WISCONSIN REALTORS® ASSOCIATION

LEGAL UPDATE

A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

DECEMBER 2021, 21.12

Top Five 2021 Legal Developments

The world of real estate practice evolves and changes. This *Legal Update* provides a recap of some of the new legal developments impacting Wisconsin REALTORS® that came down the road in 2021. The developments included in this year-end summary include a recap of the host of new forms introduced in 2021, new requirements for home inspection reports, riparian rights for property owners on flowages, modifications to the Real Estate Condition Report (RECR) and Vacant Land Disclosure Report (VLDR) and the rules for their use, and new measures for the maintenance and repair of private roads.

New Practice Forms

2021 saw the introduction of many new forms. The Real Estate Examining Board (REEB) at the Department of Safety and Professional Services (DSPS) updated and revised the 2021 WB-15 Commercial Offer to Purchase, WB-12 Farm Offer to Purchase, WB-16 Offer to Purchase – Business With Real Estate Interest, the WB-17 Offer to Purchase – Business Without Real Estate Interest, WB-46 Multiple Counter-Proposal and WB-25 Bill of Sale.

ⓘ MORE INFO

These WB forms are in zipForm and in the WRA PDF forms library (for forms library subscribers only) and yellow-highlighted copies appear at www.wra.org/Resources/Transactional/Form_Update_Resource along with links to *Wisconsin Real Estate Magazine* articles and other resources. The forms are also available on the DSPS website at https://dsps.wi.gov/Pages/BoardsCouncils/RealEstate/ContractualForms/Forms.aspx.

In addition, several WRA forms were revised and updated. These included the WRA Addendum A to the Offer to Purchase, Addendum B to the Offer to Purchase, Addendum R to the Offer to Purchase – Rental Properties, Lease Guaranty/Renewal/Sublease/Assignment, Assignment of Leases/Rental Contracts and Security Deposits, and Addendum O to the Offer to Purchase – Occupancy Agreement. The WRA also introduced a new form to use with condominium offers – the Request for Condominium Disclosure Documents/Information that may be used to facilitate a unit seller's request for the required condominium disclosure documents the seller must deliver to the buyer, to see what additional condominium documents are available and to request the delivery of those materials.

ⓘ MORE INFO

These WRA forms are in zipForm and in the WRA PDF forms library (for forms library subscribers only).

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The 2021 WB-15 Commercial Offer to Purchase revisions

The WB-15 Commercial Offer to Purchase (WB-15) received a major overhaul in 2021. The REEB approved the WB-15 with an optional use date of January 1, 2021, and a mandatory use date of February 1, 2021. In addition to placing the commercial offer into the transactional flow found in the other approved WB offer forms and adopting the common provisions shared by the WB offers such as Earnest Money, Financing Commitment Contingency, Seller Financing, If This Offer Is Not Contingent on Financing Commitment, and Inspection Contingency, other revisions were made to specialized commercial provisions. The Proposed Use Contingencies and the Land Use Approval/Permits were reconfigured to make them easier to use. A new Secondary Offer provision, the Foreign Investment in Real Property Tax Act (FIRPTA) provision and a new Tax Deferred Exchange provision were added. The Closing of Buyer's Property Contingency was removed because so few commercial buyers used it.

ⓘ MORE INFO

See the detailed discussion of these changes in the January 2021 *Legal Update*, "The 2021 WB-15 Commercial Offer to Purchase Revisions," at www.wra.org/LU2101.

WB-12 Farm Offer to Purchase 2021

The REEB approved an updated WB-12 Farm Offer to Purchase (WB-12) with an optional use date of April 1, 2021, and a mandatory use date of May 1, 2021. Changes to the basic transactional provisions made in the WB-11 Residential Offer to Purchase were made in the revised WB-12 and the same transaction flow was adopted.

The WB-12 has several provisions that are uniquely about farm transactions including the Leased Property/Crop Agreements provision, and the Government Programs contingency that addresses Wisconsin's Managed Forest Land (MFL) program, use-value assessments, the Farmland Preservation Program, the Conservation Reserve Program, and Shoreland Zoning Ordinances. There are provisions for the property's zoning classification and fence law. The WB-12 is the only REEB form that includes contingencies for Well Water Testing, Well System(s) Inspection, and Private Sanitary System(s) (POWTS) Inspection. These are grouped with the Environmental Evaluation and share the same Contingency Satisfaction / Right to Cure subsection. These contingencies have all been significantly updated and revised.

