

February 6, 2018

Katharine Lord Klein
kklein@k-plaw.comBY ELECTRONIC TRANSMISSION ONLYHon. Charles Kaniecki and
Members of the Select Board
Southampton Town Hall
210 College Highway, Suite 7
Southampton, MA 01073Re: Chapter Lands – Intent to Convert upon Sale

Dear Members of the Select Board:

You have requested an opinion regarding the Town's rights under Chapters 61 (forest land), 61A (agricultural/horticultural land) and 61B (recreational land). You have specifically inquired regarding the circumstances in which a town is entitled to notice of a sale and has a right of first refusal under the Chapter Lands statutes, G.L. c. 61, §8, G.L. c. 61A, §14 and G.L. c. 61B, §9 (the "Notice Statutes"). A question arises when a town is not provided with notice of the sale and afforded a right of first refusal, but there is evidence that the buyer intends to convert the property to a residential, industrial or commercial use.

The Notice Statutes each state: "Land taxed under this statute shall not be sold for, or converted to, residential, industrial or commercial use while so taxed or within 1 year after that time unless the city or town in which the land is located has been notified of the intent to sell for, or to convert to, that other use." (emphasis added) As you know, in the event the owner of property classified and assessed under Chapters 61, 61A or 61B sells the property to a purchaser who intends to convert it to a residential, industrial or commercial use, or converts the land while so taxed to such a use, notice of the sale or conversion must be given to the town. The town has a right of first refusal to acquire the property on the same terms and conditions as set forth in the agreement with the third party, in the case of a sale, or, in the case of a conversion, an option to purchase the property at full and fair market value, as determined by appraisal.

On their face, the Notice Statutes provide that in the event the buyer does not change the use of the property from the protected use to a residential, industrial or commercial use at the time of conveyance and for one year after the land is so taxed, i.e., if the buyer continues to use the land for forest, agricultural/horticultural or recreational purposes, as the case may be, a town's right to notice of the sale and right to match the buyer's offer, on the same terms and conditions, is not triggered. Accordingly, when land classified as and taxed under Chapter 61, 61A or 61B is acquired, but not converted for at least one year from the date that the property was most recently assessed as Chapter Lands, a town may be deprived of both the right to notice of the impending sale and its right

Hon. Charles Kaniecki and
Members of the Select Board
February 6, 2018
Page 2

to purchase the property. Once the conveyance has occurred, should the buyer convert the property to a residential, industrial or commercial use within one year from the date the property was last assessed under the Chapter Lands statute, a town's right to notice and to acquire the property is resurrected, in my opinion.

Nonetheless, there may be circumstances surrounding a proposed conveyance where there is evidence of the buyer's intent to convert the property to another use, at some point in the future (and not immediately upon conveyance), arguably triggering a town's right of first refusal. Actions of the buyer of classified property during and after the sale can be demonstrative of an intent to convert the use of the property.

In Town of Sudbury v. Scott, 439 Mass. 288 (2003), the buyer, although claiming that he intended to continue to use the property for agricultural purposes, engaged in minimal agricultural activity, and simultaneously conducted development-related activities, including meetings with town officials regarding permitting, performed percolation tests and executed mortgage documents indicating development intentions. The Massachusetts Supreme Judicial Court ("SJC") held that the town had submitted sufficient evidence that it could be found that the buyer never intended to use the property for Chapter Lands purposes, and that the minimal agricultural activity "was undertaken to conceal his intent in order to defeat the town's right of first refusal. In these circumstances, specific performance would be warranted." Sudbury, 439 Mass. at 301-02. Therefore, the SJC denied the developer's motion for summary judgment.

A town might demonstrate an intent to convert in a number of ways. The purchase price may be indicative of an intention to use the property for a non-classified use, i.e., a buyer may pay considerably more for property that will be developed for a residential, industrial or commercial use than for a Chapter Lands purpose. If a buyer (either before or after a sale) sought approvals/permits for a proposed residential, industrial or commercial use, this would be indicative of a proposed conversion. Minimal activities under the classified use might also demonstrate an intention not to continue the current use.

