



July 19, 2023

The Honorable Judge James Chou
Marin County Superior Court
P.O. Box 4988
San Rafael, CA 94913-4988
Emailed to: departmentb@marin.courts.ca.gov

Pat Shepherd, Foreperson
Marin County Civil Grand Jury
3501 Civic Center Drive, Room #275
San Rafael, CA 94903
emailed to: grandjury@marincounty.org

Re: Response to Marin County Civil Grand Jury Report
Build More ADUs - An Rx to Increase Marin's Housing Supply, June 15, 2023

Dear Honorable Judge Chou and Foreperson Shepherd:

Per your request, North Marin Water District (NMWD) is providing responses to Finding F-7 and Recommendation R-4 of Marin Civil Grand Jury Report entitled: *Build More ADUs - An Rx to Increase Marin's Housing Supply, June 15, 2023*. The responses by NMWD were reviewed and approved by the NMWD Board of Directors at the July 18, 2023 Regular Meeting. The responses are presented in the required form ("Response Form: 2022-2023 Marin Civil Grand Jury Report"), provided as Attachment 1. Associated supporting statements and explanations to our responses are provided as Attachment 2 (3 pages).

We also have some comments on the portion of the Report entitled 'Impact Fees – Exceptionally Confusing in Spite of State Law,' which reflects a lack of complete understanding of connection fees and capacity charges like those charged by NMWD. It is not clear which "profession" is practiced by the "ADU professional," but we feel it is incorrect to characterize any of NMWD's fees and charges as "piracy." As noted in our response to Recommendation R-4, the process of raising the revenues necessary to operate and expand a public water system is a zero-sum game. The amendments to NMWD Regulation 1 adopted in December 2022 were the end result of a comprehensive evaluation of the cost of service performed by Hildebrand Consulting, a firm specialized in the complicated calculations of capacity charges. A water usage analysis was conducted for the four basic types of residential accounts within NMWD; the usage was then compared to the typical usage of a single family detached residence, and the resulting ratio was used to determine the capacity charge (called a "Facility Reserve Charge" for historical reasons). For ADUs on a parcel in undivided ownership, that ratio was 0.27, meaning that the Facility Reserve Charge for such an ADU is \$7,640 (as compared to \$28,310 for a single family detached residence) in the Novato service area; and \$5,580 (as compared to \$20,660 for a single family detached residence) in the West Marin service area. As noted in the response to Recommendation R-4, NMWD chose not to use an alternative method of calculation that would have resulted Facility Reserve Charges more than two times higher than the ones it enacted.

If NMWD is prevented from collecting the true cost of providing service to an ADU, it will need to obtain those funds elsewhere. As is described in our response to the Report findings, each of the potential other sources of revenues to make up the shortfall has constitutional and statutory constraints that render NMWD vulnerable to a potentially successful judicial challenge.

The text in the portion of the of the Report entitled 'Impact Fees – Exceptionally Confusing in Spite of State Law,' also notes that NMWD "reads the code as exempting only ADUs created within an existing structure." That reading is correctly based on the statutory language of subdivision (f)(5) of Government Code section 65852.2, which allows for capacity charges and collection fees for all ADUs other than those "described in subparagraph (A) of paragraph (1) of subdivision (e) [of section 65852.2]" which states, "The accessory dwelling unit *or junior accessory dwelling unit* is within the proposed space of a single-family dwelling or existing space of a single-family dwelling or accessory structure and may include an expansion of not more than 150 square feet beyond the same physical dimensions as the existing accessory structure. An expansion beyond the physical dimensions of the existing accessory structure shall be limited to accommodating ingress and egress."

Finally, as noted in NMWD's responses, NMWD does not charge "impact fees," but instead charges "connection fees" and "capacity charges." Subdivision (f)(3)(B) of Government Code section 65852.2 establishes that there is a distinction between "impact fees" and the "connection fees" and "capacity charges" that NMWD charges. This language was the subject of a fair amount of discussion during the legislative process that led to the adoption of AB 3182, the bill that enacted subdivision (f)(3)(B) of Government Code section 65852.2 in 2020.

Sincerely,



Anthony Williams, P.E.
General Manager

Attachments:

1. Response Form: 2022-2023 Marin Civil Grand Jury Report
2. Response Form Continuation – Statements and Explanations

c: Carl Nelson and Craig Judson, Bold Polisner, Maddow, Nelson & Judson
Dennis Rodoni, Supervisor, Marin County Board of Supervisors
Eric Lucan, Supervisor, Marin County Board of Supervisors
Adam McGill, Novato City Manager

RESPONSE FORM: 2022-2023 Marin Civil Grand Jury Report

Report Title: Build More ADUs - An Rx to Increase Marin's Housing Supply, June 15, 2023

Respondent/Agency Name: North Marin Water District

Submitter Name: Anthony Williams Title: General Manager

FINDINGS

- Agree with the findings numbered: _____
- Disagree *partially* with the findings numbered: F7
- Disagree *wholly* with the findings numbered: _____

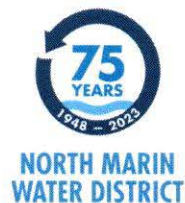
(Attach a **statement** specifying any portions of the findings that are disputed; include an explanation of the reasons therefor.)

