

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS



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PRIVATE AGRICULTURAL PRESERVATION RESTRICTION (APR) GUIDANCE

Request for the Massachusetts Department of Agricultural Resources to approve a private agricultural preservation restriction under M.G.L. c. 184, § 32.

What is a Private APR?

A private APR is an Agricultural Preservation Restriction in which the primary holder (and co-holder if applicable) are entities other than the Massachusetts Department of Agricultural Resources (“MDAR”).

An APR is defined by [MGL Chapter 184 Section 31](#) as “a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land appropriate to retaining land or water areas predominately in their agricultural farming or forest use, to forbid or limit any or all (a) construction or placing of buildings except for those used for agricultural purposes or for dwellings used for family living by the land owner, his immediate family or employees; (b) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to adversely affect the land's overall future agricultural potential; and (c) other acts or uses detrimental to such retention of the land for agricultural use. Such agricultural preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two. All other customary rights and privileges of ownership shall be retained by the owner including the right to privacy and to carry out all regular farming practices.”

Who is Eligible to Hold a Private APR?

[MGL Chapter 184, section 32](#) establishes that any governmental body which has power to acquire interest in land or any charitable corporation or trust which has power to acquire interest in land and whose purposes include conservation of land or water areas or of a particular such area, may acquire an Agricultural Preservation Restriction.

What type of land is eligible for a Private APR?

[MGL Chapter 184 section 32](#) states when determining whether the restriction is in the public interest, the governmental body approving the private APR (MDAR if held by a municipality and both MDAR and the municipality if held by a charitable corporation or trust) shall take into consideration:

- the public interest in such agricultural preservation; and
- any national, state, regional and local program in furtherance thereof; and
- any public state, regional or local comprehensive land use or development plan affecting the land; and
- any known proposal by a governmental body for use of the land.

Therefore, MDAR has established the following criteria to measure whether the APR is in the public interest:

1. The land proposed for a Private APR *is currently* actively devoted to commercial agricultural or horticultural uses as defined in [sections 1 & 2 of chapter 61 A](#) (herein “agricultural” or “agriculture”). The land should have been in active

agricultural production for at least one year. The proposal demonstrates the land has reasonable agricultural viability. For the purposes of private APRs, Agricultural Viability is defined herein as the ability of the land to support and maintain a commercial agricultural business.

Factors that are indicators of viability may include, but are not limited to:

- Geographic location (near other viable farms, markets, agricultural stores etc.)
- Infrastructure; (barns, irrigation, labor housing, etc.)
- Access to reliable markets.
- Quality of soil resources; (Typically measured by the amount of prime, statewide, and/or locally important agricultural soils.)
- Physical characteristics of the land (such as topography, drainage, water source, and size.) There is no minimum size required for eligibility, but non-forested parcels less than 5 acres will be subject to additional scrutiny for overall viability.
- There is a minimum size of 10 acres for a commercial forestry operation.
- Municipal ordinances or bylaws (such as zoning) that support agricultural use; (right to farm bylaw, etc.)
- Marketable title free of any existing exceptions, encumbrances, agreements, leases, easements, other clouds on the title, or other circumstances that would:
 - undermine the APR Holder's ability to achieve the purposes of an APR including enforcement of the restriction; and/or
 - prohibit or limit agricultural or horticultural uses or activities to the extent that it would preclude or interfere with achieving the purposes of an APR.

2. Additional factors that help demonstrate a private APR is in the public interest may include, but are not limited to:

- Protecting the land will further a National, State or local policy or plan consistent with the purposes of APR.
- The land contains prime, statewide, or locally important agricultural soils (or forest soils if commercial forestry is the proposed horticultural use).
- The proposal limits resale value of the land to agricultural value.
- The proposal includes infrastructure, such as barns, wells, irrigation, and/or affordable housing for the farmer and/or labor.
- The proposal protects the whole property, including associated forests and wetlands and infrastructure.
- The land is currently predominantly in agricultural use.
- The property abuts other protected land.
- The landowner/operator has completed a formal succession plan.
- The landowner/operator has successfully completed Farm Viability Enhancement Program (FVEP) or other MDAR Grant Program.
- The landowner/operator has completed a formal business plan.
- Participation in agricultural business training program(s).
- The property is within or is reasonably accessible to a [designated Environmental Justice \(EJ\) block group](#);
- The property is within NHESP Biomap Core Habitat or Critical Natural Landscape.
- The landowner/operator utilizes Climate Smart and/or [healthy soils practices](#) (cover crops, no till, rotational grazing, riparian buffer, habitat linkage, energy efficiency, drought preparedness, invasive species remediation, etc.)

