



# **Agricultural Preservation Restriction Program Department of Agricultural Resources**

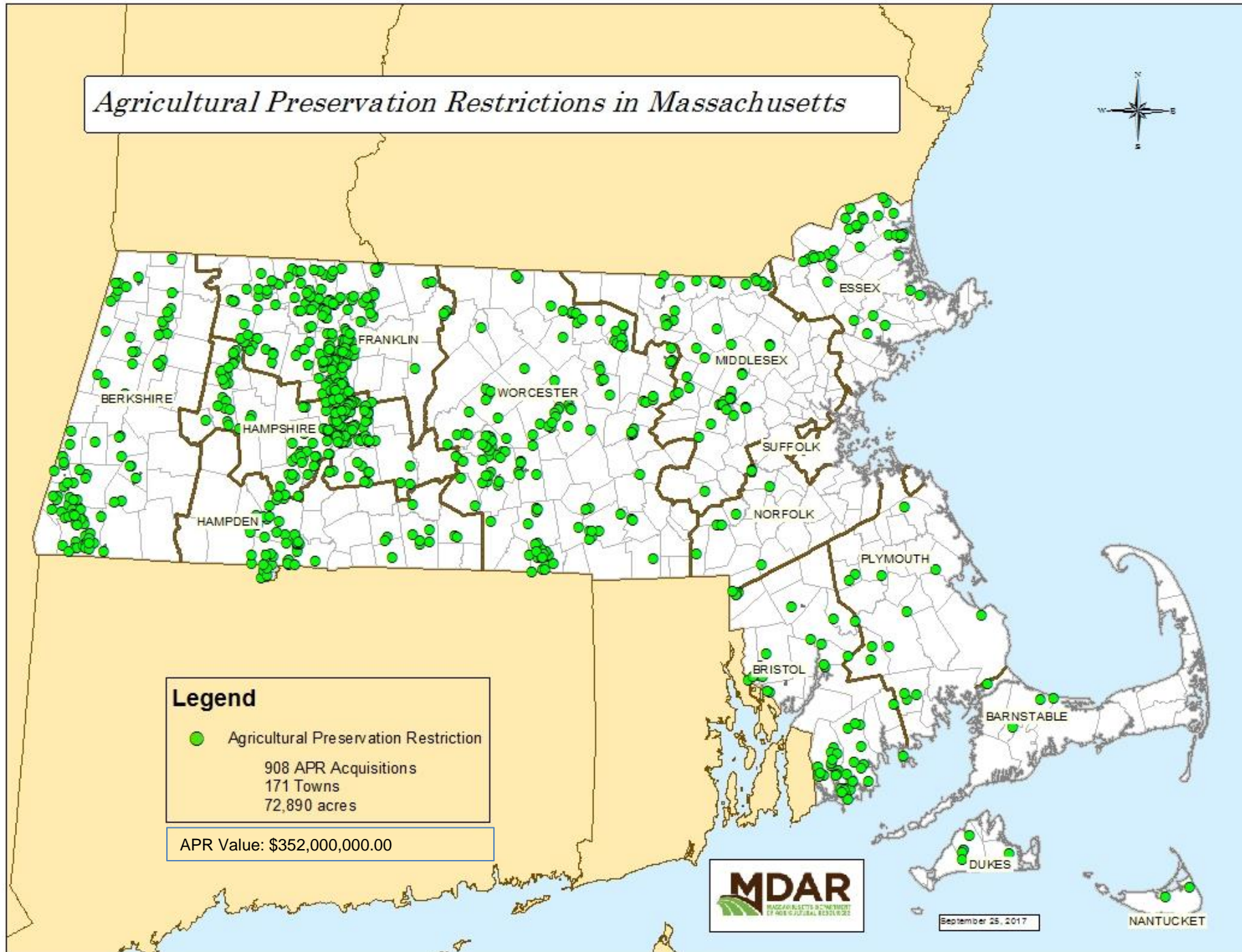
*Division of Agricultural Conservation and Technical Assistance*

*ALPC Nov. 2, 2018*

*ROFR/ OPAV*



## *Agricultural Preservation Restrictions in Massachusetts*



- **Requires** the Commissioner to establish policies and promulgate regulations for the management and oversight of the APR program.
- Regulations need to include, at a minimum,
  - when the department can exercise a right of first refusal or option to purchase,
  - waiver procedures, and
  - guidelines for conferences (before acquisition of new APRs and before selling APR land).
- MDAR, in consultation with the ALPC committee and the Board of Agriculture, shall establish benchmarks and criteria to be used to evaluate and measure a farm business plan submitted by a farmer as part of any waiver request.
- Ag Board is to be consulted and the ALPC needs to approve the regulations.



