

Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Legal Action Program



2008 Supreme Court Decisions Affecting Real Estate

The Legal Action Program becomes involved in litigation, primarily as amicus curiae or “friend of the court,” with regard to issues that are of importance to the Wisconsin REALTORS® Association membership, the Wisconsin real estate industry and private property owners in our state. The Program has been particularly active the last few years and the 2007-2008 term of the Wisconsin Supreme Court was no exception. The Program has weighed in on a wide range of important and interesting real estate-related issues ranging from the remedies available to a real estate buyer when the seller misrepresents the property condition, to the constitutionality of zoning ordinances with no permitted uses, to the applicability of open meetings and open records laws to economic development corporations and property assessment records – all issues of great interest to real estate professionals.

The following *Legal Update* reviews six of the most important Wisconsin Supreme Court opinions issued in 2008, deciding issues that are critical to REALTORS®. The WRA, through the WRA Legal Action Program, filed an amicus curiae brief in each of these cases:

- Buyer remedies for seller misrepresentations
Below v. Norton, 2008 WI 77 (www.wisbar.org/res/sup/2008/2005ap002855.htm)
- *Novell v. Migliaccio*, 2008 WI 44 (www.wisbar.org/res/sup/2008/2005ap002852.htm)

- Land use and development practice
Town of Rhine v. Bizzell, 2008 WI 76 (www.wisbar.org/res/sup/2008/2006ap000450.htm)
Olson v. Town of Cottage Grove, 2008 WI 51 (www.wisbar.org/res/sup/2008/2005ap002257.htm)
- Open meetings and open records laws
State v. Beaver Dam Area Development Corporation, 2008 WI 90 (www.wisbar.org/res/sup/2008/2006ap000662.htm)
WIREdata, Inc. v. Village of Sussex, et al, 2008 WI 69 (www.wisbar.org/res/sup/2008/2005ap001473.htm)

Economic Loss Doctrine Eliminates Common Law Misrepresentation Claims in Residential Real Estate Transactions

Below v. Norton, 2008 WI 77 (www.wisbar.org/res/sup/2008/2005ap002855.htm)

In the *Below v. Norton* case, the buyer, Shannon Below, discovered after she moved in that the sewer line between her home and the street was broken. The sellers, the Nortons, had represented no plumbing defects other than a defective bathtub drain handle on the Real Estate Condition Report (RECR). The buyer sued for intentional misrepresentation, theft by fraud in violation of Wis. Stat. §§ 895.80 & 943.20(1)(d), misrepresentation in advertising in violation of Wis. Stat. § 100.18, strict responsibility misrepresentation

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and negligent misrepresentation. Below's complaint did not originally include any breach of contract claim, and an attempt to amend the complaint to add breach of contract failed due to a procedural timing issue.

Below's complaint alleged that the Nortons knew about the sewer line defect but did not disclose it in the RECR or elsewhere in order to induce Below to purchase the house. Below alleged that she relied on this misrepresentation (concealment) in buying the home, and that the sewer line defect caused her to suffer a pecuniary loss. The Nortons argued that Below's common law intentional, negligent and strict responsibility misrepresentation claims were barred by the Economic Loss Doctrine (ELD).

The trial court dismissed the misrepresentation claims based upon the ELD. It was not clear why the trial court dismissed the § 100.18 claim and the theft by fraud claim based upon Wis. Stat. §§ 895.80 & 943.20(1)(d) – the court merely said they were not applicable.

Upon appeal to the Wisconsin Court of Appeals, the § 100.18 false advertising claim was reinstated, but the Court affirmed the dismissal of the remaining claims. The Court did not specifically address or explain the dismissal of the theft by fraud allegations.

Below appealed to the Wisconsin Supreme Court, which held in a 4-3 decision that the ELD bars all common law intentional misrepresentation claims in all real estate transactions, including residential real estate transactions.

Economic Loss Doctrine

The ELD is a judicially created doctrine that encourages the parties to a contract to anticipate and address all of their potential legal claims relating to the contract *in* the contract. According to the ELD, there should not be any lawsuits based in mis-

representation, fraud or negligence (referred to as tort claims) with regard to the subject of a contract because the parties should have provided the remedies they need in their contracts. The purchaser is the party best situated to evaluate his or her risk of economic loss and to provide measures to address that risk. "Economic loss" refers to a product having inadequate value because it is inferior, does not work for its intended use or the purposes for which it was sold, or does not live up to the contracting party's expectations.

In the *Below* case, the house has inadequate value – it is inferior because the broken sewer line prevents an intended use and one of the purposes for which it is sold: basic sanitary service. Her loss would normally be addressed with contract remedies.

The ELD originally was applied to commercial contracts and business deals in which experienced business people, often with the assistance of their attorneys, routinely bargain for business deals, create warranties and indemnification agreements, and set specific penalties or buy business operation insurance to guard against potential losses. These sophisticated parties generally benefit from the rights and remedies of the Uniform Commercial Code (UCC) and negotiate to assume, allocate or insure against risk of loss to the extent they are not protected by the UCC.

The same cannot be said for consumers purchasing a home. Home buyers, with the assistance of real estate agents, typically write up their purchase contracts on the Offer to Purchase forms approved by the Department of Regulation and Licensing, not attorney-drafted contracts customized to the specific property, transaction and potential risks. Buyers fall "in love" with the home of their dreams and tend not to think or behave like sophisticated professionals

negotiating a business deal – and they do not enjoy UCC protections.

The ELD has been applied in other decisions to negligence and strict liability claims in consumer goods transactions and common law misrepresentation claims in real estate transactions. There is a narrow “fraud in the inducement” exception to the ELD that applies when the misrepresentation induces the party to enter into the contract and is not specifically related to the subject matter of the contract.

Application of the ELD to residential offers to purchase is a bad fit. It limits the remedies available to most buyers, contrary to the Wisconsin policy of transparency and full disclosure as evidenced in the RECR law and the provisions of the DRL-approved offers to purchase. Fewer remedies and less onerous potential penalties may function as a green light to seller misrepresentation of property defects. This, in turn, would increase the need for buyer inspections and testing, which would increase the cost of purchasing a home. Another potential by-product of applying the ELD to residential real estate is that it may indirectly raise the standards and expectations with respect to real estate brokers, and essentially “raise the bar,” potentially increasing liability for REALTORS®.

Less Truth and Fewer Consequences

The Supreme Court’s opinion is quick to point out that application of the ELD does not leave a home buyer without any remedies – buyers will still have contract remedies and statutory remedies such as Wis. Stat. § 100.18. The Court also indicated that claims such as a theft by fraud claim based upon Wis. Stat. §§ 895.80 & 943.20(1)(d) would also be available, pointing to a finding in another very recent Supreme Court case (*Stuart v. Weisflog’s Showroom Gallery, Inc.*, 2008 WI 22) that the ELD cannot apply to statutory

claims. The Court also points to the right to rescind under Wis. Stat. § 709.02 as a valuable contract remedy.

In residential real estate transactions, the seller is required by Wis. Stat. Chapter 709 to make property condition disclosures to the buyer in an RECR. Up until now, sellers who misrepresented or concealed the condition of the home were often sued for intentional misrepresentation because the buyer could recover compensatory damages and punitive damages and file suit based upon when the damage was discovered instead of when the deception occurred.

