



# LEGAL UPDATE

MAY 2021, 21.05

## A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

### Legislation Makes Requirements for Home Inspection Reports

The purchase of a home is typically the single largest investment a person makes. As a result, buyers purchasing a home want to understand the conditions relating to the home. Neither real estate licensees nor legal counsel are the experts when it comes to understanding the condition of the property. The expertise as to the condition of the property belongs to the home inspector.

For obvious reasons, there is a great deal of emphasis placed on the home inspector's report.

### The Home Inspection

#### What is a home inspection?

The home inspection is where a home inspector, who is registered in the state of Wisconsin by the Department of Safety and Professional Services, examines the readily accessible observable systems and components of improvements to residential properties. The home inspector's report is the written opinion of the home inspector regarding the condition of any improvements, as well as mechanical and structural components of residential property that contains no more than four dwelling units.



#### REALTOR® Practice Tip

**The new legislation requires pre-registration education for new home inspectors.** Before the law change, to become a Wisconsin-registered home inspector, there was no education required before taking the necessary exams. However, the law now requires those who wish to become a Wisconsin-registered home inspector to complete 40 hours of education before taking the examinations.

#### What is required during a home inspection?

It is important to first understand what a home inspector must do, is not obligated to do and can never do when it comes to the inspection and its related report.

##### A home inspector must observe and describe:

1. FOUNDATIONS: type and condition of foundation.

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2. COLUMNS: type and condition of columns.
3. FLOORING SYSTEMS: type and condition of flooring systems.
4. ROOFS: roof coverings, including type, roof drainage systems, flashings, skylights, chimneys, roof penetrations, and signs of leaks or abnormal condensation on building components. The home inspector must describe the methods used to observe the roof.
5. EXTERIORS: wall claddings, including type; flashings and trim; entryway doors and at least one window per side of a dwelling unit; garage door operators, including whether any garage door operator automatically reverses or stops when meeting reasonable resistance during closing; decks, balconies, stoops, steps and porches including railings; eaves, soffits, and fascias; and grading, drainage, driveways, patios, walkways, and retaining walls that abut the dwelling unit. A home inspector shall operate all entryway doors, garage doors, and at least one window per side of a dwelling unit.
6. PLUMBING SYSTEMS: interior water supply and distribution system, including piping materials, supports, fixtures, faucets, functional flow and drainage, leaks and cross connections; interior drain, waste and vent system, including traps, drain, waste, and vent piping, piping supports and leaks; hot water systems, including water heating equipment, normal operating controls, automatic safety controls, and the exterior surfaces of chimneys, flues, and vents; fuel storage and distribution systems, including interior fuel storage equipment, supply piping, venting, supports and leaks; and sump pumps. A home inspector shall operate all plumbing fixtures, including their faucets and accessible exterior faucets attached to the dwelling unit.
7. ELECTRICAL SYSTEMS: service entrance conductors; service equipment, grounding equipment, main over current device; main and distribution panels, including their location; amperage

and voltage ratings of the service, including whether service is overhead or underground; branch circuit conductors, their over current devices, and the compatibility of their ampacities and voltages, including any aluminum branch circuit wiring; the operation of a representative number of installed lighting fixtures, switches and receptacles located inside the house, garage and any exterior walls; the polarity and grounding of all receptacles within 6 feet of interior plumbing fixtures, in the garage or carport, and on the exterior of inspected structures; the operation of ground fault circuit interrupters; and the functionality of the power sources for smoke detectors.

8. INTERIORS: walls, ceilings and floors; steps, stairways, balconies and railings; counters and all sink base cabinets; a random sample of doors and windows; separation walls, ceilings, and doors between a dwelling unit and an attached garage or another dwelling unit; and signs of water penetration into the building or signs of abnormal or harmful condensation on building components.
9. HEATING SYSTEMS: the condition of all of the following within a permanently installed heating system: heating equipment and distribution systems; normal operating controls and energy source; automatic safety controls; exterior surfaces of chimneys, flues and vents; solid fuel heating devices; and the presence of an installed heat source in each room. A home inspector shall operate the heating systems using normal operating controls and open readily accessible access panels provided by the manufacturer or installer for routine homeowner maintenance.
10. CENTRAL AIR CONDITIONING: the condition of the cooling and air handling equipment, including type and energy source; normal operating controls; and the presence of an installed cooling source in each room. A home inspector shall operate the central air conditioning systems, using normal operating controls, and open readily accessible access panels provided by the manufacturer or installer for routine homeowner maintenance.
11. INSULATION AND VENTILATION: the presence or absence of insulation in unfinished spaces; ventilation of attics and foundation areas; and the condition of kitchen, bathroom, and laundry venting systems.

