



LEGAL UPDATE

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A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

Revisions to the Real Estate Condition and Vacant Land Disclosure Reports – 2022

Last session, the Wisconsin Legislature passed 2017 Wisconsin Act 338, which in part provided a more user-friendly report for a seller to complete when selling residential or vacant land. Since the implementation on July 1, 2018, of the revised Real Estate Condition Report (RECR) and Vacant Land Disclosure Report (VLDR), the WRA discovered the need to make a few modifications. To learn how the RECR and VLDR were changed at that time, see the June 2018 *Legal Update*, “Revisions to the Real Estate Condition and Vacant Land Disclosure Reports – 2018” at www.wra.org/LU1806.

2021 Wis. Act 96 and 2021 Wis. Act 47 update the Real Estate Condition Report (RECR) and Vacant Land Disclosure Report (VLDR), to correct one statutory inconsistency, clarify a practice issue, address one minor technical modification to a question for clarification, and add a few new disclosures.

Before getting into the details of the new disclosures added to the RECR and VLDR, let’s first discuss how 2021 Wis. Act 96 changed Wisconsin Statute Chapter 709.

Who must complete an RECR/VLDR?

Wis. Stat. § 709.01 requires a residential seller to complete a § 709.03 RECR, whether they are broker-assisted or For Sale by Owner (FSBO), or risk rescission of the offer to purchase. Wis. Stat. § 709.03 generally applies to all persons who transfer real estate containing one to four dwelling units, including condominium units, time share property and living quarters in a commercial property.

Who is exempt from completing an RECR/VLDR?

Wis. Stat. § 709.01 does not apply to (1) personal representatives, trustees, conservators and other fiduciaries appointed by or subject to supervision by the court, but only if those persons have never occupied the property (Note this exclusion does not apply to powers of attorney); (2) real estate that has not been inhabited, e.g., new construction; and (3) transfers exempt from the real estate transfer fee, e.g., between spouses, foreclosures, probate transfers, etc.

If a seller is claiming he or she is exempt from completing an RECR, the broker may review the WRA Seller Refusal/Statement Regarding Condition or Disclosure Report, available in zipForms, and ask the seller

to complete the form. The form includes check boxes identifying potential exemptions.

2021 Wis. Act 96 Changes to Wisconsin Statute Chapter 709

Inconsistency in the statute

Two different sections of Wisconsin Statute Chapter 709 provide a buyer a two-business-day right to rescind the offer or option in writing but provide inconsistent results as to the return of the buyer’s earnest money when the buyer exercises those rights.

For instance, Wis. Stat. § 709.05 permits a buyer to automatically get earnest money back if the buyer exercises his or her rescission rights when:

- A) The buyer receives a report after the submission of an offer or option if a defect as defined in the report is disclosed.
- B) The buyer receives an incomplete report or inaccurate assertion that an item is not applicable.
- C) The buyer receives an amended report disclosing a defect that was not previously disclosed.

Interestingly, Wis. Stat. § 709.02(1) also affords the buyer a two-business-day right to rescind in writing if the buyer does not receive the report within 10 days after acceptance of the offer or option but does not provide the buyer the right to automatically receive the earnest money back after exercising these rights.

As a result, the two sections of the statute are inconsistent, creating confusion for the parties. Therefore, as of April 1, 2022, 2021 Wis. Act 96 amends Wis. Stat. § 709.02(1) to authorize the buyer to receive earnest money back if the buyer has the right to rescind the offer, creating consistency between Wis. Stat. § 709.05 and Wis. Stat. § 709.02(1).

Practice issue clarification

Rather than answering the specific questions on the disclosure report, some sellers mark an “X” through the entire report or strike a line through all “N/A” responses. This practice creates ambiguity as to whether the seller has provided the buyer a completed report.

Effective April 1, 2022, 2021 Wis. Act 96 clarifies if the seller provides a report with strikethroughs or unanswered questions, that the form is considered incomplete, and the buyer then has certain statutory direction in Wis. Stat. § 709.05(1) as to their rescission rights.

Technical modification to a current disclosure

When sellers were completing the report, they were unsure as to whether they are required to disclose public rights of way. However, the question was intended to ask the seller about private rights-of-way impacting the land.

Thus, effective April 1, 2022, 2021 Wis. Act 96 modifies the items in the land use disclosure, so the reports specify the disclosure applies to private and not public rights-of-way. The underlined language shows how this question was modified by 2021 Wis. Act 96 to help provide needed clarity as to what rights-of-way and easements the seller was being asked about.

