

Lands Policy and Process - MGL Chapters 61, 61A and 61B

Whereas the Town of Charlton (“the Town”) in accordance with state law allows owners of open lands used for forestry, farming or recreation to enroll their property in preferential tax classification programs under Mass. General Laws Chapter 61, 61 and 61B (“the statutes”) in order to help maintain these lands in their current use, but in doing so forgoes tax revenue that would otherwise be generated by these lands; and

Whereas owners of land enrolled in these programs are required to grant the Town a 120-day assignable right of first refusal in the event that these lands are proposed to be sold for or converted to other uses; and

Whereas the Town has the right to exercise its right of first refusal on land sold for, or converted to, another use while such land is taxed under one of the statutes or within one year after the land has been so taxed; and

Whereas the Town has ongoing needs for land for municipal purposes including but not limited to conservation land and finds it in the Town’s best interest to give full consideration to the opportunity presented by withdrawal of land from these programs, to gather information from relevant boards and staff, and to determine whether the Town should exercise or assign its right of first refusal, but also recognizes the legitimate interest of a landowner in not being unnecessarily delayed in disposition of privately owned property if after due diligence and reasonable consideration the Town decides not to exercise its right of first refusal in a given instance;

Therefore the Board of Selectmen adopts this Chapter 61, 61A and 61B Lands Policy and Process to set forth a reasonably clear process by which the Town of Charlton will review and respond to notices of intended conversion or sale of land classified under Chapter 61, 61A or 61B and will determine whether or not to exercise or assign its right of first refusal on such land. This policy and procedures are adopted solely for the purposes of coordinating local review. Failure to adhere to these policies and procedures shall not affect any rights that the Town has under MGL Chapters 61, 61A and 61B, nor shall the Policy and Process to the extent, if at all, irreconcilably inconsistent with the statutes affect any right of the landowner.

Note: For the purposes of this document, the following items that are required by statute are noted in italic type. This is not an exact replication of the wording of the statute. Other items are adopted as part of this policy. The statute should always be consulted for exact wording and any requirements not discussed in this policy and process document.

A. Right of First Refusal

Within 120 days of mailing by the Landowner (not receipt¹) of a proper notice of intent to sell or convert, the Town, acting through the Board of Selectmen, after the required public hearing discussed below, must either:

1. *A. Vote to exercise its right of first refusal option to purchase (to meet a bona fide*

¹ The Town Clerk and Board of Selectmen immediately upon receipt of any such notice should date stamp same with the date of receipt. They should also attach to the notice and retain the envelope bearing the date of mailing and a copy of any related receipt.

purchase offer or, in the case of intended conversion by the landowner, an option to purchase at full and fair market value) and

B. (1) Prepare and

(2) Send to the owner by certified mail to the address specified in the notice of intent and

(3) Record at the Registry of Deeds

a notice of the exercise:

(a) signed by the Board of Selectmen and containing

(b) the name of the record owner of the land and

(c) a description of the premises adequate for identification of same and

(d) a copy of the purchase and sale agreement discussed in D. 1 below²; or

2. A. Vote to assign its rights to a non-profit conservation organization or the Commonwealth or any of its political subdivisions under such terms and conditions as the Board of Selectmen may consider appropriate and

B. (1) Prepare and

(2) Send to the owner by certified mail to the address specified in the notice of intent and

(3) Record at the Registry of Deeds

a notice of such vote to assign:

(a) signed by the Board of Selectmen and containing

(b) the name of the record owner of the land and

(c) a description of the premises adequate for identification of same;

(d) the name and address of the organization or agency of the Commonwealth which will exercise the option and

(e) the terms and conditions of the assignment³; or

3. A. Prepare and

B. Send to the owner by certified mail to the address specified in the notice of intent and

C. Have recorded at the Registry of Deeds⁴

² See Sec. D. 1 below for further requirements and procedures.

³ See Sec. D. 2 below for further requirements and procedures.

⁴ The statute, in the to the last paragraph of c. 61B, sec. 9 for example, states that such notice “shall be recorded with the registry of deeds,” but does not say who is to so record. As I read those provisions, the Town could leave it to the

a notice of non-exercise of the right of first refusal:

(1) signed by the Board of Selectmen and containing

(2) the name of the record owner of the land and

(3) a description of the premises adequate for identification of same⁵.

Default provision...

