchase agreement or to relinquish the buyer's primary status to a secondary offer. If a licensee is providing brokerage services in a transaction and the licensee has knowledge that the property is subject to a right of first refusal, the licensee shall disclose the right of first refusal, in writing and in a timely manner, to all persons seeking to acquire an interest subject to the right of first refusal. After disclosure of the right of first refusal to a party seeking to acquire an interest in the property, the licensee may deliver a copy of that party's subsequent offer to purchase, exchange agreement, option contract or lease proposal to the party holding the right of first refusal.

Some comments by various attorneys, who are not all in agreement on all of the following:

The REEB 24.12 rule, in my opinion, is to stop competitive advantage between buyers on the same property. It would prohibit the broker delivery in escalation clause situations because two buyers are attempting to purchase same property. REEB 24 however would have no bearing in the context of a seller asking for the buyer's buyer's offer. The seller is seeking information about the strength of their buyer's offer which is subject to sale.

The 452 rule is the one that could be applicable to the buyer's buyer's expectations of confidentiality. As a buyer would I think my offer is going to be shared with my seller's seller? My first thought is no, at least not without my express permission.

Looking at the § 452.133(6) issue, which explicitly states the section on confidentiality can't be waived. Admittedly (6) is expressly contrary to the potential for a person, whose interest may be adversely affected, to authorize disclosure. My read, when there is an offer, if either party expects confidentiality, unless they are both persons whose interest is adversely affected, you can't get a waiver.

I believe the average buyer is under the impression their offer terms are not going to be shared with anyone that may be competing with them. To highlight this fact, I have even been pressed by agents and buyers about having to put information in the financing contingency – they feel that is too personal. Therefore, I'm pretty sure they would argue a reasonable person believes the offer terms are confidential at least when it involves a competitor. This alone – this general impression in Wisconsin that offers are private and confidential -- speaks to a reason why the proposed language may not fly.

Part of the chatter at Forms Council was assuming the terms and conditions of the offer were confidential, that then the buyer's buyer could not give specific authorization because it is not adverse to them to disclose a copy of their offer. That begs the question: if it is not adverse to anyone then is the offer confidential to begin with?

Do we assume that the terms and conditions of an offer always are confidential? Or is there just certain information that is confidential? Or does that depend upon context?

In the listing contract it provides:

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

The following information is required to be disclosed by law:

Material Adverse Facts, as defined in section 452.01 (5g) of the Wisconsin statutes (see lines 195-198).
 Any facts known by the Firm and its agents that contradict any information included in a written

inspection report on the property or real estate that is the subject of the transaction.

To ensure that the Firm and its agents are aware of what specific information you consider confidential, you may list that information below (see lines 147-148). At a later time, you may also provide the Firm with other information you consider to be confidential.

#### CONFIDENTIAL INFORMATION: \_

NON-CONFIDENTIAL INFORMATION (The following may be disclosed by the Firm and its agents):

Is the information confidential?

Assume the whole of the offer is confidential to the buyer's buyer even though the provision in § 452.133 was intended to apply to specific facts or information.

Is the buyer's buyer a "person whose interests may be adversely affected by the disclosure" so they can give authorization? We don't really know who a "person whose interests may be adversely affected by the disclosure" is. Would it be anyone with regard to whom the information in the offer is private or confidential? If we assume that all offers are automatically confidential do we assume that all parties are automatically a "person whose interests may be adversely affected by the disclosure"?

Then why could the parties not give the authorization? Arguably that is not the same thing as entirely waiving the confidentially provision in § 425.133, it is rather an implementation of that duty provision not waiving it away, it is simply just complying with the duty.

It would seem there has been no definitive interpretation of what the language" the person whose interests may be adversely affected by the disclosure specifically authorizes the disclosure of particular information" in § 452.133(1)(d) means and there is a general impression that the public will generally believe the terms of their offers are confidential in Wisconsin, at least t the extent that no one seems secure in relying upon that language as a green light to adopt the proposed additional language for the Distribution of Information provision.

- > What do you think of all of this?
- > Do you want the bump clause to remain part of the Closing of Buyer's Property Contingency or separate? WRA Forms Committee says separate.

# Bump Clause – Lines 379-389:

This shows what this would look like as a separate provision. It allows for a bump that requires removal of various provisions or the meeting of other conditions. It has a default for the timeframe, involves the debate over whether or not actual receipt is a good thing and adds a statement that the seller may unilaterally waive the bump clause provision – for better or for worse – the group may look at this and decide. Also, is it good or bad to have a list of check box items for the buyer to comply with to satisfy the bump? Are the prompts better within the text as in the current version? Which prompts should be included?

BUMP CLAUSE: If Seller accepts a bona fide secondary offer, Seller may give written notice to Buyer of acceptancethat another offer has been accepted. If Buyer does not deliver to Seller written waiver of the Closing of Buyer's Property Contingency and: CHECK AND COMPLETE AS APPLICABLE

- Written waiver of Financing Commitment Contingency
- Proof of bridge loan financing\_\_\_\_\_

Proof of ability to close\_\_\_\_\_

(other – specify)

[INSERT OTHER REQUIREMENTS, IF ANY (e.g., PAYMENT OF ADDITIONAL EARNEST MONEY, WAIVER OF ALL CONTINGENCIES, PROVIDING EVIDENCE OF SALE, etc.)] within \_\_\_\_\_ hours ("72" if left blank) of Buyer's Actual Receipt/delivery of said notice, this Offer shall be null and void. <u>Seller may unilaterally waive this Bump clause provision.</u>

Another way to state this:

BUMP CLAUSE: If Seller accepts a bona fide secondary offer, Seller may give written notice to Buyer of acceptance. If Buyer does not deliver to Seller a written notice waiving and/or satisfying all items specified below, within \_\_\_\_\_hours ["72" hours if left blank] of Buyer's Actual Receipt of Seller's notice, this Offer shall be null and void. \_\_\_\_\_\_

[INSERT OTHER REQUIREMENTS, IF ANY (e.g., PAYMENT OF ADDITIONAL EARNEST MONEY, WAIVER OF CLOSING OF BUYER'S PROPERTY CONTINGENCY, WAIVER OF FINANCING COMMITMENT CONTINGENCY, ALL CONTINGENCIES, PROVIDING EVIDENCE OF SALE OR BRIDGE LOAN, etc.)] Seller may unilaterally waive this Bump Clause provision.

Proposal regarding the area that addresses the number of hours that a buyer is given to address the "bump" from receipt of a Notice is changed: From: "within \_\_\_\_\_ hours of Buyers Actual..." To: "within \_\_\_\_\_ hours (24 if nothing is written in) of Buyers Actual..."

Another variation: within \_\_\_\_\_ hours ("72" if left blank) of Buyer's Actual Receipt OR SEVEN DAYS AFTER DELIVERY of said notice.... whichever occurs first ...

The DSPS Forms Committee looked at these and worked on the following rough draft of what they preferred that now is shown in the WB-11 draft:

► The WRA Forms Committee reviewed the drafts of the Bump Clause, indicated they prefer the check boxes to the blank line with prompts and the following is their latest proposal:

BUMP CLAUSE: If Seller accepts a bona fide secondary offer, Seller may give written notice to Buy	er
that another offer has been accepted. If Buyer does not deliver to Seller written waiver of the Closing of Buyer	's
Property Contingency and CHECK AND COMPLETE AS APPLICABLE :	

Financing Commitment Contingency

Proof of bridge loan financing

Proof of ability to close from a financial institution or third party in control of Buyer's funds which shall provide Seller with reasonable written verification that Buyer has, at the time of verification, sufficient funds to close.

Other:

other requirements, if any (e.g., payment of additional earnest money, waiver of all contingencies, providing evidence of sale, etc.)]

within \_\_\_\_\_ hours ("72" if left blank) of Buyer's Actual Receipt of said notice, this Offer shall be null and void.

> Is this acceptable or are there other suggestions and ideas?

# > Should this provision be made so that it can be used with other contingencies in addition to the Closing of Buyer's Property Contingency? The WRA Forms Committee says yes.

**BUMP CLAUSE:** If Seller accepts a bona fide secondary offer, Seller may give written notice to Buyer that another offer has been accepted. If Buyer does not deliver to Seller:

(1) written waiver of the Closing of Buyer's Property Contingency and \_

(name other contingencies subject to the Bump Clause) STRIKE AND

COMPLETE AS APPLICABLE and

(2) CHECK AND COMPLETE AS APPLICABLE :

Financing Commitment Contingency

Proof of bridge loan financing

Proof of ability to close from a financial institution or third party in control of Buyer's funds which shall provide Seller with reasonable written verification that Buyer has, at the time of verification, sufficient funds to close.

Other:

\_\_\_\_ [insert

[insert

other requirements, if any (e.g., payment of additional earnest money, waiver of all contingencies, providing evidence of sale, etc.)]

within \_\_\_\_\_ hours ("72" if left blank) of Buyer's Actual Receipt of said notice, this Offer shall be null and void.

> Is this acceptable or are there other suggestions and ideas?

# Secondary Offer – Lines 390-395:

A default time frame was added.

**SECONDARY OFFER:** This Offer is secondary to a prior accepted offer. This Offer shall become primary upon delivery of written notice to Buyer that this Offer is primary. Unless otherwise provided, Seller is not obligated to give Buyer notice prior to any deadline, nor is any particular secondary buyer given the right to be

made primary ahead of other secondary buyers. Buyer may declare this Offer null and void by delivering written notice of withdrawal to Seller prior to delivery of Seller's notice that this Offer is primary. Buyer may not deliver notice of withdrawal earlier than \_\_\_\_\_ days (<u>"fiveseven" if left blank</u>) after acceptance of this Offer. All other Offer deadlines which are run from acceptance shall run from the time this Offer becomes primary.

#### A proposal for an addition:

**SECONDARY WITHDRAWAL LOCK-IN:** If this Offer is a Secondary Offer, it is also agreed that if Seller elects to send a "Bump" Notice to the Primary Buyer, Seller may notify Buyer in writing when Seller delivers a "Bump" Notice to the Primary Buyer, and Buyer agrees that upon such notification from Seller Buyer's right to withdraw under lines xxx is removed from this Offer. Note: Notification under this provision does not make Buyer's offer primary. Buyer's right to withdraw under lines xxx is reinstated if the Primary Buyer waives and/or satisfies the conditions permitting Primary Buyer to proceed. Seller agrees to promptly notify Buyer in writing if the Primary Buyer is proceeding or if Seller is choosing to elevate Buyer to a primary offer.

#### **Priority Over All Other Secondary Offers**

Buyer is aware this is a secondary offer. In the event the primary buyer cannot meet the offer terms, and upon written notice from Seller to Buyer hereunder, this Offer shall become the primary offer. Seller agrees not to grant any extensions or modifications to primary buyer after acceptance of this Offer. Seller shall not have the right to consider this secondary offer subordinate to any other secondary offer. Buyer may declare this Offer null and void by delivering written notice of withdrawal to Seller at any time prior to delivery of Seller's notice this Offer is primary. Buyer may not deliver notice of withdrawal earlier than \_\_\_\_\_ days ("10" if left blank) after acceptance of this Offer. Offer deadlines, other than deadlines in this secondary offer provision and for payment of earnest money, measured from acceptance shall be measured from the time this Offer becomes primary.

The DSPS Forms Committee was fine with the existing language shown first above with the five-day default added. The WRA Forms Committee prefers a seven-day default. Is this acceptable?

# Title Evidence section – Lines 403-439:

First of all, the language highlighted in yellow has been referred to the smart title attorneys with the Wisconsin Land Title Association and they will study this and give us a recommendation so stay tuned. The provision makes it clear that the buyer pays for the cost of recording the deed. This may need further clarification as to whether this means just the recording fee or whether it includes the transfer fee – meant it to be just the recording fee while the seller would pay the transfer fee. The provision also provides a choice for when the title commitment will be furnished and offers shifts the opportunity for obtaining the title insurance commitment closer to the beginning of the transaction.

#### TITLE EVIDENCE

#### Lines 403-416:

\_\_\_\_\_\_ (insert other allowable exceptions from title, if any) which constitutes merchantable title for purposes of this transaction. Seller shall complete and execute the documents necessary to record the conveyance at Seller's cost and pay the Wisconsin Real Estate Transfer Fee.

A representative of Chicago Title mentioned a potential problem she has run across when a certain attorney in town drafts a deed and includes a "reference" to the Condition Report, with it never to be fully explained going forward, but will be there recorded on record forever. The language is the last part "…present uses of the Property in violation of the foregoing disclosed in the Seller's Real Estate Condition Report and in this Offer…"

#### The Wisconsin Land Title Association has looked at this issue and does not recommend any modifications to the current language or would be amenable to returning to the 1999 version of this section. The 1999 language is shown in tracking in the draft.

