



LEGAL UPDATE

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A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

WB-11 Residential Offer to Purchase – 2020 Edition – Part I

The Real Estate Examining Board (REEB) at the Department of Safety and Professional Services (DSPS) has approved an updated WB-11 Residential Offer to Purchase. The optional use date for the revised WB-11 is November 1, 2019, and the mandatory use date is January 1, 2020.

The current WB-11 was last revised in 2011. Although the existing offer form has generally served licensees well, after 10 years the time has come for an update.

In the big picture, the new WB-11 is not drastically different than the 2011 version, although the sequencing of the provisions has changed. At the same time a few WB-11 provisions have undergone some substantive changes to help bring the offer up to date with current practice and hopefully improve ease of use. The REEB has tried to make changes to make the residential offer a bit more understandable and user-friendly for consumers and licensees alike. Many revisions clarify and improve the provisions already in place.

This *Legal Update* reviews the changes made to the 2020 WB-11 Residential Offer to Purchase in the first portion of the 2020 Offer through the Radon Testing Contingency on page 5. The section-by-section discussion points out changes adopted by the REEB and provides practice tips for getting the best results with this new version of the WB-11. See the October and November 2019 *Legal Updates* for discussion of the other portions of the 2020 Offer.

① MORE INFO

An “educational use only” copy of the 2020 WB-11 Residential Offer to Purchase is available on the DSPS website at <https://dsps.wi.gov/Documents/BoardCouncils/REB/Forms/WB11FINALwatermarked.pdf>, and on the WRA Forms Update Resource page at www.wra.org/formsupdate. Visit the Forms Update Resource page regularly for information about forms availability and additional WB-11 resources.

The Updated Residential Offer Forms Revision Process

The WRA Forms Committee and the Real Estate Contractual Forms Advisory Committee at the DSPS put in their best efforts to improve the 2011 version of the offer and make it more consumer- and user-friendly.

Many different ideas from all corners were discussed and sometimes the better choice was to stay with what was in the 2011 version. Other times the existing language was improved and clarified to make the transaction a bit easier to process and explain to the parties. And in some instances, new provisions were introduced to keep up with the law and the evolution of real estate practice. The goal was to make offers more intuitive and simpler to navigate.

In the course of all this improvement the, 2020 version of the WB-11 grew a little bit and is now 10 pages long.

In the following discussions, the existing WB-11 (mandatory use date 7-1-11) is referred to as the “2011 Offer,” and the newly updated WB-11 (mandatory use date 1-1-20) is referred to as the “2020 Offer.”

Transactional Flow Format

The updated WB-11 is reorganized so at first glance it may look like a completely different contract, but not to worry! The majority of the offer provisions are substantially the same as before. What is different is the order of the provisions; the provisions have been arranged to approximate the flow of a transaction. The artificial layout of the 2011 Offer, needed to accommodate paper carbon forms, had provisions often out of any logical order. One had to jump about from page to page if a definition was needed. The Inspection Contingency was on the last page of the 2011 WB-11, but that certainly is not when it happens as you explain a transaction to the parties and work through the steps of the transaction. Hopefully everyone will find the new format carries them through various provisions as they will typically arise in the transaction.

Who is Drafting the Offer? (Lines 1-2)

Lines 1-2 of the 2020 Offer have not changed: “LICENSEE DRAFTING THIS OFFER ON _____ [DATE] IS (AGENT OF BUYER) (AGENT OF SELLER/LISTING BROKER) (AGENT OF BUYER AND SELLER) STRIKE ONES NOT APPLICABLE.”

- If the property is listed with another firm and the licensee drafting the offer is a buyer’s agent under a buyer agency agreement, the licensee is the “agent of buyer.”
- If the property is listed with another firm and the licensee drafting the offer is associated with a subagent of the listing firm, the licensee is the “agent of seller/listing broker.”
- If the licensee drafting the offer is an agent in the same firm as

the listing agent and there is no buyer agency agreement with the buyer, the licensee is the “agent of seller/listing broker.”

