

Are phasing rights in a phased condo real property, personal property, and/or contract rights?

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In this article I am going to address whether phasing rights in a phased condominium are real property, personal property, and/or contract rights. I have been treating phasing rights as real property since the early 1970s. Only recently have I learned that phasing rights in a phased condominium are still treated as personal property and/or contract rights by at least one of the major title insurance companies doing business in Mass. As personal property and/or contract rights, a title insurance company will not provide title insurance for phasing rights. It is time to resolve this issue once and for all.

If Mass. had adopted the Uniform Condominium Act, there would be a clear definition of phasing rights. Unfortunately, Chapter 183A, the Massachusetts Condominium Statute, lacks a definition of phasing rights. Rather, Chapter 183A mentions the concept only in one place, referencing the addition of units and/or land and the alteration of each unit's undivided interest that would result from such addition (Section 5(b)(i)).

Phasing rights are important not only for developers of a condominium who want the right to expand the condominium horizontally by the addition of a series of buildings over a period of time, but also for developers of a condominium who want the right to expand the condominium vertically by adding additional floors to the building. These "air rights" are an interest in real estate which a title insurance company should insure.

In a phased condominium, the first thing a lawyer drafting the master deed must do is check to be certain that the condominium as expanded by phases will comply with municipal zoning requirements such as height and floor area ratio limitations.

There are three places to which we can look to understand the concept of phasing rights in Mass.:

(1) A well-drafted master deed will clearly describe the phases of a so-called phased condominium. For example, in a condominium consisting of phase I with one building and two units, and a second phase yet to be built that will also consist of one building with two units, all of the land will be initially put into the condominium when the condominium is created by recording the master deed and the site plan showing all of the land. However, the "as built" floor plans will be recorded only for phase I. The master deed will provide that the declarant and his successors and assigns reserve the right and easement unilaterally to amend the master deed by a phasing amendment to add phase II. A construction lender will want the language of the master deed to be broad enough to include not only a foreclosing mortgagee, its successors and assigns, but also any purchaser of the note and mortgage. This is usually achieved by a broad definition of the "declarant" in the master deed. The phasing rights may be contract rights as well as an interest in real property. Whether just real property or a hybrid of real estate and contract rights, such rights are insurable by title insurance.

There is absolutely no doubt whatsoever, in my opinion, that the declarant of a phased

condominium has in the phasing rights an interest in real estate. I have been able to obtain title insurance in this situation without a problem, beginning with Weymouthport Condominium in 1971. My developer client was unable to obtain planning board approval to subdivide the lot into three lots. Weymouthport was one of the first phased condominiums built on a single lot in Mass. The site plan showed three phases on a single lot with phasing lines delineating the three phases. A high rise building with wonderful views of the Atlantic Ocean was built on each phase. Since Weymouthport, I have drafted condominium documents for hundreds of phased condominiums including, for example, Longyear at Fisher Hill Condominium, at 120 Seaver St. in Brookline, which consists of five luxury buildings on one lot containing nine acres. More recently, for another example, I drafted a phased condominium for Olde Village Square Condominium, a multi-phased residential condominium on one 298,930 s/f lot in Medfield. I am preparing phasing amendments from time to time to bring new phases into the condominium. In each case, my developer client had absolutely no problem in obtaining title insurance for himself, his mortgagee, his buyers and their mortgagees, insuring the phasing rights as interests in real estate.

Therefore, phasing rights are real property based upon the practice of condominium lawyers over the last forty to fifty years. We have routinely drafted condominium documents for a phased condominium and have obtained title insurance for phased condominiums.

(2) The common law in Mass. helps to substantiate that phasing rights are real property. Mass. case law has been that phasing rights are real property, *Queler v. Skowron*, 438 Mass. 304 (2002). Therefore, the rights to add additional land and/or units by one or more phasing amendments are real property rights for which title insurance should be available.

(3) Finally, the Uniform Condominium Act has a definition of development rights. *Barclay v. DeVeau*, 384 Mass. 676 (1981), stated in footnote 17 that where Chapter 183A is vague, it is permissible to look to the Uniform Condominium Act, even though it has not been adopted in Mass.

Conclusion: As a condominium lawyer who is also an aficionado of the condominium form of ownership, I am very concerned that it is not settled in Massachusetts that phasing rights are real property. This issue is important for suburban condominium developments that will expand horizontally. It is also important for urban condominiums that will expand vertically, as long as air rights are real property. The tremendous current demand for condominiums in Boston makes the issue very relevant. To the extent that phasing rights are real estate, an attorney drafting a master deed can provide in the master deed the right to develop additional floors above an existing building. Whether they are called phasing rights, reserved rights, or development rights, such rights to expand a condominium horizontally and vertically are rights in real property. Therefore, every title insurance company in Mass. may and indeed should insure them.

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