In the older (1999) listing contract, the offer to purchase and the deed, the seller guarantees (warrants) that the title will be transferred free and clear of liens and encumbrances except for (paraphrasing) local ordinances, building codes and subdivision restrictions, which do not prohibit the current use of the property. If the use of the property, like an illegal bedroom, violates one of these then it would violate the Conveyance of Title section: "Upon payment of the purchase price, Seller shall convey the Property by warranty deed(...) free and clear of all liens and encumbrances, except: municipal and zoning ordinances and agreements entered under them, recorded easements for the distribution of utility and municipal services, recorded building and use restrictions and covenants, general taxes levied in the year of closing and \_\_\_\_\_\_ (provided none of the foregoing prohibit present use of the Property), which constitutes merchantable title ...."

If a seller added an illegal bedroom in the attic, the seller's warranty will arguably be violated because the current use of the property (a bedroom in the attic) is prohibited under the local building code. The present use of the bedroom is illegal, so it is not an exception to the warranty of title because the building code does prohibit the present use of the property. Because of that the addition was made to the list if exceptions for "present uses of the Property in violation of the foregoing disclosed in Seller's Real Estate Condition Report and in this Offer." The problem is that neither the RECR or the Offer are part of the chain of title, so this becomes meaningless once you get past the first transaction.

- ★ The draft shows in tracking what it would look like if the language was taken back to the 1999 version. It takes out the reference to the RECR and by doing so opens the door to possible lawsuits based upon the seller's warranty of title, which might rarely occur when other theories of redress are not available or less profitable.
- > Which way should this go or are there other suggestions and ideas?

The WLTA suggests the following modifications for lines 421-425:

■ <u>GAP ENDORSEMENT</u>: Seller shall provide a "gap" endorsement or equivalent gap coverage at (Seller's)(Buyer's) <u>STRIKE ONE</u> ("Seller's" if neither stricken) cost to provide coverage for any liens or encumbrances first filed or recorded after the <u>effective\_commitment</u> date of the title insurance commitment and before the deed is recorded, subject to the title insurance policy <u>conditions</u>, exclusions and exceptions, provided the title company will issue the <u>endorsementcoverage</u>. If a gap endorsement or equivalent gap coverage is not available, Buyer may give written notice that title is not acceptable for closing (see lines xxx-xxx).

#### > Is this acceptable or are there other suggestions and ideas?

The WB-11 and the WB-14 Residential Condominium offers have the title commitment delivery time frame at the end of the process immediately before closing which may not allow any time to point out and address concerns and may delay closing or force decisions the buyer and/or title company would not otherwise make. The following looks to provide a choice of timing for delivery of the title commitment. It also looks to place a deadline on the buyer's objections to title.

#### Lines 426-439:

PROVISION OF MERCHANTABLE TITLE: For purposes of closing, title evidence shall be acceptable if the required title insurance commitment is delivered to Buyer's attorney or Buyer no later than days ("15" if left blank) (after acceptance)(prior to closing) [STRIKE ONE] ("after acceptance" if neither is stricken), losing, showing title to the Property as of a date no more than 15 days before delivery of such title evidence to be merchantable per lines <u>326-335xxx-xxx</u>, subject only to liens which will be paid out of the proceeds of closing and standard title insurance requirements and exceptions, as appropriate.

<u>TITLE NOT ACCEPTABLE FOR CLOSING</u>: If title is not acceptable for closing, Buyer shall notify Seller in writing of objections to title by the time set for closingwithin five days of delivery of the title commitment to Buyer or Buyer's attorney. In such event, Seller shall have a reasonable time, but not exceeding 15-\_\_\_\_days ("five" if left blank) from Buyer's delivery of the notice stating title objections, to remove the objections, and the time for closing shall be extended as necessary for this purpose. In the event that Seller is unable to remove said objections, Buyer shall have five days from receipt of notice thereof, to deliver written notice waiving the objections, and the time for closing shall be extended accordingly. If Buyer does not waive the objections, this Offer shall be null and void. Providing title evidence acceptable for closing does not extinguish Seller's obligations to give merchantable title to Buyer.

The DSPS Forms Committee reviewed and discussed these provisions and made the following changes making it so the title is provided a short time before closing and any objections to title may bleed over the closing date and likely require extension of closing:

DELIVERYPROVISION OF MERCHANTABLE TITLE: For purposes of closing, title evidence shall be acceptable if <u>T</u>the required title insurance commitment <u>shall be</u> delivered to Buyer's attorney or Buyer <u>no later</u> than \_\_\_\_\_\_ days ("15" if left blank) (after acceptance)(prior to closing) [STRIKE ONE] ("after acceptance" if <u>neither is stricken</u>), not less than 5 business days before closing, not less than 5 business days before closing, showing title to the Property as of a date no more than 15 days before delivery of such title evidence to be merchantable per lines <u>326-335xxx-xxx</u>, subject only to liens which will be paid out of the proceeds of closing and standard title insurance requirements and exceptions, as appropriate.

<u>TITLE NOT ACCEPTABLE FOR CLOSING</u>: If title is not acceptable for closing, Buyer shall notify Seller in writing of objections to title <u>within five days of delivery of the title commitment to Buyer or Buyer's attorneyby</u> the time set for closing. In such event, Seller shall have a reasonable time, but not exceeding <u>15</u>\_\_\_\_\_days ("five" if left blank) from Buyer's delivery of the notice stating title objections, to remove the objections, and the time for closing shall be extended as necessary for this purpose. In the event that Seller is unable to remove said objections, Buyer shall have five days from receipt of notice thereof, to deliver written notice waiving the objections, and the time for closing shall be extended accordingly. If Buyer does not waive the objections, this Offer shall be null and void. Providing title evidence acceptable for closing does not extinguish Seller's obligations to give merchantable title to Buyer.

> Does this work or are there other suggestions and ideas?

Example of language where title commitment provided fairly soon after acceptance where the parties want to know if there are concerns and be able to resolve them timely before going forward with other provisions and investing time and money:

#### WB-12 Farm Offer, WB-15 Commercial, WB-13 Vacant Land

PROVISION OF MERCHANTABLE TITLE: For purposes of closing, title evidence shall be acceptable if the required title insurance commitment is delivered to Buyer's attorney or Buyer not more than davs after acceptance ("15" if left blank), showing title to the Property as of a date no more than 15 days before delivery of such title evidence to be merchantable per lines 293-299, subject only to liens which will be paid out of the proceeds of closing and standard title insurance requirements and exceptions, as appropriate. TITLE NOT ACCEPTABLE FOR CLOSING: If title is not acceptable for closing, Buyer shall notify Seller in days ("15" if left blank) after delivery of the title commitment to writing of objections to title within Buyer or Buyer's attorney. In such event, Seller shall have a reasonable time, but not exceeding days ("5" if left blank) from Buyer's delivery of the notice stating title objections, to deliver notice to Buyer stating Seller's election to remove the objections by the time set for closing. In the event that Seller is unable to remove said objections, Buyer may deliver to Seller written notice waiving the objections, and the time for closing shall be extended accordingly. If Buyer does not waive the objections, Buyer shall deliver written notice of termination and this Offer shall be null and void. Providing title evidence acceptable for closing does not extinguish Seller's obligations to give merchantable title to Buyer.

# Special Assessments/Other Expenses: Lines 440-449:

The idea here is to define what "levied" means.

SPECIAL ASSESSMENTS/OTHER EXPENSES: Special assessments, if any, levied or for work actually commenced prior to the date <u>stated on line 1</u> shall be paid by Seller no later than closing. All other special assessments shall be paid by Buyer. <u>"Levied" means the local municipal governing body has passed and published a final resolution describing the planned improvements and the assessment of benefits.</u>

#### > Does this work or are there other suggestions and ideas?

An alternative provision:

SPECIAL ASSESSMENTS/OTHER EXPENSES: Seller has disclosed the following special assessment(s) that has been published by the local municipal governing body and sent to all interested persons:

Buyer has contacted city, county, and other local municipal governing bodies with the power to levy special assessments on the property and is aware of the following current or pending special assessments:

(Buyer)(Seller) [STRIKE ONE] ("Seller" if neither is stricken) shall pay for current or pending special assessments. If Seller is to pay for current or pending special assessments, Seller shall pay prior to closing. If Buyer is to pay for current or pending special assessments, Buyer may elect to pay in a lump sum when final bills are distributed or on an installment bases if permitted by the local municipal governing body responsible for the special assessment.

#### > Does this work or are there other suggestions and ideas?

# Earnest Money Disbursement – Lines 450-475:

#### EARNEST MONEY

<u>HELD BY</u>: Unless otherwise agreed, earnest money shall be <u>mailed or delivered in accordance with lines 10-12</u> and held in the trust account of the listing <u>Firm</u> (<u>trust account of Buyer's agent's Firm</u> if Property is not listed, Seller's account if no <u>Firm</u> is involved <u>or the account of thea</u> third party <u>as</u> designated on line 12), until applied to the purchase price or otherwise disbursed as provided in the Offer.

#### CAUTION: Should persons other than a Firm hold earnest money, an escrow agreement should be drafted by the Parties or an attorney. If someone other than Buyer makes payment of earnest money, consider a special disbursement agreement.

■ <u>DISBURSEMENT IF EARNEST MONEY HELD BY A FIRM</u>: If negotiations do not result in an accepted offer, the earnest money shall be promptly disbursed (after clearance from payer's depository institution if earnest money is paid by check) to the person(s) who paid the earnest money. At closing, earnest money shall be disbursed according to the closing statement. If this Offer does not close, the earnest money shall be disbursed according to a written disbursement agreement signed by all Parties to this Offer. If said disbursement agreement has not been delivered to the Firm holding the earnest money within 60 days after the date set for closing, that Firm may disburse the earnest money: (1) as directed by an attorney who has reviewed the transaction and does not represent Buyer or Seller; (2) into a court hearing a lawsuit involving the earnest money and all Parties to this Offer; (3) as directed by court order; or (4) any other disbursement required or allowed by law. The Firm may retain legal services to direct disbursement per (1) or to file an interpleader action per (2) and the Firm may deduct from the earnest money any costs and reasonable attorneys' fees, not to exceed \$750, prior to disbursement.

■ <u>LEGAL RIGHTS/ACTION</u>: <u>The Firm's</u> disbursement of earnest money does not determine the legal rights of the Parties in relation to this Offer. Buyer's or Seller's legal right to earnest money cannot be determined by <u>the Firm holding the earnest money</u>. At least 30 days prior to disbursement per (1) or (4) above, <u>the Firm shall</u> send Buyer and Seller notice of the disbursement by certified mail. If Buyer or Seller disagree with <u>the Firm's</u> proposed disbursement, a lawsuit may be filed to obtain a court order regarding disbursement. Small Claims Court has jurisdiction over all earnest money disputes arising out of the sale of residential property with one-to-four dwelling units and certain other earnest money disputes. Buyer and Seller should consider consulting attorneys regarding their legal rights under this Offer in case of a dispute. Both Parties agree to hold <u>the Firm</u> harmless from any liability for good faith disbursement of earnest money in accordance with this Offer or applicable Department of <u>Safety and Professional Services</u> regulations concerning earnest money. See Wis. Admin. Code Ch. <u>REEB</u> 18.

#### A proposed suggestion:

If this Offer does not close due to a contingency that has not been satisfied, the earnest money shall be returned to the Party whose contingency has not been satisfied within 10 days of notice of termination if the other Party does not object. If for any other reason this offer does not close, the earnest money shall be returned according to the written disbursement agreement ....

How to tell who the contingency is for? What if no notice of termination? Inspection?

#### Another similar proposal:

In the event this Offer is terminated by Buyer pursuant to a contingency in the this Offer, the earnest money shall be returned to Buyer if Seller does not object within 10 days of delivery of the notice terminating the Offer.

Language shown in the draft attempts to incorporate the standards from the first page with respect to how the earnest money gets to the listing firm and also takes account of the fact that another holder of the earnest money may be named on line 12 of the offer. The money that may be spent for an attorney is increased to 750 – should it be more?

Also can a firm that has not initiated a small claims interpleader action or has not retained an attorney for a legal opinion still use the \$750 for the legal services involved if named in a small claims action between the parties?

# **Inspections and Testing – Lines 476-490:**

There has been a request from a member who believes there is a contradiction in language between the listing and the offer regarding a buyer's agent's responsibility to attend a home inspection.

Listing contract line: 260-261 " ... and that buyers <u>OR</u> licensees may be present at all inspections and testing....

Offer to purchase lines 546-547: Buyer AND licensees may be present at all inspections and testing..."

He believes that the language of the listing implies that a buyer's agent does NOT have to accompany buyer on home inspection, but language of offer implies that either both buyer AND licensee will attend or neither buyer nor licensee will attend – its either buyer and their agent + home inspector or home inspector solo. Sounds like we need our grammar experts!

# Inspection Contingency – Lines 491-514:

Note the insertion of the word "independent" on line 492 and a default timeframe of 20 days on line 502. There also is a clarification to the time frame on line  $511 - \frac{1}{at \text{ least}}$  three days prior to closing.

**Suggestion:** should the timeframe for the Seller's response to the notice of defects be less than 10 days? The draft at line 509 says <u>seven days</u>. Should it be shorter, for instance, five days? Or should there be a blank line for the number of days so the parties may decide for themselves?