- If the licensee drafting the offer is an agent in the same firm as the listing agent, there is a buyer agency agreement with the buyer and the drafting licensee is working with the buyer as a designated agent, the licensee is the “agent of buyer.”
- If the licensee drafting the offer is the listing agent, there is a buyer agency agreement with the buyer and the drafting licensee is working with both the seller and the buyer as a dual agent, the licensee is the “agent of buyer and seller.”

If the licensee is the buyer in the offer to purchase, and thus not acting in an agency capacity, the licensee should line out all of Lines 1-2 and indicate elsewhere in the offer that he or she is a real estate licensee purchasing the property for personal use/investment/speculation/resale, as the case may be.

Buyer and Description of Property (Lines 3-8)

The GENERAL PROVISIONS heading is gone, but otherwise the content on lines 3-8 is the same: name the buyer and describe the property. Licensees will be happy to see the blank lines in this area are a bit longer than in the 2011 Offer.

Purchase Price (Lines 9-10)

Purchase Price now has a heading. Looking down the first page of the 2020 Offer, the headings are Purchase Price, Included in Purchase Price, Not Included in Purchase Price, Binding Acceptance, Acceptance and Closing. Thus, the first page tells the parties the purchase price, what the buyer will receive in exchange for that purchase price and the closing date – the basic, overarching information that is of great importance to the parties. The earnest money and the balance of the purchase price provisions have been shifted to the second page of the 2020 Offer.

Included in Purchase Price (Lines 11-18)

As the buyer and the drafting agent complete and review the 2020 Offer, they have just named the purchase price and now they are specifying what is included in that price: “Included in purchase price is the Property, all Fixtures on the Property as of the date stated on line 1 of this Offer (unless excluded at lines 20-23), and the following additional items: ____.” The Property is the real estate described on Lines 4-8 (as confirmed in the definition of Property on Line 453), and Fixtures are defined on Lines 27-39 of the 2020 Offer, appearing in the middle of page 1 for handy reference.

The 2020 Offer refers to “the date stated on line 1 of this Offer” instead of the 2011 language “on the date of this Offer” because that was confusing: was it the date the offer was drafted, signed by the buyer, accepted by the seller, or the binding acceptance day? The clear answer here, and throughout the 2020 Offer whenever this comes up, is that it is the drafting date on line 1.

The other difference, apart from formatting, is there are more than four full lines to write in the additional property, per the request of several WRA members. Next is the note reminding everyone that the offer, and not the MLS, listing contract or marketing materials, determine what is and is not included in the offer. Same note as before, slightly different placement.



REALTOR® Practice Tip

Sellers should consider what items they will definitely want to take with them and what items can be left behind, and buyers should think about what items they want included and what items they want the seller to remove.

Not Included in Purchase Price (Lines 19-26)

Next up is the Not Included in Purchase Price section, which provides: “Not included in purchase price is Seller’s personal property (unless included at lines 12-16) and the following: ____,” followed by almost four full blank lines. The 2020 WB-11 automatically excludes the seller’s personal property unless it is written in as included in the Included in Purchase Price section.

The Not Included in Purchase Price section is immediately followed by “CAUTION: Identify Fixtures that are on the Property (see lines 27-37) to be excluded by Seller or which are rented (e.g., water softeners or other water treatment systems, LP tanks, etc.) and will continue to be owned by the lessor.” This caution is substantially the same as the similarly placed caution in the 2011 Offer except that it gives examples of fixtures that may be excluded such as water softeners, water treatment systems and LP tanks.

Definition of Fixture (Lines 27-39)

On the immediately following lines is the definition of “Fixture.” Whereas this definition was tucked away in a section of definitions on page 4 of the 2011 Offer, the 2020 WB-11 places the fixture definition immediately adjacent to the provisions where it plays a predominant role, that is, Included in Purchase Price and Not Included in Purchase Price. Other definitions that are used throughout the form, such as “Firm,” do still appear in a small section of definitions found on page 8. The definition of fixture is followed by another caution directing the parties to exclude any fixtures the seller will retain or that are rented, and repeating the examples of water softeners or other water treatment systems, LP tanks, etc.

