

## Real Estate Transactions in Maine & COVID-19

Q & A: by Hannah McMullen, MAR Legal Counsel

(March 20, 2020 / Updated April 8, 2020)

### **Part I. State & Local Restrictions**

#### **Q. How do the Governor's recent Executive Orders impact my interactions with clients and customers? (Added 4/8/20)**

- A. Maine Governor Janet T. Mills has issued several Executive Orders over the last few weeks related to the COVID-19 virus. There are three orders in particular that are highlighted in part below. For more in depth summaries please refer to MAR's E-News or for the most up-to-date information on communications from the Governor's office, please refer to the website: <https://www.maine.gov/governor/mills/>
1. Executive Order No. 19 FY 19/20 on March 25, 2020
    - Directs non-essential businesses and operations to cease activities at sites that are public facing.
    - Upon appeal, real estate services were deemed an "essential business."
  2. Executive Order No. 28 FY 19/20 ("Stay Healthy at Home Order") on March 31, 2020 (effective until April 30, 2020)
    - Places restrictions on public contact and movement, schools, vehicle travel and retail business operations including the following:
      - All persons in the State of Maine are to stay at their homes except to conduct or participate in essential activities.
      - When out of the home or when at work at an essential business, all individuals shall maintain a minimum distance of six feet from other persons.
      - Persons traveling in private vehicles shall limit passengers within their immediate household, unless transporting for essential activities.
      - Limits the number of customers at a given time in essential businesses.
    - \*The Department of Economic and Community Development (DECD), which has been tasked with providing guidance on the Governor's Executive Orders, has issued specific guidelines for real estate activities which can be found at the website: <https://www.maine.gov/decd/sites/maine.gov.decd/files/inline-files/Real%20Estate%20Guidelines.pdf>
      - ***Please review these restrictions carefully. If real estate agents engage in additional activities beyond those identified in the guidelines or do not follow the restrictions, the Governor could place additional restrictions on the real estate industry or revoke the designation as an essential business.***

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3. Executive Order No. 34 FY 19/20 on April 3, 2020 (effective until April 30, 2020)
  - Requires any person, resident or non-resident, traveling into the State of Maine to self-quarantine for 14 days.
  - People are prohibited from traveling into Maine from certain “hot spots” and states included, but not limited to, New York, New Jersey and Connecticut.
  - Closes all lodging accommodations in the state except for limited purposes.

**Q. What do I do if my town or city also has an order in place? (Added 4/8/20)**

- A. The Governor’s Executive Orders preempt any local ordinances or emergency orders that are less restrictive. However, any local municipal orders that are more restrictive are permitted by the Governor’s Executive Orders. This means that if your local municipality passes an order that has additional restrictions on business practices, then those restrictions are also enforceable and must be followed. You can check the municipality’s website to determine if a municipal Order is in effect.

**Q. Do REALTORS® need a letter or documentation identifying them as an essential service? (Added 4/8/20)**

- A. No. The Governor’s Office and the Department of Economic and Community Development have indicated on their websites that workers engaged in essential services do not need a letter while they are conducting business. For practical purposes, you could choose to have business cards with you.

**Part II – Delays, Extensions & Terminations**

**Q. Is the COVID-19 Addendum provided by MAR mandatory?**

- A. No, like any other contingency, this document is not mandatory; however, getting this addendum signed early will help protect all parties should issues arise later in the transaction. This addendum may be incorporated into new transactions or added to ones that are already under contract. In addition, if your agency or franchise has provided you with a different addendum you may use that instead. Please remember the addendum can only be utilized by agreement of all parties. Therefore, it is important to encourage clear communication between the parties about how the COVID-19 virus could potentially impact the transaction.

**Q. What should I say if my seller asks why they should agree to the COVID-19 Addendum? (Updated 4/8/20)**

- A. Sellers may be impacted in a variety of ways: They can’t close on their next house, they are now subject to quarantine, there is a title issue that can’t be resolved due to closures, etc. This form protects all parties by extending deadlines in the transaction for a period of time while matters get resolved.

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**Q. What if there is a delay for the buyer's inspections or appraisal?**

- A. Speak with your client about the possibility that home inspectors or appraisers may be unwilling or unable to perform services during this period. Consider adding an extension to the deadlines in the Purchase and Sale Agreement by utilizing the COVID-19 Addendum.