The draft also shows in tracking a requirement that the inspection must be performed and the inspection reports used to trigger the notice of defects must be new reports dated after the date the offer was accepted. This is intended to disallow the use of prior inspection reports for this purpose. There have been some buyers trying to do this.

# Interconnection between home inspection and testing- one possibility

Some brokers have been using provisions providing that if the inspection report recommends tests – similar to the way that it sometimes recommends further inspections – and if there is a testing contingency in the offer that refers to the inspection report by saying that tests recommended by the home inspection report are included in the testing contingency. Would that be desirable? If there is a testing contingency in the offer the testing contingency could be completed, for example, as shown below.

August 9: The WRA Forms Committee discussed this and felt that any such provisions should be countered out. The seller should have the ability to consider and negotiate appropriate parameters for testing and restoration if they will allow testing – this should be done in an amendment if the testing was not agreed to in the original offer.

#### > Does the DSPS Committee agree or are there other suggestions and ideas?

**TESTING CONTINGENCY:** This Offer is contingent upon (Buyer obtaining)(Seller providing) [STRIKE ONE] ("Buyer obtaining" if neither is stricken) a current written report from a qualified independent expert(s) documenting the results of the following test(s) conducted pursuant to applicable government or industry protocols and standards [indicate substances or compounds to be tested, e.g., asbestos (see <a href="http://www2.epa.gov/asbestos/protect-your-family">http://www2.epa.gov/asbestos/protect-your-family</a>), etc.]: <a href="http://www2.epa.gov/asbestos/protect-your-family">substance(s) recommended for testing in the inspection report provided per lines xxx-xxx of the Offer</a>

no later than \_\_\_\_\_ days (after acceptance)(prior to closing) STRIKE ONE ("prior to closing" if neither is stricken), at (Buyer's) (Seller's) STRIKE ONE ("Buyer's" if neither is stricken) expense. Specify any

protocols, testing contractors, labs, standards/levels constituting a Defect, financial limits, acceptable repair methodology, etc.: \_\_\_\_\_\_. Seller

(shall)(shall not) STRIKE ONE ("shall" if neither is stricken) have the right to cure. See lines 62-71 regarding the Right to Cure. With regard to testing recommended in the inspection report per lines xxxxxx of this Offer, the deadline for performance of the testing shall be extended to the deadline per line xxx of that contingency (deadline for follow-up inspections).

Then the Inspection Contingency could be modified by adding:

**INSPECTION CONTINGENCY:** This contingency only authorizes inspections, not testing (see lines 395-409). This Offer is contingent upon an <u>independent</u> Wisconsin registered home inspector performing a home inspection of the Property which discloses no Defects. This Offer is further contingent upon a qualified independent inspector or independent qualified third party performing an inspection of

(list any Property component(s) to be separately inspected, e.g., swimming pool, roof, foundation, chimney, etc.) which discloses no Defects. Buyer shall order the inspection(s) and be responsible for all costs of inspection(s). Buyer may have follow-up inspections recommended in a written report resulting from an authorized inspection, provided they occur prior to the deadline specified at line xxx. Inspection(s) shall be performed by a qualified independent inspector or independent qualified third party. Buyer may have follow-up testing recommended in a written report resulting from an authorized inspection, provided there is a testing contingency in this Offer, any testing is in accordance with the testing contingency and any testing occurs prior to the deadline specified at line xxx.

# Another consideration for timeframes when there is testing recommended by the inspection report might be to add this:

**INSPECTION AND TESTING DEADLINE EXTENSIONS:** The Parties agree to extend the deadlines for any Inspection Contingency and any Testing Contingency in this Offer for any follow-up inspections or testing recommended in a timely written inspection or testing report. The extension shall apply only to follow-up inspections or testing.

#### Inspection Contingency Right to Cure suggestion:

■ **RIGHT TO CURE:** Seller (shall)(shall not) <u>STRIKE ONE</u> ("shall" if neither is stricken) have a right to cure the Defects. If Seller has the right to cure, Seller may satisfy this contingency by: (1) delivering written notice to Buyer within 7 days of Buyer's delivery of the Notice of Defects stating Seller's election to cure Defects by <u>either having</u> the Defects <u>cured</u> in a good and workmanlike manner; <u>at Seller's expense no later than 3 days prior to closing or and (32)</u> delivering to Buyer a written report detailing the work done at least 3 days prior to closing.giving Buyer a credit at closing so Buyer, or a contractor or vendor of Buyer's choice, can cure the Defects in a good and workmanlike manner. This Offer shall be null and void if Buyer makes timely delivery of the Notice of Defects and written inspection report(s) and: (1) Seller does not have a right to cure or (2) Seller has a right to cure but: (a) Seller delivers written notice that Seller will not cure or (b) Seller does not timely deliver the written notice of election to cure.

#### General discussion regarding Inspection Contingency:

Some WRA Forms Committee members talked about a system where there is a notice of defects and then a curative amendment that specifies the details of the cure. If the seller doesn't agree then it is up to the buyer to decide whether the offer ends. This flips or reverses the decision making power and puts the

buyer in power while the seller has more power under the existing offer. The current inspection contingency is a deterrent to buyers to give a notice of defects in the minds of some WRA Forms Committee members.

# Earnest Money Receipt – Lines 530-531:

Does this configuration make more sense? Other modifications?

# License Numbers for RESPA

Should thee be an area where the licensees in the transaction provide their license numbers needed for the RESPA Closing Disclosure?

# Wisconsin Marital Property Law Disclosure

Persons in the process of divorce, who are buying a personal residence for themselves without their partner's participation, may not be able to honor their commitment in the end. The Seller has no way of knowing what the buyer is legally able to do. A statement of representation or a statement to provide sufficient proof a legally binding agreement to permit the person to buy without interference from the soon to be ex-spouse would be helpful. Thus a request has been made of the parties to complete a disclosure just above the signature lines at the end of the offer:

Wisconsin Marital Property Law Disclosure: I am the Buyer/Seller [STRIKE ONE]. By signing below, I represent that I, along with any other person named as a Buyer/Seller [STRIKE ONE] on this Offer, have the sole authority to commit to this transaction without the approval of any other person or entity. CAUTION: In the event there is more than one Owner of this property, or the property is or will be marital property, the transaction may not be binding without all signatures. Persons who are in the process of divorce should provide evidence of their ability to complete this sale without approval, cooperation, or any other agreement with any other person's.

**Observation:** Buyers do not need to have both spouses sign an offer as buyers and sellers may not either depending upon management and control powers. Marital property law kicks in with the sellers. The problem may be that a buyer who is getting divorced may have issues purchasing before the divorce is final because the property purchased might become categorized as marital instead of that buyer's individual property. The thought behind the last sentence is appropriate for that circumstance.

OfferWB-11RevisionDSPS4-3-19

Approved by the Wisconsin Real Estate Examining Board xx-1-xx (Optional Use Date) xx-1-xx (Mandatory Use Date)

Page 1 of x, WB-11

1	LICENSEE DRAFTING THIS OFFER ON [DATE] IS (AGENT OF BUYER)
2	(AGENT OF SELLER/LISTING FIRM) (AGENT OF BUYER AND SELLER) STRIKE THOSE NOT APPLICABLE
3	GENERAL PROVISIONS The Buyer,, offers to purchase the Property known as [Street Address]
4	, offers to purchase the Property known as [Street Address]
5	[longer line requested for Tax Parcel Numbers, etc.] in the
6	Ionger line requested for Tax Parcel Numbers, etc.]       in the         of, County of       Wisconsin (insert additional description, if any, at lines xxx-xxx or xxx-xxx or attach as an addendum per line xxx), on the following terms:
7	description, if any, at lines xxx-xxx or xxx-xxx or attach as an addendum per line xxx), on the following terms:
8	PURCHASE PRICE:
9	Dollars (\$).  ■ EARNEST MONEY of \$accompanies this Offer and earnest money of \$
10	EARNEST MONEY of \$accompanies this Offer and earnest money of \$
11	will be mailed, or commercially or personally delivered within days ("five" if left blank) of acceptance to (listing Firm) (Buyer agent's Firm) (third party identified as) STRIKE THOSE NOT APPLICABLE (listing Firm if none
12	to (listing Firm) (Buyer agent's Firm) (third party identified as) STRIKE THOSE NOT APPLICABLE (listing Firm if none
	chosen; if no listing Firm, then Buyer agent's Firm; then Seller <del>'s account</del> ).
	CAUTION: Should persons other than a Firm hold earnest money, an escrow agreement should be drafted by the
	Parties or an attorney. See lines XXX to XXX for additional provisions regarding disbursements unless a third-party
	escrow agreement supersedes such provisions.
	■ THE BALANCE OF PURCHASE PRICE will be paid in cash or equivalent at closing unless otherwise provided below.
	NOTE: Because of the extraordinary threat of wire-and money transfer fraud. Buyers or Sellers anticipating using
	money transfers should personally contact the title company or other settlement service provider by phone or in
	person to confirm timing and other requirements for transfer of funds. These communications should be directly
	between Buyers and/or Sellers and the title company or settlement service provider, and do not involve the Firms or
	real estate agents.
	INCLUDED IN PURCHASE PRICE is the Property, all Fixtures on the Property as of the date stated on line 1 (unless excluded
	at lines xx-xx), and the following additional items:
27	
28	NOTE: The terms of this Offer, not the listing contract or marketing materials, determine what items are included or
	not included.
	NOT INCLUDED IN PURCHASE PRICE:
	CAUTION: Identify Fixtures that are on the Property (see lines xxx-xxx) to be excluded by Seller or which are rented
	(e.g., water softeners or other water treatment systems, LP tanks, etc.) and will continue to be owned by the lessor.
	ACCEPTANCE Acceptance occurs when all Buyers and Sellers have signed one copy of the Offer, or separate but identical
	copies of the Offer.
	CAUTION: Deadlines in the Offer are commonly calculated from acceptance. Consider whether short term deadlines
	running from acceptance provide adequate time for <u>both</u> binding acceptance and performance.
	BINDING ACCEPTANCE This Offer is binding upon both Parties only if a copy of the accepted Offer is delivered to Buyer on
	or before Seller may keep the Property on the
	market and accept secondary offers after binding acceptance of this Offer.
	CAUTION: This Offer may be withdrawn prior to delivery of the accepted Offer.
	INCLUSION OF OPTIONAL PROVISIONS Terms of this Offer that are preceded by an OPEN BOX ( ) are part of this
	offer ONLY if the box is marked such as with an "X". They are not part of this offer if marked "N/A" or are left blank.
	DELIVERY OF DOCUMENTS AND WRITTEN NOTICES Unless otherwise stated in this Offer, delivery of documents and
	written notices to a Party shall be effective only when accomplished by one of the authorized methods specified at lines xx-xx.
48	(1) Personal: giving the document or written notice personally to the Party, or the Party's recipient for delivery if named at line
	xx or xx.
	Name of Seller's recipient for delivery, if any:
	Name of Buyer's recipient for delivery, if any:
	(2) Fax: fax transmission of the document or written notice to the following number:
	Seller:            Buyer:
	(3) <u>Commercial</u> : depositing the document or written notice, fees prepaid or charged to an account, with a commercial
55	delivery service, addressed either to the Party, or to the Party's recipient for delivery, for delivery to the Party's address at line
56	XX OF XX.

57 (4) U.S. Mail: depositing the document or written notice, postage prepaid, in the U.S. Mail, addressed either to the Party,

58 or to the Party's recipient for delivery, for delivery to the Party's address.

59 Address for Seller:

60 Address for Buyer:

61 (5) <u>E-Mail</u>: electronically transmitting the document or written notice to the e-mail address.

62 E-Mail address for Seller:

63 E-Mail address for Buyer:

64 **PERSONAL DELIVERY/ACTUAL RECEIPT** Personal delivery to, or Actual Receipt by, any named Buyer or Seller constitutes 65 personal delivery to, or Actual Receipt by, all Buyers or Sellers.

66 **OCCUPANCY** Occupancy of the entire Property shall be given to Buyer at time of closing unless otherwise provided in this 67 Offer at lines xxx-xxx or xxx-xxx or in an addendum attached per line xxx, or lines xxx-xxx if the Property is leased. At time of 68 Buyer's occupancy, Property shall be in broom swept condition and free of all debris, refuse, and personal property except for 69 personal property belonging to current tenants, or that sold to Buyer or left with Buyer's consent. Occupancy shall be given 70 subject to tenant's rights, if any.

#### 71 **DEFINITIONS**

ACTUAL RECEIPT: "Actual Receipt" means that a Party, not the Party's recipient for delivery, if any, has the document or written notice physically in the Party's possession, regardless of the method of delivery. If the document or written notice is recipient delivered, Actual Receipt shall occur when the Party opens the electronic transmission.

75 • <u>CONDITIONS AFFECTING THE PROPERTY OR TRANSACTION</u>: "Conditions Affecting the Property or Transaction" are 76 defined to include:

77 a. Defects in the roof, basement or foundation (including cracks, seepage and bulges), electrical system, or part of the 78 plumbing system (including the water heater, water softener and swimming pool); or basement, window, or plumbing leaks; 79 overflow from sinks, bathtubs, or sewers; or other water or moisture intrusions or conditions.