3. The proposed APR MUST:

- Demonstrate the holders are qualified under [MGL Chapter 184, section 32](#) to acquire an APR.
- Clearly demonstrate ownership of the land and who has the signatory authority.
- Demonstrate the land has legal and functional access.
- Provide proof of marketable and acceptable title.

4. The APR document MUST include terms and conditions which are appropriate to:

- Describing that the intent of the APR is to be for perpetuity.
- Retaining the land predominately in its agricultural farming or horticultural use.

- Including an affirmative requirement (aka Affirmative Duty) to keep the land primarily in commercial agricultural or horticultural production.
- Showing that all other customary rights and privileges of ownership shall be retained by the owner including the right to privacy and to carry out all regular farming practices; and
- Forbidding acts or uses detrimental to such retention of the land for agricultural use.

5. The APR document MUST include language forbidding or limiting the following activities and requiring approval from the proposed holder for the activities which can only be granted if the activities are necessary to maintain the viability of the APR property and not affect the land's overall future agricultural use:

- construction or placing of buildings except for those used for agricultural purposes or for residential dwellings used for family living by the landowner or their immediate family or employees;
- excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to adversely affect the land's overall future agricultural potential.

Who Must Approve a Private APR?

Approval of Private APRs depends on who the proposed holder is. According to [MGL c. 184 s.32](#):

- A restriction held by a city or town or a commission, authority or other instrumentality thereof is approved by MDAR's Commissioner
- A restriction held by a charitable corporation or trust is approved by:
 - MDAR's Commissioner **and** the mayor, or in cities having a city manager the city manager, and the city council of the city, or selectmen or town meeting of the town in which the land is situated.

What Materials are required for Approval?

Applicants are **required** to vet potential projects with MDAR prior to submitting for an approval of a Private APR, including an initial site visit. Please email your submission to the appropriate APR acquisition staff. MDAR will strive to complete initial vetting in a timely manner. Materials helpful for initial vetting may include:

- Description of the owner/operators of the land (farm resume, relevant experience etc.)
- Maps (aerial, soils, topography, etc.) of the property and any exclusions, a GIS shapefile
- Description of current and proposed agricultural uses and any other activities on the land
- Proposed holder(s) of the private APR (i.e. Land-trust or municipality) & description of capacity to monitor and enforce the restriction.
- Any atypical restriction terms being considered at this time (such as unique reserved rights) (does not have to be exact language at this stage)
- Known encumbrances/easements that may undermine the acquisition and purpose of an APR (certain extensive Utilities, Sewer, Rights of Way, Existing Restrictions, Leases, Options to Purchase, Rights of First Refusal)
- Description of how this project is in the public interest, if not self-evident.
- If available: appraisal report, survey, title,
- If available Phase 1 ESA, plans and agreements (conservation, forest management, business, leases, etc.)
- Approximate closing date goal
- The following materials are **required** to be provided to MDAR at least 90 days prior to the desired closing date:
 - Description of how this project is in the public interest
 - Proposed APR document and exhibits
 - Appraisal, survey (if available), title commitment or preliminary title report, Phase 1 ESA or commercially reasonable All Appropriate Inquiry, any existing management plans for the property, Template Baseline Documentation Report (BDR) (not required to be a complete draft)

- GIS shapefile of the APR boundary
- Documentation of duly authorized approval by the municipality (if applicable)

What is the Process for Approval?

- Applicants are required to vet potential projects with MDAR prior to submitting for an approval of a Private APR, including an initial site visit.
- When ready, submit final materials for approval *at least* 90 days prior to closing.
- MDAR will review final documents and request more information and/or identify necessary edits as soon as reasonably practicable.
- Once approved by MDAR, documents may be shared with Grantors, Grantees and/or co-holders for signature. The MDAR Commissioner must be the last to sign.
- The applicant is responsible for recording documents at the appropriate Registry of Deeds and providing complete copies of the recorded documents to MDAR within 60 days of closing.

MDAR staff will be available on an ongoing basis to continue to provide feedback as project revisions (if any) are submitted.

Are there Stewardship reporting and enforcement obligations?

An affirmative requirement to maintain the property predominantly in agricultural/horticultural (including forestry) use is required. There should be a stated intention to monitor the APR annually.

No APR shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes, or on account of the governmental body the charitable corporation or trust having received the right to enforce the restriction by assignment.