



## **Town of Wenham Chapter 61 Right of First Refusal Procedure**

**PURPOSE:** Massachusetts offers preferential tax treatment to those landowners who maintain their property as open space for the purposes of timber production, agriculture or recreation. A town containing so-called Chapter Lands forgoes tax revenue that would otherwise be generated by these lands. However, the Town obtains an opportunity to purchase Chapter Lands in the event that these lands are proposed to be sold for or converted to residential, industrial, or commercial uses.

The Town of Wenham encourages owners of open lands used for forestry, farming and recreation to enroll them in these preferential tax programs to help maintain these lands in their current uses. This procedure statement is adopted by the Wenham Selectpersons to confirm and state the steps that Town staff, boards, and committees will take to support the Town's purchase option, including whether the Town should exercise or assign the Town's option.

The provisions of state law governing this process are found at M.G.L. Chapter 61, Section 8, Chapter 61A, Section 14, and Chapter 61B, Section 9 (each, a "Chapter Statute"). Chapter applies to forestland. Chapter 61A applies to agricultural and horticultural land (which may also include forestland), and Chapter 61B applies to recreational land (which may also include forestland). The statute should be consulted for the exact wording of requirements to be followed by all parties – this procedure statement is a guide to the process, not a restatement of the statutory requirements for the process.

### **A. Cases that activate the Town's Purchase Rights**

1. When the owner of all or part of a property classified under one of the Chapter Statutes proposes to convert or use the Chapter Land for residential, commercial or industrial use (any "Disqualifying Use") either while the land is classified under one of the Chapter Statutes or within one year after being taxed under Chapter 61. In the event of a conversion, the Town has an option to purchase the Chapter Lands at a price acceptable to the Town and the owner.
2. When the owner of all or part of a property classified under one of the Chapter Statutes proposes to sell the Chapter Land and the buyer will use the land for a Disqualifying Use, again while the land is classified under one of the Chapter Statutes or within one year after being taxed under Chapter 61. In the event of a sale, the Town has a right of first refusal to purchase the Chapter Land, that is, the Town has the right to purchase the land on the same terms and for the same price that is stated in the purchase and sale agreement between the owner and a third party. In essence, if the Town exercises its right of first refusal, the Town steps into the buyer's shoes.

Note that the Town does not have any purchase rights if land classified under one Chapter Statute is converted to another Chapter Statute classification or if the buyer does not intend to change the use of the Chapter Lands (and an affidavit is provided to the Assessor).

**Notice of Intent**

In accordance with the Chapter Statutes, the landowner must provide a "Notice of Intent" to sell or convert Chapter Land, by U.S. certified mail or hand-delivery, to the Town Administrator, the Board of Selectmen, Planning Board, Board of Assessors, Conservation Commission, and State Forester (c/o the Commissioner of the Department of Conservation and Recreation). It is the responsibility of the property owner to make sure that the Notice of Intent completely satisfies the statutory requirements, which include at a minimum:

1. A statement of intent to sell or convert,
2. A statement of proposed use of the land,
3. The location and acreage of land as shown on a map drawn at the scale of the Assessor's map,
4. The name, address and telephone number of the landowner, and/or attorney representing the landowner,
5. In the case of an intent to sell land for a Disqualifying Use, 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 a Chapter Statute, and must be a bona fide offer. To be a bona fide offer, the purchase and sale agreement may not be 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.
6. Any additional agreements or a statement of any additional consideration for any contiguous land under the same ownership, and not classified under a Chapter Statute, but sold or to be sold contemporaneously with the proposed sale.

In the event that the Notice of Intent does not include the materials that are required under the Chapter, the Town must notify the landowner of the deficiency in writing within 30-days from the date of the receipt of the Notice of Intent. It is critical for the Town to review the sufficiency of a Notice of Intent soon after receipt.

**B. The Town's Right of First Refusal**

As discussed more fully below, the Town has 120 days from the certified mailing date of a complete Notice of Intent, unless an extension of this deadline is received from both buyer and seller, to determine whether to purchase the Chapter Land. The Town's options are to:

1. Exercise its right of first refusal (matching a bona fide purchase offer), and record a Notice of Exercise at the Registry of Deeds and send the owner written notice of such exercise by certified mail and a purchase and sale agreement, all within the 120-day period, or
2. Assign its rights to a nonprofit conservation organization, or the Commonwealth or any of its political subdivisions, recorded at the Registry of Deeds within the 120-day period, or
3. Not to exercise its right of first refusal, either before or after the hearing, and notify the property owner that it does not intend to exercise its right of first refusal.
4. In the event that the Town does not respond to the landowner within the 120-day period, it is deemed that the Town has not exercised its right of first refusal.

