

Massachusetts Alliance Against Predatory Lending

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AN ACT TO REVERSE STRUCTURAL RACISM AND RESTORE LAND TITLE: FACT SHEET

House Bill #XXX, Main Sponsors: Representative XXX

What Does This Omnibus Bill Do?

The proposed legislation addresses structural racism in adverse lending practices, denial of loan modifications and damage from illegal foreclosures; these have been a key cause of the disparate, COVID-19 death rate between people of color and whites in our Commonwealth. The moratorium on foreclosures has helped save lives. This bill is the only legislative vehicle that provides a measured path for reopening for legal foreclosures.

Like the Poll Taxes of the past, these practices have damaged Land Records, constitutional protections and our economy for all even though their target was people of color.

The legislature has been prescient in addressing structural racism, going back to its initial, anti-redlining legislation, MGL Chapter 183 §64. Unfortunately, the predatory lending and its targeting of people of color were perpetrated by lenders ignoring that it was specifically illegal; inside the industry, subprime mortgages were referred to as “mud people” and “ghetto” loans; mapping demonstrates racial targeting; federal and state legal suits have shown racial bias incentivizing and terms by numerous originators and in practices denying modifications. In the 4 worst years of subprime foreclosures 2005-2009, Latino median wealth lost 66%; Black median wealth 54%; Asian median wealth ascribable to mortgages and foreclosures 34%. These trends still continue.

This must be repaired —*now*. Laws already on the books must be strengthened & teeth put into enforcement against their systemic violations. This bill combines several of the most urgent pieces of proposed legislation.

This omnibus bill stops the continuing illegal foreclosures; requires proven pre-foreclosure mediation and provides the appropriate court venue to enforce the necessary laws & changes, including the additional sanctions against illegal mortgages, their collection & foreclosures. This venue will address an increase in foreclosure-related suits as widespread illegal mortgage practices are identified which require a court to be reversed. This bill provides a vehicle for the state to both write out the predatory terms of unjust loans’ and collect significant state revenue through acceptance of real estate titles that, by law, already reverted to the state. Currently, the state lets banks & mortgagees enrich themselves through claiming title and enforcing illegal loans that they do not hold.

Bill Components:

Real Estate Title Protection (originally filed: Rep. Frank Moran):

Section 1-12 protects real estate titles of everyone who owns or buys a home, farm or business property in the Commonwealth and who will or has taken out a mortgage loan on it. With it, the mortgagor (borrower) can tell who owns the mortgage and have the Mortgage Note returned to the mortgagor, marked “Paid in Full,” upon payoff. Registries of Deeds must record each mortgage in the names of the real parties in interest, i.e. mortgagee and lender as defined in consumer law and the Common law. It institutes deadlines for recording assignments of mortgage and foreclosure deeds. Protecting marketable title will bolster business creation; 70% of the credit for new U.S. businesses have been funded by mortgages on the entrepreneurs’ own homes. It also brings the state’s Notary statute into line with long standing recordation laws and provides appropriate sanctions for illegal acts.

Why needed: Many mortgages falsely state the mortgagee’s identity, shielding lenders from consumer protection law liability and resulting in falsified mortgage assignments. Neither homeowners nor purchasers can verify whether a foreclosing entity holds the mortgage or owns the Promissory Note and thus has authority to foreclose. Many mortgages have a destroyed chain of title; unrecorded mortgage assignments; purported assignments from out of business originators and/or MERS assignments by non-members. Most foreclosures are non-judicial.

How Will Real Estate Title Protection Work?

It requires documents affecting title to real property be recorded promptly in the appropriate Registry of Deeds (assignments of mortgage, 30 days; foreclosure deeds, 60 days.) It clarifies that existing criminal provisions for knowingly using a false or fraudulent document apply to real estate title in a Registry or filing it with a court.

Additionally: every monthly home mortgage statement must show current mortgage holder, note owner & servicer. Upon mortgage payoff, the note owner must return it marked “Paid in Full,” just as banks returned hard-copy cancelled checks. Thus, no one else can claim to be owed on the mortgage.

To show it owns the note, a party intending to foreclose must record—in the appropriate Registry—a complete copy of the original, wet-ink, signed promissory note before publishing a Notice of Foreclosure by Sale. The sections also abolish the archaic, non-judicial procedure of foreclosure by “entry and possession” which does not require notice to the homeowner; is frequently surreptitious and is both redundant and unfair.

These sections establish \$100/day fine for late notification, under section 15A of G.L. chapter 244, that a foreclosing party has taken possession. Municipality keeps 50% of the fine; General Fund or County gets 50%. This helps to prevent “zombie” properties, where a municipality cannot tell who is liable for water, sewer, etc.

This increases revenue by requiring all mortgage assignments be recorded (\$105 recording fee/each).

