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## 2001-2002 MARIN COUNTY GRAND JURY

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**TITLE OF REPORT: Residential Pre-Sale Inspections – Should  
Marin County Also Require Them?**

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Date of Report: May 30, 2002

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## **RESIDENTIAL PRE-SALE INSPECTIONS - SHOULD MARIN COUNTY ALSO REQUIRE THEM?**

### **SUMMARY**

The Grand Jury learned that, except for houseboats, the County of Marin has never required pre-sale inspections of residential properties. At the same time, pre-sale inspections are required for residential properties in all 11 Marin cities or towns; and some have had the requirement for almost 30 years. Novato was the final city to adopt a presale inspection requirement, and did so in 1988.

Pre-sale inspections are intended to serve as both a consumer disclosure mechanism, providing potential buyers with information on Zoning issues and Building and Fire Code violations that may exist, and also as a way of identifying potentially hazardous conditions. They would enable the buyer and sellers to negotiate these issues prior to close of escrow and, indeed, afford the buyer the opportunity to make a more informed decision as to whether or not to purchase the property at all. Pre-sale inspections by County staff would also alert buyers to possible future problems they could encounter if they later seek County permits to improve the property.

Pre-sale inspections would enable the County to build up a public record history, over time, of conditions on and changes made to residential properties. The County currently has only limited records on residential properties other than houseboats – primarily where building permits, septic permits or other County entitlements have been applied for and obtained.

A requirement for pre-sale inspections by County staff might also deter some property owners from doing construction without permits since they would know that, when a property is sold, a County inspector would go through the property and check for non-permitted construction, code violations, and possible safety hazards.

Both the fees for and scope of the reports/inspections in Marin's cities and towns vary considerably. A representative of the real estate profession (who routinely deal with the existing city requirements) strongly urged that an attempt be made to standardize the process from jurisdiction to jurisdiction.

Based upon a sampling of jurisdictions by the Grand Jury, it appears that the actual scope of the pre-sale inspections in many jurisdictions goes beyond the limitations set by governing Municipal Code provisions and applicable State laws and court decisions. In many jurisdictions the process appears to have evolved over time, without corresponding revisions being made to the Municipal Code.

From the Grand Jury's investigation of the issue, it appears that a requirement for pre-sale inspections/reports at the County level could have merit and certainly deserves further study.

## **BACKGROUND**

It was disclosed during an interview with a staff member from the Code Enforcement Division of the Marin County Community Development Agency that the County has never had a requirement for pre-sale inspections of residential properties. At the same time, pre-sale inspections are required for residential properties in all 11 Marin cities or towns – some for almost 30 years.

The Grand Jury decided to look into the existing pre-sale residential inspection process used by Marin cities and towns in order to determine whether the County should similarly require inspections of residential properties by Community Development Agency staff prior to the completion of a sale.

## **METHODOLOGY**

As part of its investigation of this issue, the Grand Jury reviewed the pre-sale inspection forms used by the 11 Marin cities or towns to determine the scope of their inspections/reports. Information on fees charged for providing the service was also obtained to determine whether those programs are revenue neutral. Interviews were conducted with relevant County staff, including members of the Building Inspection and Zoning Enforcement Divisions of the County Community Development Agency.

The Grand Jury interviewed several members of the County Board of Supervisors to obtain their opinions on the potential benefits/problems if the County required pre-sale inspections. The Grand Jury also interviewed staff responsible for conducting or overseeing pre-sale inspections in three other jurisdictions (San Rafael, Novato and Corte Madera) and interviewed a representative of the real estate profession regarding the pre-sale inspection process used by other Marin jurisdictions.

## **DISCUSSION**

### **Legal Authority for Requiring County Pre-sale Inspections**

In response to questions from the Grand Jury regarding enabling legislation, several cities or towns cited California Government Code §38780 that specifically authorizes cities to enact ordinances that require pre-sale reports. The Grand Jury sought a legal opinion as to whether there is a provision of state law that would allow a county to require pre-sale reports on residential properties in unincorporated areas.