### **C. Option to Purchase**

If the landowner intends to convert the use of the Chapter Land to a Disqualifying Use, the Town must take the following steps if it wishes to purchase the land:

1. Obtain an appraisal of the fair market value of the Chapter Land, at the Town's expense, and send the appraisal to the landowner within 30 days from the date of the Notice of Intent to convert.
2. In the event the landowner disagrees with the Town's appraisal, the owner must obtain a second appraisal, at the owner's cost, within 60 days from the date of the conversion Notice; alternatively, the owner may accept the Town's appraisal.
3. In the event that the Town disagrees with the owner's appraisal, the owner and the Town will select a mutually acceptable appraiser, who shall deliver the appraisal to the owner and the Town within 90 days from the date of the conversion Notice. The value of the Chapter Land as determined by the third appraiser is final. The owner has the right to revoke its Notice to convert at any time without recourse.
4. The Town has 120 days from the date on which the final price has been determined to decide whether to exercise its option to purchase the Chapter Land.

### **D. Procedure for Review of Notices and Evaluation of Properties: Roles of Town Staff and Boards**

#### Town Counsel

Town Counsel will review the Notice of Intent to make sure the Notice is proper and complete. If the Notice of Intent to sell or convert does not contain all of the material as described above, then Town Counsel will notify the Town Administrator, who will notify the landowner in writing, as soon as possible, but within 30 days of receipt, that the notice is insufficient. The 120-day period will begin only if and when the landowner sends in a Notice that complies with the requirements of the law listed above. Town Counsel will determine the final day of the 120 day period, and attempt to seek confirmation from the landowner or his/her representative regarding this date.

In the event of a sale, Town Counsel will review the purchase and sales agreement to determine whether the agreement constitutes a bona fide offer and does not include any contingencies that are prohibited under the Chapter Statutes (such as subdivision approval). Town Counsel will also review the purchase and sale agreement to determine if it offers a fixed purchase price. Town Counsel should consult with the Board of Selectmen and Town Administrator when the purchase and sale agreement contains contingencies which may or may not be able to be met and which may have the effect of delaying the deadline for the Town to act to purchase the property. Town Counsel or the Town should send written notice to the landowner if the purchase and sale agreement is deemed not to comply with Chapter 61 within 30 days from the receipt of the Notice of Intent.

#### Town Administrator

Upon receipt of notification, the Town Administrator will contact all relevant Town Departments to review the property and assess potential impacts to the Town's natural resources, zoning, master plan, open space plans and the potential impact on Town services. The Town Administrator may forward such notice to other relevant Town boards, commissions or committees, such as the Open Space and Recreation Committee, as appropriate. Additionally, the Town Administrator will notify appropriate Town Departments, Boards and Committees if the Notice of Intent is insufficient.

The Town Administrator will determine whether prior funds were authorized or appropriated for the purchase of the parcel, and inform the Board of Selectmen to his or her findings.

The Town or its assignees, during the 120 day period, has the right, at reasonable times and upon reasonable notice, to enter upon the land for the purpose of surveying and inspecting the land, including, but not limited to, soil testing for purposes of Title V and the taking of water samples.

In the case of intended or determined conversion not involving sale, the Town has the option to purchase the land at full and fair market value to be determined by an impartial appraisal performed by a certified appraiser hired at the expense of the Town or its assignee. The original appraisal is to be completed and delivered to the landowner within 30 days after the notice of conversion to the municipality. Upon agreement of a consideration, the Town then has 120 days to exercise its right of first refusal option. At any time in the process, the landowner may withdraw his or her notice to convert with no penalty, thus withdrawing the town's right of first refusal, but is not permitted to proceed with the conversion.

#### Boards, Committees and/or Commissions

Upon receipt of notification from the Town Administrator, the Chairs of relevant Boards, Committees and/or Commissions, will bring the Notice of Intent to the attention of their members. Any such Board, Department, or Commission will notify the Board of Selectmen, within 30 days of receiving the Notice, of their recommendation to the Selectpersons as to whether the property should be acquired by the Town.