<sup>80</sup> b. Defects in heating and air conditioning system (including the air filters and humidifiers); in a wood burning stove or fireplace; <sup>81</sup> or caused by a fire in a stove or fireplace or elsewhere on the Property.

82 c. Defects related to smoke detectors or carbon monoxide detectors, or a violation of applicable state or local smoke detector 83 or carbon monoxide detector laws.

84 d. Defects in any structure, or mechanical equipment included as Fixtures or personal property.

85 e. Rented items located on the Property such as a water softener or other water conditioner system.

86 f. Defects caused by unsafe concentrations of, or unsafe conditions on the Property relating to, radon, radium in water 87 supplies, lead in paint, soil or water supplies, unsafe levels of mold, asbestos or asbestos-containing materials or other 88 potentially hazardous or toxic substances on the Property; manufacture of methamphetamine or other hazardous or toxic 89 substances on the Property; or high voltage electric (100 KV or greater) or steel natural gas transmission lines located on but 90 not directly serving the Property.

#### 91 NOTE: Specific federal lead paint disclosure requirements must be complied with in the sale of most residential 92 properties built before 1978.

93 g. Defects caused by unsafe concentrations of, unsafe conditions relating to, or the storage of, hazardous or toxic substances 94 on neighboring properties.

95 f. Property is served by a joint well; Defects related to a joint well serving the Property; or Defects in a well on the Property or 96 in a well that serves the Property, including unsafe well water.

97 g. A septic system or other private sanitary disposal system serves the Property; Defects in the septic system or other sanitary 98 disposal system on the Property; or any out-of-service septic system serving the Property not closed or abandoned according 99 to applicable regulations.

100 h. Underground or aboveground fuel storage tanks on or previously located on the Property; or Defects in the underground or 101 aboveground fuel storage tanks on or previously located on the Property. (The owner, by law, may have to register the tanks 102 with the Department of Agriculture, Trade and Consumer Protection at P.O. Box 8911, Madison, Wisconsin, 53708, whether the 103 tanks are in use or not. Department regulations may require closure or removal of unused tanks.)

<sup>104</sup> i. "LP" tank on the Property (specify in the additional information whether the tank is owned or leased); or Defects in an "LP" tank on the Property.

Notice of property tax increases, other than normal annual increases, or pending Property reassessment; remodeling that may increase the Property's assessed value; pending special assessments; or Property is within a special purpose district, such as a drainage district, that has authority to impose assessments.

109 k. Proposed construction of a public project that may affect use of the Property; Property additions or remodeling affecting
 110 Property structure or mechanical systems during Seller's ownership without required permits; or any land division involving the
 111 Property without required state or local permits.

112 I. The Property is part of or subject to a subdivision homeowners' association; or the Property is not a condominium unit and 113 there are common areas associated with the Property that are co-owned with others.

114 m. Any zoning code violations with respect to the Property; the Property or any portion thereof is located in a floodplain, wetland 115 or shoreland zoning area; or the Property is subject to a shoreland mitigation plan required by Wisconsin Department of Natural 116 Resources (DNR) rules that obligates the Property owner to establish or maintain certain measures related to shoreland 117 conditions, enforceable by the county.

118 n. Nonconforming uses of the Property; conservation easements, restrictive covenants or deed restrictions on the Property; 119 or nonowners having rights to use part of the Property, including, but not limited to, rights-of-way and easements other than 120 recorded utility easements.

121 o. All or part of the Property has been assessed as agricultural land; has been assessed a use-value assessment conversion 122 charge; or payment of a use-value assessment conversion charge has been deferred.

123 p. All or part of the Property is subject, enrolled in, or in violation of a farmland preservation agreement, Forest Crop Law, 124 Managed Forest Law, the Conservation Reserve Program, or a comparable program.

125 q. A dam is totally or partially located on the Property; or an ownership interest in a dam not located on the Property will be 126 transferred with the Property because the dam is owned by a homeowners' association, lake district, or similar group of which 127 the Property owner is a member.

<sup>128</sup> r. No legal access to the Property; or boundary or lot line disputes, encroachments or encumbrances (including a joint <sup>129</sup> driveway) affecting the Property.

130 s. Federal, state, or local regulations requiring repairs, alterations or corrections of an existing condition; or any insurance 131 claims relating to damage to the Property within the last five years.

132 t. A pier attached to the Property not in compliance with state or local pier regulations.

<sup>133</sup> u. Current or previous termite, powder-post beetle or carpenter ant infestations or Defects caused by animal, reptile, or other <sup>134</sup> insect infestations.

<sup>135</sup> v. Structure on the Property designated as an historic building; all or any part of the Property in an historic district; or one or <sup>136</sup> more burial sites on the Property.

137 w. Other Defects affecting the Property.

138 (Definitions Continued on page 4)

139 **CLOSING** This transaction is to be closed on

140 at the place selected by Seller, unless otherwise agreed by the Parties in writing. If the date for closing falls on a weekend, or 141 federal or state holiday, the closing date shall be the next Business Day.

142 CAUTION: To reduce the risk of wire transfer fraud, any wiring instructions received should be independently verified 143 by phone or in person with the title company, financial institution, or entity directing the transfer. The real estate 144 licensees in this transaction are not responsible for the transmission or forwarding of any wiring or money transfer 145 instructions.

146 **CLOSING PRORATIONS** The following items, if applicable, shall be prorated at closing, based upon date of closing values: 147 real estate taxes, rents, prepaid insurance (if assumed), private and municipal charges, property owners association 148 assessments, fuel and \_\_\_\_\_\_.

149 CAUTION: Provide basis for utility charges, fuel or other prorations if date of closing value will not be used.
 150 Any income, taxes or expenses shall accrue to Seller, and be prorated at closing, through the day prior to closing.
 151 Real estate taxes shall be prorated at closing based on CHECK BOX FOR APPLICABLE PRORATION FORMULA :

151 Real estate taxes shall be prorated at closing based on CHECK BOX FOR APPLICABLE PRORATION FORMULA.

- 152 The net general real estate taxes for the preceding year, or the current year if available (Net general real estate taxes 153 are defined as general property taxes after state tax credits and lottery credits are deducted) (NOTE: THIS CHOICE
- 154 APPLIES IF NO BOX IS CHECKED)
- 155 Current assessment times current mill rate (current means as of the date of closing)
- 156 Sale price, multiplied by the municipality area-wide percent of fair market value used by the assessor in the prior year, 157 or current year if known, multiplied by current mill rate (current means as of the date of closing)

157 or current year if known, multiplied by current mill rate (current means as of the date of closing)

158 \_\_\_\_\_. 159 CAUTION: Buyer is informed that the actual real estate taxes for the year of closing and subsequent years may be 160 substantially different than the amount used for proration especially in transactions involving new construction, 161 extensive rehabilitation, remodeling or area-wide re-assessment. Buyer is encouraged to contact the local assessor

# 162 regarding possible tax changes.

Buyer and Seller agree to re-prorate the real estate taxes, through the day prior to closing based upon the taxes on

the actual tax bill for the year of closing, with Buyer and Seller each owing his or her pro-rata share. Buyer shall, within 5

days of receipt, forward a copy of the bill to the forwarding address Seller agrees to provide at closing. The Parties shall reprorate within 30 days of Buyer's receipt of the actual tax bill. Buyer and Seller agree this is a post-closing obligation and is

the responsibility of the Parties to complete, not the responsibility of the real estate Firms in this transaction.

**ILEASED PROPERTY** If Property is currently leased and lease(s) extend beyond closing, Seller shall assign Seller's rights
 under said lease(s) and transfer all security deposits and prepaid rents thereunder to Buyer at closing. The terms of the (written)
 (oral) STRIKE ONE lease(s), if any, are \_\_\_\_\_\_

171 172

\_\_\_\_\_. Insert additional terms, if any, at lines xxx-xxx or xxx-xxx or attach as an addendum per line 434.

173 **REAL ESTATE CONDITION REPORT** Wisconsin law requires owners of property which includes one-to-four dwelling units to 174 provide Buyers with a Real Estate Condition Report. Excluded from this requirement are sales of property that has never been 175 inhabited, sales exempt from the real estate transfer fee, and sales by certain court-appointed fiduciaries, (for example, personal 176 representatives who have never occupied the Property). The form of the Report is found in Wis. Stat. § 709.03. The law provides: 177 "§ 709.02 Disclosure . . . the owner of the property shall furnish, not later than 10 days after acceptance of the contract of sale 178 . . ., to the prospective Buyer of the property a completed copy of the report . . . A prospective Buyer who does not receive a 179 report within the 10 days may, within two business days after the end of that 10-day period, rescind the contract of sale . . . by 180 delivering a written notice of rescission to the owner or the owner's agent." Buyer may also have certain rescission rights if a 181 Real Estate Condition Report disclosing defects is furnished before expiration of the 10 days, but after the Offer is submitted to 182 Seller. Buyer should review the report form or consult with an attorney for additional information regarding rescission rights.

183 PROPERTY CONDITION REPRESENTATIONS Seller represents to Buyer that as of the date of acceptance Seller has no 184 notice or knowledge of Conditions Affecting the Property or Transaction (lines xx-xxx) other than those identified in Seller's Real 185 Estate Condition Report dated \_\_\_\_\_\_, which was received by Buyer prior to Buyer

186 signing this Offer and which is made a part of this Offer by reference <u>COMPLETE DATE OR STRIKE AS APPLICABLE</u> and 187 \_\_\_\_\_\_

## INSERT CONDITIONS NOT ALREADY INCLUDED IN THE CONDITION REPORT

189 ADDITIONAL PROVISIONS/CONTINGENCIES

188

#### 196 197 DEFINITIONS CONTINUED FROM PAGE 2

198 ■ <u>BUSINESS DAY</u>: "Business Day" means a calendar day other than Saturday, Sunday, any legal public holiday under 199 Wisconsin or Federal law, and any other day designated by the President such that the postal service does not receive registered 200 mail or make regular deliveries on that day.

DEADLINES: "Deadlines" expressed as a number of "days" from an event, such as acceptance, are calculated by excluding the day the event occurred and by counting subsequent calendar days. The deadline expires at Midnight on the last day. Additionally, deadlines expressed as a specific number of Business Days are calculated in the same manner except that only Business Days are counted while other days are excluded. Deadlines expressed as a specific number of "hours" from the cocurrence of an event, such as receipt of a notice, are calculated from the exact time of the event, and by counting 24 hours per calendar day. Deadlines expressed as a specific day of the calendar year or as the day of a specific event, such as closing, expire at Midnight of that day. "Midnight" is defined as 11:59 p.m. Central Time.

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.

211 ■ <u>FIRM:</u> "Firm" means a licensed sole proprietor broker or a licensed broker business entity.

EIXTURE: A "Fixture" is an item of property which is physically attached to or so closely associated with land, buildings or improvements so as to be treated as part of the real estate, including, without limitation, physically attached items not easily nervoable without damage to the premises, items specifically adapted to the premises and items customarily treated as fixtures, including, but not limited to, all: garden bulbs; plants; shrubs and trees; screen and storm doors and windows; electric lighting fixtures; window shades; curtain and traverse rods; blinds and shutters; central heating and cooling units and attached attached antennas and satellite dishes (but not the component parts); audio/visual wall mounting brackets (but not the 219 audio/visual equipment); garage door openers and remote controls; installed security systems; central vacuum systems and 220 accessories; in-ground sprinkler systems and component parts; built-in appliances; ceiling fans; fences; in-ground pet 221 containment systems (but not the collars); storage buildings on permanent foundations and docks/piers on permanent 222 foundations.

223 CAUTION: Exclude any Fixtures to be retained by Seller or which are rented (e.g., water softener or other water 224 treatment systems, L.P. tanks, etc.) on lines xx-xx.

225 <u>PROPERTY</u>: Unless otherwise stated, "Property" means the real estate described at lines x-x.

226 **PROPERTY DIMENSIONS AND SURVEYS** Buyer acknowledges that any land, building or room dimensions, or total acreage 227 or building square footage figures, provided to Buyer by Seller or by a Firm or its agents, may be approximate because of 228 rounding, formulas used or other reasons, unless verified by survey or other means.

229 CAUTION: Buyer should verify total square footage formula, total square footage/acreage figures, and land, building 230 or room dimensions, if material.

231 **MAINTENANCE** Seller shall maintain the Property and all personal property included in the purchase price until the earlier of 232 closing or Buyer's occupancy, in materially the same condition as of the date of acceptance of this Offer, except for ordinary

233 wear and tear.

