Testimony of Wendy J. Weinberg
Legal Aid Society of the District of Columbia[1, 2]

Committee on Public Services and Consumer Affairs
Council of the District of Columbia

Bill 18-0691: Saving D.C. Homes from Foreclosure Act of 2010

June 14, 2010

The District of Columbia is in the midst of a foreclosure crisis. Nearly 3% of all mortgages in the District of Columbia are in foreclosure and 8% of loans are delinquent.[3] The rate of foreclosure, while high in all parts of the District is highest east of the River.[4] Thousands of the District's most vulnerable families are affected, but the District has very weak legal protections for homeowners. As a result, avoidable foreclosures often proceed, causing unnecessary devastation to homeowners, their families, their neighborhoods, and the District as a whole. Every time a family is unnecessarily foreclosed upon, this displacement reverberates throughout the community. In this time of economic crisis, it is particularly important that the Council enact a fair, home-owner-friendly foreclosure bill. We would greatly appreciate the opportunity to work with the Council as it enacts this and other measures to deal with the foreclosure crisis in D.C.

The Legal Aid Society supports the mediation provisions of the Saving D.C. Homes from Foreclosure Act as an important first measure to improve the District's foreclosure laws. This measure could be critical in saving families from the financial and emotional upheaval that comes from the loss of a home. As currently drafted, however, the measure will fall short of the Council's goal of decreasing foreclosures and maintaining neighborhood stability. Several key changes are needed to make this measure as effective as the Council intends. Most importantly, unless the notice period for an auction is lengthened, the role of judicial oversight clarified and strengthened, the form and timing of the notices required under the bill improved, and the fees required of homeowners to participate in the mediation are waived, the number of people who will benefit from mediation will be small.

Few people in the District realize the degree to which the District's legal regime is adverse to homeowners threatened with foreclosure. Indeed, the District ranks with the most regressive states in the Nation when it comes to foreclosure protections. A description of current law is useful in this regard.

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[1] The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent person in civil law matters and to encourage measures by which the law my better protect and serve their needs." Over the last 78 years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the areas of consumer law, housing, family law, and public benefits. It also has an appellate practice.

[2] Legal Counsel for the Elderly (LCE), an affiliate of AARP, also endorses these comments.

[3] http://www.neighborhoodinfodc.org/foreclosure/Foreclosure%20Monitor%204-14-2010.pdf.

[4] http://www.neighborhoodinfodc.org/foreclosure/DC%20Foreclosures%20Wd%20Cls%202009.pdf

This bill is being offered against the backdrop of an existing legal structure that is generally adverse to homeowners. Under existing law, foreclosure is accomplished by the mailing of one notice, sent to a homeowner by certified mail, stating that the home will be sold at auction in 30 days. A homeowner does not even need to receive the notice, and in fact, many never do. The lender simply needs to sends it. There is then ***no*** review of the lender's decision or accounting that led to the notice of foreclosure. There is simply an auction, which takes place in an office building, not a courthouse. The notice itself does not even provide the homeowner with concrete information about the actual amount that she must pay to stop the foreclosure. Instead, the notice states that the homeowner must pay a specified amount plus unspecified fees and costs. The fees and costs number changes frequently from the time that the homeowner receives the notice until the actual sale. These fees and costs are neither explained nor disclosed in the notice. The practical effect of this omission is that homeowners have no idea what amount they must come up with to try to stop the sale of their homes. Further, this amount is a moving target that changes between the time that the notice is sent and the sale occurs, as the lender adds attorney's fees, charges from the auction house, or other costs, over the course of the month. These amounts are not nominal – and usually amount to thousands of dollars. Homeowners have up until five days before the sale to cure the default. However, homeowners have no right to redeem the property after the sale- a right that is available to homeowners in at least 21 states.[5]

This lack of procedure and notice is particularly striking when compared to the more robust protections available to tenants in the District. Under well-established law, an eviction action must be filed in the Superior Court, tenants are entitled to formal service of process which must be delivered to them personally or posted on their door and mailed. Landlords then have to file an affidavit of service, so that the court can confirm that the landlord properly served the papers. Contrast that rigorous, multi-layered approach to the singular certified mailing notice for a foreclosure – a mailing that, as previously noted, the law does not even require that the homeowner receive.

