

HOUSE No. 3563

The Commonwealth of Massachusetts

PRESENTED BY:

Peter Capano

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act establishing foreclosure mediation programs.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Peter Capano</i>	<i>11th Essex</i>
<i>Kate Hogan</i>	<i>3rd Middlesex</i>
<i>James K. Hawkins</i>	<i>2nd Bristol</i>
<i>Brian M. Ashe</i>	<i>2nd Hampden</i>
<i>Christine P. Barber</i>	<i>34th Middlesex</i>
<i>Michelle L. Ciccolo</i>	<i>15th Middlesex</i>
<i>Mindy Domb</i>	<i>3rd Hampshire</i>
<i>Nika C. Elugardo</i>	<i>15th Suffolk</i>
<i>Stephan Hay</i>	<i>3rd Worcester</i>
<i>Denise Provost</i>	<i>27th Middlesex</i>
<i>Rebecca L. Rausch</i>	<i>Norfolk, Bristol and Middlesex</i>
<i>Steven Ultrino</i>	<i>33rd Middlesex</i>
<i>RoseLee Vincent</i>	<i>16th Suffolk</i>

HOUSE No. 3563

By Mr. Capano of Lynn, a petition (accompanied by bill, House, No. 3563) of Peter Capano and others for legislation to establish foreclosure mediation programs. The Judiciary.

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-First General Court
(2019-2020)**

An Act establishing foreclosure mediation programs.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 244 of the General Laws, as appearing in the 2016 Official Edition, is hereby
2 amended by inserting after section 35C the following section:-

3 Section 35D. (a) As used in this section the following terms shall, unless the context
4 clearly requires otherwise, have the following meanings:-

5 “Certificate of mediation completion”, a certificate issued by the mediation program
6 manager upon good faith effort in mediation if a mutually-agreeable commercially reasonable
7 alternative to foreclosure cannot be reached.

8 “Commercially reasonable alternative”, an alternative based on a comparison of the net
9 present value of receiving payments pursuant to a modified mortgage loan, or the likely financial
10 recovery from other foreclosure alternatives, to the anticipated net recovery following
11 foreclosure incorporating an assessment of the borrower’s current circumstances, including,
12 without limitation, the borrower’s current income, debts, and obligations.

13 “Entity”, a business organization, or any other kind of organization, including without
14 limitation, a corporation, partnership, trust, limited liability corporation, limited liability
15 partnership, joint venture, sole proprietorship, or any other category of organization, and any
16 employee, agent, servant or other representative of such entity.

17 “Eviction”, any action, without limitation, by a foreclosure sale purchaser of residential
18 property, which is intended to compel an occupant to vacate or to be constructively evicted from
19 such residential property.

20 “Fair market rent”, an amount equal to that established by the United States Department
21 of Housing and Urban Development pursuant to 42 U.S.C. § 1437f(c)(1), as it exists or which
22 may be amended, for a unit of comparable size in the area in which the residential housing is
23 located.

24 “Fire chief”, the chief of the city or town fire department or the fire chief’s designee.

25 “Foreclosed property”, a property on which a foreclosure deed has been recorded until
26 such property has been purchased from a mortgagee or its mortgage servicer.

27 “Foreclosing property”, a property on which the mortgagee or its agent has filed a
28 complaint with the land court or superior court pursuant to the Massachusetts Soldiers’ and
29 Sailors’ Civil Relief Act (St. 1943, c. 57 (1943), as amended through St. 1988, c. 142) until such
30 time as a foreclosure deed has been recorded in the registry of deeds in which the property is
31 located.

32 “Foreclosure”, termination of a mortgagor’s equity of redemption in property, by action,
33 bill in equity, entry or power of sale.

34 “Foreclosure sale”, the foreclosure of a mortgage of a residential property pursuant to a
35 power of sale in a mortgage and as described in this chapter.

36 “Foreclosure sale purchaser”, a foreclosing owner or a person or entity who purchases
37 residential property from a foreclosing owner and not intending to reside or have a family
38 member reside in such residential property as the primary residence.