For instance, the POWTS contingency now makes the offer contingent upon the buyer receiving a current written report regarding the POWTS on the property from either a county sanitarian, licensed master plumber, licensed master plumber-restricted service, licensed plumbing designer, registered engineer, certified POWTS inspector, certified septage operator and/or a certified soil tester. The report must indicate the POWTS conforms to the code in effect when the POWTS was installed and is not disapproved for current use, in other words, it is hydraulically functional and structurally sound. The vertical separation requirement was removed even though it still remains an administrative code legal requirement because it often is too difficult to determine unless there are written records for the POWTS.

ⓘ MORE INFO

See the detailed discussion of these changes in the April 2021 *Legal Update*, "WB-12 Farm Offer to Purchase 2021," at www.wra.org/LU2104.

WB-16 Offer to Purchase – Business With Real Estate Interest

The WB-16 Offer to Purchase – Business With Real Estate Interest (WB-16) has an optional use date of September 1, 2021, and a mandatory use date of October 1, 2021. The WB-16 was updated to reorganize the sequence of provisions to echo the transactional flow in the other WB offers to purchase and to incorporate the standard provisions used in the other offers such as Earnest Money, Inspection Contingency and FIRPTA.

The terminology in the WB-16 was recalibrated to use the terms "Real Estate," "Other Assets of the Business" and "Assets," avoiding the term "Property" as it is confusing in the business offer context. "Assets" is the global term referring to everything the buyer is purchasing in the WB-16. Under "Included in Purchase Price" there is a description of two components: Interest in Real Estate and Other Assets of the Business. These two components are collectively referred to as the "Assets."

References assuming the inclusion of accounts receivable were removed, and the provisions such as Allocation of Purchase Price, Sales and Use Tax, and Appraisal Contingency were updated and improved. The Appraisal Contingency has three parts, one for an appraisal of all assets included in the purchase price (appraised value to be greater than or equal to the purchase price), one for the appraisal of the real estate (appraised value to be greater than or equal to a specified amount) and one for the appraisal of specified assets (appraised value to be greater than or equal to a specified amount). Thus, the parties have the ability to select whether there will be an appraisal or more than one appraisal of all assets, just the real estate, specified assets only or some combination thereof. The Caution in the Allocation of Purchase Price section alerts the parties of the need to file the IRS Form 8594 asset allocation statement.

The provision for Sales and Use Tax and the optional provision for the Sales and Use Tax Escrow have been modified as a result of a change in procedure at the Department of Revenue (DOR) for obtaining a clearance certificate. A clearance certificate is requested by the buyer of a business after the sale is complete to ensure that the seller has filed all sales and use tax returns and paid all sales and use taxes due.

In addition to the WB forms, an updated WRA Business Disclosure Report is now in zipForm and the PDF subscription library. The Business Disclosure Report was updated to include more standard real estate disclosure items and upgrade the business disclosures to add details and a wide array of issues. The disclosure items in the report substantially mirror the disclosure items in the definition of "Conditions Affecting the Business, Assets or Transaction" in the WB-16.

WB-17 Offer to Purchase – Business Without Real Estate Interest

The WB-17 Offer to Purchase – Business Without Real Estate Interest (WB-17) has an optional use date of September 1, 2021, and a mandatory use date of October 1, 2021. References assuming the inclusion of accounts receivable were removed, and the provisions such as Allocation of Purchase Price, Sales and Use Tax, and Appraisal Contingency were updated and improved. The WB-17 is more-or-less the WB-16 stripped of its real estate provisions. It is the only offer that does not include FIRPTA because the WB-17 does not relate to real estate. Most of the discussion in this *Update* relative to the WB-16 also applies to the WB-17 unless the provision in question deals with real estate interests.

