

HOUSE No. 2036

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 enabling municipal pre-foreclosure mediation.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>Peter Capano</i>	<i>11th Essex</i>	<i>1/20/2023</i>

HOUSE No. 2036

By Representative Capano of Lynn, a petition (accompanied by bill, House, No. 2036) of Peter Capano for legislation to authorize municipalities to establish foreclosure mediation programs. Municipalities and Regional Government.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 2143 OF 2021-2022.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Third General Court
(2023-2024)**

An Act enabling municipal pre-foreclosure mediation.

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 natural person, business organization, or any other kind of organization,
14 including without limitation, a corporation, partnership, trust, limited liability corporation,
15 limited liability partnership, joint venture, sole proprietorship, or any other category of
16 organization, and any employee, agent, servant or other authorized 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 "Foreclosed property", a property on which a foreclosure deed has been recorded until
25 such property has been purchased from a foreclosing entity by a party who is not the foreclosing
26 entity, itself.

27 "Foreclosing owner:", an entity that either: held or owned a mortgage loan secured by the
28 property at any point prior to the foreclosure of the property or is the subsidiary, parent, or agent
29 of, or otherwise is related to any entity which held or owned the mortgage in the property at any
30 time prior to the foreclosure of the property; and holds title to this property that it acquired at a
31 foreclosure sale or by any other method of foreclosure and holds a security interest in 3 or more

32 mortgage loans. For purpose of this definition, the phrase ‘hold title’ shall include an entity
33 which holds title in any capacity, directly or indirectly, without limitation, whether in its own
34 name, as trustee or as beneficiary.

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

40 “Foreclosure”, termination of a mortgagor's equity of redemption in property, by action,
41 bill in equity, entry or power of sale.

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

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

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”, “Massachusetts Foreclosure Mediation Program” or “the
61 program”, the program created pursuant to subsection (b). the foreclosure mediation program
62 established by a municipality pursuant to this section.

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

76 “Mediator”, an individual, (i) trained in compliance with the qualification standards for
77 neutrals specified in the guidelines for training mediators adopted by the Supreme Judicial Court
78 of Massachusetts pursuant to Rule 8 of the Uniform Rules for Dispute Resolution; (ii) trained in
79 mediation and the Massachusetts foreclosure process; and knowledgeable of the mortgage
80 foreclosure laws of the commonwealth (iii) with a working knowledge of all federal, state, and
81 municipal programs available to help homeowners retain their home;’

82 “Mortgage documents”, shall include the entire wet ink mortgage note with all allonges
83 attached; mortgage; loan agreement; assignments (recorded and unrecorded) and any other
84 documentary evidence of transfer of the note and interest in the note or mortgage; ledgers or
85 accounting of all payments and disbursement of these payments since the commencement of the
86 loan; any powers of attorney granted by the mortgagee or homeowner in relation to the mortgage
87 loan.

88 “Mortgage loan”, a loan, both mortgage note and mortgage on residential property, to 1
89 or more natural persons, or to a nominee trust or any other entity commonly recognized under
90 Massachusetts law as a lawful borrower, made primarily for personal, family or household
91 purposes on residential property in the municipality, which is the principal residence of 1 or
92 more borrowers of the loan or their family members, or in the case of a nominee trust, 1 or more
93 of the beneficiaries of the trust.

94 “Mortgage servicer”, or “servicer”, the person legally authorized by the mortgagee to
95 service the mortgage loan.an entity that administers or services or at any point administered or
96 serviced the Mortgage Loan; provided, however, that such administration or servicing shall
97 include, but not be limited to, calculating principal and interest due on the mortgage loan,

98 assessing fees and costs onto a mortgagor's loan account, collecting regular payments from the
99 mortgagor, acting as escrow agent for the owner of the mortgage loan or foreclosing on a
100 mortgage loan in the event of a default.

101 "Mortgagee", or "mortgage holder" a person who has invested funds or other
102 consideration and who is named as such in the mortgage or any assignment thereof.

103 "Mortgagor" or "Homeowner", grantor of a mortgage.

104 "Net recovery following foreclosure", a calculation of mortgagee's costs until projected
105 sale or resale to third party purchaser, including but not limited to: (i) costs from projected
106 delinquency; (ii) interest; (iii) fees by date of foreclosure based on current actual length of
107 foreclosure process in Massachusetts; (iv) costs associated with all legally required actions to
108 foreclose and percentage loss from foreclosure sale; (v) costs to meet all sanitary code
109 requirements; (vi) property maintenance costs; (vii) costs associated with eviction, if part of
110 standard operating procedure for creditor; and (viii) other ownership costs.

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

113 "Parties", the mortgagor and the mortgagee or its mortgage servicer.

114 "Person", any individual, corporation, partnership, limited liability partnership, limited
115 liability company, trust or other entity.

116 "Property", any real property, residential or commercial, or portion thereof, located in the
117 municipality, including building or structures situated on the property.

118 "Residential real property", a 1 to 6 family structure or a residential condominium unit or
119 a residential co-op unit.