39 “Foreclosing owner”, an entity that either: held or owned a mortgage loan in the property
40 at any point prior to the foreclosure of the property or is the subsidiary, parent, or agent of, or
41 otherwise is related to any entity which held or owned the mortgage in the property at any time
42 prior to the foreclosure of the property; and holds title to this property that it acquired at a
43 foreclosure sale or by any other method of foreclosure and holds a security interest in 3 or more
44 mortgage loans. For purpose of this definition, the phrase 'holds title' shall include an entity
45 which holds title in any capacity, directly or indirectly, without limitation, whether in its own
46 name, as trustee or as beneficiary.

47 “Good faith effort”, each party to the mediation is present, has decision-making authority
48 to negotiate and agree upon a commercially reasonable alternative to foreclosure, provides
49 required documentation, and actively participates in the mediation process.

50 “Mediation conference”, the formal discussion and negotiation undertaken by the parties
51 in a good faith effort to negotiate and agree upon a commercially reasonable alternative to
52 foreclosure, and held in the municipality or at a location mutually convenient to the parties. Both
53 the mortgagor and mortgagee or its mortgage servicer must be physically present for the
54 mediation conference unless telephone participation is mutually agreed upon and the mediation
55 program manager certifies that the mortgagor has been made aware of the mortgagor’s right to

56 an in-person mediation conference. The mortgagor shall be allowed to have a lawyer, an
57 interpreter, and up to 3 additional persons of the mortgagor's choosing present at the mediation
58 conference. The mortgagor shall be notified of this right at the time the mediation conference is
59 scheduled by the mediation program manager.

60 "Mediation program", the foreclosure mediation program established by a municipality
61 pursuant to this section.

62 "Mediation program manager", a neutral not-for-profit organization, attorney, or
63 qualified third party experienced in the mediation of the foreclosure process, familiar with all
64 programs available to help homeowners avoid foreclosure, knowledgeable of the mortgage
65 foreclosure laws of the commonwealth, and having no ownership interest or management interest
66 in residential housing in the municipality other than their primary residence. The mediation
67 program manager shall sign a user agreement with the municipality authorizing the receipt and
68 use of personal and financial information for the purposes of the mediation program only. the
69 mediation program manager shall ensure the security and confidentiality of any and all
70 information received or exchanged under the program consistent with applicable federal, state,
71 and municipal laws. Access to such program information shall be limited to those officers and
72 employees of the organization who require the information to properly perform services under
73 the mediation program, and that the organization and its officers and employees may not access,
74 modify, use or disseminate such information for inconsistent or unauthorized purposes.

75 "Mediator", an individual: (i) whose training complies with the qualification standards
76 for neutrals specified in the guidelines for training mediators adopted by the Supreme Judicial
77 Court of Massachusetts pursuant to Rule 8 of the Uniform Rules for Dispute Resolution; (ii) who

78 has completed training on foreclosure mediation; and (iii) who has a working knowledge of all
79 federal, state, and municipal programs available to help homeowners retain their homes

80 “Mortgage documents”, shall include the promissory note, including any allonges,
81 additional pages, and other evidence of all endorsements; mortgage; loan agreement;
82 assignments (recorded and unrecorded); powers of attorney granted by the mortgagee or
83 homeowner to entities acting on its behalf; and any other documents evidencing or securing a
84 mortgage loan.

85 “Mortgage loan”, a loan, in the form of a promissory note, to 1 or more natural persons,
86 or to a nominee trust or residential trust on behalf of 1 or more natural persons, made for non-
87 commercial purposes and secured wholly or partially by a mortgage on residential property in the
88 municipality, which is the principal residence of 1 or more borrowers of the loan or their family
89 members, or in the case of a nominee trust, 1 or more of the beneficiaries of the trust.

90 “Mortgage servicer”, an entity that administers or services or at any point administered or
91 serviced the Mortgage Loan; provided, however, that such administration or servicing shall
92 include, but not be limited to, calculating principal and interest due on the mortgage loan,
93 assessing fees and costs onto a mortgagor’s loan account, collecting regular payments from the
94 mortgagor, acting as escrow agent for the owner of the mortgage loan or foreclosing on a
95 mortgage loan in the event of a default.

96 “Mortgagee”, an entity that is the present holder of the mortgage Loan.

97 “Mortgagor” or “Homeowner”, a natural person or residential trust who received a
98 mortgage loan secured by a residential property located in the municipality, and for whom such
99 residential property is the person’s principal residence.