WB-46 Multiple Counter-Proposal

The WB-46 Multiple Counter-Proposal (WB-46) has an optional use date of September 1, 2021, and a mandatory use date of October 1, 2021. The WB-46 allows a seller to engage in non-binding negotiations with multiple buyers at the same time, giving sellers a powerful tool, especially in a competitive market. The changes to this form do not modify its purpose or function but rather improve the layout. In addition, the WB-46 was updated to add a place at the end where the seller can reject or counter a buyer-approved Multiple Counter-Proposal. Line 50 of the revised WB-46 Multiple Counter-Proposal reads: "This Multiple Counter-Proposal approved by Buyer is **(rejected) (countered)** **STRIKE ONE** (Seller's Initials) _____".

WB-25 Bill of Sale

The WB-25 Bill of Sale (WB-25) has an optional use date of September 1, 2021, and a mandatory use date of October 1, 2021. The WB-25 was modified so that it is effective only upon the successful closing of the buyer's purchase of the seller's real estate, and an entity signature block was added to the form. As before, the seller uses a bill of sale to legally transfer ownership of personal property to the buyer.

MORE INFO

See the detailed discussion of the changes to the WB-16 Offer to Purchase – Business With Real Estate Interest, the WB-17 Offer to Purchase – Business Without Real Estate Interest, the WB-46 Multiple Counter-Proposal and the WB-25 Bill of Sale in the August 2021 *Legal Update*, "2021 Forms Update: WB-25 & WB-46; WB-16 & WB-17," at www.wra.org/LU2108.

WRA Addendum A to the Offer to Purchase

The revisions to the WRA Addendum A to the Offer to Purchase (Addendum A) are designed to complement recent changes to the WB offer forms. The WRA Addendum A is a general, all-purpose addendum that may be used in an offer with any property type. Addendum A was reorganized to loosely follow the sequence of provisions and topics in the various offers to purchase and has grown from two to three pages. The various provisions have been upgraded and clarified.

Despite this expansion, two major provisions have been removed from Addendum A. The Radon Testing Contingency was removed because there now is a Radon Testing Contingency in the residential, residential condominium and farm offers. The provision for Underground Storage Tanks and Basement Fuel Oil Tanks was removed and a new Underground or Aboveground Fuel Storage Tank(s) Currently Not in Use contingency was added to WRA Addendum B.

Addendum A includes a generic testing contingency. The Map of the Property contingency is the same as the Map provision in the vacant land offer. The most obvious addition to Addendum A comes near the end, on the bottom half of the last page, where the parties may fill in their Contact Information for the Closing Disclosure.

WRA Addendum B to the Offer to Purchase

The WRA Addendum B to the Offer to Purchase (Addendum B) may most often be used with a rural or semi-rural property because of its focus on wells, well water and sanitary systems. It in large part adopts the well inspection, well water testing and POWTS inspection contingencies from the WB-12 Farm Offer to Purchase. Just like in the farm offer, the contingencies for Well Water Testing, Well System(s) Inspection and Private Sanitary System(s) (POWTS) Inspection are grouped together and share the same Contingency Satisfaction / Right to Cure subsection. This helps achieve consistency and is incorporating provisions that have been approved by DSPS for use with farm properties, which makes them perfect for transactions involving properties not served by municipal sanitary and water systems.



Addendum B includes a new provision for Abandoned Well(s), an optional Shared Well Agreement contingency and an optional Shared Driveway Agreement contingency.

A new contingency in Addendum B addresses underground (UST), aboveground (AST) or basement fuel tank(s) on the property not currently in use and allows the parties to choose which of them shall be responsible for tank closure or removal. If the seller is responsible, they must accomplish the tank closure, abandonment or removal by the deadline (default is five days before closing) and deliver written confirmation thereof at least five days before closing, or the buyer can deliver notice making the offer null and void.

One benefit of adding a third page to the WRA Addendum B is that there was room to include numerous Additional Provisions lines at the end of the form.

MORE INFO

See the detailed discussion of these changes to Addendum A and Addendum B in the June 2021 *Legal Update*, "WRA Addenda A and B 2021," at www.wra.org/LU2106.

