



LEGAL UPDATE

APRIL 2021, 21.04

A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

WB-12 Farm Offer to Purchase 2021

The Real Estate Examining Board (REEB) has approved an updated WB-12 Farm Offer to Purchase. The optional use date is April 1, 2021, and the mandatory use date is May 1, 2021.

This *Legal Update* focuses primarily on the changes made to those provisions of the WB-12 that are uniquely about farm transactions. The section-by-section discussion points out the new set of changes adopted by the REEB and provides practice tips for getting the best results with this newest version of the WB-12.

① MORE INFO

An “educational use only” copy of the WB-12 with yellow highlights indicating the changes made is available on the WRA Forms Update Resources page at www.wra.org/formsupdate as well as a new FIRPTA flow chart and other resources.

The Farm Offer

The WB-12 Farm Offer to Purchase is an offer that is used in a whole host of situations involving farms, farmettes and agricultural lands. A farm sale may be the traditional sale of a family farm, a multi-million-dollar corporate agribusiness deal, a hobby farm transaction or the sale of farmland for new development. The buyers may be starry-eyed city slickers seeking the idyllic peace and tranquility of the country or sophisticated agribusiness corporations or developers. It may be used for the purchase of farm fields, portions of a farm involving various accessory buildings, the farmhouse and the surrounding land, or the entire farm. Practitioners, accordingly, are well served to be familiar with the various provisions included in the WB-12 so they may be well-equipped to adeptly draft the form according to the instructions of the parties and serve the best interests of their clients and customers.

Several issues unique to farms or predominant in rural life are involved in a farm sale. In addition to disclosures relating to the use-value system for assessing farmland, safe well water is a primary concern given multiple types of pesticides and herbicides have been found in farm water supplies due to livestock waste and the application of fertilizers, herbicides and pesticides. It is also important for the parties to know about any enrollment in the Conservation Reserve Program, Farmland Preservation Program or similar programs because stiff penalties can be imposed when the property is conveyed without adhering to program rules. A farmer's practices with respect to animal feedlots; livestock

waste storage; land spreading of livestock waste; fertilizer application, handling and storage; pesticide application, handling and storage; and irrigation may have significant impacts on groundwater and soil quality.

The 2021 WB-12 Farm Offer to Purchase has been placed in the same transactional flow as the WB-11 Residential Offer to Purchase. The WB-12 has the same operational provisions that are found in the other offers, such as Earnest Money, Closing, Time Is of The Essence and Real Estate Condition Report (RECR). These provisions are not addressed in detail in this *Update*.

The provisions relative to farm transactions from the prior 2012 version of the WB-12 have been retained unless otherwise noted. The following discussion focuses on farm features and revised provisions and follows the sequence of the updated WB-12 offer.

Property identification and tax parcel numbers

Several practitioners had noted they sometimes worked in transactions where there was no street address that encompassed the group of parcels being sold. In other words, using a street address would not provide an accurate description of the property. This may be particularly true with a farm where different parcels and fields were added over time, creating a conglomeration of different parcels. They suggested there be a place where tax parcel numbers or PINs could be used as the property description or as part thereof.

Accordingly, there is a prompt on lines 6-7 following the long blank at lines 4-5 of the WB-12, suggesting that the property identification might be completed by using a street address, the most common means of identifying the property in a transaction, but also suggesting alternative ways of identifying the property. These include the parcel numbers as well as the legal description and other descriptions placed in the additional provision lines or in an attached addendum.

The language on lines 6-7 states: “the Property known as _____ [e.g., Street Address, Parcel Number(s), legal description, or insert additional description, if any, at lines 759-772, or attach as an addendum per line 794] in the ____ ...”

Annual crops and fixtures

It is always worth noting that annual crops are not part of the purchase price unless otherwise agreed, as is stated in the note on line 15 of the WB-12.

As was done with the other updated offers, the definition of “fixture” was placed immediately following the Not Included in Purchase Price section. That definition on lines 24-36 is similar to the definition in the WB-11 Residential Offer to Purchase but includes a few items unique to farms:

perennial crops; perennial plants; in-ground and aboveground crop irrigation systems; ventilating fans; barn cleaners; silo unloaders; augers; feeding equipment; bulk tanks and refrigeration systems; pipeline milking systems; vacuum lines; vacuum pumps and attached motors; and aboveground and underground fuel tanks.

The caution following the fixture definition reminds the parties regarding some considerations distinctly related to farms:

CAUTION: Exclude any Fixtures to be retained by Seller or that are rented (e.g., water softeners or other water treatment systems, LP tanks, etc.) on lines 17-19 or at lines 759-772 or in an addendum per line 794). Address annual and perennial crops, livestock, rented fixtures not owned by Seller, fixtures owned by Seller but which will not be included in the purchase price (e.g., irrigation systems) and equipment which may be personal property but will be included in the purchase price. Annual crops are not part of the purchase price unless otherwise agreed.

