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March 4, 2013

Testimony of Leo J. Delicata, Esq., Legal Services for the Elderly, in favor of an amendment to L.D. **1389 An Act to Expedite the Foreclosure Process** (based on recommendations of Attorney General Janet T. Mills).

Senator Valentino, Representative Priest and members of the Joint Standing Committee on Judiciary,

Legal Services for the Elderly is a non-profit legal services organization that provides free legal representation to Maine's most economically or socially needy older residents. Over the last five years we have defended many seniors in foreclosure actions and based on our experience, we are in favor of this proposal and would like to offer some comments.

First of all, we thank the Attorney General for all of her work and the work of everyone in her office that led to the creation of this proposal. It is difficult to balance interests in this area without risking significant harm to consumers. From the beginning Attorney General Mills has understood this challenge. This amendment improves the foreclosure process without adversely affecting people caught up in mortgage foreclosure cases and it does not compromise the basic viability of the foreclosure diversion program.

Understanding that we are in favor of this proposal we do have some suggestions for some relatively minor changes that would add clarifying language and, in some cases, add some additional notice protections for consumers without substantially burdening the foreclosure process. These are our suggestions. The amendment is divided into six parts and labeled A through F. We will comment on Parts A, B, E and G.

First, Part A, Section A-2 on the first page of the amendment describes the transfer tax responsibilities that arise when a foreclosed property is sold at public sale. Another statutory section, not included in this amendment,

establishes the general rule that both the grantor and grantee each pay one-half of the transfer tax due calculated on the value of the property sold. Section A-2 subsection B of the amendment changes the general rule when a foreclosed property is sold to a third party. In such a case, the Grantor's share of the tax is not based on the total sales price but only on the excess of sales price over all claims. Unfortunately, the new language says nothing about the Grantee's share of the transfer tax. We are left with the question of whether the Grantee's share is the same as the Grantor's share or, as provided by the general rule, it is based on the total sales price. It would be helpful to have that clarified.

Second, Part B, Section B-1 subsection 3 (court determination of abandonment; vacation of order) on page 3 of the amendment: This subsection begins with language establishing the process for a court finding that the property is abandoned. It states: "The plaintiff may at any time after commencement of a foreclosure action under Section 6321 file with the court a motion to determine that the mortgaged premises have been abandoned." Our comments are directed to Subparagraphs A, B and C that follow this introductory sentence.

Subparagraph A: this section reads as follows: "If the court finds by clear and convincing evidence, based on testimony or reliable hearsay, including affidavits by public officials and other neutral nonparties, that the mortgaged premises have been abandoned, the court may issue an order granting the motion and determining that the premises are abandoned."

The first clause articulates a standard of proof that the court must use to decide the issue of abandonment, i.e., clear and convincing evidence. We fully support that standard. The rest of the sentence then describes the evidence to which that standard is applied as "...testimony or **reliable hearsay**, (emphasis added) including affidavits by public officials and other neutral non-parties, that the mortgaged premises have been abandoned..." We are concerned that the description of evidence, as written, will cause some uncertainty.

Hearsay evidence is not ordinarily admissible in judicial proceedings. We expect that the intent of the drafter in using the term "reliable hearsay" is to create an exception allowing a specific type of hearsay to be admitted because of the particular challenges involved in making a finding regarding abandonment. We also think that there is no intent to make all types of

“reliable hearsay” admissible. The next clause supports our thinking because it limits the meaning of “reliable hearsay” with the following words:

“...including affidavits by public officials and other neutral non-parties...”

We believe that use of the term “including” limits the universe of “reliable hearsay” to the described items. However we are also mindful that only a strict application of the principles of statutory construction supports an interpretation limiting the meaning of “reliable hearsay” in this fashion. If the intent is to allow only affidavits from particular sources to define the universe of reliable hearsay then the language might be less open to interpretation by lay persons and judges alike if it was written differently.

This is one suggestion for how it could be done:

“If the court finds by clear and convincing evidence, based on in-court testimony or affidavits by public officials or other neutral nonparties, that mortgaged premises have been abandoned, the court may issue an order granting the motion and determining that the premises are abandoned.”

Deletion of the term “reliable hearsay” and specifically mentioning the out of court document that could be admitted and considered by the court would remove any doubt about that term. This would also be consistent with the practice of admitting sworn written statements to support certain motions as now allowed by the Maine Rules of Civil Procedure. Motions for summary judgment are one example.

