

Real Estate Finance: Massachusetts

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A Q&A guide to real estate finance law for borrowers and lenders in Massachusetts. This Q&A addresses state laws relating to security instruments, usury laws, limitations on personal liability, recording requirements and taxes, priority issues, mechanics' liens, landlord liens, title insurance matters, and foreclosure procedures primarily impacting lending transactions in a commercial context. Federal, local, or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see Real Estate Finance: State Q&A Tool).

INSTRUMENT AND EXECUTION

1. When real estate is part of the lender's collateral, is a mortgage commonly used in your jurisdiction or is a trustee appointed to hold a deed of trust (or a deed to secure debt) as security for the loan? If a deed of trust is more commonly used, who is typically designated as the trustee?

In Massachusetts, a mortgage is a conveyance in fee defeasible on payment or performance of the conditions stated in the mortgage. It is used to secure an obligation of the owner of the mortgaged real property.

Massachusetts is a title theory state, which means that:

- The lender holds legal title to the real property.
- The borrower maintains equitable title until the secured obligation is satisfied.

2. Describe any laws that would limit a borrower's or guarantor's personal liability for debt secured by real property.

In Massachusetts, a foreclosing lender must strictly comply with the statutory requirements for non-judicial foreclosures set forth in Chapter 244 of the Massachusetts General Laws, including giving notice to a borrower that it will seek a deficiency at least 21 days before the date of sale. An affidavit of the mailing of the notice must be signed and sworn to within 30 days after the foreclosure sale. Failure to give proper notice prevents the lender from seeking any deficiency. (Mass. Gen. Laws ch. 244, § 17B.)

3. Are there restrictions on interest rates charged for loans secured by real property?

The Massachusetts usury statute prohibits any loan from carrying an interest greater than 20% per year, unless:

- The lender notifies the Attorney General of the Commonwealth of Massachusetts of its intent to engage in a transaction involving a proscribed interest rate.
- The lender maintains records of the transaction.
- These transaction records are available to the Attorney General for inspection.

(Mass. Gen. Laws ch. 271, § 49(a), (d).)

The amount to be paid on any loan for interest and expenses include all sums paid, or to be paid, by or on behalf of the borrower for:

- Interest.
- Brokerage.
- Recording fees.
- Commissions.
- Services.
- Other enumerated costs and expenses.

(Mass. Gen. Laws ch. 271, § 49(a).)

Any lender who violates this statute is guilty of criminal usury, which is punishable by either or both:

- Imprisonment for up to ten years.
- A fine of up to \$10,000.

(Mass. Gen. Laws ch. 271, § 49(a).)

The Massachusetts usury statute does not apply to:

- Loans where the interest rate is regulated under any general or special law, for example Section 114B of Chapter 140 of the Massachusetts General Laws regarding finance charges on open end credit accounts.
- Lenders subject to control, regulation, or examination by any state or federal regulatory agency, for example the US Office of the Comptroller of the Currency.

(Mass. Gen. Laws ch. 271, § 49(e).)

4. Are there any requirements for the execution of a mortgage or deed of trust? In particular, please consider if:

- Witnesses are required.
- Specified officers of a corporation (or members of a limited liability company) must execute the security instrument.
- The signatory's name and title must be specified on the signature page.
- A corporate seal is required.
- Signed resolutions must be presented with the security instrument for purposes of recording.
- There are any other important requirements in your state?

WITNESSES

In Massachusetts, there is no requirement for witnesses to a mortgage.

SPECIFIED OFFICERS

If the signatory is a corporation, it must be signed by both the:

- President or vice president.
- Treasurer or assistant treasurer.

(Mass. Gen. Laws ch. 156D, § 8.46.)

These officers may be the same person. Alternatively, a corporate resolution recorded with the mortgage can allow other individuals to sign for the corporation. (Mass. Gen. Laws ch. 156D, § 8.46.)

For all entities, certain individuals and entities may be authorized to sign documents to be recorded or filed if those names are listed on a Long Form Legal Existence Certificate issued by the Secretary of the Commonwealth of Massachusetts. If not, resolutions must be recorded for all entities setting out the authorized signatories.