Leased Property/Crop Agreements

The Leased Property/Crop Agreements provision and caution on lines 42-52 have been modified in recognition of the crop leases or other tenant arrangements that may often be in play with a farm property.

Farm leases often begin and end in the spring, typically on March 1 or April 1, and many are verbal “handshake” agreements. Farm leases vary widely in nature, depending on what the landlord and tenant, respectively, are furnishing to the farm enterprise (livestock, equipment, seed, fertilizer, etc.).

If there is a tenant with a crop lease or if the seller will retain crops and the closing will occur before harvest, arrangements need to be made for caring for, accessing and harvesting the crops after the sale of the farm so that the respective rights of the seller, crop tenant and buyer can be protected. If the seller or the seller's tenants will occupy the property after closing or retain ownership of crops, a special agreement for occupancy, insurance, utilities, maintenance, rights to crops, farm operations, government programs, etc., should be considered. Any crops to be harvested, as well as the machinery and implements necessary to harvest and remove the crops from the farm, should be noted in the Not Included in Purchase Price section on lines 17-19 because these are all items that will be removed at some point after closing.



REALTOR® Practice Tip

If the seller's tenant will harvest crops and pay the seller rent after closing, the seller should carefully consider the Closing Prorations section on lines 581-585 and decide whether any crop rents are to be prorated at closing or whether special provision should be made to exclude crop rents paid by tenants in the year of closing from proration.

Perennial crops such as raspberries or apples, as well as trees, bushes and grass, that do not require annual planting and cultivation are classified as fructus naturales (fruits of nature) and are considered part

of the real estate, that is, fixtures. Such crops will need to be excluded from the sale on lines 17-19 if they will be harvested and removed by the seller or tenants. Annual crops that have to be planted each year such as wheat and corn are classified as fructus industriales (fruits of industry) and are generally considered personal property. Accordingly, such crops must be specifically listed as “Included in Purchase Price” on lines 12-14 of the WB-12 if they are to be included in the sale. If they will be harvested and removed by the seller or tenants, it may be best to list them on lines 17-19 for clarity's sake, although they would not generally be included in the transaction since they are personal property.

The WB-12 next has the same operational provisions found in the other offers, such as Binding Acceptance, Acceptance, Closing, Earnest Money, Time Is of The Essence and RECR.

Conditions Affecting the Property or Transaction

The farm offer assumes that the farm property includes one to four dwellings and calls for the use of the Wis. Stat. ch. 709 RECR. Chapter 709 generally applies to all persons who transfer real estate containing one to four dwelling units, including condominium units, time share property, living quarters in a commercial property, etc.



REALTOR® Practice Tip

REALTORS® may use the updated the WRA Real Estate Condition Report – Farm, a Wis. Stat. § 709.03 RECR for real property including one to four dwelling units that has been supplemented with additional disclosure items pertinent to farming and rural life. The farm RECR is available on zipForm and in the WRA form subscription package.

The list of items comprising the definition of “Conditions Affecting the Property or Transaction” mirrors, for the most part, the disclosure items in the WRA Real Estate Condition Report – Farm. In this definition, “Property” includes: 1) the land; 2) dwellings; 3) barns and outbuildings and 4) any other real or personal property included in the transaction, as is the case in the WRA RECR-Farm. The list includes the disclosure items required in residential transactions, assuming the residential conditions make sense as there most likely is a farmhouse, supplemented with items pertaining to vacant land and agricultural concerns. Some of these additional items address issues such as boundary lines, fence issues, hazardous and toxic substances disposed of in farm dumpsites, cisterns, abandoned wells, crop damage, livestock disease, pollutants or other irritants emanating from neighboring properties, livestock siting violations, manure storage facilities, and exclusive agriculture or farmland preservation zoning.

The definition of “Conditions Affecting the Property or Transaction” on lines 126-197 also includes the new items that were held up and not approved by the state senate when the coronavirus stopped all legislative action in the summer of 2020. These are the same “legislative items” that were added to the WB-11 and the other updated WB offers and that the WRA is optimistic will be quickly enacted in the 2021 legislative session. Those “legislative items” include the references to “private” rights-of-way and easement on lines 173 and 174; the items relating to riparian rights for properties on flowages on lines 187-188; agreements with electric cooperatives on line 194; and the FIRPTA disclosure if the seller is a foreign person on line 195.

