



## Foreclosure Fairness Program

### WHAT HAPPENS IF THERE IS NO AGREEMENT AFTER MEDIATION?

#### Borrower Options

#### It's the Law!

- If the parties (borrower(s) and beneficiary) do not reach an agreement during the mediation process, the beneficiary may proceed with the foreclosure—and the property may be sold at a trustee sale—after receipt of the mediator's certification. See [RCW 61.24.163](#)(13).
- Both the borrower and the beneficiary are expected to act in good faith during the foreclosure mediation process. A beneficiary's violation of their duty of good faith required by the Foreclosure Mediation Program is a violation of the Consumer Protection Act ([19.86 RCW](#)). See [RCW 61.24.135](#). "Good faith" includes, but is not limited to: timely participation in the mediation process and sessions; timely delivery of documents requested by law and by the mediator; timely payment of the mediator's fee; and attendance of a beneficiary representative at the sessions who has authority to settle, compromise, or otherwise reach a resolution with the borrower. In addition, a beneficiary may not request that the borrower waive certain future rights as a condition of agreeing to a loan modification. See [RCW 61.24.163](#)(10).
- A certification showing the beneficiary failed to act in good faith in the mediation process constitutes a borrower's defense to the non-judicial foreclosure action (on the basis of which the mediation referral was made). See [RCW 61.24.163](#)(14)(a). Unless the non-judicial foreclosure is discontinued by the trustee and/or beneficiary, borrowers would need to consult an attorney to discuss asserting this defense, such as filing a lawsuit to enjoin (stop) the trustee's sale pursuant to [RCW 61.24.130](#)(1).
- If there was no agreement reached in a mediation and the beneficiary did not offer the borrower an affordable loan modification, but the certification shows that the net present value (NPV) of the modified loan would have exceeded the anticipated net recovery at foreclosure (NPV Question 3 on the certification was answered "Yes"), the certification constitutes a basis for the borrower to enjoin (stop) the foreclosure. See [RCW 61.24.163](#)(14)(c). Unless the non-judicial foreclosure is discontinued by the trustee and/or beneficiary, borrowers would need to consult an attorney to discuss asserting this defense, such as filing a lawsuit to enjoin (stop) the trustee's sale pursuant to [RCW 61.24.130](#)(1).
- A certification showing the borrower failed to act in good faith means that the beneficiary can move forward with the foreclosure. See [RCW 61.24.163](#)(15).



## What Now?

After the mediator issues and sends her/his certification to the parties, trustee, and to Department of Commerce, the foreclosure mediation process is complete. If an agreement was not reached between the borrower and the beneficiary, the certification authorizes the beneficiary to move forward with the foreclosure process, which may include selling the property at a trustee sale (see [RCW 61.24.163](#) (13)). Borrowers *may* have a few options to consider, as described below.

### Continue to Negotiate with the Beneficiary

Borrowers may find that they can continue to work with their beneficiary towards a resolution even after the mediation process is complete. A successful resolution may avoid a foreclosure sale or allow borrowers to leave their homes on their own terms, such as a short sale or cash-for-keys. If the borrowers had representation during the mediation process, they may choose to continue to use the same representative in their communications with the beneficiary. Alternatively, the borrowers may negotiate directly with the beneficiary, or seek the assistance of a free housing counselor or an attorney. See “Resources” below.

### Enjoin (Stop) the Foreclosure

Borrowers who received a certification from their mediator showing “Beneficiary Not in Good Faith” may use that certification to try to stop the foreclosure process in a court of law by filing a lawsuit and moving the court to enjoin the foreclosure. See [RCW 61.24.130](#)(1). The beneficiary is entitled to rebut the allegations (defend itself) that it failed to act in good faith. See [RCW 61.24.163](#)(14)(a).

Similarly, borrowers who received a certification showing that agreement was not reached and a loan modification was not offered but the NPV of the modified loan would have exceeded the anticipated net recovery at foreclosure (NPV Question 3 on the certification was answered “Yes”) may use the certification to enjoin the foreclosure in a lawsuit filed in court pursuant to [RCW 61.24.130](#)(1). See [RCW 61.24.163](#)(14)(c).

Borrowers may represent themselves, but are encouraged to seek the assistance of an attorney (private or legal aid) to enjoin the foreclosure in a court of law. See “Resources” below.

