The Real Estate Examining Board (REEB) at the Department of Safety and Professional Services (DSPS) has prepared and approved an updated WB-24 Option to Purchase for use by real estate licensees in their transactions when they need to draft an option. The optional use date is May 1, 2022, and the mandatory use date is July 1, 2022.

Option Overview

An option to purchase is a contractual right to buy a property at a specified price within a specified time period. An option to purchase is, in simple terms, a continuing promise to sell. In an option, the seller or owner of the real estate may be referred to as the “optionor,” and the potential buyer may be called the “optionee.” However, the WB-24 Option to Purchase and the discussion in this Update, use the more familiar “seller” and “buyer” terminology.

The seller is bound by the option and generally cannot sell the property to anyone else during its term. The buyer, on the other hand, is not bound to take the property or pay for it – the buyer has a choice. The buyer has a stated period of time in which to investigate the situation and decide whether or not to exercise the option and proceed with the purchase of the property. The buyer’s exercise of the option, like an acceptance of an offer, must be in writing.

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 due diligence by performing inspections and testing, checking zoning and other applicable ordinances, reviewing documents, determining the availability of financing, having the property appraised and ascertaining the suitability of the property for the buyer’s intended purpose before proceeding to exercise the WB-24 option. This is accomplished using the provisions for Buyer Due Diligence; Inspections and Testing; and Authorization for Appraisal, Inspections and Tests that appear on lines 108-145 of the updated WB-24.

The option differs from an offer to purchase because the buyer typically evaluates property conditions, financing availability, applicable ordinances, etc., before deciding whether to exercise the option and go forward with the purchase. In other words, it is backwards: in an offer the contract is accepted first and then the buyer uses the contingencies to determine property condition, financing and other important standards, but in an option the buyer makes those determinations before becoming committed to purchase. The seller, however, cannot compel the sale and may be left with nothing but the option fees and a property that has been off the market for a period of time.

REALTOR® Practice Tip

The general rule for options is that time is of the essence, whether or not this is specified in the agreement. The WB-24, unless modified, makes the payment of option fees, payment of extension fees, the seller’s grant of the option, and the buyer’s exercise of the option all time-is-of-the-essence. The buyer must exercise the option by the stated deadline if the option is to become a purchase contract. If the buyer does not timely exercise the option, it expires without further notice and the buyer’s rights and nonrefundable option fees are immediately forfeited.

REALTOR® Practice Tip

In an offer to purchase, the buyer conducts inspections, testing, etc., after the offer is accepted and a contract is formed and asks the seller to make repairs and remedy conditions as a condition of proceeding to closing. In an option, the buyer secures the seller’s authorizations and consents, and may conduct the same inspections and testing, but will use the results to decide whether to exercise the option, the step that will create a contract similar to an accepted offer. If the property condition is unacceptable to the buyer, the buyer may choose to simply not proceed.
The WB-24 is used in a wide range of transactions, from a single-family home or condominium unit to a commercial or development property. As a result, the WB-24 is sprinkled with property-specific provisions necessary to create a serviceable contract should the buyer exercise the option to purchase. For example, see the condominium provisions on lines 331-391.

The option to purchase is also frequently paired with a lease to create a lease-option arrangement, so the WB-24 ideally must be equipped to be paired with a lease or rental agreement. See the Lease-Option Provisions on lines 69-81 of the updated WB-24.

The Updated WB-24 Option to Purchase

Familiarity with the language and sequence of provisions promotes ease of use. Accordingly, changes to the basic transactional provisions made in the WB-11 Residential Offer to Purchase and the other WB offers have also been made in the revised WB-24 when those same provisions are used. In addition, the same transactional flow has been adopted to the greatest extent possible.

For example, modifications were made to the provisions for the Terms of Purchase on lines 24-52 to mirror the offer provisions for Purchase Price, Included in Purchase Price and Not Included in Purchase Price, and the “fixture” definition was moved to the first page under the Terms of Purchase heading. Other updated offer verbiage and provisions new appearing in the updated WB-24 are found in the sections for Closing, Closing Proration, Special Assessments/Other Expenses, Definitions, Inclusion of Optional Provisions, Maintenance, Property Damage Between Exercise of Option and Closing, Distribution of Information, Condominium Buyer Rescission Rights, and Delivery of Documents and Written Notices. The content and language in these provisions should be familiar if not second-hand to those who work with the WB offers to purchase.

