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Legal Update

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Using Land Contracts and Leases with Options

The tightened underwriting requirements imposed after the sub-prime hey day of recent years are making it difficult for some buyers to qualify for financing. Accordingly, sellers may more frequently consider offering financing to buyers. A seller who is willing to finance the sale of his or her real estate typically receives installment payments over time rather than the entire purchase price outright at closing. Such a seller has a choice of two common methods of securing the unpaid balance of the purchase price:

- The seller may loan the buyer the money needed for the purchase and receive a promissory note and mortgage, or
- The seller and the buyer may enter into a land contract.

The economic essence of the two methods is the same: a seller becomes a secured creditor for the unpaid installments, and the sold property provides the security.

A lease with an option to purchase is another possibility worth seller consideration if the buyer needs some time to get his or her financial house in order and qualify for financing.

This *Legal Update* examines the use of land contract financing and leases with options to purchase, starting with a comparison of land contract and seller mortgage financing, and the advantages and disadvantages for the parties. This discussion reviews the remedies available under these

two types of seller financing. The *Update* then provides tips for drafting an offer to purchase for a land contract and the land contract itself, as well as pointers for the listing broker relative to marketing and commissions.

Turning to the “rent to own” model, the *Update* reviews the definition of an option, distinguishing it from a right of first refusal. The *Update* also overviews the general legal principles that control a REALTOR®’s use of this technique. The *Update* then provides tips for drafting an offer to purchase for a lease with option and the WB-24 Option to Purchase, as well as pointers for the listing broker relative to authority to negotiate a lease, marketing and commissions. The suitability of these financing options within the financing contingency of the offer to purchase is also covered. Discussion is supplemented with Wisconsin REALTORS® Association Legal Hotline questions and answers concerning land contracts and leases with options.

Land Contract Versus Seller Mortgage Financing

Either a land contract or a mortgage may be used when the seller finances the buyer’s purchase of the property. With a land contract, the buyer pays the seller in installments and receives a deed when all payments have been made rather than paying the entire purchase price at closing. In other words, when the seller enters into a land contract with the buyer, the seller reserves title to the property as security.

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Alternatively, the seller can loan the money the buyer needs to pay the purchase price as a private lender and receive a promissory note and mortgage from the buyer to evidence the debt and secure the payments on the note. With either a land contract or a mortgage from the seller, the buyer will pay the seller installment payments on the purchase debt. The difference is that the buyer receives a deed and has title to the property if the seller provides a mortgage loan, but the buyer does not have title – the buyer has the vendee's or purchaser's equitable interest – with a land contract.

Seller's Perspective

The seller may be able to attract a broader range of potential buyers by offering land contract financing. Land contract financing allows the seller to report interest income and capital gains on his or her income tax returns over the term of the land contract by using the installment method under the Internal Revenue Code. This may be a good investment for the seller if the interest rate compares favorably to market rates and if the seller does not need the sale proceeds to immediately pay off any mortgages or liens on the property.

Enforcement of a land contract is somewhat easier than enforcement of a mortgage, but the seller assumes the risk that he or she will have to take back the property and resell it. However, if the buyer has only minimal down payment money or other financial constraints, land contract financing may be the only way to put the sale together.

Land Contract Remedies

When a buyer falls behind on his or her land contract payments, the following are possible remedies that the seller may consider in conjunction with the seller's legal counsel.

Voluntary Termination

This typically will involve the buyer

quit claiming the vendee's interest in the property back to the seller. The seller first should confer with legal counsel to examine any liens that may have attached to the buyer's interest in the property to determine if they will survive and continue to apply to the property after the buyer quit claims the buyer's interest back to the seller. If the buyer has significant liens, the seller may choose to bring a foreclosure action in court in order to remove the liens from title.

If the buyer is going to voluntarily deed the property back to the seller, good faith dealings are required. The transfer back to the seller must be voluntary and for adequate consideration. The consideration in a voluntary termination is that the seller forgives the buyer's past-due and remaining contract obligations. The law does not permit the seller to take advantage of the buyer's economic circumstances – this must be a solution to which the buyer willingly and freely agrees because the buyer will lose the property and the payments made so far. The seller's attorney will likely prepare an affidavit for the buyer's signature stating the circumstances of the conveyance: that the transfer is voluntary and done in good faith and upon the advice of the buyer's attorney.

Quiet Title Action

The seller may declare the land contract to be at an end and file a quiet title action in court to remove the land contract as a cloud on the seller's title to the property. This remedy generally is only used if the buyer's equitable interest in the property is insignificant. This action may be faster than a foreclosure or strict foreclosure action because there is no redemption period. It may be useful in circumstances where the property has been abandoned or the buyer has left town. The seller usually keeps all payments the buyer has made up to that point.

Suit for Unpaid Purchase Price

The seller can sue the buyer for the money owed and get a money judgment. The acceleration clause in the Wisconsin State Bar Form No. 11 Land Contract makes it possible for the seller to declare the entire outstanding balance to be immediately due and sue for it if the buyer defaults on just one installment payment. This remedy allows the seller to quickly obtain a money judgment against the buyer. However, accelerating the debt and suing for the money does not take advantage of the seller's remedies involving the property.

Specific Performance or Land Contract Foreclosure

The seller also can sue for foreclosure by sale, usually called "specific performance." This is similar to a mortgage foreclosure. The foreclosure terms are stated in the land contract. Generally, any significant breach, such as failing to make an installment payment on time or damaging the property in a way that reduces its value, can lead to foreclosure. Based upon the acceleration clause in the land contract, the seller files suit for the entire outstanding balance on the land contract. The court establishes the redemption period in the foreclosure judgment. The court has a certain amount of discretion in fixing the redemption period, which may be as short as two months. If the buyer does not pay the balance, the sheriff sells the property at public sale. If the property does not bring in as much as the buyer owes, there may be a deficiency judgment against the buyer for the unpaid balance. The costs of the land contract foreclosure action will probably equal those of a mortgage foreclosure, but the time required will usually be shorter than the time needed for a mortgage foreclosure.

Strict Foreclosure

It may be more likely that a land contract seller will ask for a strict

foreclosure, something he or she cannot do if a mortgage is used. In a strict foreclosure, the seller elects to rescind the contract, waiving his or her rights to a deficiency judgment for the unpaid balance due on the contract. Instead, the seller gets his or her property back and keeps the payments the buyer has already made. There is no sheriff's sale. The costs may be less than those for a mortgage foreclosure and the time required to complete the strict foreclosure is usually shorter than the time required by law for a mortgage foreclosure.