Without the threat of punitive awards, the consequences for sellers who lie may be less severe. If a seller gets caught in a misrepresentation, the home buyer can still sue for a breach of contract because the offer incorporates the RECR and calls for additional property condition representations (see lines 53-81 of the WB-11 Residential Offer to Purchase). But the seller will typically only have to repair the defect that the seller misrepresented or concealed. If the worst a seller could face would be to pay for the defect that they should have paid to fix in the first place, then sellers may decide against making truthful property condition disclosures. Since many buyers may be reluctant to sue because of the costs, time and burden of proving the case, particularly if the amount involved is only a few thousand dollars, sellers may conclude it is worth the risk to lie because they stand a decent chance of getting away with it.

Sellers who misrepresent the condition of their homes may also be sued under Wis. Stat. § 100.18 and Wis. Stat. § 895.466. Under Wis. Stat. § 100.18, the false advertising statute, a home buyer can sue a seller who makes a false, deceptive or misleading statement to induce the real estate sale if the buyer suffers a monetary loss as

a result. A successful buyer may recover any monetary loss together with costs and reasonable attorney fees. §100.18 lawsuits can be brought only with respect to representations made before an offer to purchase is accepted.

Wis. Stat. § 895.466 gives a civil remedy to those suffering damages as a result of a violation of Wis. Stat. § 943.20, a criminal statute. § 943.20(1)(d) makes it illegal for anyone to “obtain title to property of another person” by intentionally deceiving the person with a false representation, which is “known to be false, made with intent to defraud, and which does defraud the person to whom it is made.” Obtaining title to property includes obtaining the purchase price money from the buyer. Wis. Stat. §895.466 allows the court, in its discretion, to award all costs and attorney fees, and to triple the damages, but is more difficult to prove.

Licensee Liability

Because agents and brokers are not parties to the offer to purchase, it would appear that the ELD would not block misrepresentation lawsuits against licensees. Real estate licensees may be found liable for false advertising under § 100.18, but only with respect to false representations knowingly made prior to the acceptance of the offer. No attorney fees may be recovered under § 100.18 from a real estate licensee engaged in real estate practice.

Keeping Sellers Honest

Wisconsin public policy, as reflected in the RECR law and in the DRL offer to purchase forms, promotes seller disclosure of property defects in residential transactions because sellers are the ones most familiar with their homes. Buyers who receive a seller’s RECR receive more complete and accurate information on which they may base their offer to purchase negotiations.

Over the upcoming weeks, the WRA

will evaluate different avenues that might be pursued to restore the prior level of seller accountability. One avenue may be legislation amending the RECR law to provide remedies for buyers in addition to the limited contract rescission remedy currently provided in the statutes. The WRA will also work with the DRL Real Estate Contractual Forms Advisory Committee in evaluating offer to purchase provisions regarding seller property condition representations.

REALTOR® Performance Precision

Now that the *Below v. Norton* case has changed the remedies available in a residential real estate transaction, what is the best thing that REALTORS® can do right now to protect themselves from liability? The answer is that REALTORS® should be very careful to do their jobs well: thoroughly, methodically and with precision, working with facts and not assumptions or speculation.

Visual Inspections

Wis. Admin. Code § RL 24.07(1)(b) provides, “Listing broker. When listing real estate and prior to execution of the listing contract, a licensee shall inspect the real estate..., and shall make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property as applicable. The licensee shall request that the seller provide a written response to the licensee's inquiry.”

The inquiries to the seller regarding the property condition and the seller's written response generally take the form of the RECR. With respect to the listing broker's inspection of the property, no written record is required, but prudent listing brokers will require all listing agents to keep a written record of their observations, using a form like the WRA Listing/Selling Visual Inspection Form. As an alternative, the agent can note on a copy of the RECR that all defects observed by the list-

ing agent or otherwise known are disclosed by the seller in the RECR.

The visual inspection form is a due diligence tool for implementing licensee inspection and disclosure duties under § RL 24.07. Listing agents are required to inspect a property and disclose material adverse facts and facts inconsistent with the seller's RECR or other disclosures, if any. The form serves as a checklist to help ensure that a competent and reasonably thorough inspection has been performed. It also provides a record of observations to use when reviewing the RECR to look for inconsistencies and when making written disclosures of material adverse facts. Detailed notes on the visual inspection form, for example, “boxes stacked against west basement wall,” will help licensees accurately remember what they saw – and could not see. The form will assist agents to spot issues and concerns for sellers who may address these items prior to putting their property on the market and for buyers who may address these items in their offers to purchase.

Agents working with buyers may also be required to complete and sign a WRA Listing/Selling Visual Inspection form for each property showing where the buyer shows a high level of interest or plans to draft an offer. Licensees must inspect prior to or during each showing where they have access, so brokers need to consider whether the completion of a form should be required for every showing. Brokers may require buyers to use professional inspectors whenever there is no RECR, problems were observed during the licensee's inspection or licensees are otherwise concerned that there may be property condition issues. REALTORS® should always encourage parties to use other professionals, such as inspectors, accountants and attorneys, whenever appropriate.

The prudent broker has an office

policy that requires the company's agents to complete a visual inspection form for the file for every listing. This ensures maximum license law compliance for the benefit of the broker and the associates, and facilitates quality services for clients.

Seller's RECR

All sellers subject to Wis. Stat. Chap. 709, whether broker-assisted or FSBO, must complete an RECR or risk rescission of the offer to purchase. Chapter 709 generally applies to all persons who sell or otherwise transfer Wisconsin real estate containing one to four dwelling units. Dwelling units include condominium units, time-share property, living quarters in a commercial property and summer cottages.

Chapter 709 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. This exemption for fiduciaries, however, does not apply to persons holding powers of attorney because this relationship is created by contract, not by court appointment, and is not subject to direct court supervision.
2. Real estate that has never been inhabited, such as new construction and properties converted to residential from another use.
3. Transfers exempt from the Wisconsin real estate transfer fee, such as gifts between spouses, tax sales, foreclosures, condemnations and transfers by will.

When the seller completes the RECR, the seller is indicating whether the seller has notice or knowledge of the listed property conditions. The RECR is not a warranty, but rather a statement of the seller's knowledge and awareness of the property offered for sale. A “defect,” as used in the RECR, means 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.

For example, in a property that had fire damage to the siding, but the siding was replaced and painted, disclosure of the fire, the resulting fire damage and subsequent repairs will be a determination made by the seller, with or without the assistance of legal counsel. Some sellers are reluctant to disclose past defects that have presumably been repaired and eliminated. Buyers and buyers' attorneys, on the other hand, are more comfortable when the past defect is disclosed, along with information about the repairs made. This gives buyers the opportunity to investigate and confirm that the problem was eliminated. Prudent brokers encourage full disclosure but leave resolution of legal questions to the seller's attorney.

The listing agent should remember that the responsibility to complete an RECR falls solely upon the shoulders of the seller. If the seller wants specific guidance on what to disclose or not disclose, the agent should refer him to his attorney for legal advice. An agent who tells a seller how to answer RECR questions risks liability for the content thereof.

