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

Bill 19-676: Saving DC Homes from Foreclosure Clarification Amendment Act of 2012

June 28, 2012

On behalf of the Legal Aid Society of the District of Columbia and as an advocate for low-income homeowners, I testify in support of the District's foreclosure mediation program as a whole, but also to urge the Council to do two things with respect to this important piece of legislation: first, to amend the current bill to build in a post-mediation judicial review process that would protect critical homeowner rights while providing finality to the mediation process; and second, to preserve, if not strengthen, the existing standing and good faith requirements that are so important to the long-term success of this program.

I. Background on the District's Foreclosure Mediation Program

Two years ago, Legal Aid testified in support of the Saving D.C. Homes from Foreclosure Act as a critical and timely measure to address the foreclosure crisis in the District. At the time the law was enacted, thousands of the District's most vulnerable residents were in danger of losing their housing, and the lack of legal protections allowed avoidable foreclosures to proceed, causing unnecessary devastation to homeowners, their families, their neighborhoods, and the District as a whole. The Saving D.C. Homes from Foreclosure Act implemented important protections for homeowners, and not a moment too soon. By requiring lenders to offer mediation prior to initiating foreclosure, to provide evidence of their standing, and to mediate in good faith, the legislation changed the momentum of foreclosures in the District, saving far more than just homes.

Today, we continue to stand behind the Council's foreclosure mediation law, and we appreciate the opportunity to testify on the current bill as a means of proposing important and workable changes to ensure the mediation program works effectively and consistent with its original intent. The foreclosure situation in the District looks very different today than it did two years ago. Foreclosure activity has slowed significantly, in part because some defaults have been resolved through mediation or are still going through the process, but primarily because in most cases lenders have made a conscious decision not to initiate the process at all. The Recorder of Deeds database indicates that in the last year, lenders filed approximately 70 Notices of Default. In contrast, the number of mortgages in the District that were more than 90 days delinquent as of

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 may better protect and serve their needs." Over the last 80 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.

March 2011 was approximately 2,900.² What these numbers reflect is not a broken system, but instead a shift from a framework in which lenders could foreclose in volume and without documentation, to one in which they are held accountable for every home they try to take. The numbers also signal that although actual auction sales are down, we are in the midst of a vast and continually growing crisis.

Thousands of homeowners, including some of the District's most vulnerable residents, are behind on their mortgages and need help. Many of these homeowners – despite having experienced economic and other hardships, or having been the unwitting consumers of predatory or unfair mortgage products – have the financial ability to make payments and keep their homes, if only their lenders would work with them. But for many homeowners, widespread failures on the part of the mortgage servicing industry have made the process of trying to get a loan modification a losing battle. The recent national mortgage settlement between the federal government, the attorneys general of 49 states and the District of Columbia, and the five largest servicer banks in the country, identified not only widespread robo-signing practices, but also deceptive practices involving loan modifications and other performance failures well beyond what could be characterized as poor customer service. The investigation leading up to the settlement found that these failures caused unnecessary foreclosures to occur across the nation.

In light of the number of defaulted mortgages in the District, the demonstrated failures of lenders in working with homeowners to avoid foreclosure, and the ability of lenders to foreclose on homes in the District using a non-judicial process, it is more important now than ever before to have a fair, effective, and enforceable mediation program.

II. Key Recommendations

A. Adding a Mechanism for Post-Mediation Judicial Review Would Provide Both Fairness and Finality to the Mediation Process

The Saving D.C. Homes from Foreclosure Clarification Amendment Act of 2012 that is before the Council today provides an important opportunity to evaluate the workability and effectiveness of the mediation program as it currently exists. We believe that some, but not many, amendments to the mediation law are necessary. The most important change that we urge the Council to make – and which we believe would effectively address several issues at once – is the adoption of a mechanism for post-mediation judicial review.³

As currently drafted, the mediation law provides no clear mechanism for homeowners to seek review of the Mediation Administrator's decision to issue a mediation certificate allowing a lender to proceed with foreclosure. This means that even if a lender fails to comply with key mediation requirements, if the Mediation Administrator nevertheless finds that the parties

² http://www.neighborhoodinfodc.org/CountyProfilesPDFs/2011Q1/District_of_Columbia_2011Q1.pdf

³ Legal Aid supports full judicial foreclosure. Our current recommendation regarding judicial review focuses on the needs of the existing mediation program and is in acknowledgment of the resources that a transition to full judicial foreclosure would require.

mediated in good faith, that determination constitutes both the first and final say allowing the lender to foreclose – and the homeowner has no opportunity to request a further review.