The Open Space and Recreation Committee will review the parcel ranking generated using the OSRP Parcel Ranking Matrix, and recommend an action to the Board of Selectmen.

#### The Board of Selectmen

Following the receipt of the Notice of Intent the Board of Selectmen will:

- Schedule a meeting, preferably on the next Board agenda, when the Board of Selectmen will discuss the notice of intent and any comments from the appropriate Boards, Committees and Commissions on the purchase option. The Board of Selectmen may vote at any time during the 120-day period not to exercise the Town's purchase rights; a public hearing is not required for such purposes.
- Per the Chapter Statutes, if the Board of Selectmen is considering exercising or assigning the right of first refusal or its option to purchase, the Board must schedule a public hearing with proper notice in accordance with M.G.L. Chapter 30A, Sections 18-23, the Open Meeting Law, before making that decision. These options may be exercised only after a public hearing followed by written notice signed by the Board of Selectmen, mailed to the landowner by certified mail at such address as may be specified in the notice of intent. It is recommended that abutters within 500 feet of the land be notified of the public hearing.
- The Selectpersons may vote at the public hearing or at any later meeting, within the 120 day timeframe, to either: a) exercise the first refusal option or option to purchase, b) assign the Town's purchase rights to a qualified nonprofit conservation organization or agency or to the commonwealth or any of its political subdivisions, OR c) decline to exercise the first refusal option or option to purchase.
- If grant funds have not previously been secured or the Town has not appropriated funds for the purchase, such funds must be appropriated by vote of Town Meeting. If the funds have not previously been appropriated at an Annual Town Meeting, the Board of

Selectmen must hold a Special Town Meeting within the 120-day period.

#### **E. Exercise of the Town's Purchase Rights**

The Board of Selectmen must choose one of four courses of action:

1. Exercise of First Refusal Option: If the Board of Selectmen decides to exercise the Town's first refusal or option to purchase the land at or after a public hearing, it must:
  - Unless grant funds have previously been secured or Town funds authorized, schedule a Town Meeting for the purpose of appropriating funds to purchase the property and place an article on the warrant for this purpose and schedule an override vote (if necessary) for the purpose of authorizing expenditure of funds. It is recommended that Town Meeting appropriate the funds within the Town's 120-day period, unless an extension of this deadline is received from both buyer and seller.
  - Send the landowner by certified mail a notice of the Town's exercise of right of first refusal in accordance with the Chapter Statutes and include, with the notice, a purchase and sale agreement signed by the Town that, for a sale, is on the same terms and conditions that were set forth in the agreement between the owner and the buyer, or, in the event of a conversion, the Town's form of purchase and sale agreement, all within the 120-day period.
  - The closing is to occur within 90 days after the purchase and sale agreement is endorsed by the landowner and returned by certified mail to the Town, or upon expiration of any extended period the landowner has agreed to in writing, whichever is later.
  - Record at the Registry of Deeds, within the 120-day period, a Notice of Exercise signed by the Board of Selectmen, stating that the Board voted to exercise the right of first refusal or purchase option. The Notice should include the name of the owner of the land and a description of the premises which is adequate for identification.
  - As a courtesy, provide written notification of the Selectmen's vote to appropriate Town boards, commissions and committees.
  - Close on the property by the date set forth in the purchase and sale agreement.
2. Assignment of First Refusal Option: If a vote is taken to assign the Town's purchase rights to a qualified nonprofit conservation organization or to the Commonwealth or any of its political subdivisions after a public hearing, the following steps must be completed:
  - The nonprofit must use a "major portion of the property", meaning at least 70% of the property, for any Chapter Lands purposes, but may be permitted to undertake a limited development on the balance (provided it is not larger than the area proposed to be developed by the buyer, in the event of a right of first refusal); 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 land other than that which may be developed is to be bound by a permanent deed restriction that meets the requirements of MGL Chapter 184.
  - The Town must notify the landowner by certified mail in accordance with the Chapter Statutes to the address specified in the landowners' Notice of Intent, of the Town's assignment of its option to a nonprofit conservation organization, stating the name and address of nonprofit organization and the terms and conditions of the assignment, within

the 120-day period.