The prudent listing broker will make sure the seller understands that if the seller makes a full and complete disclosure of the nature and extent of property conditions that may be seen by the buyer as a defect, those property conditions may not be listed as a defect under the inspection contingency in the offer to purchase. Defects which have been previously disclosed in sufficient detail so that the buyer is aware of the nature and extent thereof cannot be the reason for the voiding of the offer under

the Inspection Contingency in the WB-11 Residential Offer to Purchase.

Broker Disclosure of Material Adverse Facts

If a seller fails to disclose a defect and it is not disclosed elsewhere, the licensee must promptly disclose the defect in writing if it constitutes a material adverse fact. If the licensee, as a competent licensee, knows that this fact (1) has a significant adverse effect on the value of the property, (2) significantly reduces the structural integrity of the property, (3) presents a significant health risk to the occupants of the property, or (4) is information that indicates that a party to the transaction is not able to or does not intend to meet his or her obligations under the contract, then the issue constitutes an adverse fact. If a party to the transaction were to so indicate, or if a competent licensee would generally recognize that this fact is of such importance that it would affect a reasonable party's decision to enter into a contract or would affect the party's decision about the terms of the contract, the fact is both adverse and material. If this fact is both adverse and material, then Wis. Admin. Code § RL 24.07(2) requires a licensee to timely disclose the fact in writing to all parties to the transaction, even if the client would direct the licensee not to disclose. A sample material adverse fact disclosure letter is available in *Legal Update 02.12*, "2002 REALTOR® Highlights," online at www.wra.org/LU0212.

If an agent knows or is aware of information suggesting the possibility of a material adverse fact, Wis. Admin. Code § RL 24.07(3) states that the agent will be practicing competently if the agent makes timely written disclosure of the information suggesting the material adverse fact to all parties to the transaction, recommends the parties obtain expert assistance to inspect or investigate for the possible material adverse fact and, if directed by the

parties, draft appropriate inspection or investigation contingencies. The duty to disclose has priority over any duty owed to the agent's client.

Disclose facts only – avoid assumptions, inferences and predictions. When in doubt, disclose it!

Attributing the Source

A Wisconsin licensee can be found liable to a buyer for inaccurate statements made by the broker that appear to the buyer to have been made from the broker's own personal knowledge. In Wisconsin, the law provides that an inexperienced buyer should be entitled to rely on the factual statements made by a professional. Accordingly, when a broker receives data from the seller, the city treasurer's office, or another third party and restates the information in the MLS data sheet or in other advertising as if it were fact, the broker may be responsible for the accuracy of the information. Accordingly, REALTORS® are recommended to specifically attribute data used in advertisements, such as acreage, square footage and assessed values, to its source, and use general disclaimers. Disclaimers may not, however, provide certain and absolute protection in all cases.

Inspection and Testing Contingencies

The buyer should be equipped to investigate and inspect every aspect of the property. A diligent agent will give the buyer every opportunity to inspect, test and investigate all aspects of the property by providing a full array of inspection and testing contingencies that the buyer may use. The buyer can decide later whether to employ them; the buyer does not have to use every contingency, but it is better to have provisions that the buyer decides not to use than to try to amend the offer to add something later because there is no guaranty that the seller will agree. This is particularly true in cases where there is no RECR, for example, where the seller

is exempt from the RECR. In addition, offers on rural properties without well and septic inspection and testing contingencies are written by licensees foolish enough to risk DRL discipline for incompetent practice.

CLUE Reports

Comprehensive Loss Underwriting Exchange (CLUE) is a loss history information database developed and used by insurance companies to share information about insurance claims, reported losses and damage, and even insurance policy inquiries with respect to properties and individuals. A CLUE report will reveal a particular property's claims history over the last five years: how many claims reported, how many resulted in loss payments and how much each loss cost. Seventy percent of all CLUE reports have no reported claims or paid losses – the average homeowner files an insurance claim only once every 10 years.

When a seller obtains a copy of his or her CLUE report, it will serve as a third-party, supplemental property condition report, and the seller will be ready to respond to buyers who request a copy of the report before writing an offer to purchase. The broker may want to write a provision into the listing contract requiring the seller to provide a copy of his or her CLUE report to the listing broker.

Having a copy of the CLUE report will help increase the accuracy and completeness of seller and broker disclosures. Property owners may not remember the details of property damage incidents, such as dates, causes and amounts spent, so the CLUE report serves as a back-up measure to make sure that any recent property damage mishaps are documented and disclosed.

Buyers may ask the seller for the property's CLUE report before writing an offer to purchase because the claims history of the

property may impact the buyer's ability to obtain homeowner's insurance at a reasonable price. If the seller does not provide a CLUE report, the buyer may put a contingency in the offer requiring the seller to furnish his or her CLUE report.

CLUE reports may be ordered online from www.choicetrust.com. A consumer can also send a request for a copy of his or her CLUE report to Choice Point's Consumer Disclosure, P.O. Box 105108, Atlanta, GA 30348-5108. Choice Point asks that mail requests be submitted on a form that may be downloaded at www.choicetrust.com/pdfs/curious_consumer_form.pdf.

For Further Discussion

See *Legal Update* 02.07, "Duty to Disclose," online at www.wra.org/LU0207, for further discussion of the disclosure obligations of licensees and sellers. More information about disclaimers and attributing the source of representations, see the February 2006 *Legal Update*, "Real Estate Advertising," online at www.wra.org/LU0602. Also see the February 2004 *Legal Update*, "Listing

Procedures for the Prudent Broker," online at www.wra.org/LU0402.

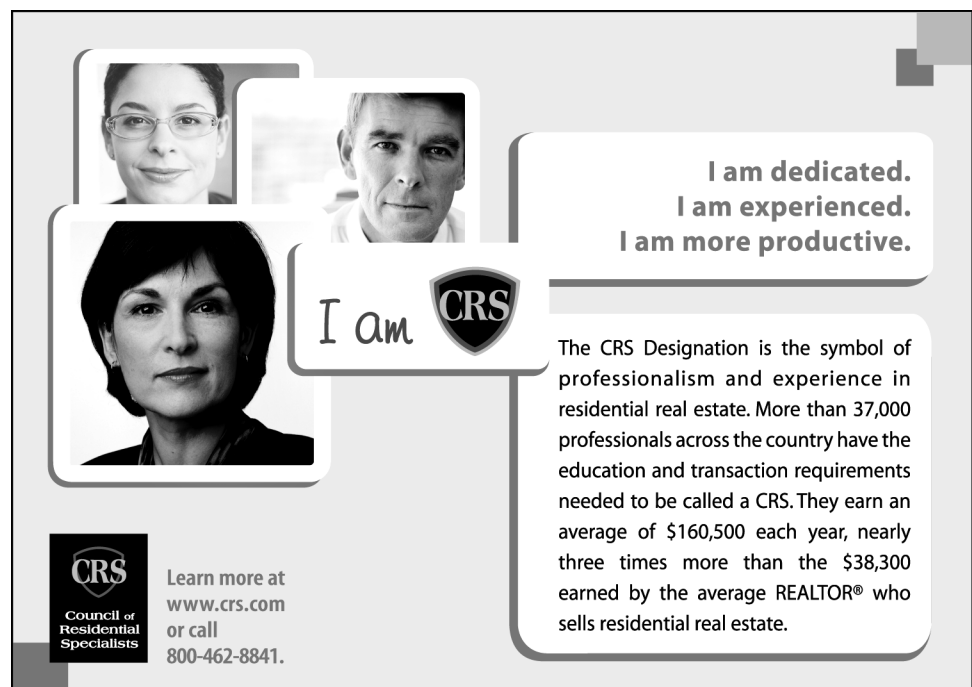
The WRA, acting through its Legal Action Program, filed an amicus brief with the Wisconsin Supreme Court in the *Below* case to argue that application of the ELD to residential real estate transactions was ill advised and would diminish legal protections and remedies for Wisconsin home buyers. The dissenting opinion in *Below* agreed with the arguments advanced in the brief, specifically referring to the REALTORS® amicus brief.