RECOMMENDATIONS

- Recommendations numbered _____ have been implemented.
(Attach a **summary** describing the implemented actions.)
- Recommendations numbered _____ have not yet been implemented, but will be implemented in the future.
(Attach a **timeframe** for the implementation.)
- Recommendations numbered _____ require further analysis.
(Attach an **explanation** and the scope and parameters of an analysis or study, and a **timeframe** for the matter to be prepared for discussion by the officer or director of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This **timeframe shall not exceed six months** from the date of publication of the grand jury report.)
- Recommendations numbered R4 will not be implemented because they are not warranted or are not reasonable.
(Attach an **explanation**.)

Date: 7/19/23 Signed: 

Number of pages attached: 3



Response Form Continuation – Statements and Explanations
Marin Civil Grand Jury Report
Build More ADUs - An Rx to Increase Marin's Housing Supply, June 15, 2023 ("Report")

Findings

F7. Impact, connection, and capacity fees vary considerably throughout the County and such fees can be a disincentive to homeowners considering ADU development.

Statement: North Marin Water District ("NMWD") has been asked to respond to Finding F-7 stated above and listed on page 16 of 21 of the Report. The Report incorrectly refers to NMWD's Facility Reserve Charge (FRC) and any associated charges for new service¹ as an "Impact Fee". NMWD does not charge "impact fees," but rather charges "connection fees" and "capacity charges" – as respectively defined in subdivisions (b)(2) & (b)(5) and (b)(3) of Government Code section 66013. Subdivision (f)(3)(B) of Government Code section 65852.2 clarifies that there is a distinction between "impact fees" and the "connection fees" and "capacity charges" that NMWD charges.

It is not clear to NMWD that it's capacity charge or connection fees are a direct disincentive to homeowners considering ADU development. The Report doesn't address whether the NMWD FRC in particular is any more or less a cost factor than any other cost associated with construction, including for example the cost of the roofing or the foundation of the structure (all of which are critical for habitation); or for that matter what PG&E may charge for a new electrical or gas service to the ADU, also critical for habitation but also not addressed in the Report. More importantly, NMWD does not monitor "impact fees" and thus cannot comment about whether they vary considerably or not, within Marin County or in the greater Bay Area. The Report doesn't mention that NMWD has two distinct water service areas, and the FRC for NMWD's West Marin Service Area is \$5,580. The Report seems to focus only on NMWD's Novato Service Area.

Table 3 of the Report notes that the charges imposed by Novato Sanitary Agency are in line with NMWD's water FRC. However, the "connection fees" and "capacity charges" charged by other entities are legally irrelevant to those charged by NMWD, which are required by law to be based on facilities, water sources, usage, and other factors peculiar to NMWD. Further, those fees and charges are tightly constrained by Government Code section 66013 and by Proposition 26 (enacting a new § 1(e) in article XIIC of the California Constitution) as well as Government Code section 65852.2 and are required by state constitutional law to be proportional to the "burdens on, or benefits received from, the governmental activity," here water service. (*Newhall County Water District v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1441 (citing § 1(e) in article XIIC of the California Constitution).) NMWD does, however, periodically survey the "capacity charges" levied by other agencies for informational purposes. The most recent survey was performed in November 2022 in connection with the updating of NMWD's "capacity charges" to conform to current law. That survey revealed that there are indeed variations among the "capacity charges" charged by other entities in Marin County and

¹ See NMWD Regulation 1 - <https://nmwd.com/wp-content/uploads/2022/12/Reg-01-12.6.22-final.pdf>

elsewhere in the Bay Area. Although NMWD was not asked to respond to Finding F-8, it does want to point out that it updated its Regulation 1 in December 2022 to fully “conform with current California ADU laws.”

Recommendations

R4. By December 1, 2023, begin a feasibility assessment of waiving or significantly lowering impact and connection fees for units smaller than 750 square feet.

