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February 27, 2012

Honorable Eugene L. O'Flaherty, Chair
Joint Committee on the Judiciary
State House, Room 136
Boston, MA 02133

Dear Chairman O'Flaherty:

At the present time, there are a number of proposals before the Judiciary Committee that seek to establish various forms of mediation programs to be utilized by lenders and borrowers in an effort to avoid foreclosure. Rather than comment on any specific piece of proposed legislation, I write to support the concept of mediation to facilitate alternatives to foreclosure. Foreclosures on family homes are devastating and overwhelming events to homeowners and the negative effects of foreclosures blight neighborhoods and stagnate local and state-wide housing markets. This slowed housing market recovery in turn distresses economic recovery and job creation. Although Massachusetts is not at the forefront of the states in numbers of foreclosures, it is a significant concern with over 9,000 foreclosure sales in 2010 alone. Thankfully, the number of foreclosure sales in 2011 dropped, but it remains a significant number at around 8,500. Preventing foreclosures when an alternative exists should be at the forefront of our economic recovery efforts, and mediation is a positive vehicle for facilitating those alternatives.

Despite the time and expense of the foreclosure process, including property management, disposition, and write-offs, many lenders follow through with the foreclosure process without considering the net present value and cost-benefit analysis or negotiating creative alternatives to foreclosure. I, along with the Commissioner of the Division of Banks, met with over 70 banks from around the Commonwealth in the past weeks and have learned that many state chartered banks in general go to great lengths to avoid foreclosure thereby avoiding these costs, reaching out to the homeowner and negotiating creative alternatives to the foreclosure process. However, the largest volume of foreclosures is from national lenders and servicers and for a variety of reasons these organizations do not appear to offer as many of the creative solutions that more local institutions offer distressed homeowners. The sheer number of foreclosures at these larger institutions often hampers a directed focus on unique solutions that may save homes from foreclosure.

Alternatives to foreclosure that keep homeowners in the home are preferable to foreclosure. These alternatives include loan modifications by reducing interest rates, a principal forbearance plan with or without shared appreciation, write-downs of principal with or without repayment, sales to non-profits at distressed market values that in turn resell to homeowners and other alternatives. In addition, alternatives that allow the homeowner a so-called "graceful exit," such as deed-in-lieu, short sale, and cash for keys, are also preferable to foreclosure. Mediation allows the homeowner and lender a venue to explore all commercially reasonable alternatives and if possible to reach a resolution that gives the lender the best net present value while also affording the borrower a restructured loan that can be repaid. These outcomes would be beneficial to lenders and borrowers, as well as communities and local and state housing markets.

Over twenty states and municipalities across the country have foreclosure mediation programs. These programs' success rates have varied from around 14% - to 80% of mediations complete. Connecticut, for example, has increased funding to its mediation program due to its high success rates. Success in mediation programs around the country is measured in different ways, however, of those homeowners and lenders that participated and completed a mediation process, over half of these mediations in the aggregate ended in agreement. Because the foreclosure process is expensive and requires a significant amount of time, eliminating over half of the foreclosures that go to mediation is a positive result.

In conclusion, I support mediation that is run through a neutral third-party and that offers both homeowner and lender the opportunity to target creative methods to restructure the mortgage agreement under the guiding principle that this restructuring should produce a net present value over foreclosure and that the homeowner should be able to make payments over the term of the new restructured loan. Funding mediation is always an issue and I do not recommend any particular funding source. Some sources of funding include the lenders and servicers themselves, or arrangements whereby lenders and consumers share the cost if it is nominal. In some states that are judicial foreclosure states, the judiciary pays for mediation. It is possible that with the recent settlement between the banks and the state attorneys general that some funding from that source may be available for mediation.

The following components should be included in such a mediation endeavor:

1. The mediator should be neutral and independent.
2. The mediation should be focused on a net present value that will determine whether restructuring is the best commercially reasonable alternative for the lender.
3. The borrower should be able to repay the restructured loan over the long term.
4. The homeowner should be held responsible for producing all necessary financial information in a timely way or the mediation will not be offered.
5. The lender should be held responsible for producing net present value analysis that will withstand independent scrutiny or the lender should not be permitted to foreclose.
6. Mediation should be tied to an early stage of delinquency.
7. The mediation program should accord some incentive to those lenders that participate, such as in cases where the mediator determines that restructuring is not the best commercially reasonable alternative based on present value analysis and ability to repay a restructured loan.

As you deliberate over the many bills before you, please do not hesitate to contact me or my office and to use us as a resource.

Respectfully submitted,

Barbara Anthony