



**MARYLAND
LEGAL AID**

Advancing
**Human Rights and
Justice for All**

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The Honorable Luke Clippinger, Chairperson
Judiciary Committee
House Office Building, Room 241
Annapolis, MD 21401

RE: Testimony of Maryland Legal Aid in Support of House Bill 1038 –
Foreclosure Proceedings – Residential Mortgagors and Grantors – Access to
Counsel

Dear Chair Clippinger and Members of the Committee:

Thank you for the opportunity to testify in favor of HB 1038. Maryland Legal Aid (MLA) is a non-profit law firm that provides free legal services to the State's low-income and vulnerable residents, including abused and neglected children, nursing home residents, and veterans. With 12 offices serving residents in each of Maryland's 24 jurisdictions, MLA handles civil legal cases involving a wide range of issues, including family law, housing, public benefits, consumer law, and criminal record expungements to remove barriers to obtaining child custody, housing, driver's licenses, and employment. MLA supports this Bill and asks that the Committee give it a favorable report. Anthony Davis, Esq. will testify in support of HB 1038.

HB 1038 is a remarkable piece of legislation that could change the legal landscape in foreclosure proceedings while recognizing the need to provide legal assistance and information to homeowners who are in jeopardy of falling behind on their mortgage payments and face the possibility of losing their homes through foreclosure.

In 2010, Maryland's Foreclosure Mediation Law took effect. It was designed to help foster a dialogue between homeowners and lenders to ensure a fair assessment was made to help homeowners get relief through any available alternatives to foreclosure they might qualify. Maryland Legal Aid created the Foreclosure Legal Assistance Project (FLAP) to ensure that homeowners had access to legal representation at the foreclosure mediation. FLAP is a statewide unit of attorneys specializing in foreclosure defense and provides full-service legal

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representation to homeowners facing serious payment delinquency, default, and foreclosure. Since that time, MLA's FLAP staff have been representing homeowners in foreclosure all over the State.

In the experience of MLA advocates, those who seek legal assistance early in the process and participate in foreclosure mediation have a higher rate of home retention. Early involvement in the process allows an attorney to investigate legal claims properly and fully explore all available options to save a home. Early involvement allows time for exchanging information, pursuing loss mitigation alternatives, making applications for loan modifications, and reviewing vital information regarding the servicing of the loan. All of this helps determine if there are any legal grounds to challenge a foreclosure action and a thorough assessment of the situation makes the mediation much more beneficial to both parties.

Respectfully, the proposed legislation will be more effective and impactful if access to legal representation was provided to homeowners earlier in the foreclosure process before a post file mediation concludes or the date the Office of Administrative Hearings (OAH) files a report with the court. Under present law, a homeowner has the right to request mediation once the lender initiates foreclosure proceedings with the court system. Once that happens, a lender must send the homeowner a "Request for Foreclosure Mediation" form. To have their request for mediation granted, the homeowner must complete the form and file it with the Circuit Court within 25 days. The mediation is scheduled by OAH, who sends notice to the homeowner. Many homeowners continue to be unrepresented at foreclosure mediations and remain unaware of the legal services. As a result, far too many eligible clients seek assistance late in the process, limiting the options available to save their homes. Others may seek assistance only after a foreclosure sale has been conducted or ratified, at which point the home is already lost.

MLA recommends that the standard Request for Foreclosure Mediation be amended to include a provision that allows the homeowner to check a box and request access to counsel at the same time that mediation is requested. OAH, the Circuit Court, and MLSC could all share this information, and counsel could be scheduled at the same time as the mediation is scheduled.

A second recommended amendment to improve the effectiveness of HB 1038 is to give the mediators, the administrative law judges (ALJ) who preside over the mediations, the authority to make actual legal and factual determinations that have a binding effect on the parties as a way to ensure that alternatives to foreclosure have been reasonably considered and adequately evaluated. Currently, the ALJ's role is to facilitate the mediation, to listen in, and report back to the court as to whether an agreement was reached or not. ALJ's have no power over the parties; they cannot require parties to attend, compel parties to turn over documents, or provide evidence of their allegations. They cannot order that mediation be continued unless both parties agree. They cannot require a lender to stay any foreclosure proceedings, even for good cause.

To be of greater utility and practical benefit in the process of helping homeowners and lenders find a resolution to avoid foreclosure, ALJ's must have some power to resolve disagreements and issues that arise outside of a courtroom. In Maryland, a mortgage servicer must

submit an affidavit stating that it has engaged in good-faith loss mitigation efforts or explain what is required for the homeowner to qualify¹. HB 1038 could empower ALJ's to evaluate lender practices and investigate claims of servicer abuse; to determine if the homeowner is entitled to loss mitigation; to assess the merits of foreclosure actions and claims of defense; if the homeowner is entitled to loss mitigation and, to allow for pauses in the process when relevant changes occur that merit a redetermination of a preliminary or final loss mitigation application.

Finally, HB 1038 is needed to ensure that wrongful foreclosures are prevented. While much of the foreclosure defense in Maryland is devoted to loan modifications, deeds in lieu of foreclosure, short sales, and other ways to help homeowners exit their homes, not much effort is devoted to challenging a wrongful foreclosure. Under current case law, a borrower must bring any substantive challenges to stop a foreclosure before a sale occurs. After a sale, any right to object is limited primarily to assertions of procedural irregularities in the foreclosure sale itself. The right to counsel must occur early in the process to allow a homeowner time to assert known and ripe defenses regarding the conduct of loss mitigations or foreclosure before the sale, rather than in post-sale exceptions or by filing a motion for pre-sale injunctive relief. For access to counsel in foreclosure cases to be effective, this right must occur earlier in the process to assure the relevant claims are examined and timely pursued.

HB 1038 is vital legislation and critical to preserving valuable property rights and protecting homeowners in distress. Thank you for the opportunity to comment on this important legislation. Maryland Legal Aid supports HB 1038 and asks that this Committee give it a favorable report with amendments.

Respectfully Submitted,

/s/Anthony Davis

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¹ Md. Code, Real Prop. § 7-105.1(d)(2)(viii).