Explanation: As noted above under “Findings”, NMWD doesn’t levy impact fees. It will not be possible for NMWD to waive its connection fees and capacity charges (except to the extent required by subdivisions (e)(1)(a)(i) and (f)(4) of Government Code section 65852.2). The costs of providing service and responding to demands for service are a zero-sum game. If NMWD does not recover the true cost of providing service to a new ADU, it must recover those costs in some other fashion. As noted above, there are strict statutory and constitutional constraints on NMWD’s ability to raise revenues necessary to meet costs. For example, if NMWD waived connection fees and/or capacity charges to smaller ADUs and tried make up the shortfall in the costs of providing service to a new ADU by charging other new connections more, it would be vulnerable to judicial challenge under both Government Code section 66013 (and section 65852.2, if the other new connection was a larger ADU) and Proposition 26; conversely, if NMWD waived connection fees and/or capacity charges to smaller ADUs and tried make up the shortfall in the costs of providing service to these ADUs by charging its ratepayers more, it would be vulnerable to judicial challenge under Proposition 218, which generally prohibits water districts like NMWD from charging more than “the proportional cost of the service attributable to the [ratepayer’s] parcel.”

NMWD’s water system capacity required to serve new development, includes source of water supply, treatment, pumping, storage, pipelines, recycled water and Sonoma County Water Agency facilities that serve NMWD. In 2022, NMWD updated its FRCs for all classes of development, including ADUs, using a hybrid methodology (a combination of incremental and buy-in methodologies) because while some capacity remains available in the existing system to meet the needs of future users, a portion of that available capacity needs to remain un-used for the purpose of providing a buffer against changes in peak usage or changes in existing customer demands. The District’s capital improvement plan (through the year 2035) includes numerous projects which add capacity to serve future growth. The hybrid approach uses the weighted average (based on 2 percent available capacity) of both methods, and results in reasonable fees which will ensure that existing users do not bear any part of the burden of providing capacity to new users. This approach is universally accepted throughout the state.

The physical size of the ADU (square footage floor area) is not a factor when considering water capacity availability. A 1,200 square foot ADU equipped with a kitchen sink, dishwasher, bathroom sink, toilet, shower, and clothes washer would have the same impact on the water system capacity as a 750 square foot ADU with the same water fixtures and appliances. The water fixtures and appliances are more relevant than size and different combinations of fixtures and appliances expected to exist in an ADU result in water use that is equivalent to 42% to 63% of a single-family detached residence’s fixtures and appliances. The tables below compare a single-family detached residence and an ADU with typical fixtures and appliance and calculates the resulting Drainage Fixture Units (DFUs) using the California Plumbing Code. In the example below, the DFUs for an ADU is 62.5% of a single-family detached residence.

Residential Domestic Use (Single-family) -

Fixture	Count	DFU (Each)*	DFU (Total)
Shower (single head)	2	2	4
Clothes washer (horizontal axis)	1	3	3
Dishwasher	1	2	2
Toilet (flush tank)	2	3	6
Faucet (kitchen sink)	1	2	2
Bathtub	2	2	4
Faucet (lavatory)	3	1	3
Total DFU			24

Residential Domestic Use (ADU) -

Fixture	Count	DFU (Each)*	DFU (Total)
Shower (single head)	1	2	2
Clothes washer (vertical axis)	1	3	3
Dishwasher	1	2	2
Toilet (flush tank)	1	3	3
Faucet (kitchen sink)	1	2	2
Bathtub	1	2	2
Faucet (lavatory)	1	1	1
Total DFU			15

*Table 702-1 CA Plumbing Code

The amendments to NMWD Regulation 1 adopted in December 2022 were the end result of a comprehensive evaluation of the cost of service performed by Hildebrand Consulting, a firm specialized in the complicated calculations of capacity charges². A water usage analysis was conducted for the four basic types of residential accounts within NMWD as opposed to the DFU analysis illustrated above; the usage was then compared to the typical usage of a single family detached residence, and the resulting ratio was used to determine the capacity charge. For ADUs on a parcel in undivided ownership, that ratio was 0.27³, meaning that the Facility Reserve Charge for such an ADU is \$7,640 (as compared to \$28,310 for a single family detached residence) in the Novato service area, and \$5,580 (as compared to \$20,660 for a single family detached residence) in the West Marin service area.

Page 10 of the Report states that Marin Water doesn't charge a "connection fee" for a newly constructed ADU under 700 square feet. It is NMWD's understanding for this zero charge, two conditions must be met by the applicant: 1) "has continuously maintained water service at the parcel, on which the ADU will be constructed, for a period of at least one year immediately preceding submission" (of an application); and 2) the property owner will occupy either the existing single family dwelling or the new ADU.

If the state, County or the City of Novato were able to subsidize the connection fee charge as part of an obligatory housing program, the NMWD would waive the fee to the homeowner or water customer.

² See report - <https://nmwd.com/wp-content/uploads/2022/11/2022-North-Marin-WD-Facility-Reserve-Charge-Study-Final-11.15.22.pdf>

³ As opposed to ratios ranging from 0.42 to 0.63 using proportional drainage fixture unit analysis.