Provisions newly added to the WB-24 in this 2022 update include the Contingency for Additional Condominium Information and Foreign Investment in Real Property Tax Act (FIRPTA).

This Legal Update primarily focuses on the changes made to those provisions of the WB-24 that are unique to option transactions. The section-by-section discussion points out the changes adopted by the REEB and provides practice tips for getting the best results with this newest version of the WB-24.

Option Terms

The Option Terms on lines 10-23 have some new subsections.

- The Initial Option Fee subsection first sets forth the amount and the deadline for payment of the initial option fee the buyer will pay to the seller.
- Next, the Exercise Deadline subsection provides the deadline for the buyer’s exercise of the option.
- The Exercise subsection describes what the buyer must do to exercise the option and gives the breakdown of what portion of the option fees will be applied to the purchase price.
- If the Extended Option Term subsection is completed, the buyer will have the opportunity to extend the term of the option by paying the specified option extension fee by the stated date.
- The Option Fees subsection at line 20 advises: “Unless otherwise provided in this Option, the option fee and the option extension fee shall be nonrefundable.” One reason this was added is because the new provisions in the title section make the option fees refundable if the buyer terminates the option because the seller cannot remove the buyer’s title objections.

Recording of Option

The Recording of Option section at the top of the second page was restated to make it clear that it is the parties and their attorneys, but not the licensees, who would be responsible to provide the legal description of the property and any notarized signatures required should the parties agree to record the option or a memorandum thereof. Lines 61-62 provide:

If recording this Option or a separate instrument evidencing this Option, the parties agree to provide the applicable legal description and authenticated or acknowledged signatures as may be required.

Property Condition Representations caution

The caution at lines 90-103 of the WB-24 was updated to describe the requirements for when a Real Estate Condition Report needs to be used and when a Vacant Land Disclosure Report needs to be used.

Title Evidence

Much of the Title Evidence section was rewritten and reconfigured to give a buyer the opportunity to have title evidence provided at two different points in the option process. The buyer may elect to have title evidence provided upon the granting of the option and will receive title evidence in all cases – unless the parties modify the WB-24 – upon the buyer’s exercise of the option.

The buyer may be more likely to elect to receive title evidence at two different times if the timeframe in the option process encompasses many months if not years. The risk of new intervening liens and encumbrances is greater when more time passes.

Preparation and recording of deed

There was some question raised by the DSPS Forms Council about what the seller does versus the buyer with regard to preparation of the deed and payment of the transfer fee and the recording fee. Lines 188-189 now state, “Seller, at Seller’s cost, shall complete and execute the documents necessary to provide a recordable conveyance and pay the Wisconsin Real Estate Transfer Fee.” Lines 216-217 state, “Buyer shall pay the costs of providing the title evidence required by Buyer’s lender and recording the deed or other conveyance.” This should clarify that the seller pays for the preparation of the deed and pays the transfer fee while the buyer pays the recording fee.

Seller Changes Prohibited

The Seller Changes Prohibited provision on lines 193-195 indicates:

Seller Changes Prohibited: The Parties agree that Seller shall not rezone the Property or create any additional liens or encumbrance on title after Seller grants of this Option without Buyer’s written consent except for liens and encumbrances that will be removed at closing.
The language is not new, but it has been pulled out and placed in its own subsection for emphasis. This helps provide a little more reassurance that the seller will not make significant changes affecting title while the buyer conducts due diligence.

Following the Seller Changes Prohibited provision, the structure of the Title Evidence section divides into two parts: (1) Title Upon Granting of Option and (2) Title Upon Exercise of Option. The Title Upon Granting of Option part is optional and applies only if the box at line 199 is checked, while the part for Title Upon Exercise of Option is automatically included and resembles the title evidence provisions from the prior version of the WB-24 and the title evidence provisions in many of the offers.

**Title Upon Granting of Option**

Title Upon Granting of Option on lines 196-212 is new. This part is optional and if the box on line 199 is not checked, then the parties should skip this part and go directly to Title Upon Exercise of Option at line 213. If the box on line 199 is not checked, then no title insurance commitment need be provided by seller upon the granting of the option and the provisions on lines 199-212 do not apply.