As the Sudbury case demonstrates, establishing the buyer's "intent" is a case-specific, and fact intensive, inquiry. Importantly, since the Sudbury case was decided in 2003, Chapters 61, 61A and 61B have been amended, to provide that land taxed under these statutes may not be sold or converted to a residential, industrial or commercial use while so taxed "or within 1 year after that time." Previously, there was no time frame given during which a town must be provided with the notice of intent to sell or convert. It may be that the one-year period is now a "safe harbor," and if the conversion does not take place during this time frame, the right of the town to acquire the property may not arise. This issue has not, to my knowledge, been determined by the courts.

Hon. Charles Kaniecki and
Members of the Select Board
February 6, 2018
Page 2

Given the uncertainty in the law, at this point, it is safe to say that a town that desired to challenge an owner's determination not to give notice of the town's right of first refusal would need to pursue relief in court, whether it be to obtain information about the transaction such as the purchase and sale agreement (if not otherwise voluntarily provided to the town by one of the parties to the transaction), and/or to argue that the conduct of the buyer was indicative of an intent to convert the property to another use. The town would need to have evidence supporting these claims, which may be difficult to obtain especially if the town does not already have in its possession the operative agreement. In any event, these cases can be costly to litigate.

You also asked if Chapter Lands may be conveyed without payment of the "lien" to a town. Each of the Chapter Lands statutes provides that, if the purchaser files an affidavit with the board of assessors that the land is being purchased for the same use, and the property is thereafter held for those purposes for the time frame required under each of the statutes, no conveyance tax will be due. See G.L. c. 61, §6; G.L. c. 61A, §12; G.L. c. 61B, §7.

I have enclosed, for your general reference, a "Chapter Lands Checklist," which outlines the process once a notice of intent has been received by the Town.

Please do not hesitate to contact me with any questions.

Very truly yours,



Katharine Lord Klein

KLK/jsh

602820/SOUT/0001

CHAPTER LANDS¹ CHECKLIST

Sale or Conversion of Chapter Lands for Other Use²

SALE

I. TOWN RECEIVES NOTICE OF INTENT TO SELL

Town's 120-day period commences when Town has received a notice of intent to sell (the "Notice") and a purchase and sale agreement ("P&S") that comply with statutory requirements.

Critical for Town to review Notice promptly upon receipt. 30-day review period

A. Notice of Intent to Sell Must Comply with Statute. To comply, the Notice must contain:

1. Statement of intent to sell,
2. Statement of the proposed use of the land,
3. Location and acreage of the land, as shown on map drawn to scale of the assessors map,
4. Name, address, and telephone number of the owner,
5. A certified copy of the P&S, which is a *bona fide* offer and is limited to land classified as Chapter Lands, and
6. Any additional agreements or statement of consideration for any contiguous land under the same ownership, not classified as Chapter Land but sold contemporaneously with the proposed sale.

And, the Notice must be:

7. Sent to the Select Board, Planning Board, Assessor, and Conservation Commission. Also sent to the State Forester, and
8. Sent by certified mail or hand delivery.

Notice is defective if it does not contain the foregoing materials; 30-Day Response Period

CONVERSION

I. TOWN RECEIVES NOTICE OF INTENT TO CONVERT

Town's 120-day period commences when Town has received a notice of intent to convert (the "Notice") that complies with statutory requirements and the parties have agreed on a purchase price.

Critical for Town to review Notice promptly upon receipt. 30-day review and appraisal period

A. Notice of Intent to Convert Must Comply with Statute. To comply, the Notice must contain:

1. Statement of intent to convert,
2. Statement of the proposed use of the land
3. Location and acreage of the land, as shown on map drawn to scale of the assessors map, and
4. Name, address, and telephone number of the owner, and attorney, if any.

And, the Notice must be:

5. Sent to the Select Board, Planning Board, Assessor, and Conservation Commission. Also sent to the State Forester, and
6. Sent by certified mail or hand delivery.