4. Failure to record either the notice of exercise or the notice of assignment within the aforementioned 120 days is also considered conclusive evidence that the Town will not exercise its right of first refusal, but since the term “shall” is used in the provision as to notice of non-exercise the procedure outlined in no. 3 immediately above should be followed rather than relying upon this statutory default provision.

B. Requirements for Notice by Property Owner

1. The 120-day right of first refusal time period begins with a notice of the landowner’s intent to sell or convert a parcel for commercial, industrial or residential use. This notice must be sent by certified mail or hand delivered to the Board of Selectmen in care of the Town Clerk (with a copy to the Selectmen’s Office if the landowner wishes), in addition to the Planning Board, Board of Assessors and Conservation Commission, and to the State Forester. This notice must include the following:

a. A statement of intent to sell or convert,

b. A statement of proposed use of the land,

c. The location and acreage of land as shown on a map drawn at the scale of (municipal) Assessor’s map of the town in which the land is situated,

d. The name, address and telephone number of the landowner,

e. In the case of an intent to sell, a certified copy of an executed purchase and sale agreement specifying the purchase price and all terms and conditions of the proposed sale, which is limited only to the property classified under the Chapter, and must be a bona fide offer,

f. The purchase and sale agreement must be a bona fide offer, defined as a good faith offer not dependent upon potential changes to current zoning or conditions or contingencies relating to the potential for, or the potential extent of, subdivision of the property for residential use or the potential for, or the potential extent of, development of the property for industrial or commercial use, made by a party unaffiliated with the landowner for a fixed consideration payable upon delivery of the deed.

g. Any additional agreements or a statement of any additional consideration for any contiguous

landowner to record same, which would save the Town the cost of recording and also give the landowner the opportunity to have its title company or attorney record same in connection with a proposed sale.

⁵ See Sec. D. 3 below for further recommendations and procedures.

land under the same ownership, and not classified under the Chapter, but sold or to be sold contemporaneously with the proposed sale,

h. A notarized affidavit that the landowner has mailed or delivered the notice will be conclusive evidence that the notice has been mailed in the manner and at the time specified, provided the affidavit has attached to it a copy of the notice of intent to which it relates.

i. In the case of an intent to convert the land to other use, the landowner must also notify the Town of the landowner's attorney, if any.

C. Procedure for Review of Notices and Evaluation of Properties

1. Within three days of receipt of a proper Notice from a landowner⁶, the Board of Selectmen's office will ascertain that the Notice, with the required information, was also properly transmitted to the Planning Board, Board of Assessors and Conservation Commission. Copies of the Notice may be provided by the Board of Selectmen to the Open Space Committee, Water and Sewer Commission, Historic Commission, and non profit organization(s) as well as any other entities the Board of Selectmen deems appropriate.

2. The Board of Selectmen's office will also determine the final day of the 120-day period and the person assigned to keep track of the process should note and red-flag same and other deadlines mentioned in this policy in a calendar to be kept on the matter and may attempt to seek confirmation from the landowner or his/her representative regarding this date. (Note that the date of receipt should be excluded from such computation and the final day of the 120 day or other period to be computed should be included in same, but that all reasonable efforts should be made to avoid waiting until the last, possible day for action under any such computation, so as to avoid issues and potential litigation as to same.)

3. The Board of Selectmen will consult with town counsel to review the notice, including the purchase and sale agreement, and determine whether the Town is being given the same opportunity as the buyer with regard to the terms of the agreement.

4. If the Notice is determined to be insufficient, the Board of Selectmen will immediately, but in any event within 30 days from receipt of the Notice, notify the landowner by certified letter in writing that the proper notice has not been given and that the 120-day clock has not started. A copy of this letter will be provided to the Planning Board, Board of Assessors and Conservation Commission and other boards/officials mentioned in Paragraph C 1 above.

5. The Board of Selectmen may gather information on the property to determine its conservation value and other, pertinent information. The Board of Selectmen may also gather background information about the interests and perspectives of the landowner, abutters and the proposed buyer.

The Board of Selectmen may also perform, or have another board, commission or agent perform, an analysis of the location of the property relative to other protected lands, along with an

⁶ See footnote 1 above as to date stamp and retention of envelope, and no. 4 below re notice to owner if the owner's notice of intent does not satisfy statutory requirements.

environmental assessment.

A determination may be made whether the property contains any unique geological or other environmental features, important soils, a drinking water source, or was the site of an important historical event.

