

The Massachusetts Condominium Act: Mass. Ann. Laws ch. 183A

A Practical Guidance® Practice Note by
Christopher S. Malloy and Katherine G. Brady, Moriarty Troyer & Malloy LLC



Christopher S. Malloy
Moriarty Troyer & Malloy LLC



Katherine G. Brady
Moriarty Troyer & Malloy LLC

This practice note provides an overview of the Massachusetts Condominium Act (Mass. Ann. Laws ch. 183A, §§ 1–23) (the Condominium Act or, simply, the Act), which governs the establishment and operation of condominiums in Massachusetts. The first portion of this practice note discusses some of the most noteworthy sections of the Condominium Act while the remainder provides an overview of rights and obligations set forth in the Act, with practice tips for protecting the interests of developers, unit owners, and condominium associations.

For more on condominium law in Massachusetts, see [Condominium Ownership and Operation \(MA\)](#) and [Condominium Collection Practices \(MA\)](#).

Legal Background and Framework

Originally passed by the Massachusetts Legislature on June 27, 1963, the Condominium Act authorizes and regulates unit ownership with a jointly owned, undivided interest in common areas in both residential and commercial spaces. A condominium created under the provisions of the Act must have the following key governing documents or instruments:

- Master Deed (Mass. Ann. Laws ch. 183A, § 8)
- The bylaws of the condominium association often in the form of a Declaration of Trust
- Unit Deed –and–
- Rules/regulations for residents, guests, and tenants

The Condominium Act is an enabling statute in that it provides planning flexibility to developers and unit owners beyond the statutory minimum required criteria for setting up condominiums. *Tosney v. Chelmsford Village Condominium*, 397 Mass. 683, 686 (1986). Unless otherwise covered by the Condominium Act, a developer—and subsequently the unit owner-controlled board—can modify the details of condominium operation and management in the association’s governing documents by way of amendment to the governing documents.

Condominium Ownership and Common Area Provisions

Mass. Ann. Laws ch. 183A, § 2: Unit May Be Devised, Mortgaged, or Sold

Condominiums can be established on leased land. Pursuant to Section 2 of the Act, as long as the term of the lease is not less than 60 years, a leasehold condominium can be established. This may not seem like a significant issue when 90 years are left on such a lease, but the remaining lease terms for some associations might be half that at present.

Mass. Ann. Laws ch. 183A, § 4: Exclusive Ownership and Possession

Every unit owner is entitled to exclusive ownership and possession of their unit, subject to the governing documents and applicable rules and regulations. Section 4 also specifies that unit ownership is subject to the right of the organization of unit owners to have reasonable access to the units, during reasonable hours, for the maintenance, repair, or replacement of the common areas and for making emergency repairs to prevent damage to the common areas or other units. This statutory right of access is critical in the event of an emergency or if the organization of unit owners needs unit access to access common areas.

Mass. Ann. Laws ch. 183A, § 5(a): Undivided Interest in Common Areas

This section provides that all unit owners own an undivided interest in the common areas. The condominium form of ownership combines title in specific units with an undivided interest—with other owners—in the common areas. Section 5 establishes that the percentage interest of each unit should be in the approximate relation that the unit has to the market value, at the time the condominium is created, of all the units combined.

Mass. Ann. Laws ch. 183A, § 5(b)(1): Consent to Alter Ownership Interest

This section provides that a unit owner's percentage of ownership interest cannot be altered without their consent. That is an important protection for unit owners because these percentage interests control most voting and usually fix the amount of an owner's monthly common expense fee. The prohibition has been recognized by the courts as prohibiting a numeric alteration to percentage interest, a change to the percentage number in the master deed, and an alteration to percentage interest by means of some occupation of the common area and that deprives a unit owner of use or access.

Rights Granted by the Organization of Unit Owners

There are certain rights that the organization of unit owners can grant that do not impact the percentage interest of the unit owners. Those rights include the following:

- **Easements.** The right to grant, modify, and amend easements over the common areas.
- **Limited Common Areas.** The right to grant or designate for any unit owner the right to use, whether exclusively or in common with other owners, any limited common area and facility. If there is an adjoining unit(s) to the proposed limited common area, that owner and any mortgagee of that unit must consent to the grant. Similarly, a limited common area grant cannot be made without the consent of any owner or mortgagee of a unit if the limited common area will impede unit access.
- **Development Rights.** The power to extend, revive, or grant rights to develop the condominium, including to add units or land if the right to add units is set forth in or authorized by the master deed and with the requisite owner the mortgagee consent.
- **Licenses.** The organization of unit owners can grant permission to owners to install, inter alia, electric vehicle charging stations, solar panels, or to use a parking space in which an owner does not otherwise have an easement interest.

