



AGRICULTURAL PRESERVATION RESTRICTION (APR)

CHANGE IN OWNERSHIP

Selling or Transferring APR Land

Not all, but most APR agreements include an Option to Purchase at Agricultural Value (OPAV) or Right of First Refusal (ROFR) and need an MDAR waiver before the sale – if yours does not MDAR will let you know. A landowner wishing to sell or transfer ownership of an APR property with a ROFR or OPAV should notify APR staff immediately to request a waiver. A waiver states that MDAR waives its right to purchase the farmland which would then allow the sale of the APR to move ahead.

It's important for you to review and understand the process for the sale or transfer of your APR land. The process and timeframe are clearly described in your APR agreement and may be different for each landowner APR agreement. It's important to review your APR agreement with your attorney and realtor. Please note that the process for a decision on an approval for a sale or transfer could take up to 120 days.

Notifying MDAR

If you intend to sell or transfer and receive an offer to purchase, you must notify MDAR in writing as stated in your APR agreement. For example, a letter requesting a waiver for an OPAV must include copies of:

- The offer to purchase
- The purchase and sale agreement and any amendments
- Any appraisal prepared for the proposed sale specifying the fair market agricultural value (FMAV)
- Any appraisal prepared for the sale in which the landowner acquired the APR property
- Other relevant documents relating to the proposed sale

Documentation will be reviewed. If the sale or transfer contains non-APR property, such as a house or land that is not covered by an APR, the landowner should apportion the value between any APR property and any non-APR property. Written notice to MDAR is required and unless otherwise agreed to must be delivered by certified mail, return receipt requested; or hand delivered to MDAR's address listed at mass.gov/agr.

CONSIDERING A SALE OR TRANSFER?

Notify MDAR immediately. Some APRs have an Option to Purchase at Agricultural Value (OPAV) or Right of First Refusal (ROFR) and may need an MDAR waiver before the sale which may take up to 120 days. This information is clearly described in your APR agreement. If you can't find it, notify MDAR to request a copy.

Of the approximately 900 APR agreements about 650 have an OPAV, 100 have an ROFR, and the rest are early APR agreements with no such provisions.

Right of First Refusal (ROFR)

is the right to allow the Commonwealth the opportunity to purchase the property if it is offered for sale. If you apply for a waiver MDAR may, and usually does, waive its right to purchase.

Option to Purchase at Agricultural Value (OPAV)

is a legal tool to ensure the agricultural land remains available to farmers at agricultural value.

OPAV, ROFR, and Waiver guidelines are available at www.mass.gov/apr at "APR Program Details".

Guideline and Policy Updates

MDAR and the Executive Office of Energy and Environmental Affairs (EEA) have established guidelines, policies, and procedures in addition to APR documents, that are periodically updated and provide further guidance for APR landowners. Any inconsistency between the language of an APR agreement, policy or regulation will be resolved in favor of the APR. All APR regulations and MDAR policy documents are posted on MDAR's website and MDAR will provide copies to a landowner upon request. The ALPC may advise and make a recommendation to MDAR for policy development or changes. ALPC meetings are held quarterly as needed, are open to the public, and are a forum for the public to comment on proposed changes to policy.

The complete regulations are available at www.mass.gov/apr and may be consulted for details.

OPAV PURPOSE

The OPAV's purpose is to make sure farms are available to farmers at an agricultural value. Because of the OPAV, which was pioneered by MDAR in 1992 as the first in the nation, hundreds of protected farms have remained in the hands of Massachusetts farmers.

Guidance

The pages that follow may assist you with APR change of ownership process..



SELLING OR TRANSFERRING LAND

FOR LANDOWNERS

Selling or Transferring APR Land

Not sure where to start or what to do?
Here are some quick suggestions:

- Review your APR agreement and contact MDAR as early as possible. Can't find your APR agreement? Contact APR staff to request a copy.
- Some APRs contain a Right of First Refusal (ROFR) or an Option to Purchase at Agricultural Value (OPAV). Check your APR agreement to understand if either of these applies to your APR land.
- If there is an ROFR or an OPAV, specific procedures must be followed (samples include: obtaining an appraisal of the Fair Market Agricultural Value (FMAV) or the Fair Market

Value (FMV), preparing a farm plan, drafting an offer letter, etc.) Your APR agreement - in combination with APR guidelines, policies and regulations - lists the requirements and the timeframe for the process. A decision could take up to 120 days after all documents are submitted to MDAR.

- MDAR has published regulations describing the process at www.mass.gov/apr.
- It is advisable to contact an attorney to help you through not only the land sale/transfer process but also the APR-specific process.
- APR staff are available to walk you through the process.