**A home inspector may, but is not obligated to observe and describe:**

1. ROOFS: walk on the roofing; observe attached accessories, including, but not limited to, solar systems, antennae, and lightning arrestors; and observe internal gutter and downspout systems and related underground drainage piping.
2. EXTERIORS: observe storm windows, storm doors, screening, shutters, awnings, and similar seasonal accessories; observe locks, latches or other security devices or systems; observe intercom systems; fences or privacy walls; observe insulation or vapor barriers in exterior walls; observe safety glazing; observe garage door operator remote control transmitters; observe geological or soil conditions; observe recreational facilities; observe outbuildings other than garages and carports; and observe trees, shrubs and other vegetation.
3. PLUMBING SYSTEMS: state the effectiveness of anti-siphon devices; determine whether the water supply and waste disposal systems are public or private; operate automatic safety controls or sump pumps equipped with internal or water dependent switches;

operate any valve except water closet flush valves, fixture faucets and hose faucets; observe water conditioning systems, fire and lawn sprinkler systems, on-site water supply quantity and quality, on-site disposal systems, foundation drainage systems, or spas; observe the interior of flues, chimneys and vents, or solar water heating systems; observe exterior plumbing components such as water mains or swimming pools; determine water temperature; and determine the proper sizing, design or use of plumbing materials.

4. ELECTRICAL SYSTEMS: insert any tool, probe or testing device inside the panels; test or operate any over current device except ground fault circuit interrupters; dismantle any electrical device or control other than to remove the covers of the main and: auxiliary distribution panels; observe low voltage systems, telephones, security systems, cable TV, intercoms, or other ancillary wirings that is not a part of the primary electrical distribution systems; and measure amperage, voltage, or impedance.
5. INTERIORS: observe paint, wallpaper, and other cosmetic finish treatments on the interior walls, ceilings and floors; observe carpeting; observe draperies, blinds or other window treatments; observe household appliances; and observe recreational facilities or another dwelling unit.
6. HEATING SYSTEMS: operate heating systems when weather conditions or other circumstances may cause equipment damage; operate automatic safety controls; ignite or extinguish fuel fires; observe the interior of flues, fireplace insert flue connectors, humidifiers, electronic air filters, or the uniformity or adequacy of heat supply to the various rooms; and observe a heat exchanger unless it is readily observable and normally accessible to an occupant of a dwelling unit.
7. CENTRAL AIR CONDITIONING: operate cooling systems when weather conditions or other circumstances may cause equipment damage; observe non-central air conditioners; observe the uniformity or adequacy of cool-air supply to the various rooms; operate electronic air filters; observe the pressure of the system coolant or determine the presence of leakage; and test the electrical current drawn by the unit.
8. INSULATION AND VENTILATION: concealed insulation; and venting equipment that is integrated with household appliances.

**A home inspector is never permitted to in writing or verbally report on:**

1. The market value or marketability of a property.
2. Whether a property should or should not be purchased.

## New Legislation

### Before this new legislation

A few years ago, the WRA embarked on a path to help better align the terminology used in the real estate transaction by sellers (“defect” in the Real Estate Condition Report) and by buyers and sellers (“defect” in the offer to purchase), to the terminology used by the home inspector in the home inspection report. In this legislative endeavor the WRA worked with the Wisconsin Association of Home Inspectors (WAHI) to modify the home inspector terminology used in the report. Before this legislation was passed, the home inspector statute used the phrase “material adverse fact.” Therefore, as of July 1, 2018, when a home inspector called something a defect in the inspection report, the condition had to meet the definition

contained in the home inspector statute of Wis. Stat. § 440.97(2m).