Mass. Ann. Laws ch. 183A, § 6: Liability for Common Expenses

This section is critical to the operation of a condominium as it relates to the obligation of the unit owners to pay their common expense assessment and the consequences for failing to do so. Section 6 provides that common expense assessments must be charged based on percentage interest. It also creates a lien in favor of the association for unpaid common expense assessments. This lien arises automatically when the expense comes due. The condominium association's lien for six months of common expenses due and owing has priority over a unit mortgage provided the requirements of Section 6 are satisfied. The association can establish the amount of lien and its priority through judicial process and obtain an order of sale.

Mass. Ann. Laws ch. 183A, § 7: Contributions Toward Common Expenses

As a corollary to Section 6, Section 7 provides the obligation to pay common expenses or other charges levied or lawfully assessed is no subject to offset, deduction, or waiver. The basic functioning and operation of a condominium requires the regular collection of condominium fees. As interpreted by the appellate courts,

a unit owner cannot contest the legitimacy of a common expense assessment by refusing to pay it, and except for narrow exceptions that a court must endorse, a unit owner must first pay an assessment in order to challenge it. *Trustees of the Prince Condominium Trust v. Prosser*, 412 Mass. 723 (1992); *Blood v. Edgar's, Inc.*, 36 Mass. App. Ct. 402 (1994).

Required Provisions in Condominium Association Instruments or Governance Documents

Mass. Ann. Laws ch. 183A, § 10: Organization of Unit Owners

This section addresses the powers of the organization of unit owners. Notably, Section 10(b)(4) of the Condominium Act grants to the trustees the exclusive right to conduct litigation concerning the common areas and facilities. See also *Strauss v. Oyster River Condominium Trust*, 417 Mass. 442 (1994).

Section 10(c) provides that all unit owners have the right to inspect and copy the books and records of the association.

Mass. Ann. Laws ch. 183A, § 8: Master Deed Recording and Contents

The legal submission of land to the condominium form of ownership is accomplished by the recording of a master deed with the registry where the land is located. Section 8 of the Condominium Act sets forth the required content of the master deed:

- Specific statement as set forth under Section 2
- Description of land, including identifying town/street and setting forth the legal description
- Description of the buildings, including the number of buildings, number of stores, number of units, and the principal construction materials
- Unit description/designation, including statement of location, approximate area, number of rooms and immediate common area to which the unit has access, as well as other data necessary for its proper identification (The statute does not require that a master deed include a description of the unit boundaries, but such a description is almost always included. It is important to pay careful attention to describing and interpreting how floors, ceilings, walls, doors, and windows are defined.)

- Description of common elements, which should be congruent with the description of the units, particularly as it relates to utility lines and other elements that may, in part, service only a particular unit
- Determination of percentage interest (in relation to fair market value of the unit)
- Architectural and use restrictions (This will depend on the type of condominium.)
- Protection of first mortgage
- Plans, most often as-built plans
- The method by which the master deed may be amended (The master deed must set forth the percentage of unit owners required to amend (typically 67% or 75%), how consent will be obtained (e.g., vote at a meeting or written consent/vote), who signs the amendment, and any lender consent requirements.)

Mass. Ann. Laws ch. 183A, § 11: Mandatory Bylaws Provisions

This section identifies and lists the bylaw's mandatory provisions. At a minimum, the bylaws are required to have provisions on the following:

- The method of maintaining, repairing, and replacing the common areas and facilities and collecting payments for this work
- The manner of collecting each unit owner's share of the common expenses
- Procedures for hiring personnel, with or without the use of a manager or a management entity
- The method of adopting and amending administrative rules and regulations governing the operation and use of common areas and facilities –and–
- Such restrictions on and requirements for the use and maintenance of the units and the use of the common areas and facilities, not set forth in the master deed, as are designed to prevent unreasonable interference with the use of their respective units and of the common areas and facilities by the several unit owners

Mass. Ann. Laws ch. 183A, § 12: Additional Bylaws Provisions

Section 12 recognizes the inherent flexibility of the statute, giving the organization of unit owners certain flexibility to adopt reasonable rules and regulations governing the common areas, "(d) such other provisions as may be deemed necessary for the management and regulation of the organization of units owners or the condominium not inconsistent with this chapter and the master deed."

Mass. Ann. Laws ch. 183A, § 23: Prior Consent for Amendment of Deed, Trust or Bylaw Required

Under Section 23, a mortgagee's consent to amendments to a master deed, declaration, or bylaws is deemed given if:

- Written notice of the proposed amendment to the master deed, declaration of trust or bylaws, was provided to each mortgagee who holds a first mortgage on a unit within the condominium
- The governing body of the organization of unit owners provided the notice by first class mail and certified mail, return receipt requested –and–
- The mortgagee fails to respond or object within 60 days of the date of mailing such notice

In the event of any conflict between Section 23 and the master deed, trust or bylaws or other governing documents of the condominium, this section controls.

