

Mediation of Real Estate Contract Disputes in Maine

Residential real estate purchase and sale agreements (PSAs) contain numerous terms that might give rise to disputes between buyers and sellers. There are terms involving the payment and forfeiture of earnest money deposits if the transaction fails. There are conditions involving building and property inspections that can result in additional negotiations with the potential for dispute. There are financing conditions with detailed date and document requirements that can lead to disagreement as to whether financing has been or should have been obtained. Property disclosure forms can generate disputes over nondisclosure of defects or misrepresentation of required items in the property.

To help address these disputes in a more efficient and less costly and adversarial way than pursuing litigation, the Maine Association of REALTORS®' standard form residential purchase and sale agreement contains a paragraph requiring mediation of any dispute between buyers and sellers arising out of performance of the contract before litigation can be initiated. The mediation requirement provision of the PSA states:

“17. MEDIATION: Earnest money or other disputes within the jurisdictional limits of small claims court will be handled in that forum. All other disputes or claims arising out of or relating to this Agreement or the property addressed in this Agreement (other than request for injunctive relief) shall be submitted to mediation in accordance with generally accepted mediation practices. Buyer and Seller are bound to mediate in good faith and to each pay half of the mediation fees. If a party fails to submit a dispute or claim to mediation prior to initiating litigation (other than request for injunctive relief), then that party will be liable for the other party's legal fees and any subsequent litigation regarding the same matter in which the party who failed to first submit the dispute or claim to mediation loses in that subsequent litigation. This clause shall survive the closing of the transaction.”

For any party involved in a dispute under the terms of their PSA it is important to understand certain requirements and limitations of the mediation provision. Disputes involving earnest money deposits or other disputes of less than the small claims jurisdictional amount, now \$6,000, are not subject to the mediation requirement. Those disputes can be brought to Small Claims Court for binding decision by that Court.

Only the buyers and sellers who signed the contract are required to participate in mediation. The real estate agents involved can, and sometimes do, attend the mediation in support or witness roles for their clients, but their participation is voluntary, and they are not required to be involved in the monetary settlement negotiations.

The mediation provision of the PSA also provides for sanctions if either party fails to participate in the mediation. Once a mediation request has been made, a party who fails to submit a dispute to mediation prior to initiating litigation will be liable for the other party's attorney's fees in the litigation if the other party prevails. Since attorney's fees for each party going to court can be substantial, the penalty for not going to mediation can be severe and significantly more than the amount in controversy.

In addition to substantial cost and time savings, mediation has other advantages over litigation. Unlike court proceedings, which are public, the mediation process is confidential, and any settlement reached can be kept confidential as part of the settlement agreement. Further, the parties to the mediation control the elements of the settlement - the mediator does not impose a decision on the parties if a settlement agreement is not reached. The mediator, a professional neutral, facilitates the settlement negotiation by helping the parties understand the strengths and weaknesses of their positions along with the uncertainties, risks, and costs of going to court as compared to reaching a negotiated settlement agreement.

When there is a dispute under a PSA, the first step is for the parties to select a mediator. If the parties have attorneys involved (not required), their recommendations can be helpful in selecting a mediator with experience and expertise in real estate matters. The Maine Association of Mediators is a valuable source of information about mediators. The Association provides biographical profiles of all mediators who are members of the organization, approximately 75, and the ability to conduct a search of those mediators by both area of practice, such as real estate, and geographic location. Once a mediator has been selected, the mediator determines a mutually convenient date and location for the mediation and schedules it accordingly, usually within 30 to 60 days of the initiation of the mediation request, and directs the mediation process to its conclusion. Fees for mediation are set in advance by the mediator and agreed upon by the parties.

Peter Schroeter is a Mediator with the firm of Shaheen & Gordon. He is a member of the National Academy of Distinguished Neutrals, rated AV by Martindale-Hubbell and recognized by Best Lawyers in America and New England Super Lawyers in Mediation. He is Chair of the Maine State Bar Association ADR Section and a Past President of the Maine Association of Mediators.