§ 100.18 Fraudulent Representations/False Advertising

Novell v. Migliaccio, 2008 WI 44 (www.wisbar.org/res/sup/2008/2005ap002852.htm)

The issue before the Wisconsin Supreme Court in *Novell v. Migliaccio* was whether "reasonable reliance" or "justifiable reliance" is an essential element of a false advertising claim brought under Wis. Stat. § 100.18.

The dispute in this case arose out of the sale of a home with a leaking



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basement. In the fall of 2002, Chad Novell, who lived with his parents, was in the market to buy a home. A friend of the Novell family put him in contact with her sister and brother-in-law, Anthony and Andrea Migliaccio, who were thinking of selling their house. Novell saw the home in October 2002 and was interested enough to prepare an offer to purchase, but the Migliaccios replied that they were not ready to sell. Novell saw the house again in June 2003 and gave the Migliaccios an offer for \$172,500, which they accepted.

The Migliaccios prepared and signed an RECR, which indicated that the sellers were unaware of any defects in the basement or foundation, and were also unaware of any basement moisture problems, water or moisture intrusions, flooding, extreme dampness or wet walls, unsafe concentrations of mold, or problems with the drain tiles or any sump pumps.

Inspection Results

Prior to closing, Novell had a home inspection. The home inspector reported the foundation to be “marginal” and noted displacement and stair step cracks on the basement walls. He recommended that the buyer hire a foundation specialist for further evaluation. The inspector also reported that the sump pump was operative but submerged, and that the drain line was not properly connected or was not draining away from the foundation. There were water stains and high moisture readings in one corner of the basement. The inspector recommended downspout extensions, grading and extensions to the sump pump pipes to divert water away from the foundation. The Migliaccios agreed to make these improvements as a condition of the sale.

After preparing the home inspection report, the home inspector went through the house with Novell, his father and Mr. Migliaccio. He

expressed concern with bowing and cracking in the basement walls and the water in the basement, and wanted to know whether he should remove the wood paneling covering much of the basement walls. Mr. Migliaccio said there had never been water in the basement and that the bowing and cracks had not changed during the nine years he had lived there. The inspector asked whether the Migliaccios had painted the walls and Mr. Migliaccio said they had been painted by the previous owner. Novell decided against hiring a basement specialist because of Mr. Migliaccio’s statements that the walls had not been painted in nine years, that there had been no water in the basement, that they had had no problems or wall movement and because he was a friend of the family. Novell was a college graduate and was going to use the basement for a sound studio.

Novell closed on the house in September 2003. In early 2004, he discovered standing water covering about one-third of the finished basement. The same thing happened five to seven times that year when the snow melted or when it rained. Novell hired a professional engineer who indicated that water was coming in from behind the paneling. There were patched cracks concealed behind the paneling in the basement corner where the standing water appeared. He told Novell that the previous owners would have experienced numerous periods of water intrusion. Novell then hired a foundation specialist who concluded the basement walls had been recently painted to conceal cracks and that water had been leaking into the basement for at least the previous three years.

Suit for Five Varieties of Misrepresentation

Novell sued the Migliaccios for breach of contract, intentional misrepresentation, strict responsibility representation, negligent misrepresentation, vio-

lation of Wis. Stat. § 100.18 (fraudulent representation/false advertising) and violation of §§ 895.80 (now 895.466) and 943.20 (theft by fraud). The sellers filed a motion for summary judgment on all claims, which the circuit court granted because it found that Novell was not justified in his reliance upon the Migliaccios’ representations because he had notice of the basement problems before he closed. Common law misrepresentation claims require proof of reasonable reliance on the misrepresentation. With respect to the § 100.18 claim, the court found that justifiable reliance was also a necessary element of a § 100.18 claim. Novell appealed.

The appellate court affirmed the circuit court’s judgment on five of the six claims. On Novell’s claim of misrepresentation in violation of Wisconsin statute § 100.18, the Court of Appeals reversed the circuit court, in an unpublished decision, indicating that reasonable reliance is not an element of a §100.18. The Migliaccios appealed to the Wisconsin Supreme Court, contending that Novell must prove reasonable reliance in order to sustain a § 100.18 claim against them.

Elements of § 100.18 Fraudulent Representation Claim

The issues before the Supreme Court were whether reasonable reliance was a required element of a § 100.18 claim, and whether the home buyer’s claim of reliance on a seller’s misrepresentations in the face of the inspector’s recommendation to get the basement inspected by a professional basement contractor should be deemed unreasonable as a matter of law.

The Court observed that § 100.18 prohibits making false representations with the intent to sell real estate and provides for recovery when those representations cause pecuniary loss. In order to prevail on a § 100.18 claim, a party must prove three elements: (1) that the other party made a misrepresentation to the public with

the intent to induce a sale; (2) that the representation was untrue, deceptive or misleading; and (3) that the misrepresentation caused a pecuniary loss. The words “rely” or “reliance” do not appear in the statute, causing the Court to conclude that the legislature did not intend to limit a buyer’s remedy under the statute to those cases where the buyer can show reasonable reliance. The legislature did not intend to merely add yet another remedy for common law misrepresentation when it enacted § 100.18. The purpose of the statute is to deter sellers from making false and misleading representations in sales promotions to the public in an effort to induce a sale. Deterrence does not require reasonable reliance, the Court noted.

While a demonstration of reasonable reliance can show that the representation induced a sale, it is not a necessary element of a § 100.18 claim. Citing two prior cases from the Supreme Court and Court of Appeals, the Court indicated that the reasonableness of a party’s reliance may be relevant in considering whether the representation materially induced the pecuniary loss. The Court did agree with the Migliaccios that the reasonableness of a party’s reliance on a representation may be a defense and may be considered in determining whether the representation caused the loss. The Court also agreed that there may be circumstances where a court can determine as a matter of law that the misrepresentation did not cause the pecuniary loss, that the party’s reliance is unreasonable and that the party would have acted regardless of the representation.