FOR REAL ESTATE PROFESSIONALS

Questions and Considerations Before Listing a Property

- Is all or a portion of the property in agricultural use?
- Does it have an Agricultural Preservation Restriction (APR)? If so, the buyer must be informed and should read the APR agreement before deciding to purchase the property.
- Each APR property has an APR agreement that is a public record at the Registry of Deeds. The landowner and MDAR also have copies of the APR agreement.
- Some APRs contain a Right of First Refusal (ROFR) or an Option to Purchase at Agricultural Value (OPAV).

You and the landowner must check the APR agreement to understand if either of these applies to the APR land.

- If there is an ROFR or an OPAV, specific procedures must be followed (examples include: obtaining an appraisal of the FMAV, preparing a farm plan, drafting an offer letter, etc.).
- The landowner's APR agreement - in combination with APR guidelines, policies and regulations - lists requirements and the timeframe for the process. Information is available at www.mass.gov/apr.

- It could take up to 120 days after all documents are submitted to MDAR before a decision is made.
- Does the listing make it clear that the land is subject to an APR?
- Does the Purchase and Sale limit the price to the FMAV and list the price for any non-APR land separately?
- Does the APR agreement prohibit sub-division?
- The buyer may be required to submit a farming resume, farm business plan and a financial plan.

UPDATES:

Please note that policies and guidelines may change over time. Any inconsistency in the language of an APR agreement, policy or regulation will be resolved in favor of the APR agreement. APR Program updates are available at www.mass.gov/APR.

OPAV, ROFR, AND WAIVER POLICY

Option to Purchase at Agricultural Value (OPAV) and Right of First Refusal (ROFR)

As of July 26, 2019, the Department has updated the APR regulations to include sections outlining the approach the Department must take when considering whether to exercise its options to purchase APR land at the time of sale. The new regulations outline the process that MDAR must follow when reviewing APR transfers, describe an automatic waiver process, a withdrawal option and also a right to appeal decisions to the ALPC for landowners. Here is a summary of how it works:

In 1985, the APR program implemented two tools that give the Commonwealth the ability to purchase APR protected farmland when it is put up for sale. These tools, called an “Option to Purchase at Agricultural Value” (OPAV) and “Right of First Refusal” (ROFR) enable, but do not require the Commonwealth to purchase APR protected land when it is up for sale. Since 1985, **most** APRs have included a purchase option:

- ① **APRs before 1985 do not have an ROFR or OPAV**
- ② **APRs acquired between 1985 and the first half of 1994 include a ROFR**
- ③ **APRs acquired after the second half of 1994 include an OPAV**

In practice, unlike state agencies such as DCR and DFW, MDAR does not purchase APRs. Yet under certain circumstances MDAR may be required to transfer this right to purchase APRs at the time of sale to an interested buyer other than the original buyer. In the vast majority of transfers, MDAR chooses to “waive” its OPAV or ROFR and not become involved in the transfer.

When an APR landowner has a bona-fide offer from an interested buyer, the APR landowner with an APR agreement that contains an OPAV or an ROFR provision, must notify

MDAR of their intent to sell and offer the land to the Commonwealth to purchase. Along with this notification a landowner can also include a request that MDAR waive its right to purchase. After receiving the notification, MDAR reviews the details of the sale and decides whether to waive its right or elect to utilize its right to purchase the land. If MDAR elects to exercise its right to purchase the APR property, it will not actually purchase the land but will instead seek to transfer or assign its right to purchase to another person or entity, usually a farmer. The Department will do this through a public bidding process. Owners of APRs without an OPAV or an ROFR provision do not have to notify the Department when selling their APR land.

Over the course of the 40-year history of the APR program, MDAR has waived its right to purchase the APR in the vast majority of cases. MDAR has only transferred its right on four occasions. This transfer of rights (also known as “Assignments”) is rare and has only occurred when MDAR’s review of a proposed sale concluded that the proposed buyer was not a farmer or where the property was for sale at a greatly inflated price above agricultural value.

At the 2018 APR Listening Sessions, some comments about the waiver process for ROFRs and OPAVs were brought forward. Later, a state audit of the APR program provided recommended changes; one of these specifically gave a landowner the right to withdraw from the waiver process. Legislation subsequently mandated changes.

As of August 2019, MDAR updated the APR regulations to address how requests for waivers of ROFRs or OPAVs will be managed when submitted. The new regulations outline the process that MDAR must follow when reviewing APR sales; and describe an automatic waiver process, a withdrawal option and also a right to appeal decisions to the Agricultural Land Preservation Committee (ALPC) for landowners. The following is a summary of the main changes to the APR regulations.

WAIVER REQUIREMENTS

Waiver Requirements

When an APR landowner has a bona-fide offer from an interested buyer the APR landowner must notify MDAR of the intent to sell and offer the land to the Commonwealth to purchase or request that MDAR waive its right to purchase the property. Upon receiving the notification, MDAR reviews the details of the sale and decides whether to waive its right or elect to utilize its right to purchase the land.

