

TOWN OF WEST NEWBURY, MA
PROCEDURE FOR CHAPTER 61, 61A, 61B RIGHT OF FIRST REFUSALS
APPROVED ON FEBRUARY 22, 2016

PURPOSE

M.G.L. Chapters 61, 61A, and 61B provide tax relief for owners of forestland, farmland, and recreational land respectively. (Chapter 61A is most commonly applicable in the Town of West Newbury.) When a landowner intends to convert such land to other uses, the Town has a Right of First Refusal. This document is intended to provide a procedure which promotes consistency, transparency, and fairness when a landowner intends to convert such land. The procedure is intended to ensure that potentially interested town entities become aware of the potential conversion, to allow them to provide input to the Board of Selectmen, and to ensure that the Board of Selectmen have the ability to make a fully informed decision on behalf of the Town.

Note that it is incumbent upon all entities using this procedure to review the applicable laws and consult legal counsel. Details on how to carry out steps in this procedure are detailed in the law and, of course, such steps must comply with the law. After the steps in this procedure are executed, additional steps may be necessary according to the law. The entire law in all its details are not included herein.

Text in this draft of this procedure which is wholly or substantially taken directly from the law is highlighted in light green. MGL 61A, §14, is given in Appendix A and parts of the law that are directly addressed in this procedure are highlighted in yellow.

OVERVIEW

Land currently taxed under MGL Chapters 61, 61A, or 61B cannot be sold for, or converted to, residential, industrial, or commercial use unless the city or town in which the land is located has been notified of that intent.¹ A Notice of Intent shall be sent by the landowner by Certified Mail or hand delivered to the Board of Selectmen, the Assessor, the Planning Board, the Conservation Commission, and the State Forester.² An electronic copy shall also be submitted for transmittal to other town departments as noted below. Receipt of a complete and proper Notice of Intent triggers a period of 120 days during which the Town shall have a Right of First Refusal to match a bona fide offer to purchase the land or to assign this right to another entity.³

¹ MGL 61A, §14, Appendix A, Lines 1-4.

² MGL 61A, §14, Appendix A, Lines 35-38.

³ MGL 61A, §14, Appendix A, Lines 51-53 and Lines 81-82.

PROCEDURE FOR HANDLING NOTIFICATIONS OF INTENT TO CONVERT CHAPTER 61, 61A, OR 61B LAND

When the Board of Selectmen receives a Notice of Intent to sell Chapter 61, 61A, or 61B land for, or convert such land to, residential, industrial, or commercial use, the following procedure will be followed:

1. Town Counsel will review the Notice of Intent to make sure the notice is proper and complete and shall notify the Board of Selectmen of their findings within 2 business days of receipt.
2. If the Notice of Intent is determined to be insufficient, within 30 days of receipt of the Notice, the Town Counsel will notify the landowner in writing that the Notice is insufficient, does not comply, and that no 120 day period has begun.⁴ If the Notice is proper and complete, Town Counsel will notify the landowner of such. In the case of sufficient notice, the start of the 120 day period for the Town to exercise its Right of First Refusal has begun.⁵
3. The Planning Board, Assessor, Conservation Commission, Finance Committee, Historical Commission, Open Space Committee, Park and Recreation Commission, and Water Department are hereafter referred to as the Town Entities. The Executive Administrator to the Board of Selectmen will also provide copies of a bonified Notice by e-mail to the Town Entities. The Executive Administrator to the Board of Selectmen will ascertain that the Notice was received by the Town Entities.
4. The Town Entities will promptly review the Notice and decide whether to make a written recommendation to the Board of Selectmen. Such recommendations will state whether the land in question is viewed by that entity as valuable to the Town and, if so, why.
5. The Board of Selectmen will set an agenda item at the next available meeting that will still allow the Town Entities a reasonable opportunity to prepare recommendations and the Town Entities and abutters of the subject property will be notified of the time and date of this meeting. Town Entities not providing feedback within 7 days of being notified or at the Board of Selectmen's meeting will be assumed as not wishing to offer a recommendation.
6. Only after consideration of the recommendations of the Town Entities, the responses of other interested parties, and discussion at the Board of Selectmen's meeting, the Board of Selectmen may determine that it will not exercise the Town's Right of First Refusal and, in such cases, the Board of Selectmen will promptly send written notice of non-exercise to the landowner.⁶ If, however, the Board of Selectmen deems that further investigation into exercising the Right of First Refusal is warranted, the board shall arrange for a Public Meeting and provide proper notice of such to the public per Section 20 of Chapter 30A⁷ Furthermore, the Board shall also promptly arrange for an impartial appraisal, performed by a certified appraiser.⁸ A decision at this time to further investigate the Right of First Refusal does not constitute any obligation on the Town to eventually exercise that right.