# Calendar for Regulation Development

Effective Date	Summary
February 1, 2020	Commence review of existing policies, procedures and regulations.
Fall 2019	Roll out of regulations/ outreach
August 1, 2019	Promulgate regulations.
July, 2019	ALPC meeting to approve the regulations.
June, 2019	Final Draft of Regulations
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April, 2019	Public Hearing
Spring 2019	Consult with ALPC and Ag Board to establish criteria for evaluating farm business plan
March/ April 2019	Public Comment Period Opens
21d prior to Public Comment Period	Public Notice in Newspaper. Notify parties who have requested notice. Notice to Register. Electronic and Paper Copies to Regulations Division.
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## APR: ROFR/ OPAV Timeline

- **1980 to 1987:** No mechanism to address transfer (~211 APRs), APRs silent/ No need to notify the Department prior to sale.
- **1986:** ALPC voted to model the ROFR after MGL Chapter 61A language.
- **1987- 1991:** Right of First Refusal (~87 APRs) included in recorded APRs.
- **1991-present:** Option to Purchase at Agricultural Value (~615 APRs) included in recorded APRs (discontinued purchasing ROFRs and instead moved to purchasing OPAVs as part of APRs).

- **Right of First Refusal (ROFR):** a recorded contractual right that gives the holder the right to purchase land according to specific terms set by the seller before the landowner sells to a third party. The seller (landowner) and buyer set the sale price, MDAR only has the right to purchase at that specified price.
- **Option to Purchase at Agricultural Value (OPAV):** a recorded contractual right that gives the holder the option to purchase land at its agricultural value, regardless of the sale price. I.E. If seller is selling land for \$50,000, but the land is worth \$30,000 as farmland (agricultural value), MDAR has a right to purchase the land for \$30,000. Seller obtains an appraisal or does an inflation calculation to determine the agricultural value.

## OPAV - Fair Market Agricultural Value (FMAV)

- Instructions are spelled out in the APR document itself
- **Fair Market Agricultural Value:** the combined total of the
  - **Fair Market Agricultural Land Value (“FMALV”)**, and
  - the **Fair Market Agricultural Business Value (“FMALV”)**, and
  - the **Fair Market Agricultural Dwelling Value (“FMADV”)**.
- **DEPARTMENT DOES NOT SET SALE PRICE OR AGRICULTURAL VALUE.**
- **FMAV is determined by:**
  - Inflation Calculation:** Fair Market Ag Land Value at the time of acquisition multiplied by the inflation rate
  - or
  - New Appraisal:** paid for and commissioned by the seller.

### **RIGHT OF FIRST REFUSAL POLICIES**

- A. Request for waiver of the Department's right of first refusal for purchase of real estate
- B. Request for assignment of right of first refusal

### **OPTION TO PURCHASE AT AGRICULTURAL VALUE POLICIES**

- A. Request for waiver of option to purchase at agricultural value
- B. Assignment of option to purchase at agricultural value



## APR: Review of Request to Waive ROFR/OPAV

- Preliminary discussion with landowner and/or their attorney regarding procedures.
- Letter and associated materials offering the state the right to purchase the APR sent to Commissioner.
- Staff review and notification to landowner and/or their attorney if the submission is incomplete.
- Internal Evaluation conducted by staff.
- Recommendation to the Commissioner to Waive or Exercise.
- Commissioner makes decision based upon the ROFR/OPAV and the policy.
- If the Commissioner waives MDAR's right to purchase, a signed and notarized waiver is issued to the landowner consenting to the transfer.
- If the Commissioner decides to exercise, the seller is notified in writing and the Department will seek qualified farmers interested in receiving an assignment of the right to purchase.
- If no qualified farmers are interested in purchasing the property, the original transfer can proceed.

## APR: Waivers Summary (*since 2014*)

- **Waivers of Rights of First Refusal (ROFR)**
  - Waivers Requests Received: 14  
Exercised: 6 (Assigned 2 Waived 4)  
Waivers Granted: 12
- **Waivers of Options to Purchase at Agricultural Value (OPAV)**
  - Waiver Requests Received: 38  
Exercised: 6 (Assigned 2 Waived 4)  
Waivers Granted: 36

## To Issue a Waiver – current practice

### ROFR

- **Potential Purchaser:**
  - is a Farmer and provides a Farmer Resume and a Farm Plan

*If requirements are met, staff recommend to Commissioner to “Waive”*

### OPAV

- **Potential Purchaser:**
  - Is a Farmer or New Entry Farmer and provides a Farmer Resume and a Farm Plan
- **Purchase price:**
  - Less than 25% above agricultural value
- If 25% or greater above agricultural value the premium must be justified by a Business Plan
- Department has never exercised solely based upon agricultural value

*If requirements are not met, staff recommend to Commissioner to “Exercise” (MDAR seeks buyer)*

### ROFR

- Demonstrated ability to pay and close within timeframe
- Details of farm owned or operated previously, or
- If New Entry Farmer list relevant education and provide Financial Plan
- If more than one respondent:
  - Ownership of other APR land
  - Demonstrated Farming History
  - Ownership of Agricultural Land
  - Proximity of other Agricultural Land Leased