Property Improvements and Other Provisions

Mass. Ann. Laws ch. 183A, § 13: Claims Involving Common Areas and Facilities

The organization of unit owners is the proper party in all claims involving the common areas and facilities. This section may provide support for the dismissal of claims brought against the managing agent, individual trustees, or unit owners for claims involving the common areas. Similarly, it works in tandem with Chapter 183A Section 10(b)(4) to prevent owners from directly asserting claims that belong exclusively to the organization of unit owners. The organization of unit owners has the sole power to “conduct litigation and to be subject to suit as to a course of action involving the common areas and facilities.” *Sea Pines Condominium III Association v. Steffens*, 61 Mass. App. Ct. 838 (2004); *Berish v. Bornstein*, 437 Mass. 252, 265 (2002); *Trustees of Cambridge Point Condo. Tr. v. Cambridge Point, LLC*, 478 Mass. 697, 701 (2018).

By statute, the common areas are not subject to attachment or execution. This means that a contractor cannot place or perfect a mechanic's lien against the common areas of the condominium *Michael Shea Co. v. Chellis*, 81 Mass. App. Ct. 1105, 958 N.E.2d 537 (2011), but they can attempt to place a lien on common funds of the condominium. For that matter, there is no statutory authority that allows a contractor to assert a lien against the individual units for work labor and/or materials provided to service the common areas.

Of note, Section 13 contains a seldom implicated but important provision about a unit owner's personal liability for claims against the organization of unit owners. The section provides that when the common funds and property of the association have been exhausted, the individual unit owners are liable for the balance due. Unit owners are the proper party to advance unit-related claims.

Mass. Ann. Laws ch. 183A, § 18: Common Areas and Facilities Improvements

This section controls when an improvement can be made to the common areas of the condominium. The section provides that when 50%–75% of the unit owners authorize an improvement, the cost of the improvement is borne solely by those unit owners voting in favor of the improvement. If in excess of 75% of the unit owners authorize an improvement, the costs of the improvement are treated as a common expense payable by all unit owners. Courts have discussed and clarified the meaning of the word “improvement” and the work that condominium trustees wish to undertake in the context of Chapter 183A, Section 18:

Work which is extensive-and thus expensive-is not automatically (or even presumptively) an improvement. Work which fixes, restores, corrects, and returns to a more safe and modern condition the common elements may well constitute repair or restoration, even if the work involved takes considerable time, covers a wide scope, and costs much.

The volume and cost of the challenged work does not put it into the improvement category which only a vote by the unit owners may authorize. That requirement is reserved for work which does more in the way of new, permanent addition to, or expansion of, the common elements than proposed here.

Bonderman v. Naghieh, 2005 Mass. LCR LEXIS 93, at *3 (Mass. Land Ct., July 18, 2005).

In *Bonderman*, the Court noted that “there is not planned here any new building, any creation or expansion of habitable space, or any change in the structures and improvements of the condominium which would necessitate an amendment to the description of the units and the buildings constituting the condominium in the registered master deed and accompanying plans.” 2005 Mass. LCR LEXIS 93, at *3.

Mass. Ann. Laws ch. 183A, § 19: Removal of Condominium from Provisions

This section allows 75% of the unit owners to remove all or a portion of the condominium from condominium status in which case the portions removed are owned in common by the unit owners.

Taxation and Foreclosure Provisions

Mass. Ann. Laws ch. 183A, § 14: Taxes, Assessments, and Charges

This section focuses on the way condominiums should be taxed. Each unit and its interest in the common areas is considered an individual parcel of real estate for the assessment and collection of real estate taxes. Under this provision, common areas and facilities as well as the building and the condominium are not a taxable parcel. Mass. Ann. Laws ch. 183A, § 14. Assessors may factor common areas and facilities into the value of an individual condominium unit to be taxed, but the common areas and facilities are not a separately taxable parcel. Therefore, a municipality is prohibited from separately issuing an assessment against the common areas of a condominium. *Spinnaker Island and Yacht Club Holding Trust v. Board of Assessors of Hull*, 49 Mass. App. Ct. 20, 23–24 (2000). Further, the right to develop subsequent phases of a condominium is not a taxable interest. Mass. Ann. Laws ch. 59, § 11; *Spinnaker Island and Yacht Club Holding Trust v. Board of Assessors of Hull*, 49 Mass. App. Ct. 20 (2000); *First Main Street Corp. v. Board of Assessors of Acton*, 49 Mass. App. Ct. 25 (2000). Real estate is generally assessed as a whole unit and not on the basis of separate interests in it; development rights are not severable from the underlying fee.

