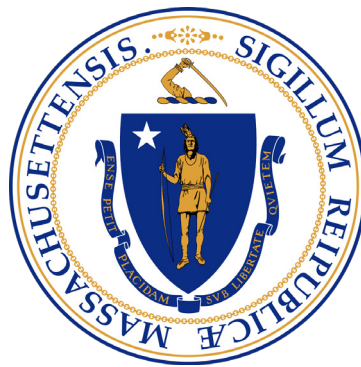


Final Report of the Foreclosure Impacts Task Force



JUNE 2014

Foreclosure Impacts Task Force (FIT Force) – Members¹

Chair, Chris Barry-Smith, Deputy Attorney General, Office of Attorney General Martha Coakley
(appointee of Attorney General Martha Coakley)

Senator James Eldridge, Chair, Joint Committee on Housing

Representative Kevin Honan, Chair, Joint Committee on Housing

Senator Anthony Petrucci, Chair, Joint Committee on Financial Services

Representative Michael Costello, Chair, Joint Committee on Financial Services

Senator William Brownsberger,² Chair, Joint Committee on the Judiciary

Robert J. Gillis, Jr., Vice President, Cape Ann Savings Bank
(appointee of Senate Minority Leader Bruce Tarr)

Julieann Thurlow, President & Chief Executive Officer, Reading Co-operative Bank
(appointee of House Minority Leader Bradley Jones, Jr.)

Kevin F. Kiley, Executive Vice President & Chief Operating Officer, Massachusetts Bankers Association
(appointee of Massachusetts Bankers Association)

Elyse Cherry, Chief Executive Officer, Boston Community Capital
(appointee of Governor Deval Patrick)

Max Weinstein, Attorney & Clinical Instructor, Legal Services Center of Harvard Law School
(appointee of Governor Deval Patrick)

Joel Reck, Retired Partner, Brown Rudnick LLC
(appointee of Governor Deval Patrick)

FIT Force Staff

Benjamin J. Meshoulam, Senior Policy Advisor & Assistant Attorney General,
Office of Attorney General Martha Coakley

Sean Tierney, Mary Corrado, Andrew Chappell, & Brian White, Interns,
Office of Attorney General Martha Coakley

TABLE OF CONTENTS

I. Executive Summary	5
II. Reducing Post-Foreclosure Vacancies	7
Limiting the Number of Vacancies:	9
Recommendations Limiting the Duration of Vacancies	11
Recommendations Both Minimizing the Number and Limiting the Duration of Vacancies	11
III. Foreclosure Mediation – Findings	13
Table - Foreclosure Mediation Program Inventory	16
Table - Mediation Fees and Funding	18
Table - Foreclosure Mediation Quantitative Data	20
IV. Foreclosure Mediation – Best Practices	25
Structural Features	25
Pre-Mediation Practices	26
Mediation Practices	26
V. Conclusion	28
Exhibit 1: Chapter 194 of the Acts of 2012, § 4.....	29
Endnotes.....	30
Appendix A: <i>Supplemental Statement of Kevin F. Kiley, Massachusetts Bankers Association</i>	36
Appendix B: <i>Joint Supplemental Statement of Julieann M. Thurlow, Reading Co-operative Bank, and Robert J. Gillis, Jr., Cape Ann Savings Bank</i> ...	39
Appendix C: <i>Supplemental Statement of Max Weinstein, Legal Services Center of Harvard Law School</i>	41
Appendix D: <i>Supplemental Statement of Representative Michael Costello, Chair, Joint Committee on Financial Services</i>	46

I. EXECUTIVE SUMMARY

On August 3, 2012, Governor Patrick signed into law Chapter 194 of the Acts of 2012, *An Act Preventing Unlawful and Unnecessary Foreclosures*. This law requires lenders to offer commercially reasonable mortgage modifications prior to foreclosure for “certain mortgage loans.” Section 4 of that law also created a thirteen³ member Task Force, Chaired by a designee of the Attorney General, to file a report with the Legislature (1) making recommendations on ways to reduce unnecessary vacancies following foreclosure, and (2) reviewing and evaluating existing foreclosure mediation programs across the United States.⁴ In addition to the Attorney General’s designee, the task force consisted of six legislators (the House and Senate Chairs of the Joint Committee on Financial Services, Joint Committee on Housing, and the Joint Committee on the Judiciary⁵), a designee of the House Minority Leader, a designee of the Senate Minority Leader, a representative of the Massachusetts Bankers Association, and three designees of the Governor.

Ultimately named the Foreclosure Impacts Task Force (FIT Force), the Task Force met eight times between January 2013 and May 2014. The Task Force was staffed by the Office of the Attorney General, and heard from economists, industry representatives, mediation professionals, community-based organizations, and others. This report responds to the Legislature’s two distinct charges as follows.

Reducing Post-Foreclosure Vacancies. Recognizing that no single policy or strategy can eliminate post-foreclosure vacancies, the Task Force advanced a menu of recommendations intended to reduce both the number and duration of vacancies:

- *Encouraging Short Sales & Deeds-in-Lieu of Foreclosure:* lenders and borrowers should be encouraged to pursue short sales and deeds-in-lieu of foreclosure as alternatives to foreclosure.
- *Principal Reduction:* all lenders and servicers should have the option of considering commercially reasonable principal reduction among the several tools at their disposal when evaluating loss mitigation options with borrowers.
- *Excluding from the State Income Tax Income Attributable to the Discharge of Mortgage Debt:* state and federal law should be amended to exclude from the calculation of gross income any income attributable to the discharge of mortgage debt on a primary residence.
- *Lender Programs Allowing Former Homeowners to Continue Living in Homes for a Limited Duration:* the Task Force heard evidence that it is feasible for large banks to implement rental programs that allow former homeowners to remain in their former property until such time as it is sold to a bona fide purchaser who intends to occupy the property. As a result, large lenders and servicers should endeavor to develop these types of programs.
- *Distressed Properties Registration Ordinances:* municipalities with high foreclosure rates should consider adopting distressed property ordinances to track foreclosed and vacant properties.
- *Support for the Distressed Properties and Revitalization Grant program and similar initiatives:* municipalities should continue to share and implement best practices on programs aimed at identifying vacant properties and advocating for the prompt return of those properties to productive residential use.
- *Improving Lender/Servicer Communications & Internal Practices:* large banks and servicers, in particular, should improve their communications and internal practices that hinder their ability to minimize the number of vacant properties.

- *Compliance with G.L. c. 244, § 35C(h)*: all institutions that are not already doing so should promptly comply with G.L. c. 244, § 35C(h).
- *Tax Incentives for Rehabilitating Vacant Properties*: the Legislature should consider expanding existing tax deductions that incentivize the rehabilitation of vacant properties.

Foreclosure Mediation. With respect to foreclosure mediation, the Task Force was charged with conducting a review and evaluation of existing mediation programs across the United States. Specifically, the Task Force was charged with, among other things, gathering data on existing mediation programs and identifying procedures necessary for implementing a statewide foreclosure mediation program. In response to this charge, the Task Force, relying on various existing studies, provided an inventory of existing programs, and statistics on these programs. The Task Force also set out a series of best practices in foreclosure mediation that legislators and other policymakers should consider if they conclude that foreclosure mediation is appropriate for Massachusetts. Additionally, while the Task Force did not endorse or reject the concept of foreclosure mediation, it urged that any approach to foreclosure mediation should be mindful of existing foreclosure statutes, and promote uniformity and predictability for all stakeholders.

II. REDUCING POST-FORECLOSURE VACANCIES

The Task Force's first charge was to:

“study ways in which the commonwealth can encourage the prevention of unnecessary vacancies following foreclosures, [including] . . . the feasibility of allowing a foreclosed homeowner to continue to occupy the foreclosed property, in whole or in part, until a binding purchase and sale agreement has been executed with a purchaser who intends to occupy the housing accommodation as such purchaser's primary residence and who is not a foreclosing owner. The task force shall study the feasibility in which these situations would be subject to landlord-tenant law in the commonwealth and where the foreclosure sale purchaser may initiate eviction proceedings against the foreclosed homeowner in possession of the property, under chapter 239 of the General Laws.”

Accordingly, this section briefly discusses the importance of reducing vacancies, surveys several existing programs and policies aimed at achieving this objective, and presents a menu of policy options that would further reduce vacancies.

The Case for Minimizing Vacancies. Massachusetts housing costs are among the highest in the nation,⁶ and there are inefficiencies in keeping otherwise quality housing stock vacant. While certain properties may be more marketable when vacant, it is ultimately to the benefit of all stakeholders – struggling and former homeowners, their neighbors, municipalities, and financial institutions – to keep post-foreclosure properties occupied with owners or long-term tenants. Making use of our housing stock increases investment in our communities, and keeps our neighborhoods active and vital. Mitigating and reducing both the incidents and adverse consequences of unnecessary vacancies post-foreclosure is a worthwhile public policy goal.

Because post-foreclosure vacancies exist on a spectrum, the report sets out a range of policy prescriptions that may help reduce vacancies. In some instances, homes may simply be empty, their owners having left them post-foreclosure; such homes are not necessarily in a state of disrepair. This poses a problem insofar as housing is going unused in our high cost housing market. Accordingly, some of the recommendations are aimed at reducing the number of homes that go empty in the first instance, or reducing the time that post-foreclosure homes remain empty.

At the same time, many foreclosed homes are not only empty or unoccupied, but have also been abandoned and are no longer or poorly maintained. Abandoned homes can be an eyesore, lead to neighborhood blight and crime, and have a negative effect on surrounding property values. These homes may require more intensive intervention, and must be brought up to code and returned to productive residential use.

Empirical Findings. Due to a lack of reliable data on whether specific properties are vacant or occupied, it is difficult to measure the specific effect of a vacancy on neighboring property values. However, using data on delinquencies and where properties are in the foreclosure process, as well as property-level complaint data, researchers have been able to make several important observations that helped guide the Task Force's recommendations.

Properties that are seriously delinquent and at various stages of the foreclosure process have measurable negative impact on surrounding property values. The impact begins at delinquency, and continues through the foreclosure process. In 2009, properties within a tenth of a mile of a seriously delinquent (more than 90 days delinquent) property saw a 1.2% decline in sale price; those within a tenth of a mile of an REO (bank owned) property saw a

0.9% decline; and those within a tenth of a mile of a property sold out of REO in the previous year saw a 0.6% decline.⁷ The negative effect disappeared between one and two years after a property was sold out of REO.⁸

A study examining property-level complaint and foreclosure data in the City of Boston demonstrated that properties were more than twice as likely to receive a complaint once in foreclosure, and over three times as likely to receive a complaint once bank-owned.⁹ The study concluded that property conditions suffer most while a home is bank owned.¹⁰ Short sales, which avoid bank ownership of foreclosed properties, resulted in fewer complaints.¹¹

Existing Programs. Numerous programs employ different approaches to ensuring that foreclosed properties remain occupied, minimizing the number of foreclosures altogether, or minimizing the time that empty and abandoned homes remain vacant. The following is a non-exhaustive list of programs, several of which were the subject of presentations at Task Force meetings.

- *Boston Community Capital Stabilizing Urban Neighborhoods (SUN) Initiative:* through this program, Boston Community Capital purchases foreclosed REO properties, and resells them at a steep discount (averaging 40%, and reflecting their current market value) to the property's former owner. Because the owner must have sufficient income to maintain a new mortgage on the property (albeit at a reduced amount), this program is not ideal for very low income individuals/families or those without a steady income.
- *Coalition of Occupied Homeowners in Foreclosure (COHIF):* through COHIF, occupied foreclosed properties are purchased by a developer, and subsequently resold to a community development corporation (CDC) with an affordability restriction. Properties are then rented to low-income tenants. This program is better suited for low-income tenants and those living on fixed incomes. This and other similar programs may be enhanced if banks can be encouraged to sell properties at prices that reflect current market value.
- *Freddie Mac REO Rental Initiative:* through this program, Freddie Mac rents to former homeowners that meet income and other eligibility requirements, and agree to vacate property after it is sold. The former owner enters a month-to-month lease agreement, and agrees to pay fair market rent and utilities and make the property available for showings to prospective purchasers. Former homeowners that vacate in accordance with their agreement may also be eligible for relocation assistance.
- *Attorney General's Abandoned Housing Initiative (AHI):* the Attorney General Office's Abandoned Housing Initiative (AHI) provides a tool for communities to rid otherwise viable neighborhoods of blighted residential properties. Utilizing their inherent code enforcement authority, the Attorney General and individual municipalities require delinquent owners of abandoned, residential properties to fix properties and bring them into compliance with the State Sanitary Code. If an owner is unable or unwilling to make the necessary repairs, the Attorney General's Office will petition the appropriate court to appoint a receiver to rehabilitate the property. A provision in the receivership statute allows the receiver to place a lien against the property for all costs incurred by the receiver during the project. That lien is given a priority over all existing liens (except municipal liens).
- *Distressed Properties Identification and Revitalization (DPIR) Grant Program:* the Attorney General Office's DPIR Grant Program helps cities and towns identify vacant distressed properties and return properties to productive residential use. Under the program, municipalities with high numbers of foreclosures and distressed properties work with the Registers of Deeds, along with relevant municipal departments and stakeholders, to identify vacant and distressed bank-owned properties. After prioritizing a list of properties, municipalities advocate with owners to promptly bring the properties up to code and return the properties

to market so that they can be put to productive residential use. If owners are unwilling or unable to return properties to productive residential use, municipalities take appropriate action, including referring the properties to the AGO's AHI (see above).

Recommendations. Because there is no monolithic solution, it is important to advance a package of solutions that address different aspects of the vacant property problem. Some of the recommendations outlined below are general in nature, and urge broad changes in policies and practices by various stakeholders. Other recommendations are more specific, and call for particular actions – for example, passage of a piece of legislation or adoption of particular practice or policy by stakeholders.

