Memorandum to:	Members of the Massachusetts Legislature's Registry of Deeds Modernization and Efficiency Commission
From:	Sarah McKee, Esquire (Patrick Appointee to the Commission)
Re:	Proposal that the Commission recommend, to the Legislature, consideration of legislation concerning the seven points outlined ***(in bold italics)*** below
Date:	16 December 2013

Certainty of title to real property is fundamental to the Commonwealth's economic prosperity. It is basic as well as to the financial and emotional stability of our families.

But, how fundamental it? Up to 80% of American businesses are started with a loan secured by the home of the entrepreneur.[1] If there is a break in the chain of title to that home, however, or if title is otherwise clouded, what bank will lend?

Notice to the world of who owns what interests in which piece of real property ensures certainty of title. Documenting this is the function of our public land records. The integrity, transparency, and completeness of the public land records in our Registries of Deeds are thus vital to Massachusetts both immediately, to facilitate lending and other real estate transactions, and over the long term.

Modern mortgage financing practices have however affected our Registries. Modern mortgage finance relies on "bundling" or aggregating mortgages into so-called "Mortgage-Backed Securities." These "Mortgage-Backed Securities" are in the form of Trusts. Large investors buy certificates, or shares, in such Trusts. They want steady income from all of the mortgagors' monthly payments of principal and interest.

The Massachusetts State Pension Fund invests in "Mortgage-Backed Securities." So does at least one County employees' pension fund.[2] So Commission members who participate in such a pension fund are, through it, investors in these securities/Trusts. Legislation to protect the Massachusetts homeowners and business owners whose mortgages are "bundled" into "Mortgage-Backed Securities" can thus help to protect pensions, as well.

Federal tax law requires at least three successive sales and assignments of a mortgage in order to convey it into a Mortgage-Backed Security Trust.[3] But banks organizing and selling these Mortgage-Backed Securities have acted cavalierly in whether they actually complete the sales and assignments required to convey a mortgage into a Trust.[4]

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[1] de Soto, Hernando: *The Magic of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else.* Black Swan, 2000, at 56 - 58.

[2] Hampshire County

[3] *See* Title 26, U.S. Code, Sec. 860(d)

[4] "[W]hat is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets." *U.S. Nat'l Bank Ass'n, trustee, v. Ibanez,* 458 Mass. 637 (2011) Cordy, J. with whom Botsford, J., joined,

In the two foreclosure cases consolidated as *Ibanez,* for instance, U.S. Bank as trustee insisted that it owned both mortgages, and that it therefore had standing to foreclose. But U.S. Bank as trustee could prove only that both mortgages had been sold and assigned by the so-called "mortgage originator" to the so-called "seller" or "securitization sponsor."[5] This bank as trustee simply could not prove that either mortgage had ever then been sold and assigned to the so-called "depositor" or, from the "depositor," into the Trust that assertedly owned it.

Yet, we know about these failures of securitization in *Ibanez* only because of the litigation. Why did it take litigation? Why weren't these breaks in chain of title obvious already from the Massachusetts public land records?

Because, as of yet, nothing in Massachusetts law requires the recordation of the documents that would be necessary. Yet, starting to mandate a complete chain of title for every Massachusetts property *on the public record* would be sound public policy.

The writer's work on these and related issues during the past year includes:

- Visiting 11 of our 21 Massachusetts Registries of Deeds, and consulting at length with Registers, Assistant Registers, and other Registry personnel;
- Participating in seminars on Mortgage-Backed Securities and foreclosure at the Office of the Inspector General of the Federal Home Finance Agency in Washington, D.C., and at the Harvard Law School; and
- Consulting with experts in securities law, foreclosure law, title examination, title insurance, information technology as applied to Registries of Deeds, surveying, the forensic auditing of Registries, and related specialties.