An entry and inspection of the property by the Town or its agents shall occur *at reasonable times and upon reasonable notice*, with the Town enjoying all its statutory rights as well as all the rights designated as belonging to the buyer in the purchase and sale agreement contained in the notice of intent, including but not limited to surveying, soil testing and water testing.

Zoning and subdivision control regulations will be examined to determine the impact of the potential development on town services.

6. Upon a determination that proper Notice was received, the Board of Selectmen shall schedule and give notice of a public hearing for the purpose of receiving comments on the importance of the property to Town, its conservation significance and/or potential for use to serve municipal needs, if any, and for initiating discussion of whether or not the Town should exercise or assign its right of first refusal. The public hearing will be scheduled, ideally within 60 days of receipt of the notice from the property owner - and as soon as reasonably possible if the Board determines for any reason that it is unlikely to either exercise or assign the right of first refusal. In those cases where there is a proposed conversion of the land but no sale, the determination of sale price may take as long as 90 days, at which point the public hearing will be scheduled if it has not been scheduled earlier. *Notice of the hearing shall be given in accordance with M.G.L. Ch. 39, Section 23B (Open Meeting Law)*. The Board of Selectmen will also notify the Planning Board, Conservation Commission, the Board of Assessors and such other boards and organizations as it deems appropriate, which by way of example only may include an open space committee, economic development committee, recreation committee, etc. *The option to exercise the right of first refusal may only occur after a public hearing*. At the public hearing, the Board of Selectmen will afford the landowner (if such owner chooses to attend⁷) and interested boards, organizations and individuals the right to comment. If there is interest in pursuing acquisition of the property for municipal uses or in assigning the right of first refusal to a non-profit conservation organization or to the Commonwealth or one of its political subdivisions, the Board of Selectmen may continue the public hearing as needed to allow time to present a more specific proposal for consideration by the Board. The Board of Selectmen may create a Study Committee comprised of the chairs (or their representatives) of these and/or other boards to assist in developing a proposal.

7. If the landowner is converting the property, and the Town is interested in the option to purchase the land at fair market value, the Town will hire a certified independent appraiser, and obtain the appraisal within 30 days of the notice to convert. If the landowner contests the appraisal, the landowner may at the landowner's sole expense hire a certified independent appraiser and obtain an appraisal to be completed within 60 days of the notice to convert and delivered to the Board of Selectmen. If the Town and the landowner cannot agree on an appraised value, then the two

⁷ While the statute does not appear to so require, the Board ideally should send a copy of the notice of the public hearing to the landowner as his, her, its or their name and address appear in the notice of intent, by certified mail. Such notice should include a description of the premises sufficient to identify same.

parties will jointly hire a third appraiser, each paying half the cost, and obtain an appraisal to be delivered to each party within 90 days of the notice to convert. The purchase price established by the third appraisal will prevail if there is a sale, but at any time during the appraisal process the landowner may withdraw his or her notice to convert. Upon agreement of a consideration, the Town will have 120 days to exercise its option.

D. Decision by Municipality

Based on input at the public hearing and further research as warranted, the Board of Selectmen will close the hearing and determine whether or not to pursue the opportunity to exercise the right of first refusal. The Board of Selectmen must choose one of four courses of action:

1. If the Town desires to exercise its option, the Board of Selectmen shall before expiration of the 120 day period:

- *Record the notice to exercise the option, meeting the requirements set forth in A. 1 above, at the Registry of Deeds as part of an affidavit of a notary public, which shall contain the name of the record owner of the land and a description of the premises adequate for identification of same.*
- *(a) Notify the landowner by letter signed by the Board of Selectmen, by certified mail, at the address specified in the landowner's notice, of the Town's intent to exercise its option and (b) enclose with such notice a proposed purchase and sale agreement between the Town and the landowner, which if executed shall be fulfilled within a period of not more than (1) 90 days after the date such agreement, endorsed by the landowner, is returned by certified mail to the Board of Selectmen or (2) upon expiration of any extended period that the landowner has agreed to in writing, whichever is later.*
- *If sufficient, previously appropriated funds are not available, schedule a town meeting for the purpose of appropriating funds to purchase the property, place an article on the meeting warrant for this purpose, and schedule an override, debt exclusion or capital expenditure exclusion vote (if necessary) for the purpose of authorizing expenditure of funds. The town meeting must be held within Charlton's 120-day period, unless an extension of this deadline is agreed to in writing between the Town of Charlton and the seller.*
- *Purchase of the property must occur within 90 days of the date the agreement to purchase the land, signed by the landowner, is returned by certified mail to the Board of Selectmen, unless otherwise agreed to in writing by the landowner.*