If the grantor is a trustee of a trust, a trustee's certificate must be recorded with the Registry (Mass. Gen. Laws ch. 184, § 35).

SIGNATORY'S NAME AND TITLE

The signatory's name and title must be indicated on the signature page and in the notary block.

CORPORATE SEAL

A seal is no longer required by law in Massachusetts. However, the deed often includes a recitation that it was executed "under seal" or "as a sealed instrument."

The benefit of including the recitation of a seal is that it:

- Implies consideration.
- Extends the statute of limitations beyond the six years applicable to unsealed instruments.

(Mass. Gen. Laws ch. 260, § 1 and ch. 106, § 3-118.)

SIGNED RESOLUTIONS

If the signatory is a corporation, a corporate resolution must be executed to permit signature on behalf of the corporation by individuals other than the president, vice president, treasurer, or assistant treasurer (Mass. Gen. Laws ch. 156D, § 8.46).

For all entities, certain individuals and entities may be authorized to sign documents to be recorded or filed if those names are listed on a Long Form Legal Existence Certificate issued by the Secretary of the Commonwealth of Massachusetts. If not, resolutions must be recorded for all entities setting out the authorized signatories.

OTHER REQUIREMENTS

In Massachusetts, the signature of at least one person executing a mortgage as or on behalf of the borrower must be notarized (Mass. Gen. Laws ch. 183, § 30). For proper Massachusetts forms of acknowledgment, see Question 5.

5. Provide the statutory form of acknowledgment for:

- An individual.
- A corporation.
- A limited liability company.
- A limited partnership.
- A trustee.

Forms of acknowledgment are governed by Section 15 of Chapter 222 and Section 30 of Chapter 183 of the Massachusetts General Laws. These forms may be used for documents that are executed within the US but outside of Massachusetts and are intended for recording or filing within Massachusetts.

INDIVIDUAL

COUNTY OF [COUNTY] [Commonwealth/State] of [STATE]

On this [DATE] day of [MONTH], [YEAR], before me, the undersigned notary public, [SIGNATORY NAME] personally appeared, proved to me through satisfactory evidence of identification, which were [TYPE OF ID PRESENTED], to be the person whose name is signed on the preceding or attached document, and acknowledged to me that [he/she] signed it voluntarily for its stated purpose.

[NOTARY SIGNATURE] (official signature and seal of notary)

My commission expires [DATE]

[NOTARY SEAL]

CORPORATION

COUNTY OF [COUNTY] [Commonwealth/State] of [STATE]

On this [DATE] day of [MONTH], [YEAR], before me, the undersigned notary public, [SIGNATORY NAME] personally appeared, proved to me through satisfactory evidence of identification, which were [TYPE OF ID PRESENTED], to be the person whose name is signed on the preceding or attached document, and acknowledged to me that [he/she] signed it voluntarily for its stated purpose as [TITLE] for [CORPORATION NAME], a [STATE] corporation, as the voluntary act of the corporation.

[NOTARY SIGNATURE] (official signature and seal of notary)

My commission expires [DATE]

[NOTARY SEAL]

LIMITED LIABILITY COMPANY

COUNTY OF [COUNTY] [Commonwealth/State] of [STATE]

On this [DATE] day of [MONTH], [YEAR], before me, the undersigned notary public, [SIGNATORY NAME] personally appeared, proved to me through satisfactory evidence of identification, which were [TYPE OF ID PRESENTED], to be the person whose name is signed on the preceding or attached document, and acknowledged to me that [he/she] signed it voluntarily for its stated purpose as [TITLE] for [LIMITED LIABILITY COMPANY NAME], a [STATE] limited liability company, as the voluntary act of the limited liability company.