### Mediate Again

If the borrower receives a NEW Notice of Default from the beneficiary (starting a new foreclosure proceeding) after the mediation concluded, the borrower may be eligible for foreclosure mediation once again.

Just like with their first referral, borrowers will need the assistance of an attorney or housing counselor to be referred to mediation (see “Resources” below). The referral form and instructions are posted on the program website at [www.commerce.wa.gov/foreclosures](http://www.commerce.wa.gov/foreclosures).

Department of Commerce will process and review a new referral—resulting from a new Notice of Default being issued—and assign a mediator just as with any other eligible mediation referral. The mediator will then conduct the mediation process just as any other foreclosure mediation under the Foreclosure Fairness Act.



## Explore Other Options

There may be additional options available under state or federal law, even if the beneficiary participated in good faith during the mediation. Borrowers may wish to consult with an attorney regarding options that may be available to stop or postpone the foreclosure. See “Resources” below.

## What Else Is Being Done?

Department of Commerce receives all certifications from the mediators and sends copies of the certifications showing “Beneficiary Not in Good Faith” to the Washington State Attorney General’s Office and to the Washington State Department of Financial Institutions.

### Washington State Attorney General’s Office

The Consumer Protection Division of the Washington State Attorney General’s Office (AGO) is enforcing the Deed of Trust Act ([RCW 61.24](#)), which includes the Foreclosure Fairness Act and the Foreclosure Mediation Program. See [RCW 61.24.172](#).

The AGO reviews the “Beneficiary Not in Good Faith” certifications it receives from Department of Commerce and watches for patterns and repeat violators. It may take action by further investigating or escalating with a beneficiary that repeatedly failed to act in good faith.

Borrowers can also file a complaint *directly* with the AGO. Complaints about a beneficiary’s conduct or actions may be submitted at <http://www.atg.wa.gov/FileAComplaint.aspx>.

**IMPORTANT:** The AGO cannot represent or act on behalf of an individual borrower. While the AGO may investigate or take action against a beneficiary, the borrower should take action on her/his own behalf. The borrower should NOT wait for the AGO to complete its investigation. Investigation or action by the AGO is NOT likely to stop the foreclosure process.

### Washington State Department of Financial Institutions

The Washington State Department of Financial Institutions (DFI) licenses *some* of the beneficiaries that are participating in foreclosure mediation in Washington.

DFI reviews the “Beneficiary Not in Good Faith” certifications it receives from Department of Commerce and may open complaints with their licensees. DFI may contact the borrower and/or the mediator to request more information. Once DFI has all needed information, it decides on the appropriate course of action, on a case-by-case basis.

Borrowers can also file a complaint *directly* with DFI. Complaints about a beneficiary’s conduct or actions may be submitted at <http://www.dfi.wa.gov/consumers/file-complaint>.

**IMPORTANT:** While DFI may open a complaint or take action against a beneficiary, the borrower should take action on her/his own behalf. The borrower should NOT wait for DFI to complete its investigation. Investigation or action by DFI’s is NOT likely to stop the foreclosure process.



## Resources

### FREE Housing Counselors

Foreclosure prevention counseling is provided free of charge to Washington homeowners (paid by the Foreclosure Fairness Program). The counselors are trained to help the homeowner (borrower) understand her/his options and determine the best course of action, including referring the borrower to legal services if necessary.

- FREE homeowner counseling hotline: 1-877-894-4663.

### Private Attorneys

- Washington State Bar Association: [www.wsba.org](http://www.wsba.org)
- County Bar Associations, for example the King County Bar Association: [www.kcba.org/LRS/](http://www.kcba.org/LRS/)

### Legal-Aid Attorneys

Low- and moderate-income borrowers can contact a legal aid service provider to see if they qualify for FREE legal services.

- Northwest Justice Project: 1-800-606-4819, [www.nwjustice.org/get-legal-help](http://www.nwjustice.org/get-legal-help)
- Columbia Legal Services: 1-360-943-6260, [www.columbialegal.org](http://www.columbialegal.org)
- Northwest Consumer Law Center: 1-888-978-3386, [www.nwclc.org](http://www.nwclc.org)
- Washington Legal Help: [www.washingtonlawhelp.org](http://www.washingtonlawhelp.org)
- Some County Bar Associations run pro-bono (free) legal services, for example King County Bar Association's Neighborhood Legal Clinics: [www.kcba.org/pbs/NLC.aspx](http://www.kcba.org/pbs/NLC.aspx)