Addendum R to the Offer to Purchase – Rental Properties

Addendum R to the Offer to Purchase – Rental Properties (Addendum R) was designed for use in the sale of residential rental properties – with a residential or commercial offer to purchase – regardless of the number of units involved. Addendum R tries to contemplate many of the problems that may arise when tenants do not pay their rent, abandon their units, damage the property or terminate their tenancies between the date of the offer and closing. This may leave the seller with less income, potential claims on security deposits, possible repair costs and vacant units. Disputes may arise and the parties will have no rules to guide them, that is, unless they use Addendum R with the offer.

The upgraded Addendum R provides additional room in the rent schedule and new provisions giving additional clarity regrading the seller continuing with normal rental operations; a STRIKE ONE item as to what should be done with vacant units; a requirement that the seller apprise the buyer when tenants abandon their units, terminate their tenancies or commit a major breach; a STRIKE ONE provision about responsibility for pending evictions; and optional items regarding units the buyer requests remain vacant and the number of units becoming vacant during the pendency of the offer.

Assignment of Leases/Rental Contracts and Security Deposits

The Assignment of Leases/Rental Contracts and Security Deposits form is intended to be used at closing to implement some of the provisions found in the offer as far as the assignment of leases and security deposits, and the all-important Indemnification and Rent provisions from Addendum R if that addendum was used.

Lease Guaranty/Renewal/ Sublease/ Assignment

The Lease Guaranty/Renewal/Sublease/Assignment form has been revised to provide more detail and specificity when the form is used to document a basic Guaranty, Renewal (with or without amended terms), Sublease or Assignment of Lease/Rental Contract.

The form may be used if there is a lease guarantor, often the parents or relatives of college students or younger individuals, who do not live in the premises but make payments if the tenants do not. The Lease Guaranty/ Renewal/Sublease/Assignment form may also be used as a quick way to renew an existing lease or rental contract without a lot of paperwork. The beginning and end date of the renewed lease term are specified and the parties sign and date the agreement at the bottom of the first page. If the idea is to renew the lease or rental contract but change a few of the lease or rental contract terms, blank lines are provided where the parties can designate the changed provisions.

The third section of the form is a basic agreement to document a sublease. A sublease is the re-renting of the premises by an existing tenant (sublessor) to a new subtenant (sublessee) for a defined period where the sublessor remains liable to the landlord. The fourth section of the Lease Guaranty/Renewal/Sublease/Assignment form is for an assignment where a new tenant essentially takes over and assumes all liability with the assigning tenant being completely released from any liability.

Addendum O to the Offer to Purchase – Occupancy Agreement

Addendum O to the Offer to Purchase – Occupancy Agreement (Addendum O) is flexible enough to be used if the buyer occupies the property before closing or if the seller occupies the property after closing. By choosing a box at the beginning of the form, the person preparing Addendum O will be defining most of the crucial terms used throughout the addendum. Marking the Post-Closing or Pre-Closing box sets the definition of "Owner," "Occupant," "Occupancy Date" and "Occupancy Period," as those terms are used throughout the rest of the addendum.

Addendum O raises numerous considerations, most in optional check box items, relevant to a non-owner's occupancy of the property for the parties to address. The topics addressed include a security deposit, utility charges, maintenance, keys, property taxes and more. The provisions have been clarified and amplified to enhance understanding and use.

ⓘ MORE INFO

See the detailed discussion of these changes to Addendum R, the Lease Guaranty/Renewal/Sublease/Assignment form, the Assignment of Leases/Rental Contracts and Security Deposits form and Addendum O in the October 2021 *Legal Update*, "WRA Addenda R and O 2021," at www.wra.org/LU2110.

Request for Condominium Disclosure Documents/Information

The WRA optional Request for Condominium Disclosure Documents/ Information form includes an introductory area followed by three parts. Part I is a request for the association to deliver to the unit seller the condominium disclosure documents required under Wis. Stat. § 703.33. Part II is an inquiry to determine which of the documents listed in the Contingency for Additional Condominium Issues in the WB-14 are available from the association. Part III is a request for the association to deliver the available Additional Condominium Issues documents to the unit seller.

ⓘ MORE INFO

Read more about the Request for Condominium Disclosure Documents/Information form and see a sample copy in the February 2021 *Legal Update*, "Request for Condominium Documents," at www.wra.org/LU2102.