Further, this legislation provided that while the item had to meet the definition of defect in the home inspector statute if the home inspector called an item a defect in the report, the law did not require home inspectors to use the word defect. The WRA was cautiously optimistic this consistency change in terminology was going to resolve the constant complaint that the home inspector's failure to use the word defect in the report was creating serious challenges in the transaction. Thus, the WRA along with WAHI knew there was a high probability that legislation may be needed in the future to address the overall issue of the use of the word defect in the report.

After a couple of years, it quickly became apparent that the law needed to be changed because home inspectors were inconsistently using the word defect in their report because the law did not require them to do so. Therefore, some used the word defect in some of their reports and not in others, some used different phrases to describe defects such as, "major issues," "major concerns," "significant issues," and "potential safety and health issues," further creating consumer inconsistencies as to what terms home inspectors were using to describe a defect. During the last session in 2019-2020, the WRA pursued legislation to address the inconsistencies. However, due to COVID-19, the legislation failed to meet the final step of passing the senate floor because the pandemic shut down the Legislature.

## The new legislation

Once the new 2021-2022 legislation session began, the WRA once again had the legislation introduced. After getting through committee hearings and floor dates, all with unanimous votes, Gov. Evers signed 2021 Wis. Act 17 into law with the report requirements becoming effective June 1, 2021.

Therefore, as of June 1, 2021, all home inspection reports will contain certain and consistent information, creating an expectation of consistency for all involved in the real estate transaction.

### ***Home inspectors were required to identify defects during the home inspection before the new legislation.***

Home inspectors have been legally required to identify conditions that are defects during the home inspection; this legislation does not modify that requirement. See Wis. Stat. § 440.975. Further, the law included a definition of defect in the home inspector statute.

### ***This legislation DID NOT expand the home inspector definition of defect.***

The new law did modify the definition of defect in the home inspector statute to statutorily clarify that defect is what the home inspector determines based on their judgment at the time of the inspection. This modification reduced concerns that buyers perceive home inspectors are guaranteeing there will not be any defects in the future. Further, this change ensures that the buyer understands that the home inspector is identifying conditions as of the day of the inspection and not making any warranties as to the future condition of the property.

### ***How was the home inspector defect definition modified?***

Therefore, under the new legislation, the home inspector definition of "Defect" means a condition of any component of an improvement that a home inspector determines, on the basis of the home inspector's judgment on the day of an inspection, would significantly impair the health or safety

of occupants of a property or that, if not repaired, removed, or replaced, would significantly shorten or adversely affect the expected normal life of the component of the improvement. See Wis. Stat. § 440.97 (2m).