Turning to the matter of whether Novell’s reliance on the Migliaccios’ representations was unreasonable as a matter of law, the Supreme Court reviewed the evidence in the record. The Court concluded that this was not a case where it is beyond all reasonable doubt that Novell refused to

take the definitive advice of a home inspector. His reliance on the sellers was not unreasonable as a matter of law. Rather, the Court found, there are genuine issues of material fact as to whether his reliance was unreasonable. The evidence demonstrated that a reasonable jury could determine the Migliaccios’ representations caused the buyer’s loss and return a verdict in his favor on the § 100.18 claim. Thus, the Supreme Court found the circuit court erred in granting summary judgment to the Migliaccios on that claim. The Court of Appeals’ decision was therefore affirmed.

In a concurring opinion, Justice Ziegler made a point to indicate that under different facts a court may rightfully determine, as a matter of law, that a party’s reliance is so unreasonable that summary judgment or dismissal of a Wis. Stat. § 100.18 claim is appropriate. § 100.18 ought not to protect a fully informed consumer who, with knowledge of a defect, ignores the obvious and proceeds to purchase, only later to turn around and claim that a § 100.18 misrepresentation caused the party’s predicament. Sellers who intentionally lie about the condition of their property should not be protected, but there are circumstances where a buyer should be responsible if they choose to take clearly unreasonable action.

The WRA, acting through the Legal Action Program, filed an amicus brief with the Wisconsin Supreme Court in the Novell case to argue that Novell was acting like an ostrich and ignoring clear indications of basement water leakage such that the Court should find that he acted unreasonable as a matter of law. The Court interpreted the evidence to be a bit less clear-cut, choosing instead to send the case back to the circuit court to allow the jury to decide whether Migliaccios’ representations caused his loss or whether his reliance was so unreasonable that the representations were not the cause of his damages.

Zoning without Permitted Uses is Unconstitutional

Town of Rhine v. Bizzell, 2008 WI 76 (www.wisbar.org/res/sup/2008/2006ap000450.htm)

In October 2003, the Manitowoc Area Off-Highway Vehicle Club (the Club) purchased an abandoned quarry in the town of Rhine to ride motorcycles, snowmobiles and all-terrain vehicles, and for hunting. The property was zoned B-2 Commercial Manufacturing or Processing. There were no permitted uses in the B-2 District; any use of the land required a conditional-use permit.

The Club began using the property for riding ATVs and hunting. After being informed at a town board meeting that they would need to apply to the town Plan Commission for a CUP or rezoning, the Club applied for a CUP but were denied. The club also applied for rezoning but that request was also denied. The neighbors complained about the noise and tried to stop further riding of recreational vehicles in the quarry. After more noise complaints came in, citations were issued to six Club members for violating the town’s public nuisance ordinance, but the municipal court dismissed the charges due to insufficient evidence. In December 2004, the town of Rhine filed a lawsuit against the Club, asking for a new review of the dismissed public nuisance violations and a determination of whether the Club was in violation of the town’s zoning code.

The circuit court held that the zoning ordinance was unconstitutional because it bars all uses within the district, calling the zoning ordinance unreasonable, oppressive and confiscatory in nature. The court also held that the town nuisance ordinance prohibited public nuisances while the nuisance allegedly caused by the Club was a private nuisance because it did not take place in a public place and did

not affect the entire community. Thus, the town was found to have no standing to advance such a claim. The town appealed to the Court of Appeals.

Court of Appeals Invitation and Bypass

Judge Richard S. Brown from the Wisconsin Court of Appeals (District II) called and asked the WRA to write an amicus brief for the *Town of Rhine v. Bizzell* case. The Legal Action Committee gave its approval and a WRA amicus brief was filed with the Court. The WRA was also asked to participate in the oral argument before the Court of Appeals. The primary issues were whether a zoning ordinance with no permitted uses and just five or six conditional uses is constitutional, and whether the noise generated by the Club members riding their vehicles was a private nuisance rather than a public nuisance.

On June 27, 2007, the Court of Appeals decided to certify the case or ask the Wisconsin Supreme Court to take the case directly rather than going through the intervening step of a Court of Appeals decision (see the certification request online at www.wicourts.gov/ca/cert/DisplayDocument.html?content=html&seqNo=29433), and the Supreme Court agreed to take the case.

Entitlement to Use of Private Property

The Wisconsin Supreme Court observed that zoning ordinances generally provide landowners with permitted uses that give the owners the right to use their land for the specified purposes. Conditional uses, on the other hand, are allowed only if certain property or situation-specific conditions or standards, established in the CUP, are first met. Although zoning is a legislative function, the courts are still involved to make sure that enacted zoning ordinances are constitutional. Under the due process clause of the state and U.S. constitutions, the courts ana-

lyze municipal zoning controls under the rational basis test: the ordinance must advance legitimate governmental interests such as public health, safety, morals and general welfare.

Persons cannot be deprived of life, liberty or property without due process of law. The right to own and use property is constitutionally protected. The Court rejected the town's contention that a property owner is entitled to a CUP as a matter of right.

Instead, the Court held that the town of Rhine's B-2 District zoning ordinance is unconstitutional on its face because it does not permit any use of property, as a matter of right, without first obtaining a CUP. In other words, property owners in this zoning classification cannot use their property for any purpose (even recreation, hunting, etc.) unless they first apply for and obtain a CUP. Such an ordinance is unreasonable and arbitrary, and fails the rational basis test because there is no substantial public health, safety, morals or general welfare justification for a "no permitted uses" zone in this situation.

The Court noted that a more common and accepted practice for zoning ordinances is to allow some permitted uses as a matter of right, and then to allow additional uses only if the property owner first obtains a conditional-use permit. This is in stark contrast to the "no permitted uses" zone of the town's B-2, which exemplifies excessive government control and restriction in violation of the constitution.

In a concurring opinion, Chief Justice Shirley Abrahamson emphasized that similar "permit only use zone" ordinances in other communities are not necessarily unconstitutional as a result of the Court's decision. Rather each such ordinance must be examined on a case-by-case basis to see if the ordinance passes the rational basis test: does it bear a substantial relation to public health, safety, morals or general welfare?

The WRA, acting through the Legal Action Program, filed an amicus brief with the Wisconsin Supreme Court in the *Town of Rhine v. Bizzell* case to argue that the town of Rhine's B-2 zoning ordinance was unconstitutional in violation of substantive due process.

Challenge to Transfer of Development Rights: Claim is Ripe for Review

Olson v. Town of Cottage Grove, 2008 WI 51 (www.wisbar.org/res/sup/2008/2005ap002257.htm)

In 2001, real estate developer Walter Olson submitted a petition to the county to rezone about 70 acres of property from Exclusive Agricultural to Residential zoning in order to divide the property into 15 residential lots.

TDR Program

In 2002, the town of Cottage Grove adopted a transfer of development rights (TDR) program, which allows landowners to sever development rights from properties in designated low-density areas, and sell them to property owners who want to develop in areas that have been selected as higher-density areas.