Next we address Subparagraph B: It reads as follows: “B. The court may not grant the motion if the mortgagor or a lawful occupant of the mortgaged premises appears and objects to the motion.”

We support this language but wonder how the lawful occupants would know about the motion if they are not parties- in- interest. We suggest adding language that requires service of the motion to any known occupants of the premises since determining who is a lawful occupant or who is not living there as a lawful occupant would be difficult. It is reasonable to believe that an inquiry about whether the mortgaged premises are abandoned would discover the presence of occupants. We also suggest that in the absence of evidence of occupants that the notice of the motion is published in a newspaper of general circulation or the newspaper’s online website at least 7 days before the hearing date on the motion.

Lastly we address Subparagraph C: It reads as follows:

“The court shall vacate the order under paragraph A if the mortgagor or a lawful occupant of the mortgaged premises appears in the action and objects to the order prior to the public sale provided for in section 6326.”

Again, we support this paragraph but suggest the addition of language requiring publication of the order of abandonment in a newspaper of general circulation or the newspaper’s online website.

Third, we would like to address Part E. This Part creates a permissive opportunity, rather than a requirement, for municipalities to adopt an ordinance that returns one-half of the net proceeds associated with the sale and final disposition of tax-acquired property to the immediate former owner. The obligation would end if that owner did not apply to the municipality for the return of the proceeds within 90 days from the date of recording the deed from the sale. We support this idea. However, we would be remiss if we did not offer an observation and a suggestion.

While we are hopeful that municipalities will embrace this opportunity we are not optimistic that many will voluntarily make this choice. At the same time we are aware that if this provision is made mandatory, Maine’s Constitution (Article IX, Section 21) will likely require the addition of a “mandate preamble” to this legislation and thus it will need a two-thirds vote for passage. Passage of this amendment would doubtless improve the foreclosure process and we support that goal. Nevertheless, the question remains: does justice require a discussion of whether this section should be mandatory? We think that the Committee should consider that question.

If this Committee believes that there are cases where the financial return to a municipality from the sale of tax acquired property is so unreasonably disproportionate to the value of the taxes owed that it would be fundamentally unfair for the municipality to retain such a windfall then perhaps it makes sense to explore the idea of requiring the type of return described in this amendment. For example, if a return exceeding 200% of the taxes and expenses owed is thought to be unreasonably disproportionate then language requiring a municipality to return some of the sales price might be developed. If the model offered in the amendment was followed the immediate former owner could receive one-half of the net proceeds that exceeds 200% of the tax owed plus any accrued interest on the tax as well as fees, costs or other expensed incurred by the municipality in the foreclosure and sale process. The immediate former owner would have same affirmative

obligation to apply for the return the proceeds not later than 90 days from the date of recording the deed from the sale in the registry of deeds.

Our fourth and final comment concerns Part G.

Section G-2 Amends existing law describing the contents of a mediator's report. The first paragraph amending 14MRSA§6321-A, sub§13 contains this last sentence before the two new proposed subsections A and B:  
"As part of the report, the mediator **may** (emphasis added) notify the court if, in the mediator's opinion, either party failed to negotiate in good faith".

We believe that this sentence is not intended to be permissive and that the "may" should be changed to a "must". We have reached this conclusion based on an examination of the new language in proposed subsection B. That subsection as well as proposed subsection A is prefaced with mandatory language, i.e. "The mediator's report must also include:"

Sub paragraph B thus requires: "A statement as to whether each party complied with requirements set forth in subsection 12 and the promises and commitments made and other agreements reached at mediation. In the event of noncompliance, the mediator's report must specifically set forth the manner in which the parties have failed to comply."

Subsection 12 is existing language that requires good faith in the mediation process. The language of Subsection 12 is as follows:  
"12. Good faith effort. Each party and each party's attorney, if any, must be present at mediation as required by this section and shall make a good faith effort to mediate all issues. If any party or attorney fails to attend or to make a good faith effort to mediate, the court may impose appropriate sanctions."

We suggest that in order to make all the statutory language in existing and proposed parts of Section13 consistent, the language in the existing last sentence should be changed from "may" to "must". The resulting sentence would read: "As part of the report, the mediator must notify the court if, in the mediator's opinion, either party failed to negotiate in good faith". This change would also make this statute consistent with existing court civil rule 93(j) also requiring the mediator to report occasions of bad faith.

This concludes our comments. Thank you for the opportunity to share these thoughts with you.