[NOTARY SIGNATURE] (official signature and seal of notary)

My commission expires [DATE]

[NOTARY SEAL]

LIMITED PARTNERSHIP

COUNTY OF [COUNTY] [Commonwealth/State] of [STATE]

On this [DATE] day of [MONTH], [YEAR], before me, the undersigned notary public, [SIGNATORY NAME] personally appeared, proved to me through satisfactory evidence of identification, which were [TYPE OF ID PRESENTED], to be the person whose name is signed on the preceding or attached document, and acknowledged to me that [he/she] signed it voluntarily for its stated purpose as General Partner of [NAME OF PARTNERSHIP], a [STATE] limited partnership, as the voluntary act of the limited partnership.

[NOTARY SIGNATURE] (official signature and seal of notary)

My commission expires [DATE]

[NOTARY SEAL]

TRUSTEE

COUNTY OF [COUNTY] [Commonwealth/State] of [STATE]

On this [DATE] day of [MONTH], [YEAR], before me, the undersigned notary public, [SIGNATORY NAME] personally appeared, proved to me through satisfactory evidence of identification, which were [TYPE OF ID PRESENTED], to be the person whose name is signed on the preceding or attached document, and acknowledged to me that [he/she] signed it voluntarily for its stated purpose as Trustee of the [TRUST NAME] Trust.

[NOTARY SIGNATURE] (official signature and seal of notary)

My commission expires [DATE]

[NOTARY SEAL]

PRIORITY**6. Describe the relevant statutes granting priority to mechanics' liens.**

Chapter 254 of the Massachusetts General Laws sets out the priority of mechanics' liens and the strict guidelines under which priority is granted (Mass. Gen. Laws ch. 254, §§ 1 to 33).

Parties that may take advantage of mechanics' liens are:

- Laborers.
- General contractors.
- Subcontractors.
- Materials suppliers.
- Vendors.
- Design professionals, such as architects, landscape architects, engineers, licensed site professionals, and surveyors (Mass. Gen. Laws ch. 254, § 2A).

Generally, a Notice of Contract must be filed in the registry of deeds where the property is located no later than the earliest of the following:

- 60 days after a notice of substantial completion is filed.
- 90 days after the last work under a written contract has been completed.
- 90 days after a notice of termination of the contract is filed.

(Mass. Gen. Laws ch. 254, § 2.)

A Statement of Account must be filed in the registry of deeds where the property is located no later than the earliest of the following:

- 90 days after a notice of completion is filed.
- 120 days after the last work under a written contract has been completed.
- 120 days after a notice of termination of the contract is filed.

(Mass. Gen. Laws ch. 254, § 8.)

A civil action must begin within 90 days of filing the Statement of Account (Mass. Gen. Laws ch. 254, § 11). An attested copy of the civil action complaint must be filed in the registry of deeds where the property is located no later than 30 days after the commencement of the civil action (Mass. Gen. Laws ch. 254, § 5).

If the above Notice of Contract, Statement of Account, and civil action steps are strictly followed, then generally the mechanic's lien has priority over any:

- Mortgage recorded after the work at issue actually commenced (or after a subcontractor filed a Notice of Contract).
- Mortgage recorded before the work at issue actually commenced if funds were advanced after the Notice of Contract was recorded, except funds that were advanced .
- Deed recorded after a Notice of Contract is recorded.

7. Are there liens which can supersede the priority of a lender's recorded lien?

Liens for real estate taxes supersede the priority of a lender's recorded lien.

Mechanics' liens may supersede the lender's recorded lien for future advances that the lender is not unconditionally obligated to advance (see *Whelan v. Exch. Trust Co.*, 100 N.E. 1095, 1095-96 (Mass. 1913)).

Any liens created under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act have priority over any other previously recorded encumbrance (Mass. Gen. Laws ch. 21E, § 13). These are remediation-related liens. Once the Commonwealth spends money assessing or cleaning up a polluted tract of land, it may place a priority lien on that property.

A condominium lien for unpaid common expenses for a period of up to six months supersedes the priority of a lender's recorded mortgage (Mass. Gen. Laws ch. 183A, § 6). Condominium associations can refile successive complaints for ongoing unpaid common expenses, and each successive complaint to enforce a condominium lien on the same unit is entitled to its own six months of superpriority over a lender's recorded lien, in effect creating a rolling lien superpriority period (*Drummer Boy Homes Ass'n, Inc. v. Britton*, 47 N.E.3d 400 (Mass. 2016)).