100 “Net recovery following foreclosure”, a monetary value that includes, but is not limited
101 to, projected costs from: (i) delinquency, interest, fees incurred by the date of foreclosure sale
102 based on average length of Massachusetts foreclosure process; (ii) costs of all legally required
103 actions to foreclose and percentage loss from foreclosure sale; (iii) meeting all sanitary code
104 requirements; (iv) property maintenance; (v) eviction; and (vi) other ownership costs until
105 projected sale or re-sale to third party purchaser.

106 "Occupant", any person or group of persons, including the mortgagor, who occupied
107 residential property prior to a foreclosure sale.

108 “Parties”, the mortgagor and the mortgagee or its mortgage servicer.

109 “Person”, any individual, corporation, partnership, limited liability partnership, limited
110 liability company, trust or other entity.

111 “Property”, any real property, residential or commercial, or portion thereof, located in the
112 municipality, including building or structures situated on the property.

113 “Residential property", real property that is either a single family dwelling or a structure
114 containing not more than 4 residential units, and shall also include a residential condominium
115 unit or a residential co-op unit.

116 “Responsible party”, (i) every person, entity, servicer, property manager, or real estate
117 broker, who or which, alone or severally with others: (ii) has care, charge or control of Property,
118 including but not limited to any dwelling, dwelling unit, mobile dwelling unit or parcel of land,
119 vacant or otherwise, including a mobile home park, or any administrator, executor, trustee or
120 guardian of the estate of the holder of legal title; (iii) is a mortgagee of any such property who

121 has filed a complaint with the Land Court or Superior Court pursuant to the Massachusetts
122 Soldiers' and Sailors' Civil Relief Act (St. 1943, c. 57 (1943), as amended through St. 1988, c.
123 142), including its successors or assigns; (iv) is an agent, trustee or other person appointed by the
124 courts and vested with possession or control of any such property; (v) is a mortgagee who has
125 made entry on any such property, pursuant to the terms of the mortgage, in order to make repairs
126 upon mortgagor's failure to do so.

127 "Vacant property", a structure or building not legally occupied.

128 "Unit" or "residential unit", the room or group of rooms within a property, located in the
129 municipality, which is used or intended for use as a residence by 1 household.

130 (b) A mortgagee who has sent the notice of the right to cure pursuant to section 35A
131 pertaining to residential property in a city or town accepting the provisions of this section
132 pursuant to section 4 of chapter 4, shall engage in a mediation program as set out in this section.

133 (c) A municipality may establish a foreclosure mediation program by ordinance or by-law
134 and enter into any agreements necessary to implement the program in accordance with this
135 section.

136

137 (d) The foreclosure mediation program shall provide mediation prior to all foreclosures of
138 residential property in which the mortgagor or mortgagor's family resides. The program shall
139 address all issues reasonably related to foreclosures on residential property, including but not
140 limited to all commercially reasonable alternatives to foreclosure. The parties shall make a good

141 faith effort in mediation. Mediations conducted pursuant to the program shall use the
142 calculations, assumptions and forms that are established by or are made available through:

143

144 (i) the Federal Deposit Insurance Corporation and published in the Federal Deposit
145 Insurance Corporations Loan Modification Program Guide available on the Federal Deposit
146 Insurance Corporation's publicly accessible website;

147 (ii) the Home Affordable Modification Program;

148 (iii) any modification program that a mortgagee may use which is based on accepted
149 principles and the safety and soundness of the institution and recognized by the National Credit
150 Union Administration, the division of banks;

151 (iv) the Federal Housing Authority; or

152 (v) similar federal loan modification programs.

153 (e) A municipality shall provide for a means of evaluating and selecting qualified
154 mediation program managers. The municipality shall also provide for a means of assessing and
155 evaluating annually the municipality's mediation program, including reports and data related to:

156 (i) the number of mortgagors who are notified of mediation;

157 (ii) the number of mortgagors who attend mediation and who receive counseling or
158 assistance;

159 (iii) the number of certificates of mediation completion issued under the program; and

160 (iv) the results of the mediation program, including the number of loans restructured,
161 number of principal write-downs, total value of principal write-downs, number of interest rate
162 reductions and, to the extent such information is available, the number of mortgagors who
163 default on mortgages within a year after restructuring, and the number of short sales and any
164 other alternatives to foreclosure.