The Grand Jury was advised that Government Code §25846 states that counties may also require such building reports subject to the provisions of §38780 (which requires a seller to provide to the buyer a report showing the regular authorized use, occupancy, and zoning classifications of such property). The Jury was further advised that the purpose of this law is to protect purchasers from not being able to use their property in the manner that the sellers represented prior to sale (Grenell v. City of Hermosa Beach 103 Cal. App.3d 864).

The Grand Jury was cautioned, however, that if the intention is to use the general “police power” for the purpose of enforcing building and zoning codes, such use would raise the question of whether an inspection could be conducted without the property owner's permission. Sections 38780 and 25846 of the Government Code do not give a city or county the right to enter the property for the purpose of an inspection. Indeed neither statute specifically authorizes (or even mentions) an “inspection”. The United States Supreme Court has held that residential property cannot be inspected without either the owner's permission to inspect or a warrant from the court (Camera v. Municipal Court of the City and County of San Francisco 387 U.S. 523).

The Grand Jury was advised that cities or towns doing physical inspections as part of the pre-sale report procedure probably rely more on the seller's eagerness to sell than any specific legal authority for doing so.

### **Typical Information on Forms Used by Marin Cities and Towns**

All of the cities and towns within Marin County currently require a Residential Building Record/Residential Inspection prior to the sale of residential property. While the process varies considerably from one city to another, most cities and towns include the following in their reports:

- Property information<sup>1</sup>
- Planning and Zoning information<sup>2</sup>
- Codes and permits<sup>3</sup>
- Building Inspection information<sup>4</sup>

The scope of the inspections varies greatly among the cities and towns. San Rafael's inspections, for example, focus on identifying immediate health and safety hazards. In general, they do not cite substandard work based on present building code requirements if that work was undertaken based on a different code requirement. They consider all work in the context of the building codes in existence at the time the work was undertaken. However, if there is a dangerous situation, the City will require remedial action.

Most cities and towns operate under the premise that inspections are limited in scope, and the inspector does not try to overextend his authority. In contrast, it was reported to the Grand Jury that a few cities or towns, as a result of pre-sale inspections, require that code violations in a dwelling be remedied. The Grand Jury was advised that there may be no legal basis for such requirements.

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<sup>1</sup> Property information

- Name of Owner/Applicant
- Address of property
- Parcel number
- Number of living units
- Realtor/office

<sup>2</sup> Planning and Zoning information

- Zoning district/classification
- Permitted uses
- Authorized uses
- Setback requirements
- Parking requirements
- Whether the property is located within a designated flood hazard zone

<sup>3</sup> Codes and permits

- A historic record of new construction, conversions, or alterations
- For each permit, the permit number, the date and usually a description of the work done as well as whether the work conforms, is legal nonconforming, or is illegal nonconforming.
- An Indication of what further action is required: no correction; correction required and retroactive permit; or abate work.

<sup>4</sup> Building Inspection information

- Electrical (e.g. exterior disconnects, splicing, location, fuses, panel label)
- Building (e.g. handrails, smoke detectors, fireplace/spark arrestor, visible address, garage firewall, tree limbs)
- Mechanical (e.g. hot water heater, furnace, gas lines, solar system)
- Plumbing (e.g. traps, drain vents)

## Fees Charged by Other Jurisdictions for Pre-sale Inspections

Just as the scope of pre-sale inspections/reports varies greatly from jurisdiction to jurisdiction, so also do the fees charged for the service. They range from a low of \$90 in Sausalito to a high of \$174 in San Anselmo for a single-family home. The current fees average about \$130.<sup>5</sup>

City staffs interviewed by the Grand Jury felt that the fees they are charging cover their costs of providing the service and, if anything, some jurisdictions are actually generating profit from the fees.

## Existing County Residential Pre-sale Inspections

Marin County currently conducts only a very limited number of pre-sale inspections of residential properties. For some time the County Code has required pre-sale inspections of houseboats located in unincorporated areas. The County currently performs 35-40 houseboat inspections each year. These inspections cover life safety issues only, such as electric wiring, water heaters without pressure relief valves, broken windows, inadequate heating facilities, sewage connections, sewage injection pumps, smoke alarms, GFI outlets in bathrooms and sometimes in the kitchen (depending on the date of the original construction), room ventilation, etc. The harbormaster where the houseboat is located notifies the boat owner of the requirement for a pre-sale inspection. The buyer is required to acknowledge, in writing, receipt of a copy of the report issued by the County. This report lists the deficiencies found during the inspection. A re-inspection may be required to cure major deficiencies. The report is kept in a permanent file maintained by the County for each houseboat. It was reported that real estate agents frequently go to the County to review these reports before listing a houseboat for sale.

