Atlantic Country Club: An Overview of the Chapter 61B Process

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What property is this?

Atlantic Country Club ("Atlantic") is a privately owned golf course in South Plymouth located off of Little Sandy Pond Road, which is a private way. The property totals about 176 acres.

What can the property be used for?

Until recently, Atlantic was designated as Chapter 61B land, which is a designation under state law providing for a reduced tax rate on land used for recreational purposes. However, the owners of Atlantic recently chose not to file to renew their Chapter 61B status, meaning that as of July 1, 2025, Atlantic will no longer be classified as recreational land, and will be treated by the Town for tax purposes as it is zoned, Rural Residential, which is housing at 3 acres per unit, with the exception of a portion of the property which has an existing approval for greater density.

Why did the owners let the Chapter 61B designation lapse?

They have entered into an agreement to sell the property to someone who is proposing to develop it into housing. In order to start that process, they needed to change the designation and give notice to the Town of their intent to sell the property .

Why does the Town get notice?

Under the Massachusetts General Laws, properties designated as agricultural, forest, or recreational under Chapters 61, 61A, and 61B, get special tax treatment. When someone seeks to change the designation of their property, the town in which the property is located has certain rights. If the property is being sold, the town has a right of first refusal, meaning it can buy the property under the same terms as it is being sold to a third party. If the property is not being sold, then the town has the right to buy the property at an appraised value.

Did the Town get notice?

It did receive a notice ("Notice") from the owners of Atlantic which states, in part:

> You are hereby notified that Sandy Bridge, Inc. and Mark P. McSharry, Trustee of MBI Realty Trust (collectively referred to as "Property Owner"), intend to convert the premises owned by them, being Plymouth Assessor's Parcel 058-000-032-001 containing 176.69+/- acres ("Premises"), from recreational to residential use by selling the Premises to a developer of residential properties.

The Notice also included a copy of a Purchase and Sale Agreement ("P&S") between the owners of Atlantic and LSPR, LLC ("LSPR"), proposing a sale of Atlantic for $20 million. LSPR is a newly created Massachusetts Limited Liability Company under the directorship of Robert McGehee of Newton, MA. The stated purpose of LSPR is real estate development and management.

What does the Notice mean?

Given the text and the attachment, it is clear that the owner is intending the Notice to be considered a Notice of Conversion for Sale triggering the Town's right of first refusal to purchase under M.G.L. c. 61B, § 9. Under that statute, if the P&S contains a "*bona fide*" (legitimate) offer, the Town has up to 120 days to decide whether it will match the $20 million purchase price.

Was this a "*bona fide*" offer?

This is where things start to get complicated. Under current Massachusetts statute, a "bona fide" offer is defined as follows:

> For the purposes of this chapter, a bona fide offer to purchase shall mean 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, made by a party unaffiliated with the landowner for a fixed consideration payable upon delivery of the deed.

This definition was added to the statute in 2007, and made applicable to all Chapter 61, 61A, and 61B offers. It was done in response to the Supreme Judicial Court decision in Town of Franklin v. Wyllie, 443 Mass. 187 (2005). In that case, the court ruled that under the prior version of the statute a *bona fide* offer could be contingent on future approvals or changes in land use because the "existence of contingencies concerning obtaining approvals are common in real estate transactions and do not make the agreement any less than a bona fide offer." Since adding this definition to the statute, there has been no court decision further defining what constitutes a *bona fide* offer. However, looking at what the Legislature and the courts said about the intent of change at the time, it is arguable that the P&S for Atlantic does not contain a *bona fide* offer under the statute.

The legislative history of the amendment indicates that the Legislature considered contingent offers inappropriate for purposes of Chapter 61, 61A, and 61B transactions. The reasoning was that a contingent offer would require a municipality to definitively commit to

a purchase price based on an offer which was contingent on events which may never occur. Accordingly, it added a definition intended to require offers triggering a right of first refusal under the statute to be sufficiently defined such that only contingencies applicable to any normal transaction (such as verification of title) would be considered *bona fide*.

The Appeals Court verified the effect of this change in City of Newburyport v. Woodman, 79 Mass. App. Ct. 84 (2011). In that case, a landowner entered into an agreement with a prospective purchaser to sell property that had been previously designated under Chapter 61A contingent on the prospective purchaser being able to obtain approval for a residential development under Chapter 40B. Newburyport filed suit in the Land Court seeking a determination that given the speculative nature of such approvals the transaction may never occur, and thus this could not be considered a *bona fide* offer under Chapter 61A. The Land Court agreed with Newburyport, but the Appeals Court overturned that ruling, noting that whether the offer was *bona fide* had to be judged based on the language of Chapter 61A as it was when the offer was made, which was before the added definition. However, the Appeals Court also expressly confirmed that had the offer been made after that amendment it would not be considered *bona fide* for the purposes of triggering a right of first refusal.