Wis. Stat. § 846.30 requires that the circuit court grant a redemption period of at least seven working days from the date of a judgment of strict foreclosure to all land contract purchasers. In addition, no strict foreclosure is final until the court enters an order, separate from the judgment and after the redemption period has expired, which confirms that the buyer has not redeemed. Within the redemption period fixed by the judge, the buyer must pay the entire balance to save his or her equity or lose all of his or her interest in the property.

Mortgage Remedies

The seller with a mortgage may sue for a money judgment, just as with a land contract. Practically all mortgages permit acceleration of the debt upon default by the buyer.

Mortgage Foreclosure

Foreclosure by sale under Wis. Stat. chapter 846 is the required remedy on a defaulted mortgage. Unlike a land contract redemption period, the period within which the buyer can pay the mortgage debt is fixed by legislation, not the judge. For farms and owner-occupied residences, the redemption period allowed is at least one year from entry of judgment unless the mortgage holder waives any deficiency judgment, in which case the period is reduced from one

year to six months. For commercial property, the redemption period is six months, but this may be reduced to three months if the mortgage holder waives the deficiency judgment. When a mortgage holder waives the deficiency judgment, he or she is taking the chance that the sale of the property will net enough money to pay off the mortgage debt. If it does not, the mortgage holder cannot obtain a judgment against the buyer for the remaining amount due (the deficiency).

For further discussion of mortgage foreclosures, see *Legal Update 99.05*, "Mortgage Foreclosures," online at www.wra.org/LU9905.

Buyer's Perspective

For the buyer, the land contract may be the only financing method available depending upon economic conditions, the type of property or the buyer's creditworthiness. The land contract may permit a small down payment and a low interest rate not offered in other means of financing. Often, a land contract will have a short term and a lump-sum (balloon) payment of the balance due at the end of the land contract term. The theory is that the buyer's equity will build up to a point by then where he or she can obtain conventional mortgage financing and pay the seller in full.

The flexibility of a land contract allows the parties to structure payments in a manner to accommodate the interests of each party, permitting varying payment amounts or interest-only payments. The buyer can avoid closing costs such as loan fees, service charges and mortgage insurance. The buyer also may ask to have a clause inserted in the land contract providing that the property will be deeded to the buyer, who will give a mortgage back, once installments have been paid totaling a certain percentage of the purchase price. A land contract may be particularly attractive to a buyer who is

purchasing vacant land for future use.

The primary disadvantage of a land contract for the buyer is the risk of losing the property and all payments made up to that point if the buyer defaults. The redemption periods in land contract foreclosures and strict foreclosures may be relatively short, affording the buyer little opportunity to save his or her investment.

From the buyer's perspective, seller mortgage arrangement seems best. There is not only the legislatively-assured "redemption" period in case he or she gets into financial difficulties and foreclosure is necessary, but there is also what one might call the psychology of the real estate market. If the buyer wants to sell, the fact that he or she has a deed giving "legal title" is psychologically important, even though the real estate is heavily mortgaged. The buyer "feels" better off than if he or she owns a buyer's equitable interest in a land contract.

Legal and Equitable Interests in Land Contract Transactions

In a land contract, the buyer is bound to make payments and the seller is bound to deed the property to the buyer when all payments have been made. If the seller refuses to deliver the deed, the buyer can sue for "specific performance." That is, the buyer can compel the seller to do what the seller promised, namely, to deliver the deed. Because this extraordinary remedy of specific performance is available to the buyer, Wisconsin and other state courts generalize this result and say that the buyer becomes "equitable owner." If the buyer/equitable owner dies before the contract is performed, his or her interest is treated as real estate (not personal property) in the buyer's estate.

Mueller v. Novelty Dye Works, 273 Wis. 501, 78 N.W.2d 881 (1956), is the leading case in

Wisconsin regarding equitable conversion in land contracts. The buyer under a land contract has equitable ownership of the property while the seller retains legal title as collateral for the balance due on the land contract. As a result of the "equitable conversion," judgments against the seller do not attach to the property after the execution of the contract. Thus the purchaser is protected from the seller's creditors and liens. At the same time, equitable conversion permits liens against the buyer to attach to the property, a point which must be remembered by a seller considering a voluntary deed back from the buyer in the case of buyer default.

Drafting an Offer for Land Contract Financing

The REALTOR® has a buyer-client who wants to write an offer to purchase a property under a land contract. What is the procedure for drafting an offer calling for land contract financing?

Drafting these offers may at times be challenging because the offer generally needs to establish all of the terms and conditions that will appear in the

land contract. In fact, some parties and licensees fill out a land contract form (except for the signatures) and attach it to the offer as an addendum to make sure that all terms and conditions have been agreed upon in advance.

Some procedural guidance is provided in some of the DRL-approved offer to purchase forms. The 1999 WB-12 Farm Offer to Purchase and the 2001 WB-16 Offer to Purchase – Business With Real Estate contain substantially the same land contract provision:

"LAND CONTRACT: If this Offer provides for a land contract both Parties agree to execute a State Bar of Wisconsin Form 11 Land Contract, the terms of which are incorporated into this Offer by reference. Prior to execution of the land contract Seller shall provide the same evidence of merchantable title as required above and written proof, at or before execution, that the total underlying indebtedness, if any, is not in excess of the proposed balance of the land contract, that the payments on the land contract are sufficient to meet all of the obligations of Seller on the underlying indebtedness, and that all creditors

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whose consent is required have consented to the land contract sale. Seller may terminate this Offer if creditor approval cannot be obtained. Seller may terminate this Offer if Buyer does not provide a written credit report which indicates that Buyer is credit worthy based upon reasonable underwriting standards within 15 days of acceptance. Buyer shall pay all costs of obtaining creditor approval and the credit report. Seller shall be responsible for preparation and the expense of preparation of all closing documentation, including the land contract.”

This provision, together with the financing contingency provisions, is fairly thorough in covering most of the important considerations involved with land contract financing in a farm or business transaction. In offers without preprinted land contract provisions, many of these points will have to be specifically and separately addressed. There also may be other information, in addition to that which is included in the preprinted offer form, that should be covered to enable the parties to reach a complete agreement with regard to financing.

 **Key Point:** The key when drafting the offer to purchase for a land contract transaction is to have the parties agree on all of the terms and conditions that will be needed to complete the State Bar of Wisconsin Form 11 Land Contract. Some of the basic points that need to be covered include:

1. Purchase price, down payment and land contract balance;
2. Interest rate, contract term and amortization schedule;
3. Schedule and amounts of installment payments;
4. Maturity date;
5. Under what conditions, if any, prepayment will be allowed;
6. Payment of property taxes and insur-

ance, with or without an escrow;

7. Default grace period provisions;
8. Buyer’s creditworthiness and financial status;
9. Status and disposition of any underlying mortgage;
10. Purchase price modifications;
11. Interest rate adjustments on any underlying mortgage;
12. Buyer’s rights upon seller default on any underlying mortgage; and
13. Document preparation responsibilities and costs.