The recommendations advanced in this report can be divided into two broad categories. The first set of recommendations seek to limit vacancies in the first instance, so that properties remain in productive residential use, avoiding many of the negative impacts of vacancies. The second set of recommendations recognize that there will be vacancies, and seek to limit the duration of these vacancies. A final set of recommendations addresses both the number and duration of vacancies.

LIMITING THE NUMBER OF VACANCIES:

- *Encouraging Short Sales and Deeds-in-Lieu of Foreclosure:* where it is clear that an owner cannot remain in the home, lenders and borrowers should be encouraged to pursue short sales and deeds-in-lieu of foreclosure as alternatives to foreclosure, thereby avoiding many of the negative impacts of properties becoming bank-owned. Short sales and deeds-in-lieu may also be encouraged through, among other things, legislative changes that would exempt from the state and federal income taxes income attributable to the discharge of mortgage debt (see below). Under a short sale, a lender accepts a sale of the property for less than the principal owed. In exchange, the owner releases the lien for the full principal amount and forgives the remaining balance. Under a deed-in-lieu of foreclosure, a distressed borrower conveys their property interest to the bank; in exchange the borrower's debt is deemed satisfied and the foreclosure proceeding is terminated.

Allowing distressed homeowners to relinquish their property through a short sale or deed-in-lieu, rather than going through the foreclosure process, has numerous benefits: it gives distressed homeowners greater ability to dispose of the property on their own terms; allows lenders to avoid the cost of foreclosure and eviction; and can help minimize the negative impact of vacancy by facilitating direct transfer of the property from the former owner to a new owner occupant. To the extent that property conditions decline when foreclosed properties are bank-owned, short sales are a means of minimizing the negative effect of bank ownership by minimizing the number of bank-owned foreclosed properties.

- *Principal Reduction:* lenders and servicers should have the option of considering commercially reasonable principal reduction among the several tools at their disposal when negotiating mortgage modifications with distressed borrowers. While principal reduction is not appropriate for every borrower, principal reduction is, in many circumstances, an effective tool for keeping distressed borrowers in their homes. Principal reduction, provided through a mortgage modification, is especially appropriate when a home is worth less than the outstanding principal balance. Principal reduction affords a distressed borrower the opportunity to stay in a home at a cost that reflects the home's current value, and may avoid a foreclosure where the loss to the lender at foreclosure would exceed the loss of value occasioned by the principal reduction through loan modification. Unfortunately, many large institutions that hold underwater mortgage loans, including Fannie Mae and Freddie Mac, do not provide relief through principal reduction. These institutions should change their internal policies and procedures so that they at least consider commercially reasonable

principal reduction as one of many options during the modification process. Moreover, mortgage modifications should be structured in a way to incent lenders to provide more modifications. For example, mortgage modifications that allow for shared appreciation of any increase in property value would give lenders a direct incentive to provide more modifications, and alleviate concerns that they are assuming the entire risk of downward market fluctuations.

- *Excluding from the State Income Tax Income Attributable to the Discharge of Mortgage Debt:* a recently-expired federal law exempted from the federal income tax income attributable to the discharge of mortgage debt, including principal forgiven through short sales and mortgage modifications. Unfortunately, under state law, income attributable to the discharge of mortgage debt, including through short sales and principal reduction, is subject to the state income tax. As a result, struggling homeowners that have received relief through a modification or short sale often find themselves receiving unexpected tax bills, further hindering their ability to achieve financial stability. To address this, Massachusetts should exclude from the state income tax income attributable to the discharge of mortgage debt on a primary residence. This change would facilitate mortgage modifications with principal write downs (which will allow homeowners to stay in their homes), and short sales (which will minimize the number of instances where properties go vacant and/or are bank-owned). Similarly, the federal government should extend its income tax exclusion, which expired on December 31, 2013.

However, because relief should be focused on helping homeowners with the greatest need, any such exclusion from the state and federal income taxes should continue to be limited to debt discharged from a mortgage loan on a primary residence, and restricted according to income and/or the amount of discharged debt. According to a recent Department of Revenue (DOR) analysis of pending legislation, excluding income attributable to the discharge of mortgage debt from the state income tax would have resulted in a loss of \$5.5 million in tax revenue in FY2013.¹² However, loss of tax revenue would be significantly less – between \$500,000 and \$1 million – in a time of stable housing prices.¹³ The federal exclusion cost the federal government approximately \$1.3 billion in 2013.¹⁴

- *Lender Programs Allowing Former Homeowners to Continue Living in Homes for a Limited Duration:* lenders and servicers should endeavor to develop rental programs that allow former owners to stay in their former property until such time as the property is sold to a bona fide purchaser who intends to occupy the property as a primary residence. Under any such program, the former owner should agree to pay a fair market rent, comply with basic occupancy obligations, and voluntarily vacate the property once it is sold to an owner that intends to occupy it as a primary residence. In light of their obligation to comply with foreclosure laws vis-à-vis a defaulted homeowner, lenders have expressed reluctance to then have to comply with a set of laws governing the landlord-tenant relationship (presumably triggered by a post-foreclosure rental arrangement). Lenders may be more receptive to occupancy by former homeowners if the lender can recoup a portion of outstanding delinquency, taxes, and insurance costs from the former owner, and if the occupancy agreement contains a binding acknowledgement of the lender's ownership interest in the property that waives the borrower's right to challenge the validity of the foreclosure in future legal proceedings.

With respect to the Legislature's question whether it is feasible to allow homeowners to rent after foreclosure, the evidence presented to the Task Force uniformly demonstrates that it is feasible for large banks to allow foreclosed homeowners to continue to occupy and rent their homes after foreclosure until those homes are purchased by a third party as a primary residence. Large financial institutions already maintain departments to manage post-foreclosure, bank-owned homes. In fact, Bank of America, Citi, and Freddie Mac have already established programs that allow former homeowners to rent their homes

for a period of time after a foreclosure. Despite multiple inquiries, the Task Force heard no evidence or testimony that properties occupied by former homeowners would be less marketable than vacant properties. The evidence instead demonstrated that vacant foreclosed homes are targets for vandalism and crime, deteriorate in value, and harm surrounding communities. Accordingly, the Task Force finds that allowing foreclosed homeowners to remain in their homes until sold would be feasible and does not appear to pose any undue or extraordinary burden to large financial institutions.

RECOMMENDATIONS LIMITING THE DURATION OF VACANCIES

- *Distressed Properties Registration Ordinances:* several cities have adopted ordinances requiring owners to register their foreclosed, foreclosing, and vacant properties, so that municipalities can more effectively track the properties and ensure that they are properly maintained in accordance with relevant codes and ordinances. Municipalities with high foreclosure rates should consider adopting distressed property ordinances as a means of tracking foreclosed and vacant property, and ensuring that these properties are properly maintained so that they can be expeditiously returned to productive residential use.
- *Support the Distressed Properties Identification and Revitalization Grant Program and Similar Initiatives:* the DPIR Grant Program, funded through settlement funds secured by the Attorney General's Office, helps municipalities with high rates of distressed vacant REO properties advocate for returning the properties to productive residential use. Municipalities that have received DPIR Grant funds, as well as other municipalities conducting similar work, should continue to share and implement best practices on advocating for the prompt return of such properties to active residential use.

RECOMMENDATIONS BOTH MINIMIZING THE NUMBER AND LIMITING THE DURATION OF VACANCIES

- *Improving Lender/Servicer Communications & Internal Practices:* stakeholders have observed that large banks, especially national banks and those banks subject to the national mortgage settlement, have poor internal communications that hinder their ability to minimize vacancies, and promptly return REO properties to productive residential use. For example, anecdotal accounts demonstrate that REO departments are often unaware that a bank may receive credit under the national mortgage settlement for certain activities (e.g., short sales). Large banks should improve their policies and technology, and align their internal procedures, as part of an overall effort to minimize the number of vacancies through tools such as mortgage modifications and short sales. Additionally, bank employees, especially those at large national lenders, should be trained in the details of relevant state-specific mortgage and foreclosure statutes, so that they can effectively work with distressed borrowers to avoid foreclosure.
- *Compliance with G.L. c. 244, § 35C(h):* the mortgage modification statute signed into law in 2012 contained a provision intended to facilitate programs like Boston Community Capital's SUN Initiative. Under G.L. c. 244, § 35C(h), a creditor that sells a property to a non-profit organization is barred from including as a condition of sale a restriction limiting the non-profit's ability to resell the property to former owners or occupants. All institutions that are not already doing so should promptly comply with § 35(h); failure to do so serves as an unnecessary impediment to effective buyback programs.
- *Tax Incentives for Rehabilitating Vacant Properties:* the Legislature should consider providing enhanced incentives for developers to rehabilitate vacant and abandoned residential properties. Under the state's existing abandoned building renovation deductions (see G.L. c. 62, § 3(B)(a)(10) and G.L. c. 63, § 38O), certain personal and corporate taxpayers can, if particular requirements are met, deduct up to

10% of the cost of renovating qualifying buildings designated as abandoned by the Economic Assistance Coordinating Council (EACC) and located in an EACC-designated Economic Opportunity Area (EOA). In FY2014, the deduction is estimated to cost Massachusetts \$100,000 in personal income tax revenue,¹⁵ and a negligible amount of corporate income tax revenue.¹⁶ The Legislature should consider raising the deduction as a means of encouraging the rehabilitation of abandoned and vacant homes and the development of affordable housing in areas with high vacant property rates. Going forward, the program should continue requiring parties applying for the deduction to certify that the rehabilitated property was vacant or abandoned, and potentially cap the total amount of tax credits that a developer can receive in a given year.

III. FORECLOSURE MEDIATION – FINDINGS

The Task Force was also charged with “conduct[ing] a comprehensive review and evaluation of the existing mediation programs throughout the United States . . .”¹⁷ Specifically, the Task Force was asked to review and evaluate:

- the varying models of mediation programs, and their effectiveness;
- the percentage of borrowers utilizing mediation, the percentage remaining in their homes after mediation, and the percentage who re-default;
- the costs and procedures necessary for implementing and maintaining a state mediation program;
- funding sources for a state mediation program;
- potential entities to oversee the state mediation program;
- potential credit and borrowing obstacles in jurisdictions with mediation programs; and
- the feasibility for judiciary involvement in the mediation process.

Every jurisdiction has been impacted by the foreclosure crisis differently and operates under a unique legal framework. As a consequence, no model program can be applied uniformly or imported wholesale from another jurisdiction into Massachusetts. Other jurisdictions’ experiences with foreclosure mediation, however, may provide valuable lessons for Massachusetts. Thoughtful application of these lessons to the state’s foreclosure law framework could, if the Legislature were to establish mediation, yield a mediation program that serves the unique needs and circumstances of Massachusetts borrowers and lenders. Therefore, consistent with its mission, the Task Force has compiled data on existing mediation programs from across the country, and best practices that may be instituted should Massachusetts policymakers elect to establish a foreclosure mediation program.

As a threshold matter, any discussion of mandatory foreclosure mediation in Massachusetts should take into account the current statutory landscape related to foreclosure and foreclosure avoidance. Although Massachusetts does not mandate mediation as do some states and localities (see discussion *infra*), the Commonwealth has codified borrower protections and foreclosure avoidance tools that do not exist in other states. Namely, the 2012 statute that called for this Task Force’s study of mediation also included Section 35B which requires, with respect to “certain mortgage loans,” that lenders offer a commercially reasonable loan modification prior to foreclosure. Like many mediation programs, Section 35B has a general goal of avoiding “unnecessary” foreclosures – those where a loan modification would better serve the economic interests of the creditor (and also, of course, the borrower) than would the losses expected at foreclosure. Members of the Task Force reasonably have raised the question whether legislative consideration of mediation would replace or supplement the protections of Section 35B, and suggest that an additional layer of consumer protection (in the form of mediation) is unwarranted in light of the Commonwealth’s current set of protections reflected in Section 35B. This perspective, and whether mediation would supplant Section 35B, should be kept in mind as this report fulfills the Legislature’s request to study and report on mediation. Task Force members also believed that any mediation program, if adopted by the Legislature, should be integrated with existing foreclosure statutes in a way that is mindful of all impacts of delay. Moreover, Task Force members believed that if the Legislature adopts a statewide foreclosure mediation program, it should consider exempting certain lenders – for example, those that initiate a low number of foreclosures annually, or for whom mortgages in foreclosure represent a small percentage of their residential lending portfolio.

Finally, some localities in Massachusetts, including Lawrence, Lynn, Springfield, and Worcester, have adopted

local foreclosure mediation ordinances. However, none of the mediation programs created through these ordinances appear to have yet conducted any mediations.¹⁸ Several Task Force members raised concerns that local mediation ordinances could potentially impose overlapping, redundant, or inconsistent obligations on lenders. While the Task Force took no position on legal and policy merits of these and any other local mediation ordinances in Massachusetts, members agreed that any foreclosure mediation program should endeavor to establish both uniformity and predictability for all stakeholders.