Home Inspection Reports

On June 1, 2021, a new law went into effect that changed the requirements for what must be included in a home inspection report prepared by a Wisconsin-registered home inspector. This legislation simply requires a home inspector who identifies a defect during the inspection as currently required by law, to label that item as a defect in the inspection report. A home inspector will label items as defects based on the home inspector's judgment at the time of the inspection and is not making any warranties as to the future condition of the property.

The home inspector definition of "defect" means a condition of any component of an improvement that a home inspector determines, on the basis of the home inspector's judgment on the day of an inspection, would significantly impair the health or safety of occupants of a property or that, if not repaired, removed or replaced, would significantly shorten or adversely affect the expected normal life of the component of the improvement.

Every Wisconsin home inspector must provide a written report that:

- Labels items as defects that meet the home inspector state law definition of defect.
- Includes a summary page.

The summary page must include:

- A list of conditions that are defects per the home inspector definition of defects.
- Other than conditions listed as defects, a list of components needing repairs, components needing further evaluation, items to monitor and maintenance items.
- References for each listed item to the page, heading or item number in the rest of the report for details and further information.
- Required mandatory information explaining the report to the parties:

  NOTE: This summary page is provided for convenience and is not a substitute for reading the entire report and should not be relied upon as the complete list for the client's reference.

  For the purposes of the report, "defect," as defined in section 440.97 (2m), Wis. Stats., means a condition of any component of an improvement that a home inspector determines, on the basis of the home inspector's judgment on the day of an inspection, would significantly impair the health or safety of occupants of a property or that, if not repaired, removed, or replaced, would significantly shorten or adversely affect the expected normal life of the component of the improvement. The contract of sale may

define "defect" to also include a condition that would have a significant adverse effect on the value of the property, but such a condition may not be labeled a defect in the report unless it meets the definition in section 440.97 (2m), Wis. Stats.

NOTE: A home inspector may not report on the market value or marketability of a property or whether a property should or should not be purchased.

REALTOR® Practice Tip

The Understanding Wisconsin Home Inspection Reports handout at www.wra.org/UnderstandInspectionsPDF gives guidance to the parties regarding what should be included in a home inspection report and what they might do if the required elements are not included.

MORE INFO

To learn more, review these resources:

- September 2021 *Legal Update*, "Home Inspection Reports," at www.wra.org/LU2109
- May 2021 *Legal Update*, "Legislation Makes Requirements for Home Inspection Reports," at www.wra.org/LU2105
- *Legal Update* Live Episode 12: "New Law, New Home Inspection Report" at www.wra.org/LUL/Episode12
- "The Rumor Mill Stops Here" in the May 2021 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/May21/RumorMill



Riparian Rights

On January 23, 2018, the Wisconsin Supreme Court, in *Movrich v. Lobermeier*, held that riparian owners on a flowage do not have a right to place a pier.

The *Movrich v. Lobermeier* story

The dispute in this case involved a brother and a sister, Movrich and Lobermeier. The Lobermeiers own land beneath the waters of Sailor Creek Flowage. Historically, the flowage was a creek, but in the 1940s, the area was flooded with a dam resulting in the flowage. The property adjacent to the flowage was subdivided, and waterfront lots of the Sailor Creek Flowage Subdivision were sold.

The Movriches purchased one of the waterfront lots. For years, they and the other waterfront property owners placed seasonal piers that sat on the bed of the flowage. The Movriches and Lobermeiers had a dispute, and the Lobermeiers demanded that the Movriches and the other property owners remove their piers and refrain from using the water for recreational purposes.

The Movriches filed a lawsuit, asking the circuit court for a declaratory judgment establishing their right to install a pier. They maintained waterfront property owners have an inherent right to reasonable use and access to the adjacent waters and, in addition, the Public Trust Doctrine set forth in the Wisconsin Constitution guarantees public access to the water. The Lobermeiers argued the Movriches did not have pier rights because the body of water was a manmade flowage created by the damming of a creek, rather than a lake or other natural water body, and the legal description in their deed specifically included the flowage bed.