Restating the RECR items in the 2021 definition of Conditions Affecting the Property or Transaction encourages sellers to make disclosures or explain why they are not doing so (for example, an “as is” sale). This supports the philosophy of Wis. Stat. Ch. 709 to encourage seller disclosure regarding the condition of the property. The seller is in the best position to know the true condition of the property. Getting this information to buyers enables buyers to make better-informed decisions.

① MORE INFO

For insight into the updated RECR content, read “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. Also see “Extreme Disclosure Report Makeover” in the June 2018 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/June18/RECR, the June 2018 *Legal Update*, “Revisions to the Real Estate Condition and Vacant Land Disclosure Reports – 2018,” at www.wra.org/LU1806 and “The Best of the Legal Hotline: Buyer Said, Seller Said” in the June 2018 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/June18/Hotline.

Government programs

The number of government and conservation programs that farmers and their tenants may take advantage of is immense. A buyer needs to know what they are, how long they are for, the limitations of the programs, and how each program is going to affect a new property owner. These are obligations a new buyer may not comply with if they are not made aware of them. Some programs require the owner to open his or her land to the public for hunting. Some programs provide that the property or enrolled acreage cannot be mowed or used for anything except hunting or walking. Some programs offer a property tax incentive, others provide cash, and in some cases a property easement is created.

The Government Programs contingency on lines 198-210 provides the buyer an opportunity to see what federal, state, county and local programs and accompanying fees apply to the property. The seller is to deliver a list of all conservation, farmland, environmental, governmental or land use programs, agreements, restrictions, conservation easements, etc., that apply to the property (farmland preservation, use value assessments, managed forest, conservation reserve, etc.) along with a list of any pending or deferred penalties and fees. Many of these programs involve requirements that the owner must meet and penalty provisions that are triggered by early withdrawal from the program or conveyances in violation of program rules.

A default of 15 days was added with regard to the seller’s deadline, stated on line 198 of the WB-12. This default was aligned with the default time frame for the seller’s delivery of the title insurance commitment (see lines 627-631) as the title work and the government program information logically fall together and may overlap. The buyer has seven days from the buyer’s “actual receipt” of the information to decide whether to terminate the offer based upon those restrictions, programs, fees, etc., that the buyer finds unsatisfactory. “Actual receipt” is defined on lines 651-653 of the WB-12.

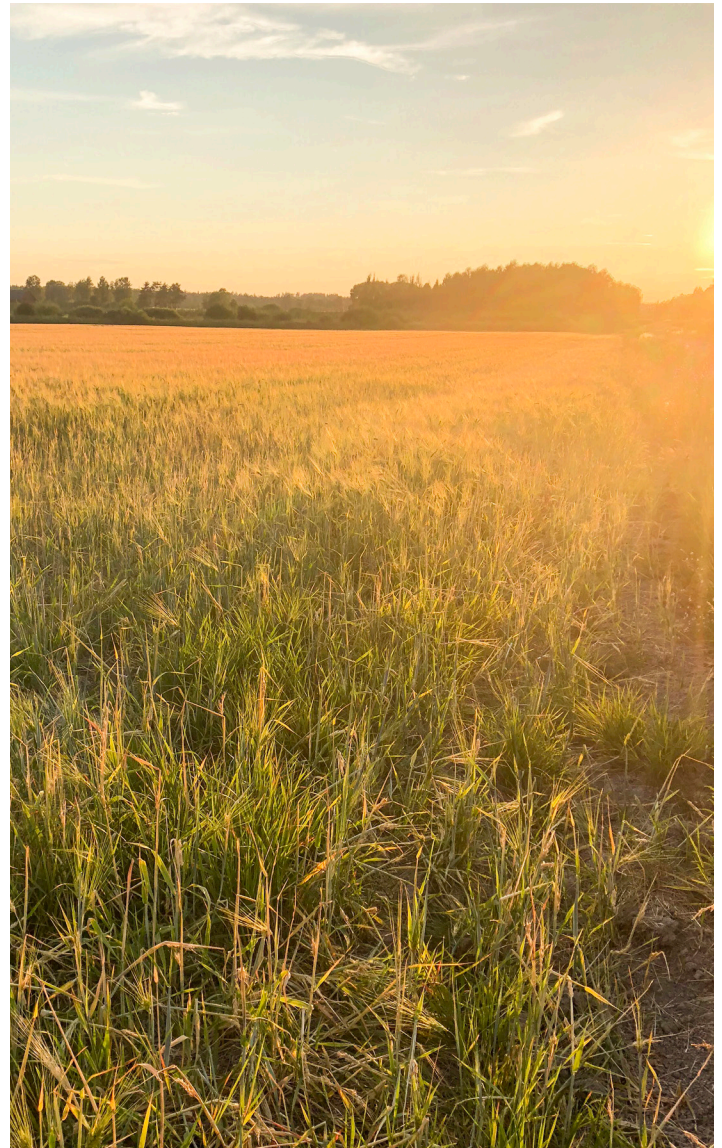
A caution included in the contingency points out that if the buyer does not terminate the offer and moves forward, then the buyer is agreeing

to continue participation in all of the programs listed by the seller. If the buyer fails to do so, the buyer must reimburse the seller for any fees and penalties charged to the seller as a result of the buyer’s failure to remain in any of the programs or adhere to program guidelines and restrictions.