Mediation Generally. While there is no standard definition for mediation, it is broadly defined “by confidential communications, neutrality of the mediator, and voluntary resolution of any issues.”¹⁹ In a foreclosure mediation program, the mediator typically leads the parties – a borrower and lender/servicer – through a “self-determination process” to explore alternatives to foreclosure, with the goal of determining whether the parties can reach a mutually acceptable agreement.²⁰ In short, foreclosure mediation provides “an opportunity for lenders and homeowners to reach mutually agreeable and beneficial alternatives to foreclosure.”²¹

Basic Structure of Foreclosure Mediation. The structure and process of a typical foreclosure mediation program has been described as a “funnel,”²² narrowing down a universe of eligible borrowers through a series of steps and, where possible, ending in an agreement or resolution. The following outline of the foreclosure mediation process, adopted from Kulp and Shack,²³ identifies the steps typical to a mediation program:

- Notice: a borrower in foreclosure is informed by a court or government agency that mediation is available.²⁴
- Mediation Selected: in the case of an “opt-out” program a borrower is scheduled for mediation unless the borrower elects not to enroll. In the case of an “opt-in” program a borrower has an opportunity to request mediation.²⁵
- Eligibility Screening: the entity overseeing the mediation program screens the borrower to ensure that the case is eligible for mediation, and may require the borrower to submit financial paperwork.²⁶ Eligibility criteria may be based on the borrower’s employment status, whether the home is the borrower’s primary residence, and other factors.²⁷
- Mediation Session(s): if a borrower is not screened out of the foreclosure mediation program, the borrower and lender meet in a mediation session with a mediator, with the goal of reaching an agreement or resolution.²⁸ Documents are typically exchanged before or at the mediation session. At the mediation session, the mediator facilitates a discussion between the borrower and a representative from the lender or loan servicer. Depending on the discussion, the parties may schedule a further session or sessions, proceed to foreclosure, exchange additional documents, or pursue foreclosure alternatives.²⁹
- Resolution: the mediation session(s) may conclude with one of several resolutions:³⁰
 - Agreement: agreement can span a range of options, including relinquishment of the property (including through a short sale or deed-in-lieu of foreclosure) or retaining the property (including through a mortgage modification).³¹
 - Partial Agreement:³² partial agreement can also span a range of options, including scheduling further mediation sessions, or a temporary loan modification with the possibility of a permanent modification after a period of time.
 - No Agreement

Mediation Program Models. The table³³ below provides an inventory of foreclosure mediation/alternative dispute resolution programs across the United States. Foreclosure mediation programs can be created by, among other methods, statewide legislation, municipal ordinances, or judicial circuit or other court orders. The table below organizes programs by whether they operate statewide or in a limited jurisdiction; whether they operate in jurisdictions with a judicial or non-judicial foreclosure process; and whether they utilize an “opt-in” or “opt-out” method of enrolling borrowers. The table also summarizes which entities oversee the various mediation programs.

Foreclosure mediation programs operate on either a statewide basis, or within a limited jurisdiction, such as a municipality (e.g., Phoenix, Arizona), or, as is more commonly the case, a political subdivision such as a county or judicial circuit. Additionally, some jurisdictions have a judicial foreclosure process, under which a foreclosure is initiated when the lender files a foreclosure complaint against the borrower in court. In non-judicial foreclosure states, including Massachusetts, the lender does not need to file a complaint in court, and can foreclose by complying with a statutory foreclosure process. Finally, foreclosure mediation programs use either an “opt-out” or “opt-in” method of enrolling borrowers.

Mediation Program Inventory. We identified 15 statewide programs operating in the country – 8 in judicial foreclosure jurisdictions, and 7 in non-judicial foreclosure jurisdictions. Thirteen of the statewide programs use an opt-in method for enrolling borrowers, and 2 use an opt-out method. Twelve states have foreclosure mediation programs operating within a limited jurisdiction (i.e. city, county, or judicial district). In these 13 states, there are 158 programs serving limited jurisdictions. Of these, limited jurisdiction programs, the vast majority – 156 – operate within a judicial foreclosure jurisdiction – and only 2 operate within a non-judicial foreclosure jurisdiction.³⁴ Of those 156 limited jurisdiction programs operating in a judicial foreclosure jurisdiction, 39 utilize opt-in method of enrolling borrowers, and 29 utilize an opt-out method.³⁵ Both limited jurisdiction programs operating in non-judicial jurisdictions use opt-in enrollment methods. The various limited jurisdiction programs operating in Florida, Illinois, Ohio, and Pennsylvania allow each jurisdiction to choose between opt-in and opt-out enrollment. For this reason, these states appear twice in the table below. Moreover, one state – Hawaii – has a statewide program that runs concurrently with a limited jurisdiction program. Consequently, Hawaii appears twice in the table.

The vast majority of programs in the United States – 162 – are managed by courts. In some jurisdictions (such as Connecticut), the entire program is managed by the courts, whereas in other jurisdictions, the court maintains supervisory functions, and contracts out substantive mediation work to volunteer groups, non-profit organizations or other third-party entities. For example, in Cook County, Illinois the court partners with the non-profit Center for Conflict Resolution to train and provide mediators.³⁶ Six programs are managed by another government entity (Maryland’s program, for example, is managed by the Maryland Office of Administrative Hearings).³⁷ St. Louis’s program, which was recently discontinued,³⁸ contracted out its entire mediation program to a private third-party. In that jurisdiction, the United State Arbitration and Mediation Services, Midwest managed and coordinated foreclosure mediation on behalf of the city.³⁹ Iowa relies on the community non-profit mediation group Iowa Mediation Services to schedule and run its mediations.⁴⁰ Finally, at least two programs have relationships with universities: Phoenix, Arizona’s program, is managed by the Sandra Day O’Connor School of Law at Arizona State University,⁴¹ and the program in McLean County, Illinois receives assistance from the University of Illinois School of Law.⁴²

TABLE - FORECLOSURE MEDIATION PROGRAM INVENTORY

	State	Scope	Judicial/ Non-judicial	Opt-in/ Opt-out	Managing Entity	Jurisdiction
Statewide/ Judicial/Opt-in	Connecticut	Statewide	Judicial	Opt-in	Court	N/A
	Maine	Statewide	Judicial	Opt-in	Court	N/A
	Maryland	Statewide	Judicial	Opt-in	Government ⁴³	N/A
	New Jersey ⁴⁴	Statewide	Judicial	Opt-in	Court	N/A
	South Carolina	Statewide	Judicial	Opt-in	Court	N/A
	Vermont	Statewide	Judicial	Opt-in	Court	N/A
Statewide/ Non-Judicial/ Opt-in	Washington, D.C.	District- wide ⁴⁵	Non-judicial	Opt-in	Government ⁴⁶	N/A
	Iowa	Statewide	Non-judicial	Opt-in	Non-profit ⁴⁷	N/A
	Nevada ⁴⁸	Statewide	Non-judicial	Opt-in	Court	N/A
	Oregon	Statewide	Non-judicial	Opt-in	Government ⁴⁹	N/A
	Washington	Statewide	Non-judicial	Opt-in	Government ⁵⁰	N/A
	Hawaii ⁵¹	Statewide	Non-judicial	Opt-in	Government ⁵²	N/A
	Rhode Island ⁵³	Statewide	Non-judicial	Opt-in	Unknown	N/A
Statewide/ Judicial/Opt- out	Delaware	Statewide	Judicial	Opt-out	Government ⁵⁴	N/A
	New York	Statewide	Judicial	Opt-out	Court	N/A
Limited/ Judicial/Opt-in	Arizona	Limited	Judicial	Opt-in	Law School	Phoenix
	Florida ⁵⁵	Limited	Judicial	Opt-in	Court ⁵⁶	3 judicial circuits
	Hawaii ⁵⁷	Limited	Judicial	Opt-in	Court	3rd Judicial Circuit
	Illinois ⁵⁸	Limited	Judicial	Opt-in	Court ⁵⁹	2 judicial circuits
	Kentucky	Limited	Judicial	Opt-in	Court	Louisville
	Ohio ⁶⁰	Limited	Judicial	Opt-in ⁶¹	Court	88 counties
	Pennsylvania ⁶²	Limited	Judicial	Opt-in	Court	14 counties
	New Mexico	Limited	Judicial	Opt-in	Court	2 judicial districts
Wisconsin	Limited	Judicial	Opt-in	Court	15 counties	

	State	Scope	Judicial/ Non-judicial	Opt-in/ Opt-out	Managing Entity	Jurisdiction
Limited/ Judicial/Opt- out	Florida ⁶³	Limited	Judicial	Opt-out	2 judicial circuits	Court ⁶⁴
	Illinois	Limited	Judicial	Opt-out	3 judicial circuits	Court
	Indiana ⁶⁵	Limited	Judicial	Opt-out	20 counties	Court
	Ohio	Limited	Judicial	Opt-out	88 counties ⁶⁶	Court
	Pennsylvania ⁶⁷	Limited	Judicial	Opt-out	4 counties	Court
Limited/Non- Judicial/Opt-in	Colorado	Limited	Non-judicial	Opt-in	Douglas County	Quasi-Public
	Missouri	Limited	Non-judicial	Opt-in	St. Louis County	Mediation services group ⁶⁸

Costs and Funding. Because each mediation program is ideally designed to respond to the unique needs of its host jurisdiction, mediation programs vary widely in scope, and, accordingly, the financial resources necessary to execute their mission. The following table provides an overview of the fees and costs associated with different programs, where available.⁶⁹ Numerous variables determine the cost of a mediation program, including the cost of the mediators, number of sessions required per case, and overall number of mediations occurring in a particular program/jurisdiction. Judicial jurisdictions typically use court staff and administrative resources to run their programs, with jurisdictions such as New York and Pennsylvania using existing court personnel and volunteer attorneys.⁷⁰ Other jurisdictions, such as Connecticut and Cook County, Illinois, have appropriated additional public funds to help support their mediation programs.

In order to achieve self-sufficiency, many jurisdictions assess a surcharge on the fees charged to lenders for filing foreclosure-related documents. These charges range from \$50-\$500 per foreclosure, and are typically directed towards administrative costs, including, in many programs, compensating mediators for their work.⁷¹ Some jurisdictions, including Maryland and Washington, D.C., require borrowers to pay a \$50 fee when they request mediation.⁷² Hawaii, Nevada, and Washington State require the borrower and lender split a mediation fee (\$400 in Washington and Nevada, and \$600 in Hawaii).⁷³

Some jurisdictions generate funding from multiple sources. For example, Nevada's program draws funding from two sources, and directs the proceeds to a variety of areas. In that state, a \$200 surcharge, levied upon the filing of the notice of default in the land records, is split between the mediation program (\$45), the state's general fund (\$150), and legal services (\$5).⁷⁴ An additional fee of \$400 is split evenly between the lender and borrower, and is used to compensate mediators.⁷⁵ In its first year, Nevada's filing fee surcharge generated approximately \$6-\$8 million in revenue.⁷⁶ Similarly, Washington State's recording fee surcharge generates approximately \$8 million annually, with 80% of that amount directed toward housing counseling.⁷⁷

TABLE - MEDIATION FEES AND FUNDING

State/Jurisdiction	Registry or Court Filing Fee Surcharge ⁷⁸	Other Charges	Costs, Funding Sources & Miscellaneous Information
Colorado (Douglas County)	None	None	\$800,000 Colorado HUD budget allocation, and \$75,000 federal grant.
Connecticut	None	None	\$2 million appropriation from CT State Banking Fund
Delaware	Unknown	Unknown	Unknown.
Washington, D.C.	\$300 (recoverable by lender after sale of foreclosed home)	\$50 borrower fee upon electing mediation. \$500 lender penalty for not participating in good faith or defaulting on agreement.	Exact budget unknown. Fees directed to Foreclosure Mediation Fund. Mediators can charge no more than \$1,000/mediation.
Florida	\$400 ⁷⁹	\$350 lender fee if mediation conducted ⁸⁰	Exact budget unknown. Mediation organizations may not charge more than \$750/mediation.
Hawaii ⁸¹	\$350	\$600 split by borrower and lender	Exact budget unknown.
Illinois (Cook County)	Unknown	Unknown	\$3.4 million appropriation from County Board for first year of program.
Illinois (Will County)	\$150 (portion of larger filing fee)	None	Unknown. Mediators compensated \$150 for each mediation file.
Indiana	\$50	None	Unknown
Iowa	None	Lender charged \$50/hour of mediation.	Various sources (including mediation fees, federal stimulus money, state Finance Authority Fund allocation).
Kentucky (Jefferson County)	None	None	Funded through state and private grants. Exact amount unknown.
Maine	\$150	\$200 lender fee per mediation session.	Mediators paid \$175/half day, \$300/full day.
Maryland	\$300	\$50 by borrower upon filing request for mediation	Exact cost unknown.

State/Jurisdiction	Registry or Court Filing Fee Surcharge⁷⁸	Other Charges	Costs, Funding Sources & Miscellaneous Information
Nevada	\$200 ⁸²	\$400 split by borrower and lender	Mediators paid \$400/session (from borrower and lender fees). Exact cost unknown.
New Hampshire	None	None	Funded by state Housing Finance Agency and private entities.
New Jersey	None	None	\$12.5 million legislative appropriation.
New Mexico (1st and 3rd Circuits)	None	\$500 cost split by borrower and lender (free/reduced-cost mediation available)	Exact cost unknown. Mediators paid \$500/4-hour session.
New York	None	None	Exact cost unknown; funded by Department of Housing and Community Renewal.
Ohio (various counties)	Up to \$500 (depending on county)	None	Exact cost unknown; various public funding sources (depending on county).
Pennsylvania (Philadelphia)	Unknown	Unknown	Exact cost unknown.
Rhode Island (Providence)	None	Costs borne by lender (additional \$2,000 lender fine if conciliation conference requirements not met)	Costs for counseling and conciliation conference borne by lender; exact cost unknown.
Vermont	Unknown	Lender covers mediation costs (unknown).	Exact cost unknown.
Washington ⁸³	\$250	\$400 split by parties.	Exact cost unknown.
Wisconsin (Milwaukee)	Unknown	\$100 processing fee paid by both borrower and lender.	Funded in part by WI Department of Justice. Exact cost unknown.

Quantitative Findings. The Task Force was also charged with reporting on the utilization and effectiveness of existing programs, including the percentage of borrowers remaining in their homes after mediation. Statistics regarding existing mediation programs were gathered from several studies that have compiled and evaluated data from programs across the country.⁸⁴ Unfortunately, only a small percentage of existing mediation programs have made available the percentage of foreclosure cases completing mediation, and an even smaller percentage have made available the percentage of borrowers who retained their home after participating in foreclosure mediation.⁸⁵ Additionally, programs that maintain statistics do not track the same statistics.