In the land use section of the RECR and VLDR, the following disclosure was added:

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

New disclosures

Both 2021 Wis. Act 96 and 2021 Wis. Act 47 create new disclosures in the RECR and VLDR.

FIRPTA

Federal law imposes a withholding tax on foreign sellers when they sell real property and requires buyers involved in such transactions to potentially be responsible for the tax.

The sale of a U.S. real property interest by a foreign seller is subject to income tax withholding under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). FIRPTA authorized the U.S. to tax “foreign people” selling U.S. real property interests. A “foreign person” is defined in FIRPTA as a nonresident alien individual, foreign corporation, foreign partnership, foreign trust or foreign estate; it does not include a resident

alien individual. U.S. green card holders as well as U.S. citizens and non-citizens who fulfill the requirement of the substantial presence test are not subject to FIRPTA.

People buying U.S. real estate interests from foreign sellers, certain purchasers’ agents and settlement officers are required to withhold 15% of the amount realized to ensure Internal Revenue Service (IRS) taxation of the gains realized on the sale. Under FIRPTA, the buyer is the withholding agent. The buyer must find out if the seller is a foreign person. If the seller is a foreign person and the buyer fails to withhold, the buyer may be held liable for the tax.

Although at this time, these transactions are infrequent due to the significant consequences for buyers failing to comply with FIRPTA, the newly revised WB-11 Residential Offer to Purchase required for use by Wisconsin real estate licensees as of January 1, 2020, includes a FIRPTA provision on lines 516-536.

2021 Wis. Act 96 adds FIRPTA as a disclosure to the reports to help in determining if the seller is a foreign person for tax purposes.

Effective April 1, 2022, In the RECR and VLDR in the Additional Information section, the following is added:

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

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

Riparian rights

Other new disclosures were added based on changes made in 2021 Wis. Act 47, effective July 1, 2022, legislation that restored riparian property owners the right to place a pier.

For over 140 years, Wisconsin law has recognized that owners of waterfront property have riparian rights, including the right to place a pier. Unfortunately, in the 2018 *Movrich v. Lobermeier* case, the Wisconsin Supreme Court declared that some waterfront property owners do not have the right to place a pier. The court held owners of waterfront property along flowages in artificial waterways do not have the right to place a pier because the lakebeds of flowages and artificial waterways are privately owned. The court decided the owners of lakebeds can prohibit any pier from touching the bed or floating above it.

The potential impacts of this decision were far-reaching. Consider the following:

- The court’s ruling applied to all flowages and other man-made bodies of water in Wisconsin.
- According to the Wisconsin Department of Natural Resources (DNR), Wisconsin has approximately 260 flowages.
- Thousands of lakes in Wisconsin are considered man-made, including large bodies of water such as Lake Koshkonong, Lake Wisconsin and the chain of lakes in areas like Minocqua and Eagle River.

Because of this ruling, affected property owners could have been forced to either remove their pier or pay several hundreds of dollars for a dock license fee to keep their existing pier.



The legislation restored a waterfront property owner's right to place a pier. 2021 Wis. Act 47 was imperative for affected property owners, including homeowners, as well as waterfront businesses such as restaurants, marinas and gas stations.

To ensure transparency for potential purchasers, the law also included questions in the RECR and VLDR asking property owners to disclose if they are aware of written agreements affecting riparian rights as well as if they are aware the property abuts the bed of a navigable waterway owned by a hydroelectric operator.

Effective July 1, 2022, 2021 Wis. Act 47, added the following disclosures:

- Are you aware of a written agreement affecting riparian rights related to the property?
- Are you aware that the property abuts the bed of a navigable waterway that is owned by a hydroelectric operator?

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

To learn more about the law, see the July 2021 *Legal Update*, "Pier Rights Restored for Wisconsin Property Owners," at www.wra.org/LU2107.

WRA's disclosure reports

The Real Estate Examining Board (REEB) with the knowledge of the bills resulting in 2021 Wis. Act 96 and 2021 Wis. Act 47, included the revisions and new disclosures in the WB-11 Residential Offer to Purchase and the WB-14 Residential Condominium Offer to Purchase, both having optional use dates of August 1, 2020, and mandatory use dates of September 1, 2020. Therefore, the WRA added the same changes in italics to all of its disclosure reports. Further, as historically done, when the language in italics becomes law, the italics are removed.

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