Lines 211-244 are slightly indented and provide short summaries of some of the more common government programs that would be listed by a seller in the Government Programs contingency including the Managed Forest Land program, use value assessments, Farmland Preservation, the Conservation Reserve Program and shoreland zoning ordinances. The language and links in these sections were refreshed and updated to reflect 2021 rather than 2012 standards and laws.

Managed Forest Land Contingency

Wisconsin’s Managed Forest Land (MFL) program, referenced on lines 211-221 of the WB-12, is a landowner incentive program that encourages sustainable forestry on private woodlands in Wisconsin. Wis. Stat. § 710.12 requires sellers to provide buyers with a written disclosure, no later than 10 days after acceptance of the offer, if the property will continue to be subject to an MFL order after the sale. This disclosure explains that MFL orders remain in effect for 25 or 50 years



and that the Department of Natural Resources Division of Forestry monitors MFL management plan compliance. In addition, the seller must provide Division of Forestry contact information and include the mandatory language that appears on lines 218-220 of the WB-12: “Changes you make to property that is subject to an order designating it as managed forest land, or to its use, may jeopardize your benefits under the program or may cause the property to be withdrawn from the program and may result in the assessment of penalties.” This provision automatically accomplishes the required disclosure.

① MORE INFO

Additional MFL information may be found at <https://dnr.wi.gov/topic/ForestLandowners/mfl/index.html>.

Use-value assessments

Under the use-value assessment method referenced on lines 222-226 of the WB-12, Wisconsin farmland is assessed for property tax purposes based upon its agricultural productivity rather than its fair market value or potential for development. If the use of land assessed under the use-value system is changed to a nonagricultural use, the then-current owner must pay a “conversion charge” (previously referred to as a penalty). In other words, a conversion charge is assessed when agricultural land is converted to a residential, commercial or any other nonagricultural use. The statutes do not define when a “change of use” occurs. Rather, the local assessors are given the authority to make this determination.

Wis. Stat. § 74.485(7) requires sellers to notify the buyer:

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

The seller is prompted to make these disclosures in the RECR forms and in the Government Programs contingency.



REALTOR® Practice Tip

Licensees should make sure they are always using the most current RECR forms and encourage sellers to provide information about use-value status and potential conversion fees under Wisconsin's use-value law. Buyers should be made aware that, if the use of the property changes to a non-agricultural use, they may be subject to conversion fees.

Farmland Preservation

Wisconsin's Farmland Preservation Program helps farmers and local governments preserve farmland, protect soil and water, and minimize land use conflicts. Through participation in the program counties develop farmland preservation plans, local governments can develop farmland preservation zoning districts, landowners and local governments together form Agricultural Enterprise Areas and landowners meet soil and water conservation standards to become eligible to claim an income tax credit. As indicated on lines 227-230, conversion fees apply under Wis. Stat. Chapter 91 when a farmland preservation agreement is terminated early or when land is released from a farmland preservation agreement.

① MORE INFO

See the Wisconsin Farmland Preservation Program brochure at <https://datcp.wi.gov/Documents/FPPBrochure.pdf> and Farmland Preservation Agreements resources at https://datcp.wi.gov/Pages/Programs_Services/FPAgreements.aspx.

Conservation Reserve Program

The Conservation Reserve Program (CRP) is a voluntary program administered by the U.S. Department of Agriculture's Farm Service Agency. CRP helps agricultural producers use environmentally sensitive land for conservation benefits. As indicated on lines 231-236 of the WB-12, CRP contracts run for 10 to 15 years, and owners receive an annual rent plus up to one-half of the cost of establishing permanent ground cover. Removing lands from a CRP in breach of a contract can be quite costly. If an owner subject to a CRP contract sells the land and the buyer does not continue in the program, the seller forfeits all rights to future payments and must refund all payments already received, plus interest, and pay liquidated damages in the amount of 25% of the annual rent rate.