Consequently, it is difficult to make comparisons across programs and determine which features necessarily lead to a successful program.⁸⁶

Moreover, even where programs collect and compile data, because they do not share the same goals and objectives, it is difficult to compare and evaluate effectiveness across programs.⁸⁷ For example, one program may define success as any outcome that removes a case from that jurisdiction's foreclosure process, and another may define success only as a retention agreement that permanently allows a borrower to remain in their home.⁸⁸ What has worked for Philadelphia, Connecticut, and Nevada, may not work for Massachusetts, and depends on various factors, including the jurisdiction's unique legal frameworks, the scope of the jurisdiction's foreclosure problem, the level of funding available to support and sustain a foreclosure mediation program, and the goals of that foreclosure mediation program.

TABLE - FORECLOSURE MEDIATION QUANTITATIVE DATA

Jurisdiction	Percentage of Foreclosures/ Eligible Foreclosures Referred to Mediation	Percentage of Foreclosures and/or Cases Referred Entering Mediation	Percentage of Mediations (or Referrals) Resulting in Agreement	Specific Mediation Outcomes	Specific Retention Outcomes	Misc. Data
Connecticut (Judicial/ Opt-out)	43% of eligible foreclosures (26,984 of 62,118)	22% of eligible foreclosures (13,844 of 62,118) 51% of referrals (13,844 of 26,984)	82% of cases mediated (11,362 of 13,844)	Graceful Exit: 15% No Agreement: 18% Retention: 67%	14% of eligible homeowners facing foreclosure retain home Retention Outcomes: Reinstatement: 7% Forbearance: 10% Loan Modification: 83%	15% of eligible borrowers in foreclosure retained home
District of Columbia (Non-Judicial/ Opt-in)	57% of eligible foreclosures (36 of 63)	43% of eligible foreclosures (27 of 63) 75% of referrals (27 of 36)	81% of mediations (22 of 27)	Graceful Exit: 4% No Agreement: 19% Retention: 78%		33% of eligible homeowners facing foreclosure retain home

Jurisdiction	Percentage of Foreclosures/ Eligible Foreclosures Referred to Mediation	Percentage of Foreclosures and/or Cases Referred Entering Mediation	Percentage of Mediations (or Referrals) Resulting in Agreement	Specific Mediation Outcomes	Specific Retention Outcomes	Misc. Data
Florida* (statewide) (Judicial/ Opt-out) * Program no longer in effect.	42% of foreclosures (32,798 of 78,067)	14% of foreclosures (11,151 of 78,067) 34% of referrals (11,151 of 32,798)	25% of mediations (2,835 of 11,151)	N/A	N/A	3.6% of cases referred to mediation yielded written agreement. ⁸⁹
Florida (bankruptcy) (Judicial/ Opt-in)	N/A	N/A	35% of mediations result agreement to retain home (250 of 710)	N/A	N/A	
Hawaii (3rd Judicial Cir.) (Judicial/ Opt-in)	8% of foreclosures (47 of 609)	N/A	34% of cases referred (16 of 47)	N/A	N/A	
Illinois (3d Judicial Cir.) (Judicial/ Opt-in)	5% of eligible foreclosures (4,072 of 77,993)	N/A (291 mediation referrals)	21% of referrals result in agreement to retain home (61 of 291 referrals)	N/A	N/A	
Illinois (Cook County) (Judicial/ Opt-in)	5% of eligible foreclosures (4,072 of 77,993)	4% of eligible foreclosures (4,072 of 77,993) 84% of referrals (3,434 of 4,072)	51% of mediations (1,742 of 3,434)	Graceful Exit: 13% No Agreement: 49% Retention: 38%		1.7% of eligible homeowners facing foreclosures retain home
Illinois (Will County) (Judicial/ Opt-out)	41% of eligible foreclosures (2,625 of 6,542)	25% of foreclosures (1,606 of 6,542) 60% of referrals (1,606 of 2,695)	57% of mediations (914 of 1,606)	Graceful Exit: 13% No Agreement: 49%	N/A	

Jurisdiction	Percentage of Foreclosures/ Eligible Foreclosures Referred to Mediation	Percentage of Foreclosures and/or Cases Referred Entering Mediation	Percentage of Mediations (or Referrals) Resulting in Agreement	Specific Mediation Outcomes	Specific Retention Outcomes	Misc. Data
Maine (statewide) (Judicial/ Opt-in)	18 % of eligible foreclosures (983 of 5,409)	9% of foreclosures (505 of 5,409) 51% of referrals (505 of 983)	21% of mediations (107 of 505)	Agreement: 21% No Agreement: 79%	N/A	
Maryland (Judicial/ Opt-in)	N/A	N/A	41% of mediations (483 of 1,180)	Graceful Exit: 3% Retention: 15% Other Agreement: 23% No Agreement: 59%	38% of agreements resulted in retention.	
Nevada (Non-judicial/ Opt-in)	82% of requesting foreclosures (2,244 of 2,752) ⁹⁰	58% of referrals (1,411 of 2,422) ⁹¹	31% of mediations (439 of 1,411) ⁹²	Relinquish property: 51% (223 of 439) Retain property: 49% (216 of 439) ⁹³	Retention Outcomes: Temporary loan modification: 44% Permanent loan modification: 17% Interest rate reduction: 13% Government program: 12% Other outcome: 9% Principal reduction: 5% ⁹⁴	Relinquishment Outcomes: Short Sale: 67% Other Forbearance: 14% Voluntary Surrender: 8% Deed in Lieu: 6% Cash for Keys: 5% ⁹⁵

Jurisdiction	Percentage of Foreclosures/ Eligible Foreclosures Referred to Mediation	Percentage of Foreclosures and/or Cases Referred Entering Mediation	Percentage of Mediations (or Referrals) Resulting in Agreement	Specific Mediation Outcomes	Specific Retention Outcomes	Misc. Data
Ohio (Cuyahoga County) Judicial/Opt-out	29% of eligible foreclosures (6,960 of 23,696)	20% of foreclosures (4,653 of 23,696) 67% of referrals (4,653 of 6,960)	61% of mediations (2,825 of 4,653)	N/A	N/A	
Ohio (Franklin County) Judicial/Opt-out	20% of eligible foreclosures (3,728 of 18,609)	12% of eligible foreclosures (2,294 of 18,609) 62% of referrals (2,294 of 3,728)	32% of mediations (744 of 2,294)	N/A	N/A	
Pennsylvania (Philadelphia) (Judicial/Opt-out)	97% of eligible foreclosures (15,915 of 16,435)	67% of foreclosures (11,061 of 16,435) 69% of referrals (11,061 of 15,915)	33% of mediations (3,624 of 11,061)	No Agreement: 4% Default: 4% Default Delayed: 15% Sheriff's Sale Ordered: 16% Pending: 29% Agreement: 33%	N/A	85% of borrowers reaching agreement in home after 1 year. ⁹⁶
Pennsylvania (Allegheny County)	N/A	N/A	33% of mediations (734 of 2,221)	N/A	N/A	
Washington (Non-judicial/opt-in)	N/A	N/A	N/A	20% of mediations result in retention (71 of 364 mediations)	N/A	

Percentage of Borrowers in Foreclosure Referred to and Utilizing Mediation. As a general matter, jurisdictions that track the utilization rate of existing programs do not track the percentage of overall borrowers that use foreclosure mediation programs. Instead, they typically track the percentage of borrowers in foreclosure, or the percentage of eligible borrowers in foreclosure, that utilize a foreclosure mediation program. The percentage of eligible foreclosures referred to mediation ranges from a low of 5% in Cook County, Illinois, to 97% in Philadelphia. The percentage of eligible borrowers referred to mediation that ultimately utilize mediation ranges from 34% in Florida (whose program is no longer in effect) to a high of 84% in Cook County, Illinois.

General Mediation Outcomes. There is also wide range in the percentage of mediations that result in an agreement. For example, in Maine, only 21% of mediations resulted in agreements, whereas in Connecticut, a vast majority of mediations – 82% – resulted in agreements.

Specific Agreement & Retention Outcomes. An even smaller subset of jurisdictions track specific agreement and retention outcomes. The percentage of agreements that result in home retention ranges significantly, from a low of 15% in Maryland to a high of 78% in Washington, D.C. Similarly, few jurisdictions track the percentage of homeowners eligible for foreclosure mediation that retain their home after mediation. This figure ranges from 1.7% in Cook County, Illinois to 33% in Washington, D.C.

Only two jurisdictions – Connecticut and Nevada – track the specific features of retention agreements, and only one jurisdiction – Philadelphia – has measured the percentage of homeowners remaining in their homes a year after entering into a retention agreement. In Connecticut, 83% of borrowers that entered into retention agreements received a mortgage modification, and in Nevada, 17% of borrowers that entered into retention agreements received permanent loan modifications (44% of Nevada borrowers entering into retention agreements entered into temporary loan modification agreements. Connecticut does not appear to provide a similar breakdown between temporary and permanent loan modifications). However, neither Connecticut nor Nevada track how long borrowers receiving loan modifications were able to stay in their homes. In Philadelphia, 85% of homeowners who reached agreement remained in their homes after one year.⁹⁷

IV. FORECLOSURE MEDIATION – BEST PRACTICES

In addition to gathering data on existing mediation programs, the Task Force was charged with reviewing and evaluating “procedures necessary for implementing and maintaining a state mediation program.”⁹⁸ This particular charge provided the Task Force with an opportunity to lay out a set of best practices that legislators and policymakers should consider if they conclude that foreclosure mediation is appropriate for Massachusetts. However, if policymakers explore crafting a mediation program for Massachusetts, it is important to note that no universal program features or structure guarantees effectiveness.⁹⁹ In fact, it has been observed that programs with similar structures have often yielded drastically different results.¹⁰⁰ Therefore, instead of advancing a particular formula or model of foreclosure mediation in Massachusetts, these best practices outlined here – compiled from various reports and studies – identify programmatic and structural features that are commonly found in successful foreclosure mediation programs. This report, like a 2010 report issued jointly by the United States Departments of Justice and Housing and Urban Development, describes “several program features that appear to have a positive impact on the effectiveness of [foreclosure] mediation programs, and [offers] those features for consideration by jurisdictions...”¹⁰¹

STRUCTURAL FEATURES

*Defining Success – Articulating Program Objectives & Goals.*¹⁰² Realistic goal articulation is critical to the success of any foreclosure mediation program.¹⁰³ If program objectives are clearly identified at the outset, policymakers can then design a program tailored to reach these goals.¹⁰⁴ Specifically, policymakers must define what a successful mediation outcome is for their program.¹⁰⁵ One program, for instance, may seek a foreclosure alternative for every distressed borrower,¹⁰⁶ while another may view a graceful exit as a success.¹⁰⁷ A program may consider a modification agreement a success, while another may define success only as a modification agreement that results in the borrower staying in the home for at least a year after the modification agreement is entered into. Ohio, for example, defines success as when the lender and borrower reach a “mutually agreeable, sustainable agreement” (which may include a graceful exit).¹⁰⁸ Clearly articulating and defining what success looks like is critical for ensuring that a program is properly designed to achieve specifically enumerated objectives and goals.

Data Tracking and Evaluation. Correspondingly, data tracking should be used to evaluate program efficacy.¹⁰⁹ For example, a program with the articulated goal of finding an alternative to foreclosure for every distressed borrower would need to measure, among other things, the number of borrowers referred to mediation, the number of foreclosures settled before the commencement of mediation, and the number of foreclosures avoided through the mediation process.¹¹⁰ In the long term, when measured against clearly articulated program objectives and goals, rigorous data tracking, analysis, and reporting allows program administrators to evaluate program trends, and take appropriate corrective action.¹¹¹ Moreover, making such data public can lead to greater transparency, thereby increasing trust from stakeholders and members of the public.¹¹²

Establishing Self-Sufficiency. As the nation continues its recovery from the economic downturn, policymakers at the state and local level continue to face budgetary constraints. To the extent that fiscal considerations may stand as an impediment to implementation of an effective program, a mediation program in Massachusetts may endeavor to achieve self-sufficiency by charging reasonable fees.¹¹³ At the same time, any fee imposed on borrowers should not be set so high as to discourage their participation.¹¹⁴

PRE-MEDIATION PRACTICES

Robust Notification & Outreach Efforts. Mediation programs should clearly communicate to borrowers their right to participate in a mediation program, and should use a multi-pronged outreach effort – relying on legal services, banks, community organizations, and others – to maximize participation.¹¹⁵ Moreover, where possible, legal notices should use simple, non-technical language, and clearly spell out the steps a borrower needs to take to participate in mediation.¹¹⁶

Effective Screening. Screening mechanisms help preserve resources by analyzing ahead of time whether mediation is an appropriate fit for the borrower, and diverting borrowers whose cases are unlikely to render a desired outcome. Therefore, programs should align screening criteria with their program goals.¹¹⁷ For example, where a mediation program is aimed at preventing homelessness and allowing borrowers to stay in their homes, a program may screen out borrowers whose property does not serve as their primary residence, or whose income exceeds a certain threshold.

Borrower Support. Foreclosure mediation, and the foreclosure process generally, are fraught with complications that may confuse even more sophisticated borrowers. Because mediation is intended to present borrowers and lenders with a meaningful opportunity to explore alternatives to foreclosure, all borrowers should have access to a well-trained housing counselor or lawyer that can educate the borrower about the foreclosure process and prepare them for the mediation session.¹¹⁸ Housing counselors, in particular, can work with borrowers to compile necessary financial documents and evaluate foreclosure alternatives in advance of mediation sessions.¹¹⁹ Moreover, evidence suggests that borrowers who are able to meet with housing counselors are almost twice as likely to find an alternative to foreclosure than borrowers who do not meet with counselors.¹²⁰

MEDIATION PRACTICES

Clear Document Exchange Standards & Procedures. The loss mitigation process generally entails exchanging a large number of documents. Unfortunately, a lack of clear and predictable document exchange standards and procedures poses a major challenge for foreclosure mediation programs.¹²¹ Accordingly, any foreclosure mediation program should place special emphasis on establishing clear document exchange standards and procedures, to ensure that both parties timely provide the proper documents in the proper format.¹²² In this regard, providing borrowers with a Housing Counselor (see Borrower Support, above) may help borrowers gather appropriate documents in advance of the mediation session.¹²³ Some programs have also established pre-mediation conferences, in which the borrower and lender meet to evaluate the borrower's circumstances and determine what documents are needed to proceed with a loan modification.¹²⁴

Multiple Sessions. Achieving agreement through mediation on a foreclosure alternative entails significant commitment and effort on the part of borrower, lender, and mediator. Because of the complicated issues involved, mediation programs should be structured to allow for multiple mediation sessions.¹²⁵ Moreover, where feasible, the mediator should be authorized to communicate with the parties in between mediation sessions, so as to build on any progress made during the previous mediation session.¹²⁶

Predictable Timelines. Some mediation programs find it useful to operate on a predictable timeline. This gives parties a sense of what to expect through the mediation process, and when it is appropriate to terminate mediation efforts.¹²⁷ At the same time, mediation timelines should not be so strict so as to terminate mediation where progress is being made or where there are reasonable delays, and procedures should be sufficiently flexible to accommodate additional sessions (see Multiple Sessions, above).