PROPERTY DAMAGE BETWEEN ACCEPTANCE AND CLOSING If, prior to closing, the Property is damaged in an amount not more than five percent of the purchase price, other than normal wear and tear, Seller shall promptly notify Buyer in writing,

and will be obligated to restore the Property to materially the same condition it was in at the date on Line 1 of this Offer. Seller shall provide Buyer with copies of all required permits and lien waivers for the lienable repairs no later than closing. If the amount damage exceeds five percent of the purchase price, Seller shall promptly notify Buyer in writing of the damage and this Offer may be canceled at option of Buyer. Should Buyer elect to carry out this Offer despite such damage, Buyer shall be entitled to the insurance proceeds, if any, relating to the damage to the Property, plus a credit towards the purchase price equal to the amount of Seller's deductible on such policy, if any. However, if this sale is financed by a land contract or a mortgage to Seller, any insurance proceeds shall be held in trust for the sole purpose of restoring the Property.

243 BUYER'S PRE-CLOSING WALK-THROUGH Within three days prior to closing, at a reasonable time pre-approved by Seller 244 or Seller's agent, Buyer shall have the right to walk through the Property to determine that there has been no significant change 245 in the condition of the Property, except for ordinary wear and tear and changes approved by Buyer, and that any defects Seller 246 has agreed to cure have been repaired in the manner agreed to by the Parties.

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#### IF LINE XXX IS NOT MARKED OR IS MARKED N/A LINES XXX-XXX APPLY.

FINANCING COMMITMENT CONTINGENCY: This Offer is contingent upon Buyer being able to obtain a written
[loan type or specific lender, if any] first mortgage loan commitment as described below, within
days of acceptance of this Offer. The financing selected shall be in an amount of not less than \$

days of acceptance of this Offer. The financing selected shall be in an amount of not less than \$
for a term of not less than \_\_\_\_\_\_ years, amortized over not less than \_\_\_\_\_\_ years. Initial monthly payments of principal and
interest shall not exceed \$
Buyer acknowledges that lender's required monthly payments may also include
1/12th of the estimated net annual real estate taxes, hazard insurance premiums, and private mortgage insurance premiums.
The mortgage shall not include a prepayment premium. Buyer agrees to pay discount points in an amount not to exceed
% ("0" if no entry) of the loan. If Buyer is using multiple loan sources or obtaining a construction loan or land contract

<sup>255</sup> \_\_\_\_\_% ("0" If no entry) of the loan. If Buyer is using multiple loan sources or obtaining a construction loan or land contract <sup>256</sup> financing, describe at lines xxx-xxx or xxx-xxx or in an addendum attached per line xxx. Buyer agrees to pay all customary loan <sup>257</sup> and closing costs, wire fees, and loan origination fees, to promptly apply for a mortgage loan, and to provide evidence of <sup>258</sup> application promptly upon request of Seller. Seller agrees to allow lender's appraiser access to the Property.

LOAN AMOUNT ADJUSTMENT: If the purchase price under this Offer is modified, any financed amount, unless otherwise
 provided, shall be adjusted to the same percentage of the purchase price as in this contingency and the monthly payments shall
 be adjusted as necessary to maintain the term and amortization stated above.

#### 262 CHECK AND COMPLETE APPLICABLE FINANCING PROVISION AT LINE xxx or xxx.

<sup>263</sup> FIXED RATE FINANCING: The annual rate of interest shall not exceed \_\_\_\_\_%.

 264
 ADJUSTABLE RATE FINANCING: The initial interest rate shall not exceed \_\_\_\_\_%. The initial interest rate shall be

 265
 fixed for \_\_\_\_\_\_ months, at which time the interest rate may be increased not more than \_\_\_\_\_\_% ("2" if no entry) at

 266
 the first adjustment and by not more than \_\_\_\_\_\_% ("1" if no entry) at each subsequent adjustment. The maximum

 267
 interest rate during the mortgage term shall not exceed the initial interest rate plus \_\_\_\_\_% ("6" if no entry). Monthly

 268
 payments of principal and interest may be adjusted to reflect interest changes.

<u>SATISFACTION OF FINANCING COMMITMENT CONTINGENCY</u>: If Buyer qualifies for the loan described in this Offer or
 another loan acceptable to Buyer, Buyer agrees to deliver to Seller a copy of a written loan commitment. This contingency shall
 be satisfied if, after Buyer's review, Buyer delivers to Seller a copy of a written loan commitment (even if subject to conditions)
 that is: (1) signed by Buyer; or, (2) accompanied by Buyer's written direction for delivery. Delivery of a loan commitment by
 Buyer's lender or delivery accompanied by a notice of unacceptability shall not satisfy this contingency.

274 CAUTION: The delivered loan commitment may contain conditions Buyer must yet satisfy to obligate the lender to 275 provide the loan. Buyer understands delivery of a loan commitment removes the Financing Commitment Contingency 276 from the Offer and shifts the risk to Buyer if the loan is not funded.

277 ■ <u>SELLER TERMINATION RIGHTS</u>: If Buyer does not deliver a loan commitment on or before the Deadline on line xxx, Seller 278 may terminate this Offer if Seller delivers a written notice of termination to Buyer prior to Seller's Actual Receipt of written loan 279 commitment from Buyer.

EINANCING UNAVAILABILITY: If financing is not available on the terms stated in this Offer (and Buyer has not already delivered an acceptable loan commitment for other financing to Seller), Buyer shall promptly deliver written notice to Seller of same including copies of lender(s)' rejection letter(s) or other evidence of unavailability.

**SELLER FINANCING:** Seller shall have 10 days from the earlier of (i) Buyer delivery of written notice of evidence of unavailability as noted in lines xxx to xxx or (ii) the deadline for delivery of the loan commitment set on lines xxx to xxx, to deliver to Buyer written notice of Seller's decision to finance this transaction with a note and mortgage under the same terms set forth in this Offer, and this Offer shall remain in full force and effect, with the time for closing extended accordingly. If Seller's notice is not timely given, the option for Seller to provide financing shall be considered waived. Buyer agrees to cooperate with and authorizes Seller to obtain any credit information reasonably appropriate to determine Buyer's credit worthiness for Seller financing.

APPRAISAL CONTINGENCY: This Offer is contingent upon Buyer or Buyer's lender having the Property appraised at Buyer's expense by a Wisconsin licensed or certified independent appraiser who issues an appraisal report dated subsequent to the date stated on line 1, indicating an appraised value for the Property equal to or greater than the agreed upon purchase price.

This contingency shall be deemed satisfied unless Buyer, within days of acceptance, delivers to Seller a copy of the appraisal report indicating an appraised value not equal to or greater than the agreed upon purchase price, and a written notice objecting to the appraised value. 297 ■ RIGHT TO CURE: Seller (shall) (shall not) STRIKE ONE ("shall" if neither is stricken) have a right to cure. If Seller has the 298 right to cure, Seller may satisfy this contingency by delivering written notice to Buyer adjusting the purchase price to the value 299 shown on the appraisal report within \_\_\_\_\_\_ days ("five" if left blank) of Buyer's delivery of the appraisal report and the notice 300 objecting to the appraised value. Seller and Buyer agree to promptly execute an amendment initiated by either party after 301 delivery of Seller's notice, solely to reflect the adjusted purchase price. This Offer shall be null and void with any earnest money 302 returned to Buyer if Buyer makes timely delivery of the notice objecting to appraised value and the written appraisal report and: 303 (1) Seller does not have a right to cure or (2) Seller has a right to cure but: (a) Seller delivers written notice that Seller will not 304 adjust the purchase price or (b) Seller does not timely deliver the written notice adjusting the purchase price to the value shown 305 on the appraisal report.

<sup>306</sup> **IF THIS OFFER IS NOT CONTINGENT ON FINANCING** Within seven days of acceptance, a financial institution or third party <sup>307</sup> in control of Buyer's funds shall provide Seller with reasonable written verification that Buyer has, at the time of verification, <sup>308</sup> sufficient funds to close. If such written verification is not provided, Seller has the right to terminate this Offer by delivering written <sup>309</sup> notice to Buyer prior to Seller's Actual Receipt of a copy of Buyer's written verification. Buyer may or may not obtain mortgage <sup>310</sup> financing but does not need the protection of a financing contingency. Seller agrees to allow Buyer's appraiser access to the <sup>311</sup> Property for purposes of an appraisal. Buyer understands and agrees that this Offer is not subject to the appraisal meeting any <sup>312</sup> particular value, unless this Offer is subject to an appraisal contingency, nor does the right of access for an appraisal constitute <sup>313</sup> a financing contingency.

FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA): Section 1445 of the Internal Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must deduct and withhold a 15% tax on the total Amount Realized in the transaction if the transferor (Seller) is a Foreign Person and no exception from FIRPTA withholding applies. A Foreign Person is a nonresident alien individual, foreign corporation that has not made an election under section 318 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. The Amount 319 Realized is the sum of the cash paid, the fair market value of other property transferred, and the amount of any liability assumed by Buyer.

321 Seller shall provide a sworn affidavit under penalties of perjury prior to closing confirming Seller's status in conformance with
 322 IRC § 1445(b)(2). If Seller is a Foreign Person and Buyer fails to withhold, Buyer may be held liable for the tax. Firms or real
 323 estate agents are not responsible for determining whether FIRPTA applies. The Parties may wish to consult independent legal
 324 counsel or tax advisors.

325 DISTRIBUTION OF INFORMATION Buyer and Seller authorize the agents of Buyer and Seller to: (i) distribute copies of the 326 Offer to Buyer's lender, appraisers, title insurance companies and any other settlement service providers for the transaction as 327 defined by the Real Estate Settlement Procedures Act (RESPA); (ii) report sales and financing concession data to multiple listing 328 service sold databases; and (iii) provide active listing, pending sale, closed sale and financing concession information and data, 329 and related information regarding seller contributions, incentives or assistance, and third party gifts, to appraisers researching 330 comparable sales, market conditions and listings, upon inquiry.

DEFAULT Seller and Buyer each have the legal duty to use good faith and due diligence in completing the terms and conditions
 of this Offer. A material failure to perform any obligation under this Offer is a default which may subject the defaulting party to
 liability for damages or other legal remedies.

334 If <u>Buyer defaults</u>, Seller may:

(1) sue for specific performance and request the earnest money as partial payment of the purchase price; or

(2) terminate the Offer and have the option to: (a) request the earnest money as liquidated damages; or (b) sue for actual
 damages.

338 If <u>Seller defaults</u>, Buyer may:

339 (1) sue for specific performance; or

(2) terminate the Offer and request the return of the earnest money, sue for actual damages, or both.

In addition, the Parties may seek any other remedies available in law or equity.

The Parties understand that the availability of any judicial remedy will depend upon the circumstances of the situation and the discretion of the courts. If either Party defaults, the Parties may renegotiate the Offer or seek nonjudicial dispute resolution the instead of the remedies outlined above. By agreeing to binding arbitration, the Parties may lose the right to litigate in a court of law those disputes covered by the arbitration agreement.

346 NOTE: IF ACCEPTED, THIS OFFER CAN CREATE A LEGALLY ENFORCEABLE CONTRACT. BOTH PARTIES SHOULD 347 READ THIS DOCUMENT CAREFULLY. THE FIRM AND ITS AGENTS MAY PROVIDE A GENERAL EXPLANATION OF THE 348 PROVISIONS OF THE OFFER BUT ARE PROHIBITED BY LAW FROM GIVING ADVICE OR OPINIONS CONCERNING 349 YOUR LEGAL RIGHTS UNDER THIS OFFER OR HOW TITLE SHOULD BE TAKEN AT CLOSING. AN ATTORNEY SHOULD 350 BE CONSULTED IF LEGAL ADVICE IS NEEDED.

**ENTIRE CONTRACT** This Offer, including any amendments to it, contains the entire agreement of the Buyer and Seller regarding the transaction. All prior negotiations and discussions have been merged into this Offer. This agreement binds and increase in the benefit of the Parties to this Offer and their successors in interest.

**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 <u>http://www.doc.wi.gov</u> or by telephone at (608) 240-5830.

**RADON TESTING CONTINGENCY:** This Offer is contingent upon Buyer obtaining a current written report of the results of a radon test at the Property performed by a qualified third party in a manner consistent with applicable EPA and Wisconsin Department of Health Services (DHS) protocols and standards indicating the radon level is less than 4.0 picoCuries per liter (pCi/L), at (Buyer's) (Seller's)[STRIKE ONE ("Buyer's" if neither is stricken) expense. This contingency shall be deemed satisfied unless Buyer, within \_\_\_\_\_\_ days ("20" if left blank) of acceptance delivers to Seller a written copy of the radon test results report indicating a radon level of 4.0 pCi/L or higher and written notice objecting to the radon level in the report.

**RIGHT TO CURE:** Seller (shall)(shall not) **STRIKE ONE** ("shall" if neither is stricken) have the right to cure. If Seller has the right to cure, Seller may satisfy this contingency by (1) delivering a written notice of Seller's election to cure within 10 days of delivery of Buyer's notice; and, (2) installing a radon mitigation system in conformance with EPA standards in a good and workmanlike manner and by giving Buyer a report of the work done and a post remediation test report indicating a radon level of less than 4.0 pCi/L no later than three days prior to closing. This Offer shall be null and void if Buyer timely delivers the above written notice and report to Seller and (1) Seller does not have the right to cure; or (2) Seller has a right to cure but: a) Seller delivers written notice that Seller will not cure or b) Seller does not timely deliver the notice of election to cure. If Seller was responsible to provide the report, this Offer shall be null and void if Buyer to Seller within three days of the report.