Shoreland Zoning Ordinances

Under Wis. Admin. Code Ch. NR 115, a property owner often must agree to perform some type of mitigation in exchange for exceeding impervious surface limits or expanding a nonconforming structure that is located between 35 and 75 feet from the water. The mitigation plan must be recorded with the register of deeds to make sure subsequent property owners are aware of it and will comply with terms and conditions of the plan, if applicable (e.g., do not mow the grass within 35 feet of water). This is what is referenced on lines 237-244 of the WB-12. Mitigation may include activities such as restoring the primary buffer (the area between the water and 35 feet from the water) to its natural state, removing a nonconforming structure or reducing some existing impervious surfaces. In most cases, the mitigation plan will apply to all future owners of the property.

① MORE INFO

For more information on shoreland zoning regulations, see “The Top 10 Things REALTORS® Should Know about the New Shoreland Zoning Regulations” in the May 2010 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/May10/ShorelandZoningRegulations.

Fences

Lines 245-248 remind the parties that Wisconsin fence law, in Wis. Stat. § 90.03, requires that when one or both occupants of adjoining lands use the land for farming or animal grazing, a partition fence must be maintained in good repair between the adjoining lands. Each owner is responsible for one-half of the fence.

Document Review Contingency

The Document Review contingency on lines 253-274 of the WB-12, similar to the provision in the WB-15 Commercial Offer to Purchase, gives the buyer the opportunity to request a wide range of paperwork. What a buyer selects will depend upon the buyer's planned use. If the sale of an operating farm is viewed as the sale of a business, then

soil analysis, acreage calculations and copies of government program contracts, if available, would be of interest to the buyer. The same would be true for regarding the seller's practices with respect to animal feedlots; livestock waste storage; land spreading of livestock waste; fertilizer application, handling and storage; pesticide application, handling and storage; and irrigation. Documents may also be requested regarding entity authorization, inventory, UCC lien records, acreage allocation, financial records, transfer of development rights, and farm contracts, leases and permits.

Zoning Classification Confirmation

The 2012 WB-12 had an item that appeared on line 53 where the seller represented the zoning of the property being sold. This was removed for 2021. There are sources for finding the applicable zoning such as on the MLS and if the buyer needs to confirm zoning, they should instead use the Zoning Classification Confirmation contingency on lines 275-280. Knowing the zoning classification is not the same as verifying the zoning classification with municipal officials and confirming the zoning will accommodate the buyer's plans. If that is not the case, the buyer may terminate the offer.

Land Use Approval/Permits

The contingency on lines 281-286 of the revised farm offer is the same as the provision in the vacant land offer. This contingency may be selected if the buyer anticipates making changes to the use of the property. The buyer has the opportunity to secure any rezoning, conditional use permits, licenses and variances, as well as building, occupancy or other permits needed for the buyer's proposed use stated within the provision at line 284.

Map of the Property

The updated Map of the Property contingency on lines 287-304 of the WB-12 now has a 30-day default with regard to the deadline for the delivery of the surveyor's map dated after the date of acceptance of the offer. Revisions were also made with regard to the implementation mechanism. The buyer's deadline for providing a notice objecting to the map is five days after the deadline for delivery of the map, and new language applies if the seller fails to timely deliver the map described in the contingency:

Once the deadline for delivery has passed, if Seller was responsible to provide the map and failed to timely deliver the map to Buyer, Buyer may terminate this Offer if Buyer delivers a written notice of termination to Seller prior to Buyer's Actual Receipt of said map from Seller.

This language is similar to the Seller Termination provision under the Financing Commitment Contingency.

Grouping of Well Water, Well System, POWTS and Environmental Site Assessment contingencies

The contingencies for Well Water Testing, Well System(s) Inspection, Private Sanitary System(s) (POWTS) Inspection and Environmental Evaluation are grouped together and share the same Contingency Satisfaction / Right to Cure subsection on lines 400-419. A separate election is made in each individual contingency regarding whether the seller will have a right to cure.

This configuration creates a uniform process for the implementation

of these different contingencies once the deadline for delivery or receipt of the respective applicable report(s) is reached. The buyer then has five days in which to deliver a Notice of Defects to the seller stating why the respective contingency standard has not been met, along with a copy of the respective report. The right to cure has been modeled from the procedure used in the inspection contingencies in other offers and will hopefully be familiar to licensees and the parties.

Well Water Testing Contingency

In the Well Water Testing Contingency on lines 320-332 of the farm offer, the offer is contingent upon the buyer receiving reports indicating safe water results. The parties indicate the deadline on line 320, that is, the time by which the buyer should receive the test results from a state-certified or other qualified lab indicating the substances are at safe levels.

The Well Water Contingency automatically calls for bacteria (total Coliform and E.coli), nitrate and arsenic testing. A blank line is provided to add any other substances the water should be tested for. The parties are directed on line 327 to the DNR website at www.dnr.wi.gov/topic/Wells/waterQuality.html for information regarding other contaminants that they may wish to test for. In some cases, FHA, VA and other government loans may require well water testing for lead, nitrites and other substances.