Notice is defective if it does not contain the foregoing materials; 30-Day Response Period

¹ "Chapter Lands" refers to land that is, or was during the past 1 year, classified and taxed under G.L. c. 61 (forest land), G.L. c.61A (agricultural or horticultural land), or G.L. c. 61B (recreation land)

² The Town's purchase rights are triggered when Chapter Land is to be used for residential, industrial or commercial purposes, either by a third party who is going to purchase the Chapter Land from the owner (whereby the Town acquires a right of first refusal to match the terms of the third-party offer), or by the property owner (whereby the Town acquires an option to purchase the property on terms negotiated with the owners). A continuation of the Chapter Lands use by a new owner does not trigger the Town's purchase rights. The Chapter Lands statutes state, however, that land taxed under the statutes shall not be sold for, or converted to, residential, industrial or commercial use while so taxed, or within one year after that time unless the Town is notified of the intent to sell for, or to convert to, that other use. Thus, if the property is converted within one year after the tax classification ends, the Town is entitled to notice.

SALE

The statutes provide that “if the notice to sell or convert does not contain all the materials described above, then the town...shall notify the landowner in writing that the notice is insufficient and does not comply” within 30 days from the receipt of the Notice

If the Purchase and Sale Agreement is not a bona fide offer, recommend that the Town send landowner notice of the same within same 30-day period (*see below*)

- B. The P&S Must Be Bona Fide.** For a P&S to be a *bona fide* offer:
1. The purchase cannot be contingent on potential changes to zoning, contain conditions related to potential for, or potential extent of, subdivision of property for residential use, or potential development for industrial or commercial use,
 2. The buyer must be unaffiliated with the owner, and
 3. The purchase price must be a fixed amount payable upon the delivery of deed.

Although the statutes refer to the Town notifying the owner within the 30-day period if the Notice “does not contain all the materials” and is silent as to whether there is a deadline by which the owner must be notified if a P&S is not a bona fide offer, we recommend that, if a P&S is not bona fide, the Town notify the owner within the same 30-day period

Critical for the Town to review P&S promptly upon receipt of Notice

The Notice of Intent (original or revised) is complete and the P&S is Bona Fide. The Town has a valid right of first refusal, which it must exercise, if at all, within 120 days following the date on which the Notice was deposited in the mail (or was hand delivered).

CONVERSION

The statutes provide that “if the notice to sell or convert does not contain all the materials described above, then the town...shall notify the landowner in writing that the notice is insufficient and does not comply” within 30 days from the receipt of the Notice

Notice of Intent (original or revised) is complete.

- B. Establish Purchase Price.** The parties must establish a price for the property:

The Town must obtain an appraisal of the property within 30 days of receipt of Notice of Conversion

The Town must, at the Town’s expense, obtain an impartial appraisal prepared by a certified appraiser and deliver appraisal to owner within 30-day period

If the owner is dissatisfied with the Town’s appraisal, it may, at its expense, obtain its own appraisal from a certified appraiser within 60 days of the delivery of a complete Notice

If the Town and owner cannot agree on a price, the parties shall hire a mutually acceptable appraiser to complete an appraisal within 90 days of the delivery of complete Notice of Intent to Convert, the cost of which is to be divided evenly among the parties. This is the final price that the Town may accept or reject.

The owner has the right to revoke its Notice of Intent to Convert at any time during the appraisal process, without recourse

Critical for Town to order appraisal promptly upon receipt of Notice of Intent to Convert that complies with statutory requirements

The Town has a valid option to purchase when the parties have agreed upon a price, and must exercise the option, if at all, within 120 days from the date on which the parties agreed on the price.

SALE

II. 120-DAY RIGHT OF FIRST REFUSAL PERIOD

To exercise its right of first refusal, the Town must, within the 120-day period:

A. Exercise or Assign Right of First Refusal

(1) Exercise Right of First Refusal

1. *Public Hearing:* Select Board must hold public hearing to exercise right of first refusal (notice to be given in compliance with Open Meeting Law, GL c. 30A. The Town could choose to have additional notice requirements)³,
2. *Record Notice of Exercise:* The Town must record the Notice of Exercise with the Hampshire County Registry of Deeds. Include name of owner and describe property. Also record affidavit by a notary public as to mailing of notice, and
3. *Notify Owner:* Must send letter and Notice of Exercise signed by Select Board to owner by certified mail to address specified in Notice, and include P&S. The P&S is the same as the P&S owner entered into with buyer, with the Town substituted as buyer.*