Under the TDR program, some land-use districts are designated as "sending areas" and others as "receiving areas." Sending areas include agricultural land, open space and park districts. Receiving areas include residential districts, which are designated as Conservation Residential, Medium Density or High Density. Property owners who seek to develop property in a receiving area must acquire a requisite number of transfer development rights from property in sending areas. Owners of land in sending areas may sell their transfer development rights to owners of land in receiving areas. A TDR easement is then established by a deed entered into by the developer, the town and the county. Through these easements, land interests from sending areas are transferred to autho-

size an increase in density and enable residential development in receiving areas. The ordinance does not allow approval of rezoning and division of land in a receiving area unless the developer first obtains the requisite number of transfer development rights and records a TDR easement.

After the town adopted the TDR program, Olson filed a second, separate petition to rezone his property for 58 lots instead of the 15 lots previously requested. The County Board conditionally approved Olson's second zoning application. The town conditionally approved Olson's plat, subject to TDR compliance, and gave him an extended period of time to record the plat.

Under the TDR ordinance, Olson could not rezone the property without first obtaining 10 transfer development rights. Claiming that the TDR requirement would force him to purchase an additional 350 acres of farmland at a cost of approximately \$750,000, Olson sought a declaratory judgment challenging the TDR ordinance on constitutional and other grounds. A declaratory judgment is a ruling by the court that resolves a question of law without ordering anything else to be done.

The circuit court ruled in favor of the town, concluding that the case was premature, or not ripe for adjudication, because Olson had not secured the necessary approvals to rezone his land and the town had not yet applied the TDR ordinance to Olson's property.

Ripeness for Adjudication

The Court of Appeals reversed the circuit court's ruling, finding that Olson's claim was ripe because the town had enacted the ordinance and "the possibility that the town will apply the ordinance to Olson" was "real, precise and immediate."

The Wisconsin Supreme Court affirmed the Court of Appeals' rul-

ing and held that a challenge to the town's TDR program was ripe for review by the courts. In doing so, the Court noted that the purpose of a declaratory judgment is "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Property owners may ask a court to determine whether a land-use regulation is legal or constitutional without first incurring financial harm. A declaratory judgment allows property owners to determine whether land-use regulations are legal without first having to spend considerable time and money going through approval processes and without subjecting themselves to forfeitures or prosecution.

The Court noted that Olson's efforts to rezone, plat and develop his property were all directly impeded by application of the TDR ordinance. He was at the point where he could proceed no further without complying with the ordinance, and he was not required to comply with the ordinance before seeking a declaratory judgment because that would defeat the purpose of such an action. Accordingly, the Court held that Olson's suit is ripe and remanded the case to the circuit court for further action.

The ability to seek a declaratory judgment to challenge land-use regulations is important for REALTORS® and property owners for the following reasons:

- The development of real estate is often an expensive and time-consuming process. To develop a parcel of property, a person must generally go through several steps including a market analysis, project feasibility study, environmental analysis, soil studies and site acquisition. Each of these processes generally requires assistance from professionals such as surveyors, architects, engineers and attorneys. Before making these expenditures, it is important to know whether the applicable development regulations are legally valid.

- Regulations have a direct impact on the price of real estate. For example, real estate that is properly zoned for a desired use is generally more valuable than real estate that must be re-zoned prior to using it for its desired use. When purchasing real estate, prospective buyers place great importance on knowing how a property can be used and what development regulations may affect its use. Accordingly, it is critically important for property owners and the real estate industry to be able to seek a declaratory judgment on whether a regulation impacting the use of real estate is legally valid without going through the development approval process and exhausting all administrative remedies.

The WRA, acting through its Legal Action Program, filed an amicus brief with the Wisconsin Supreme Court to argue that Olson's claim was ripe for adjudication in a declaratory judgment action.

Economic Development Corporations Subject to Open Meetings/Records Laws

State v. Beaver Dam Area Development Corporation, 2008 WI 90 (www.wisbar.org/res/sup/2008/2006ap000662.htm)

In late 2004, the state of Wisconsin filed a complaint seeking declaratory judgment that the Beaver Dam Area Development Corporation, a non-profit corporation organized as a private entity to promote and retain business development around the city of Beaver Dam, is a quasi-governmental corporation and subject to the state's open meetings laws and public records laws, and alleging that the BDADC convened on various occasions in violation of the open meetings laws.

The primary responsibility of an Economic Development Corporation (EDC) like the BDADC is to attract private companies and new economic development opportunities to the

respective community. The communications between the EDC and private companies are often confidential so that competitors are not aware of the companies' future plans. Like other EDCs, the BDADC:

- (a) is comprised of a majority of private citizens (business owners, bankers, real estate professionals, etc.), with one or two local government officials serving as board members, but who have no voting authority on EDC matters;
- (b) is funded primarily by the private sector; and
- (c) contracts with both public and private entities to provide economic development services.

Open Meetings and Open Records Laws

The open meetings law in Wis. Stat. § 19.83 provides that meetings of a "governmental body" must be preceded by public notice and held in open session. The public records law in Wis. Stat. § 19.35(1) provides that "except as otherwise provided by law, any requester has a right to inspect any record." A "record" is defined to include certain kinds of material created or kept by "an authority."

The terms "governmental body" in the open meetings law and "authority" in the public records laws both are defined to include a quasi-governmental corporation, but neither statute defines "quasi-governmental corporation." This term also is not defined in any published Wisconsin case, but has been addressed in several attorney general opinions, most notably 80 Wis. Op. Att'y Gen. 129 (1991). This attorney general's opinion establishes a test for determining whether a private corporation is a "quasi-governmental corporation" that looks to the function, effect and status of the company on a case-by-case basis, examining factors such as:

- Does the corporation serve a public purpose?
- Does it receive funding from public sources?
- Do government officials select corporate officers?

- Are government officials involved in daily operations?
- Are the corporate offices located in government buildings?
- Is there a relationship between government and the corporation with respect to supplies, equipment, payroll and benefits?

The circuit court held that the BDADC is not subject to the open meetings and public records laws, because it is not a "quasi-governmental corporation" within the meaning of these laws. The state appealed, and the case was to be heard by the Court of Appeals. But on March 8, 2007, the Court of Appeals certified the case to the Wisconsin Supreme Court. The core issues in this case concern the establishment of a legal test to determine whether a corporation is a "quasi-governmental corporation," as that term is used in the open meetings and public records laws, and the application of that standard to the BDADC and the facts of the case.

In *State v. Beaver Dam Area Development Corporation*, the majority opinion in this 4-2 Wisconsin Supreme Court decision recites that it is balancing "the need for economic development and open government." "On one hand we cannot countenance a government body circumventing the legislative directive for an open and transparent government by paying an entity to perform a governmental function," Justice Bradley wrote. "On the other hand, we have to be cognizant of the realities of economic development and the need, at times, for flexibility and confidentiality." With these principles in mind, the Wisconsin Supreme Court held that the BDADC is a quasi-government entity that is subject to open meetings and records laws.

The Beaver Dam Area Development Corporation

The Court's opinion reviewed the facts and circumstances relative to the BDADC, a nonprofit corporation organized under Wisconsin law in January 1997. It was not created by any constitution, statute

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or ordinance, and its bylaws state that its exclusive purpose is to engage in economic development and business retention in Beaver Dam.