**Q. What happens if one of the parties is unable to attend closing because they are quarantined or unable to travel due to COVID-19 issues?**

- A. If the closing agent is able to perform the closing by mail or other means, closing can still occur, even if one of the parties is not able to be there in person. Speak with the closing agent about how best to address these issues prior to closing.

**Q. What happens if one of the parties does not want to attend closing because they are a member of a high-risk population or have underlying health concerns?**

- A. The closing agent may be able to perform the closing by mail or may be able to schedule separate times to meet with each party to limit the group gatherings. Speak with the closing agent about how best to address these issues prior to closing.

**Q. Can a buyer (or seller) terminate a contract because of Coronavirus?**

- A. There is nothing in the Purchase and Sale Agreement that would give either party a right to terminate solely because of the COVID-19 virus. However, it is possible that the contract may be terminated under a different provision – for example, if a buyer loses their job and can no longer get financing, the buyer would be able to terminate if they were subject to a financing contingency. In addition, if the parties agree to use the COVID-19 Addendum, there is a termination option not otherwise available in the Purchase and Sale Agreement.

**Q. If a buyer (or seller) terminates a contract because of Coronavirus, is the buyer entitled to return of the Earnest Money Deposit?**

- A. Unless the parties agree otherwise, the standard Default paragraph of the Purchase and Sale Agreement applies. If the buyer does not have a contractually valid reason for termination, then they would not be entitled to return of the Earnest Money Deposit. As a reminder, if there is a dispute about the return of the Earnest Money Deposit, be sure to provide proper written notice of the dispute. The standard remedies of mediation and/or court action still apply. Keep in mind that the parties are free to negotiate this matter and it is important to maintain open communication among parties to encourage cooperation during this health crisis and challenging economic climate.

## **Part III – Interactions with Clients, Showings & Open Houses**

### **Q. May I ask clients or others I interact with in my real estate business if they have traveled recently, or have any signs of respiratory illness?**

- A. Yes, you may ask clients or others about their recent travel, particularly to areas identified as having an increased risk of coronavirus. You may also ask if the person has a cold, influenza or other contagious respiratory illness. Agents are not required to put themselves at risk. *To avoid potential fair housing issues, however, be sure to ask ALL clients the same screening questions based on current, factual information from public health authorities.* If you are concerned about exposure, you can always take additional precautions if your client has recently traveled to a location where there is higher risk of exposure or has signs of respiratory illness.

### **Q. Can I still conduct in-person showings? (Added 4/8/20)**

- A. Limited in-person showings are currently allowed in most areas of the State provided the specific guidelines from DECD are followed. However, the Governor and DECD strongly recommend that agents do as much remote work as possible and maximize the use of features such as virtual tours and showings to limit in-person interactions. In addition, some municipalities in Maine have more restrictive orders and in person showings are not allowed under those orders. You can check the municipality's website to determine if a municipal Order is in effect.

### **Q. Are there any risks or potential liability to showing a property to a buyer virtually? (Added 4/8/20)**

- A. Buyers have purchased properties “sight unseen” for a variety of reasons long before this pandemic (There is a “Sight Unseen Waiver” in Zipforms). However, where a buyer purchases a property without physically visiting, relying only on photos, livestreaming, or online virtual tours, it may be a good idea to include language in the purchase and sale agreement where the buyer acknowledges that the buyer – not the listing broker, agent or seller – is responsible for personal verification, walk-throughs and professional inspections to confirm condition and that the property is satisfactory.

### **Q. Can my seller refuse to allow access to their house? (Updated 4/8/20)**

- A. It depends. If the house is not under contract, the seller can restrict access to their house, but it needs to be done in a uniform manner to prevent fair housing issues. A seller generally has control over how their property is shown, and has agreed to certain marketing activity in the listing agreement. If the seller desires to prohibit in-person showings, be sure to get those instructions in writing. If your seller has concerns about exposure to the COVID-19 virus and wants to prohibit all access to the home for a period of time, consider withdrawing the property for that duration. If the house is already under contract, the seller must allow access as called for in the contract including for inspectors

and appraisers among other service providers. However, the seller may take precautions and may require individuals to follow certain protocols when visiting the property. In addition, the guidelines received from DECD limits who may be present inside a seller's home for a showing, inspection, or appraisal and provides instructions on what safety measures those people must follow (such as wearing gloves and shoe coverings).