Well-Trained Mediators. Ensuring that mediators are well-trained is critical to the success of any foreclosure mediation program.¹²⁸ Ideally, mediators are experienced with both mediation practice and the specifics of the foreclosure process.¹²⁹ Funding for compensating mediators for their time, including training and conducting mediations, can be provided through mediation fees (see Establishing Self-Sufficiency, above).

V. CONCLUSION

In order to effectively address the problems posed by post-foreclosure vacancies, policymakers and the Legislature should consider various approaches aimed at both limiting the number and duration of vacancies. These approaches, which can take advantage of existing mechanisms (including short sales and deeds-in-lieu of foreclosure) can help preserve community stability, and maximize the amount of housing available in our expensive housing market.

With respect to foreclosure mediation, the Task Force reviewed data from existing foreclosure mediation programs from across the country. The Task Force concluded that while other programs have enjoyed varying degrees of success, policy makers considering whether to adopt foreclosure mediation statewide must tailor that program to the Commonwealth's unique needs and circumstances. For instance, in Massachusetts policymakers must answer the threshold question whether a mediation program would supplant, or supplement, the protections of Section 35B. A foreclosure mediation program should have clearly articulated goals, and be structured to meet those goals. Additionally, adoption of several best practices will help ensure that both lenders and homeowners are in best position to benefit from foreclosure mediation.

EXHIBIT 1: CHAPTER 194 OF THE ACTS OF 2012, § 4

“There is hereby established a task force to consist of 13 members , 1 of whom shall be a representative of the Massachusetts Bankers Association; 1 of whom shall be the attorney general, or a designee, who shall serve as chair of the task force; 2 of whom shall be the chairs of the joint committee on housing; 2 of whom shall be the chairs of the joint committee on financial services; 2 of whom shall be the chairs of the joint committee on the judiciary; 1 of whom shall be appointed by the minority leader of the house of representatives; 1 of whom shall be appointed by the minority leader of the senate; and 3 of whom shall be appointed by the governor, 2 of whom shall be representatives of a legal organization which represents consumers or homeowners in the commonwealth. The task force shall study ways in which the commonwealth can encourage the prevention of unnecessary vacancies following foreclosures. This shall include, but not be limited to, the feasibility of allowing a foreclosed homeowner to continue to occupy the foreclosed property, in whole or in part, until a binding purchase and sale agreement has been executed with a purchaser who intends to occupy the housing accommodation as such purchaser’s primary residence and who is not a foreclosing owner. The task force shall study the feasibility in which these situations would be subject to landlord-tenant law in the commonwealth and where the foreclosure sale purchaser may initiate eviction proceedings against the foreclosed homeowner in possession of the property, under chapter 239 of the General Laws.

The task force shall also conduct a comprehensive review and evaluation of the existing mediation programs throughout the United States. The evaluation made by the task force shall include, but not be limited to, the varying models of mediation programs and their effectiveness; the percentage of borrowers utilizing mediation, the percentage that remain in their homes after mediation and the percentage who re-default; the costs and procedures necessary for implementing and maintaining a state mediation program; funding sources for a state mediation program; potential entities to oversee the state mediation program; potential credit and borrowing obstacles in jurisdictions with mediation programs; and the feasibility for the judiciary to be involved in the mediation process.

The task force shall submit its findings and recommendations with the clerks of the house of representatives and senate, the joint committee on financial services, the joint committee on housing and the joint committee on the judiciary not later than [July 21, 2014].”¹³⁰

ENDNOTES

1. The legislation creating the Task Force included a seat for the House Chair of the Joint Committee on the Judiciary. At the time of adoption of the final report, the House Chairmanship of that committee was vacant. As a consequence, the final report and supplemental statements were adopted by the remaining Task Force members.
2. Senator Brownsberger, in his capacity as Senate Chair of the Joint Committee on the Judiciary, replaced former Senator and Committee Chair Katherine Clark. Because he replaced Senator Clark after the majority of the Task Force's substantive deliberations had concluded, Senator Brownsberger abstained from voting on final adoption of the report.
3. The full language creating the Task Force is included in Exhibit 1. See note 1, *supra*.
4. See note 3, *supra*.
5. See note 3, *supra*.
6. See National Low Income Housing Coalition, *Out of Reach 2012: America's Forgotten Housing Crisis* 8 (March 2012), <http://nlihc.org/sites/default/files/oor/2012-OOR.pdf> (last visited April 7, 2014).
7. Paul Willen & Lauren Lambie-Hanson, *Foreclosure Externalities* (presentation before Foreclosure Impacts Task Force) 3 (April 10, 2013) (Willen & Lambie-Hanson presentation). Paul Willen and Lauren Lambie-Hanson are researchers with the Federal Reserve Banks of Boston and Philadelphia, respectively; their presentation was based in part on papers authored by each. See Kristopher S. Gerardi, Eric Rosenblatt, Paul S. Willen, and Vincent W. Yao, *Foreclosure Externalities: Some New Evidence*, Public Policy Paper No.12-5, Federal Reserve Bank of Boston (July 25, 2012), and Lauren Lambie-Hanson, *When Does Delinquency Result in Neglect? Mortgage Delinquency and Property Maintenance*, Public Policy Paper 13-1, Federal Reserve Bank of Boston (March 15, 2013). Willen and Lambie-Hanson presented to the Task Force in their respective capacities as researchers, not as representatives of the Federal Reserve Banks of Boston or Philadelphia, or the Federal Reserve System.
8. Willen & Lambie-Hanson presentation, *supra* at 3.
9. *Id.* at 5.
10. Lauren Lambie-Hanson, *When Does Delinquency Result in Neglect? Mortgage Delinquency and Property Maintenance*, Public Policy Paper 13-1, Federal Reserve Bank of Boston, 1, 20 (March 15, 2013).
11. Willen and Lambie-Hanson presentation, *supra* at 5.
12. Memorandum from Massachusetts Department of Revenue, *Fiscal Impact of S. 1323 (H. 2664) and S. 1368 (H. 2534) Adopting Federal Exclusion of Forgiven Mortgage Debt* (2013).
13. *Id.*
14. *Id.*
15. See Commonwealth of Massachusetts, *FY 2014 Tax Expenditure Budget, 1.204-Abandoned Building Renovation Deduction*, http://www.mass.gov/bb/h1/fy14h1/tax_14/items/htax1204.htm (last visited April 25, 2014).
16. See Commonwealth of Massachusetts, *FY 2014 Tax Expenditure Budget, 2.206 -Economic opportunity areas; tax deduction for renovation of abandoned buildings*, http://www.mass.gov/bb/h1/fy14h1/tax_14/items/htax2206.htm (last visited April 25, 2014).
17. Chapter 194 of the Acts of 2012, § 4. See note 3, *supra*.
18. For example, Springfield's mediation ordinance is currently being challenged in federal court, and has yet to be implemented. See *Easthampton Savings Bank v. Springfield*, 736 F.3d 46 (1st Cir., July 3, 2013), certifying questions of law to Massachusetts Supreme Judicial Court, *Easthampton Savings Bank v. Springfield*, SJC-11612. See also Maureen Turner, *City Lags on Foreclosure Mediation Ordinance*, *Valley Advocate*, Oct. 30, 2013, <http://www.valleyadvocate.com/article.cfm?aid=17311> (last visited April 25, 2014).
19. Memorandum from Heather Scheiwe Kulp, Staff Att'y, Resolution Sys. Inst., to the Unif. Law Comm. on Residential Mortg. Foreclosure, *Mortgage Foreclosure Committee Meeting Re: Dispute Resolution 2-3* (May 16, 2012), http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/5_2012may16_RREMPPF_Dispute%20Resolution%20Memo_Kulp.pdf (last visited April 25, 2015) (Kulp Memorandum). There is considerable debate concerning whether foreclosure mediation

programs are in fact bona fide mediation programs, or instead a form of alternative dispute resolution. While mediation “is defined by confidential communications, neutrality of the mediator, and voluntary resolution of any issues,” and many mediators follow the Model Standards of Conduct of Mediation, to the extent that some foreclosure dispute resolution programs do not meet existing mediation standards or definitions, they may not properly be characterized as foreclosure mediation. See Kulp Memorandum at 3. Dispute resolution is a more general term, used to describe “any process in which borrower and lender discuss alternatives to foreclosure in the presence of a neutral third party.” Heather Scheiwe Kulp & Jennifer Shack, *A (Mortgage) Crisis in Communication: Foreclosure Dispute Resolution as Effective Response?*, 66 Ark. L. Rev. 185, 193 (2013) (Kulp and Shack). Other terms used to describe these programs include “conciliation,” diversion,” and “settlement conference.” Kulp and Shack at 194. Because the Task Force was charged with examining “mediation programs,” the term mediation, as used throughout this report, includes the terms mediation, dispute resolution, and other related concepts.

20. See Jacqueline C. Hagerott, *Foreclosure Mediation: Responding to the Current Crisis*, 40 Cap. U. L. Rev. 899, 901 (2012) (Hagerott).
21. U.S. Dep’t. of Hous. & Urban Dev. & U.S. Dep’t of Justice, *Emerging Strategies for Effective Foreclosure Mediation Programs* (2010) 1, <http://www.justice.gov/atj/effective-mediation-prog-strategies.pdf> (last visited April 25, 2014) (Emerging Strategies).
22. Kulp and Shack, *supra* at 187.
23. See *id.* at 187-190.
24. *Id.* at 187.
25. *Id.* at 187.
26. *Id.* at 187-188.
27. Hagerott, 40 Cap. U. L. Rev. at 914.
28. Kulp and Shack, *supra* at 188.
29. *Id.* at 188.
30. *Id.* at 188-189.
31. *Id.* at 189.
32. *Id.* at 188.
33. Unless otherwise noted, the data in the table below is compiled from Heather Scheiwe Kulp, *Foreclosure Dispute Resolution Program Models State-by-State*, Resolution Systems Inst. (Sep. 2012), http://www.aboutrsi.org/pfimages/ForeclosureMediationProgramModels_September2012.pdf (last visited April 25, 2014) (Kulp State-by-State). The various reports used in this section were published by the Resolution Systems Institute, an organization that endeavors to enhance court alternative dispute resolution systems “through expertise in program development, research and resources . . . RSI provides a range of information-gathering, clearinghouse, evaluation, analysis and training services.” Resolution Systems Institute, *Mission*, <http://www.aboutrsi.org/mission.php?ID=miss> (last visited April 25, 2014). The reports used to compile the Foreclosure Impact Task Force’s foreclosure mediation findings include Kulp State-by-State, *supra*; Jennifer Shack and Heather Scheiwe Kulp, *Foreclosure Dispute Resolution By the Numbers*, Resolution Systems Inst. (Sep. 2012), <http://www.aboutrsi.org/pfimages/ForeclosureDRStats.pdf> (last visited April 25, 2015) (Shack and Kulp By the Numbers); and *Foreclosure Mediation Programs Funding*, Resolution Systems Inst. (Jan. 2011), <http://www.aboutrsi.org/pfimages/ForeclosureMediationFunding.pdf> (last visited April 25, 2014) (RSI Funding).
34. Some limited-jurisdiction programs, including foreclosure mediation programs adopted via ordinance in Lawrence, Lynn, Worcester and Springfield, Massachusetts, have not yet been launched and have not yet conducted mediations. These programs are not included in the inventory of programs provided in this report.
35. Ohio’s 88 counties, all of which have adopted foreclosure mediation, have the option of selecting an opt-in or opt-out enrollment model. At the time of researching this issue, a specific breakdown of which counties have adopted opt-in and opt-out enrollment was not available.
36. Circuit Court of Cook County, *Mortgage Foreclosure Mediation Partners*, <http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/ChanceryDivision/MortgageForeclosureMechLien/MediationProgram/Partners.aspx> (last visited April 29, 2014).