⁴ MGL 61A, §14, Appendix A, Lines 48-50.

⁵ MGL 61A, §14, Appendix A, Lines 51-53. The 120 day period begins running on the day following the latest date of deposit of the notice in the United States mail or when the notice has been hand delivered to the Board of Selectmen.

⁶ MGL 61A, §14, Appendix A, Lines 118-120.

⁷ MGL 61A, §14, Appendix A, Lines 68, 70-71, and 84-85 refer to a "Public Hearing" saying that "the board will arrange for a Public Hearing and provide proper notice of such to the public per Section 23B of Chapter 39. Section 23B of Chapter 39 has been repealed, however, and, therefore, by the recommendation of Michael McCarron, this procedure instead makes reference to Section M.G.L. c. 30A, §§ 18-25 by substituting the phrase "Public Meeting" wherever "Public Hearing" had been used.

⁸ MGL 61A, §14, Appendix A, Lines 54-58. The law requires an appraisal if no purchase and sale agreement has been received but the law does not require such if there is a purchase and sale agreement. Requiring it here, even if a purchase and sale agreement has been received, seems necessary and prudent.

7. There may or may not be a purchase and sale agreement received with the Notice of Intent. If a purchase and sale agreement was received, the Board of Selectmen will compare the Town's appraisal with that agreement and take any discrepancies into consideration. If no purchase and sale agreement was received, the Town's appraisal shall be completed and delivered to the landowner within 30 days of the properly submitted Notice of Intent. If the landowner is dissatisfied with the appraisal, the landowner, at the landowner's expense, may contract for a second appraisal to be completed within the first 60 days of the 120 day period. If after the completion of this second appraisal, the municipality and the landowner cannot agree on a price, both parties must contract for a third appraisal with a mutually agreed upon Appraiser, splitting the cost evenly. The third appraisal is the final determination of price, and must be delivered to the parties within the first 90 days of the 120 day period.⁹
8. The Public Meeting shall take place in time to consider the additional input from the Town, have more discussions, and allow for the process to be complete before the end of the 120 day period. The date for the Public Meeting shall be as soon as possible and preferably not greater than 104 days from the start of the 120 day period, thus assuring the appraisal process is complete and the appraisal value is known.
9. Only after the Public Meeting¹⁰ and after the appraisal process is complete and before 120 day period has ended¹¹, the Board of Selectmen has the sole authority to decide whether to exercise the Right of First Refusal either by exercising the option directly or by assigning the right to a non-profit conservation organization, the Commonwealth, or any of the Commonwealth's political subdivisions.¹² Whichever the decision, the Board of Selectmen shall notify the landowner by certified mail and record a notice of exercise or non-exercise at the Registry Deeds.¹³
10. If the Town fails to act within the 120 day period, the Town is deemed to have failed to exercise the Right of First Refusal and the conversion of the sale of the land, but only on the same terms as contained in the purchase agreement.¹⁴
11. If the Board of Selectmen decides to exercise its option, the board shall (not necessarily in this order):
 - Promptly record the notice of the Town's exercise of the option at the Registry of Deeds as part of an affidavit of a notary public.
 - Promptly notify the landowner by certified mail, at the address specified in the landowner's notice, of the Town's intent to exercise its option.
 - Schedule a Town meeting to be held during the 120-day period, for the purpose of appropriating funds to purchase the property, place a warrant article on the town warrant for this purpose, and schedule an override vote (if necessary) for the purpose of authorizing expenditure of funds. The town meeting and override vote must occur within Town's 120-day period, unless an extension of this deadline is agreed to in writing between the Town of West Newbury and the seller.
 - Complete purchase of the property within 90 days of West Newbury's notice of its decision to exercise its right of first refusal, unless otherwise agreed to in writing by the landowner.

⁹ MGL 61A, §14, Appendix A, Lines 54-65.

¹⁰ MGL 61A, §14, Appendix A, Lines 68.

¹¹ MGL 61A, §14, Appendix A, Lines 54-66.

¹² MGL 61A, §14, Appendix A, Lines 81-82 and Lines 86-92. If the Board of Selectmen decide to assign the Right of First Refusal to a qualifying entity, the assignment shall be for the purpose of maintaining no less than 70% of the land as land that would qualify for Chapter 61A or Chapter 61B protection and in no case shall the assignee develop a greater proportion of the land than was proposed by the developer whose offer gave rise to the assignment. All land other than land that is to be developed shall then be bound by a permanent deed restriction that meets the requirements of chapter 184.