Second, in landlord-tenant court a landlord must swear that he or she has the right to bring the proceeding. The new landlord-tenant forms require the person or entity bringing the proceeding to explain its right to seek possession if the relationship to the property is something other than landlord, owner or personal representative. Further, when the system works, a Superior Court Judge who is faced with a Plaintiff who has no standing, can and will independently challenge that person's right to attempt to bring an eviction proceeding. Compare that to the current system for foreclosures. A significant and emerging issue that is being litigated in foreclosure proceedings across the country is whether the party that is attempting to foreclose holds the note to the property. Courts across the country have increasingly dismissed judicial foreclosure proceedings when the banks and other entities attempting to foreclose on homeowners have not been able to prove that they have the right to do so.

The Bill before the Council does address this issue. It requires that a lender bring evidence to the mediator that it has the right to foreclose. There are two ways to strengthen this requirement. The first would be to impose a sanction that the lender cannot proceed with the foreclosure

[5] At least 7 of these states utilize a power of sale (non-judicial) foreclosure process. John Rao & Geoff Walsh, NCLC, Foreclosing A Dream 34 (2009) *available at* http://www.consumerlaw.org/issues/foreclosure/content/FORE-Report0209.pdf.

unless and until it provides such evidence. Further, the best way to make such a sanction meaningful, would be to allow for judicial oversight of the foreclosure proceeding. This will also allow for appropriate resolution of other critical legal issues in these cases, and will ensure that the parties negotiate in good faith.

Perhaps the most unfair aspect of the District's current system for foreclosures is the lack of time that a homeowner has to respond to a notice of the impending sale of her home. Under the best of circumstances, the homeowner gets a little over three weeks. This is barely enough time to consult with a housing counselor, let alone a lawyer. It is usually not enough time to scrape together the needed funds. Again, compare this timeline to that in place in landlord-tenant court. After a tenant receives notice that a landlord is seeking possession, a hearing will occur approximately 7-14 days after the date that the landlord served the notice. Tenants are then generally allowed a two week continuance on the date that their matter is set for its initial hearing in order to attempt to obtain counsel. If a tenant is scheduled for a bench trial, she can reasonably expect that that hearing will occur approximately five weeks later. If a tenant is scheduled for a jury trial, the trial will likely take place at least 6 months later. Compared to tenants, homeowners, who may have substantial equity in their homes, and who may be faced with losing a house that has been in their family for generations, come up short.

The Legal Aid Society believes that one of the most important changes that should accompany the Council's proposed legislation, is to increase the amount of notice that homeowners receive before a foreclosure from 30 days to at least 90 days. This would provide homeowners with the necessary time to assess and improve their situation. It would also dovetail with this legislation's requirement for mediation, which otherwise will conflict with the 30 day notice period for the auction. Specifically, the bill states that homeowners have 30 days to elect mediation. After that period has expired, if the homeowner has not sent in the notice requesting mediation, the lender sends a notice to the homeowner and the mediator stating that it has not received the request. The mediator must then send a certificate to the lender stating that no mediation is required. Alternatively, if the homeowner elects to mediate, the foreclosure is on hold pending the result of that process. In others words, whether or not the homeowner elects to mediate, the bill implicitly expands the notice period for an auction. In order to avoid confusion, or violations of the mediation requirement, the bill should explicitly expand the notice period for the auction to at least 90 days. An expansion of the notice period would also be more in keeping with other states, as the District has one of the least generous notice periods in the country. The lack of notice in the District is particularly harsh given that as previously noted, homeowners here have no post-sale right to redeem – a right that is available in some of the other states with a short notice period.

Finally, the bill states that parties can be charged up to $1000 for the cost of the mediation. This financial burden will preclude many homeowners from being able to take advantage of the mediation that they need. In at least 12 states with mediation the programs, a fee is never imposed on the homeowner.[6]

[6] The following states do not impose a mediation fee on the homeowner: CA, CT, DE, KY, NJ, ME, NM, NY, OH, OR, PA, RI. *See generally* NCLC, SUMMARY OF MEDIATION PROGRAMS (2009), *available at* http://www.consumerlaw.org/issues/foreclosure_mediation/content/SummaryOfPrograms.pdf.

In sum, Legal Aid believes that the most critical amendments to the bill are the following:

- Explicitly expand the notice period between when a homeowner receives notice of a foreclosure and the when the sale can take place, to 90 days.
- Strengthen and clarify the role of judicial review and oversight.
- Waive the fee for a homeowner to participate in the mediation.
- Require personal service of the notice of foreclosure and notice of mediation.

Legal Aid is excited about the potential for helping homeowners that this bill presents. We look forward to working on this legislation with you over the coming months. Thank you for your leadership on this critical issue.