Creating a mechanism for post-mediation judicial review provides a fair and practical solution to this problem. But judicial review would not only address the fairness concerns of homeowner advocates. It would also provide a practical and workable solution to the stated concern of members of the title insurance industry, who have taken the position that the current version of the District’s foreclosure mediation law fails to provide the finality necessary to guarantee they will insure title on foreclosed properties. It is our understanding that this concern over a lack of finality may be contributing to the growing backlog of mortgages in default, as the threat of non-insurable title has prompted some lenders’ decisions not to participate in the mediation process.

Given the importance of this legislation and its clear goal of “Saving D.C. Homes from Foreclosure” wherever possible, fairness must come before finality. But with a well-designed judicial review component, we can achieve both. With the industry’s desire for finality in mind, balanced with the need to preserve critical homeowner rights, we propose a framework for judicial review in which the issuance or non-issuance of a mediation certificate would serve as a rebuttable presumption that the parties complied or failed to comply with the requirements of the mediation law. This rebuttable presumption would be in lieu of language in the current draft bill stating that the issuance of a mediation certificate shall serve as “conclusive evidence” of compliance.

To our knowledge, no other jurisdiction with a foreclosure mediation program has incorporated such an extreme “conclusive evidence”-type provision to allay the concerns of title insurers; in fact, several jurisdictions have adopted provisions with the exact opposite effect – explicitly providing homeowners the opportunity to seek court-ordered sanctions based on noncompliance with mediation requirements, rather than foreclosing homeowners from bringing challenges. Further, while the “conclusive evidence” provision may have been passed on a temporary basis in an effort to address the concerns of members of the title industry, it does not appear to have effectively addressed those concerns, as we understand that finality continues to be an industry concern today.

Our proposed framework for judicial review provides that after the Mediation Administrator’s decision regarding the issuance of a mediation certificate, homeowners and lenders alike would have a set period of time to file a petition for judicial review, after which, if no petition for review is filed, the rebuttable presumption would become final. If a petition for judicial review is timely filed, the presiding judge would review the allegations regarding compliance with the mediation requirements and render a final decision. The review would be strictly limited to issues of compliance with the mediation law itself, therefore providing finality of the mediation process created by the legislation without diminishing or otherwise affecting any claims or rights that would have already existed independent of the legislation.

Our proposed framework for judicial review is fair, it achieves finality of the mediation process, and it appropriately shifts liability back onto the mediation parties rather than leaving the Department of Insurance Securities and Banking vulnerable to post-mediation challenges based on the contested issuance of a certificate. It addresses the critical need for judicial oversight that

homeowner advocates have emphasized since the inception of the mediation program, while limiting the use of judicial resources to only those cases in which mediation has failed and there is a genuine dispute regarding a party's compliance with the mediation requirements.

B. Preserving the Standing and Good Faith Requirements is Critical to Preventing Avoidable Foreclosures

While some changes to the mediation law are necessary, it is equally important that certain key aspects of the mediation law be preserved, if not strengthened, consistent with the legislative intent of saving homes and avoiding foreclosures wherever possible. Two of the most important elements of the foreclosure mediation law that must not be weakened or eliminated are the requirements that lenders establish their standing and mediate in good faith.

1. Standing

To address the systemic problems revealed in mortgage documentation and processes across the nation, including robo-signing and other issues affecting the ownership of mortgage debts, the Council wisely incorporated a requirement into the original legislation that, as part of the mediation process, lenders provide “a true copy of the mortgage, including the mortgage note or agreement, every assignment of the mortgage, evidence proving that the lender has standing to commence foreclosure against the borrower, and any other information required.” This requirement is essential to ensure that the lender participating in each mediation session is the proper party to negotiate with the homeowner and would be authorized to proceed with foreclosure in the event that a mediation certificate is issued. The underlying requirement that a lender must have standing in any legal proceeding is nothing new.

The District of Columbia is not alone in incorporating a standing requirement in its mediation law. Several other states with foreclosure mediation programs (including Nevada, Washington, and Hawaii) similarly require lenders to provide specific documentation of their standing, and many judicial foreclosure jurisdictions (including Maine, Vermont, and New York) have amended their pleading rules or issued administrative orders requiring plaintiffs to attach standing documentation at the outset of the case. Further, the standing requirement set forth in the District's foreclosure mediation law is entirely consistent with the D.C. Attorney General's Enforcement Statement issued in October 2010 requiring that all documents evidencing the chain of assignment of interests in real property be recorded. Such documents are non-proprietary, are often entirely within the lender's control, and are critical to analyzing the legality of foreclosure actions. We urge the Council to preserve the existing requirement that lenders provide evidence of their standing.