8. How do lenders maintain the priority of their real property liens over superseding liens, such as real property tax liens and mechanics' liens? In particular, please consider:

- Permanent loans.
- Construction loans with future advances.
- Credit facilities with future advances under revolving lines of credit.

PERMANENT LOANS

The priority of the liens is generally established by operation of law, without regard to specific additional efforts to maintain priority. Basically, the time of recording the lien establishes the priority of the lien, subject to any liens that may relate back in time (see Question 7).

CONSTRUCTION LOANS

The priority of construction loans are established by operation of law (see Permanent Loans).

When a lender makes a construction loan, the lender should conduct title rundowns to check for intervening liens that may have priority

over future advances, which the lender is not unconditionally obligated to advance (see Question 7).

If there is an intervening lien, for example a mechanic's lien, the lender should obtain a lien release before advancing any additional funds. The lender should also require that the borrower deliver with each advance request a general contractor's statutory form of partial waiver and subordination of lien, upon which the lender's construction mortgage retains priority for advanced made within 25 days after the last day of the period state in the form, except regarding retainage set forth in the form (Mass. Gen. Laws ch. 254, §§ 7 and 32).

CREDIT FACILITIES

The priority of credit facility liens are established by operation of law (see Permanent Loans).

A mortgage may expressly secure existing indebtedness as well as future advances to the same extent as if these advances were made at the time of execution (Mass. Gen. Laws ch. 183, § 28A).

If there is an advance under a revolving line of credit secured by a mortgage, that amount advanced has the same priority as the original principal amount under the mortgage loan, even if both of the following are true:

- The amount advanced is subsequently paid back and re-advanced over the term of the loan.
- The lender is required to make its advance subject to conditions precedent under the credit agreement.

(Mass. Gen. Laws ch. 183, § 28A.)

9. What are a landlord's legal rights to a tenant's personal property located in the leased premises? Are these rights governed by statute, common law, or contract?

Massachusetts does not have a statute granting a landlord a lien on its tenant's personal property. A landlord's legal rights to a tenant's personal property are governed by contract. Therefore, a landlord's lien rights on the tenant's personal property must be expressly stated in the lease agreement.

MORTGAGE RECORDING TAXES

10. Is there a mortgage recording tax (or similar tax)? If so:

- What is the rate and how is the tax calculated?
- Can a loan or refinance be structured to reduce the tax?
- Is the tax payable on making a loan secured by real property or perfecting a lien on real property?
- Is there any type of real property or transaction that is exempt from a mortgage recording tax (or similar tax)?
- Are there any other state or local taxes or fees imposed on the grant, perfection, or enforcement of a security interest in real property? Are there any exceptions?

There is no mortgage recording tax in Massachusetts.

There are recording fees that vary with each jurisdiction. There are no other state or local taxes or fees imposed on the grant, perfection, or enforcement of a security interest in real property.

TITLE INSURANCE

11. Are title insurance premiums or service charges for lenders' title insurance policies regulated? Are the costs of title insurance negotiable within a specified range of rates? Are there any discounts available for reissued policies?

Title insurance premiums for lender's title insurance policies are not regulated in Massachusetts. The cost of title insurance is negotiable. Each title insurance company determines whether or not discounts are available for reissued policies. Typically, there are discounts available for reissued lender's title policies.

12. Provide a list and brief description of the title insurance endorsements available to lenders?

The title endorsements available for loan policies are the generally available American Land Title Association (ALTA) endorsements, including:

- Alta 9 (Comprehensive Endorsement).
- Land Same as Survey Endorsement.
- ALTA 3.1 (Zoning Endorsement).
- Street Access Endorsement.
- Contiguity Endorsement.
- Doing Business Endorsement.
- Usury Endorsement.
- Subdivision Endorsement.
- Tax Parcel Endorsement.
- Street Address Endorsement.
- Utility Facilities Endorsement.
- Assessment for Street Improvements Endorsement.
- Environmental Lien Endorsement.
- Endorsement deleting Arbitration provision.
- Other endorsements depending on the type of loan and security, for example:
 - the revolving credit endorsement;
 - the disbursement endorsement;
 - the reverse mortgage endorsement;
 - the secondary mortgage market endorsement;
 - the first loss endorsement;
 - the construction pending endorsement; and
 - the mezzanine loan endorsement.