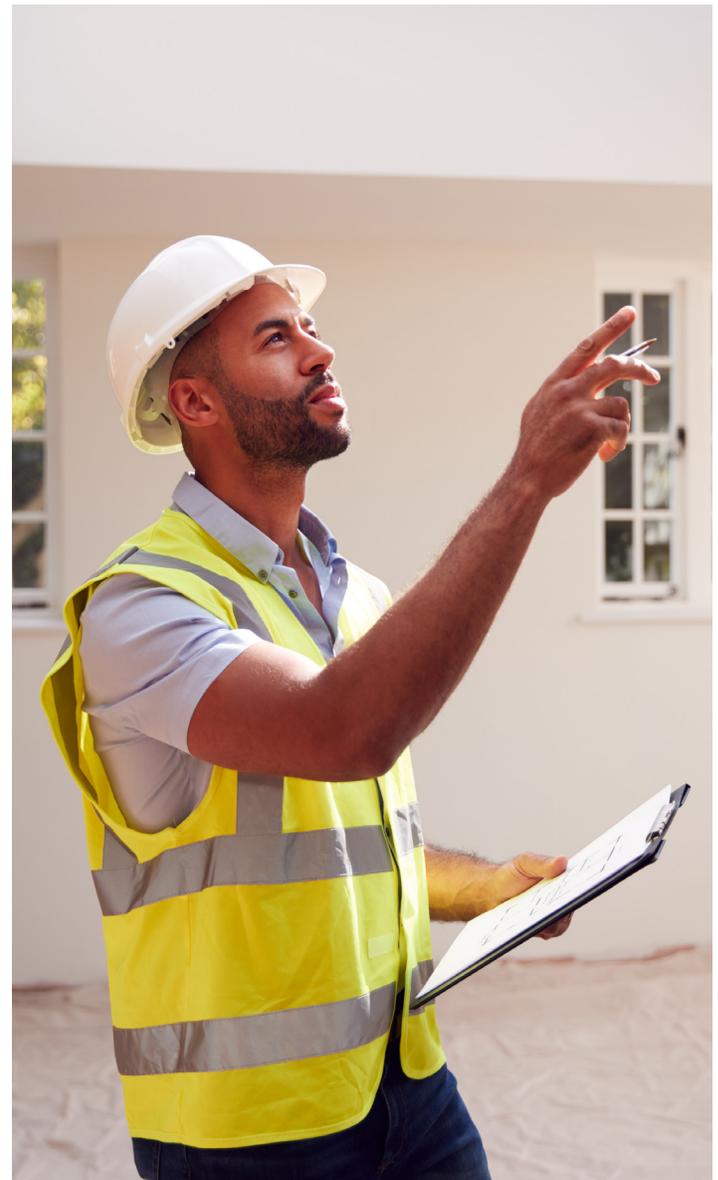
### ***This legislation DID NOT change the home inspection process or the inspector's evaluation.***

Again, while the legislation modifies the definition of defect to clarify defects are conditions based on the inspector's judgement as of the day of the inspection, the legislation does not expand what the home inspector must identify as defects.

This new legislation does not change what defects are to be identified by the home inspector. This legislation simply requires a home inspector who identifies a defect during the inspection as currently required by law, to label that item as a defect in the inspection report.

### ***Home inspectors now must refer to a defect as a "defect" in the report.***

Prior to the law change and after the law change, home inspectors must identify conditions during the inspection that meet the statutory



definition of defect. However, the new law requires the home inspector to label those items as defects in the report.

When the buyer makes their offer contingent on a home inspection, the offer is conditioned on a Wisconsin-registered home inspector performing a home inspection “which discloses no Defects.” After the inspection, the buyer’s home inspector must provide a written report to them.

Before the law change, sellers and their legal counsel often claim the condition is not a defect because the home inspector did not use the word “defect” to describe the condition the buyer is citing as a defect per the offer to purchase terms. Without consistency, confusion and disputes will continue for consumers on both sides of the transaction.

#### REALTOR® Practice Tip

**The new law DOES NOT increase the liability of home inspectors.** Home inspectors have been and are continued to be required to identify conditions that meet the statutory definition of defect during the inspection. The mere fact a home inspector is now required to label those items defects, does not increase liability.

Additionally, to address concerns voiced by home inspectors as to liability, section 11 of nonstatutory provisions states the Legislature was not intending to modify home inspector liability by requiring the home inspector to use the term defect as defined in the statute.

#### ***Does this law change how the parties negotiate?***

No, the legislation DOES NOT change negotiation rights between buyers and sellers.

Neither the home inspector nor this legislation determines how the buyer and seller choose to negotiate the terms of the offer based upon the inspection report. The buyer may receive the home inspection and still decide to do nothing, offer an amendment, or provide a Notice of Defects. Again, nothing in this legislation changes how the parties choose to negotiate once the report is received.

In addition, this legislation DOES NOT guarantee agreement between buyers and sellers. This legislation is not a cure all. Buyers and sellers may still disagree as to what is or is not a defect even if the home inspector calls the item a defect in the report. Whether any item listed is actually a defect as defined in the offer is determined on a case-by-case basis. If the parties cannot agree whether an item is a defect as defined in the offer, then the parties should be directed to their respective attorneys for advice.

#### REALTOR® Practice Tip

**The legislation DID NOT change the offer to purchase.** As defined on lines 445-447 of the WB-11 Residential Offer to Purchase, “Defect” 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.

#### ***Is the WB offer to purchase and home inspector definition of defect the exact same?***

No. According to lines 445-447 of the WB-11 Residential Offer to

Purchase, “Defect” 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.

