

Real Estate Transactions in Maine & COVID-19

Q & A: by Hannah McMullen, MAR Legal and Government Affairs Counsel

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Part I. State & Local Restrictions

Q. What are the current guidelines for real estate activities in Maine? (Updated 3/28/21)

- A. Maine Governor Janet T. Mills has issued numerous Executive Orders and announcements over the last year related to the COVID-19 virus. For the most up-to-date information on communications from the Governor's office, including a list of current Executive Orders, please refer to the website: <https://www.maine.gov/governor/mills/>

*The Department of Economic and Community Development (DECD), which has been tasked with providing guidance on the Governor's Executive Orders, issued guidelines for real estate activities on May 27, 2020 and these guidelines remain current to date: <https://www.maine.gov/decd/sites/maine.gov.decd/files/inline-files/Real%20Estate%20as%20an%20essential%20business.pdf>

❖ ***Please review these guidelines carefully. If real estate agents do not follow the guidelines or if they engage in additional activities beyond those identified in the guidelines, the Governor could place additional restrictions on the real estate industry.***

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.

Q. Can my real estate office be open to the public? (Updated 11/10/20)

- A. Yes, your real estate offices may be open to the public as long as you adhere to the State's health and safety guidelines (social distancing, cleaning protocols etc.). You must follow the General Business Checklist available on the DECD's website:
<https://www.maine.gov/decd/checklists/general-guidance>

The DECD also has optional badges available on their website if you wish to display one in your window or doorway to serve as a positive visual to the public that you are adhering to the State's guidelines:

<https://www.maine.gov/decd/covid-19-prevention-checklists>

In addition, please check your local municipal orders to see if there are any specific business restrictions in your town which you would also be required to follow.

Part II – Contract Delays, Extensions & Terminations

Q. Is the COVID-19 Addendum provided by MAR mandatory? (Updated 11/10/20)

- A. No, like any other contingency, this document is not mandatory. 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.

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

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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? (Updated 6/05/20)

- A. In-person showings are currently allowed provided the specific guidelines from DECD are followed. However, the Governor and DECD still 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 may have more restrictive orders and in person showings may be limited with 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 11/10/20)

- 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, *you should withdraw the property from the MLS 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 face coverings and gloves).

Q. May I still conduct open houses on my listed properties? (Updated 6/05/20)

A. The DECD guidelines strongly discourage in-person open houses at this time.

Q. What procedures need to be followed during showings? (Updated 6/05/20)

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%20as%20an%20essential%20business.pdf>

Q. What else can I do to minimize risk while conducting showings? (Updated 6/05/20)

A. If you do hold an in-person showing, consider requiring the following: Have visitors (including yourself) wear face coverings, one-use disposable gloves or hand coverings, and shoe coverings (if required by the seller) 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 disinfect or dispose of their face coverings, 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? (Updated 6/05/20)

A. Yes, the guidelines issued from DECD require that agents and buyers must wear cloth face coverings during showings (as well as one-use disposable gloves). For more information on face coverings in general, 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 3/28/21)

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. 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.

Please take careful note of the restrictions on showings/access to commercial property in the DECD guidelines (multi-family with more than 4 units).

Additional Notes: If the seller has specific landlord-tenant questions, they should consult an attorney who is familiar with landlord/tenant law. Additional resources are available with the Consumer Protection Division of the Maine Attorney General's Office (https://www.maine.gov/ag/consumer/law_guide_article.shtml?id=27933) or Pine Tree Legal Services (www.ptla.org). 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>.

Information on the Emergency Rental Assistance Program is available on the Maine State Housing Authority's website: <https://www.mainehousing.org/programs-services/rental/rentaldetail/covid-19-rental-relief-program>

Please note there are currently federal and state limitations on certain Forcible Entry and Detainer (eviction) actions. **If a seller has specific questions about evicting a tenant, they should consult with an attorney who is familiar with landlord/tenant law and the eviction process.** For more information on the Maine court process regarding eviction cases during the pandemic, please refer to the court's website: <https://www.courts.maine.gov/help/eviction/index.html>

Part V – COVID Positive Protocols

Q. What happens if a REALTOR® or someone else involved in the real estate transaction tests positive for COVID-19? (Updated 11/10/20)

- A. The person who tests positive should contact the Maine CDC and their healthcare professionals for instructions on how to proceed. If a REALTOR® tests positive, the REALTOR® should immediately self-isolate at home per Maine CDC guidance and notify their designated broker of this information as well. Please note that after a positive test, an individual is assigned a CDC case investigator that works one-on-one with the individual during their self-isolation period. In addition, the CDC will likely ask you for a list of anyone with whom you have had close contact (within 6 feet for 15 minutes or more during the person's infectious period) and will be notifying those individuals to self-quarantine. As an agent, you should be prepared to provide relevant information (i.e. client contacts, list of recent shown properties etc.) to your designated broker in the event they might need to help assist the CDC case investigator with contact tracing.

- For more information on the Maine CDC protocols, please visit their website: [https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus/general-information.shtml#:~:text=How%20can%20a%20person%20be,fever%2Dreducing%20medications\)%2C%20AND](https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus/general-information.shtml#:~:text=How%20can%20a%20person%20be,fever%2Dreducing%20medications)%2C%20AND)
- Additional Note: 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>

Q. If a REALTOR® or one of their clients tests positive for COVID-19, when can they return to work and/or resume showings on properties? (Added 11/10/20)

- A. According to the Maine CDC, a person who tests positive is requested to self-isolate in their home (unless they are under medical care/hospitalization outside the home). Even if they are asymptomatic, the person should not visit the office, meet with clients, attend showings or closings until they have been released from the self-isolation period by the CDC. As noted above, after a positive test, an individual is assigned a CDC case investigator that works one-on-one with the individual during their self-isolation period.

Q. What should a REALTOR® do if their seller client or a person living in the seller's home tests positive for COVID-19? (Added 11/10/20)

- A. The person who tests positive should consult with their healthcare professional and the Maine CDC for guidance on treatment and the appropriate self-isolation period. The Maine CDC requests that a person who tests positive remain in self-isolation at home (unless they are under medical care/hospitalization outside the home). **The property should not be shown during this time and the agent must withdraw the property from MLS until the person has been released from self-isolation by the Maine CDC.**

Q. What is the proper protocol after known exposure to someone who has tested positive for COVID-19? For example, if a REALTOR® and/or a client has contact with someone in the transaction (i.e. attending a showing or closing) before becoming aware that the person had a recent positive test. (Added 11/10/20)

- A. The Maine CDC investigates all positive cases and will notify individuals who were known close contacts of the person who tested positive. According to the CDC, if the REALTOR® or client was a close contact then they would be requested to self-quarantine for 14 days from the last date of exposure and monitor for symptoms. You should not visit the office, meet with clients, attend showings or closings during this time. A CDC investigator will work one-on-one with you during your self-quarantine period. It is recommended that you consult with your healthcare professional if you experience any symptoms or have health related concerns during this time.