13. How is gap coverage (the time between closing the loan and actually recording the lien) typically handled by the title insurance companies?

Gap coverage is becoming more prevalent in Massachusetts but is not universal.

If the transaction requires gap coverage, the borrower signs a gap indemnity in favor of the title insurance company, and the title

insurance company insures the lender's mortgage effective as of the disbursement of the closing escrow funds.

FORECLOSURE

14. Describe the foreclosure process available and the typical timing for the process. Do borrowers have a right of redemption? If so, what is the redemption period? Can lenders limit a borrower's right of redemption?

The Foreclosure Process

A lender in Massachusetts may foreclose on its mortgage by:

- Entry.
- Judicial action.
- Sale.

(Mass. Gen. Laws ch. 244, §§ 1 to 40.)

The vast majority of foreclosures in Massachusetts involve both the sale and entry methods. Foreclosure by judicial action is extremely rare.

Massachusetts foreclosure practice is largely governed by Chapter 244 of the Massachusetts General Laws, which sets out the procedural requirements of foreclosure under power of sale in a mortgage.

The basic foreclosure process entails:

- Filing with the Land Court to comply with the Servicemembers Civil Relief Act if the borrower is covered under that Act.
- Publishing a statutory notice of the auction once in each of three successive weeks, the first of which is at least 21 days before the sale date in a newspaper of general circulation where the property is located.
- Delivering notice of the sale to the borrower by registered mail at least 14 days before the sale date.
- Holding the foreclosure auction.
- Recording the foreclosure deed, a statutory notice of sale, and an affidavit of compliance with the requirements of the power of sale by the mortgagee, including confirmation that the foreclosing entity both:
 - was the holder of the mortgage; and
 - either held the note or was the authorized agent of the note holder.
- Providing notice that the property has been transferred to the assessor and water or sewer department of the municipality where the property is located.

The timing and costs of foreclosures can vary greatly (see Question 15).

Right of Redemption

In Massachusetts, the borrower has a right of redemption until foreclosure (*Bevilacqua v. Rodriguez*, 955 N.E.2d 884, 894-895 (Mass. 2011)).

15. Describe any significant costs of or impediments to foreclosing a lien on real property.

Timing variations may be based on, among other things:

- Whether the borrower is an individual subject to the Servicemembers Civil Relief Act, in which case additional statutory protections apply to residential real property owners.
- Ongoing negotiations with the borrower.
- Defects in the publishing of the notice of sale.
- A bankruptcy filing by the borrower.

Cost variations may be based on, among other things:

- The scope of legal or commercial advertising, or both, for the sale.
- A title and environmental review of the property before foreclosure.
- The complexity of the underlying loan documents.
- Preparation necessary for an auction bid package.
- If a borrower is subject to the Servicemembers Civil Relief Act (50 U.S.C. §§ 3901 to 4043) and the mortgage in question originated before the period of military service, the lender must

comply with the provisions of that act regarding foreclosures, which may add costs and delays to the foreclosure procedure (50 U.S.C. § 3953; Mass. Acts of 1943 ch. 57).

If the borrower files for bankruptcy at any time before the foreclosure sale, the foreclosure is stayed until the lender receives relief from the automatic stay from the US Bankruptcy Court.

FOREIGN ENTITIES

16. Are there any permissions, approvals, or licenses specifically required for foreign banks (or other foreign lenders) to make loans secured by real property?

Other than general licensing requirements for mortgage loan origination and brokering related to residential real estate loans under Section 2 of Chapter 255A of the Massachusetts General Laws, in which licensing requirements apply to all residential mortgage lenders and brokers foreign and domestic, there are no permissions, approvals, or licenses specifically required for foreign banks (or other foreign lenders) to make loans secured by real property in Massachusetts.

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