During this year, the following seven points ***(in bold italics)*** have repeatedly arisen as ways that the Legislature can:

- Ensure the integrity, transparency, and completeness of the Commonwealth's public land records, from now on;
- Otherwise protect both municipalities and mortgagors in foreclosure cases; and
- Ensure that all the Registries have timely legal advice as the law in this area develops.

1. ***That for a mortgage of real property to be recorded, it identify and be indexed by the names of the real parties in interest, i.e., at least the property owner/mortgagor, and the lender/mortgagee.***

Many mortgages are recorded only in the names of the mortgagor/property owner and of Mortgage Electronic Registration System, Inc. (MERS). MERS is a large, privately-owned database of information on mortgages, promissory notes secured by mortgages, and servicing rights for mortgages owned by large banks and others that are members of MERS. ("Servicing rights" include receiving monthly mortgage payments, and forwarding the income to Mortgage-Backed Security Trusts.)

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concurring.)

[5] *U.S. Nat'l Bank Ass'n, trustee, v. Ibanez,* 458 Mass. 637 (2011).

MERS never lends money for mortgages. It never holds the promissory note securing a mortgage. Massachusetts courts have nonetheless held that MERS alone may appear in the public land records with "bare legal title" to a property as so-called "mortgagee of record." [6] This shows that the property has a lien on it. But it conceals the identity of the lender whose loan gives rise to the lien.

If our public land records are to be transparent in this respect, legislation is required.

2. ***That every assignment of a mortgage on real property identify and be indexed by the real parties in interest and that, to be valid, it be recorded within sixty (60) days of the date of execution.***

Massachusetts law requires that, to be valid, an assignment of a mortgage on *registered* land be recorded.[7] The recent decision in *Bristol County v. MERS* establishes definitively, however, that Massachusetts law does NOT require the recordation of assignments of mortgage on unregistered, that is, recorded land.[8]

If the Commonwealth's public land records are to be complete, they must include ***all*** assignments of mortgage, regardless of whether the land is registered land or unregistered (i.e., recorded), as well as the names of the real parties in interest. The Registers of Deeds cannot require this. Only the Legislature can.

3. ***That a foreclosing party record the promissory note along with its <u>Eaton</u> affidavit, which attests that the foreclosing party owns both the promissory note and the mortgage securing that note.***

In *Eaton,* the Supreme Judicial Court held that, M.G.L. Chap. 244, Sec. 14, means "a mortgagee who also owns the underlying mortgage note."[9]

The promissory note will presumably show a complete chain of indorsements from the

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[6] *Culhane v. Aurora Loan Serv.,* 826 F. Supp. 2d 352, 371 (D. Mass. 2011), *aff'd,* 708 F. 3d 282 (1st Cir. 2013) ("MERS system fits perfectly into the Massachusetts model for the separation of legal and beneficial ownership of mortgages."), cited in *Bristol Count v. MERSCORP, INC, Mortgage Electronics Registration Systems, Inc. et al.,* Suffolk Superior Court, Civ. No. 12-1246-BLS 2, Consolidated with 12-1247-BLS 2 and 12-1251-BLS 2, at 5, Nov. 14, 2013.

[7] M.G.L. c. 185 S. 67 provides: "The owner of registered land may mortgage it by executing a mortgage deed. Such deed may be assigned, extended, discharged, released in whole or in part, or otherwise dealt with by the mortgagee by any form of deed or instrument sufficient in law for the purpose. <u>But such mortgage deed, and all instruments which assign, extend, discharge and otherwise deal with the mortgage, shall be registered, and shall take effect upon the title only from the time of registration."</u>
[Emphasis supplied.] The Commonwealth guarantees title to registered land.

[8] *Bristol County v. MERSCORP, Inc. Mortgage Electronics Registration Systems, Inc. et al.* Superior Court Civil Action No. 12-1246-BLS 2 Consolidated with 12-1247-BLS 2 and 12-1251-BLS 2, Sanders, J. Nov. 14, 2013 (dismissing plaintiff counties' consolidated lawsuits for recordation fees where various banks and financial institutions had failed to record assignments of mortgage.)