The fixture definition includes a few new items to bring it into conformance with the fixture definition in the WB-1 Residential Listing Contract. These include water softeners, satellite dishes (but not the component parts), audio/visual wall mounting brackets (but not the audio/visual equipment) and in-ground pet containment systems (but not the collars).

This cohesive sequence of provisions on lines 11-39 of the 2020 Offer thoroughly addresses what a buyer is to receive in exchange for the indicated purchase price without having to scroll or flip pages to check the fixture definition material.



REALTOR® Practice Tip

If there is any uncertainty over whether the item is or is not a fixture, then it should be listed as included or not included to remove all doubt. Home entertainment systems, stereo systems, satellite dish systems, invisible fencing and other multi-component features of the home warrant careful consideration.

Binding Acceptance and Acceptance (Lines 40-47)

Next on the first page are the Binding Acceptance and Acceptance sections. Nothing changed in these provisions except Binding Acceptance now appears first before Acceptance.

① MORE INFO

See pages 3-5 of the August 2007 *Legal Update*, "'Favorite' Offer to Purchase Provisions," at www.wra.org/LU0708 for discussion of acceptance and binding acceptance.

Closing (Lines 48-55)

The Closing provision calls for the parties to write in a specific date as the closing date in the blank line provided. The preprinted text no longer states the closing date as "on or before _____." There also is a safety net provision indicating if the stated date falls on a weekend or holiday, the closing will instead be held on the next business day. And for those who were fond of the "on or before _____" language, the blank line for insertion of the date stretches for almost a line and a half and thus is long enough to write in that phrase or other language along with a date, as is desired.

As far as the location for closing, the closing is "at the place selected by Seller, unless otherwise agreed by the Parties in writing." This language is the same as the 2011 Offer. It was thought best to not change this language because practitioners from the different market areas, with their differing local practices, seem to have adjusted to this and include a provision in their addenda should they want to specify a location other than the place selected by the seller.

① MORE INFO

See page 8 of the November 2009 *Legal Update*, "WB-11 Residential Offer to Purchase – 2010 Edition," at www.wra.org/LU0911 and pages 4-5 of the January 2010 *Legal Update*, "Updating Addendum A, Addendum O and Property Condition Reports," at www.wra.org/LU1001 for further discussion.



Wire Fraud Warning

The ever-present danger of wire transfer fraud and other cybercrimes aiming to steal private identification information, personal identities and purchase money have led to the inclusion of a wire fraud warning in the 2020 Offer, at the bottom of the first page directly following the Closing provision.

The caution tells the parties they should personally contact the title company or other party hosting the closing to independently verify the details of any wire transfer. The caution suggests this contact should be by telephone or in person. This is the responsibility of the parties and not the licensees in the transaction.

REALTOR® Practice Tip

Urge the parties to contact the title company or other closing provider using contact information from an independent source and to not rely on any contact information appearing in any communication from a person purportedly providing wire transfer instructions at the last minute or changing the instructions. If that email is from a scammer, the crook has likely made a tiny change to the email address, phone numbers displayed or other contact information such that reliance on those contacts may lead the party to the crook and not to the title company.

REALTOR® Practice Tip

The parties should not use the agents in the transactions as conduits for wire transfer information because having the information relayed through an additional person only increases the possibility of a hack and the opportunities for a crook setting himself up to steal the parties' money.

① MORE INFO

See "The Phisherman, the Extortionist and the Thief: Meet the cast of characters hoping to steal your money and your data," in the August 2019 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Aug19/Fisherman and "The Risks of Sending Wire Transfer Instructions: Don't be the broker the buyer sues!" in the October 2017 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Oct17/WireTransferFraud.

Earnest Money (Lines 56-91)

All of the provisions relating to earnest money are gathered together on the top half of the second page of the 2020 Offer under an Earnest Money heading.

Earnest Money Receipt (Line 58)

First of all, Line 57 indicates the amount of any earnest money accompanying the offer. Line 58 states, "If Offer was drafted by a licensee, receipt of the earnest money accompanying this Offer is acknowledged." This language is intended to replace the earnest money receipt on lines 449-450 of the 2011 Offer, which has been removed from the 2020 Offer. This language also is intended to comply with the license law requirement found in Wis. Admin. Code § REEB 18.05:

"Receipt for earnest money received by the licensee. A licensee shall indicate on the offer to purchase the receipt of earnest money received from a buyer at the time the offer is drafted."