The default on line 328 states the buyer is responsible to obtain and pay for the reports. The parties specify in this contingency whether the seller has the right to cure on line 331. The parties are then referred to the Contingency Satisfaction/Right to Cure provisions on lines 400-419.

Well System(s) Inspection Contingency

If the Well System(s) Inspection Contingency on lines 333-345 is selected, the offer is contingent upon the buyer receiving, by the stated deadline, a current report from a licensed well driller or a licensed pump installer competent to inspect well systems, as required under Wis. Stat. § 280.30(3). The well inspection report must indicate that the well and pressure systems conform to code. The licensed well professional will conduct a visual inspection of the well and pressure systems and look for specific features that do not comply with the state well regulations in Wis. Admin. Code chapter NR 812. The inspector will record their observations on a required inspection form (DNR Form #3300-221). Wells are generally required to meet the regulations in effect at the time the well was constructed or installed, but there are some exceptions, so not all wells are "grandfathered." The inspector will search for any other wells that may be on the property, even if they are unused. The inspector is required to inspect and complete a separate report form for each well on the property.

Although not required, the inspector may note observations regarding the condition, capacity or performance of the well and pressure system, including well or pump yield. The party ordering the well inspection(s) should request that information on the well capacity and water yield be included if the box on line 340 has been checked.

Line 342 indicates that *"If the well is inspected, the Well Water Testing Contingency at lines 320-332 is automatically included in this Offer."*

The default on lines 338-339 states the buyer is responsible to obtain and pay for the reports. The parties specify in this contingency whether the seller has the right to cure on line 344. The parties are then referred to the Contingency Satisfaction/Right to Cure provision on lines 400-419.

REALTOR® Practice Tip

If the parties want to have the well inspected and include a Well System(s) Inspection Contingency in the offer, the parties should also include the Well Water Testing Contingency because the water is going to be tested for Coliform bacteria, nitrate and arsenic regardless of whether the parties make that request in the offer. Wis. Admin. Code § NR 812.44 (4) provides that any property transfer well inspection shall include the collection of water samples to be tested for Coliform bacteria, nitrate and arsenic for each potable and each nonpotable well on the property.

① MORE INFO

For more information about the well inspection and water testing rules, see:

- DNR website at <https://dnr.wisconsin.gov/topic/Wells/RETransfer.html> and <https://dnr.wisconsin.gov/topic/Wells/privateWellTest.html>.
- DNR Property Transfer Well Inspections fact sheet at <https://dnr.wi.gov/files/pdf/pubs/dg/DG0091.pdf>.
- "Property Transfer Well Inspections: What every REALTOR® needs to know about new DNR well water testing regulations" in the November 2014 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov14/WellWater.
- "The Best of the Legal Hotline: Well, Well, Well! Practical tips for putting the new well inspection rule into practice" in the November 2014 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov14/Hotline.

Abandoned Well(s)

A new provision in the updated WB-12 is found on lines 346-350:

ABANDONED WELL(S): If Seller has notice or knowledge of an abandoned well(s) on the Property, or any other well(s) required to be closed per applicable law, or Seller is made aware of such a well(s) prior to closing, Seller shall, prior to closing, close the well(s) at Seller's expense and provide Buyer with documentation of closure in compliance with applicable codes or provide Buyer with documentation evidencing the well(s) was previously closed in compliance with the applicable codes in effect at the time of closure.

If the seller has notice or knowledge of, or learns about an abandoned well on the property, the seller is required to close the well. The seller also is to provide the buyer with documentation pertaining to wells closed earlier.

① MORE INFO

See the DNR publication "Answers to Your Questions on Well Filling and Sealing" at <https://dnr.wi.gov/files/pdf/pubs/DG/DG0016.pdf>. Also see the well filling and sealing information at <https://dnr.wisconsin.gov/topic/Wells/FillingSealing.html>.

POWTS

The Private Sanitary System(s) (POWTS) Inspection Contingency on

lines 351-366 of the revised WB-12 makes the offer contingent upon the buyer receiving, by the deadline indicated at line 352, a current written report regarding the Private Onsite Wastewater Treatment System(s) or POWTS on the property. The report must be 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 professional's report should 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.

Wis. Admin. Code § SPS 383.03 provides that an existing POWTS installed prior to July 1, 2000, must conform to rules in effect when it was permitted and installed. New POWTS, on the other hand, must conform to current code. A POWTS that does not conform to code (time of installation or current) could be subject to repair or removal if discovered by the local code administrator. Indicating the POWTS is not disapproved for current use and is hydraulically functional and structurally sound is a statement of hydraulic functionality, that the POWTS works in a suitable manner. Unless the inspector is the county sanitarian, the inspector would not have the authority to disapprove the system.