37. Maryland Office of Administrative Hearings, Section on Foreclosure Mediation, <http://www.oah.state.md.us/foreclosuremediation.asp> (last visited April 28, 2014).
38. See Jason Rosenbaum, St. Louis Beacon, Nixon lets bill eliminating foreclosure mediation programs go into effect, July 12, 2013, https://www.stlbeacon.org/#!/content/31836/foreclosure_mediation_bill_over (last viewed April 3, 2014).
39. United States Arbitration & Mediation Midwest, Inc., Section on Foreclosure Mediation Program, St. Louis County Foreclosure Mediation Program, <http://www.usam-midwest.com/for.shtml> (last visited April 29, 2014).
40. Iowa Mortgage Help, Help for Homeowners, <http://www.iowamortgagehelp.com/homeowners/> (last visited April 29, 2014).
41. See Kulp State-by-State, *supra* at 5.
42. See University of Illinois College of Law, Community Preservation Clinic, <http://www.law.illinois.edu/academics/community-preservation> (last visited April 29, 2014).
43. The Maryland Office of Administrative Hearings manages the program. See note 37, *supra*.
44. The United States Bankruptcy Court for the District of New Jersey also offers a loss mitigation program for those filing under Chapters 7, 11, 12 or 13 of the United States Bankruptcy Code. The program is not officially mediation, but instead a process to encourage negotiation, so that parties – with the assistance of the Bankruptcy Court – can seek alternatives to foreclosure. See U.S. Bankr. D. N.J., Loss Mitigation Program and Procedures, http://www.njb.uscourts.gov/sites/default/files/downloads/2011_07_29_Loss_Mitigation_Program_and_Procedures_7-28-11.pdf 1 (last visited April 28, 2014). See also Kulp State-by-State *supra* at 96-98.
45. For the purposes of this report, Washington D.C. is considered a state. Like other statewide programs, the Washington, D.C. program applies across the entire district.
46. The Washington, D.C. Department of Insurance, Securities and Banking manages the program. See Information for Homeowners – Foreclosure Mediation Program, <http://disb.dc.gov/page/information-homeowners-foreclosure-mediation-program-fmp> (last visited April 25, 2014).
47. The Iowa Attorney General’s office assists in coordination. See Kulp State-by-State, *supra* at 61.
48. Nevada is a non-judicial jurisdiction. However, the court allows participants to seek limited judicial review of mediations. See Nevada Supreme Court, Rules for Foreclosure Mediation, Rule 21, <http://www.nevadajudiciary.us/images/foreclosure/adkt435amendedrules.pdf> (last visited April 28, 2014).
49. The Oregon Attorney General’s has contracted with a private entity, Mediation Case Manager, to manage the program. See Oregon Foreclosure Avoidance Program, Oregon Department of Justice, http://www.doj.state.or.us/consumer/pages/foreclosure_mediation.aspx (last visited April 29, 2014).
50. The Washington Department of Commerce manages the program. See Washington Department of Commerce, Foreclosure Fairness Program, <http://www.commerce.wa.gov/Programs/housing/Foreclosure/Pages/default.aspx> (last visited April 29, 2014).
51. Hawaii has programs on both a statewide and limited-jurisdiction basis. Hawaii’s limited jurisdiction program is in the 3rd Judicial Circuit. The 3rd Judicial Circuit’s program, established in 2009, predates the statewide program, which was established in 2011. While Hawaii’s foreclosure mediation program applies to non-judicial foreclosures, lenders typically have the option of pursuing a judicial foreclosure. There is evidence that some lenders and servicers have attempted to bypass Hawaii’s statewide non-judicial mediation program by choosing to pursue judicial foreclosure. See Andrew Gomes, Foreclosures Might Swamp Isle Courts, Honolulu Star Adviser, Aug. 5, 2011, http://www.staradvertiser.com/business/businessnews/20110615_foreclosures_might_swamp_isle_courts.html (last visited April 28, 2014).
52. The Department of Commerce and Consumer Affairs oversees Hawaii’s mediation program. Mediation is contracted out to paid neutrals. See Hawaii Department of Commerce and Consumer Affairs, Mortgage Foreclosure Dispute Resolution (MFDR) Program, <http://cca.hawaii.gov/oah/mfdr/mortgage-foreclosure-dispute-resolution-mfdr-program/> (last visited April 28, 2014).
53. See R.I. Gen. Laws § 34-27-3.2 (2013). The City of Providence, Rhode Island had a local mediation ordinance. See Kulp State-by-State, *supra* at 116. However, the statewide program established pursuant to R.I. Gen. Laws § 34-27-3.2 appears to preempt all local foreclosure mediation programs in that state. See R.I. Gen. Laws § 34-27-3.2(b). Additionally, the United States Bankruptcy Court for the District of Rhode Island has a loss mitigation program for borrowers that are debtors and have filed under Chapter 7, 11, 12 or 13 of the Bankruptcy Code. See Kulp State-by-State, *supra* at 118-119. The program does not provide third-party neutrals. Kulp State-by-State, *supra* at 121.

54. The Delaware Department of Justice, Division of Consumer Protection administers the program. See Superior Court of the State of Delaware Administrative Directive No. 2012-2 2, http://courts.delaware.gov/Superior/pdf/Administrative_Directive_2013_2.pdf (last visited April 25, 2014).
55. Florida had a statewide program that ended in December 2011, because few eligible borrowers were participating. Jeff Ostrowski, Admitting failure, Florida Supreme Court ends foreclosure mediation program, Palm Beach Post, Dec. 19, 2011, <http://www.palmbeachpost.com/news/news/real-estate/admitting-failure-florida-supreme-court-ends-forec/nL2bJ/> (last visited April 28, 2014). However, the court order that ended the statewide program permitted individual circuits to create their own mediation programs. See Kulp State-by-State, *supra* at 31. Some of these circuit-based programs use opt-in enrollment, and some use opt-out. Accordingly, Florida appears twice on this table.
56. At least two of these programs contact a portion of their mediation work to paid mediators. See Kulp State-by-State, *supra* at 35-39.
57. Because Hawaii has both limited-jurisdiction and statewide programs, it appears twice in this table. See note 51, *supra*.
58. Illinois does not have a statewide program. Instead, each judicial circuit has authority to implement a foreclosure program. See Supreme Court of Illinois, Illinois Supreme Court Adopts New Rules to Ease Burdens of Home Foreclosure Process (Feb. 22, 2013), <http://www.state.il.us/court/media/PressRel/2013/022213.pdf> (last visited April 28, 2014). There is no requirement that the programs adopt opt-out or opt-in procedures. Out of those five judicial circuits that have adopted mediation, two have adopted opt-in, and three have adopted opt-out. See Kulp State-by-State, *supra* at 46-58.
59. Cook County works with The Center for Conflict Resolution to train volunteer mediators. See State of Illinois Circuit Court of Cook County, Mortgage Foreclosure Mediation Home, <http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/ChanceryDivision/MortgageForeclosureMechLien/MediationProgram/Partners.aspx> (last visited April 28, 2014).
60. The Ohio State Supreme Court put forth a model for implementing mediation programs, but does not mandate that counties adopt it. Nonetheless, all 88 counties in Ohio have adopted some form of foreclosure mediation. Supreme Court of Ohio & The Ohio Judicial System, Foreclosure Mediation Program Model Overview, <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/overview.asp> (last visited April 29, 2014).
61. Ohio counties have discretion to choose between opt-in and opt-out models. See Kulp State-by-State, *supra* at 107. For this reason, Ohio appears twice on this table. A specific breakdown of which counties have chosen opt-in and opt-out models was not available for this report.
62. Eighteen counties, including Philadelphia, have implemented foreclosure mediation programs. Four of the programs are opt-out, and 14 are opt-in. See Kulp State-by-State, *supra* at 112 and 114. For this reason, Pennsylvania appears twice on the table.
63. See note 55, *supra*.
64. Florida's 6th Judicial Circuit's foreclosure mediation program is managed by the non-profit Mortgage Managers, Inc. See Mortgage Foreclosure Procedures Update, Fla. 6th Ct. Admin. Order No. 2013-026, <http://www.jud6.org/LegalCommunity/LegalPractice/AOSAndRules/aos/aos2013/2013-026w-attachlistforweb.htm> (last visited April 30, 2014).
65. In order for a county program to receive funding from the state, the program must adopt an opt-out mediation model. See Kulp State-by-State, *supra* at 64.
66. See notes 35 and 60, *supra*.
67. See note 62, *supra*.
68. The program is managed by United States Arbitration and Mediation Midwest, Inc. See Kulp State-by-State, *supra* at 87.
69. Unless otherwise noted, the data in the funding table below is compiled from RSI Funding, *supra* at note 33.
70. See Kulp State-by-State at 103-104, 115.
71. See generally RSI Funding.
72. RSI Funding, *supra* at 3 and 9.
73. Geoff Walsh, National Consumer Law Center, Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation, 35-36, (February 2012), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-mediation.pdf (last visited April 30, 2014) (Walsh).

74. Walsh, *supra* at 35.
75. Walsh, *supra* at 35.
76. Walsh, *supra* at 35.
77. Walsh, *supra* at 35.
78. Unless otherwise noted, filing fee surcharges are paid by the lender.
79. See Walsh, *supra* at 35.
80. See Walsh, *supra* at 35.
81. See Walsh, *supra* at 35.
82. See Walsh, *supra* at 35.
83. See Walsh, *supra* at 35.
84. Unless otherwise noted, the statistics in the table below are compiled from Shack and Kulp *By the Numbers*, *supra* at note 33. Please note that the statistics in the table are from different time periods, depending on the program. Moreover, the table only includes statistics from those programs that have made statistics available; those programs that have not compiled statistics are not included in the table. Additionally, jurisdictions do not necessarily use the same calculation methodologies. For example, Cook County, Illinois does not count a borrower as being referred to mediation until after the borrower meets with housing and legal counselors, and is ordered by the court to mediation. See Shack and Kulp *By the Numbers*, *supra* at 2.
85. Kulp and Shack, 66 Ark. L. Rev. at 191.
86. See Kulp and Shack, *supra* at 212-214.
87. See Kulp and Shack, *supra* at 212-213.
88. See Kulp and Shack, *supra* at 212-213.
89. See Kim Miller, Foreclosure Mediation Program's Low Rate of Success Leaves Its Future in Doubt, Palm Beach Post, Sept. 21, 2011, <http://www.palmbeachpost.com/news/news/real-estate/foreclosure-mediation-programs-low-rate-of-success/nLyBn/> (last visited April 30, 2014).
90. Fiscal Year 2013 (July 1, 2012-June 30, 2013) State of Nevada Foreclosure Mediation Program Report 1, <http://foreclosure.nevadajudiciary.us/images/statistics/july%202012%20-%20june%202013.pdf> (last visited April 30, 2014).
91. *Id.* at 1-2.
92. *Id.* at 2.
93. *Id.* at 2.
94. *Id.* at 4.
95. *Id.* at 4.
96. Kulp and Shack, 66 Ark. L. Rev. at 201.
97. Kulp and Shack, *supra* at 201.
98. Chapter 194 of the Acts of 2012, § 4.
99. Kulp and Shack, *supra* at 209-210.
100. See Kulp and Shack, *supra* at 209.
101. U.S. Dep't. of Hous. & Urban Dev. & U.S. Dep't of Justice, Emerging Strategies for Effective Foreclosure Mediation Programs (2010) 2, <http://www.justice.gov/atj/effective-mediation-prog-strategies.pdf> (last viewed December 12, 2013) (Emerging Strategies).
102. See Kulp and Shack, *supra* at 217-218. See also Hagerott, 40 Cap. U. L. Rev. at 908-909 .
103. Kulp and Shack, *supra* at 217.
104. Kulp and Shack, *supra* at 217.
105. Kulp and Shack, *supra* at 190.

106. See Kulp and Shack, *supra* at 190.
107. Hagerott, *supra* at 909.
108. Hagerott, *supra* at 909.
109. See generally Kulp and Shack, *supra* at 212-216. See also Emerging Strategies, *supra* at 7.
110. Kulp and Shack, *supra* at 190.
111. Kulp and Shack, *supra* at 190-191.
112. Kulp and Shack, *supra* at 190-191.
113. Heather Kulp, Resolution Systems Institute, Best Practices in Foreclosure Mediation, available at <http://www.aboutrsi.org/pfimages/ForeclosureMediationBestPractices.pdf> 4 (last visited April 30, 2014) (Kulp Best Practices).
114. Kulp Best Practices, *supra* at 4.
115. Hagerott, *supra* at 910; Kulp Best Practices, *supra* at 3; Kulp and Shack, *supra* at 225-226.
116. Kulp Best Practices, *supra* at 2-3.
117. Kulp Best Practices, *supra* at 4.
118. Kulp Best Practices, *supra* at 3; Hagerott, *supra* at 918; Emerging Strategies, *supra* at 5.
119. Emerging Strategies, *supra* at 5. See also Walsh, *supra* at 22.
120. Kulp, *supra* at 3.
121. Kulp and Shack, *supra* at 219.
122. Kulp and Shack, *supra* at 219-224. See also Emerging Strategies, *supra* at 7.
123. Hagerott, *supra* at 921; Kulp and Shack, *supra* at 224.
124. Kulp and Shack, *supra* at 222.
125. Kulp Best Practices, *supra* at 5.
126. Kulp Best Practices, *supra* at 5.
127. See Hagerott, *supra* at 915-916.
128. Kulp Best Practices, *supra* at 4-5. See also Hagerott, *supra* at 926-927.
129. Kulp Best Practices, *supra* at 5. See also Hagerott, *supra* at 926-927.
130. The deadline for the Task Force to submit its final report was extended from December 31, 2013 to July 21, 2014. See Chapter 85 of the Acts of 2014.

APPENDIX A: SUPPLEMENTAL STATEMENT OF KEVIN F. KILEY, MASSACHUSETTS BANKERS ASSOCIATION

(Joined by Representative Michael Costello, Chair, Joint Committee on Financial Services; Julieann Thurlow, Reading Co-Operative Bank; and Robert J. Gillis, Jr., Cape Ann Savings Bank)

On behalf of our more than 170 member institutions located throughout Massachusetts and New England, the Massachusetts Bankers Association appreciates the opportunity to provide a dissenting point of view to the final report of the Commonwealth's Foreclosure Impacts Task Force. Over the last seven years, the Massachusetts Legislature has enacted three separate foreclosure prevention laws -- Chapter 206 of the Acts of 2007, Chapter 258 of the Acts of 2010, and most recently Chapter 194 of the Acts of 2012. Each one of these state laws extended new protections for Massachusetts consumers, added costs to the lending community and significantly delayed the time frames to complete a foreclosure in the Commonwealth. It should also be noted that the framework and protections incorporated into Chapter 194 of the Acts of 2012 were filed on behalf of Attorney General Martha Coakley, the leading advocate for homeowner protections in the Commonwealth.