372	CLOSING OF BUYER'S PROPERTY CONTINGENCY: This Offer is contingent upon the closing of the sale of Buyer's
	property located at, no later than (the deadline). Buyer may
374	proceed to closing without satisfaction of this contingency, and may waive this contingency unilaterally, in writing, at any time
	upon written notice delivered to Seller. If Buyer sells Buyer's property Buyer shall deliver written notice to Seller indicating the
376	contingency is satisfied. But if this contingency is not otherwise timely satisfied or waived by the deadline, Seller may deliver a
	notice of termination to Buyer, rendering this Offer null and void, except that Buyer may elect to proceed with this Offer if Buyer
378	delivers to Seller a written notice waiving this contingency within hours after delivery of Seller's notice.
379	BUMP CLAUSE: If Seller accepts a bona fide secondary offer, Seller may give written notice to Buyer that another offer
380	has been accepted. If Buyer does not deliver to Seller written waiver of the Closing of Buyer's Property Contingency and CHECK
381	AND COMPLETE AS APPLICABLE :
382	Financing Commitment Contingency
383	Proof of bridge loan financing
384	Proof of ability to close from a financial institution or third party in control of Buyer's funds which shall provide Seller
385	with reasonable written verification that Buyer has, at the time of verification, sufficient funds to close.
386	Other: [insert other
387	requirements, if any (e.g., payment of additional earnest money, waiver of all contingencies, providing evidence of sale,
388	<u>etc.)]</u>
389	within hours ("72" if left blank) of Buyer's Actual Receipt of said notice, this Offer shall be null and void
390	SECONDARY OFFER: This Offer is secondary to a prior accepted offer. This Offer shall become primary upon delivery
	of written notice to Buyer that this Offer is primary. Unless otherwise provided, Seller is not obligated to give Buyer notice prior
	to any deadline, nor is any particular secondary buyer given the right to be made primary ahead of other secondary buyers.
	Buyer may declare this Offer null and void by delivering written notice of withdrawal to Seller prior to delivery of Seller's notice
	that this Offer is primary. Buyer may not deliver notice of withdrawal earlier than days ("five" if left blank) after acceptance
	of this Offer. All other Offer deadlines which are run from acceptance shall run from the time this Offer becomes primary.
	TIME IS OF THE ESSENCE "Time is of the Essence" as to: (1) earnest money payment(s); (2) binding acceptance; (3)
	occupancy; (4) date of closing; (5) contingency Deadlines STRIKE AS APPLICABLE and all other dates and Deadlines in this
398	Offer except:
399	
400	If "Time is of the Essence" applies to a date or
	Deadline, failure to perform by the exact date or Deadline is a breach of contract. If "Time is of the Essence" does not apply to
	a date or Deadline, then performance within a reasonable time of the date or Deadline is allowed before a breach occurs.
	<u>CONVEYANCE OF TITLE</u> : Upon payment of the purchase price, Seller shall convey the Property by warranty deed
	(trustee's deed if Seller is a trust, personal representative's deed if Seller is an estate or other conveyance as provided
	herein), free and clear of all liens and encumbrances, except: municipal and zoning ordinances and agreements entered under
	them, recorded easements for the distribution of utility and municipal services, recorded building and use restrictions and
	covenants, present uses of the Property in violation of the foregoing disclosed in Seller's Real Estate Condition Report and in
	this Offer, general taxes levied in the year of closing and
410	

411 (insert other allowable exceptions from title, if anyprovided none of the foregoing prohibit present use of the Property), which 412 constitutes merchantable title for purposes of this transaction. Seller shall complete and execute the documents necessary to 413 record the conveyance at Seller's cost and pay the Wisconsin Real Estate Transfer Fee.

414 WARNING: Municipal and zoning ordinances, recorded building and use restrictions, covenants and easements may 415 prohibit certain improvements or uses and therefore should be reviewed, particularly if Buyer contemplates making 416 improvements to Property or a use other than the current use.  $_{417}$  **TILE EVIDENCE**: Seller shall give evidence of title in the form of an owner's policy of title insurance in the amount of the  $_{418}$  purchase price on a current ALTA form issued by an insurer licensed to write title insurance in Wisconsin. Seller shall pay all  $_{419}$  costs of providing title evidence to Buyer. Buyer shall pay <u>the</u> costs of providing <u>the</u> title evidence required by Buyer's lender  $_{420}$  and recording the deed or other conveyance.

421 ■ <u>GAP ENDORSEMENT</u>: Seller shall provide a "gap" endorsement or equivalent gap coverage at (Seller's)(Buyer's) <u>STRIKE</u> 422 <u>ONE</u> ("Seller's" if neither stricken) cost to provide coverage for any liens or encumbrances first filed or recorded after the effective 423 date of the title insurance commitment and before the deed is recorded, subject to the title insurance policy exclusions and 424 exceptions, provided the title company will issue the endorsement. If a gap endorsement or equivalent gap coverage is not 425 available, Buyer may give written notice that title is not acceptable for closing (see lines <u>353-359xxx-xxx</u>).

<u>DELIVERYPROVISION OF MERCHANTABLE TITLE</u>: For purposes of closing, title evidence shall be acceptable if <u>T</u>the
 required title insurance commitment <u>shall be</u> delivered to Buyer's attorney or Buyer <u>no later than <u>days</u> ("15" if left blank)</u>
 (after acceptance)(prior to closing) [STRIKE ONE] ("after acceptance" if neither is stricken), not less than 5 business days before
 closing, not less than 5 business days before closing, showing title to the Property as of a date no more than 15 days before
 delivery of such title evidence to be merchantable per lines <u>326-335xxx-xxx</u>, subject only to liens which will be paid out of the
 proceeds of closing and standard title insurance requirements and exceptions, as appropriate.

432 ■ <u>TITLE NOT ACCEPTABLE FOR CLOSING</u>: If title is not acceptable for closing, Buyer shall notify Seller in writing of objections 433 to title <u>within</u> five <u>days of delivery of the title commitment to Buyer or Buyer's attorneyby the time set for closing</u>. In such event, 434 Seller shall have a reasonable time, but not exceeding <u>15</u>\_\_\_\_\_\_days ("five" if left blank) from Buyer's delivery of the notice stating 435 <u>title objections</u>, to remove the objections, and the time for closing shall be extended as necessary for this purpose. In the event 436 that Seller is unable to remove said objections, Buyer shall have five days from receipt of notice thereof, to deliver written notice 437 waiving the objections, and the time for closing shall be extended accordingly. If Buyer does not waive the objections, this Offer 438 shall be null and void. Providing title evidence acceptable for closing does not extinguish Seller's obligations to give 439 merchantable title to Buyer.

440 SPECIAL ASSESSMENTS/OTHER EXPENSES: Special assessments, if any, levied or for work actually commenced prior

to the date stated on line 1 shall be paid by Seller no later than closing. All other special assessments shall be paid by Buyer.
 <u>"Levied" means the local municipal governing body has passed and published a final resolution describing the planned</u>
 <u>improvements and the assessment of benefits.</u>

444 CAUTION: Consider a special agreement if area assessments, property owners association assessments, special 445 charges for current services under Wis. Stat. § 66.0627 or other expenses are contemplated. "Other expenses" are 446 one-time charges or ongoing use fees for public improvements (other than those resulting in special assessments) 447 relating to curb, gutter, street, sidewalk, municipal water, sanitary and storm water and storm sewer (including all 448 sewer mains and hook-up/connection and interceptor charges), parks, street lighting and street trees, and impact fees 449 for other public facilities, as defined in Wis. Stat. § 66.0617(1)(f).

#### 450 EARNEST MONEY

451 ■ <u>HELD BY</u>: Unless otherwise agreed, earnest money shall be <u>mailed or delivered in accordance with lines 10-12</u> and held in
 452 the trust account of the listing <u>Ffirm</u> (Buyer's agent if Property is not listed, Seller's account if no <u>Ffirm</u> is involved <u>or a third party</u>
 453 <u>as designated on line 12</u>), until applied to the purchase price or otherwise disbursed as provided in the Offer.

454 CAUTION: Should persons other than a firm hold earnest money, an escrow agreement should be drafted by the Parties

455 or an attorney. If someone other than Buyer makes payment of earnest money, consider a special disbursement 456 agreement.

■ <u>DISBURSEMENT</u>: If negotiations do not result in an accepted offer, the earnest money shall be promptly disbursed (after does clearance from payer's depository institution if earnest money is paid by check) to the person(s) who paid the earnest money. At closing, earnest money shall be disbursed according to the closing statement. If this Offer does not close, the earnest money and all be disbursed according to a written disbursement agreement signed by all Parties to this Offer. If said disbursement agreement has not been delivered to the <u>Ffirm holding the earnest money</u> within 60 days after the date set for closing, <u>that Ffirm</u> are may disburse the earnest money: (1) as directed by an attorney who has reviewed the transaction and does not represent Buyer or Seller; (2) into a court hearing a lawsuit involving the earnest money and all Parties to this Offer; (3) as directed by court and order; or (4) any other disbursement required or allowed by law. <u>The Ffirm</u> may retain legal services to direct disbursement per 465 (1) or to file an interpleader action per (2) and <u>the Ffirm</u> may deduct from the earnest money any costs and reasonable attorneys' 466 fees, not to exceed \$750, prior to disbursement.

467 ■ LEGAL RIGHTS/ACTION: The Ffirm's disbursement of earnest money does not determine the legal rights of the Parties in 468 relation to this Offer. Buyer's or Seller's legal right to earnest money cannot be determined by the Ffirm holding the earnest 469 money. At least 30 days prior to disbursement per (1) or (4) above, the Ffirm shall send Buyer and Seller notice of the 470 disbursement by certified mail. If Buyer or Seller disagree with the Ffirm's proposed disbursement, a lawsuit may be filed to 471 obtain a court order regarding disbursement. Small Claims Court has jurisdiction over all earnest money disputes arising out of 472 the sale of residential property with one-to-four dwelling units and certain other earnest money disputes. Buyer and Seller should 473 consider consulting attorneys regarding their legal rights under this Offer in case of a dispute. Both Parties agree to hold the 474 Ffirm harmless from any liability for good faith disbursement of earnest money in accordance with this Offer or applicable 475 Department of Safety and Professional Services regulations concerning earnest money. See Wis. Admin. Code Ch. REEB 18.

477 478 479 480 481 482 483 484 485	<b>INSPECTIONS AND TESTING</b> Buyer may only conduct inspections or tests if specific contingencies are included as a part of this Offer. An "inspection" is defined as an observation of the Property, which does not include an appraisal or testing of the Property, other than testing for leaking carbon monoxide, or testing for leaking LP gas or natural gas used as a fuel source, which are hereby authorized. A "test" is defined as the taking of samples of materials such as soils, water, air or building materials from the Property and the laboratory or other analysis of these materials. Seller agrees to allow Buyer's inspectors, testers and appraisers reasonable access to the Property upon advance notice, if necessary to satisfy the contingencies in this Offer. Buyer and licensees may be present at all inspections and testing. Except as otherwise provided, Seller's authorization for inspections does not authorize Buyer to conduct testing of the Property. <b>NOTE: Any contingency authorizing testing should specify the areas of the Property to be tested, the purpose of the test, (e.g., to determine if environmental contamination is present), any limitations on Buyer's testing and any other</b>
	material terms of the contingency.
488 489 490 491 492	environmental pollution which may be required to be reported to the Wisconsin Department of Natural Resources. INSPECTION CONTINGENCY: This contingency only authorizes inspections, not testing (see lines 395-409xxx-xxx). This Offer is contingent upon an independent Wisconsin registered home inspector performing a home inspection of the Property
	after the date on line 1 of this Offer which discloses no Defects. This Offer is further contingent upon a qualified independent
494	inspector or independent qualified third party performing an inspection of
495 496	(list any Property component(s) to be separately inspected, e.g., swimming pool, roof, foundation, chimney, etc.) which discloses no Defects. Buyer shall order
	the inspection(s) and be responsible for all costs of inspection(s). Buyer may have follow-up inspections recommended in a
	written report resulting from an authorized inspection, provided they occur prior to the deadline specified at line xxx. Inspection(s)
	shall be performed by a qualified independent inspector or independent qualified third party.
	CAUTION: Buyer should provide sufficient time for the home inspection and/or any specialized inspection(s), as well
	as any follow-up inspection(s).
	This contingency shall be deemed satisfied unless Buyer, within days ( <u>"20" "15?" if left blank</u> ) of acceptance, delivers
	to Seller a copy of the written inspection report(s) dated after the date on line 1 of this Offer and a written notice listing the
	Defect(s) identified in those report(s) to which Buyer objects (Notice of Defects).
	CAUTION: A proposed amendment is not a Notice of Defects and will not satisfy this notice requirement.
	For the purposes of this contingency, Defects (see lines xxx-xxx) do not include structural, mechanical or other conditions the
	nature and extent of which Buyer had actual knowledge or written notice before signing this Offer (lines xxx-xxx).
	■ RIGHT TO CURE: Seller (shall)(shall not) STRIKE ONE ("shall" if neither is stricken) have a right to cure the Defects. If Seller
	has the right to cure, Seller may satisfy this contingency by: (1) delivering written notice to Buyer within seven (five??) days of
	Buyer's delivery of the Notice of Defects stating Seller's election to cure Defects; (2) curing the Defects in a good and
	workmanlike manner; and (3) delivering to Buyer a written report detailing the work done at least three days prior to closing.
	This Offer shall be null and void if Buyer makes timely delivery of the Notice of Defects and written inspection report(s) and: (1)
513	Seller does not have a right to cure or (2) Seller has a right to cure but: (a) Seller delivers written notice that Seller will not cure
514	or (b) Seller does not timely deliver the written notice of election to cure.
515	
516	ADDITIONAL PROVISIONS/CONTINGENCIES
517	
523	
524	This Offer was drafted by [Licensee and Firm]
525	
	(x)
527	Buyer's Signature ▲ Print Name Here ► Date ▲
	(X) Dete A
529	Buyer's Signature ▲ Print Name Here ► Date ▲
530	EARNEST MONEY RECEIPT Firm acknowledges receipt of earnest money as per line xx of the above Offer.
531	Firm: Signature of Agent for the Firm:

	SELLER ACCEPTS THIS OFFER. THE WARRANTIES, REPRESENTATIONS AND COVENAN	
	SURVIVE CLOSING AND THE CONVEYANCE OF THE PROPERTY. SELLER AGREES TO CO	
534	THE TERMS AND CONDITIONS AS SET FORTH HEREIN AND ACKNOWLEDGES RECEIPT OF	- A COPY OF THIS OFFER.
535	FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA) Section 1445 of the Interna	al Revenue Code (IRC)
	provides that a transferee (Buyer) of a United States real property interest must deduct and w	
	total amount realized in the transaction if the transferor (Seller) is a Foreign Person and no ex	
	withholding applies. A Foreign Person is a nonresident alien individual, foreign corporation that	
	election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partne	
540	foreign estate. If Seller is a Foreign Person, and Buyer does not withhold the tax, Buyer may	be held directly liable by
541	the United States Internal Revenue Service for the unpaid tax and a tax lien may be placed up	oon the Property.
	This Offer is made with the express understanding that Seller is not a Foreign Person. If Selle	
	Seller acknowledges proceeds of this transaction may be subject to FIRPTA withholding. Firm	
	are not responsible for determining whether FIRPTA applies. The parties may wish to consult	independent legal counsel
545	or tax advisors.	
546	Seller is not a Foreign Person. Seller shall provide a qualifying certification of non-foreign st	atus to the closing agent
	no later than 3 days prior to closing.	atus to the closing agent
547	no later than o days phor to closing.	
548		
549	Seller's Initials  Date  Seller's Initials  Date	
	Seller is a Foreign Person. Seller shall provide a qualifying certification of foreign status to the	<u>ne closing agent no later</u>
551	than 3 days prior to closing.	
	Seller's Initials  Date  Seller's Initials  Date  Date	
555		
554	(x)	
555	Seller's Signature ▲ Print Name Here ►	Date ▲
556	(X)	
557	Seller's Signature ▲ Print Name Here ►	Date 🔺
558	This Offer was presented to Seller by [Licensee and Firm]	
559	on at	a.m./p.m.
560	This Offer is rejected set to the This Offer is countered [See attached counter]	
560 561		Seller Initials▲ Date▲
201		

## Proposed Revisions: WRA/Debbi Conrad

**FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA):** Section 1445 of the Internal Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must deduct and withhold a 15% tax on the total amount realized in the transaction if the transferor (Seller) is a Foreign Person and no exception from FIRPTA withholding applies. A Foreign Person is a nonresident alien individual, foreign corporation that has not made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If Seller is a Foreign Person, and Buyer does not withhold the tax, Buyer may be held directly liable by the United States Internal Revenue Service for the unpaid tax and a tax lien may be placed upon the Property.

This Offer is made with the express understanding that Seller is not a Foreign Person. If Seller is a Foreign Person, Seller must counter this Offer and **affirmatively confirm Seller's status with respect to FIRPTA laws** and acknowledges proceeds of this transaction may be subject to FIRPTA withholding. Firms or real estate agents are not responsible for determining whether FIRPTA applies. The parties may wish to consult independent legal counsel or tax advisors.

The above statement is true. Seller shall provide a qualifying certification of non-foreign status to the closing agent no later than 3 days prior to closing.

Seller's Initials ▲	Date A	Seller's Initials	Date <b>A</b>
	-	Offer is countered <b>. Seller sha</b> sing agent no later than 3 d	
Seller's Initials	Date <b>A</b>	Seller's Initials	Date ▲

Note: This rough draft provision based upon the discussion of the WRA Forms Committee on March 14 assumes the WRA would create a form for sellers to use for the certification of foreign/non-foreign status.

# FIRPTA REVISIONS AS PRESENTED BY MICHAEL GORDON

# 1<sup>st</sup> Draft:

This Offer is made by Buyer with the express understanding and condition that Seller is not a Foreign person, is not a nonresident alien individual and is not a foreign corporation that has made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If any of the above representations are not true, seller MUST counter this offer and agrees that proceeds of this transaction may be subject to FIRPTA withholding.

The above statement is true. \_\_\_\_\_ The above statement is not true, this Offer is countered. \_\_\_\_\_

582 (x)

583 Seller's Signature ▲ Print Name Here ► Date ▲ 584 (x)

585 Seller's Signature ▲ Print Name Here ► Date ▲
586 This Offer was presented to Seller by [Licensee and Firm]

#### 2<sup>nd</sup> Draft:

This Offer is made by Buyer with the express understanding and condition that Seller is not a Foreign person, is not a nonresident alien individual and is not a foreign corporation that has made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If any of the above representations are not true, seller MUST counter this offer affirmatively verifying Seller's status with respect to FIRPTA laws and agrees that proceeds of this transaction may be subject to FIRPTA withholding.

The above statement is true.

The above statement is not true, this Offer is countered to include Seller's FIRPTA status with respect to Section 1445 of the Internal Revenue Code (IRC).

582 (x)

583 Seller's Signature▲ Print Name Here► Date▲ 584 (x)

585 Seller's Signature ▲ Print Name Here ► Date ▲
586 This Offer was presented to Seller by [Licensee and Firm]

# 3<sup>rd</sup> Draft:

This Offer is made by Buyer with the express understanding and condition that Seller is not a Foreign person, is not a nonresident alien individual and is not a foreign corporation that has made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If any of the above representations are not true, seller MUST counter this offer affirmatively verifying Seller's status with respect to FIRPTA laws and agrees that proceeds of this transaction may be subject to FIRPTA withholding.

The above statement is true. Seller further agrees to provide certification no later than 3 days prior to closing. \_\_\_\_\_\_

The above statement is not true, this Offer is countered to include Seller's FIRPTA status with respect to Section 1445 of the Internal Revenue Code (IRC). Seller agrees to provide certification no later than 3 days prior to closing \_\_\_\_\_\_

582 (x)

583 Seller's Signature ▲ Print Name Here ► Date ▲ 584 (x)

585 Seller's Signature ▲ Print Name Here ► Date ▲ 586 This Offer was presented to Seller by [Licensee and Firm]

# SELLER'S CERTIFICATION OF NON-FOREIGN STATUS

Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a United States real property interest must withhold tax if the transferor (seller) is a foreign person. To inform \_\_\_\_\_\_ ("**Buyer**") that withholding of tax is not required upon the disposition of such United States real property interest by the transferor (seller), the undersigned hereby certifies the following on behalf the transferor: :

- 1. The name of the transferor is \_\_\_\_\_\_, [an individual resident of Wisconsin][a Wisconsin limited liability company/corporation/partnership] ("Seller").
- 2. Seller is not a foreign person, nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and income tax regulations).
- 3. Seller's U.S. taxpayer identification number (Social Security Number or employer identification number) is \_\_\_\_\_\_.

4. Seller's address is:

5. Seller understands that this certification may be disclosed to the Internal Revenue Service by Buyer, its successors and assigns, and that any false statement contained herein could be punished by fine, imprisonment, or both.

UNDER PENALTIES OF PERJURY, I DECLARE THAT I HAVE EXAMINED THIS CERTIFICATION AND, TO THE BEST OF MY KNOWLEDGE AND BELIEF, IT IS TRUE, CORRECT, AND COMPLETE, AND I FURTHER DECLARE THAT I HAVE AUTHORITY TO SIGN THIS CERTIFICATE ON BEHALF OF THE SELLER.

Dated this \_\_\_\_\_ day of February, 2019.

By: \_\_\_\_\_

By: \_\_\_\_\_

# Laura Peck Draft:

After more thought, I am not in favor of a True/Not True Initial by Seller as to foreign status. On the other hand, I think we should assume the Seller is NOT foreign. I am on the fence as to whether we can ask Seller to make this representation in the Offer, since we acknowledge that tax and legal counsel may need to be consulted. If we put this representation in, it <u>should</u> generate a Counter Offer if Seller is foreign. At the very least, we will know within 30 days or whenever. I do think that it might be a good ideaq to put the representation above the signature line if we decide to include it.

**FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (FIRPTA):** Section 1445 of the Internal Revenue Code (IRC) provides that a transferee (Buyer) of a United States real property interest must pay or withhold as a tax up to 15% of the total "Amount Realized" in the sale if the transferor (Seller) is a "Foreign Person" and no exception from FIRPTA withholding applies. A "Foreign Person" is a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate. The "Amount Realized" is the sum of the cash paid, the fair market value of other property transferred, and the amount of any liability assumed by Buyer. [Seller hereby represents that Seller is not a Foreign Person.] CAUTION: Under this law if Seller is a Foreign Person, and Buyer does not pay or withhold the tax amount, Buyer may be held directly liable by the U.S. Internal Revenue Service for the unpaid tax and a tax lien may be placed upon the Property.

Buyer and Seller agree to comply with FIRPTA requirements under IRC § 1445. Within \_\_\_\_\_ ["30" if no entry] days of acceptance of this Offer, Seller shall execute and deliver to Buyer, a sworn certificate under penalties of perjury of Seller's non-foreign status in accordance with IRC § 1445 and furnishing Seller's Social Security number or taxpayer identification number. Any representations made by Seller with respect to this issue shall survive the closing and delivery of the deed. If Seller is a Foreign Person or fails to deliver the certificate, Buyer shall be entitled to withhold the amount required to be withheld pursuant to IRC § 1445 from amounts otherwise payable to Seller under this Offer. Buyer and Seller shall complete, execute, and deliver, on or before closing, any other instrument, affidavit, or statement needed to comply with FIRPTA, including withholding forms.

Firms and Agents are not responsible for determining FIRPTA status or whether any FIRPTA exemption applies. The Parties are urged to consult with their respective independent legal counsel and tax advisors.

# 1<sup>st</sup> Draft:

This Offer is made by Buyer with the express understanding and condition that Seller is not a Foreign person, is not a nonresident alien individual and is not a foreign corporation that has made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If any of the above representations are not true, seller MUST counter this offer and agrees that proceeds of this transaction may be subject to FIRPTA withholding.

The above statement is true. \_\_\_\_\_ The above statement is not true, this Offer is countered. \_\_\_\_\_

582 (x)

583 Seller's Signature▲ Print Name Here► Date▲ 584 (x)

585 Seller's Signature ▲ Print Name Here ► Date ▲
586 This Offer was presented to Seller by [Licensee and Firm]

# 2<sup>nd</sup> Draft:

This Offer is made by Buyer with the express understanding and condition that Seller is not a Foreign person, is not a nonresident alien individual and is not a foreign corporation that has made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If any of the above representations are not true, seller MUST counter this offer affirmatively verifying Seller's status with respect to FIRPTA laws and agrees that proceeds of this transaction may be subject to FIRPTA withholding.

The above statement is true.

The above statement is not true, this Offer is countered to include Seller's FIRPTA status with respect to Section 1445 of the Internal Revenue Code (IRC).

582 (x)

583 Seller's Signature ▲ Print Name Here ► Date ▲ 584 (x)

585 Seller's Signature ▲ Print Name Here ► Date ▲
586 This Offer was presented to Seller by [Licensee and Firm]

# 3rd Draft:

This Offer is made by Buyer with the express understanding and condition that Seller is not a Foreign person, is not a nonresident alien individual and is not a foreign corporation that has made an election under section 897(i) of the IRC to be treated as a domestic corporation, foreign partnership, foreign trust, or foreign estate. If any of the above representations are not true, seller MUST counter this offer affirmatively verifying Seller's status with respect to FIRPTA laws and agrees that proceeds of this transaction may be subject to FIRPTA withholding.