The terms of payment are arguably the most important part of the land contract. By varying interest rate, term, installment payments and the amortization, the installment payments can pay off all of the balance (like a mortgage); pay off only part of the balance, leaving a balloon payment due at the end of the land contract term; call for interest-only payments; or vary the amounts and/or timing of payments from year to year. In other words, there is a great deal of flexibility in setting the payment terms.

Another critical point to address is any underlying mortgage on the property. If the mortgage will remain on the property, the mortgagor usually will have to consent to the seller’s land contract sale – failure to obtain this consent may lead to acceleration of the mortgage with the entire balance outstanding becoming immediately due and payable. The underlying mortgage may also have an adjustable interest rate that may suggest to the parties that corresponding changes periodically need to be made to the land contract. It is also important for the buyer to be able to somehow monitor the activity on the underlying mortgage, particularly if the seller is missing payments or is otherwise in default. The buyer may want to have the right to make his or her payments directly to the mort-

gagee in order to help avoid foreclosure or other drastic remedies that would jeopardize the buyer’s interest.

REALTOR® Practice Tips:

Land contract terms and conditions may be addressed in the Additional Provisions sections of the offer forms or in addenda. One approach to drafting an offer for a land contract is to complete a Form 11 Land Contract (except for signatures) and use it as an addendum to the offer. Another approach is to use the WRA Land Contract Rider addendum. Examples of the other provisions that may be used can be found in the Wisconsin Real Estate Clauses – Contingencies and Other Standard Provisions book (Minter & Staff, 2000) and on pages 14-15 of *Legal Update 01.01*, “Land Contract Financing,” online at www.wra.org/LU0101.

Drafting the Land Contract

A licensee with a broker’s license may draft a State Bar of Wisconsin Form 11 Land Contract because it has been approved by the Department of Regulation and Licensing for use by brokers in Wis. Admin. Code § RL 16.03(1)(a). A licensee with a real estate salesperson’s license, however, is not authorized to draft land contracts and should obtain the services of a broker or an attorney. When the deal involves a transfer by land contract and there are technical issues involved, a real estate broker would be well-advised to obtain legal advice or encourage the parties to obtain legal advice in preparing the offer to purchase as well as the land contract. Because the offer must describe the land contract terms in detail, the parties, brokers and attorneys working on the transaction must work out all of the land contract terms before the offer is accepted.

Good communication and discussion between the brokers and parties involved is also essential to help ensure that the land contract will

reflect the parties' agreement. If the offer to purchase has been carefully prepared, it will furnish all of the information needed to complete the land contract. A few basic tips for filling in a land contract include:

1. The form calls the seller the "Vendor" and the buyer the "Purchaser."
2. Check the seller's deed to see if it names him or her alone or if there is also a spouse named. If both spouses are named, the deed must name whichever spouse(s) has management and control under the Wisconsin Marital Property Act. See Pages 5-7 of the June 2007 *Legal Update*, "Ownership and Title Pointers for Brokers," online at www.wra.org/LU0706 for additional discussion of marital property rights relative to real estate titles.
3. A spouse must sign the land contract if the property is homesteaded even if the spouse is not named on title. See Page 4 of the June 2007 *Legal Update*, "Ownership and Title Pointers for Brokers," online at www.wra.org/LU0706 for additional discussion of a spouse's homestead rights.
4. The Wisconsin Real Estate Transfer Return (RETR) form must be completed for submission at the time the land contract is recorded; the transfer fee is payable at that time based upon the full sale price. If this is done, no transfer fee need be paid when the land contract has been paid off and the deed is recorded. The transfer fee is legally the responsibility of the seller. RETRs are increasingly being submitted electronically (eRETRs). Visit www.revenue.wi.gov/ust/retn3.html for information about applicable procedures for filing an RETR or eRETR in the land contract transaction.

Commissions in Land Contract Transactions

Because the seller in a land contract transaction is not receiving the

full sales price at the closing table, there can be issues with commissions that need to be worked out by the brokers and parties involved.

Listing Contract

The listing contract states, for instance, on line 54 of the 2008 WB-1 Residential Listing Contract, that "Once earned, commission is due and payable in full at the earlier of closing or the date set for closing, unless otherwise agreed in writing." The broker's commission is earned if the seller "sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property" (line 42) or if "a transaction occurs which causes an effective change in ownership or control of all or any part of the Property" (line 45). The closing for a land contract conveys the equitable ownership interest in the property, hopefully creates an enforceable contract for the sale of the property, and thus triggers the seller's commission obligation. The execution and recording of a land contract also represents an effective change in ownership or control because the land contract buyer is treated as the owner while the seller is treated as the secured party.

If the buyer's down payment under the land contract is not enough to pay all of the listing broker's commission, the seller and listing broker can look for other solutions. For example, the seller may offer to pay part of the commission after the terms of the land contract are fulfilled and the buyer obtains conventional financing. If the listing broker agrees to the seller's proposal, this should be documented in an amendment to the listing contract. Ideally, the seller would also give the broker a promissory note for the remaining commission due. Other arrangements may also be made as long as the seller and broker agree and they commit their agreement to writing.

MLS Co-Broke

If a buyer's broker or subagent worked with the buyer in the land contract transaction and procured the buyer, that cooperating broker will be entitled to any cooperative commission offered in the MLS. The closing for a land contract is a successful transaction and represents a sale of the property. A listing broker making payment arrangements with the seller needs to remember that the cooperating broker must also be paid.

Marketing Land Contract Opportunities

If the listing broker is aware at the time of the listing that the seller is willing to offer land contract financing, that fact should be documented in the listing contract. The broker should make a record of all terms and conditions that the seller knows are most acceptable or totally unacceptable to the seller, using Additional Provisions or addenda. Once the seller thinks about the parameters under which a land contract would be acceptable, the seller can also decide if the listing broker should advertise the availability of land contract financing as a mode of "special financing" on lines 19-20 of the 2008 WB-1 Residential Listing Contract.

For additional information regarding land contracts, see *Legal Update 01.01*, "Land Contract Financing," online at www.wra.org/LU0101.

Legal Hotline Questions and Answers – Land Contracts

The broker has an investor that he is working with who has procured three properties on a land contract. The investor is interested in listing the properties with the broker. Does the broker need to approach the actual holder of the original land contract and get his signature on the listing? How does the broker proceed with the sale of these properties?