In this instance, under the P&S, LSPR has the following ability:

> (c) Termination Right.
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> > If Buyer, in its sole and absolute discretion, is dissatisfied with the Property based on the tests, surveys, inspections, studies, investigations and review of documents described above, for any other reason whatsoever, or for no reason, then Buyer may terminate this Agreement by giving written notice to Seller of such termination at any time on or prior to the expiration of the Due Diligence Period, in which event the Deposit shall be returned to Buyer, and neither Party shall have any further obligations or liabilities, except for the Surviving Obligations. Buyer shall simultaneously submit a demand to Escrow Agent for return of the Deposit to Buyer prior to the expiration of the Due Diligence Period with a copy of such demand to Seller in compliance with the terms of this Agreement. In the event Buyer does not exercise its option to terminate this Agreement on or before the expiration of the Due Diligence Period, Buyer shall be deemed to have waived its right under this Section 24(c) to terminate this Agreement and the Parties shall proceed to Closing as provided herein (subject to the terms and conditions of this Agreement).

In simple terms, this means that during the due diligence period, LSPR could decide not to proceed with the transaction for any reason or no reason at all. The due diligence period is

defined in the P&S as 60 days from the date of the offer. The due diligence period can also be extended an additional 60 days in exchange for an additional $500,000 deposit, which would bring it to the date the Town has to exercise its right of first refusal if this is considered a *bona fide* offer.

The potential argument rests on the vagueness of the P&S. While it does not state that the transaction is contingent upon some future change in the type or extent of use for the Atlantic property, which would clearly be outsider the definition of *bona fide* offer, it also does not state that it isn't contingent on such a change. Instead, the P&S is left so open that LSPR can decide not to go forward for any or no reason, which by definition would include a future land use or extent of development change. As such, the Town may be able to take the position that in order to be a *bona fide* offer under Chapter 61B it must specifically exclude the possibility of being contingent on the events excluded by that statute.

Additionally, under the P&S, the transaction is contingent upon:

> G. Buyer's obligation to perform hereunder is contingent upon Seller, at Seller's' sole cost and expense, obtaining written confirmation from the Town of Plymouth waiving its right of first refusal pursuant to MGL Chapter 61B to purchase the Premises ("ROFR Waiver").

Curiously, the P&S does not state that it is contingent on a waiver or expiration of the Town's right of first refusal. This is concerning because once the Town has affirmatively waived its right, LSPR is free to decide whether or not to proceed based on any condition, including a future type or extent of land use change. However, if the time for the right of first refusal merely expires (meaning that there has been no affirmative waiver), and it is then discovered that the offer was in fact contingent upon a condition which would have deemed the offer not *bona fide*, the Town arguably has the right to seek to reopen the matter based upon the assertion that the intent of the parties was to try and interfere with the Town's ability to properly assess the validity of the offer. *See* Town of Sudbury v. Scott, 439 Mass. 288 (2003) (Court held that if intent in purchasing agricultural land was to convert most of it to residential use, then failure to provide notice of such intention to the town improperly interfered with its ability to assess its rights under G.L. c. 61).

Given that this transaction may never occur or otherwise may only occur based on a future land use or extent of development change, there is a potential argument that the offer is not *bona fide* or, at a minimum, needs to be clarified in order to confirm that it is not subject to a statutorily prohibited contingency. Otherwise, the Town could not simply step into the shoes of LSPR to match its offer, which is arguably the intent of the statute. Further, allowing such open-ended offers would not serve as a deterrent to collusive transactions where

someone proposes an excessive price to see if the Town would match it, and if not then later simply withdraw the offer without consequence. However, given the current state of the case law, the outcome of a challenge based on these arguments would be uncertain.

If the Notice is defective can the Town buy Atlantic at its appraised value?

The answer to this question is, it depends on what happens next.

The mere fact that a Notice of Sale is defective does not create a right to purchase at appraised value. That issue was decided by the courts in Town of Oxford, v. EAV Realty, LLC, and Pulte Homes of New England, LLC, MISC 323064, May 6, 2009. In that case, the court found that G. L. c. 61B, § 9 provides a municipality with an option to purchase said land at full and fair market value to be determined by impartial appraisal only in the case of an intended conversion not involving sale. As such, where the municipality receives a notice which is intended to convey an intent to convert land subject to a sale, that cannot later be read to create a different type of right. Moreover, the court noted that where a municipality is arguing that a notice is in any way defective for one purpose it cannot then say that it is adequate for another.

However, in this instance, we have a situation where the owner of Atlantic also elected not to renew their Chapter 61B designation separate and apart from the Notice of Sale. The conversion of property from Chapter 61B protection does automatically trigger the Town's right to purchase the Atlantic property. It may be possible for the owners to seek to reinstate the Chapter 61B protection on the property before it terminates on July 1, 2025. If that is the case, the Town will be forced to wait to see if there is a *bona fide* offer to purchase that it must match. If not, it may seek to proceed with the appraisal process for the property, which would likely result in a valuation significantly less than the $20 million "offer" from LSPR.

What happens if the Town agreed to match an offer, then couldn't raise the money?

In that instance, the Town would have to pay the liquidated damages called for in the P&S, which are the total deposit amounts paid by the buyer. This amount is dependent on certain events, but at a minimum it is $500,000. Based on existing case law, if the Town decides to exercise its right of first refusal it will likely be obligated to substitute itself for LSPR, including any deposit payments it had made. Kunelis v. Town of Stow, 08-2393 (1st Cir. 2009).

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