165 (f) The municipality may terminate a mediation program manager's participation in the
166 mediation program for good cause. In such case, the mediation program manager shall deliver to
167 the municipality all records and information in its possession for appropriate preservation and
168 storage.

169 (g) Except for financial information otherwise permitted by law to be disclosed, any
170 financial statements or information provided to the municipality or its approved independent
171 counseling agencies or provided to the mortgagee or its mortgage servicer or mortgagor during
172 the course of mediation in accordance with this article is confidential and shall not be available
173 for public inspection. Any financial statement or information required to reasonably facilitate the
174 mediation shall be made available as necessary to the mediator and to the attorneys or
175 representatives, if any, of the parties to the mediation. Any financial statement or information
176 designated as confidential under this section shall be kept separate and apart from other papers
177 and matters not the subject of the mediation. No mortgagee or its mortgage servicer shall be
178 required to disclose information in violation of chapter 93H, and 201 CMR 17. No information
179 provided by the mortgagor in the course of the mediation may be used by the mortgagee or its
180 mortgage servicer or its agents in a subsequent legal proceeding.

181 (h) For the purpose of the mediation program established by the municipality, a
182 mortgagee shall send a copy of all notices given to a mortgagor pursuant to subsections (g) and
183 (h) of section 35A, which relate to residential property in the municipality, to the clerk of such
184 municipality, within 10 days of giving such notices to a mortgagor. The receipt by the
185 municipality of said notice, or of a request for mediation from the mortgagor made within 15
186 days of receipt of a mortgagor's notice pursuant to subsections (g) and (h) of section 35A, shall
187 constitute the beginning of the mediation process as set forth in this section. At that time the
188 municipality shall notify a mortgagee and a mortgagor of their rights and responsibilities under
189 this section regarding mediation.

190 Mediation shall commence within 45 days of the mortgagor receiving notice of the
191 mortgagor's right to cure as provided in subsections (g) and (h) of section 35A. The municipality
192 shall refer the matter for mediation to an approved mediation program manager, which shall have
193 the responsibility of assigning a mediator and scheduling the parties to immediately commence
194 mediation pursuant to this section. The mediation shall proceed with the parties' good faith effort
195 to negotiate and agree upon a commercially reasonable alternative to foreclosure. The mediation
196 shall continue without delay until completion, but shall in no way constitute an extension of the
197 foreclosure process, nor an extension of the right to cure period. Notwithstanding the limitation
198 in the previous sentence, the mediation may be extended by mutual agreement.

199 (i) The municipality's mediation program established by this section shall include, but is
200 not limited to, the following steps:

201 (1) The parties shall participate in a mandatory mediation conference at a location
202 mutually convenient to the parties. All parties or their respective representatives present at the

203 mediation conference must have authority to enter into any agreements renegotiating the
204 mortgage that is the subject of the foreclosure, or to otherwise resolve the pending foreclosure.

205 (2) The mediation conference shall be scheduled at a time and place to be determined
206 by the mediation program manager, but not later than 45 days following the mortgagor's receipt
207 of the mortgagor's notice of right to cure under subsections (g) and (h) of section 35A. The
208 parties shall be sent notice under the mediation program by certified and first class mail at the
209 parties' last known address(es), if any, or if none, then to the address to which the tax collector
210 last sent the tax bill for the property. The notice shall contain the following declaration on the
211 first page in English, Spanish, Cambodian, Russian, Greek, Vietnamese, French, Haitian Creole,
212 and in any other language which the mortgagee or its mortgage servicer knows is the
213 mortgagor's primary language, and any other language deemed appropriate by the mediation
214 program manager: "(insert city or town name) has a mediation program that may help you
215 negotiate more affordable mortgage payments and avoid foreclosure however there is no express
216 or implied guarantee foreclosure will be avoided. Have this notice translated at once and contact
217 us for help."

218 (3) If a mortgagor does not respond to the initial notice, the mediation program
219 manager shall, to the extent possible, utilize additional outreach methods to supplement mailed
220 notices.

221 (4) Prior to the scheduled mediation conference, the mortgagor shall be assigned a
222 municipally approved loan counselor. If the mortgagor is already working with a municipally
223 approved loan counselor, no assignment is necessary. However, such loan counselor must agree

224 to work with the mortgagor during the mediation process in accordance with this section or any
225 by-law or ordinance established under this section.