2. If the Town desires to assign its right of first refusal to a qualified, nonprofit land trust or other conservation organization, or to the Commonwealth or one of its political subdivisions the Board of Selectmen shall, before expiration of the 120 day period:

- *At a public hearing vote to so assign its right of refusal, setting forth any terms and conditions of the assignment. [Note: Such assignee must conserve at least 70% of the property in a use consistent with Mass. Gen. Laws Chapter 61, 61A or 61B, or no less a percentage conserved than proposed by the developer whose offer gave rise to the assignment, whichever is greater, but may be permitted to undertake limited development on the balance of the property. The Board of Selectmen may place conditions on this use; for example the number of lots in the limited*

development can be specified. And all the land other than that which is to be developed shall then be bound by a permanent deed restriction meeting the requirements of Mass. Gen. Laws Chapter 184.]

- *Record the notice of the assignment, meeting the requirements set forth in A. 2 above, at the Registry of Deeds as part of an affidavit of a notary public.*
- *Notify the landowner by certified mail, at the address specified in the landowner's notice, of the vote to assign, stating: (a) the name and address of the non-profit organization or the agency of the Commonwealth which will exercise the option, and (b) the terms and conditions of the assignment.*
- *Purchase of the property by the assignee must occur within 90 days of the date the agreement to purchase the land, signed by the landowner, is returned by certified mail to the assignee, unless otherwise agreed to in writing by the landowner.*

3. If the Town decides to neither exercise nor assign its right of first refusal, the Board of Selectmen should before expiration of the 120 day period:

- *Examine wisdom of sending to the landowner and recording at the Registry of Deeds a limited notice of election not to exercise its rights. Any waiver of Town's rights may be specific to the proposed purchase terms so that if the sale falls through and a new proposal comes forth, the 120-day clock will begin again.*
- *Send by certified mail to the address specified in the notice of intent, written notice of the election not to exercise, signed by the Board of Selectmen, containing: (a) the name of the record owner of the land and (b) a description of the premises adequate for identification of same, to such owner, such notice also to be recorded with the Registry of Deeds.*
- *The Board may use as much of the 120-day period as is necessary to properly evaluate the property and the potential of exercising or assigning the right of first refusal. It is possible that Board might decide that it cannot afford to, or should not, purchase the property, but any such choice should be discussed and researched with reasonable thoroughness before making such a determination. Where there is consensus on the absence of conservation value or where the Board has negotiated a signed agreement with the landowner and/or developer that meets municipal needs with regard to the property, or where the Board determines for any other reason that it would be inadvisable to exercise or assign the right of first refusal the Board may choose not to exercise its right. Any such decision and negotiations, however, should occur in consultation with the boards/committees entitled to notice by statute.*

4. *The Town of Charlton may fail to act within the required 120-day period (and any extensions thereof), in which case Town, if the landowner has fulfilled all statutory requirements, will be deemed to have failed to exercise its right of first refusal. In such case the Board of Selectmen may, absent any dispute as to a material factual or legal issue, upon request of the landowner sign a document certifying that the right of first refusal has neither been exercised nor assigned within the statutory 120 day period, in such form as the landowner's attorney may prepare and submit to the Board. The Board reserves the right to seek advice from its legal counsel before deciding*

whether to sign any such document.

Notes:

1. *The discontinuance of forest certification shall not, in itself, for the purposes of this section, be considered a conversion. And specific use of land for a residence for the owner, the owner's spouse or a parent, grandparent, child, grandchild, or brother or sister of the owner, or surviving husband or wife of any deceased such relative, or for living quarters for any persons actively employed full-time in the forest use of such land, shall not be a conversion for the purposes of the statutes, and a certificate of the board of assessors, recorded with the registry of deeds, shall conclusively establish that particular use. See second paragraph of G.L. c. 61, sec. 8, c. 61A, sec. 14 and 61B, sec. 9, so providing.*

2. *The statutes' first refusal provisions do not apply to a mortgage foreclosure sale, but the holder of a mortgage shall in accordance with the applicable statute, at least 90 days before a foreclosure sale, send written notice of the time and place of the sale to the parties in the manner described in such statute's provisions for notice of intent to sell or convert, and the giving of that notice may be established by an affidavit, all as described in the final paragraph of each of the sections cited in note 1 immediately above.*