Wis. Stat. § 440.97(2m) of the home inspector statute defines “defect” as a condition of any component of an improvement that a home inspector determines, on the basis of the home inspector’s judgment on the day of an inspection, would significantly impair the health or safety of occupants of a property or that, if not repaired, removed, or replaced, would significantly shorten or adversely affect the expected normal life of the component of the improvement.

Home inspectors are not appraisers and cannot comment on the value of the property or its component. In fact, if a home inspector were to comment on value, one could argue it is outside the scope of their license. Therefore, the two definitions cannot match. In addition, it is quite possible that while a home inspector does not label something a defect in the report, the buyer claims it as a defect as defined in the offer to purchase because the buyer claims the condition would have a significant adverse effect on the value of the property. Again, this legislation is aimed to help reduce arguments between parties as to what is a defect; but cannot eliminate all claims and challenges that could be made by the buyer and seller.

#### REALTOR® Practice Tip

Home inspectors are required to identify defects during the inspection. The cost to repair the item is irrelevant. Neither the home inspector nor this legislation determines how the buyer and seller choose to negotiate the terms of the offer based upon the inspection report.

#### ***What if this legislation results in home inspectors labeling everything as a defect?***

Under this bill and current law today, a home inspector could list everything as a defect. If a home inspector decided to list every item in the report as a defect even though it did not meet the statutory definition, it could result in:

1. a complaint filed at the Department of Safety and Professional Services challenging the competency of the home inspector’s practice.
2. the inspector being known as having provided an inspection report having no benefit to the buyer, since the buyer is hiring the home inspector to assist them in discerning the condition of the property.

#### ***Is there one uniform summary page?***

No. Other than labeling items as defects, when applicable, and the incorporation of the summary page and its minimum statutorily required language, there is not a uniform form by which the inspector must document the inspection. While Wisconsin real estate licensees who must use state-approved WB forms find this lack of consistency occasionally frustrating, home inspectors are not required to use a specific approved form. This legislation intentionally stayed away from being too prescriptive to allow home inspectors the ability to set themselves apart in their business models.

However, as noted, the new law requires every home inspection report

as of June 1, 2021, to include a summary page. The summary page could in theory be more than one single page depending on the amount of information needing to be included by the home inspector. The summary page could include more than what is required by law depending on the style of the home inspector.

**What must every summary page include?**

At minimum, as of June 1, 2021, every home inspector report will include a summary page with the following:

- Property address
- Home inspector’s name
- Date of the home inspection
- Name(s) of the individual(s) who prepared the report
- Date the report was prepared or revised
- References to the page, heading or item number in the detailed account for further information
- List of conditions including at least all of the following:
  - List of conditions, labeled as defects, that are observed under par. (cm) to be defects, as defined in s. 440.97 (2m).
  - Items not labeled as defects:
    - Listing of components needing repair
    - Components needing further evaluation
    - Items to monitor
    - Maintenance items
- Certain notices/statements including:
  - NOTE: This summary page is

provided for convenience and is not a substitute for reading the entire report and should not be relied upon as the complete list for the client’s reference.

- For the purposes of the report, “defect,” as defined in section 440.97 (2m), Wis. Stats., means a condition of any component of an improvement that a home inspector determines, on the basis of the home inspector’s judgment on the day of an inspection, would significantly impair the health or safety of occupants of a property or that, if not repaired, removed, or replaced, would significantly shorten or adversely affect the expected normal life of the component of the improvement. The contract of sale may define “defect” to also include a condition that would have a significant adverse effect on the value of the property, but such a condition may not be labeled a defect in the report unless it meets the definition in section 440.97 (2m), Wis. Stats.



**REALTOR® Practice Tip**

There are many WRA resources about the home inspection, home inspector responsibilities and the Inspection Contingency in the offer to purchase at [www.wra.org/Resources/Transactional/Home\\_Inspections\\_Resources](http://www.wra.org/Resources/Transactional/Home_Inspections_Resources).

- NOTE: A home inspector may not report on the market value or marketability of a property or whether a property should or should not be purchased.

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