** The Chapter Lands statutes state that the P&S "shall be fulfilled" (that is, the closing is to occur) within 90 days from the date the owner signs the P&S and returns it to the Town. Since the statutes do not expressly state that the Town may satisfy its contingencies during the 90-day period, after the P&S is signed, we recommend that the Town satisfy its contingencies during the 120-day period and then send notice to the owner prior to the expiration of said 120-day period. Such contingencies are discussed below.*

All Steps to Exercise Right of First Refusal Must be Completed Within 120-Day Period

(2) Assign Right of First Refusal

1. *Assignee:* Assignee must be nonprofit conservation organization, the commonwealth,

CONVERSION

II. 120-DAY OPTION TO PURCHASE PERIOD

To exercise its option to purchase, the Town must, within the 120-day period:

A. Exercise or Assign Option to Purchase

(1) Exercise Option to Purchase

1. *Public Hearing:* Select Board must hold public hearing to exercise option to purchase (notice to be given in compliance with Open Meeting Law, GL c.30A. The Town could choose to have notice requirements)³,
2. *Record Notice of Exercise:* The Town must record the Notice of Exercise with the Hampshire County Registry of Deeds. Include name of owner and describe property. Also record affidavit by a notary public as to mailing of notice, and
3. *Notify Owner:* The Town must send letter and Notice of Exercise signed by Select Board to owner by certified mail to address specified in Notice, and include a P&S.*

** The Chapter Lands statutes state that the P&S "shall be fulfilled" (that is, the closing is to occur) within 90 days from the date the owner signs the P&S and returns it to the Town. Since the statutes do not expressly state that the Town may satisfy its contingencies during the 90-day period, we recommend that the Town first satisfy its contingencies during the 120-day period and then send notice to the owners prior to the expiration of said 120-day period. Such contingencies are discussed below.*

All Steps to Exercise Option to Purchase Must be Completed Within 120-Day Period

(2) Assign Option to Purchase

1. *Assignee:* Assignee must be nonprofit conservation organization, the commonwealth,

³ A public hearing is required to exercise or assign rights of purchase. The Select Board is not required by statute to hold a public hearing, or obtain Town Meeting authorization, to decline to exercise the Town's purchase rights.

SALE

or any of its political subdivisions. Must hold greater of 70% of property, or amount to be held undeveloped by buyer, for Chapter Lands' purposes. Need permanent deed restriction,

2. *Public Hearing*: The Town must hold a public hearing to assign right of first refusal (notice to be given in compliance with Open Meeting Law, GL c. 30A. The Town could choose to have additional notice requirements),
3. *Record Notice of Assignment*: The Town must record Notice of Assignment with Hampshire County Registry of Deeds. Include name of assignee, other terms of assignment, name of record owner and describe premises,
4. *Notify Owner*: The Town must send Notice of Assignment signed by Select Board to owner by certified mail to address specified in Notice, and
5. *Assignee Exercises Right of First Refusal*: Assignee records Notice of Exercise, sends same to owner with P&S.

All Steps to Assign Must be Completed Within 120-Day Period

B. Inspect Property and Conduct Other Due Diligence

The Town has the right during the 120-day period to inspect and survey land, including, but not limited to, soil testing for Title 5 compliance and taking water samples. Such rights are independent of the P&S, in that the Town has inspection rights even if the P&S does not grant such rights to buyer. Recommend that Town complete its due diligence prior to expiration of 120-day period, including, without limitation, researching the title to the property.

C. Publish Uniqueness Determination

If the value of the property exceeds \$35,000, the Town is required to comply with GL c.30B, §16. The Town is not required to issue a request for proposals; if the property is unique, the Town publish a uniqueness determination in a local newspaper and, if the property exceeds 2,500 square feet, with the Central Register. 30 days must pass without objection for Town to be in compliance with GL c.30B.

CONVERSION

or any of its political subdivisions. Must hold 70% of property for Chapter Lands' purposes. Need permanent deed restriction,

2. *Public Hearing*: The Town must hold a public hearing to assign option to purchase (notice to be given in compliance with Open Meeting Law, GL c.30A. The Town could choose to have additional notice requirements),
3. *Record Notice of Exercise*: The Town must record Notice of Assignment with Hampshire County Registry of Deeds. Include name of assignee, other terms of assignment, name of record owner and describe premises,
4. *Notify Owner*: The Town must send Notice of Assignment signed by Select Board to owner by certified mail to address specified in Notice, and
5. *Assignee Exercises Right of First Refusal*: Assignee records Notice of Exercise, sends same to owner with P&S.