While not required, voluntary inspections of residential properties can be requested. The County only performs about 15 to 20 of these inspections each year. Most of the inspections are initiated as a result of tenant complaints and not the sale of a property. The County will also do an inspection if a new buyer insists on one, but

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<u>Jurisdiction</u>	<u>Fee</u>
Belvedere	\$150
Corte Madera	\$120 single family/first unit + \$50 for each additional unit.
Fairfax	\$125 single family/first unit + \$35 for each additional unit.
Larkspur	\$120 single family, \$80 condo, \$80 first apartment + \$40 for each additional unit
Mill Valley	\$150 single family/first unit +\$50 for each additional unit
Novato	\$118 single family, \$90 first apartment + \$37 for each additional unit
Ross	\$140
San Anselmo	\$174 single family + \$19.50 for each additional unit
San Rafael	\$100 single family, \$75 condo, \$100 first apartment + \$11 for each additional unit
Sausalito	\$90
Tiburon	\$150

only about three or four of these are performed each year. These inspections are also limited to life safety issues, and no re-inspection is performed. The County currently charges \$125 for voluntary inspections. The reports on these inspections are not indexed in the County's property file, but are maintained only in a general correspondence file. Currently there are no property records kept on residential properties in the unincorporated portion of the County unless a building permit or other entitlement has been applied for and approved.

### **Prior Proposals for Pre-Sale inspections at the County Level**

The last proposal for requiring pre-sale inspections in unincorporated areas was apparently made in the mid-1980s. The then Chief Building Official supported the proposal, as did the Assessor, who saw it as a way to find escaped valuation from non-permitted construction. The Board of Supervisors did not approve the proposal. At that time there was reportedly significant opposition from West Marin residents who were opposed to any county employee inspecting their property.

### **Comments from County Staff**

In general, County staff indicated that they thought the concept of pre-sale inspections would be a good idea. However, several concerns were raised:

- Some from the Building Inspection Division of the Community Development Agency qualified their support by saying that they would be supportive only if a separate department was set up to handle the inspections. The current Building Inspection Division staff consists of four field inspectors and two in-office plan checkers who double as field inspectors when the need arises.
- Some County officials expressed concern that while there probably would be public health and safety benefits from such inspections, such a requirement would place additional burdens on an already taxed Building Inspection Division staff and would require office space that is not available within the Division's work area.
- One individual recommended that, if pre-sale inspections were required, they should be done by "outsourcing" the activity to minimize staff and space problems. Other County staff members, however, disagreed and expressed the opinion that outsourcing would not be beneficial because the County would lose control and consistency, and inspections would tend to be non-uniform.
- Concern was expressed that trying to limit the inspections to life safety issues would not work since the inspector would be bound to report any code violations observed during a life safety inspection. It was felt that doing these inspections would require a lot of enforcement effort and activity and more

attorneys would be needed to handle enforcement hearings that would be required to cure or validate the found deficiencies.

In response to the concerns expressed by County staff regarding staffing, the Grand Jury learned that San Rafael and Novato each have a single inspector responsible for residential pre-sale inspections. The San Rafael inspector performs 98% of all the pre-sale inspections (on condos, apartments, and single family dwellings), spending approximately half his time on pre-sale inspections, which in 2001 totaled 662. Novato's results are similar. There the one full-time inspector performs between 600 and 700 inspections annually. These numbers of inspections compare favorably to the reported number of annual residential sales in the unincorporated area.<sup>6</sup>

In San Rafael most inspections are completed in about 15 minutes, although some may take up to 40 minutes if problems are discovered. Novato estimates that the typical inspection takes 15 minutes plus travel time to and from the site. Driving to and from inspections can consume significant time. The inspectors usually conduct up to four inspections a day in San Rafael and six in Novato. They usually combine pre-sale inspections with other inspections and try to concentrate on one geographic area at a time.