[9] *Eaton v. Fed'l Nat'l Mortgage Ass'n et al.,* 469 Mass. 569, 584 (2012).

original property owner/mortgagor to the foreclosing party. The note is therefore the best evidence of whether a foreclosing party qualifies as the statutory mortgagee. "[I]t can be a treasure hunt to get the note, and with Eaton, it is just as important as the mortgage."[10]

One Register reports that some foreclosing parties already record the promissory notes with their *Eaton* affidavits.[11] Any burden would thus seem minimal.

4. ***That, prior to foreclosure, a foreclosing party record a copy of the "Right to Cure Default" letter that it is required to have sent to the defaulting mortgagor pursuant to M.G.L. c. 244, s. 35A, and a copy of the affidavit attesting to its compliance with applicable Massachusetts law.***

A party seeking to foreclose must first send this Section 35A "Right to Cure to the allegedly defaulting homeowner; file a copy of that letter with the Land Court; and file an affidavit with the Land Court attesting to compliance with the law. If the Land Court determines that the Servicemembers Civil Relief Act does not protect the allegedly defaulting homeowner from foreclosure, then the foreclosure can go forward.

A recent report by the Massachusetts Alliance Against Predatory Lending[12] found widespread violation of the Massachusetts "Right to Cure default" law by the five large bank parties to the National Mortgage Settlement of 2012. Reviewing this "Right to Cure default" letter and its accompanying affidavit is thus vital to assessing whether a foreclosure complies with Massachusetts law.

The only way to see what the foreclosing party filed with the Land Court is nonetheless to go to Boston and pull the hard copies. This puts an obviously huge burden on homeowners statewide. For a foreclosing party to record a copy of the "Right to Cure" default letter and affidavit in the relevant Registry would, however, be relatively slight.

5. ***That a foreclosure deed, to be valid, be recorded within sixty (60) days of the date of the foreclosure sale.***

This would reinstate a previous time frame for recording the deed of foreclosure.

Now, there is no longer a time limit.[13] Thus a party may foreclose without ever recording the foreclosure deed, and thus without becoming the owner of record on the municipal tax rolls.

The result is so-called "zombie properties." The property was sold at foreclosure. It is empty. The foreclosed homeowner is doubtless unaware of any continuing obligation for taxes, and may have disappeared. The municipality does not know where to send the property tax bills, or whom to hold liable for public health violations.

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[10] Email, Nov. 26, 2013, from a Massachusetts foreclosure litigator.

[11] Conversation, Dec. 4, 2013.

[12] *Violating State Law: Continuing Practice by Settlement Banks in Massachusetts Foreclosures,* Aug. 5, 2013, pdf. available as of Dec. 15, 2013, at http://www.maapl.info/uploads/ViolatingStateLawContinuingReport.pdf

[13] In *Ibanez,* for instance, the foreclosure sale was on July 5, 2007. The foreclosure deed and statutory foreclosure affidavit were recorded on May 23, 2008 – more than 10 months later.

The resulting costs to taxpayers can be substantial. Reinstituting the time requirement for recording a foreclosure deed will thus assist municipalities as well as foreclosed homeowners.

6. ***That foreclosure by entry be abolished. In the alternative, that the certificate of entry of unregistered, i.e., recorded land, under M.G.L. c. 244 ss.1 and 2, be recorded within thirty (30) days of the entry in order to be valid, and that a copy of any certificate of entry be served upon the property owner/mortgagor within ten (10) days thereafter.***

Foreclosure by Entry is an ancient procedure. For unregistered, i.e., recorded land, it is governed by M.G.L. c. 244 ss. 1 and 2.[14] Registered land may be foreclosed also by entry and possession, pursuant to M.G.L. c. 185 c. 70[15] In its modern form in Massachusetts, foreclosure by entry requires only that a lender (or its authorized agent) set foot peaceably on a property whose mortgage is allegedly in default; that the lender record a certificate of two competent witnesses to prove the entry; and that the lender wait for three years after recordation.[16] If the property owner fails to contest the foreclosure, it is then final -- even if the property owner in fact knew nothing about the foreclosure by entry.