The buyer's interest under a land contract is real property. The buyer has an equitable interest in the real estate, often referred to as "equitable ownership." The buyer's interest, however, is junior to and subject to the overriding security interest of the seller.

The State Bar of Wisconsin Form 11 Land Contract (2003) states that, "Purchaser may not transfer, sell or convey any legal or equitable interest in the Property, including but not limited to a lease for a term greater than one year, without the prior written consent of Vendor unless the outstanding balance payable under this Contract is paid in full. In the event of any such transfer, sale or conveyance without Vendor's written consent, the entire outstanding balance payable under this Contract shall become immediately due and payable in full at Vendor's option without notice."

Under this provision, the investor would need the seller's consent to sell his or her interest. If the investor intends to sell the properties in fee, it appears that land contract seller's consent is not mandatory provided the land contract seller is paid off in full. It may be prudent to get the land contract seller's consent in any event to make sure there are no problems. The land contract seller, however, does not need to sign the listing.

The seller is going to sell his property on a land contract. What forms does the listing agent use?

The State Bar of Wisconsin Form 11 – 2003 Land Contract is the proper form to use for the land contract. The agent may wish to review the WRA Land Contract Rider that may be used as an addendum to the offer to purchase.

A broker may fill in the State Bar of Wisconsin Form 11 Land Contract because it has been approved by the DRL for use by licensees with broker's licenses. However, please be reminded that only a licensee with

a broker's license may use State Bar forms per Wis. Admin. Code § RL 16.03(1)(a). A real estate salesperson is not authorized to draft land contracts and should obtain the services of an attorney. When the deal involves a transfer by land contract and there are technical issues involved, a real estate broker also would be well-advised to obtain legal advice or encourage the parties to obtain legal advice in preparing the offer to purchase as well as the land contract.

There is also a State Bar of Wisconsin Form 18 – Condominium Land Contract designed for use when the property sold under land contract is a condominium unit, and a Form 10 – Consumer Land Contract for use when the amount financed is not more than \$25,000 and the transaction falls under the Wisconsin Consumer Act

Can a residence be sold using a land contract and, if so, where might one find the proper forms and the legal conditions that apply?

Yes, a single-family home may be sold under a land contract. However, the seller must have no current mortgages on the property or must have the lender's consent as this would violate the "due on sale" clause in the seller's mortgage and allow the seller's lender to call the entire mortgage balance due.

There is a due-on-sale clause in the seller's mortgage. Both parties are willing to close without obtaining the lender's consent. What are the ramifications?

Unless the consent for the sale is obtained, the lender may accelerate the loan upon learning of the land contract and foreclose upon the seller. It would arguably be considered fraud against the lender and incompetent practice for a licensee to be a party to a scheme to not record the land contract in order to prevent the lender from learning of the sale (as well as jeopardizing the buyer's title). In this situation, the licensee may wish to

suggest that each party confer with his or her own attorney for advice.

The broker is listing a piece of property with a house. The seller is willing to accept a land contract sale, the terms of which are specified in the listing contract. Does the broker need to include the land contract financing terms in the MLS, property data sheet or other advertising? Or can the broker just indicate that a land contract is available?

Regulation Z (Reg. Z), also known as the Truth-in-Lending regulations, contains disclosure rules that apply to REALTORS® who advertise real estate financing terms. These rules state that if an ad contains any of the "triggering terms," then the ad must also contain (1) the dollar amount or percentage of the down payment; (2) all of the repayment terms including the number and amount of the payments as well as the period of repayment; and (3) the "annual percentage rate," using that term or the abbreviation "APR." The "triggering terms" generally include the dollar amount or percentage of the down payment, number of payments, period of repayment, amount of any payment or amount of any finance charge.

There is, however, a little-known exception to the general rule. The use of the down payment by itself in an ad does not trigger the Reg. Z disclosure requirements unless the transaction is a "credit sale." A "credit sale" will be present in residential real estate transactions only when the seller is offering seller financing and the seller has provided seller financing in residential transactions more than five times in the current or preceding calendar year.

Mortgages from banks and other lenders involve loans and not credit sales. Thus an ad by a real estate agent containing only the down payment percentage for a mortgage available through an area lender will not be subject to the Reg. Z disclosure requirements.

This down payment exception is limited to advertisements that state only the down payment amount or percentage for financing other than credit sales. If such a financing ad also includes any other triggering term, for example, the monthly payment amount, the additional disclosures required under Reg. Z would be triggered. See the Federal Trade Commission publication, "How to Advertise Consumer Credit & Lease Terms," online at www.ftc.gov/bcp/online/pubs/buspubs/creditad.shtm#generalinfo. A useful article with specific advertising examples can be found at REALTOR® Magazine Online at www.realtor.org/rmomag.nsf/pages/DoYourAdsSDenArchive1996Dec.

There is a commercial offer that was signed for a land contract sale of a small commercial property. The broker can't find any wording saying that the seller will pay the Wisconsin real estate transfer fee when the land contract is recorded. Is there a law that requires the seller to pay the fee, or is it negotiable?

Wis. Stat. § 77.22(1) provides, "There is imposed on the grantor of real estate a real estate transfer fee at the rate of 30 cents for each \$100 of value or fraction thereof on every conveyance not exempted or excluded under this subchapter. In regard to land contracts the value is the total principal amount that the buyer agrees to pay the seller for the real estate. This fee shall be collected by the register at the time the instrument of conveyance is submitted for recording."

Since August 1, 1992, the transfer fee generally is due at the time of recording the original land contract or a memorandum thereof, and not when the deed in fulfillment of the land contract is recorded. When the deed in fulfillment of the land contract is recorded, the parties should use transfer exemption number 17 on the

transfer return, which provides, "Of a deed executed in fulfillment of a land contract if the proper fee was paid when the land contract or an instrument evidencing the land contract was recorded. NOTE: If exemption 17 [§ 77.25 (17)] is entered, enter document number (Land Contract) where fee was previously paid."

The buyer does not have a down payment, so the sellers are thinking of doing a land contract because the buyer does not qualify for a loan at this point due to a divorce. The buyer, however, is a Veteran who may qualify for a VA loan in the near future. Can the sellers have the monthly land contract payments go to the listing broker to pay the commission?

The WB-1 Residential Listing Contract (2008) provides at line 54 that, "Once earned, Broker's commission is due and payable in full at the earlier of closing or the date set for closing, unless otherwise agreed in writing." The sellers and the listing broker may modify the listing contract using line-outs, Additional Provisions and/or an addendum to provide for an agreeable solution. The land contract may also be drafted to direct that the first few payments be paid to the listing broker to cover the commission due the broker. The sellers should consult with their CPA or tax advisor should they have any questions regarding the tax implications of this arrangement.