All Steps to Assign Must be Completed Within 120-Day Period

B. Inspect Property and Conduct Other Due Diligence

The Town has the right during the 120-day period to inspect and survey land, including, but not limited to, soil testing for Title 5 compliance and taking water samples. Recommend that Town complete its due diligence prior to expiration of 120-day period, including, without limitation, researching the title to the property.

C. Publish Uniqueness Determination

If the value of the property exceeds \$35,000, the Town is required to comply with GL c.30B, §16. The Town is not required to issue a request for proposals; if the property is unique, the Town publish a uniqueness determination in a local newspaper and, if the property exceeds 2,500 square feet, with the Central Register. 30 days must pass without objection for Town to be in compliance with GL c.30B.

SALE

D. Hold Town Meeting to Approve Acquisition and Appropriate Funds, and, if applicable, hold election under Proposition 2½

Even if P&S provides buyer with a financing contingency, recommend that Town Meeting, and, if applicable, an election under Proposition 2½, be held within 120-day period, to authorize the acquisition and appropriate funds. The Select Board may hold public hearing (discussed above) before or after the Town Meeting vote. A Town Meeting vote is not required to assign the right of first refusal.

III. CLOSING

Closing to occur within 90 days from the date on which owner signs the P&S and returns it to Select Board (or the assignee) by certified mail, or upon expiration of any extended period that owner has agreed to in writing.

SUMMARY

Within 30 Days of Receipt of Notice of Intent to Sell

1. Town and Counsel review if Notice complies with the statute,
2. Town and Counsel review if P&S is a bona fide offer, and
3. If Notice and/or P&S is defective, Town or Counsel sends notice of the same to the owner.

Town's has 120 days to exercise right of first refusal once Notice and P&S comply with the statute.

Within 120-day Purchase Period

1. Select Board holds a public hearing (and votes to exercise right of first refusal or to assign rights),
2. Town conducts property inspections, if desired,
3. Counsel reviews title to the property,
4. Town Meeting votes to authorize acquisition and appropriate funds (may not be necessary under certain circumstances),
5. Select Board votes to exercise right of first refusal (if it has not done so already),
6. Town records Notice of Exercise and Affidavit

CONVERSION

D. Hold Town Meeting to Approve Acquisition and Appropriate Funds, and, if applicable, hold election under Proposition 2½

Hold Town Meeting, and, if applicable, an election under Proposition 2½, within 120-day period to authorize the acquisition and appropriate funds. The Select Board may hold public hearing (discussed above) before or after the Town Meeting vote. A Town Meeting vote is not required to assign the option to purchase

III. CLOSING

Closing to occur within 90 days from the date on which owner signs the P&S and returns it to Select Board (or assignee) by certified mail, or upon expiration of any extended period that owner has agreed to in writing.

SUMMARY

Within 30 Days of Receipt of Notice of Intent to Sell

1. Town and Counsel review if Notice complies with the statute,
2. If Notice is defective, Town or Counsel sends notice of the same to the owner, or,
3. If Notice is not defective, Town obtains appraisal and sends it to owner.

Once parties have agreed upon a purchase price, the Town has 120 days to exercise its option to purchase.

Within 120-day Purchase Period

1. Select Board holds a public hearing (and votes to exercise option to purchase or to assign rights),
2. Town conducts property inspections, if desired,
3. Counsel reviews title to the property,
4. Town Meeting votes to authorize acquisition and appropriate funds (may not be necessary under certain circumstances),
5. Select Board votes to exercise option to purchase (if it has not done so already),
6. Town records Notice of Exercise and Affidavit

SALE

with Registry, and

7. Town sends letter, Notice of Exercise and P&S to owner.

Town and owner close within 90 days from date on which owner signs P&S and returns the same to the Town, or within such extended closing date that the owner has agreed to in writing.

602819/SOUT/0001

CONVERSION

with Registry, and

7. Town sends letter, Notice of Exercise, and P&S to owner.

Town and owner close within 90 days from date on which owner signs P&S and returns the same to the Town, or within such extended closing date that the owner has agreed to in writing.