The officers of the BDADC are private individuals who are elected by the BDADC Board of Directors. The president of the city's chamber of commerce is a non-voting member of the Board of Directors, and the mayor and chairperson of the City Community Development Committee serve on the BDADC Board by virtue of their positions as city officials. The other 10 members of the Board are private citizens. When a director's term at the BDADC ends, the Board elects a replacement.

Up to the time the lawsuit was filed, the BDADC had only one paid employee, the executive vice president, who is appointed by the BDADC Board. Trent Campbell served in this position from April 1997 to January 2005. Prior to the BDADC's incorporation, Campbell was the director of the city's economic development office.

Until May 2005, the BDADC's offices were in the city's municipal building, but no meetings were held in city facilities. From the time of the BDADC's inception until the start of this litigation, the city included the BDADC on its Web site.

The BDADC and the city entered into cooperation agreements in April 1997 and January 2004. The city agreed to provide the BDADC with office space, clerical support, copy and fax machine use, telephone use and postage. The agreements provided that city representatives may examine the BDADC's accounting records and finances, and that the city may make funds available to the BDADC for economic development. Under the first agreement, the city paid an annual contribution and a large percentage of the proceeds from its room tax to the BDADC. Under the second agreement, the city paid

the BDADC 90 percent of the city's room tax proceeds. The BDADC's income consisted entirely of the room tax money or interest on the room tax money. Under the BDADC's articles of incorporation, upon the BDADC's dissolution or liquidation, any remaining assets shall be distributed to the city and used for economic development and business retention.

The 2004 agreement provides that the BDADC must submit its annual management plan to the city. The 2005 plan indicates that the BDADC may negotiate financial incentives for businesses and work on infrastructure and government approval issues related to attracting business to the area. The BDADC cannot bind the city to contracts, and its recommendations are considered and acted upon by the city under the requirements of state open meetings and public records law. The city has been the BDADC's sole client. The BDADC negotiated on the city's behalf regarding potential developments by a variety of businesses regarding issues such as utilities and fire protection.

Test for a Quasi-Governmental Corporation

The Court examined cases from other states in developing the analysis used to determine whether a company is a quasi-governmental corporation and found a number of factors that are important in determining whether an entity is subject to open meetings and public records laws. These factors include state funding, whether the entity serves a public function, whether it appears to the public to be a government entity, whether the entity is subject to government control, and the degree of government access to its records. The Court concluded that an entity is a quasi-governmental corporation if, based on the totality of the circumstances, on a case-by-case basis, it resembles a governmental corporation in function, effect or status.

Applying the Test to the BDADC

In applying the test to the BDADC, the Court observed that:

- The BDADC is almost entirely taxpayer-funded.
- The BDADC's office was in the city of Beaver Dam municipal building and it was listed on the city's Web site.
- The city provided the BDADC with clerical support and all of its office supplies, including paper, pencils and postage.
- All of the BDADC's assets revert to the city if it ceases to exist.
- It is obligated to open its books for city inspection and it has to submit its annual management plan to the city.
- The mayor and another city official serve on its Board of Directors.
- The BDADC has no clients other than the city.
- Its exclusive function is to promote economic development and business retention in and around the city, a function that prior to its creation had been performed by the city.
- It negotiates on behalf of the city.

Thus, the Court found, the BDADC resembles a governmental corporation with respect to the function it serves, both in terms of its purpose and its actions. The BDADC also resembles a governmental corporation in several important respects: (1) other than interest income, its sole source of funds is public tax dollars, (2) it serves a public function and has no purely private function, (3) its status also resembles that of a governmental corporation because, from the perspective of the public, it is part of the city, (4) the city maintains a degree of control over the BDADC, and (5) the city has access to the BDADC's financial information and management plan.

While no one factor is enough to conclude that the BDADC is a

quasi-governmental corporation, when taken all together, the Court held that the BDADC resembles a governmental corporation in function, effect or status. Thus, it is a quasi-governmental corporation within the meaning of the open meetings and public records laws. The Court applied its holdings prospectively such that BDADC would not be subject to forfeitures for past violations of the open meetings laws and actions taken at past meetings (not open to the public) were not voided.

Justice Prosser, joined by Justice Roggensack, dissented, indicating that the majority “fails to provide realistic guidance on how a non-profit economic development corporation can avoid conducting business in the fishbowl of the open meetings and public records statutes without severing its cooperative relationship with its municipal beneficiary and paying for all its economic development initiatives with private money.”

The WRA Legal Action Committee authorized funding for the WRA to partner and share costs for a joint amicus brief with the Wisconsin Economic Development Association, the National Association of Industrial and Office Properties and Wisconsin Manufacturers and Commerce.

Applying Open Records Law to Property Assessment Records

WIREData, Inc. v. Village of Sussex, et al, 2008 WI 69 (www.wisbar.org/res/sup/2008/2005ap001473.htm)

In *WIREData, Inc. v. Village of Sussex, et al*, WIREData, a wholly owned subsidiary of the Multiple Listing Service, Inc., requested property assessment records from several communities for purposes of sharing the information with members of the MLS. Independent contractors who maintained the files electronically in a computer database performed the assessments in the village of Sussex, village of Thiensville and the city of

Port Washington. WIREData sought the property assessment records in the format created and maintained by the municipalities’ independent contractor assessors in a computer database. The assessors denied WIREData’s requests and indicated that WIREData could (a) purchase the records for lump sum payment of \$6,600 plus additional costs for each property identified and placed restrictions on WIREData’s use of the data, or (b) receive the records in a PDF format.

As a result, WIREData sued three communities and their assessors, claiming violations of Wisconsin’s open records law. The circuit courts (three cases that were consolidated on appeal) found in favor of WIREData, and the municipalities appealed to the Court of Appeals.

Open Records Law

As the Court of Appeals discussed, the Wisconsin open records law, found in Wis. Stat. §§ 19.31-.37, provides that an elected official is the legal custodian of his or her records and the records of his or her office. A computer program is not subject to examination or copying, but the source material inputted into the program or the material produced by the computer program is subject to the right of examination and copying. The data the tax assessors collected and inputted in the computer program, maintained at public expense, is as much a part of the public record as if it were written on paper property cards and stored in a file cabinet.

A request for records is sufficient if it reasonably describes the requested record or information – there are no magic words that must be used, and there are no words that are prohibited in such a request. However, there must be a reasonable limit with regard to the subject matter or the time period represented by the record, and the custodian does not have to create a new record by extracting information from existing records and compiling

the information in a new format. The custodian must, “as soon as practicable and without delay, either fill the request or notify the requester of the authority’s determination to deny the request in whole or in part and the reasons therefore.” (Wis. Stat. § 19.35(4)(a)). The reasons for a denial must be provided in writing. If a records authority withholds a record or delays granting access to a record after a written request is made, the requester may immediately bring a mandamus action asking a court to order the release of the record.

The Wisconsin Courts of Appeals decision held that the open records law gives WIREData the opportunity to access the computer databases to examine and copy the property assessment records – the offered PDF files were inadequate. The Court also held that the municipalities, and not the independent contractor assessors, were the responsible authorities under the open records law. The municipalities petitioned for review before the Wisconsin Supreme Court.

Request for Assessment Records

The Supreme Court indicated there were six principal issues upon appeal.