These sections also update sanctions for relevant criminal provisions such as modernizing of fine amounts for illegal takings of title, evictions without civil process and restitution for criminal takings of homes.

Foreclosure Review Court (originally filed by Rep. Gonzalez; Sen. Kennedy):

Section 13-16 establishes a statewide, specialized division of Superior Court to adjudicate all aspects of foreclosure-related cases, instead of the several courts each now with partial, primary jurisdiction. Housing Courts (lacking the time per case, applicable expertise or jurisdiction) ignore settled law to rush illegally foreclosed people out of their homes. This Division will be empowered to clear title for those “foreclosed” & 3rd-party buyers, provide on-line & other assistance to pro se parties. It will free up court dockets and assist judicial economy.

How Will the Foreclosure Review Court Work?

The Foreclosure Review Division will be added to the Superior Court Department, with a renewable, 5 year term. It has concurrent jurisdiction with the District Court, Housing Court, Land Court and Superior Court Departments in all issues concerning foreclosures of mortgages on residential property and associated issues of civil rights, real property, secured transactions (Uniform Commercial Code), securities, tenant-landlord, trusts, etc. This Court will also handle post-foreclosure eviction (Housing Court now handles this as summary process cases) and foreclosure issues now in Land Court. It will provide assistance to pro se litigants and such options as mediation. This Court’s jurisdiction can determine and thus clear titles, restoring illegally claimed titles and returning clouded titles to marketability—*not just insurability*—for new purchasers and addressing any related criminal violations.

Why is a Foreclosure Review Court needed?

- To obtain adjudication of all relevant aspects of a foreclosure, a home owner must now file actions in 2-5 courts, wasting judicial resources; discouraging lawyers from taking cases & stressing Legal Services.
- Land Court sits in Boston, burdening residents elsewhere who must bring or defend a foreclosure-related case.
- At present, a court may hold that a homeowner should have raised a given issue in a different court, disregarding that the other court previously held the issue beyond its jurisdiction. Not all foreclosure-related decisions are published; resulting in injustice, inconsistent case law and unnecessary appeals.
- Designed as a summary process venue, Housing Court is now overwhelmed by the number of post-foreclosure cases, e.g., for a homeowner’s post-foreclosure eviction or for tenants affected by foreclosure.
- Suing pro se is the only option for most foreclosed homeowners but Land Court & Superior Court are unprepared to accommodate pro se litigants.

A Foreclosure Review Court Division will help the state recover the costs of the 100,000+ foreclosures since 2004 which have cost the state between \$20-\$40 billion.

Resolution Trust Fund: (originally filed by Rep. Dubois; Sen. Cyr)

Section 17-18 establishes a dedicated Trust Fund into which borrowers can pay when they prove that no bank can legally claim their mortgage. Recent cases show hundreds of Massachusetts mortgages lack a legal owner and should revert to the State but we lack a mechanism to receive them. Annual statewide hearings would determine use of Fund monies to rebuild housing and businesses in areas hard hit by foreclosures. As funds increase, hearings will be held regionally and the monies used to rehabilitate the areas from which they originate.

The Community Economic Development Assistance Corporation (CEDAC) will establish and administer a Trust Fund for the benefit of regions, communities and neighborhoods hardest hit by foreclosures. In addition to any monies from Massachusetts state government sources, the Trust Fund will be authorized to accept mortgages and associated payments from borrowers when a mortgage cannot be demonstrated to be owned by the claiming mortgagee. Mortgages transferred to the Trust Fund will be revised to traditional prime lending terms such as principal of no more than 80% of the present day value and no prepayment penalties.

How Will the Resolution Trust Fund Work?

The Trust Fund will be administered through CEDAC, by a director whom CEDAC appoints. When its income reaches \$300,000 per year, CEDAC will hold annual public hearings, well-advertised through community agencies, media, and the General Court, as to use of this income in accordance with the criteria specified above. CEDAC will hold similar local, annual hearings when annual Trust Fund income attributable to a given (1) county

reaches at least \$100,000, and (2) city or cluster of up to five towns reaches at least \$100,000. Such a city or cluster could also establish its own regional Trust Fund in compliance with statutory requirements.

The Trust Fund director will provide an annual accounting of the funds; their use; and their effect on affordable housing and community development within each relevant area to the Senate President; Speaker of the House and Chairs of the Joint Committees on Ways and Means, Housing, Community Development and Small Business, and Insurance and Financial Services.

Moratorium on Non-Judicial Foreclosures: (shortened from filing by Rep. Kahn; Sen. Collins)

Section 20 creates a moratorium on all types of foreclosures of residential properties *except* foreclosure by action (aka "judicial" foreclosure). Judicial foreclosure is one of four forms of foreclosure on our state's books but almost never used. This section require the entity claiming the right to foreclose to prove in front of a judge that it actually possesses this right. Without oversight, the current system depends upon legal compliance by the entity which claims (without required proof) the mortgage and either the legal note or be agent of the note owner.