**Q. May I still conduct open houses on my listed properties? (Updated 4/8/20)**

- A. No. In-person open houses are currently not allowed based on guidance provided by the Governor's Office and DECD.

**Q. What procedures need to be followed during showings? (Added 4/8/20)**

- A. Refer to the guidelines from DECD for in-person showings:  
<https://www.maine.gov/decd/sites/maine.gov.decd/files/inline-files/Real%20Estate%20Guidelines.pdf>

**Q. What else can I do to minimize risk while conducting showings? (Updated 4/8/20)**

- A. If you do hold an in-person showing, consider requiring the following: Have visitors (including yourself) wear gloves and shoe coverings pursuant to the DECD guidelines, limit the amount of people in the home, open all doors prior to the start of the showing so that people can walk around the house without touching door knobs, and maintain the appropriate 6ft. distance between each person. After the showing, recommend that your seller client clean and disinfect their home, especially commonly touched areas like doorknobs and faucet handles. After leaving the home, also remind buyer clients to properly dispose of their gloves and shoe coverings and use hand sanitizer or wash their hands.

**Q. Do I need to wear a face covering when I conduct an in-person showing? (Added 4/8/20)**

- A. Currently there is no requirement to wear a face covering. However, the CDC has recently recommended the use of face coverings. For more information, please visit the CDC website, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>

## **Part IV – Rental Properties**

**Q. Is a tenant required to allow entry into a property for purposes of showing it when the tenant fears being exposed to the coronavirus? (Updated 4/8/20)**

- A. The seller needs to make the property available for showings or take it off the market if showings are not available. It is the seller's responsibility to deal with any issues they may have with their tenant. It is ultimately up to the seller/landlord to determine whether to push to enforce the provisions of a lease or to take another approach.

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Although a tenant may not prevent showings in general, in these unique circumstances, it is imperative that you consider everyone's health and safety first and consider alternative options to minimize in-person contact. Perhaps you can consider virtual tours to decrease the amount of people walking through the occupied unit. If in-person showings are allowed, it is important to take all appropriate health and safety measures to protect both the current tenant and prospective buyers.

Additional Note: If the seller has specific landlord-tenant questions, they can contact the Consumer Protection Division of the Maine Attorney General's Office ([consumer.mediation@maine.gov](mailto:consumer.mediation@maine.gov)) or Pine Tree Legal Services (<https://ptla.org/contact-us>). Pine Tree Legal also has specific information on their website for landlord/tenant questions related to COVID-19, <https://ptla.org/covid-19-maine-eviction-rental-housing-faq#>, as well as for lending/foreclosure questions related to COVID-19, <https://ptla.org/home-foreclosure-and-covid-19-faq>.

Please note that if a seller/landlord intends to pursue a Forcible Entry and Detainer (eviction) against a tenant, Maine courts are currently only allowing limited types of cases during this time and will not resume hearing regular civil cases (including evictions) until May 1, 2020. For more information about the court's schedule, please see <https://www.courts.maine.gov/covid19.shtml>

## **Part V – Other Issues**

### **Q. What happens if you or someone else involved in the real estate transaction contracts COVID-19? (Added 4/8/20)**

- A. The person who contracts COVID-19 should contact the CDC and their health professionals for instructions on how to proceed. If a REALTOR® contracts COVID-19, the REALTOR® should immediately self-quarantine and immediately notify their designated broker of this information.
- Consult your own legal and business professionals to be prepared for this scenario. NAR has provided useful guidance on this topic and a sample preparedness plan:
    - <https://www.nar.realtor/coronavirus-resources-and-guidance-for-employers>
    - <https://www.nar.realtor/sample-preparedness-plan-for-circumstances-relating-to-covid-19>
  - It is important to remember that the Governor's Executive Orders urge remote work as much as possible. **If your clients (and you) choose to do showings, act responsibly.** NAR's General Counsel has advised that agents try to limit new listings and showings to sellers and buyers with immediate housing needs. In addition, try to limit the number of people who view a seller's home, or the number of homes a buyer views.