Although Wis. Admin. Code § SPS 383.03 continues to require that the POWTS maintain a minimum vertical separation from limiting conditions such as groundwater or bedrock, that is not a component of the standards the inspector is asked to address in the contingency in the 2021 WB-12. The standard for operating POWTS is a three-foot separation, except a POWTS installed before December 1, 1969, is permitted to have only a two-foot separation. This potentially can be determined in some cases from the written records or by having a certified soils tester make soil borings to determine separation. In other cases where the system is old and deep in the ground, the inspectors report they cannot determine vertical separation without excavation, which they do not do. As a result, the inspectors generally do not include any reference to vertical separation in their reports unless it is indicated in the written records maintained by the counties. There are no statutes or rules setting standards for POWTS inspections and inspection reports, as there are for wells and well water, so POWTS inspectors have discretion as to the content of their reports and the standards they employ.

If the POWTS does not have the required vertical separation there are risks that the POWTS will contaminate the groundwater, the owner's well or wells on neighboring properties, or the owner will be required to replace the system should the county inspect in conjunction with the owner's request for improvements or the county's efforts to establish missing records and it is discovered the POWTS is noncompliant.

The POWTS contingency includes a note on lines 357-359 stating:

This may include a records review to confirm installation date and specifications observed by the installer. Different professionals may be needed to inspect different system components. This contingency does not authorize soil testing.

If required by the inspector, the POWTS is to be pumped at time of inspection. The default on lines 362-363 states the buyer is responsible to obtain and pay for the reports, including pumping the POWTS if requested by the inspector. The parties specify in this contingency whether the seller has the right to cure on line 364. The parties are then referred to the Contingency Satisfaction/Right to Cure provision on lines 400-419.

① MORE INFO

See “Is the Grass Greener over your Septic System?” at <https://dsps.wi.gov/Documents/Programs/POWTS/GrassGreener.pdf> and the October 2014 *Legal Update*, “WRA Addendum A and Addendum B Revisions,” at www.wra.org/LU1410.

Environmental Evaluation Contingency

Because farmers have been notorious over the years for “burying stuff” such as containers of toxic chemicals and other hazardous substances on the farm, often in one or more informal “dumps,” the WB-12 includes an Environmental Evaluation Contingency on lines 367-381. This provision provides the framework and standards for a Phase I Site Assessment. The components of an Environmental Site Assessment are described in the definition directly following the contingency at lines 382-399. An “environmental site assessment,” also known as a “Phase I Site Assessment,” typically includes: (1) an inspection of the property; (2) a review of the ownership and use history of the property, including a search of title records going 80 years back; (3) a review of any historic and recent aerial photographs of the property; (4) a review of environmental licenses, permits or orders issued for the property; (5) an evaluation of the results of any environmental sampling and analysis that has been conducted previously; and (6) a review to determine if the property is included on any of the lists of sites or facilities considered to pose a threat to human health or the environment. This includes any of the written compilations of sites or facilities considered to pose a threat to human health or the environment including the National Priorities List, the Department of Nature Resources’ (DNR) Registry of Waste Disposal Sites, the DNR’s Contaminated Lands Environmental Action Network, and the DNR’s Remediation and Redevelopment (RR) Sites Map including the Geographical Information System (GIS) Registry and related resources.

Any Phase I Environmental Site Assessment must comply with generally recognized industry standards such as the current ASTM E1527-05 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, and state and federal guidelines, as applicable. Unless otherwise agreed, an Environmental Site Assessment includes the review of historical and governmental records; inspection of the property and adjacent sites; interviews with owners, occupants and local government officials; and evaluation and report preparation, but does not include subsurface testing of the soil or groundwater or other testing for pollution.

The default on line 370 states the buyer is responsible to pay for the report of the environmental consultant they select. The parties specify in this contingency whether the seller has the right to cure on line 380. The parties are then referred to the Contingency Satisfaction/Right to Cure provision on lines 400-419.

① MORE INFO

For Environmental Site Assessment overview information from the DNR, visit <https://dnr.wisconsin.gov/topic/Brownfields/ESA.html> and <https://dnr.wi.gov/files/pdf/pubs/am/am465.pdf>. For information about selecting an environmental consultant, see <https://dnr.wisconsin.gov/topic/Brownfields/Select.html>.