As it pertains to other sewer use charges, water rates and all other assessments typically due to a city, town, or district, such assessments may be charged to the organization of unit owners. However, any lien of the city, town, or district attaches to the units in proportion to the percentages set forth in the master deed, of the undivided interests of the respective units in the common areas.

Mass. Ann. Laws ch. 183A, § 22: Foreclosure on Condominium Development

In the event of a foreclosure upon a condominium development, the lender taking over the project succeeds to any obligations the developer has with the unit owners

and to the tenants, except that the developer remains liable for any misrepresentation already made and for warranties on work done prior to the transfer.

Developer Transition Considerations

The developer/declarant is responsible for the development of the condominium land and buildings and their legal submission to condominium status. The developer-appointed board typically exists until a turnover event as specified under the terms of the trust or bylaws. At turnover, a unit owner board is elected and assumes management and operation of the condominium common areas and facilities.

After turnover of the condominium to unit owner control, it is important that the owners complete reserve and condition studies to assess the financial and physical health of the condominium. The owners will also want to assess whether there are potential claims against the developer that should be pursued because of construction defects.

If there are defects, some of the causes of action which may accrue are:

- Negligence-based:
 - Negligent construction
 - Negligent design
 - Negligent manufacture
 - Negligent repair
 - Negligent misrepresentation
 - Negligent construction oversight
- Breach of express warranty
- Breach of implied warranty of habitability
- Fraud/misrepresentation
- Unfair and deceptive trade practices
- Breach of contract
- Breach of implied covenants of good faith and fair dealing
- Breach of fiduciary duty (versus declarant and declarant-appointed trustees)

A condominium association can pursue claims of building defects in the condominium common areas. *Wyman v. Ayer Properties, LLC*, 469 Mass. 64 (2014); *Berish v. Bornstein*, 437 Mass. 252, 265 (2002). The developer of

a condominium must comply with the implied warranty of habitability and with the minimum standards prescribed in the building code. Trustees of the Cambridge Point Condominium Trust v. Cambridge Point LLC, 478 Mass. 697, 707 (2018). A building code violation can also result in liability under Mass. Ann. Laws ch. 93A, pursuant to 940 Mass. Code Regs. 3.16(3).

The potential defendants include the declarant, principals of declarant (if piercing the corporate veil is appropriate), declarant-appointed board members, general contractor, subcontractor, architects, engineers, and manufacturers.

After transition, the board must be mindful of the timing of any lawsuit for construction. Two time-based defenses are critical to understand and appreciate.

The statute of limitations on most tort claims is three years; it is six on contract claims. The deadline for filing a claim for negligence starts when the association knew or should have known of the defects. The statute of repose refers to the six-year absolute limit on filing construction defect claims. The statute of repose runs regardless of when the plaintiff knows or should have known for the defect. The defect claim must be brought within six years of the building's substantial completion or its opening for use, whichever is earlier. In new construction, this often is based on the issuance of the first certificate of occupancy.

Christopher S. Malloy, Principal, Moriarty Troyer & Malloy LLC

Chris is a founding member of Moriarty Troyer & Malloy LLC and brings nearly fifteen years of litigation and trial experience in the areas of community association, real estate and complex construction law. Chris's practice also focuses on condominium construction defect and transitional litigation at the trial and appellate level of the state and federal courts as well as in various alternative dispute resolution forums.

In his condominium and real estate practice Chris represents residential and mixed-use condominiums, homeowner associations and property management companies in a broad range of matters and provides advice on operational and governance issues, interpretation and amendment of governing documents, rules and bylaw enforcement, developer transition issues and common area disputes. Chris also manages the firm's common area lien enforcement practice.

Chris represents a wide variety of clients including condominium and homeowner associations, building owners, developers, general contractors, construction managers, subcontractors and suppliers in all aspects of construction transactions, disputes and litigation including defective work claims, breach of contract, and violations of M.G.L. c. 93A. Chris has expertise with disputes involving both public and private construction projects and has extensive experience with complex multi-party construction defect litigation.

Katherine G. Brady, Attorney, Moriarty Troyer & Malloy LLC

Kate is an associate in the firm's litigation department. Kate comes to MTM with years of experience in condominium and real estate litigation and recognized expertise in fair housing, affordable housing and the myriad of statutes and regulations which apply.

In her litigation practice, Kate has handled complex transitional litigation including phasing disputes, construction defect claims and related matters. Most recently in her work with the City of Boston Kate was intimately involved with the development of housing policies including drafting and testifying in support of bills that would increase homeownership opportunities for middle income households, incentivize the preservation of naturally occurring affordable housing, prevent family homelessness and enhance tenant protections.

This document from Practical Guidance®, a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](https://www.lexisnexis.com/practical-guidance). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.