

March 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 – Town’s Rights Under the Notice Statutes

Dear Members of the Select Board:

You have requested an opinion regarding the circumstances in which the Town, when the Town becomes aware that there is an outstanding purchase and sale agreement (“agreement”) relative to chapter lands, is entitled to request a copy of the agreement and to assert that the Town has a right of first refusal as to the property. Further, you have asked, in the event of a sale of chapter lands property, in what circumstances does the Town’s right of first refusal survive the conveyance. You have also posed a number of fact scenarios, with questions, which I will address below.

As you are aware, the Town’s rights derive from Chapter 61, Section 8 for forest land, Chapter 61A, Section 14 for agricultural/horticultural land and Chapter 61B, Section 9 for recreational land (the “Notice Statutes”). 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 the purchaser converts the land to such a use within one year from the date the property was so taxed, notice of the proposed conveyance must be given to the Town, and 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.

Town’s Rights to Review the Agreement

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, the Town’s right to

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notice of the sale and 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 land, the Town is not entitled to notice of the impending sale and does not have a right to purchase the property.

In my opinion, if the Town is merely aware that there is an outstanding agreement for land classified as chapter land, but nothing more, i.e., unless the Town has, at a minimum, some evidence that the property may be converted to residential, industrial or commercial use, the Town is not entitled to a copy of the agreement from the seller. The Town may not, in my opinion, demand a copy of an agreement involving chapter land property absent some particularized knowledge of an intent to convert, discussed in more detail below.

Town's Right of First Refusal and Intent to Convert

The Town's right of refusal arises when land taxed under Chapters 61, 61A or 61B is "converted" to residential, industrial or commercial use while so taxed or within one year thereafter. You have inquired what constitutes an act of "conversion," and, ancillary thereto, can a present intent to convert in the future, albeit the conversion does not occur within one year from the date on which the property was last taxed as chapter land, trigger the Town's right of first refusal.

In my opinion, "conversion" under the Notice Statutes means the purchaser has actually taken action on the land that results in a change to the site, e.g., grading, clearing, installation of a road associated with a residential, industrial or commercial use. Conversely, pursuing or even obtaining permits and approvals that would allow development of the land does not constitute, in my opinion, in and of itself, a conversion to another use. The buyer has not, at that point, committed to taking the property out of chapter land status.

Nonetheless, there may be circumstances where there is evidence of the buyer's intent to convert the property to another use, at some point in the future, which may arguably give rise to a town's right of first refusal. Actions of the buyer of classified property during and after the sale can be demonstrative of a clear 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

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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. The SJC denied the developer's motion for summary judgment. The ruling meant that the town would be permitted to go to trial, and show that the purchaser intended, at the time of purchase, to convert the land to another use.

Thus, the Sudbury case suggests that if the Town could show that the purchaser had an unequivocal intent to use the property for a residential, industrial or commercial use at the time of purchase, and merely waited out the year period, arguably, the Town could assert a right to acquire the property. However, the Sudbury case was decided before significant changes were made to the chapter lands statutes. Prior to 2006, the Notice Statutes did not contain a time limitation, i.e., the one year time frame since the land has been so taxed. It is possible that the legislature intended to create a "safe harbor" for buyers – if they wait out this one year, a town's rights are extinguished. The Sudbury case, however, is still good law. There are not, to my knowledge, any cases since the changes to the statutory language addressing this issue. Thus, it is arguable that if the Town can show that the buyer's intent at the time of acquisition was to convert the property, even if a year has passed since the land has been taxed as classified property, the Town's right of refusal may still exist. If a court agreed, in my opinion, the Town would need to adduce compelling evidence in order to prevail – beyond showing that permits for a development had been sought.

Given the uncertainty in the law, at this point, it is safe to say that if the Town desires to challenge an owner's determination to decline to give notice of the Town's right of first refusal, the Town would need to pursue relief in court. The Town, in my opinion, would need to produce significant evidence of an intent to convert at the time of acquisition. Even with this, it is not clear whether a court would find that conversion means an actual change to the land, and without this, within a year, the Town's rights are lost, or, alternatively, look to the buyer's intent at the time of acquisition. Such a case would be time-consuming, and costly to litigate.

Town's Rights Once Chapter Land Classification Has Expired or Chapter Land Has Voluntarily Been Taken Out of Chapter Land Classification

You have posed questions relative to the application of the Notice Statutes upon: (1) expiration of chapter land classification; and (2) the seller or buyer voluntarily taking the property out of chapter land classification.

Under Chapter 61, Section 2 (forest land), the property is removed from classification unless, at least every ten years, the owner files with the assessor a new certification by the state forester. For agricultural/horticultural land, under Chapter 61A, Section 6, and recreational land, under Chapter 61A, Section 3, eligibility for favorable tax classification is determined each tax year, by application to the board of assessors not later than October 1 of the year preceding each tax year for

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which such valuation is being sought, e.g., for Fiscal Year 2019 (July 1, 2018 through June 30, 2019), application shall be made prior to October 1, 2018.

You have asked specific questions relative to timing.

A. If classification under Chapter 61, as forest land, expires on December 31, 2018, and is not renewed, and a sale occurs after December 31, 2018, does the Town have a right of first refusal? In my opinion, assuming the classification expires on December 31, 2018, the Town's right of first refusal does not expire until December 31, 2019.

B. If land classified under Chapters 61, 61A and 61B is purchased, and the new owner converts the property within one year from the date the land was last classified as chapter land, does the Town continue to have a right of first refusal? The Town would, in my opinion, have a right of first refusal for one year from the date the land was so classified.

C. If property is taken out of Chapter 61, and, subsequent thereto, there is an agreement for sale and conveyance, and a conversion occurs upon closing or within a year from when the land was taken out of chapter land status, what rights does the Town have? The Town would, in my opinion, have a right of first refusal for one year from the date the land was so classified.

D. If land classified as Chapter 61 (forest land) is used, instead, for a Chapter 61A (horticultural/agricultural) use, does the land have to remain classified as Chapter 61A for a minimum of five years, or is one year sufficient? In my opinion, if the land remains in Chapter 61A (or Chapter 61B) for a minimum of one year, the Town's right of first refusal would be extinguished. There has not been a conversion to a residential, industrial or commercial use.

Please do not hesitate to contact me with any questions.

Very truly yours,



Katharine Lord Klein

KLK/jsh