¹³ MGL 61A, §14, Appendix A, Lines 68-69, 72, 93-95, 118-120, and 122-125.

¹⁴ MGL 61A, §14, Appendix A, Lines 99-100.

12. If The Board of Selectmen desires to assign its right of first refusal to a qualified land trust/conservation agency, the board shall:
- At a public meeting during the 120-day period, vote to assign its right of first refusal to the organization, setting forth any terms and conditions of the assignment. [Note: the conservation organization or the Commonwealth or any of its political subdivisions must conserve at least 70% of the property in a use consistent with one of the three Chapters, 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 a 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.]
 - Record the notice to assign its right of first refusal at the Registry of Deeds as part of an affidavit of a notary public during the 120-day period.
 - Notify the landowner by certified mail during the 120-day period, at the address specified in the landowner's notice, of Town's intent to assign its option to a non-profit conservation organization, or governmental agency stating the name and address of the assignee and the terms and conditions of the assignment.
 - Assignee must complete the purchase of the property within 90 days of West Newbury's notification to the landowner that it has assigned its right of first refusal, unless otherwise agreed to in writing by the landowner.
13. If the Board of Selectmen decides to forgo its right of first refusal, the board should:
- Record a limited waiver of its rights of first refusal under Chapter 61, at the Registry of Deeds. Any waiver of West Newbury's rights should be specific to the proposed purchase terms so that if new terms are negotiated or if the sale falls through and a new proposal comes forth, the right of first refusal is triggered anew and the 120-day clock will begin again.
 - The Town of West Newbury shall 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 the Town may decide that it cannot afford to purchase the property, but any such choice should be thoroughly discussed and researched before making such a determination. Where there is consensus on the absence of conservation value or where the Town has negotiated a signed agreement with the landowner and/or developer that meets the municipal needs with regard to the property, the Town may choose not to exercise its right. Any such negotiations, however, should occur in consultation with the Town Entities.

At any time during this process, the landowner has the right to revoke the Notice of Intent with no recourse to either party.¹⁵ In such cases, the land cannot be sold for or converted to other purposes.

¹⁵ MGL 61A, §14, Appendix A, Lines 66-67.

REQUIREMENTS FOR THE NOTICE OF INTENT

It is the responsibility of the landowner to prepare and deliver a complete and proper Notice of Intent. The notice must include the following items:

1. The name, address, and telephone of the landowner and the landowner's attorney, if any.¹⁶
2. A statement of intent to sell Chapter 61, 61A, or 61B land for, or convert such land to, residential, industrial, or commercial use.¹⁷
3. A statement of proposed use of the land.¹⁸
4. The location and acreage of the land as shown on the Assessors' Map.¹⁹
5. 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 which shall be a bona fide offer.²⁰ A bona fide offer is 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.²¹
6. Any additional agreements or a statement of any additional consideration for any contiguous land under the same ownership, and not classified under the Chapter, but sold or to be sold contemporaneously with the proposed sale.²²
7. In the case of an intent to convert the land to another use, the landowner must also notify the Town of the landowner's attorney, if any.²³

REFERENCES

MGL Part I, Title IX, Chapter 61A, Section 14.

Conservation and Land Use Planning under Massachusetts' Chapter 61 Laws: A Primer for Cities, Towns, & Conservation Organizations, 2nd ed., November 2007.

¹⁶ MGL 61A, §14, Appendix A, Line 15 and 33-34.

¹⁷ MGL 61A, §14, Appendix A, Lines 1-2 and 12.

¹⁸ MGL 61A, §14, Appendix A, Lines 12-13 and 301-32.

¹⁹ MGL 61A, §14, Appendix A, Lines 13-14.

²⁰ MGL 61A, §14, Appendix A, Lines 16-19.

²¹ MGL 61A, §14, Appendix A, Lines 24-28.

²² MGL 61A, §14, Appendix A, Lines 20-23.

²³ MGL 61A, §14, Appendix A, Lines 33-34.

APPENDIX A

MGL CHAPTER 61A "ASSESSMENT AND TAXATION OF AGRICULTURAL AND HORTICULTURAL LAND"

SECTION 14 "SALE FOR OR CONVERSION TO RESIDENTIAL OR COMMERCIAL USE; NOTICE OF INTENT TO CITY OR TOWN; OPTION TO PURCHASE; ASSIGNMENT OF OPTION"

1 Section 14. Land taxed under this chapter shall not be sold for, or converted to, residential,
2 industrial or commercial use while so taxed or within 1 year after that time unless the city or
3 town in which the land is located has been notified of the intent to sell for, or to convert to,
4 that other use.