120 "Responsible party", (i) every person, entity, servicer, property manager, or real estate
121 broker, who or which, alone or severally with others: (ii) has care, charge or control of Property,
122 including but not limited to any dwelling, dwelling unit, mobile dwelling unit or parcel of land,
123 vacant or otherwise, including a mobile home park, or any administrator, executor, trustee or
124 guardian of the estate of the holder of legal title; (iii) is a mortgagee of any such property who
125 has filed a complaint with the Land Court or Superior Court pursuant to the Massachusetts
126 Servicemembers Civil Relief Act (St. 1943, c. 57 (1943), as amended through St. 1988, c. 142),
127 including its successors or assigns; (iv) is an agent, trustee or other person appointed by the
128 courts and vested with possession or control of any such property; (v) is a mortgagee who has
129 made entry on any such property, pursuant to the terms of the mortgage, in order to make repairs
130 upon mortgagor's failure to do so.

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

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

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

137 (c) A municipality may establish a foreclosure mediation program by ordinance or by-law
138 and enter into any agreements necessary to implement the

139 (d) The foreclosure mediation program shall provide mediation prior to all foreclosures of
140 residential property in which the mortgagor or mortgagor's family resides. The program shall
141 address all issues reasonably related to foreclosures on residential property, including but not
142 limited to all commercially reasonable alternatives to foreclosure. The parties shall make a good
143 faith effort in mediation. Mediations conducted pursuant to the program shall use the
144 calculations, assumptions and forms that are established by or are made available through:

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

148 (ii) the Home Affordable Modification Program;

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

152 (iv) the Federal Housing Authority; or

153 (v) similar federal loan modification programs.

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

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

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

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

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

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

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

182 (h) For the purpose of the mediation program established by the municipality, a
183 mortgagee shall send a copy of all notices given to a mortgagor pursuant to subsections (g) and
184 (h) of section 35A, which relate to residential property in the municipality, to the clerk of such
185 municipality, within 10 days of giving such notices to a mortgagor. The receipt by the
186 municipality of said notice, or of a request for mediation from the mortgagor made within 15
187 days of receipt of a mortgagor's notice pursuant to subsections (g) and (h) of section 35A, shall
188 constitute the beginning of the mediation process as set forth in this section. At that time the
189 municipality shall notify a mortgagee and a mortgagor of their rights and responsibilities under
190 this section regarding mediation. Mediation shall commence within 45 days of the mortgagor
191 receiving notice of the mortgagor's right to cure as provided in subsections (g) and (h) of section
192 35A. The municipality shall refer the matter for mediation to an approved mediation program
193 manager, which shall have the responsibility of assigning a mediator and scheduling the parties
194 to immediately commence mediation pursuant to this section. The mediation shall proceed with
195 the parties' good faith effort to negotiate and agree upon a commercially reasonable alternative to
196 foreclosure. The mediation shall continue without delay until completion, but shall in no way
197 constitute an extension of the foreclosure process, nor an extension of the right to cure period.
198 Notwithstanding the limitation in the previous sentence, the mediation may be extended by
199 mutual agreement.

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

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

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

206 (2) The mediation conference shall be scheduled at a time and place to be determined by
207 the mediation program manager, but not later than 45 days following the mortgagor's receipt of
208 the mortgagor's notice of right to cure under subsections (g) and (h) of section 35A. The parties
209 shall be sent notice under the mediation program by certified and first class mail at the parties'
210 last known address(es), if any, or if none, then to the address to which the tax collector last sent
211 the tax bill for the property. The notice shall contain the following declaration on the first page in
212 English, Spanish, Cambodian, Russian, Greek, Vietnamese, French, Haitian Creole, and in any
213 other language which the mortgagee or its mortgage servicer knows is the mortgagor's primary
214 language, and any other language deemed appropriate by the mediation program manager:

215 "(insert city or town name) has a mediation program that may help you negotiate more
216 affordable mortgage payments and avoid foreclosure. However, there is no express or implied
217 guarantee foreclosure will be avoided. Have this notice translated at once and contact us for
218 help."

219 (3) If a mortgagor does not respond to the initial notice, the mediation program manager
220 shall, to the extent possible, utilize additional outreach methods to supplement mailed 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, prior to
227 the mediation conference. Such orientations shall be scheduled as necessary at times convenient
228 to mortgagors. Interpretation shall be offered to mortgagors ahead of time, and provided at the
229 orientation if deemed necessary by the mortgagor. The following shall be invited to participate in
230 the design and implementation of the orientation: mediation program manager; 1 or more local
231 legal services organizations; and 1 or more community organizations operating in the
232 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 respects
237 with the mediation program manager. The mortgagor shall complete any and all loan resolution
238 proposals and applications as appropriate and provide evidence of all current income. The
239 mortgagee or its mortgage servicer's representative shall bring and make available the mortgage
240 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 mutually
249 agreeable, commercially reasonable alternative to foreclosure, such good faith effort on behalf of
250 the mortgagee or its mortgage servicer shall be deemed to satisfy the requirements of this
251 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 the county or district in which
265 the property is located. The municipality shall periodically request from the register of deeds
266 information regarding attempts to record pursuant to said section 15 without complying with the
267 recording requirements of this section.

268 (l) Until it is abolished, foreclosure by entry in a municipality accepting this section shall
269 be effectual unless and until the memorandum or certificate recorded as required by section 2

270 includes as an attachment a copy of the certificate of mediation completion. The municipality
271 shall periodically request from the register of deeds information regarding attempts to record
272 pursuant 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.