Line 58 is automatically complying with this requirement if the agent drafting the offer has received earnest money. If there is no earnest money accompanying the offer, then there will be no amount on line 57 and line 58 will not apply.

Delivery of Earnest Money After Acceptance (Lines 59-63)

When it comes to a party paying earnest money after acceptance of the offer, lines 59-63 of the 2020 Offer allow the buyer to deliver the earnest money electronically if the buyer prefers, instead of mailing the earnest money, having it commercially delivered or personally delivering the funds. With regard to the time frame for delivery of this earnest money, line 60 provides a default of five days after acceptance if nothing is filled in on the blank line.

In recognition of the practice in some markets to have a title company hold the earnest money instead of a real estate firm, the language on lines 61-63 asks the drafter to make choices and provides a default with regard to whom the buyer will deliver the earnest money and who will be holding it. A [STRIKE THOSE NOT APPLICABLE] feature allows the parties to designate if the earnest money will be delivered to and held by the listing firm, the buyer's agent's firm, or a third person named on the blank line. That might be a title company.



REALTOR® Practice Tip

This feature on lines 61-63 requires action by the drafter to strike two of the offered selections: "(listing Firm) (Buyer's agent's Firm) (third party identified as _____)" and to fill in the blank line if a firm is not receiving and holding the earnest money.

For those who do not complete the [STRIKE THOSE NOT APPLICABLE] provision, the default is, first of all, the listing firm. If there is no listing firm in the transaction, then it will be the buyer's agent's firm. If there are no firms in the transaction, then the default is that the seller receives and holds the earnest money.

Lines 65-67 address who will hold the earnest money. The answer is that the funds will be held by the person identified in the [STRIKE THOSE NOT APPLICABLE] provision for the delivery of the earnest money found on lines 61-63. The offer presumes the person to whom the earnest money is delivered will hold the funds throughout the transaction. If that is not the case, then other language may need to be written into the offer. These lines also advise the parties that if a firm holds the earnest money the firm will hold the earnest money until it is applied to the purchase price or disbursed as described in lines 71-81.

Listing Firm Has No Trust Account

There may be a listing firm that chooses not to have a trust account. In that case, the listing agent must inform the seller there is no trust account and advise the seller that it will be necessary to modify the standard offer provisions regarding earnest money because the offer states, unless modified, the earnest money will be held by the listing firm.

The listing firm would also inform cooperating agents they have no trust account. It is then the buyer's decision whether to draft the WB-11 to provide the listing firm will not be holding the trust funds and name the person who will. The 2020 WB-11 Residential Offer to Purchase simplifies this process on lines 61-63. If the buyer fails to draft the offer to name someone other than the listing firm as the person receiving and holding the earnest money, the contract default will indicate the listing firm is holding the earnest money and the seller may need to counter the offer to correct this and name a third person.

While the 2020 WB-11 provides a default, it is most helpful when there is no listing firm, and does not address the scenario when there is a listing firm but the listing firm does not have a trust account or will not hold the money; that is what the blank at line 62 of the 2020 Offer is for. Additionally, there is a bit of uncertainty as to whether "Buyer's agent's Firm" includes both a buyer's agent with a buyer agency agreement and a subagent. Logically in the context of the earnest money language it does include both, but rather than risk any disagreement it may be better to write XYZ Trust Account in on the blank line and strike the first two choices when drafting an offer or a counter-offer needed to correct this provision.



REALTOR® Practice Tip

If anyone other than a real estate firm is holding earnest money the drafter should strike "(listing Firm) (Buyer's agent's Firm)" and write in who is holding the money in the blank on line 62. The buyer and the seller should enter into a disbursement agreement or escrow agreement because the rules for disbursement as detailed in the offer to purchase only apply if a firm is holding the trust funds. The buyer and seller may also consider the costs associated with a third person holding the funds and the drafting of an escrow agreement.

MORE INFO

See "So You Don't Want to Have a Trust Account?" in the February 2016 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Feb16/TrustAccounts.