If the box is checked, then the seller will deliver a title insurance commitment to the buyer or the buyer’s attorney within the stated number of days after the granting of the option. The parties may look to lines 491-499 to determine when the option was granted. The commitment is to show the status of the title to the property as of a date no more than 15 days before the delivery of the commitment. The title shown must be merchantable in accordance with the description of merchantable title on lines 179-188. The title may, however, be subject to liens that will be paid at closing and standard title insurance requirements and exceptions.

**Title Not Acceptable Upon Granting of Option (lines 204-212)**

Steps:

1. If the buyer finds the title commitment is not acceptable, the buyer gives written notice of their objections within the stated number of days (lines 205-206) after the title commitment was delivered. The default is 15 days.
2. The seller, in turn, has the stated number of days (line 207) after the delivery of the buyer’s title objections to deliver notice to the buyer advising whether the seller will or will not remove the title objections by closing. Again, the default is 15 days.
3. If the seller gives no notice or elects to not remove the title objections, the buyer will have five days after the delivery of the seller’s notice electing to not remove the objections, or five days after the deadline for the seller’s response if the seller did not respond, to deliver notice to the seller terminating the option.
4. Upon such termination, the buyer’s option fee may be returned to the buyer depending upon whether the STRIKE ONE item at line 210 was completed to say the option fee would or would not be refunded – the default is the fee will be refunded.
5. If the buyer does not deliver notice terminating the option, their title objections are deemed waived, and the title evidence delivered to the buyer is deemed acceptable.
6. If the seller elects to remove the title objections by the time of closing, but fails to do so, the buyer may pursue the remedies for a default by the seller (lines 315-318). This is stated on lines 238-240.

**TITLE UPON GRANTING OF OPTION**

If the box at line 199 is not checked, no title insurance commitment shall be provided by Seller upon the granting of this Option.

☐ A title insurance commitment shall be delivered to Buyer or Buyer’s attorney not more than _______ days (“15” if left blank) after Seller grants this Option showing title to the Property as of a date no more than 15 days before delivery of such title evidence to be merchantable per lines 179-188, subject only to liens which will be paid out of the proceeds of closing and standard title insurance requirements and exceptions. (Seller) (Buyer) STRIKE ONE (“Buyer” if neither is stricken) shall pay for this title evidence.

☐ TITLE NOT ACCEPTABLE UPON GRANTING OF OPTION: If the title insurance commitment delivered after the granting of this Option is not acceptable, Buyer shall notify Seller in writing of Buyer’s objections to title within _______ days (“15” if left blank) after delivery of the title insurance commitment to Buyer or Buyer’s attorney. Seller shall have _______ days (“15” if left blank) after delivery of the notice stating title objections, to deliver notice to Buyer stating Seller’s election to remove or not to remove the objections by time of closing. If Seller elects not to remove said objections, or no election is made by Seller by the deadline at line 207, Buyer shall have (5) days to deliver written notice to Seller terminating this Option and Buyer’s option fee (shall) (shall not) STRIKE ONE be returned (“shall” if neither is stricken) to Buyer. If Buyer does not deliver timely written notice terminating this Option, Buyer’s title objections made under the provisions of lines 204-206 are waived and the title evidence delivered to Buyer herein is deemed acceptable.
Title Upon Exercise of Option

The process and subsections appearing in this part should be familiar and not too different from other Title Evidence sections in other WB contracts. The seller agrees to provide a title insurance policy to the buyer as the new owner, and the buyer needs to provide any title evidence required by the buyer’s lender.

Gap endorsement

The owner’s policy shall include a “gap” endorsement or equivalent gap coverage that will be paid for by the party selecting the STRIKE ONE item at lines 218-219 – the default is that the seller pays. If a gap endorsement or equivalent gap coverage is not available, the buyer may give written notice that title is not acceptable for closing.