*******REMINDER*******

**NOTICE TO APPLICANTS/THEIR ATTORNEYS
RELEASE OF AGRICULTURAL, ETC. RIGHT OF FIRST REFUSAL - MGL
CHAPTERS 61, 61A, 61B
RE: CONTINGENCIES & PERFORMANCE DATE IN PURCHASE/ SALE AGTS.**

The purpose of this notice is to save landowners (and the town) unnecessary legal time and expense when selling land and seeking a release of the town's right of first refusal ("ROFR") under the above-referenced statutes. Together with this notice the town is giving you a copy of the current board of selectmen's policy which tracks the statutes and explains the applicable procedure for seeking a release of the ROFR ("the Policy").

This notice is applicable only to proposed sale of property for a commercial, industrial or residential use. It does not apply to proposed conversion to such use, as the requirements for conversion do not involve a purchase and sale agreement. Moreover, it addresses two - and only two - of the statutory requirements as to such sales.

By statute the board of selectmen has 120 days to decide whether to purchase land on the same terms and conditions as those set forth in a bona fide offer, to assign that right to a nonprofit conservation organization or the commonwealth or one of the commonwealth's political subdivisions, or to instead waive its ROFR. The 120-day clock starts ticking upon the board's receipt of a notice of proposed sale meeting all legal requirements, as to which see the Policy.

A. Requirements of a "Bona Fide Offer".

You cannot rely solely on the common, everyday meaning of the term "bona fide offer" since the statutes set forth specific requirements which must be met for an offer to qualify as such.

G.L. c. 61A, sec. 14 (and similar sections of c. 61 and 61B, and the policy, which tracks them) defines a "bona fide offer" as:

"a good faith offer, not dependent upon potential changes to current zoning or conditions or contingencies relating to the potential for, or the potential extent of, subdivision of the property for residential use or the potential for, or the potential extent of development of the property for industrial or commercial use, made by a party unaffiliated with the landowner for a fixed consideration payable upon delivery of the deed." [Emphasis added.]

Thus if a purchase and sale agreement contains a condition or contingency of the above nature, giving the proposed purchaser the right to cancel the purchase if such were not satisfied, the agreement does not constitute a bona fide offer for purposes of the statute and the 120 day period does not commence until a purchase and sale agreement with no such condition is received along with all other materials required by the Policy.

On a number of occasions applicants or their attorneys have argued, just by way of example, that:

(a) other towns have not insisted upon it;

(b) the town or its counsel should put a gloss on the statutory language which would limit its terms to proposed subdivision of the land;

(c) contingencies in a purchase and sale agreement allowing a buyer to cancel its purchase if it does not receive approvals needed for commercial or industrial development are ubiquitous and do not make the PSA or price “dependent” on such conditions.

These arguments have been researched, carefully considered and discussed many times. To date no case has been found to support the proposition that they accurately reflect the terms and intent of the statutes. If an owner’s attorney believes she or he has a case directly in point and interpreting the statute since it was amended in response to Town of Franklin v. Wyllie, 443 Mass. 187 (2005) the attorney should submit the citation and any argument in writing which we would then have town counsel review and seriously consider. Absent such a case further discussion along those lines would be fruitless and wasteful of both the owner’s funds and those of the town.

If a purchase and sale agreement contains any such contingencies all such must be removed before submission of a notice. It is customary and prudent for a buyer to protect its interests by including such contingencies. But in view of the statutes either the parties must waive all such or the Buyer must exercise whatever due diligence it deems necessary and take all action needed to satisfy itself as to all of same in advance and before submission of the notice. The purchase and sale agreement submitted as part of the notice must contain no such contingency. If it does the town reserves the right to reject the notice without reviewing the rest of the notice, and to review the other portions of same only once that condition has been satisfied. That could cause further delay at that time if the notice is noncompliant in any other respect.

B. Performance/Closing Date.

The performance date set forth in a purchase and sale agreement must take into account the town’s right to purchase the property, or assign such right, within the 120 day statutory period. The statute affords the town to buy the property on the same terms and conditions as set forth in a PSA. That would not be possible, and nor could the Seller meet the performance date and provide title clear of the ROFR, unless the performance date were something such as “the later of (a) [insert date] or (b) X days after the date when the town of Charlton exercises, assigns or waives its right of first refusal under G.L. c. 61A, sec. 14.”

Town of Charlton

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