Foreclosure by entry can function currently as a back-up procedure for banks whose foreclosures by sale may have proved invalid.[17] Yet foreclosure by entry lacks all the

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[14] M.G.L. c. 244 s.1 provides: *A mortgagee may, after breach of condition of a mortgage of land, recover possession of the land mortgaged by an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming it, or by action under this chapter; and possession so obtained, if continued peaceably for three years from the date of recording of the memorandum or certificate as provided in section two, shall forever foreclose the right of redemption.*
M.G.L. c. 244 s.2 provides: *If an entry for breach of condition is made without a judgment, a memorandum of the entry shall be made on the mortgage deed and signed by the mortgagor or person claiming under him, or a certificate, under oath, of two competent witnesses to prove the entry shall be made. Such memorandum or certificate shall after the entry, except as provided in section seventy of chapter one hundred and eighty-five, be recorded in the registry of deeds for the county or district where the land lies, with a note of reference, if the mortgage is recorded in the same registry, from each record to the other. Unless such record is made, the entry shall not be effectual for the purposes mentioned in the preceding section.*

[15] M.G.L. c. 185 s. 70 in part *provides: Mortgages of registered land may be foreclosed in the same manner as mortgages of unregistered land; but in case of foreclosure by entry and possession, the certificate of entry required by section two of chapter two hundred and forty-four shall be filed and registered by an assistant recorder in lieu of recording. After possession has been obtained by the mortgagee or his assigns, by entry or by action, and has continued for the time required by law to complete the foreclosure, he or his assigns may request the land court for the entry of a new certificate, and the court, after notice to all parties in interest, shall have jurisdiction to hear the case, and may order the entry of a new certificate on such terms as equity and justice may require.*

[16] *Cf.* Greany, Jennifer E: "Foreclosure by Entry is Effective Method for Mortgagee to Gain Fee Simple Title," Boston Real Estate and Lease Litigation Blog, Dec. 24, 2012, http://www.bostonrealestateandleaselitigationblog.com/2012/12/foreclosure-by-entry-is-effective-method-for-mortgagee-to-gain-fee-simple-title.shtml, retrieved Dec. 15, 2013.

[17] Foreclosure by entry "may provide a separate ground for a claim of clear title apart from the foreclosure by execution of the power of sale." *Ibanez*, fn. 15 ("foreclosure by entry, by which a mortgage holder who peaceably enters a property and remains for three years after recording a memorandum

safeguards that the Legislature has enacted for homeowners facing foreclosure by sale.[18] For foreclosure by entry of unregistered, i.e., recorded land, it also appears to violate due process. Why have it?

Foreclosure by entry of registered land requires a hearing in Land Court and entry of a new certificate of title.[19] So the due process issue seems absent. But why burden the Land Court with this archaic procedure at all?

7. ***That the Attorney General, in consultation with the Registers and Assistant Registers of Deeds Association, be responsible for informing the Registers of changes in law that affect Registry functions, and that the Attorney General provide the Registers with legal guidance concerning Registry matters.***

At present, no official is legally responsible for ensuring that all Registers of Deeds, whether of state or of County Registries, keep current on relevant changes in law.

In addition, issues arise in the Registries calling for legal guidance. Particularly as some of these might result in litigation involving the Attorney General, that official is appropriate for these purposes.

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or certificate of entry forecloses the mortgagor's right of redemption.")

[18] *Cf., e.g.,* the provisions of M.G.L. c. 244 s. 35A.

[19] *See fn.* 15, above.