Contingency Satisfaction / Right to Cure

When the parties have selected the contingency for Well Water Testing, Well System(s) Inspection, Private Sanitary System(s) (POWTS) Inspection or Environmental Evaluation, on lines 320-381, the Contingency Satisfaction/Right to Cure provision is found on lines 400-419. In each contingency the buyer has five days after the deadline for delivery or receipt of the respective applicable report(s), to deliver to the seller a copy of the written inspection/testing report(s) and a written notice listing the defect(s) identified in those report(s) to which the buyer objects or stating why the report(s) do(es) not satisfy the standard set forth in the contingency(ies) selected. As is the case in most other inspection and testing contingencies, a proposed amendment is not a Notice of Defects and will not satisfy this notice requirement. The seller’s right to cure is substantially the same as the provision in the general inspection contingency found in other offers. One difference is that a POWTS defect may be cured only by repairing the current POWTS or by replacing the current POWTS with the same type of system that meets the standard stated in the Private Sanitary System(s) (POWTS) Inspection Contingency, unless otherwise agreed to by the parties in writing.

Inspection Contingency and Radon Testing Contingency

The Inspection Contingency on lines 420-453 and the Radon Testing Contingency on lines 454-472 in the 2021 farm offer are the same as the contingencies in the WB-11 Residential Offer to Purchase and other approved offers. Buyers who are looking for inspections of the barn and other accessory structures or features may be able to list such items in the Inspection Contingency in the blank lines on lines 424-425 for component inspections or may prefer to include an additional specific contingency for the inspection of farming features and buildings.

Other standard provisions

The Financing Commitment Contingency, as well as the provision for Seller Financing and the Appraisal Contingency are the same as the contingencies in the WB-11 Residential Offer to Purchase and other approved offers. The same is true for the Closing of Buyer’s Property Contingency, the Bump Clause, the Secondary Offer and the Closing Prorations provisions.

Title Evidence

Small changes were made in the Title Evidence section on lines 603-649 in the WB-12. The subsections for Delivery of Merchantable Title and Title Not Acceptable for Closing are the same as the provisions in the vacant land and commercial offers.

Line 628 gives the buyer the ability to choose the deadline for the delivery of the title commitment by inserting a specific number of days after acceptance (the default is 15 days). Since buyers purchasing farms may wish to learn the status of the title before investing money in inspections and testing, or may intend to develop all or part of the land, this revision gives the buyer’s attorney or the buyer a longer period to review the title commitment and address any title concerns.

The Title Not Acceptable for Closing subsection on lines 632-639 has blank lines provided for the deadlines for the buyer’s notice to the seller regarding any title objections and the seller’s response. If the buyer gives notice of an objection to title, the seller will have the specified

number of days (15 days is the default) from the buyer's delivery of the notice to deliver notice to the buyer stating the seller will the remove the objections by closing. If the seller is unable to remove said objections, the 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 the buyer does not waive the objections, the buyer delivers notice of termination and the offer becomes null and void. This allows the buyer to work through title concerns early on rather than waiting until the last minute just before closing.

Other provisions the same

As the finishing touch, the provisions near the end of the WB-12 farm offer are basically the same as in other updated offers. This includes the provisions for Definitions, Inclusion of Optional Provisions, Property Dimensions and Surveys, Distribution of Information, Maintenance, Property Damage Between Acceptance and Closing, Buyer's Pre-Closing Walk-through, Occupancy, Default, Entire Contract, Notice about Sex Offender Registry, FIRPTA, Delivery of Documents and Written Notices, Personal Delivery/Actual Receipt and Addenda. The farm offer includes signature blocks for two buyer entities and two seller entities as well as individuals because many farms are owned by multiple entities.

① MORE INFO

Changes to the basic transactional provisions of the offer were made in the WB-11 Residential Offer to Purchase (mandatory use date 1-1-2020), and those changes were refined in the second 2020 WB-11. All applicable basic transactional provisions in the WB-11 are found in the revised WB-12. Those basic WB-11 changes are discussed in the resources found at www.wra.org/formsupdate. Specifically see the July 2020 *Legal Update*, "WB-11 Residential Offer to Purchase – Take 2," at www.wra.org/LU2007, the September 2019 *Legal Update*, "WB-11 Residential Offer to Purchase – 2020 Edition – Part 1," at www.wra.org/LU1909, the October 2019 *Legal Update*, "WB-11 Residential Offer to Purchase – 2020 Edition – Part II" at www.wra.org/LU1910 and the November 2019 *Legal Update*, "WB-11 Residential Offer to Purchase – 2020 Edition – Part III" at www.wra.org/LU1911.

① MORE INFO

For further discussion of farm issues, see the October 2011 *Legal Update*, "WB-12 Farm Offer to Purchase – 2012 Revisions," at www.wra.org/LU1110 and "New Flexible Farm Offer Fits All" in the November 2011 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov11/FarmOffer.

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