Lease with Option to Purchase

Although most REALTORS® consider the WB-24 Option to Purchase to be a form that is rarely used, a shift in the economic winds may change that perception for numerous REALTORS® working with buyers who do not presently have the credit scores or financial resources to qualify for conventional lender financing. These and other buyers who find themselves in a predicament that is

hopefully only temporary in nature will be eager to explore the possibility of a "rent to own" arrangement in which a lease plus an option to purchase make up the transaction documents in lieu of the more conventional deed and loan documents.

While most agents are accustomed to working with leases and other rental agreements and are familiar with typical lease provisions, the option may be unfamiliar. An option to purchase is, in simple terms, a continuing promise to sell. The seller agrees to sell the property to the buyer, upon the terms stated in the agreement, if the buyer exercises the option to purchase by the stated deadline. If the option is exercised, it has the effect of creating a purchase contract. An option is legally required to be in writing and to be time-is-of-the-essence. The option fee generally will be nonrefundable.

In the following subsections, the law of options is reviewed, an option is contrasted with a right of first refusal and the provisions of the WB-24 Option to Purchase are examined. Agents who want a rental refresher may review *Legal Update 03.07*, "Residential Rental Primer," online at www.wra.org/LU0307, *Legal Update 98.10*, "Residential Rental Practice Rules," online at www.wra.org/LU9810, and the Residential Rental REALTOR® Resource page, online at www.wra.org/rental.

The Law of Options

An option is a contractual right to buy a property at a stated price during a stated time period. The option agreement will be between the owner of the property and the potential buyer who is reserving the right to purchase the property. The owner of the real estate is the potential seller, also called the "optionor." The other person, the potential buyer, is called the "optionee." For the purposes of discussion in this *Update*, however, we will refer to the optionor/owner as the seller

and optionee/potential buyer as the buyer. This is the terminology used in the WB-24 Option to Purchase.

The seller is bound by the option and cannot sell the property to anyone else while the option is in effect. The seller cannot revoke or withdraw the option, and the option is not terminated by the seller's death or incapacity. The buyer, on the other hand, is not bound to take the property or pay for it – the buyer has the choice to take it or leave it. In other words, the buyer has bargained for and obtained what amounts to an offer to sell from the seller, and the buyer has the privilege of making up his or her mind about whether or not to accept that offer and proceed to buy the property. The buyer exercises the option by giving the seller written notice that he or she will purchase the property.

Option Must Be in Writing

An option creates an interest in lands and thus it is a conveyance, as defined in Wis. Stat. §§ 706.001 & 706.01(4). Any conveyance must be in writing to be valid, and must contain the elements listed in § 706.02: the option must be in writing and identify the parties, the real estate, and the interest conveyed; the option must state any material terms and conditions, including the consideration; and the option must be signed by the seller. The buyer's exercise of the option (like an acceptance of an offer) must be in writing.

The requirements also apply to any option extension agreement or other option amendment and to the buyer's exercise of the option. An option to purchase land must be in writing and cannot be modified orally. *Kubnick v. Bohne*, 56 Wis. 2d 527, 202 N.W.2d 400 (1972).

Any separate agreement extending the option should be in writing and state the consideration for the extension. REALTORS® working with sellers should caution their clients to never suggest or discuss any exten-

sions with buyers without having it put in writing and signed by the parties. Verbal discussions with a buyer may be misunderstood and cause a serious disagreement over issues as critical as the exercise of the option.

Time is of the Essence

The general rule for options is that time is of the essence, whether or not the agreement specifically so provides. The buyer must exercise the option by the stated deadline by delivering written notice to the seller if the option is to become a purchase contract. If the buyer does not exercise the option by the stated deadline, the option expires without further notice. At that point in time, the buyer's rights to purchase are automatically forfeited.

Nonrefundable Option Fee

If the buyer pays cash for an option and then fails to exercise the option, he or she generally cannot have the option fee back. The seller gives up the right to sell the property to anyone else throughout the term of the option and gives the buyer the exclusive right to buy the property upon the stated terms and conditions. The buyer pays for this privilege via the nonrefundable option fee. If the buyer lets the option expire without exercising it, the buyer still received the benefit of the consideration he or she paid for the option.

Right of First Refusal Distinguished

A right of first refusal is somewhat similar to an option, but there are also some important differences. The right of first refusal most often given in real estate transactions provides that the potential purchaser has the first right to buy the particular property upon the terms and conditions offered by another buyer. The person given the right of first refusal has the right to match the price, terms and conditions offered by a second buyer. The terms and conditions of the offer made by the second buyer must be given to the person holding the right

of first refusal so he or she can decide whether to match those terms and buy the property or let the other prospective buyer purchase the property. A person with a right of first refusal is not entitled to buy the property, but rather only has the right to buy the property if the seller decides to sell it. The buyer with a right of first refusal cannot compel the seller to sell simply by delivering a written notice.

In an option to purchase, on the other hand, the seller agrees that the prospective buyer is entitled to buy the property at an agreed-upon price and upon the stated terms at any time during the specified term of the option. During this time period, the seller cannot revoke the option. The buyer decides when and if to buy, and is not reliant upon a third-party buyer to initiate the process, as is the case with a right of first refusal. The buyer also negotiates the terms and conditions of the potential offer in advance, again not dependent upon the third party buyer's terms and conditions. In exchange, the prospective buyer typically pays a nonrefundable option fee. The option becomes a purchase contract only if the prospective buyer exercises the option in the manner specified in the agreement before the term of the agreement ends. The terms of this contract are those stated in the option – no additional contract need be written if the buyer exercises the option.

WB-24 Option to Purchase

The 2000 WB-24 Option to Purchase contains most of the pre-printed provisions of an offer to purchase. When the parties enter into the WB-24, they have already created the offer to purchase terms that will bind them if the buyer exercises the option. However, there are no optional contingencies in the WB-24. Accordingly, the buyer typically will conduct inspections and testing, check zon-

ing and other applicable ordinances, determine the availability of financing and generally ascertain the suitability of the property for the buyer's intended purpose before proceeding to exercise the WB-24 option.

Deadline for Grant of Option

Lines 7- 8 of the WB-24 option provide for an acceptance deadline that must be met in order for the option to be valid. The option shall be invalid unless a copy of the WB-24 signed by all sellers of the property is delivered back to the buyer by the deadline stated on line 8. Time is of the essence.

In other words, the option is treated just like the offer to purchase in terms of binding acceptance – the accepted contract must be delivered back to the buyer by the specified acceptance deadline. Delivery is subject to the Delivery of Documents and Written Notices section at the top of page 4. If a counter-offer is necessary, the WB-44 Counter-Offer may be modified and used with the option.