Delivery of merchantable title

If the buyer exercises the option, then the seller will deliver a title insurance commitment to the buyer or the buyer’s attorney within the stated number of days (line 225) after the granting of the option. The default is 15 days. The commitment is to show the status of the title to the property as of a date no more than 15 days before the delivery of the commitment. The title shown must be merchantable in accordance with the description of merchantable title on lines 179-188, but may be subject to liens that will be paid at closing and standard title insurance requirements and exceptions.

Title Not Acceptable for Closing (lines 230-241)

Steps:
1. If the buyer finds the title commitment is not acceptable, the buyer gives the seller written notice of their objections by the time set for closing.
2. The seller, in turn, has the stated number of days (line 231) after the delivery of the buyer’s title objections to deliver notice to the buyer advising the seller will remove the title objections and the time for closing shall be extended as necessary for this purpose. The default is 15 days.

3. If the seller is unable to remove the title objections, the buyer will have five days from the buyer’s receipt of the seller’s notice stating they cannot remove the title objections to deliver notice to the seller waiving the title objections and the time for closing shall be extended accordingly.
4. If the buyer does not waive the objections, the buyer “may” deliver written notice to the seller terminating the option. The buyer is not limited to the remedy of terminating the option. The parties are free to craft their own resolution, use other remedies and/or amend the option.
5. If the buyer does deliver written notice terminating the option, the buyer’s option fee may be returned to the buyer depending upon whether the STRIKE ONE item at line 236 was completed to say the option fee would or would not be returned – the default is the fee shall not be refunded.
6. If the buyer exercised the option, the buyer may not object to title matters the buyer previously deemed acceptable if the buyer received and reviewed title evidence upon the granting of the option (lines 204-212). To state it another way, the buyer does not get two kicks at the can; the buyer cannot reverse their position and use a waived objection to terminate the option after the option has exercised.
7. If the seller does not remove the title objections with regard to the title evidence delivered after the granting of the option by the time of closing as stated under the provisions at lines 204-208 (if applicable), or if the seller rezones the property or creates any additional liens or encumbrances prohibited under lines 193-195, the buyer may pursue the remedies for a default by the seller listed at lines 315-318. The same is true if the seller does not remove the objections with regard to the title evidence delivered after the buyer’s exercise of the option.

Special assessments/other expenses

Special assessments, if any, levied or for work actually commenced before the date the buyer exercises the option must be paid by the seller no later than closing. All other special assessments are paid by the buyer. “Levied” means the local municipal governing body has adopted and published a final resolution describing the planned improvements and the assessment of benefits.
Condominium Units

The WB-24 option includes a page of provisions regarding condominiums on lines 331-391. This section begins with a caution suggesting that if the option involves a condominium unit, the buyer should obtain and review the condominium disclosure documents before entering into the option.

The subsequent provisions in the section trigger when the buyer exercises the option. The seller is required to deliver the mandatory condominium disclosure materials within 10 days after the buyer exercises the option.

The condominium provisions in the option have been revised to encompass the changes made in the 2020 version of the WB-14 Residential Condominium Offer to Purchase. This includes changes made with regard to buyer rescission rights when disclosure materials delivered to the buyer are later amended in a way that would materially affect the rights of the buyer. The amended documents must be promptly delivered to the buyer, and this will trigger another right to rescind for the buyer if the change materially affects the rights of the buyer. In addition, the Contingency for Additional Condominium Information was also added to the WB-24.

Wis. Stat. § 703.33(4)(c) provides, “A purchaser who timely rescinds under par. (a) or (b) is entitled to the return of any deposits made under the contract.” The provision on lines 390-391 of the revised WB-24 attempts to resolve the issue of whether a nonrefundable option fee or a nonrefundable option extension fee is a “deposit” as that term is used in the condominium statutes, which unfortunately do not include a definition of “deposit.” In the Option Fees Not a Deposit provision on lines 390-391, the parties agree that option fees are not deposits. Note this is a contractual resolution to a potential situation, and it is always possible that a court might disagree with the parties’ agreement, especially if the option has been exercised and part of the option fees are treated as credits against the purchase price. In that case the option fees would be similar to earnest money.


MORE INFO

The information contained herein is believed accurate as of May 1, 2022. The information is of a general nature and should not be considered by any member or subscriber as advice on a particular fact situation. Members should contact the WRA Legal Hotline with specific questions or for current developments.

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