

## Septic Systems located in a Shoreland Zone: Q & A by Linda Gifford, MAR Legal Counsel

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Q: What is the new law regarding septic system inspections in Maine?

A: Beginning on January 1, 2020, Maine statute requires all septic systems located in the Shoreland Zone (not just Coastal Shoreland Zone) be inspected whenever the property is transferred. Systems are exempted from the required inspection if it is less than 3 years old or has been inspected in the last 3 years by a person certified by the State of Maine. The inspection may also be waived if the buyer certifies to the Local Plumbing Inspector that a new system will be installed within 1 year.

Q. What triggers the inspection requirement?

A. The septic system is located in a shoreland zone (not the property, well or house) and the sale occurs after January 1, 2020.

Q. Who is responsible to get the inspection done?

A. The buyer is required to have the system inspected by a certified inspector. A list of certified inspectors is maintained by the Department of Health and Human Services.

<https://www.maine.gov/dhhs/mecdc/environmental-health/plumb/lists.htm>

Q. When does the inspection need to be done?

A. Prior to purchase, or if impossible due to weather conditions, within nine months after closing.

Q. What if the property went under contract prior to January 1, 2020?

A. The inspection requirement is triggered by the closing date, not the contract date, so the inspection still needs to be done.

Q. What if the due diligence period has already passed? Does it get opened up again?

A. No, the requirement to inspect is squarely on the buyer, and there is no requirement for the seller to contribute to fixing any deficiencies which may be found. Of course, in the normal negotiation, the buyer would most likely have the inspection done as part of due diligence and may very well ask for seller repair or concession. But the law envisions that the buyer would do the inspection, even after closing (up to nine months after closing) without seller contribution.

Q. Does the system need to be brought up to current code?

A. No, the inspection is designed to determine whether or not the system is malfunctioning, and if it is, it needs to be repaired or replaced within one year after closing.

Q. What does "malfunctioning" mean?

A. There are four factors, if any one of which is found, would constitute a malfunctioning system:

- Breakout of effluent at the surface
- Backup of effluent into a building not caused by a simple blockage
- Seepage of effluent into the lower level of a structure
- Contamination of groundwater or surface water

If none of these factors is found, the system may continue to be utilized.

Q. How does the new inspection law differ from the previously existing law?

A. There have been two laws in existence. The first has been in effect for many years and requires sellers to certify in writing whether or not the system has malfunctioned within 180 days prior to closing (that question is covered on the Property Disclosure form by asking in Section II whether or not there have been any malfunctions, and whether or not the system is in a shoreland zone). And, the seller states in paragraph 21 of the Purchase and Sale Agreement whether or not there is a septic system in a shoreland zone, and if so, agrees that they will sign a statement at closing about any malfunctions within the prior 180 days.

The second law has been in existence since 2007 and covers buyer inspections of septic systems in the coastal shoreland zone. Question 41 on page 12 of the Residential Property Transaction Booklet covers that law and specifies who needs to inspect, when the inspection needs to be done, exemptions from inspection requirements, and definitions of coastal shoreland zones.

The new law is EXACTLY the same as the 2007 law, except that the word "coastal" has been eliminated, meaning that everything that has been done for properties on the coast with septic systems in the coastal shoreland zone since 2007 will need to be done for properties with septic systems in any shoreland zones.

Q. What obligation does the seller have to allow a buyer to inspect the system after the due diligence timeline in paragraph 12 has passed?

A. While there may not be a per se obligation based on contract language, if the seller allows an inspection, there is no duty to renegotiate based on the results. And the buyer has time after closing in which to do an inspection, which the seller could rely upon to disallow an inspection and assume the buyer would then do the inspection after closing (within 9 months).

Q. Does the listing agent have any obligation to verify that the buyer has done the required inspection?

A. The listing agent has no obligation to the buyer. The law is all on the buyer, thus the buyer agent has an obligation to make sure their client knows about the inspection requirement. But the listing agent only has an obligation to their seller client to let them know that a buyer will be doing an inspection under the law.

Q. Are there any reporting requirements to the town or state once an inspection is done?

A. No. No filing or reporting requirement is imposed on the buyer or the inspector.

Q. How should agents/agencies manage risk of liability under this new law?

A. It is imperative that agents find a good certified inspector with whom to work.

- Listing agents need to advise their seller clients that the inspection will take place and may result in a renegotiation.
- Should the seller get an inspection done by an inspector the listing agent has worked with, which can be given to the buyer -- and results in the buyer not needing to get their own inspection (be proactive)?
- And buyer agents should be sure to advise their buyer clients about the law and the buyer obligation to get the system inspected.
- Interestingly, there is no enforcement or penalty built into the law.

Q. What if it is unsure about the location of the system and whether or not it is in a shoreland zone?

A. Isn't it always a good idea for the buyer to inspect the system? No matter its location? So if unsure, err on the side of advising a buyer to get an inspection.