Option Terms (Lines 9-20)

The option terms are stated on lines 9-20 of the WB-24. The amount of the option fee and the deadline for paying it are stated on line 9. The option fee is not refundable if the option is not exercised, and the amount stated on line 10 shall be a credit against the purchase price if the option is exercised.

The deadline for the buyer's exercise of the option is stated on line 12. The buyer has until midnight of the stated day to deliver written notice to the seller. The exercise of the option is an all-or-nothing proposition. If the notice of exercise of the option is 10 minutes late, the buyer is in breach and the seller is not obligated to sell to the buyer. The buyer may complete the Notice of Exercise of Option section at the very end of the WB-24 on a copy of the executed option and deliver that to the sellers to exercise the option.

Lines 13-16 of the WB-24 may be completed to provide for a prearranged extension of the option upon payment of the stated extension fee by the stated extension payment deadline. If the extension provisions are completed, all the buyer has to do is pay the seller the option extension fee by the payment deadline and the option will automatically be extended to the indicated extension date. The extension option fee is not refundable if the option is not exercised, and a stated amount of the fee shall be a credit against the purchase price if the option is exercised.

Lines 16-18 address to whom the option fee and any extension fees should be paid: directly to the seller or to the listing broker's trust account. If the fees are held in the broker's trust account, there is a blank line that may be completed to indicate how long the broker shall hold the fees and to whom the broker is to disburse the fees. For example, the option may be completed to say until "the exercise of the option, and then paid to the seller."

Format Requirements of Recorded Documents

Lines 19-20 of the WB-24 warn the buyer to record the option or some notice thereof to ensure that the seller does not sell the property to someone else or create liens upon the property during the term of the option or any option extension.

If the option is to be recorded, the option must be modified to meet the Wis. Stat. § 706.05 requirements for recordable documents. The legal description of the property and the tax parcel identification number will have to be included under Additional Provisions or in an addendum to the option. The signature of the seller also must be acknowledged by a notary public or authenticated by an attorney before the option may be accepted for recording.

Wis. Stat. § 59.43(2m) provides that

no instrument or document can be recorded in the office of a county Register of Deeds unless the first page substantially complies with certain requirements for the first page of the document. The front page must include the name of the instrument at the top of the document, an area in the upper left corner of the document for the document number, an area in the upper right hand corner of the document for recording information, an area for the return address and a space for the PIN. The first page must also contain the names of the grantees and grantors, the return address and a legal description in type large and dense enough to be copied in a legible manner.

The Register of Deeds must provide, without charge, a blank form that may be completed and used as the first page of any real estate document that a person wants to record. The form may be completed, stapled to the top of the document, and then recorded. This will require an extra \$2 in recording fees because of the additional page.

Recording a Separate Instrument

Many times the parties do not want to make the terms and conditions of the option public and may prefer to avoid recording what may often be a somewhat lengthy document. The WB-24 plus its attachments will usually be at least five pages (recording cover sheet, four-page WB-24). As an alternative, the parties and their attorneys may prepare a separate recordable document that gives notice that the seller has granted an option to the buyer. For example, one of the party's attorneys may draft an Affidavit of Interest, a Notice of Option or some other brief form. The buyer and the seller may wish to state in the option which party's attorney shall prepare any separate option notice document, and which party will pay for the preparation costs and recording fees if the parties do not want to record the WB-24.

Terms of Purchase

In the WB-24, matters such as inspections, testing, financing, rezoning, etc., will be handled by the buyer after the granting of the option and before the option is exercised. Accordingly, there generally are no contingency provisions. As stated in the Buyer Due Diligence provision on lines 102-109, the buyer may need to perform testing, inspections and investigations; obtain financing, permits and estimates; and find out everything he or she needs to know in order to decide whether or not to purchase the property, at the buyer's expense. The WB-24 indicates at the top of Page 4 that the buyer is authorized to conduct the inspections and tests that are listed on lines 196-200.

The presumption is that all inspections, testing and other contingencies will have been completed to the buyer's satisfaction prior to the time that the buyer exercises the option. If the buyer is satisfied, the buyer will exercise the option and promptly proceed to closing. If the buyer is dissatisfied, the buyer may seek an amendment to the option terms or simply not exercise the option. The buyer might also seek a termination of the option and then write a new offer to purchase based on the results of his or her inspections, testing and investigations.

Time is of the Essence

REALTORS® may wish to make sure that the buyer fully and completely understands the provisions for the exercise and the extension of the option. These provisions – and all other dates and deadlines in the WB-24 – are time-is-of-the-essence per lines 213-216, and must be strictly and precisely followed. The buyer cannot rely upon there being any grace periods. It is possible that the seller may voluntarily or inadvertently waive the time-is-of-the-essence deadline, but there is no guarantee.

Assignability

The WB-24 presents the parties with a choice on line 217, following the Time is of the Essence provision, regarding the assignability of the option. If the option were assignable, that would mean that

the buyer, for instance, may assign all of his or her rights and interests under the option to any third party of the buyer's choosing without any additional consent from the seller. If the seller wishes to limit a buyer's right to assign the option, the seller may wish to add an additional provision to specify that the buyer may only assign to third parties who are pre-qualified for a loan in the amount of 90 percent of the purchase price and willing to accept the property "as is."

For further discussion of the WB-24 Option to Purchase, see the May 2000 *Legal Update*, online at www.wra.org/LU0005.

Leases with an Option to Purchase

At times an option will be used in conjunction with a lease, such as when a buyer needs some additional time to get his credit score or finances in order and obtain conventional financing. A licensee drafting in this situation would use a lease form or rental agreement drafted by the owner or by an attorney (such as the WRA Residential Rental Contract or the WRA Rental Agreement), provided the form identifies the drafter. The WB-24 would be concurrently executed to create binding acceptance.

The lease and the WB-24 are executed simultaneously but can stand alone; it really does not make sense to attach one to the other and incorporate one in the other by reference because they are free-standing contracts. They may, however make reference to each other. For instance, the lease may indicate that a certain amount of the rent will be applied to the purchase price if the WB-24 option is exercised by the buyer. The WB-24 may also indicate in Additional Provisions on lines 218-224 that the buyer may not exercise the option unless the buyer is current in all rent payments under the lease and is not otherwise in default of the terms of the lease or rental agreement.

But before the licensee leaps forward to negotiate and draft a lease or rental agreement plus an option agreement,

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the licensee would be well-advised to be sure that he or she has proper authorization from the owner/client to work with these two different interests in real estate.

