

Massachusetts Alliance Against Predatory Lending

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

S.964, Main Sponsor: Senator Edward Kennedy
H.3300, Main Sponsor: Representative Carlos Gonzalez

Summary

In the past 10 years Massachusetts has had more than 82,000 home foreclosures. Foreclosures remain only one notch below the peak rate of the Great Depression – they were more than 3x the rate in the worst 3 years of this crisis. Foreclosures have cost the Commonwealth between twenty and forty *billion* dollars, most of it transferred to out-of-state banks. Many such foreclosures have been illegal and clouded title to property. Court review by engaged judges will create justice and help bring those resources back to the Commonwealth. A court venue will expedite clarifying our laws and clearing titles through one-stop for those already foreclosed and those purchasing post-foreclosure. Titles will begin to return to marketability within months of passage and restore all “foreclosed” titles to marketability in a few years. Slashing homeowners’ 20-year long rights to sue to regain illegally taken property has not made titles marketable. This Court will keep roofs over the heads of Massachusetts citizens, help revitalize our real estate markets and strengthen constitutional rights. A Fore-closure Review Division within the Superior Court Department 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.

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. The Foreclosure Review Division 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, 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. The Court would have jurisdiction to determine and thus clear titles. It would facilitate restoring homes to those unjustly deprived and return clouded titles to marketability *not just insurability* for new purchasers and address any related criminal violations.

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, will 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 has to record affidavits, advertises and forecloses by sale. A foreclosing party then may sue in Housing Court to evict occupants. Occupants may then challenge the foreclosing party’s authority to foreclose. Any court challenge thus usually follows – rather than precedes – a foreclosure.

Since 2008, the Commonwealth has had some 82,000+ foreclosures. For reasons including predatory lending to minorities and women, Courts that once looked only at an occupant’s ability to pay now tackle complex issues including whether the foreclosing party had authority to foreclose. Since summer 2011, the SJC of its own volition has been taking cases directly off the appeals docket in an attempt to clarify 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. In the SJC’s recent, historic *Adjartey v.*

Worcester Housing Court decision (April 10, 2019), the SJC recommended use of even more jurisdictions in post-foreclosure eviction cases so that homeowners might get unprejudiced justice.

- **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. 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. Three judges in the last year have stated from the bench that homeowners could be denied their Constitutional right to Jury Trial (Article 15) because eviction is supposed to be a fast, "summary" process.
- **Land Court and Superior Court are unprepared to accommodate pro se litigants,** erecting 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?

This bill will allow a single court to decide all aspects of a foreclosure case. It will provide assistance to pro se litigants. It will thus increase judicial efficiency; promote fairness to litigants; and facilitate effective pro se representation.

The integrity of title to land is fundamental to any state's economic well being. As of 2000, up to 70% of the credit that new U.S. businesses received came from using residential titles as collateral for mortgages (Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*). Yet, title to much real property in the state is no longer marketable. The SJC's decision in *U.S. Bank Nat'l Ass'n, trustee, v. Ibanez*, 458 Mass. 637 (2011) 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*. For those who are foreclosed, such title issues are current and acute. They pose a risk for post-foreclosure purchasers. Given the SJC recommending even more venues, a single, statewide venue that can clear title to foreclosed residential properties will 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. The federal Temporary Emergency Court of Appeals (1971–1993), efficiently resolved appeals concerning the Nixon-era oil price controls, and saved other Circuit Courts of Appeal from having to deal with them

Answers for any issues or concerns of opposition?

No statute can clear the many illegalities that may "cloud" a given title. Only a record of facts concerning a title (and based on them, a judicial determination where parties are 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, the 82,000+ foreclosures have cost the state between \$20-\$40 billion, much of which such a Court would help to recover. Please also see Summary, above.

Other Bills Filed: To Facilitate Alternatives to Foreclosure; Judicial Foreclosure

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, ¿Oiste?, Organization for a New Equality, Painters District Council 35, Pleasant St. Neighborhood Network Center, Southbridge Community Connections, Springfield No One Leaves Coalition, Survivors Inc., 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*

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