This section also provide for face-to-face pre-foreclosure mediation with a trained, neutral mediator. Before a judicial process could begin, mediation would have to fail to find a mutually agreeable resolution. See below.

The moratorium would be for two years & renewable up to ten years. Renewal would be automatic until the percentage of the state's foreclosures derived from predatory loans (where likely problems with title predominate) drops below 25% percentage of all foreclosures. When these thresholds are met, the moratorium's continuation would be renewable by the Legislature on all types of foreclosure, *except* for foreclosure by action inclusive of pre-foreclosure mediation, which will be an ongoing option under this statute.

Authorization for Pre-Foreclosure, Municipal Mediation Programs: (originally filed by Rep. Capano; similar also filed by Reps. Leboeuf, Keefe and Senator Chandler)

Section 21 addresses the Supreme Judicial Court's concerns for a need for state authorization. The sections provide enabling legislation for municipal pre-foreclosure mediation programs, utilizing the structure and procedures of the city of Lynn's successful pre-foreclosure mediation program, with a 97% success rate of mutually agreed upon affordable mortgage loan modifications during the 2014-2015 period it ran. One family's mediation process was interrupted by the SJC ruling; otherwise the figure would have been 100%. While this has been the only in-state pre-foreclosure mediation program to date, it utilized the most effective, identified practices for pre-foreclosure mediation programs across the nation. Connecticut's success rates were almost as high. Lynn's pre-foreclosure program is a barometer of what can be accomplished when best practices are mandated.

How would the pre-foreclosure mediation program work?

Any municipality may establish a program under this section with these authorized requirements: Both parties must produce all necessary documentation in advance. The mortgagee must provide a representative authorized to negotiate a settlement in person. The homeowner borrower may have an attorney and supportive experts with them in the mediation session. The mediation program manager must be a certified, neutral party under SJC requirements and have a background in the relevant, foreclosure-related program options. Additional mediation sessions may be mutually agreed to. Both parties must provide relevant financial information to assess a reasonable and affordable resolution. Both parties are eligible for good faith certificates if the mediation fails. If either party has complied with all program requirements, it can then move forward to exercise its legal rights. Information is recorded in the applicable Registry of Deeds, guaranteeing transparency and accountability in the future.

Debt Relief (filed by Rep. Malia; Sen. DiDomenico). Sections 22-24, stops state taxation on the "debt reduction" of a foreclosure; recognizing it as an absolute loss; brings state law in line with federal law and justice.

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MAAPL MEMBERS/SUPPORTING ORGANIZATIONS: *Action for Boston Community Development, Inc., Action for Regional Equity, Alliance of Providers of Legal Services to Individuals Facing Foreclosure, ARISE for Social Justice, Arlington Community Trabajando, Boston Tenants Coalition, Brazilian Women's Group, Brockton Interfaith Community, Carpenters Local 40, Carpenters Local 107, Charles Hamilton Houston Institute For Race & Justice, Chelsea Collaborative, Chinese Progressive Association, City Life/Vida Urbana, Coalition for Social Justice, Community Economic Development Ctr of S.E. MA, Community Labor United, Democratic Socialists of America, Dorchester People for Peace, Era Key Realty Services, ESAC, Fair Housing Center of Greater Boston, Greater Boston Legal Services, Greater Four Corners Action Coalition, Green-Rainbow Party of MA, Harvard Legal Aid Bureau, Homeowner Options for MA Elders, Jewish Alliance for Law and Social Action, Lawrence Community Works, Lawyers' Committee for Civil Rights Under Law, Lynn United for Change, Legal Assistance Corporation of Central Mass, Mass Advocates for Children, Mass AFL-CIO, Mass Coalition for the Homeless, Mass Community Action Network, Massachusetts Fair Housing Center, Mass Jobs With Justice, Mass Law Reform Institute, Mass Welfare Rights Union, Merrimack Valley Labor Council, NAACP N.E. Area Council, National Community Reinvestment Coalition, National Consumer Law Center, National Lawyers Guild, Neighbor-to-Neighbor, Neighborhood Legal Services, New England United for Justice, North Shore Labor Council, Organization for a New Equality, Painters District Council 35, Pleasant St. Neighborhood Network Center, Southbridge Community Connections, Springfield No One Leaves Coalition, Northeast Region, Union of Minority Neighborhoods, United Auto Workers Mass CAP, United Food & Commercial Workers 1445, United For a Fair Economy, United Steel Workers Local 5696, Volunteer Lawyers Project, Worcester Anti-Foreclosure Team*