Authority

Before any agent provides brokerage services to a party, there must be an agency contract authorizing the agent to do so. Thus a listing contract is required before services may be provided to the owner. While an exclusive right to sell listing contract, such as the WB-1 Residential Listing Contract, authorizes a broker to sell the listed property via traditional sale, option or exchange, there is no authorization in these listing contracts to negotiate a lease of the property. That authority comes from the DRL-approved WB-37 Exclusive Listing Contract for Lease of Real Property. Just as there is no DRL-approved form that combines a lease and an option to purchase into one form, there is no one DRL-approved listing contract form that blends the authority to sell with the authority to lease the owner's property.

The WB-37 Exclusive Listing Contract for Lease of Real Property is used when a property owner hires a real estate broker to lease the owner's property. The form is mandatory with respect to the lease of residential property. Use of the WB-37 is optional, however, for lease listings in commercial or industrial property settings. The WRA also offers a commercial lease listing on ZipForm only.

Brokers might question whether a WB-37 is required when the property owner is asking the broker who already has the property listed for sale to find a tenant for the property. When this situation arises, a WB-37 is required. Listing a residential property for sale and lease simultaneously requires both a WB-1 and a WB-37. This is true because the WB-1 does not give a licensee the authority to

list the property for lease, and the WB-37 does not give the broker the right to list the property for sale.

Each form contains specific provisions addressing the legal requirements for the particular transaction involved. Any attempt by a broker to avoid the requirement to use both forms by altering one form risks license law violations and may jeopardize the legal rights of the broker in the transaction.

For additional discussion of the WB-37, see *Legal Update 01.02*, "Lease Listing & Property Management Agreement," online at www.wra.org/LU0102. A copy of the WB-37 appears in the *Update*.

Commissions in Lease/Option Transactions

The WB-1 listing contract provides on lines 41, 43 and 50-51:

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

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

...A percentage commission, if applicable, shall be calculated based on the purchase price if commission is earned under 1) or 2) above. . . Once earned, Broker's commission is due and payable in full at the earlier of closing or the date set for closing, unless otherwise agreed in writing."

This language makes it clear that the execution of an option does not earn the commission for the listing broker. Rather it is the subsequent exercise of the option by the buyer that will trigger the commission to be due from the seller. Unfortunately this means that the listing broker may not have a payday for many years. The WB-1 does not speak of any commission coming due if the property were to be rented.

Lines 50-52 of the WB-37 provide

that, "If a lease or rental agreement is entered into as to the Premises, Owner agrees to pay Broker a commission in the amount of _____ which shall be due and payable _____." This provision may be completed to provide for commission payments at different benchmarks during the course of the lease, which will probably be tied to the points when the owner receives rent – that is when the owner will likely be ready to pay the lease listing broker. Having the WB-37 executed along with an exclusive right to sell listing should allow for the broker to receive at least some commission, albeit likely a modest sum, early on in the transaction instead of waiting for the exercise of the option.

MLS Co-Broke

If a buyer's broker or subagent worked with the buyer in the lease/option transaction and procured the buyer, that cooperating broker will be entitled to any cooperative commission offered in the MLS when the option is exercised, provided that there is a successful transaction. Entering into an option or a lease is not a sale, so the compensation offered in the MLS as a certain percentage of the gross selling price (selling = sale) is not earned until the option is exercised.

When the listing broker is a party to both a WB-1 sales listing and a WB-37 lease listing, the broker may be able to put in a percentage commission for sales – when the option is exercised – and also note a second compensation amount due upon the parties entering into a successful lease transaction. Such an offer of a smaller fee for the lease might even appear in the remarks section if there is no other mechanism for offering commission relative to the lease. REALTORS® should check the rules of their local MLS.

Marketing Lease/Option Opportunities

If the listing broker is aware at the time of the listing that the seller is

willing to offer a lease with option to purchase arrangement instead of or in addition to a traditional transaction, that fact should be documented in the WB-1 listing contract. The broker should make a record of all terms and conditions that are most acceptable or totally unacceptable to the seller, using Additional Provisions or addenda. Once the seller thinks about the conditions and qualifiers with which a lease with option would be acceptable, the seller can also decide if the listing broker should include a lease with an option to purchase as a mode of “special financing” the seller authorizes the broker, on lines 19-20 of the 2008 WB-1 Residential Listing Contract, to advertise. Sellers may not often be eager to offer a lease with option, but may come to recognize that possibility if the property does not sell after a reasonable time on the market. Thus the “special financing” authorization may come in an amendment to the listing.

Legal Hotline Questions and Answers – Lease with Option to Purchase

If someone wants to rent with an option to purchase, would the WB-24 Option to Purchase be used?

An option agreement would be drafted on the WB-24 Option to Purchase form. In an option to purchase, the seller agrees that the prospective buyer is entitled to buy the property at an agreed upon price and within the time frames stated in the option. During this time period, the seller cannot revoke the option. In exchange for the seller “holding” his property for the prospective buyer, the prospective buyer typically pays a nonrefundable option fee. The option becomes a purchase contract only if the prospective buyer exercises the option in the manner specified in the agreement by the specified deadline. The terms of the purchase contract are those stated in the option – no additional contract need be written. Although the seller

is bound for the period of the option to sell the real estate to the prospective buyer, the prospective buyer is not bound to purchase the property.

A licensee drafting in this situation would use a lease form or rental agreement drafted by the owner or by an attorney (such as the WRA Residential Rental Contract or the WRA Rental Agreement), provided the form identifies the drafter. The WB-24 would be simultaneously executed. In this scenario, the option may provide under Additional Provisions or in an addendum that all or part of the rent paid prior to the exercise of the option will be applied to the purchase price if the option is exercised. The parties may want to consult with their tax advisors in this regard.

The agent needs help with language for a right of first refusal on a property that her husband is going to be renting with a possible option to purchase.

Before entering into either a Lease with an Option to Purchase or a Right of First Refusal Agreement, the agent should consult with an attorney to identify all potential pitfalls and to make sure that all concerns are addressed.

Typically an Option to Purchase is more beneficial to a potential purchaser as the terms of the transaction are established today to take place at a time in the future, should the purchaser choose to exercise the option. Rights of first refusal, generally, leave specific terms, such as price, etc., to be established later on, i.e. after another person submits an offer to purchase. Until that occurs, the tenant/potential purchaser does not necessarily have any right to purchase the property.

Another key difference in the two agreements is that there is a DRL-approved option form. There is no approved form for rights of first refusal. Given the complexity of a right of first refusal, it should ordinarily be drafted by an attorney for one of the parties.

A client has requested a broker advertise “rent to own,” which would be a lease with an option to purchase. If the broker does not negotiate the lease but limits his services to the sale portion, is the broker okay if he does not have a lease listing? The broker would simply have the client negotiate and draft the lease.