Escrow Agreement If Money Not Held By Firm

In the Caution on lines 68-70, the parties are urged to have an escrow agreement drafted if someone other than a firm holds the earnest money because the offer provisions for disbursement of earnest money on lines 71-81 apply only to disbursements by a real estate firm. If a third person such as a title company holds the money, there are no automatic rules governing when the money is disbursed and to whom. In the absence of such provisions third persons like title companies may require the signature of both parties before they will disburse, which tends to defeat the purpose of having an escrow agreement to establish an automatic mechanism and predetermined standards.

Wis. Admin. Code § REEB 18.06 provides:

Escrow agreement for earnest money not held by the firm. If the parties to a transaction do not desire that the firm hold the earnest money in the firm's real estate trust account, and wish to designate an escrow agent other than the firm, the licensee may not draft the escrow agreement. The escrow agreement shall be drafted by the parties or an attorney. The firm may not hold the funds in the firm's real estate trust account, nor may the firm act in any way as custodian of the funds for the parties. The funds, pursuant to the escrow agreement, shall be held by a party other than the firm, such as: a bank, a savings and loan association, a credit union, or an attorney.

REALTOR® Practice Tip

If a title company is going to receive and hold any additional earnest money delivered after acceptance of the offer, the amount is inserted on line 59 and the time frame is written into line 60. On line 61 the references to listing firm and buyer's agent's firm should be stricken and a reference to or the name of the title company should be written on line 62. The parties should be urged to make sure the title company has an attorney-drafted escrow agreement for the parties to sign setting forth specific directions for the disbursement of the earnest money under various circumstances. The parties may wish to have any escrow agreement reviewed by legal counsel to make sure it adequately addresses all possible scenarios or may wish to have any attorney draft a comprehensive escrow agreement for the transaction.

REALTOR® Practice Tip

Ideally the escrow agreement will become an attachment to the offer or delivered concurrently. That way signatures of the parties and the third person holding the funds can be obtained and the parties can be assured there is a process in place for disbursement of the earnest money by the third person.

Earnest Money Disbursement by Firm (Lines 71-81)

The Earnest Money Disbursement and Legal Rights/Action subsections that are on page 8 of the 2011 Offer now appear on page 2 of the 2020 Offer together with all of the other earnest money provisions. The Disbursement subsection is now called Disbursement If Earnest Money Held By A Firm and it makes clear throughout that the provisions on lines 71-81 only apply if the earnest money was held by a firm. The other change within this subsection is that "upon authorization granted within this Offer" has been added to the list of scenarios whereby a firm may disburse. This item was added so that the list of safe harbor disbursement situations in the offer would match those stated in Wis. Admin. Code § REEB 18.09(1).

REALTOR® Practice Tip

Care should be taken when writing language into an offer to authorize an earnest money disbursement in connection with the termination of the offer. This might be based upon the failure of a contingency, for instance. Best practice would suggest more should be done than just writing that the earnest money then will be disbursed to the buyer/seller. The language should be clear: if certain enumerated conditions are met the parties agree the firm holding the earnest money is thereby authorized to disburse the earnest money to the party named or described in the provision.

The Legal Rights/Action subsection on lines 82-91 of the 2020 Offer indicates that any disbursement based upon an attorney opinion, an authorization within the contract or the law will need to be preceded by a notice to the parties sent by certified mail at least 30 days prior to the proposed disbursement if the firm has knowledge that either party disagrees with the disbursement.

MORE INFO

See the safe harbor disbursements rules and the rules requiring a 30-day advance notice via certified mail at https://docs.legis.wisconsin.gov/code/admin_code/reeb/18/09.

MORE INFO

For further discussion about earnest money issues, see *Legal Update 00.10*, "Trust Account Basics," at www.wra.org/LU0010, the May 2014 *Legal Update*, "Revisions to Forms Use and Trust Account Rules," at www.wra.org/LU1405 and the Fall 2011 WRA *Broker Supervision Newsletter*, "Trust Accounts: Are You Prepared for an Audit?" at www.wra.org/bsnfall11. For assistance with filing small claims actions, see the Self-help Law Center for Small Claims at www.wicourts.gov/services/public/selfhelp/smallclaims.htm.