226 (5) The mortgagor shall be encouraged to attend a group orientation, if available,
227 prior to the mediation conference. Such orientations shall be scheduled as necessary at times
228 convenient to mortgagors. Interpretation shall be offered to mortgagors ahead of time, and
229 provided at the orientation if deemed necessary by the mortgagor. The following shall be invited
230 to participate in the design and implementation of the orientation: mediation program manager; 1
231 or more local legal services organizations; and 1 or more community organizations operating in
232 the municipality that provide advocacy and peer-to- peer support for distressed homeowners.

233 (6) The orientation shall familiarize mortgagors with the full range of options that are
234 available as commercially reasonable alternatives to foreclosure, with the foreclosure process,
235 and with obligations of mortgagee or its mortgage servicers under the mediation program.

236 (7) The mortgagor and mortgagee or its mortgage servicer shall cooperate in all
237 respects with the mediation program manager. The mortgagor shall complete any and all loan
238 resolution proposals and applications as appropriate and provide evidence of all current income.
239 The mortgagee or its mortgage servicer's representative shall bring and make available the
240 mortgage documents, as well as a detailed accounting of the outstanding balance, costs and fees.

241 (8) If, after 2 attempts by the mediation program manager to contact the mortgagor by
242 mail, the mortgagor fails to respond to the mediation program manager's request to appear for the
243 mediation conference, the requirements of this section shall be deemed to be satisfied upon
244 verification by the municipally-approved mediation program manager that the required notice
245 was sent. If these conditions are met, a certificate of mediation completion shall be issued

246 immediately by the mediation program manager certifying that the mortgagee or its mortgage
247 servicer has satisfied the mediation requirements of this section.

248 (9) If it is determined, after a good faith effort, that the parties cannot come to a
249 mutually agreeable, commercially reasonable alternative to foreclosure, such good faith effort on
250 behalf of the mortgagee or its mortgage servicer shall be deemed to satisfy the requirements of
251 this ordinance. A certificate of mediation completion pursuant to this article shall be issued
252 immediately and without delay by the mediation program manager authorizing the mortgagee or
253 its mortgage servicer to proceed with a foreclosure in accordance with the terms of the mortgage
254 and the relevant statutes.

255 (j) The municipality may enact and from time to time revise by by-law or ordinance a
256 reasonable and appropriate mediation registration fee to be charged to the mortgagee or its
257 mortgage servicer for the services attendant to administering the mediation program established
258 under this section. Any fees assessed pursuant to such by-law or ordinance shall not be charged
259 to the mortgagor. The mediation fees shall be paid to the municipality who will then use these
260 fees to pay for the mediation program directly. It is intended there will be no cost of this
261 mediation program to be borne by a municipality adopting this section.

262 (k) After a foreclosure by sale of a residential property in the municipality, and either
263 prior to or simultaneous with the recording requirements of section 15, a seller shall file the
264 certificate of mediation completion with the registry of deeds in which the property is located.
265 The municipality shall periodically request from the register of deeds information regarding
266 attempts to record pursuant to said section 15 without complying with the recording
267 requirements of this section.

268 (l) No foreclosure by entry in a municipality accepting this section shall be effectual
269 unless and until the memorandum or certificate recorded as required by section 2 includes as an
270 attachment or exhibit a copy of the certificate of mediation completion. The municipality shall
271 periodically request from the register of deeds information regarding attempts to record pursuant
272 said section 2 without complying with the recording requirements of this section.

273 (m) A mortgagee or its mortgage servicer's failure to comply with this section shall result
274 in a fine of \$300 payable to the municipality, for each instance of a violation, to be charged to
275 the mortgagee or its mortgage servicer in accordance with section 21 of chapter 40. Every
276 calendar day of noncompliance with section shall constitute a separate violation subject to the
277 penalties described under this subsection, up until the end of the right-to-cure period given under
278 a lawful notice pursuant to subsections (g) and (h) of section 35A. The fine or fines under this
279 subsection shall be recovered by indictment or complaint pursuant to said section 21 of said
280 chapter 40. No fines pursuant to this subsection shall be charged to the mortgagor either directly
281 or indirectly.