The first issue is whether WIREData properly commenced the actions against the municipalities under the open records law, pursuant to Wis. Stat. § 19.37(1), when the municipalities had not denied WIREData’s requests for the records before WIREData filed the mandamus actions. Based on the facts of the present case, the Court held that WIREData prematurely commenced the actions against the municipalities under the open records law because the municipalities did not specifically deny WIREData’s requests for the records and made a good faith effort to promptly comply.

The second issue is whether WIREData’s initial written requests were insufficient as a matter of law as to time and subject matter. The Court

held that WIREdata's initial written requests were not insufficient and were not too broad because the municipalities were able to identify the requested information.

The third issue is whether a municipality's independent contractor assessor is an authority under the open records law, so that the independent contractor assessor is a proper recipient of an open records request. The Court held that a municipality's independent contractor assessor is not such an authority because the statutory definition of "local public office" excludes independent contractors.

The fourth issue is whether a municipality may avoid liability under the open records law by contracting with an independent contractor assessor for the collection, maintenance and custody of its property assessment records, and by then directing any requester of those records to the independent contractor assessor who has custody of the sought-after records. The Court held that a municipality is solely liable for any failure to comply with open records law.

The fifth issue is whether the Court of Appeals was mistaken in concluding that the municipalities had not fulfilled WIREdata's initial open records requests, once they produced PDF files with the requested information and gave those files to WIREdata. The Court held that the PDFs were sufficient to fulfill WIREdata's requests for "electronic/digital" copies and that direct access to the database was not required.

The sixth issue is whether the fees charged to WIREdata were fees that complied with the law for that requested output. The open records law prohibits an authority from charging more than "the actual, necessary and direct cost of reproduction and transcription of the record" unless a fee is otherwise set by law. The \$6,600 quoted to WIREdata

exceeded the costs of providing the enhanced data requested, which were actually \$3,100. The Court held that because no fees were actually charged for the information the municipalities provided to WIREdata in the PDF format, the municipalities did not violate the open records law.

Thus the Court disagreed with the Court of Appeals' findings that:

- the municipalities denied the open records requests of WIREdata and, thus, violated the open records law;
- the PDFs were insufficient to comply with such open records requests;
- the open records law requires access to the computerized database;
- the "enhanced" demands did not require the creation of new records; and
- WIREdata is entitled to fees and costs from each of the municipalities.

The Court did agree with the Court of Appeals that the municipalities are the responsible authorities under the open records law, that such responsibility cannot be shifted to independent contractor assessors, and that the initial written requests of WIREdata were valid and, thus, were not insufficient as to subject matter and length of time.

An amicus brief on behalf of the WRA, working together with the Wisconsin Freedom of Information Council, Wisconsin Broadcasters Association and Wisconsin Newspaper Association, was authorized by the WRA Legal Action Committee and filed with the Wisconsin Supreme Court.

Legal Action Program

The Legal Action Program is a special program established by the WRA in 1978 to support REALTORS® and landowners involved in legal matters that have significance for the WRA membership and the real estate industry. The cases the Legal Action Program handles may include, but

are not limited to, actions involving real estate law and practice, land-use or environmental issues, private property rights, or development rights. The cases must involve issues of significance to Wisconsin REALTORS® or the real estate industry.

The WRA, acting through the Legal Action Program, typically participates in a case by filing a brief and arguing as an amicus curiae (friend of the court); as a member of a coalition of similarly interested parties; as a party to the lawsuit; by identifying expert witnesses; or by providing legal, environmental, land-use or other research. Filing an amicus curiae brief is a neutral action done to make legal and policy arguments regarding one or more issues in the case before the court. An amicus party is neutral and does not take sides.

The Legal Action Program has traditionally participated primarily in cases that have already been tried in the circuit court and are on appeal. However, participation in a coalition bringing a suit at the trial court or administrative hearing level may also provide a vehicle for input on important legal issues at earlier stages of the litigation process.

Legal Action Fund

The Legal Action Fund is a segregated fund of the WRA, earmarked for the purposes and goals of the Legal Action Program. The Legal Action Committee administers the Legal Action Fund and authorizes disbursements to implement the program's objectives.

The Legal Action Fund is financed with allocations from annual WRA dues and with occasional special dues assessments. In other words, the Legal Action Program is one of the many superb WRA programs and benefits financed by WRA dues dollars.

The Legal Action Fund may not be used to pay any judgment for damages or fines, or any other award

of damages, whether it is by judgment or settlement. The Legal Action Program also will not pay a member's legal fees. Although it would be wonderful if the Legal Action Fund could pay the attorneys fees and legal costs for every REALTOR® who was caught up in litigation over real estate practice or land-use issues, this just isn't possible. In only the most extraordinary cases involving issues of major importance to the WRA and the real estate industry, and where the WRA position cannot be asserted in any other way, will the WRA Legal Action Committee consider contributing to the litigation expenses of another party. This has happened only once in the program's 24-year history.

The Legal Action Committee authorizes disbursements from the Legal Action Fund for Legal Action Program cases, generally for the costs of legal briefs, oral argument or research. However, the WRA Executive Committee and the Board of Directors also have authority to give initial approval in some special circumstances.

Legal Action Committee

The Legal Action Committee has nine members including the WRA chairman of the board (ex-officio), a chairperson and one broker member from each of the seven regions for a one-year term. The WRA chairman of the board appoints the chairperson and the remaining seven members and fills any vacancies occurring during a term by making an interim appointment for the remainder of the term.

The Legal Action Committee generally meets via a telephone conference call. A quorum of six committee members is required, and all actions by the committee require the vote of a majority of the committee members participating in the meeting.

Legal Action Application Process

To apply for Legal Action assistance, one should:

1. Complete the Legal Action Program application form, available online at www.wra.org/legal/pdf/LAF_Application.pdf. It may be advantageous to have the attorney who is working on the case complete the form. Make sure that the application clearly states what type of assistance is desired and any applicable dates and deadlines.
2. Include a copy of all relevant court decisions, briefs, exhibits and correspondence with the application.
3. Include a statement explaining how the applicant's case meets the case evaluation criteria.

The WRA Legal Department staff will review an application upon receipt and make recommendations to the Legal Action Committee. Generally it will take two to three weeks for this review and decision process. The WRA Legal Action Committee typically considers the following factors in determining whether a case is suitable for Legal Action involvement:

1. Does the case involve legal principles that significantly affect REALTORS®?
2. Might the outcome of the case establish an important legal precedent for the real estate industry?
3. Will the participation of the WRA via the Legal Action Program likely increase the probability of a favorable outcome or lessen the probability of an unfavorable result for the real estate industry?
4. Are the applicant's goals consistent with WRA policy?
5. Is there actual litigation – has lawsuit been filed or will an impending lawsuit be filed in court or before an administrative agency?
6. Is the applicant asking for assistance that the Legal Action Program can reasonably provide: legal or other research, identification of expert witnesses, brief and/or oral argument as an amicus curiae (friend of the court), participation in a coalition of

similarly situated parties or participation as a party in litigation?

For additional information about the WRA Legal Action Program, visit the Legal Action Program links found at www.wra.org/Legal/index.asp.