- An **Automatic Waiver** requires that MDAR waive its right to purchase when all these criteria are met:
 - *The buyer is a farmer.*
 - *The buyer submits a Farm Business Plan.*
 - *The landowner received a good faith offer and submitted to MDAR a certified copy of an executed Purchase and Sale Agreement.*
 - *The landowner provides justification, deemed valid by MDAR, when a purchase price is 20% or greater than the Fair Market Agricultural Land Value (FMAVL). Fair Market Agricultural Land Value (FMAVL) does not include dwellings that may be on the APR or the value of an Agricultural Business.*
 - *The buyer has no record of a prior violation on an APR held by the Commonwealth. (MDAR may waive this requirement if the violation is deemed minor).*
- If the criteria for an Automatic Waiver are not met, the Department *may* choose to issue a **Discretionary Waiver** when:
 - *The buyer is a farmer, a beginning farmer or a non-profit corporation organized for the purposes of leasing land to one or more farmers or beginning farmers.*
 - *The buyer submits a Farm Business Plan for review by MDAR and MDAR determines the plan is complete and presents a viable and achievable plan that is compatible with the APR and APR parcel.*
 - *The buyer has no record of a prior significant APR violation on an APR held by the Commonwealth. (MDAR may waive this requirement if the violation is deemed minor).*
 - *The buyer provides justification, deemed valid by MDAR, when the purchase price is 20% or greater than the Fair Market Agricultural Value (FMAV). Fair Market Agricultural Land Value includes the value of dwellings that may be on the APR and the value of an Agricultural Business.*
- A landowner may withdraw from the offer and process at any point prior to MDAR exercising its right or transferring its right to purchase.
- A landowner may appeal MDAR's decision regarding a waiver by contacting the ALPC which will then hold a hearing to consider the appeal.
- MDAR is always available to discuss the waiver process with the landowner. Future APR agreements will require a meeting with MDAR, the landowner and potential buyer

TIMELINE & TASKS

Thinking about selling or transferring APR land?

STEP 1

Review your APR agreement and contact MDAR as early as possible. Can't find your APR agreement? Call an APR staff member to request a copy.

STEP 2

Notify MDAR of intent to sell. Request a **Waiver** if you have an offer. See Waiver Requirements.

to discuss the ROFR, OPAV and waiver before the sale of an APR.

If MDAR elects to or exercise its right to purchase the APR, it will not typically purchase the land but will, instead, seek to transfer, or assign, its right to purchase to another person or entity, usually a farmer. The Department will do this through a public RFP process.

A landowner can also consult his/her APR agreement to review individual APR seller requirements. If you would like a printed copy of the regulations, please contact Dorothy Du at dorothy.du@mass.gov

APR Transfer Due Diligence Checklist

Seller

1. Contact Taylor Arsenault, APR Stewardship Planner, to discuss potential sale:
 - Taylor.Arsenault@mass.gov
 - 617-655-3870
2. Determine if buyer is eligible (farmer, beginning farmer, non-profit with ag leasing purpose, etc.).
3. Review APR document for ROFR or OPAV¹ language. Either of these will affect the sale process.
4. Confirm your understanding of the APR boundary; contact Taylor Arsenault to determine if a survey exists
5. Do you have an advisor or attorney to help with the transfer? If not, it is advised that you engage one.
6. You may be contacted by your MDAR APR stewardship planner to ensure your APR is in compliance. NOTE: *You will not be able to transfer your property until violations are addressed.*
7. If there's a real estate listing, ensure that it states the property is subject to an APR and accurately represents any restrictions, such as those concerning dwellings and subdivision.
8. Ensure the sale price is based on agricultural value as required. See APR manual for reference.
9. Ensure the Purchase & Sale Agreement meets requirements:
 - Will not expire prior to the end of the ROFR/OPAV waiver decision deadline.
 - Apportions value of non-APR land separately.
 - Fully executed.

Buyer

1. Contact Taylor Arsenault to discuss potential sale:
 - Taylor.Arsenault@mass.gov
 - 617-655-3870
2. Call APR program to discuss:
 - APR restrictions (including ROFR/OPAV requirements)
 - APR Compliance status
 - APR boundary/survey
 - Planned future uses
3. Check waiver eligibility requirements (are you a farmer, beginning farmer, non-profit with ag leasing purpose, etc.)
4. Do you have an advisor or attorney to help with the transfer? If not, it is advised that you engage one.
5. Ensure that sale price is based on agricultural value, as required in OPAV. See APR manual.
6. Ensure that Purchase & Sale Agreement meets requirements:
 - Will not expire prior to the end of the ROFR/OPAV waiver decision deadline.
 - Apportions value of non-APR land separately.
 - Fully executed.

¹ ROFR – Right of First Refusal; OPAV – Option to Purchase at Agricultural Value