5 The discontinuance of forest certification shall not, in itself, for the purposes of this section, be
6 considered a conversion. Specific use of land for a residence for the owner, the owner's spouse
7 or a parent, grandparent, child, grandchild, or brother or sister of the owner, or surviving
8 husband or wife of any deceased such relative, or for living quarters for any persons actively
9 employed full-time in the agricultural or horticultural use of such land, shall not be a
10 conversion for the purposes of this section, and a certificate of the board of assessors,
11 recorded with the registry of deeds, shall conclusively establish that particular use.

12 Any notice of intent to sell for other use shall be accompanied by a statement of intent to sell,
13 a statement of proposed use of the land, the location and acreage of land as shown on a map
14 drawn at the scale of the assessors map in the city or town in which the land is situated, and
15 the name, address and telephone number of the landowner.

16 Any notice of intent to sell for other use shall be accompanied by a certified copy of an
17 executed purchase and sale agreement specifying the purchase price and all terms and
18 conditions of the proposed sale, which is limited to only the property classified under this
19 chapter, and which shall be a bona fide offer as described below.

20 Any notice of intent to sell for other use shall also be accompanied by any additional
21 agreements or a statement of any additional consideration for any contiguous land under the
22 same ownership, and not classified under this chapter, but sold or to be sold
23 contemporaneously with the proposed sale.

24 For the purposes of this chapter, a bona fide offer to purchase shall mean a good faith offer,
25 not dependent upon potential changes to current zoning or conditions or contingencies relating
26 to the potential for, or the potential extent of, subdivision of the property for residential use or
27 the potential for, or the potential extent of development of the property for industrial or
28 commercial use, made by a party unaffiliated with the landowner for a fixed consideration
29 payable upon delivery of the deed.

30 Any notice of intent to convert to other use shall be accompanied by a statement of intent to
31 convert, a statement of proposed use of the land, the location and acreage of land as shown on
32 a map drawn at the scale of the assessors map in the city or town in which the land is situated,
33 the name, address and telephone number of the landowner and the landowner's attorney, if
34 any.

35 The notice of intent to sell or convert shall be sent by the landowner by certified mail or hand
36 delivered to the mayor and city council of a city, or board of selectmen of a town, and in the
37 case of either a city or a town, to its board of assessors, to its planning board and conservation
38 commission, if any, and to the state forester.

39 A notarized affidavit that the landowner has mailed or delivered a notice of intent to sell or
40 convert shall be conclusive evidence that the landowner has mailed the notice in the manner
41 and at the time specified. Each affidavit shall have attached to it a copy of the notice of intent
42 to which it relates.

43 The notice of intent to sell or convert shall be considered to have been duly mailed if addressed
44 to the mayor and city council or board of selectmen in care of the city or town clerk; to the
45 planning board and conservation commission if addressed to them directly; to the state
46 forester if addressed to the commissioner of the department of conservation and recreation;
47 and to the assessors if addressed to them directly.

48 If the notice of intent to sell or convert does not contain all of the material described above,
49 then the town or city, within 30 days after receipt, shall notify the landowner in writing that
50 notice is insufficient and does not comply.

51 For a period of 120 days after the day following the latest date of deposit in the United States
52 mail of any notice which complies with this section, the city or town shall have, in the case of
53 intended sale, a first refusal option to meet a bona fide offer to purchase the land.

54 In the case of intended or determined conversion not involving sale, the municipality shall
55 have an option to purchase the land at full and fair market value to be determined by an
56 impartial appraisal performed by a certified appraiser hired at the expense of the municipality
57 or its assignee, the original appraisal to be completed and delivered to the landowner within 30
58 days after the notice of conversion to the municipality. In the event that the landowner is
59 dissatisfied with the original appraisal, the landowner may, at the landowner's expense,
60 contract for a second appraisal, to be completed within 60 days after the delivery of the notice
61 to convert. If, after completion of the second appraisal, the parties cannot agree on a
62 consideration, the parties will contract with a mutually acceptable appraiser for a third
63 appraisal whose cost will be borne equally by both parties. The third appraisal shall be
64 delivered to both parties within 90 days after the notice of conversion to the municipality and
65 shall be the final determination of consideration. Upon agreement of a consideration, the city
66 or town shall then have 120 days to exercise its option. During the appraisal process, the
67 landowner may revoke the intent to convert at any time and with no recourse to either party.