Conditions Affecting the Property or Transaction (Lines 116-178)

Although there are no changes in the sections for Time Is Of the Essence, Real Estate Condition Report or Property Condition Representations at the bottom of page 2 of the 2020 Offer, there have been changes made with regard to the definition of Conditions Affecting the Property or Transaction on page 3 of the 2020 Offer. Rather than including this definition in the section of definitions on page 8 of the 2020 offer, this definition appears immediately after the Property Condition Representations section where the term plays a crucial role. The content of the definition has been modified so that it matches the content of the updated Real Estate Condition Report (RECR) that was required for use beginning July 1, 2018.

As in the 2011 Offer, repeating the list of RECR defects in the offer definition of Conditions Affecting the Property or Transaction informs sellers who have not completed an RECR as to their disclosure obligations. It also reveals to buyers the disclosures they have not received in cases where the buyers have not received an RECR. Restating the RECR items in the 2020 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.

MORE INFO

For insight into the updated RECR content, 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.

Inspections and Testing (Lines 179-193)

Only a few small changes were made in this section with regard to the definition of “test” and the statement regarding who may be present for inspections and testing. Lines 182-183 now indicate that “a ‘test’ is defined as the “taking of samples of materials such as soils, water, air or building materials from the Property for laboratory or other analysis of these materials.” The 2020 Offer now gives buyers, licensees or both explicit permission to accompany contractors conducting inspections and tests. In other words, either the buyer can accompany an inspector, the cooperating licensee can accompany the inspector, or both the buyer and the cooperating licensee can accompany the inspector.

REALTOR® Practice Tip

If the buyer wants any testing – the taking of samples for lab analysis – a separate testing contingency must be included in the offer. Test results and inspection reports must all be promptly provided to the seller.

Inspection Contingency (Lines 194-229)

The Inspection Contingency in the 2020 Offer begins by reminding licensees and the parties that the Inspection Contingency is not the place to authorize testing.

REALTOR® Practice Tip

Authorization for testing requires a separate testing contingency because the Inspection Contingency does not provide the buyer the right to conduct testing of the property, for example, for radon. A testing contingency is not created by listing substances on the blank lines in the Inspection Contingency – this only serves to create confusion, not a successful testing provision.

The Inspection Contingency may look a bit different because it has been formatted differently, with lists of numbered or lettered items pulled to the left margin with the hope this will facilitate conversations about the various choices a party has or the various consequences to a particular action. Substantively, very little has changed.

The contingency itself is presented as a list of three numbered parts on lines 195-203:

- (1) the home inspection,
- (2) separate inspections of any specific property components, such as the roof or the foundation, written in the blank line provided, and
- (3) follow-up inspections recommended in the home inspection or in any component inspection reports.

With regard to the home inspection, the language indicates the home inspection of the property will be performed by a Wisconsin-registered or a Wisconsin-licensed home inspector. This was done in anticipation of possible legislation that would convert home inspectors from a registration system to a licensing system. If such changes are made, this language will embrace the new credential.

REALTOR® Practice Tip

Give the parties enough time to accomplish the home and component inspections, conduct any follow-up inspections, review the inspection reports and engage in back-and-forth negotiations, all before the deadline on line 207 runs out. Any Notice of Defects must be given by this deadline.

Another change is that a note has been added on lines 213-216 that gives the definition of “defect” as part of the sequence of provisions regarding the Notice of Defects. It will no longer be necessary to turn pages or scroll to find the defects definition in the middle of a discussion of Inspection Contingency alternatives. The NOTE in bold type states that “defect” is defined on lines 449-451 to mean a condition that would have a significant adverse effect on the value of the Property; that would significantly impair the health or safety of future occupants of the Property; or that if not repaired, removed or replaced would significantly shorten or adversely affect the expected normal life of the premises. The defect definition still also appears in the definitions section on page 8 of the 2020 Offer.