Staff from the Current Planning Division of the Community Development Agency indicated to the Grand Jury that, assuming there is a political will for such a program, and also that it could be properly implemented from both a staff and financial standpoint, it would be a good idea to have County residential properties inspected for basic life safety issues. They also saw a value in being able to use the inspection information to build up a historic record on residential properties in the County's files.

### **Comments from County Supervisors**

County Supervisors interviewed by the Grand Jury indicated that, based only on their initial reaction and not on a thorough study of the matter, the concept of requiring residential pre-sale inspections has merit from a public health and safety perspective. At the same time, however, one Supervisor expressed concern that pre-sale inspections might have a detrimental effect on the availability of needed moderate to lower cost housing stock if such inspections resulted in the removal of illegal units. For example, it was reported to the Grand Jury that, at the direction of City management, San Rafael uses its pre-sale inspections to aggressively pursue illegal units. When these units are found, they are turned over to Code Enforcement.

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<sup>6</sup> According to the Marin County Assessor-Recorder, for the period December 2000 – November 2001, there were 670 sales of conventional detached dwellings and 77 sales of condominiums/townhouses in the unincorporated area.



### **Other Interview Comments**

The Grand Jury also interviewed a representative of the real estate industry. Because all 11 cities or towns (which includes a large portion of the County population) already require pre-sale inspections, this representative stated that most realtors are already familiar with the requirement and the process and often express surprise that the County does not have a similar process. The Grand Jury was told that while groups such as the Marin Association of Realtors (MAR) had no formal position on the issue of pre-sale inspections at the County level, it could be anticipated that realtors might be against the requirement because of the cost to the seller, the time required to conduct the inspection, the fact that most realtors recommend that a private inspection be purchased in most of the larger transactions, as well as the general belief that “the less government the better”. However, it was also noted that realtors might welcome a greater involvement of public agencies in the disclosure process, as this might lessen a realtor’s potential liability.

There was a strong feeling that realtors would prefer greater uniformity among the jurisdictions requiring inspections, such as a uniform checklist that could be utilized in every municipality. However, it was also noted that city inspectors have historically resisted such a level of cooperation and, although there are regular joint meetings among the staff involved in inspections (through the Marin Codes Advisory group), little has ever come out of the meetings to foster uniformity. Concern was also expressed about the timeliness of the inspections based upon complaints from some realtors that it takes too long to schedule and complete the inspections in some of the jurisdictions. This could be a particular problem when there is a short escrow period.

Likewise, city staff currently involved in the inspection process indicated that the main concerns they heard from realtors about the process include lack of uniformity between jurisdictions and delays caused by slow responses to requests for inspections. These city staff members felt that realtors generally support the process since it provides another level of protection for them. Staff members also stressed the importance of their efforts to establish and maintain a cooperative working relationship with realtors; realtors can be supportive and expedite the inspection process in return for timely response by the City in carrying out the inspections. Existing inspection staff stressed that representatives of the Marin Association of Realtors should be included in any discussions to modify the existing programs or develop one for the County.

An argument can be made that the real property disclosure laws enacted since the city pre-sale inspection requirements were first established may serve the same purpose in protecting purchasers of real property. However, those currently involved in the process generally did not agree with this assertion and felt (in some cases fairly strongly) that requiring pre-sale inspections was important from a life safety standpoint and served a largely different function.

The Grand Jury observed that city inspection staffs were generally enthusiastic regarding the benefits of pre-sale inspections and believe that pre-sale inspections may deter homeowners from undertaking construction projects without required permits. However, they warned that some jurisdictions might exploit the fees as a revenue source and try to require work that may not be legally justified under present statutes. A frequent complaint heard by the Grand Jury was that those municipalities that require upgrades to bring properties into compliance with current codes incorrectly interpret the Uniform Building Code (UBC). The UBC actually mandates that buildings be maintained in conformance with the code edition under which the construction was installed (Section 3402 of the 1997 UBC).