The above statement is true. Seller further agrees to provide certification no later than 3 days prior to closing. \_\_\_\_\_\_

The above statement is not true, this Offer is countered to include Seller's FIRPTA status with respect to Section 1445 of the Internal Revenue Code (IRC). Seller agrees to provide certification no later than 3 days prior to closing \_\_\_\_\_\_

582 (x)

583 Seller's Signature ▲ Print Name Here ► Date ▲ 584 (x)

585 Seller's Signature ▲ Print Name Here ► Date ▲ 586 This Offer was presented to Seller by [Licensee and Firm]

30 31 32 33 34	is not -OR-	TON: Pursuant to Section 5.E. herein, Seller declares that he/she nerefore subjecting this transaction to FIRPTA withholding.		
35 36	Seller's Signature	Seller's Printed Name Date	Time	
37				
38			:	AM PM
39	Seller's Signature	Seller's Printed Name Date	Time	
40 41 42	Confirmation of Repr	esentation: The Seller is represented in this transaction by:		
43	Seller's Broker:	Agent's Name:		
44	Company Name:	Office Address:		
45	Phone:	City, State, Zip:		
46	Email:	Fax:		
47 48 49 50	B LICENSEE DISCLOSURE OF INTEREST (SELLER): Pursuant to NRS 645.252(1)(c), a real estate licensee must disclose if he/she is a principal in a transaction or has an interest in a principal to the transaction.			
51	direct or indirect, in	this transaction: $\Box$ Principal (Seller) -OR- $\Box$ family or firm relationship with a entity): (specify relationship)	Seller or or	wnership interest
	Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum or counteroffer.			
	Buyer's Name:	BUYER(S) INITI	IALS:	/
	Property Address:	SELLER(S) INITI	IALS:	/
	Rev. 12/11	©2011 Greater Las Vegas Association of REALTORS® Produced with zipForm® by zipLogix 18070 Fifteen Mile Road, Fraser, Michigan 48026 www.zipLogix.com		Page 11 of 11 Untitled

From:	Jonathan Sayas
To:	Debbi Conrad
Cc:	Kate O"Keefe
Subject:	WLTA Memo
Date:	Tuesday, February 12, 2019 5:13:40 PM
Attachments:	WLTA memo.pdf

Attorney Conrad –

On behalf of the WLTA please see the attached memo regarding the title provisions of the offer to purchase.

The WLTA would also request that should any FIRPTA provision be inserted into the offer to purchase:

- 1. That the provision contain a clear representation as to whether the Seller is a non-resident alien, foreign corporation, foreign trust, foreign estate or other foreign entity (as defined in the Internal Revenue Code and Income Tax Regulations).
- 2. That any Certification of Non-Foreign Status be provided in advance of the deadline for closing.
- 3. That the provision clarifies a title agent involved in the transaction, is not required to act as a withholding agent for the Buyer, nor is responsible for compliance with any FIRPTA provision.
- 4. That if the above provisions would <u>not</u> be included in the offer to purchase, the WLTA would be agreeable to having no FIRPTA provision in the offer to purchase (status quo), or in the alternative, a very generic warning that the parties may be subject to FIRPTA, and are responsible for compliance with same.

Thank you for considering the feedback from the WLTA.

Jon

Jonathan M. Sayas Wisconsin Underwriting Counsel

**Stewart Title Guaranty Company** 250 N. Sunny Slope Rd. Suite 135 Brookfield, WI 53005 O (414) 203-1070 | M (414) 294-9658 | F (262) 912-6104 <u>stewart.com</u> | jonathan.sayas@stewart.com

NYSE: STC

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# To: Wisconsin Real Estate Contractual Forms Advisory Council

From: WLTA

Date: February 12, 2019

Re: Proposed Revisions to the WB-11 Residential Offer to Purchase form – Title Evidence and other provisions.

The Wisconsin Realtors® Association, in conjunction of the Wisconsin Real Estate Contractual Forms Advisory Council, requested the WLTA to review and give feedback regarding the current Title Evidence provisions contained in the WB-11 Residential Offer to Purchase. Specifically, regarding the following provisions:

#### 325 TITLE EVIDENCE

332 333 334

326 CONVEYANCE OF TITLE: Upon payment of the purchase price, Seller shall convey the Property by warranty deed 327 (trustee's deed if Seller is a trust, personal representative's deed if Seller is an estate or other conveyance as 328 provided herein), free and clear of all liens and encumbrances, except: municipal and zoning ordinances and agreements 329 entered under them, recorded easements for the distribution of utility and municipal services, recorded building and use 330 restrictions and covenants, present uses of the Property in violation of the foregoing disclosed in Seller's Real Estate 331 Condition Report and in this Offer, general taxes levied in the year of closing and

335 which constitutes merchantable title for purposes of this transaction. Seller shall complete and execute the documents 336 necessary to record the conveyance at Seller's cost and pay the Wisconsin Real Estate Transfer Fee.

337 WARNING: Municipal and zoning ordinances, recorded building and use restrictions, covenants and easements may 338 prohibit certain improvements or uses and therefore should be reviewed, particularly if Buyer contemplates making 339 improvements to Property or a use other than the current use.

340 TITLE EVIDENCE: Seller shall give evidence of title in the form of an owner's policy of title insurance in the amount of the 341 purchase price on a current ALTA form issued by an insurer licensed to write title insurance in Wisconsin. Seller shall pay all 342 costs of providing title evidence to Buyer. Buyer shall pay all costs of providing title evidence required by Buyer's lender.

343 <u>GAP ENDORSEMENT</u>: Seller shall provide a "gap" endorsement or equivalent gap coverage at (Seller's)(Buyer's) 344 <u>STRIKE ONE</u> ("Seller's" if neither stricken) cost to provide coverage for any liens or encumbrances first filed or recorded after 345 the effective date of the title insurance commitment and before the deed is recorded, subject to the title insurance policy 346 exclusions and exceptions, provided the title company will issue the endorsement. If a gap endorsement or equivalent gap 347 coverage is not available, Buyer may give written notice that title is not acceptable for closing (see lines 353-359).

348 PROVISION OF MERCHANTABLE TITLE: For purposes of closing, title evidence shall be acceptable if the required title 349 insurance commitment is delivered to Buyer's attorney or Buyer not less than 5 business days before closing, showing title to 350 the Property as of a date no more than 15 days before delivery of such title evidence to be merchantable per lines 326-335, 351 subject only to liens which will be paid out of the proceeds of closing and standard title insurance requirements and 352 exceptions, as appropriate.

353 TITLE NOT ACCEPTABLE FOR CLOSING: If title is not acceptable for closing, Buyer shall notify Seller in writing of 354 objections to title by the time set for closing. In such event, Seller shall have a reasonable time, but not exceeding 15 days, to 355 remove the objections, and the time for closing shall be extended as necessary for this purpose. In the event that Seller is 356 unable to remove said objections, Buyer shall have 5 days from receipt of notice thereof, to deliver written notice waiving the 357 objections, and the time for closing shall be extended accordingly. If Buyer does not waive the objections, this Offer shall be 358 null and void. Providing title evidence acceptable for closing does not extinguish Seller's obligations to give 359 merchantable title to Buyer.

As for the Conveyance of Title section (lines 326-339), the WLTA does not make any recommend changes at this time, but would also note, that if the Council would like to return to the title conveyance provisions used in the 1999 version of the offer to purchase, they would be agreeable to same:

(1999 version of the WB-11 Residential Offer to Purchase)

## 187 TITLE EVIDENCE

188 CONVEYANCE OF TITLE: Upon payment of the purchase price, Seller shall convey the Property by warranty deed (or 189 other conveyance as provided herein) free and clear of all liens and encumbrances, except: municipal and zoning ordinances 190 and agreements entered under them, recorded easements for the distribution of utility and municipal services, recorded building 191 and use restrictions and covenants, general taxes levied in the year of closing and

192

(provided none 193 of the foregoing prohibit present use of the Property), which constitutes merchantable title for purposes of this transaction. Seller 194 further agrees to complete and execute the documents necessary to record the conveyance. WARNING: Municipal and zoning 195 ordinances, recorded building and use restrictions, covenants and easements may prohibit certain improvements or uses and therefore 196 should be reviewed, particularly if Buyer contemplates making improvements to Property or a use other than the current use.

As for the Title Evidence section (lines 340-342), the WLTA does not make any recommend changes at this time.

As for the *GAP Endorsement* section (lines 343-347), the WLTA recommends the section be revised to update the vernacular to better reflect current industry terms as follows:

# (Current version)

343 GAP ENDORSEMENT: Seller shall provide a "gap" endorsement or equivalent gap coverage at (Seller's)(Buver's) 344 STRIKE ONE ("Seller's" if neither stricken) cost to provide coverage for any liens or encumbrances first filed or recorded after 345 the effective date of the title insurance commitment and before the deed is recorded, subject to the title insurance policy 346 exclusions and exceptions, provided the title company will issue the endorsement. If a gap endorsement or equivalent gap 347 coverage is not available, Buyer may give written notice that title is not acceptable for closing (see lines 353-359).

# (Proposed revision)

GAP COVERAGE: Seller shall provide a "gap" endorsement or equivalent gap coverage at (Seller's)(Buyer's) STRIKE ONE ("Seller's" if neither is stricken) cost to provide coverage for any liens or encumbrances first filed or recorded after the commitment date of the title insurance commitment and before the deed is recorded, subject to the title insurance policy conditions, exclusions and exceptions, provided the title company will issue the coverage. If a gap endorsement or equivalent gap coverage is not available, Buyer may give written notice that title is not acceptable for closing (See lines XXX-XXX).

As for the *Provision of Merchantable Title* section (lines 348-352) the WLTA does not make any recommend changes at this time.

As for the *Title Not Acceptable for Closing* section (lines 353-359), the WLTA does not make any recommend changes at this time.

Finally, WLTA has previously submitted to the Forms Advisory Council, a memo on June 1, 2018 addressing proposed revisions better defining specifics of how the funds will be transmitted by the Buyer to pay the balance of funds due at closing. A copy of referenced June 1, 2018 memo is attached as Exhibit A. WLTA again requests the Council consider the requests therein.

Respectfully submitted on behalf of the Wisconsin Land Title Association



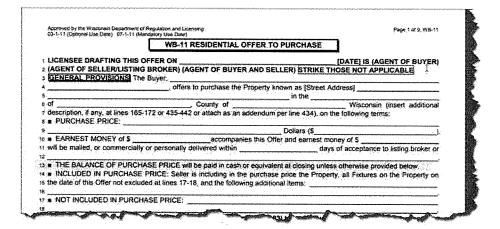
To: Wisconsin Real Estate Forms Advisory Committee

From: WLTA Members: Cheri Hipenbecker (<u>cah@knightbarry.com</u>), Brad Hoeschen (<u>bhoeschen@oldrepublictitle.com</u>), Lisa Petersen (<u>PetersenL@ctt.com</u>) and Jon Sayas (Jonathan.Sayas@stewart.com)

Date: June 1, 2018

Re: Proposed Revisions to Offer to Purchase forms – Balance of Purchase Price

COMMITTEE MEMBERS: the proposal is to amend the clause "THE BALANCE OF PURCHASE PRICE" which currently appears in all of the various Offers to Purchase forms (residential, commercial, vacant etc...") as follows:



Proposed Change: Revise "THE BALANCE OF PURCHASE PRICE" to read:

 THE BALANCE OF PURCHASE PRICE shall be submitted by (wire transfer) (cashier's check). [STRIKE ONE] ("wire transfer" if neither is stricken). NOTICE: Funds submitted by wire transfer will be available for distribution, including for Seller proceeds, on the day received if all other closing requirements are met. Funds submitted by cashier's check may not be available for distribution, including for Seller proceeds, until up to 7 days after receipt.

**Reason for Request:** With the rise of wire fraud and with concerns about the cost of sending a wire, some Buyers, real estate agents and lenders are returning to the practice of providing cashier's checks for real estate closings. This places a difficult burden on the settlement companies (the majority of the time being title companies, but in some instances lenders) as most Sellers want all funds, including their proceeds, distributed at closing by wire.

DATE: June 1, 2018



However, the settlement companies should not be funding transactions until they have fully collected funds in their bank accounts, without risk of a fraudulent check. Increasingly the settlement industry is being pressured to wire funds out of a closing when some portion of those funds have been received in the form of a check received the day of closing. If a settlement company wires money out the same day the settlement company deposits the check, thus the check has not yet cleared and the funds are not fully collected, the settlement company is using the money of others held in their trust accounts. The title industry would like to stop this practice.

The best way to remedy this issue is to have the parties to the Offer to Purchase determine what works best for them. If the Seller can wait for proceeds to be delivered (or the real estate agents can wait for commission checks), then using a cashier's check may be acceptable. If wiring of funds from a closing is required because, for example, the Seller is buying their new house the same day or in a few days, then all funds should be wired in. The proposed change to Line 13 allows the parties to determine how the funds from the Buyer will be delivered and then explains the consequences of each decision.

We are happy to discuss this matter with you further. For additional information, please contact:

Cheri Hipenbecker, Co-Chair Wisconsin Land Title Association Legislative Committee <u>cah@knightbarry.com</u> 414-847-4033

Brad L.F. Hoeschen, Co-Chair Wisconsin Land Title Association Legislative Committee <u>bhoeschen@oldrepublictitle.com</u> 414-316-5810

DATE: June 1, 2018

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