What Is a Defect? A defect is defined in the WB-11 as a structural, mechanical or other condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed or replaced, would significantly shorten or have a significant adverse effect on the normal life of the property. Whether any item listed in the home inspector’s report is a defect is a legal determination made by applying this definition to the facts on a case-by-case decision. An attorney – not a real estate licensee – may give an opinion whether a particular condition is a defect, but only a court can make the ultimate determination. Obviously, it is preferable for the parties to mutually agree whether a condition is or is not a defect rather than taking the issue to court.

① MORE INFO

See “I Noticed You, Noticing Me ...” in the August 2015 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Aug15/Defects.

REALTOR® Practice Tip

A Notice of Defects generally goes on a WB- 41 Notice Relating to Offer to Purchase. It is extremely helpful if the Notice is prepared to identify what it is – “this is a Notice of Defects.” The Notice of Defects just lists the defects to which the buyer objects. It does not specify the contractors, standards, materials, etc., for the seller’s possible repairs; that would require an amendment. A copy of the inspection report(s) should accompany a Notice of Defects.

Finally, with regard to time frames, there is a blank line at line 207 for specifying the deadline for the Inspection Contingency, as before, but there is also a default of 15 days stated. This is a theme throughout the 2020 WB-11: defaults have been added for most blank lines setting a deadline and [STRIKE ONE] features to guard against occasional oversights. For the time frame in which the seller must respond if a buyer delivers a Notice of Defects, there is now a blank line with a default of 10 days instead of the preprinted 10 days as there was in the provision in the 2011 Offer. Thus, a different time frame may be indicated, but the time period will remain at 10 days if nothing is written in.

① MORE INFO

To help explain choices to the buyer and seller and the potential outcomes, see the inspection flowchart at www.wra.org/InspectionFlowchart. Also see the June 2013, June 2014 and August 2016 issues of *Wisconsin Real Estate Magazine* at www.wra.org/WREM/June2013, www.wra.org/WREM/June2014, and www.wra.org/WREM/August2016 for more information on the Inspection Contingency.

Radon Testing Contingency (Lines 230-247)

Because many offers are drafted incorrectly with radon testing written into the Inspection Contingency, where it clearly does not belong, and because some home inspectors conduct radon testing without any contract authority whatsoever, the REEB decided it was best to include a Radon Testing Contingency in the offer so it may be included in the contract if radon testing will be done.

The Radon Testing Contingency on the top of page 5 of the 2020 WB-11 calls for the buyer to arrange for radon testing to be performed by a qualified third party in a manner consistent with applicable U.S. Environmental Protection Agency (EPA) and Wisconsin Department of Health Services protocols and standards. The test results must show the radon level is less than 4.0 picoCuries per liter (pCi/L) to satisfy the contingency. There is a [STRIKE ONE] feature indicating who pays for the testing, with the buyer named as the default.

The Contingency is deemed satisfied unless the buyer delivers a copy of the test results showing a radon level of 4.0 pCi/L or higher and a

Notice objecting thereto. The buyer’s deadline for objecting is expressed as “_____ days (“20” if left blank) after acceptance.” Once again, a default is provided for those “oops” moments.

The Radon Testing Contingency includes the ability to choose whether the seller has a right to cure in a provision structured similarly to the Right to Cure subsection in the Inspection Contingency.

If the seller has the right to cure and wishes to do so, the seller essentially has a four-step process to follow. The seller must:

1. Deliver to the buyer written notice electing to cure within 10 days after the buyer delivers the test report and the buyer’s Notice objecting thereto.
2. Install a radon mitigation system in conformance with EPA standards in a good and workmanlike manner.
3. Give the buyer a report of the work done.
4. Give the buyer a post remediation test report indicating a radon level of less than 4.0 pCi/L.

Steps 2, 3 and 4 all must occur no later than three days before closing.

The offer shall be null and void if the buyer’s Notice is delivered and the seller does not have the right to cure, the seller delivers notice electing not to cure or the seller allows the 10 days after delivery of the buyer’s Notice to expire.

REALTOR® Practice Tip

What is meant by installing a radon mitigation system in conformance with EPA standards? One answer is found on pages 12-13 of the EPA brochure entitled *Consumer’s Guide to Radon Reduction – How to Fix Your Home* at www.epa.gov/sites/production/files/2016-12/documents/2016_consumers_guide_to_radon_reduction.pdf. The following is an excerpt.