During the past eight years, our member institutions, including large multi-state national banks and community banks, have taken a pro-active role in assisting borrowers at risk for foreclosure. Not only have our member banks been working to implement these laws, many local banks also participate in numerous state and federal programs to help at-risk borrowers, initiated their own bank-specific loss-mitigation efforts and assisted in funding non-profit and housing counseling agencies. In fact, since 2008 the Massachusetts lending industry as part of our state budget has contributed more than \$7 million to fund homeowner counseling and foreclosure assistance programs.

While the Association appreciates the work of the Task Force and supports several of its preliminary recommendations, we have a number of concerns regarding some of the findings of the Task Force which are detailed below.

REDUCING POST-FORECLOSURE VACANCIES

Our member institutions share the Task Force's goal of ensuring that foreclosed properties are returned to non-bank ownership as quickly as possible and do not remain vacant for long periods of time. However, we are deeply concerned and would strongly oppose potential legislative mandates requiring lenders to allow foreclosed homeowners to remain in their properties for extended periods of time as tenants.

Many properties in foreclosure are poorly maintained, since owners who cannot afford to pay their mortgages may also be unable to pay for needed upkeep and repairs. Moreover, the Commonwealth's current foreclosure laws and challenges by delinquent borrowers delay the foreclosure process and result in properties falling further into disrepair. In fact, according to our members many occupants of these properties are many months, if not years, delinquent on their mortgages before a lender can obtain title to the property through the existing Massachusetts foreclosure process. These delays, and the subsequent deterioration of the properties, decrease the opportunities for the homes to be sold to new owners.

There are also significant legal issues with providing tenancy rights to the former owner of a foreclosed property. Under current law, a former owner is deemed a "tenant at sufferance" and has only the right to a simple notice to

vacate and the protections of a summary process action. While judges in these cases have discretion to provide the former owner with additional time to relocate, the tenant does not have the right to raise the existence of problems (i.e. code violations) with the property as a defense to eviction. In addition, the state laws entitling tenants to an automatic stay of 6-12 months do not apply. Conferring additional legal protections on the former owners of these properties will only further delay the goal of returning these homes to market and could lead to potential further deterioration of the properties.

MBA strongly opposes any mandatory tenancy program for the former owners of foreclosed properties. While a tenancy arrangement may be suitable in some very limited circumstances, banks and other lenders should retain the flexibility to offer these programs on a voluntary, case-by-case basis.

In order to reduce the number of vacant properties in various stages of the foreclosure process, MBA recommends that the Commonwealth consider instituting an expedited foreclosure process for these properties so that lenders can gain title quickly – before the home is left to deteriorate. Specifically, we believe lenders should have greater flexibility to proceed in cases where a borrower can simply not afford a property and wishes to move or transition to a new property. This would help lenders move these properties to the market faster and ultimately into new ownership. In order to accomplish this objective, MBA strongly recommends that Sections 35A and 35B of Chapter 244 of the Massachusetts General Laws (the “right-to-cure” statute) be amended to allow a borrower the opportunity to make a binding waiver of his or her cure period and allow the lender to proceed immediately to foreclosure.

Our member banks also continue to face instances where borrowers simply abandon properties leaving a lender in the position of being asked by a municipality to maintain a property to which it lacks title or has been unable to proceed to foreclosure during the Right to Cure period. We believe that the public interest would be greatly served by allowing for an expedited process in these cases. However, in many instances, servicers are unable or unwilling to state under oath that a property is vacant (and thus exempt from the requirements of Sections 35A and 35B) because of the negative ramifications and legal liability of even good faith errors. Servicers should be able to avail themselves of a “safe harbor” by obtaining confirmation from the municipality that the property is not occupied and determined to be abandoned.

We recommend that Section 35A include a provision allowing a municipality’s Board of Health, Fire Department or Inspectional Services Department to certify that a property is vacant and/or abandoned, thereby allowing a lender to proceed to foreclosure without waiting for the 150 day cure period to expire. In this way, lenders can work with municipalities to gain possession of vacant properties in a timely manner before greater damage or deterioration occurs.

FORECLOSURE MEDIATION

As we noted above, three state laws providing broad protections for homeowners at risk of foreclosure have been enacted in Massachusetts since 2007 which have slowed the foreclosure process and created opportunities for delinquent borrowers to obtain loan modifications or other forms of relief. In fact, state regulations implementing the most recent law, Chapter 194 of the Acts of 2012, were finalized only in June 2013 and lenders are still in the initial stages of compliance with these new requirements.

Given the numerous changes to state law in recent years, as well as the improving Massachusetts housing market, MBA questions the need for our state legislature to consider a mandatory foreclosure mediation program in the Commonwealth. Under current law, borrowers have lengthy periods of time to bring their loans current and, in

some cases, have the statutory right to request a loan modification if their mortgage meets certain criteria. At-risk borrowers also have access to homeowner counseling through the Attorney General's HomeCorps program as well as numerous non-profit entities.

The Association is deeply concerned that a mandatory mediation program will only cause further delays in the lengthy foreclosure process without providing any additional benefits to many borrowers. While many proponents of mediation indicate that the mediation period would run concurrently with the 150-day right-to-cure period, experiences in other states have varied widely and it is unclear if there is sufficient capacity within the housing counseling groups or enough mediators to ensure that the process is not delayed well beyond the current statutory timeframe. As we noted above, further delays will result in additional abandonment, vacancies and deterioration of properties.

CONCLUSION

Finally, MBA strongly believes that before moving forward with any further changes to the Massachusetts foreclosure laws, policymakers should undertake a comprehensive analysis that examines whether the three previous laws have been effective in helping delinquent borrowers, the current timelines to foreclose and their impact on the Massachusetts housing and lending marketplace.

APPENDIX B: *JOINT SUPPLEMENTAL STATEMENT OF JULIEANN M. THURLOW, READING CO-OPERATIVE BANK, AND ROBERT J. GILLIS, JR., CAPE ANN SAVINGS BANK*

Certain recommendations incorporated in the Foreclosure Impacts Task Force report would in the opinion of the Bank officer members cause significant harm to the Massachusetts state-chartered Community Banks and were not adequately supported by the data reviewed by the Task Force. In addition, the Task Force did not consider the effect of the new rules promulgated by the Consumer Financial Protection Bureau to meet the requirements of the Dodd Frank Act or the State's newly enacted rules and regulations under Section 35A and 35B of Chapter 244.

The following elements included in the report are disputed:

a. Property value conclusions driving recommendations are not supported by the Fed study which reported evidence of declines in home values between .6% and 1.2% in areas where there were suspected foreclosures and REO sales.

The survey was performed during a period of severe economic instability when market values were declining nationally; REO properties generally sell at 10- 20% less than market value homes and would influence comparables for any fair market sale in proximity. Resulting declines noted at 1.2%, .9% and .6% are a reasonable market reaction to economic conditions, are not significant enough to merit the recommendations of the report.

Alternatively, if one is satisfied that the data supports the above conclusion, then moving a delinquency that cannot be rectified through foreclosure as efficiently as possible, stabilizing the family in an affordable alternative would be a better resolution thereby hastening market value stabilization.

b. Lenders Allowing Homeowners to continue living in after Foreclosures

There was no evidence provided to the Task Force to support this program, nor was the anecdotal program framework vetted by the Committee. More importantly the cost to effect and administer rental properties by banks, conflicts with banking laws preventing speculative real estate holdings and the legal issues surrounding post foreclosure tenant rights are significant and onerous.

c. The report states that the Task Force heard no evidence that properties occupied by former homeowners would be less marketable, however, the opposite is true and should be acknowledged. There was no evidence that tenant occupancy would not harm the sale price or extend the time on market. Conventional wisdom and business experience shows that clean, vacant homes that have minimal impediments to consumers and can be shown at any time and sell faster than the alternative.

d. Mediation – The Task Force heard from three sources about state programs however there was no reconciliation of the data from judicial foreclosure states or data supporting or discounting the success of the programs.

Rather than debate the merits of the data provided or the ultimate goal of the presentations, Mediation as an alternative should not be considered with the current amalgamation of regulations in place in the state as it would make a cumbersome process worse and further delay the foreclosure process.

Mediation in its truest form would provide an interesting solution for the communication problems that are rife in the collection and foreclosure process as many families avoid or deny their problems. However, layering another protection on top of the current legislative fixes will just delay the process for many families and prevent them from addressing the underlying cause or difficulty.

Mediation could provide an alternative to the 150 day cure notice. The delay as presently enacted is generally ignored by borrowers creating a deeper delinquency for which borrowers cannot recover. Mediation would bring the creditor and borrower together to identify a mutually agreeable temporary resolution that meets both of their needs earlier in the process and preserves homeownership. We believe community banks would support mediation if other cumbersome and complex rules and laws were removed and replaced with a more thoughtful solution.

It is our observation that this task force and its members are focused on foreclosure and vacancy issues that are predominately state metropolitan issues. The proposals recommended if written into law would affect the state as a whole. Care needs to be taken that city solutions do not become statewide problems and affect the cost of a mortgage for every citizen of the Commonwealth.

Lastly, all committee members acknowledged that their efforts are focused on abuses observed at the largest institutions or large servicers and generally state chartered community banks have been responsible and respectful in managing their relationships with customers in default.

In the event the Task Force recommendations are considered or elements are introduced in the legislative process, we would respectfully recommend a mechanism to excuse small prudent lenders from additional rules that will prevent the Bank from handling its relationships with its customers as they have in the past. The Task force discussed whether Bank size or volume of foreclosures would be potential metrics for exemptions without conclusion; the writers are of the opinion that 10 or fewer foreclosures annually could be a reasonable breakpoint for consideration; we would suggest that banks at that level of distressed borrowers maintain a close relationship with the community and their customers.

Thank you for the opportunity to register our concerns.

*APPENDIX C: SUPPLEMENTAL STATEMENT OF
MAX WEINSTEIN, LEGAL SERVICES CENTER OF
HARVARD LAW SCHOOL*

*(Joined by Senator James Eldridge, Chair, Joint Committee on Housing; and
Elyse Cherry, Boston Community Capital*)*

In creating the Foreclosure Impacts Task Force, the General Court directed us to study “the feasibility of allowing a foreclosed homeowner to continue to occupy the foreclosed property.” We have studied that question, and, as our report states, we found that “it is wholly feasible for large banks to allow foreclosed homeowners to continue to occupy and rent their homes after foreclosure until those homes are purchased by a third party as a primary residence.”

Because our report cites only a small selection of the evidence that led us to reach this conclusion, I write separately to provide a comprehensive summary of the empirical support for our finding. The evidence presented to the Task Force, which is described in detail below, demonstrated the following:

- It is actually **harder** for banks to resell vacant homes. Leaving a home vacant typically causes physical deterioration of the home, and has a negative impact on resale value.
- Vacant properties harm the value of surrounding homes and have caused hundreds of millions of dollars in home value to be lost in Massachusetts.
- Vacant homes have cost communities across Massachusetts to lose millions of dollars in tax revenue.
- Vacant homes attract both violent and nonviolent crime. Indeed, violent crime within 250 feet of foreclosed homes increases by more than 15% once a foreclosed home becomes vacant.
- Large lenders and servicers already maintain departments to manage bank-owned homes, and a number have already designed and implemented programs that allow foreclosed homeowners to rent their homes.

All parties benefit from allowing foreclosed homeowners to rent their homes. Occupancy preserves the value of the bank’s investment, Massachusetts communities are spared the blight of foreclosed homes, and foreclosed homeowners are afforded additional time to relocate. The Task Force rightfully concluded that such a policy is both feasible and desirable. The following is a detailed discussion of the evidence summarized above.

* While I join Max Weinstein’s statement with respect to the adverse impacts of vacancies, any legislative solution should take into account of the fact that lenders with fewer than five foreclosures annually do not materially contribute to the vacancy problem, and accordingly should be exempt.

1. Keeping homes occupied preserves their resale value.

Leaving a home unoccupied typically leads to deterioration of its physical condition, weakens the seller's bargaining position, and prolongs the stigma of foreclosure.¹ An unoccupied house will likely be in greater need of repair, since no resident is invested in maintaining the property and vacancy often invites vandalism.² Additionally, the seller will almost certainly have more bargaining power against potential buyers when the house is occupied—a vacant home can create the impression that the seller is desperate to sell. Furthermore, the stigma of foreclosure will linger much longer if the house sits vacant, serving as a reminder to potential buyers that the home is on the market as a result of a foreclosure.

Multiple studies address the effect of vacancy on price and find a negative impact. In a thorough study controlling for various property and neighborhood qualities, distinguished real estate economists Clauretie and Daneshvary find that vacancy has a negative impact of -0.9% on home price.³ Another 2002 study finds that vacant homes may sell for as much as 8–12% less than occupied homes, based on data from single-family dwellings in Stockton, CA from 1997 and 1998.⁴

Numerous economic studies also find that vacancy has a statistically significant negative effect on resale values.⁵ These findings suggest that banks will actually be able to sell REO properties at higher prices if they are occupied by foreclosed homeowners, who will maintain the condition of the property, ward off vandalism, and ensure that the home appears “lived-in” to potential buyers.

