

Massachusetts Alliance Against Predatory Lending

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AN ACT TO ESTABLISH FORECLOSURE REVIEW DIVISION OF THE SUPERIOR COURT: FACT SHEET

Senate Bill 871, Main Sponsor: Senator McGee
House Bill 1640, Main Sponsor: Representative Aaron Vega

Summary

In the past 10 years Massachusetts has had more than 68,000 home foreclosures. These have cost Commonwealth residents between twenty and forty *billion* dollars, most of it transferred to out-of-state banks. Many foreclosures have been illegal and have clouded title to property. Challenging them in court – and winning – will help bring those resources back to the Commonwealth. A specialty court venue will expedite clarifying our laws and clearing titles; it will provide “one-stop shopping” for those already foreclosed and for those purchasing post-foreclosure. It will start making titles marketable within months of passage and restore all “foreclosed” titles to marketability in a few years. One proposal, to slash homeowners’ existing, 20-year rights to sue to regain illegally foreclosed homes, would not make titles marketable, and would involve delays. This Foreclosure Review Court will however keep roofs over the heads of Massachusetts citizens; help revitalize our real estate markets; and strengthen constitutional rights. Establishing this Specialty Court for a renewable term of 5-years to clear the backlog is the solution. A Foreclosure Review Court will increase judicial efficiency and brighten the financial future for families, communities, and the Commonwealth. The need is acute. Prompt action is required. Hence, an emergency preamble is provided.

What Does This Bill Do?

This bill would establish a Foreclosure Review Division, a new division in the Superior Court Department, with a renewable, 5-year term. This specialty Foreclosure Review Court would have concurrent jurisdiction with the District Court, Housing Court, Land Court and Superior Court Departments in all issues concerning foreclosures of mortgages on residential property (1– 4 units) and associated issues of civil rights, real property, secured transactions (Uniform Commercial Code), securities, tenant-landlord, trust, etc. The Court could also handle post-foreclosure eviction and tenancy issues, which Housing Court now handles as summary process cases, and specific foreclosure issues now in Land Court. It would provide assistance to pro se litigants and such options as mediation. It would have jurisdiction to determine and thus clear titles. It would facilitate restoring homes to those unjustly foreclosed; return clouded titles to marketability – *not just insurability* – for new purchasers; and provide remedies for them as appropriate.

Other Bills Filed: *To Facilitate Alternatives to Foreclosure; Preventing Unnecessary Vacancies of Foreclosed Homes; Judicial Foreclosure*

How Will the Foreclosure Review Court Work?

The Chief Justice of the Trial Court, in consultation with the Chief Justice for the Superior Court Department, would assign a Presiding Justice and other justices of the Foreclosure Review Division from among various trial court departments from among justices who have an interest in relevant areas of law. These justices would sit in four to six sessions around the state. Foreclosures now occur in every area of Massachusetts. The justices would therefore travel as caseload required.

Cases within its jurisdiction could be filed initially in the Foreclosure Review Court, or transferred there by any party to an appropriate civil action in any other court. A justice of another court department or another division of Superior Court could also transfer a case to the Foreclosure Review Court *sua sponte*. In either case, there would be no additional filing fee.

The Commonwealth needs a single, statewide venue to handle foreclosure-related cases.

Most Massachusetts foreclosures are by sale. After Land Court determines that the federal Service Members’ Civil Relief Act does not protect a given mortgagor, a foreclosing party advertises and forecloses by sale. A foreclosing party then may sue in Housing Court to evict occupants. They may then challenge the foreclosing party’s authority to foreclose. Any court challenge thus usually follows – rather than precedes – a foreclosure.

Since 2005, the Commonwealth has had some 68,000+ foreclosures. For reasons including predatory lending to people of color and women, courts that once looked only at a mortgagor’s failure to pay now tackle complex issues including whether the foreclosing party had authority to foreclose. Starting six years later, the SJC of its own volition has been taking cases directly off the appeals docket in an attempt to settle this area of law. In response, the number of foreclosure-related cases in our courts is rising. There may well be thousands of additional such cases filed.

- Fragmentation of relevant court jurisdictions: To obtain an adjudication of all relevant aspects of a foreclosure, a homeowner might now have to file actions in from two (2) to five (5) courts. This wastes judicial resources; discourages lawyers from taking these cases; and stresses Legal Services resources. It is costly in time, travel, and filing fees.
- Location of Land Court: Although it may schedule sessions elsewhere, Land Court sits in Boston. The burden to those elsewhere who may need to bring or defend a foreclosure-related case in Land Court is obvious.
- Rapidly but inconsistently developing case law: At present, a court may hold that a homeowner should have raised a given issue in a different court that now allows it, regardless that the other court previously regarded the issue as beyond its jurisdiction. Not all foreclosure-related decisions are published. This can easily result in injustice, in inconsistency among courts, and in appeals that never should need to be brought.
- Housing Court is swamped: Housing Court was designed as a summary process venue. A critical strength is its assistance to pro se litigants to argue their own cases. The number of post-foreclosure cases, e.g., for a homeowner's post-foreclosure eviction or for tenants affected by foreclosure, now overwhelms this Court. In particular, title-related aspects can be challenging: these can be based on Massachusetts land law precedent from the 1800s or even before.
- Land Court and Superior Court are unprepared to accommodate pro se litigants: This erects a nearly insurmountable bar to effective pro se representation. Yet, suing pro se is the only option for most foreclosed homeowners.

How Will This Bill Help?

A single court that decides all aspects of a foreclosure case, and assists pro se litigants, will save judges' time; promote fairness; reduce costs for litigants and the Commonwealth; help keep families in their homes, and clear titles faster.

The integrity of title to land will also promote the Commonwealth's long-term economic well-being. As of 2000, up to 70% of the credit for new U.S. businesses came using residential titles as collateral for mortgages (De Soto, *The Mystery of Capital*). Yet, title to much real property in the state is no longer marketable. In *U.S. Bank Nat'l Ass'n, trustee, v. Ibanez*, 458 Mass. 637 (2011), the SJC exposed problems of broken chain of title affecting tens of thousands of mortgages, foreclosed or not. Unless the Commonwealth repairs these records, *homeowners will face these problems for the next half-century*. Foreclosures exposed such title problems immediately and acutely – for those illegally foreclosed and those attempting to buy. A single, statewide venue can clear title to foreclosed homes and help obviate these problems.

Any Evidence/History that this will help?

The establishment of Housing Court relieved other courts of the press of summary cases such as evictions. Drug Court and other specialty courts take complex cases off other court dockets, save the judiciary money, expedite decisions and pro se issue specific information judges report save them an hour of every session day. The federal Temporary Emergency Court of Appeals (1971–1993), efficiently resolved appeals concerning the complex, Nixon-era oil price controls, keeping them off other Circuit Courts of Appeals' dockets.

Answers for any issues or concerns of opposition?

No statute can clear the many complex and varying illegalities that may "cloud" a given title. Only a record of facts concerning each clouded title, and, based on them, a judicial determination where discovery is provided, parties are notified and fully heard, can clear the title for the future and restore it to marketability.

Will this Bill cost or save the Commonwealth money?

While setting up and operating a Foreclosure Review Court Division will cost; specialty courts save the judiciary money and will especially when non-judicial foreclosure require more than one venue for resolution now. The 68,000+ foreclosures have cost the state between \$20-\$40 billion, much of which such a Court would help to recover.

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