2. Good faith

The Council also acted wisely in incorporating a requirement that lenders mediate in good faith. A review of other state foreclosure mediation programs indicates that, other than homeowner participation/opt-in rate, good faith participation in mediation may be one of the most important factors in the success of a foreclosure mediation program. Mediation programs lacking an objective and enforceable good faith requirement serve as a cautionary tale. For example, two

years after implementing a mandatory foreclosure mediation program in Florida, the state Supreme Court terminated the program based on data showing extremely low participation and settlement rates. A related workgroup assessment observed that servicers often resisted sending representatives to mediation with full authority to settle, had an economic incentive not to settle, and took a “take it or leave it” stance when offering a narrow range of settlement options, most of which were of little value to homeowners. On the other end of the spectrum, Philadelphia’s foreclosure diversion program (in which participation is an automatic, mandatory part of a broader judicial process) utilizes supervising judges to provide oversight of mediation, and the judges can intervene in the case of a party’s noncompliance with program requirements. That program is regarded as one of the most successful in the country.

Although the District currently has a non-judicial foreclosure system and therefore cannot fully model its mediation program on those of its successful judicial counterparts, incorporating a requirement that lenders mediate in good faith is both appropriate and necessary to ensure that D.C.’s program achieves its goal of keeping people in their homes whenever possible. Other non-judicial foreclosure jurisdictions, including Washington, similarly incorporate a requirement that lenders mediate in good faith. Further, the District’s current framework for requiring good faith participation (and providing clear guidance on the parameters of good faith through DISB’s regulations) strikes a reasonable and fair balance between keeping “teeth” in the foreclosure mediation law through the inclusion of an objective standard, and allowing sufficient flexibility to address the variety of unique issues that may arise for lenders and homeowners during mediation.

Without a meaningful good faith requirement, lenders can send representatives without authority to negotiate and make decisions; claim that homeowners are ineligible for loan modification or other loss mitigation alternatives without providing any meaningful or verifiable explanation; and proceed with avoidable foreclosures. This would waste precious resources invested in the mediation program and neglect the core objective of “Saving D.C. Homes from Foreclosure.” We therefore urge the Council to preserve the requirement that lenders mediate in good faith, and we stress the importance of retaining a meaningful good faith standard.

III. Other Recommendations:

While we consider judicial review, standing, and good faith to be the most critical issues relating to the foreclosure mediation law, we also offer the following additional comments and recommendations for the Council’s consideration:

- Mediation Election/Opt-In Requirements – We support the proposed language in the current bill allowing the borrower opt-in requirements to be waived by the Mediation Administrator for good cause shown. Given the gravity of losing one’s home and the range of circumstances under which a homeowner might fail to properly opt-in to mediation (for example, problems involving physical or mental health, or limited English proficiency), providing this type of flexibility is particularly appropriate. An alternative way to maximize the mediation opt-in rate would be to simplify the election process by only requiring borrowers to return the Mediation Election Form and fee – and to treat the submission of the loss mitigation application as a separate, subsequent requirement, not

affecting the borrower's opt-in status. However, the best and cleanest solution to any concerns about the opt-in and participation rate would be to make the mediation program automatic, in which borrowers would have to opt-out, rather than opt-in.

- Confidentiality - For judicial review to function in any meaningful way, the parties must have the ability to present all relevant information regarding the underlying mediation. Any claims that the Uniform Mediation Act requires strict confidentiality in this context are misplaced, because foreclosure mediations held pursuant to specific statutory requirements are entirely different from traditional mediations that take place within the context of litigation. In the traditional mediation context, for example, confidentiality is the key to successful mediation, and a failed mediation results in a case going to trial. In the foreclosure mediation context, on the other hand, enforceability is the key to resolution. To avoid unnecessary confusion in this regard, we recommend a global change to refer to the District's foreclosure mediation program as a "conciliation program" or "conference program."
- Timing – We support the proposed change in the current bill expanding the total time for mediation from 90 to 180 days. Consistent with that expansion, we note that we also would not object to increasing the amount of time that lenders have to review a borrower's loss mitigation application prior to the first mediation session. Under the current framework, if a borrower opts-in to mediation on day thirty and a mediation session must take place by day forty-five pursuant to the statute, a lender has less than fifteen days to conduct a full loss mitigation review. A revised time frame providing at least thirty days between a borrower's submission of the loss mitigation application and the first mediation session would be more reasonable.

Legal Aid is committed to helping create a legal framework that effectively and fairly protects homeowners facing foreclosure, and we appreciate your leadership on this critical issue. We look forward to working on this legislation with you over the coming months. Thank you.