- The Town also must cause to be recorded at the Registry of Deeds, within said 120-day period, a notice of the Board of Selectmen's vote, to include the name of the owner of the land and a description of the premises which is adequate for identification, the name and address of the organization or agency of the Commonwealth which will exercise this option and the terms and conditions of the assignment. The Assignee must exercise its purchase rights, inform the landowner of the exercise, and record a Notice of Exercise, all within the 120-day period
- As a courtesy, the Town should provide written notification to appropriate Town boards, commissions and committees of their vote.

3. Non-Exercise of First Refusal Option: If the Town decides not to exercise its purchase rights or its right to assign such rights, the Board of Selectmen will:

- Prepare and send the owner by certified mail a notice of non-exercise in accordance with the Chapter Statutes.
- Execute a recordable Notice of Non-Exercise signed by the Board of Selectmen, which contains the name of the record owner of the land and a description of the premises which is adequate for identification purposes. Any waiver of the Town's rights should specify the particular terms of the purchase, including the purchase price (for a right of first refusal), so that if the sale to the third-party buyer does not occur and a new deal is negotiated, the Town's 120-day clock will begin anew. The Notice of Non-Exercise may be recorded by the landowner or buyer.
- As a courtesy, provide written notification to appropriate Town boards, commissions and committees of the Selectpersons' vote.

4. Failure to Act: If the Town does not act within the required 120 day period (and any extensions thereof), the Town will be deemed to have failed to exercise its right of first refusal or option to purchase. Note: If the Town acts but does not record the Notice of Exercise or the Notice of Assignment within the 120-day period, the Town's option terminates and the landowner is free to convert the use of the Chapter Land or to sell said land, but only upon the original terms spelled out in the purchase and sale agreement that accompanied the owner's original Notice of Intent to sell.

This procedure is adopted solely for the purposes of coordinating local review and may be amended or waived as the Board of Selectmen deems expedient. Failure to adhere to these policies and procedures shall not affect any rights that the Town has under the Chapter Statutes.

Procedure Adopted June 18, 2019

Board of Selectmen Members

copies to:

Planning Board  
Board of Assessors  
Conservation Commission  
Town Clerk

## Town of Wenham: Chapter 61 Intent to Sell Checklist

Received From: \_\_\_\_\_  
(Landowner and/or Specified Attorney)

Notice Received: \_\_\_\_\_  
(Date)

Land Specified: \_\_\_\_\_  
(Address)

Start of the 120 Day Period: \_\_\_\_\_  
(Date)

### Required Materials Supplied by Landowner to Town:

- ☐ Statement of Intent to Sell
  - ☐ Statement of Proposed use of Land
  - ☐ Map of Location and acreage of Land (Assessor Scale)
  - ☐ Name, Address & Telephone number of Landowner and Attorney, if any
  - ☐ Certified Copy of Executed Purchase and Sale Agreement, specifying: **Purchase price and all terms and conditions, which shall be a Bona Fide Offer**
  - ☐ Notice sent Certified Mail or Hand-Delivered to:
    - **Board of Selectmen**
    - **Board of Assessors**
    - **Planning Board**
    - **Conservation Commission**
    - **State Forester (Dept. of Conservation and Recreation)**
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### Once the Notice of Intent to Sell is received:

- ☐ Town Administrator sends the Notice of Intent to Town Counsel to review and ensure that the Notice of Intent is complete  
Complete \_\_\_\_\_ Incomplete \_\_\_\_\_
- ☐ If incomplete, Town Administrator sends written notice of such to Landowner and/or Specified Attorney within 30 days of receipt.
- ☐ Town Administrator sends copy of Notice to all appropriate Town Departments, Boards, Committees & Commissions.
- ☐ The Board of Selectmen places the Notice on next meeting agenda to discuss their possible actions.
- ☐ If considering exercising or assigning first refusal option to purchase, the Board of Selectmen schedules public hearing to discuss their possible actions.
  - o The Board of Selectmen Office sends abutter notifications (at minimum within 500ft)  
**Date abutter notifications were sent:** \_\_\_\_\_  
**Date of Board of Selectmen Meeting(s):** \_\_\_\_\_
- ☐ The Town Administrator shall check if prior funds were authorized or appropriated for such purchases.
  - o Authorized or Appropriated **Date of Authorization or Appropriation:** \_\_\_\_\_
  - o Unauthorized
- ☐ If unauthorized, Board of Selectmen schedule a Special Town Meeting within the 120-day period to authorize and/or appropriate funding should Board of Selectmen wish to purchase:  
**Date of Special Town Meeting:** \_\_\_\_\_
- ☐ The Board of Selectmen takes a formal vote within 120 days to either: Exercise, Waive, or Assign to Qualified Non-Profit its right of first refusal  
**Date and Action of the Board** \_\_\_\_\_
- ☐ Town sends the landowner by certified mail a notice of the Town's exercise of the right of first refusal and a purchase and sale agreement (on the same terms and price as set forth in agreement between landowner and buyer) in accordance with MGL Ch. 61§ 8, 61A§ 14, and 61B§ 9 within the 120-day period.
- ☐ Record at the Registry of Deeds a Notice of Exercise of right of first refusal which is signed by the Board of Selectmen and recorded within the 120-day period.
- ☐ Town closes on purchase within timeframe specified under Chapter 61 and the Purchase & Sale Agreement.