68 The option may be exercised only after a public hearing followed by written notice signed by
69 the mayor or board of selectmen, mailed to the landowner by certified mail at the address that
70 is specified in the notice of intent. Notice of public hearing shall be given in accordance with
71 section 23B of chapter 39.

72 The notice of exercise shall also be recorded at the registry of deeds and shall contain the
73 name of the record owner of the land and description of the premises adequate for
74 identification of them.

75 The notice to the landowner of the city or town's election to exercise its option shall be
76 accompanied by a proposed purchase and sale contract or other agreement between the city
77 or town and the landowner which, if executed, shall be fulfilled within a period of not more
78 than 90 days after the date the contract or agreement, endorsed by the landowner, is returned
79 by certified mail to the mayor or board of selectmen, or upon expiration of any extended
80 period that the landowner has agreed to in writing, whichever is later.

81 At the public hearing or a further public hearing, the city or town may assign its option to a
82 nonprofit conservation organization or to the commonwealth or any of its political subdivisions

83 under the terms and conditions that the mayor or board of selectmen may consider
84 appropriate. Notice of public hearing shall be given in accordance with section 23B of chapter
85 39.

86 The assignment shall be for the purpose of maintaining no less than 70 per cent of the land in
87 use as forest land as defined in section 1, as agricultural and horticultural land as defined in
88 sections 1 and 2 of chapter 61A or as recreation land as defined in section 1 of chapter 61B,
89 and in no case shall the assignee develop a greater proportion of the land than was proposed
90 by the developer whose offer gave rise to the assignment. All land other than land that is to be
91 developed shall then be bound by a permanent deed restriction that meets the requirements of
92 chapter 184.

93 If the first refusal option has been assigned to a nonprofit conservation organization or to the
94 commonwealth or any of its political subdivisions as provided in this section, the mayor or
95 board of selectmen shall provide written notice of assignment to the landowner.

96 The notice of assignment shall state the name and address of the organization or agency of the
97 commonwealth which will exercise the option in addition to the terms and conditions of the
98 assignment. The notice of assignment shall be recorded with the registry of deeds.

99 Failure to record either the notice of exercise or the notice of assignment within the 120 day
100 period shall be conclusive evidence that the city or town has not exercised its option.

101 If the option has been assigned to a nonprofit conservation organization or to the
102 commonwealth or any of its political subdivisions, the option may be exercised by the assignee
103 only by written notice to the landowner signed by the assignee, mailed to the landowner by
104 certified mail at the address that is specified in the notice of intent. The notice of exercise shall
105 also be recorded with the registry of deeds and shall contain the name of the record owner of
106 the land and description of the premises adequate for identification of them.

107 The notice of exercise to the landowner shall be accompanied by a proposed purchase and sale
108 contract or other agreement between the assignee and landowner which, if executed, shall be
109 fulfilled within a period of not more than 90 days, or upon expiration of any extended period
110 the landowner has agreed to in writing, from the date the contract or agreement, endorsed by
111 the landowner, is returned by certified mail to the assignee.

112 During the 120 day period, the city or town or its assignees, shall have the right, at reasonable
113 times and upon reasonable notice, to enter upon the land for the purpose of surveying and
114 inspecting the land, including, but not limited to, soil testing for purposes of Title V and the
115 taking of water samples.

116 The city or town or its assignee shall have all rights assigned to the buyer in the purchase and
117 sale agreement contained in the notice of intent.

118 If the city or town elects not to exercise the option, and not to assign its right to exercise the
119 option, the city or town shall send written notice of nonexercise, signed by the mayor or board
120 of selectmen, to the landowner by certified mail at the address that is specified in the notice of
121 intent. The notice of nonexercise shall contain the name of the owner of record of the land and
122 description of the premises adequate for identification of them and shall be recorded with the
123 registry of deeds.

124 No sale or conversion of the land shall be consummated until the option period has expired or
125 the notice of nonexercise has been recorded with the registry of deeds, and no sale of the land
126 shall be consummated if the terms of the sale differ in any material way from the terms of the
127 purchase and sale agreement which accompanied the bona fide offer to purchase as described
128 in the notice of intent to sell except as provided in this section.

129 This section shall not apply to a mortgage foreclosure sale, but the holder of a mortgage shall,
130 at least 90 days before a foreclosure sale, send written notice of the time and place of the sale
131 to the parties in the manner described in this section for notice of intent to sell or convert, and
132 the giving of notice may be established by an affidavit as described in this section.