In fact, the practices of the real estate industry itself provide evidence that occupied homes are easier to sell. As one journalist explains, “most realtors will tell you a furnished house is easier to sell. That’s why there’s a whole home-staging industry.”⁶ Indeed, there are companies that specialize in renting foreclosed homes for the very

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- 1 See Kai-yan Lee, *Examining REO Sales and Price Discounts in Massachusetts*, in REO & VACANT PROPERTIES: STRATEGIES FOR NEIGHBORHOOD STABILIZATION (A JOINT PUBLICATION OF THE FEDERAL RESERVE BANKS OF BOSTON AND CLEVELAND AND THE FEDERAL RESERVE BOARD), at 56 (2010), available at http://www.phil.frb.org/phil_mailing_list/community-development/publications/special-reports/reo-compendium/reo-and-vacant-properties-strategies-for-neighborhood-stabilization.pdf#page=57.
 - 2 See John Campbell, Stefano Giglio, and Parag Pathak, *Forced Sales and House Prices* (NBER Working Paper No. 14866) (2009), available at <http://www.nber.org/papers/w14866> at 3 (in a comprehensive study of Massachusetts homes over 20 years, noting that “mortgage lenders must protect foreclosed houses while they are vacant; the threat of vandalism may be greater in bad neighborhoods, and costs of protection likely account for a larger fraction of the value of a low-priced house.”).
 - 3 Terrence Clauretie and Nassar Daneshvary, *Estimating The House Foreclosure Discount Corrected for Spatial Price Interdependence and Endogeneity of Marketing Time*, 37(1) REAL ESTATE ECON. 43, 60–62 (2009), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6229.2009.00234.x/pdf>.
 - 4 John Knight, *Listing Price, Time on Market, and Ultimate Selling Price: Causes and Effects of Listing Price Changes*, 30(2) REAL ESTATE ECON. 213 (2002), available at http://francois.marginalq.com/Biblio/Knight_REE_2002.pdf.
 - 5 See also William G. Hardin and Marvin L. Wolverton, *The Relationship Between Foreclosure Status and Apartment Price*, 12 J. OF REAL ESTATE RESEARCH 101 (1996) (finding a vacancy discount for apartment sales to non-institutional buyers in Phoenix, Arizona between January 1993 and November 1994); Paul Anglin, et al., *The Trade-off Between the Selling Price of Residential Properties and Time-on-the-Market: The Impact of Price Setting*, 26(1) J. OF REAL ESTATE FIN. AND ECON. 104 (2003) (finding that vacancy has a statistically significant impact on selling price using data on single family homes in Arlington, TX in 1997, and noting that such a result is “[t]ypical for studies of this type”); Geoffrey K. Turnbull and Velma Zahirovic-Herbert, *Why Do Vacant Houses Sell for Less: Holding Costs, Bargaining Power or Stigma?*, 39(1) REAL ESTATE ECONOMICS 19 (finding “robust vacancy effects on price and liquidity across all market phases consistent with greater seller holding cost and diminished bargaining power that does not vary systematically over the market cycle.”). Additionally, there is some evidence that occupied homes sell in a shorter period of time. See Anglin, *supra* (finding a small but statistically significant positive vacancy effect on the time a house sits on the market before being sold).
 - 6 Blake Farmer, *Banks Try to Make Vacant Foreclosures Look ‘Lived-in,’* AM. PUB. MEDIA, May 2, 2011, <http://www.marketplace.org/topics/business/banks-try-make-vacant-foreclosures-look-lived>.

purpose of making them easier to sell.⁷ One such firm, Showhomes, explains that “[p]rospective buyers often see a vacant house as stark and uninviting . . . Many buyers can’t begin to visualize furniture placement or understand how the house will function for them.”⁸ Furthermore, “[o]lder houses may suffer from wear and dated finishes. These details become glaring defects when the house is vacant.”⁹ The existence of an entire industry that aims to make homes look lived-in to increase their selling price demonstrates that permitting foreclosed owners to remain in their homes will help maintain property values.¹⁰

2. Post-foreclosure vacancies negatively impact the value of surrounding homes and have resulted in hundreds of millions of dollars in lost home value in Massachusetts in recent years.

The vacant status of a property has a clear negative price impact on the value of surrounding homes.¹¹ Part of the price impact can be attributed to the fact that foreclosed homes often remain vacant following the foreclosure: “Social costs associated with foreclosure may arise from . . . any reduction in the value of nearby properties. *These costs would seem to be especially acute for vacant properties*, which are more likely to attract criminal activity (resulting in higher municipal costs) and be in worse physical condition (depressing property values).”¹² Indeed, “anyone invested in nearby homes and businesses stands to lose if a rash of foreclosures brings down property prices, accelerating the decline of an entire neighborhood.”¹³ These descriptions illuminate how vacant properties might be expected to cause losses in the value of nearby homes: deterioration caused by lack of upkeep, increased crime, and loss of the neighborhood community.

In fact, the negative price impact of nearby vacant properties is well-established in the economic literature. One study using data from Philadelphia finds that “abandoned housing within 450 feet of property (about the size of a typical city block) lowered sales prices in the range of \$3,542–7,627, all else equal. The number of abandoned properties on the block brought with it a net loss of \$6,869 for one abandoned house up to \$11,304 for five abandoned houses. The presence of any abandonment brought with it a net loss of \$7,386.”¹⁴

7 *See id.*

8 *The Challenge: Vacant Houses Can Be Hard to Sell...*, SHOWHOMES, 2010, http://www.showhomes.com/about_presentation.php.

9 *Id.*

10 *See also A Lived-In Home Sells Faster: Realty Expert*, CHICAGO TRIBUNE, April 23, 1988, *available at* http://articles.chicagotribune.com/1988-04-23/news/8803110523_1_vacant-house-buyers-home (noting that Beth Gabinski of Merrill Lynch Relocation Management “supports the often-expressed idea that it’s easier to sell an occupied home than one that has been stripped and vacated . . . [A] vacant property can give the impression of having been on the market for a long time. Property on the market for more than a month can develop a reputation for being ‘old,’ leading buyers to wonder what’s wrong with it.”)

11 *E.g.*, John Harding, Eric Rosenblatt, and Vincent Yao, *The Contagion Effect of Foreclosed Properties*, 66(3) J. OF URBAN ECON. 164–78 (2009); Dan Immergluck and Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17(1) HOUSING POLICY DEBATE 57–79 (2006); Tammy Leonard and James Murdoch, *The Neighborhood Effects of Foreclosure*, 11(4) J. OF GEOGRAPHICAL SYSTEMS 317–32 (2009); Zhengou Lin, Eric Rosenblatt, and Vincent Yao, *Spillover Effects of Foreclosures on Neighborhood Property Values*, 38(4) J. OF REAL ESTATE FIN. AND ECON. 387–407 (2009); William H. Rogers and William Winter, *The Impact of Foreclosures on Neighboring Housing Sales*, 31(4) J. OF REAL ESTATE RESEARCH 455–79 (2009); Jenny Schuetz, Vicki Been, and Ingrid Gould Ellen, *Neighborhood Effects of Concentrated Mortgage Foreclosures*, 17(4) J. OF HOUSING ECON. 306–19 (2008).

12 W. Scott Frame, *Estimating the Effect of Mortgage Foreclosures on Nearby Property Values: A Critical Review of the Literature*, 95(3) FEDERAL RESERVE BANK OF ATLANTA ECON. REV. 1, 2 (2010) (emphasis added).

13 William Apgar and Mark Duda, *Collateral Damage: The Municipal Impact of Today’s Mortgage Foreclosure Boom*, REPORT TO THE HOMEOWNERSHIP PRESERVATION FUND, MINNEAPOLIS, MINN. at 4 (2005).

14 ANNE B. SHLAY AND GORDON WHITMAN, RESEARCH FOR DEMOCRACY: LINKING COMMUNITY ORGANIZING AND RESEARCH TO LEVERAGE BLIGHT POLICY (2004), *available at* <http://comm-org.wisc.edu/papers2004/shlay/shlay.htm>.

Multiple studies have specifically isolated the negative impact of vacancies resulting from foreclosure. The Federal Reserve Bank of Cleveland, using data from Chicago, concludes that each vacancy is associated with a decrease of about 2% in the value of homes with 250 feet of the property in “high-vacancy areas” (defined as those above the median vacancy rate).¹⁵ Another study from the Federal Reserve Bank of Cleveland authored by Brian Mikelbank, confirms this finding using data from Columbus, Ohio.¹⁶ The study concludes that each vacant property within the 250 feet around a given property decreases that property’s value by about 3.5%, and each vacant property within the next 250 feet is associated with a slightly less than 1% decrease in value.¹⁷

Recent post-foreclosure vacancies have cost Massachusetts homeowners hundreds of millions of dollars in lost home value. One study has estimated the total spillover effect of foreclosures on *subprime* loans in Massachusetts – that is, the loss in value to homes near foreclosed properties – was about \$4.5 billion from 2005 to 2006.¹⁸ Using Mikelbank’s percentage of overall foreclosure-related losses that can be attributed to vacancy-related losses,¹⁹ the impact of *vacancies alone* is about \$710 million of lost value for nearby homeowners. A policy that keeps families in their homes post-foreclosure would largely mitigate these losses.²⁰

3. Post-foreclosure vacancies have cost communities across Massachusetts millions of dollars in lost tax revenue.

The decreased value of nearby homes driven by foreclosed properties’ vacant status also has a negative impact on property tax revenue. Vacancies resulting from foreclosures cause surrounding property values to decline, eroding the community’s tax base. The vacant home itself also loses value by sitting unoccupied. Taken together, these losses can represent a significant loss in local taxes. Using Mikelbank’s analysis,²¹ Massachusetts communities have lost at least \$4.1 million in tax revenue as a result of vacant foreclosed homes from the third quarter of 2007 to the fourth quarter of 2009.²² In addition to preserving the value of neighboring homes, a policy allowing foreclosed homeowners to remain in their homes until resale would also eliminate a significant portion of the decrease in aggregate property value, saving millions in tax revenue that would otherwise be lost.

15 DANIEL HARTLEY, FEDERAL RESERVE BANK OF CLEVELAND, THE EFFECT OF FORECLOSURES ON NEARBY HOUSING PRICES: SUPPLY OR DISAMENITY? (2010), *available at* <http://www.clevelandfed.org/research/workpaper/2010/wp1011.pdf>.

16 BRIAN A. MIKELBANK, FEDERAL RESERVE BANK OF CLEVELAND, SPATIAL ANALYSIS OF THE IMPACT OF VACANT, ABANDONED AND FORECLOSED PROPERTIES (2008), *available at* http://www.clevelandfed.org/Community_Development/publications/Spatial_Analysis_Impact_Vacant_Abandoned_Foreclosed_Properties.pdf.

17 *Id.* at 15.

18 *See* Kai-yan, *supra* note 1, at 8.

19 *See* Mikelbank, *supra* note 16, at 16–17. The paper finds the vacancy-related losses to be about \$18 million, while the overall foreclosure-related losses are about \$114 million, so about 16% of the losses can be attributed solely to the vacancy status of the homes.

20 Note also that to the extent a bank also owns any of the other properties near a foreclosed home, the decrease in surrounding property values is a direct loss to the bank. As Fannie Mae’s vice president for REO Alternative Disposition explained, “Because empty homes depress neighboring homes’ values, which deepens the loss that Fannie Mae incurs on each of our properties, we continue to manage our REO pipeline as efficiently as possible, both to minimize our losses and to stabilize neighborhoods. Managed correctly, our REO dispositions can help the housing market recover and protect the interests of taxpayers.” Jay N. Ryan, Jr., *REO Disposition and Neighborhood Stabilization: A Servicer’s View*, in *REO & VACANT PROPERTIES: STRATEGIES FOR NEIGHBORHOOD STABILIZATION* (A JOINT PUBLICATION OF THE FEDERAL RESERVE BANKS OF BOSTON AND CLEVELAND AND THE FEDERAL RESERVE BOARD), at 95 (2010), *available at* http://www.phil.frb.org/phil_mailing_list/community-development/publications/special-reports/reo-compendium/reo-and-vacant-properties-strategies-for-neighborhood-stabilization.pdf#page=57.

21 *See* MIKELBANK, *supra* note 16, at 16–17.

22 *See* Kai-yan, *supra* note 1, at 9 (estimating the total foreclosure-related loss in tax revenue in Massachusetts for Q3 2007–Q4 2009 as about \$26 million).

4. Vacant homes attract both violent and non-violent crime.

As one study explains, “Police officials interviewed . . . cited the damage to quality of life from empty, foreclosed properties, including gang activity, drug dealing, prostitution, arson, rape, and murder.”²³ An extremely thorough study by Lin Cui finds that “on average, violent crime within 250 feet of foreclosed homes increases by more than 15% *once the foreclosed home becomes vacant*, compared to crimes in areas between 250 and 353 feet away. Foreclosure alone has no effect on [violent] crime.”²⁴ Another paper confirms this result, finding that an increase of one standard deviation in the foreclosure rate—approximately 2.8 foreclosures for every 100 owner-occupied properties in a year—is associated with a 6.7% increase in violent crime in the neighborhood.²⁵

Indeed, Cui specifically finds that: “While the majority of current federal and state level foreclosure programs are focusing on loan modification, *my results strongly indicate that policies aiming at post-foreclosure vacancy reduction will most effectively alleviate the external cost of foreclosure.*”²⁶

23 William Apgar and Mark Duda, *Collateral Damage: The Municipal Impact of Today's Mortgage Foreclosure Boom*, REPORT TO THE HOMEOWNERSHIP PRESERVATION FUND, MINNEAPOLIS, MINN. at 4 (2005).

24 Lin Cui, *Foreclosure, Vacancy and Crime* (2010), available at http://www.ewi-ssl.pitt.edu/econ/files/faculty/wp/Lin_Foreclosure,%20Vacancy%20and%20Crime.pdf (emphasis added).

25 Dan Immergluck and Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17(1) HOUSING POLICY DEBATE 57, 73–75 (2006), available at http://findaforeclosurecounselor.net/network/neighborworksProgs/foreclosuresolutions/pdf_docs/hpd_4closehsgprice.pdf.

26 Cui, *supra* note 24 (emphasis added).

*APPENDIX D: SUPPLEMENTAL STATEMENT OF
REPRESENTATIVE MICHAEL COSTELLO, CHAIR,
JOINT COMMITTEE ON FINANCIAL SERVICES*

As the Chairman of the Joint Committee on Financial Services, I have worked extensively over the past several years on the foreclosure issue. While I recognize the hard work of the Task Force, I must express my strong concerns for the conclusions set out in the section entitled “Reducing Post-Foreclosure Vacancies.” In passage of legislation amending M.G.L. Chapter 244 we considered the issue of post-foreclosure tenancies and came to a much different conclusion than the Task Force has on this matter.



OFFICE OF ATTORNEY GENERAL MARTHA COAKLEY

One Ashburton Place

Boston, MA 02108

(617) 727-2200

www.mass.gov/ago/foreclosure