Both the circuit court and court of appeals held riparian owners have the right to place a pier in all navigable waterways. On appeal to the Wisconsin Supreme Court, the court in a 4-3 decision ruled in favor of the Lobermeiers, finding that the property owners along a flowage created by flooding a creek do not have an inherent right to place a pier. The Lobermeiers owned a fee simple interest in the land underneath the flowage waters that entitled them to exclude others from placing a pier or structure on the property. The court stated in part, "Any property rights the Movriches may enjoy in regard to the man-made body of water created by the flowage easement must be consistent with the Lobermeiers' property rights or the flowage easement's creation of a navigable body of water."

See the case law summary on pages 3-4 of the January 2019 *Legal Update*, "Case Law Update," at www.wra.org/LU1901.

The new law in Wis. Stat. § 30.132

The WRA supported legislation seeking to clarify that all waterfront property owners, even those with land abutting flowages and artificial waterways, have the right to place a pier subject to the regulations in Chapter 30 of the Wisconsin Statutes. That legislation was signed into law in 2021 Wis. Act 47 and became effective June 20, 2021. The new law in Wis. Stat. § 30.132 restores the presumption of riparian rights for waterfront property owners, including a right to place a pier, other structures or deposits, unless those rights are specifically prohibited by the deed to the land, written agreement or other recorded instrument. The riparian rights are subject to federal law, state law or a federal energy regulatory commission (FERC) license.

With respect to flowage beds owned by hydroelectric utilities, the following applies:

- Existing piers and structures are grandfathered. No fees can

be charged unless the fee was authorized as part of an existing agreement.

- New piers and structures must receive authorization from hydroelectric utilities, but authorization can be denied only if the placement of the structure would violate federal or state law or invalidate a FERC license. A reasonable fee can be charged, but only in an amount necessary to administer the FERC license program. Fees can be appealed to the Public Service Commission (PSC).

Effective July 1, 2022, new disclosures are added to the RECR and VLDR to make prospective buyers aware of the limited riparian rights possessed by waterfront property owners along flowages with beds owned by hydroelectric utilities. Please note the WRA's condition reports currently include the disclosures in italics, which will be removed after that law becomes effective.

REALTOR® Practice Tip

Check the deed. If the deed expressly states the property does not have pier rights, or that the property is not waterfront, or that the property owner does not have riparian rights, then the deed controls. The new law does NOT trump the deed language.

REALTOR® Practice Tip

Know the type of body of water on which the property is located. Under the new law, property owners looking to place new piers and structures on a flowage bed owned by hydroelectric utilities will need to request permission from the hydroelectric utility before doing so. While such requests can be denied only in very limited circumstances, the placement of such piers and structures is not a guarantee.

MORE INFO

Read "Riparian Rights Restored: The classic tale of a family feud, collateral damage and righting a wrong" in the August 2021 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Aug21/RiparianRights and "Pier Rights Restored for Wisconsin Property Owners" in the July 2021 *Legal Update* at www.wra.org/LU2107. See Wis. Stat. § 30.132 at https://docs.legis.wisconsin.gov/statutes/statutes/30/ii/132.

RECR/VLDR

2022 will bring changes to some of the rules for the use of the RECR) and VLDR as well as the content of the reports.

Right to receive earnest money

Recent legislation clarifies a prior inconsistency in the statutes as far as buyers who rescind their offer all being entitled to the return of their earnest money. Specifically, the new legislation states that a buyer who should have, in accordance with Wis Stat. § 709.02, but who does not receive an RECR or VLDR within 10 days after acceptance of their offer has rescission rights. That buyer may, within two business days after the end of that 10-day period, rescind the offer by delivering a written notice of rescission to the seller or to the seller's agent. Beginning April 1, 2022, that buyer is also entitled to the return of their earnest money. Wis Stat. § 709.02 previously did not provide that the buyer was entitled to their earnest money in this circumstance.

Sellers must answer report questions

Another change addressed is the situation where a seller puts a huge "X" on each page of the RECR or VLDR or places a diagonal line through each page of the report rather than answering the questions. The new legislation provides that these reports will be considered incomplete and that a report will be considered complete only if the seller answers or supplies information for each item on the report. Under current law, a buyer who receives a report that is incomplete may, within two business days after receipt of that report, rescind their offer in writing and is entitled to the return of their earnest money.