CHECKING YOUR CONTRACTOR’S WORK

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

- Radon reduction systems must be clearly labeled. This will avoid accidental changes to the system that could disrupt its function.
- The exhaust pipes of soil suction systems must vent above the surface of the roof and 10 feet or more above the ground, and must be at least 10 feet away from windows, doors or other openings that could allow radon to reenter the home, if the exhaust pipes do not vent at least 2 feet above these openings.
- The exhaust fan must not be located in or below a livable area. For instance, it should be installed in unconditioned space.
- If installing an exhaust fan outside, the contractor must install a fan that meets local building codes for exterior use.
- Electrical connections of all active radon reduction systems must be installed according to local electrical codes.

- A warning device must be installed to alert you if an active system stops working properly. Examples of system failure warning devices are: a liquid gauge, a sound alarm, a light indicator, and a dial, or needle display, gauge. The warning device must be placed where it can be seen or heard easily. Your contractor should check that the warning device works. Later on, if your monitor shows that the system is not working properly, call a contractor to have it checked.
- A post-mitigation radon test should be done within 30 days of system installation, but no sooner than 24 hours after your system is in operation with the fan on, if it has one. The contractor may perform a post-mitigation test to check his work and the initial effectiveness of the system; however, it is recommended that you also get an independent follow-up radon measurement. Having an independent tester perform the test, or conducting the measurement yourself, will eliminate any potential conflict of interest. To test the system's effectiveness, a two- to seven-day measurement is recommended. Test conditions: windows and doors must be closed 12 hours before and during the test, except for normal entry and exit.

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

① MORE INFO

The Radon Mitigation Standards at www.wbdg.org/ffc/epa/criteria/epa-402-r-93-078 are longstanding criteria for the EPA. The Department of Health Services radon information includes Lowering Your Home's Radon Levels at www.dhs.wisconsin.gov/radon/reduce-radon.htm and Radon Information for Wisconsin at www.dhs.wisconsin.gov/radon/index.htm.

REALTOR® Practice Tip

Who can install radon mitigation systems? The Wisconsin Department of Health Services maintains a list of Certified Radon Measurement and Mitigation Contractors who must pass a national exam, meet continuing education requirements, maintain a quality-assurance program and follow appropriate testing protocols. The lists are found at www.dhs.wisconsin.gov/radon/radon-proficiency.htm. These contractors, however, are not credentialed by the state. Use of these contractors is optional.

Firms and their licensees will still have the ability to use a different version of a Radon Testing Contingency in their addenda since this Radon Testing Contingency is an optional, check-box provision.

REALTOR® Practice Tip

Licensees working in local associations or who are associated with firms that have an optional Radon Testing Contingency in their addenda should be very careful to not check both the Radon Testing Contingency in the offer and the one in their addendum. The result at that point arguably would be that the Contingency in the addendum would take precedence and control. It may be wise to line out the Radon Testing Contingency not being used – either in the offer or in the addendum – to make sure everyone is clear and on the same page.

① MORE INFO

For further information about the rest of the 2020 WB-11 Residential Offer to Purchase, see the October *Legal Update*, “WB-11 Residential Offer to Purchase – 2020 Edition – Part II,” at www.wra.org/LU1910 and the November *Legal Update*, “WB-11 Residential Offer to Purchase – 2020 Edition – Part III,” at www.wra.org/LU1911. Also please regularly visit the WRA Forms Update Resource page at www.wra.org/formsupdate for information about forms availability and additional WB-11 resources.

EDITORIAL STAFF

Authors

Debbi Conrad

Production

Emily Zampardi

ASSOCIATION MANAGEMENT

Chairman

Jean Stefaniak

President & CEO

Michael Theo, CAE

CONTACT INFORMATION

Wisconsin REALTORS® Association
4801 Forest Run Road, Suite 201
Madison, WI 53704
608-241-2047
800-279-1972

LEGAL HOTLINE

Ph: 608-242-2296
Fax: 608-242-2279
Web: www.wra.org

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4801 Forest Run Road,
Madison, WI 53704-7337

608-241-2047
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