### OPAV

- Demonstrated ability to pay and close within timeframe
- Details of farm owned or operated previously, or
- If New Entry Farmer list relevant education and provide Financial Plan, or
- Proposed lease agreement if leasing Premises to a Farmer or New Entry Farmer.
- If more than one respondent:
  - Ownership of other APR land
  - Demonstrated Farming History
  - Ownership of Agricultural Land
  - Proximity of other Agricultural Land Leased



# Exercising the Option

## A. Internal Evaluation of Statements of Interest for OPAV

Criteria to Assign OPAV	
<b>Potential Assignee has:</b>	
<b>1</b>	Complied with the terms of the Request for Information.
<b>2</b>	Not violated terms of any APR.
<b>3</b>	Demonstrated ability to pay the FMAV and close within timeframe descridned in APR.
<b>4</b>	Provided a Farm Plan and Farmer Resume.
<b>5</b>	if they owned or operated a farm previously details on acreage, years in business.
<b>6</b>	If New Entry Farmer, list degrees and provide a Financial Plan.
<b>7</b>	If intending to lease to a Farmer or New Entry Farmer provide copy of proposed lease agreement or letter of intent; Farm Plan and Farmer Resume.

## B. If there is more then one Potential Assignee

Additional Criteria to Assign OPAV		
<b>1 Potential Assignee's Ownership of Land Subject to an APR</b>		
<b>a.</b>	Current Ownership.	3 points
<b>b.</b>	No Ownership	0 points
<b>2 Potential Assignee's Farming History</b>		
<b>a.</b>	Farmer.	6 points
<b>b.</b>	New Entry Farmer.	3 points
<b>c.</b>	Intend to Lease to a Farmer or New Entry Farmer.	0 points
<b>3 Potential Assignee's Ownership of Agricultural Land</b>		
<b>a.</b>	Farmer has historically leased, and not owned, ag. land.	2 points
<b>b.</b>	New Entry Farmer who has historically leased, and not owned ag. land.	1 Point
<b>c.</b>	If not Farmer or New Entry Farmer, currently owns agricultural land not subject to APR	0 points
<b>4 Proximity of Other Agricultural Land Leased or Owned</b>		
<b>a.</b>	Adjacent	3 points
<b>b.</b>	Within 10 miles	2 points
<b>c.</b>	Within 25 miles	1 point
<b>d.</b>	Greater than 25 miles	0 points

## C. Tiebreakers

1. Potential Assignee that was the Potential Purchaser
2. Potential Assignee with the most number of acres under production

## Waiver Language in Legislation – must be included in regs

**MDAR shall waive its rights (OPAV and ROFR) if a landowner:**

1. has received a good faith offer, including a certified copy of an **executed P & S agreement** and delivery of the deed from a farmer.

(The farmer must have engaged in active commercial agriculture for **not less than 2 years** );

2. submits a proposed **Farm Business Plan** to MDAR that includes the proposed purchase price and demonstrates how the buyer will continue to engage in commercial agriculture to retain and use the land primarily and directly for agricultural purposes pursuant to sections 1 and 2 of chapter 61A and preserve the natural agricultural resources for a period of not less than 5 years after the date of sale; and

3. has no prior record of a violation of the written agreement or terms of an APR;

**Landowner and Potential Purchaser must met with MDAR prior to the landowner submitting the request for waiver – pre-sale conference.**

MDAR shall require any proposed farm business plan submitted to include a written justification for the proposed purchase price if the price proposed for the purchase of the subject land is **20 per cent** or more than the FMAV of the land;

MDAR, in consultation with the ALPC and the board of agriculture, shall establish benchmarks and criteria to be used to evaluate and measure a farm business plan submitted by a farmer as part of any waiver request.

## Lessons Learned/ Proposed Thoughts

- Department is available at any point to discuss either in person or via telephone with the APR Owner and the Potential Purchaser.
- Require brief summary instead of Resume and Farm Plan, e.g. a brief summary of farm experience and intention for the property.
- Make it easier to purchase if it's the tenant farmer purchasing the APR land.
- Allow non farmer owners to purchase land subject to APRs as long as there is a plan in place to ensure that the land will be farmed (i.e. – a proposed lease).
- Provide Department greater discretion around exercising.
- Require Department to exercise only where there is a likelihood that potential buyer will violate APR terms.



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An aerial photograph of a rural landscape. A wide river flows from the left towards the center, bordered by dense trees. To the right of the river, there are large green fields, some of which appear to be agricultural plots. A road or path runs parallel to the river. In the background, there are rolling hills under a clear blue sky. The text is overlaid on the upper portion of the image.

## **Agricultural Preservation Restriction Program**

Division of Agricultural Conservation and Technical Assistance

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*[www.mass.gov/agr](http://www.mass.gov/agr)*