Changes to report content

The legislation also makes clarifications and additions to the disclosure items in the RECR and VLDR. These items have been in italics in the WRA's RECR and VLDR for over a year and effective April 1, 2022, the italics may be removed for the clarification relating to private rights of way and the new question regarding whether the owner is a foreign person under FIRPTA. The italics may be removed from the new questions regarding riparian rights, flowages, and hydroelectric operators effective July 1, 2022.

In the WRA's RECR, for example, the following language addressing private rights of way, piers on flowages and FIRPTA shown below in bold italics will become part of the statutory disclosure language:

F8. ***Other than public rights of way,*** are you aware of nonowners having rights to use part of the property, including, but not limited to, ***private*** rights of way and easements other than recorded utility easements?

F17m. ***Are you aware of a written agreement affecting riparian rights related to the property?***

F17n. ***Are you aware that the property abuts the bed of a navigable waterway that is owned by a hydroelectric operator?***



Under Wis. Stat. s. 30.132, the owner of a property abutting the bed of a navigable waterway that is owned by a hydroelectric operator, as defined in s. 30.132 (1) (b), may be required to ask the permission of the hydroelectric operator to place a structure on the bed of the waterway.

G4m. ***Is the owner a foreign person, as defined in 26 USC 1445 (f)? (e.g. a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate.)***

Section 1445 of the Internal Revenue Code (26 USC 1445), also known as the Foreign Investment In Real Property Tax Act or FIRPTA, provides that a transferee (buyer) of a U.S. real property interest must be notified in writing and must withhold tax if the transferor (seller) is a foreign person, unless an exception under FIRPTA applies to the transfer.

ⓘ MORE INFO

See the November 2021 *Legal Update*, "Revisions to the Real Estate Condition and Vacant Land Disclosure Reports – 2022," at www.wra.org/LU2111 and "What's That? Changes to the WRA Disclosure Reports? Tell Me More!" in the September 2020 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Sep20/Disclosure.

Maintenance and Repair of Private Roads

Wisconsin now has a new law that provides for the allocation of maintenance costs for private roads in those instances where the adjoining property owners do not have a recorded maintenance agreement.

Gov. Evers recently signed the new Wis. Stat. § 710.20 into law in 2021 Wis. Act 99.

The costs of repairing and maintaining private roads are usually divided among the beneficial users of that road. However, the lack of a written agreement between those beneficial users can not only lead to disputes, but may also hinder real estate transactions. Federally sponsored loans by Fannie Mae have lending guidelines that require one of the following for landlocked real property accessible via a private road: (1) an enforceable maintenance agreement, (2) state statutory provisions defining the responsibilities of these beneficial users for maintenance and repair of private roads, or (3) an indemnity for loss executed by the original lender. The new Wis. Stat. § 710.20 defines the responsibilities of property owners for the maintenance and repair of private roads to meet Fannie Mae guidelines. The statute does not require anyone to enter into an unwanted agreement. Rather, it simply creates a default that would apply only if the beneficial users do not have a written agreement dividing up maintenance and repair costs to ensure lending on these properties can still occur. If the beneficial users already have a written agreement dividing up costs, then this existing agreement controls. Overall, Wis. Stat. § 710.20 fixes an obstacle for property owners and lenders when dealing with properties on private roads, while keeping private property rights intact.

If there is no recorded maintenance agreement, the new statutory formula requires each adjoining property owner to contribute an equitable share based on the amount and intensity of their actual use in proportion to the amount and intensity of all other property owners' actual use. The statute lists four factors to consider when determining whether costs are reasonable and necessary.

The WRA worked together with other interested parties such as the Wisconsin Land Title Association, the Wisconsin Register of Deeds Association and the State Bar of Wisconsin to help pass this new law.

ⓘ MORE INFO

See "Private Roads – Another Hurdle Removed in Wisconsin Homeownership," at www.knightbarry.com/wisconsin-private-roads-law, 2021 Wisconsin Act 99 at https://docs.legis.wisconsin.gov/2021/related/acts/99.pdf and testimony on the legislation at https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2021/sb283/sb0283_2021_06_15.pdf.

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