## Town of Wenham: Chapter 61 Intent to Convert Checklist

Received From: \_\_\_\_\_  
(Landowner and/or Specified Attorney)

Notice Received: \_\_\_\_\_  
(Date)

Land Specified: \_\_\_\_\_  
(Address)

Start of the 120 Day Period: \_\_\_\_\_  
(Date)

### Required Materials Supplied by Landowner to Town:

- ☐ Statement of Intent to Convert
- ☐ Statement of Proposed use of Land
- ☐ Map of Location and acreage of Land (Assessor Scale)
- ☐ Name, Address & Telephone number of Landowner and Attorney, if any
- ☐ Notice send Certified Mail or Hand-Delivered to:
  - **Board of Selectmen**
  - **Board of Assessors**
  - **Planning Board**
  - **Conservation Commission**
  - **State Forester (Dept. of Conservation and Recreation)**

### Once the Notice of Intent to Convert is received:

- ☐ Town Administrator sends the Notice of Intent to Town Counsel to review and ensure that the Notice of Intent is complete  
Complete \_\_\_\_\_ Incomplete \_\_\_\_\_
- ☐ If incomplete, Town Administrator sends written notice of such to Landowner and/or Specified Attorney within 30 days of receipt.
- ☐ Town Administrator sends copy of Notice to all appropriate Town Departments, Boards, Committees & Commissions.
- ☐ The Board of Selectmen places the Notice on next meeting agenda to discuss their possible actions.
- ☐ If Town is considering exercising its first refusal option to purchase, the Town shall immediately order an appraisal to determine full and fair market value: *Original appraisal must be completed and delivered to the landowner within 30 days after the notice of conversion to the municipality.*
  - **30 Day Deadline:** \_\_\_\_\_
  - **60 Day Land Owner Appraisal Deadline (if dissatisfied with 1<sup>st</sup> appraisal)** \_\_\_\_\_
  - **90 Day Joint Appraisal Deadline (if parties cannot agree):** \_\_\_\_\_

**Upon agreement of a consideration, the Town shall then have 120 days to exercise its option.**

**Certified Appraiser Name and Contact:** \_\_\_\_\_

- ☐ If considering exercising or assigning option to purchase, the Board of Selectmen schedules public hearing to discuss their possible actions.
  - The Board of Selectmen Office sends abutter notifications (at minimum within 500ft)  
**Date abutter notifications were sent:** \_\_\_\_\_  
**Date of Board of Selectmen Meeting(s):** \_\_\_\_\_
- ☐ The Town Administrator shall check if prior funds were authorized or appropriated for such purchases.
  - Authorized or Appropriated **Date of Authorization or Appropriation:** \_\_\_\_\_
  - Unauthorized
  - ☐ If unauthorized, Board of Selectmen schedule a Special Town Meeting within the 120-day period to authorize and/or appropriate funding should Board of Selectmen wish to purchase: **Date of Special Town Meeting:** \_\_\_\_\_
- ☐ The Board of Selectmen takes a formal vote within 120 days to either: Exercise, Waive, or Assign to Qualified Non-Profit option to purchase **Date and Action of the Board:** \_\_\_\_\_
- ☐ Send the landowner by certified mail notice of the Town's exercise of option and a purchase and sale agreement in accordance with MGL Ch. 61§ 8, 61A§ 14, and 61B§ 9 within the 120-day period.
- ☐ Record at the Registry of Deeds a Notice of Exercise of option which is signed by the Board of Selectmen and recorded within the 120-day period.
- ☐ Town closes on purchase within timeframe specified under Chapter 61 and the Purchase & Sale Agreement.