### **Potential Benefits from Pre-sale Inspections**

The Grand Jury learned that pre-sale inspections can serve as both a consumer disclosure mechanism providing potential buyers with information on Zoning (i.e. use, setback, parking and conditions of prior entitlements), and Building and Fire Code violations that may exist with the property, and as a way of identifying potentially hazardous conditions. This allows remedies to be negotiated between buyers and sellers prior to close of escrow and allows buyers to make more informed decisions as to whether or not to purchase a property. Pre-sale inspections also alert buyers to problems they may encounter if they later seek permits to improve the property.

Pre-sale inspections would allow the County to build up a public record history, over time, of conditions on and changes made to residential properties similar to those that exist in cities and towns. In the cities and towns, realtors and prospective buyers often specifically ask to review previous presale reports as an initial step in their investigation of a property. The County currently has only limited records on residential properties other than houseboats – primarily where building or septic permits or other County entitlements have been obtained.

A requirement for pre-sale inspections by County Community Development Agency staff might also deter some property owners from undertaking construction projects without required permits, knowing that when a property is sold, a County inspector will inspect the property and check for non-permitted construction, code violations and possible safety hazards.

## **FINDINGS**

1. Because pre-sale inspections/reports are already required by all 11 cities or towns (which include a large portion of the Marin County population), most realtors are already familiar with the requirement and the process and are often surprised that the County does not have a similar requirement.

2. Pre-sale inspections of residential properties can serve as a consumer disclosure mechanism providing potential buyers with information on the Zoning regulations that apply to, and Building and Fire Code violations that exist on the property; and also as a way of identifying potentially hazardous conditions. They make it easier to negotiate remedies between the buyer and the seller prior to close of escrow and enable the buyer to make a more informed decision as to whether or not to purchase the property.
3. Pre-sale inspections/reports by County staff could alert buyers to problems they may encounter if they later seek permits to improve the property.
4. Pre-sale inspections/reports would allow the County to build up a public record history, over time, of conditions on and changes made to residential properties, where currently County records only cover residential properties where building or septic permits or other entitlements have been obtained.
5. A requirement for pre-sale inspections by the County Community Development Agency staff could also act to deter some property owners from undertaking construction projects without required permits in that they would know that when a property is sold, a County inspector will inspect the property, checking for construction without permits, code violations and possible safety hazards.
6. Based upon a sampling of jurisdictions by the Grand Jury, it appears that the actual scope of the pre-sale inspections in many jurisdictions bear little relationship to the enabling legislation of the local Municipal Code and applicable provisions of State law. In many jurisdictions the process appears to have evolved over time, without corresponding revisions having been made to the applicable Municipal Code.
7. Currently the scope of pre-sale inspections varies widely from jurisdiction to jurisdiction. This frustrates realtors who often work in multiple jurisdictions.
8. Costs to perform the inspections/reports appear to be covered by the fees collected (thus the process is revenue neutral), and can be undertaken with minimum staff.

## **RECOMMENDATIONS**

1. The Marin County Board of Supervisors should appoint a committee, including at least representatives of the Building Inspection and Code Enforcement Divisions of the County Community Development Agency, the real estate profession and construction industry, to consider whether the County should require an inspection of and/or a report on all residential properties at the time of resale as well as the scope of such inspections/reports, if recommended.

2. Because the actual scope of the inspections/reports in many of Marin's cities and towns appears to have little relationship to the enabling legislation of the local municipal code and applicable State laws, the cities and towns should have their City or Town Attorneys review existing practices and code provisions and make any appropriate revisions either to the codes or to the practices of the inspectors.
3. The jurisdictions that require pre-sale inspections should either establish a new study committee or utilize an existing organization such as the Marin County Codes Advisory group to meet with representatives of the Marin Association of Realtors to discuss the feasibility of standardizing the pre-sale inspection process.

## **REQUEST FOR RESPONSES**

Pursuant to Penal Code section 933.05, the Grand Jury requests:

1. A response to Findings 1-5 and Recommendations 1 and 3 from the County Board of Supervisors.
2. A response to Findings 6, 7 and 8 and Recommendations 2 and 3 from the City or Town Council of each of the 11 Marin cities or towns.

The Grand Jury also invites a response to this report from the Marin Association of Realtors.