Because the broker will not be negotiating the terms of a possible lease nor seeking a commission therefore, it is not necessary to execute a listing for lease contract. The reason for a listing for lease contract is, among other things, to provide a broker with the authorization to negotiate on behalf of the client and to document the agreement as to compensation. The drawback to this arrangement is that the broker cannot control any cross references in the two contracts.

The listing agent is working with a developer on new construction condominiums. The agent wants to help the seller rent out units. Is there a rent with option to buy form? How should the agent proceed?

The listing for sale does not authorize a broker to negotiate rentals. If the agent chooses to provide rental services, a lease listing or property management agreement may be used. The seller may refer to the condominium documents to determine what the condominium policy is regarding rentals.

There is no DRL-approved form that is a composite of rental and option. The WB-24 Option to Purchase is the DRL form to negotiate options. However, the DRL no longer produces rental agreements or leases. Note too, if occupied rental units are concurrently marketed for sale, the seller will be subject to Wis. Stat. chapter 709 real estate condition report law for the occupied units – they are no longer new construction.

The seller of a condominium project will consider a lease with option to purchase. Can the listing broker,

when marketing the properties, state "rent to own terms available?"

The broker should be careful with what is said in any advertising. Regulation Z, also known as the Truth-in-Lending regulations, contains disclosure rules that apply to REALTORS® who advertise real estate financing terms. These rules state that if an ad contains any of the "triggering terms," then the ad must also contain (1) the dollar amount or percentage of the down payment; (2) all of the repayment terms including the number and amount of the payments and the period of repayment; and (3) the "annual percentage rate," using that term or the abbreviation "APR." The "triggering terms" generally include the dollar amount or percentage of the down payment, number of payments, period of repayment, amount of any payment or amount of any finance charge.

See the Federal Trade Commission publication, "How to Advertise Consumer Credit & Lease Terms," online at www.ftc.gov/bcp/online/pubs/buspubs/creditad.shtm#generalinfo. A useful article with specific advertising examples can be found at *REALTOR® Magazine Online* at www.realtor.org/rmomag.nsf/pages/DoYourAdsSDenArchive1996Dec.

What is the proper form of notification when a buyer exercises the option to purchase? Can this notification be made via e-mail, or does it need to be in another form of documentation? The buyer has an attorney-drafted lease with option.

The parties should review the terms and conditions of the contract as drafted and any questions should be asked of the parties' legal counsel. E-mail delivery would have to be properly authorized in compliance with state and federal law. See the February 2008 *Legal Update*, "Electronic Commerce and E-mail Delivery," online at

www.wra.org/LU0802, and the E-Commerce REALTOR® Resources page at www.wra.org/E-commerce.

The broker has a listing for the sale of a commercial property. The buyer and seller are considering a lease with option, possibly to avoid a commission. How should the broker proceed? When is commission earned with an option?

The authority granted in the WB-5 Commercial Listing Contract is for the sale of property. If the broker intends to negotiate the lease interest as well, a lease listing should be entered into with the seller. There is no WB listing form for the lease of commercial property, but the WRA has a commercial lease listing available in ZipForm. Because there is no DRL-approved commercial lease listing, a broker might also add lease listing provisions to the WB-5, but this should be done very carefully to ensure that authority to negotiate and enter into a lease, commission and all other pertinent provisions are included.

There also are no DRL-approved commercial lease forms. Wis. Admin. Code § RL 16.04(2) provides that licensees can use lease forms drafted by the owner or by an attorney. Therefore, the seller may direct the broker to use attorney-drafted forms available in the marketplace. The broker may complete the form as directed by the owner. Many commercial leases are drafted by attorneys and customized to meet the particular situation, so having an attorney prepare the commercial lease is another good alternative.

Under the WB-5, the commission is due and payable at the time of closing. In the case of an option, the commission is earned upon the exercise of the option and payable at the time of closing. Per the terms of the WB-5, a broker also may earn a commission if there is an effective change of ownership or control of the property during the term of the listing. If the seller were to enter into a long-term lease, a commission event could be triggered.

The seller has offered to pay a portion of the commission as a finder's fee for a cooperating broker. It will be paid right away because the buyer is going to lease the home with an option to purchase. About \$600 of the commission will be paid when a lease and option are executed, and the rest will be paid at the closing when the option is executed. What language should be used for this?

The broker may wish to draft an amendment to the listing contract to (1) specify that \$600 of the commission may be paid early as a finder's fee when the lease and option are entered into between the seller and a buyer, and (2) authorize the listing broker to advertise that the lease/option arrangement is available. The broker should also be authorized to offer the finder's fee in the MLS and other advertising. The listing broker may use the Remarks Section of the MLS to (1) offer the \$600 finders fee to cooperating brokers who procure a party who enters into a lease and option to purchase, and (2) explain why both a percentage of gross sale commission and stated dollar amount are offered.

Offer to Purchase Financing Contingency

REALTORS® might wonder if the land contract or lease with option might play a role within the offer to purchase in providing financing alternatives for the buyer.

The 1999 WB-11 offer to purchase provides on lines 173-179:

FINANCING 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. Unless a specific loan source is

named in this Offer, Seller shall then have 10 days to give Buyer written notice of Seller's decision to finance this transaction on 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, this Offer shall be null and void. Buyer authorizes Seller to obtain any credit information reasonably appropriate to determine Buyer's credit worthiness for Seller financing.

to give them a second mortgage or a land contract for the difference. The buyers do not want to do this. Are the buyers still bound to the contract, or does the seller need to offer financing as stated in the offer?

The seller can offer financing with a first mortgage loan on the same terms as set forth in the offer, but the seller cannot unilaterally force the buyers into accepting a second mortgage or a land contract.

While this provision gives the seller the opportunity to finance the transaction on the terms stated on lines 149-163, that usually will be limited to a seller loan with a promissory note and mortgage because the contingency describes mortgage terms and uses that terminology. This would normally not provide an opening for giving a land contract or a lease with option unless the parties amended the offer to allow for these financing alternatives.

Legal Hotline Questions and Answers – Financing Contingency

A home did not appraise out and buyer is putting \$30,000 down, which represented 20 percent of the purchase price. However, because the home did not appraise for the purchase price, it would then represent about 15 percent of the purchase price. The contract states the owner has the option to provide financing at the terms in the contract. Can this be done via a land contract?

The buyer and seller can amend the offer to allow for a land contract or different terms, etc., but the pre-printed language in the offer would arguably not permit a land contract rather than a mortgage loan.

The appraisal came in \$10,000 below the purchase price, so the buyers do not qualify for financing as stated in the offer. The seller is offering

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