

legal

Recent Farm Land Conversion Rulings

By MARK A. KABLACK

There have been two recent Supreme Judicial Court decisions that deal with notice requirements and rights of first refusal available to municipalities



under the real estate tax relief statutes for agricultural and horticultural land under Massachusetts General Law Chapter 61A. These two decisions, *Sudbury v. Scott* (439 Mass. 288, 2003) and *Town of Franklin v. Wyllie, et al.* (443 Mass. 187, 2005), conclude a series of disputes and judicial inquiries on both the trial and appellate court level and shed some light on the nuances of Chapter 61A and the respective rights of landowners, contract purchasers, developers and municipalities. This article will focus on the *Wyllie* case and the importance of its ruling with respect to the triggering of notice to a municipality and the commencement of the 120-day right of first refusal.

Chapter 61A was enacted by the state Legislature in the early 1970s in an effort to preserve farming activities and open space lands in the commonwealth of Massachusetts (a similar provision is available under M.G.L. Chapter 61B for recreation land). The statute encourages such preservation through tax relief. Usually land is assessed based upon its highest and best use under zoning. Under 61A, land may be assessed based upon its agricultural or horticultural

use value if such land contains a minimum of five acres and has been used for farming for at least two years. Landowners must affirmatively request relief under 61A, and there are annual valuation, application and reporting requirements.

Once land is assessed under 61A, there are certain conveyance taxes or rollback taxes that may be applicable to the landowner at the time land is converted to or sold for some other use. A lien is recorded against the title to the land in order to protect the municipality's right to recapture the conveyance or rollback taxes at the time of conversion or sale. The legislative intent was to provide incentives for farmers to keep land in farming use and not feel pressured to develop or sell open land simply because of the real estate tax burden.

Municipality Rights

Another aspect of 61A that encourages the preservation of farming activities and open space regards certain rights afforded to municipalities under this statute. When a landowner opts to have tax relief under 61A, he or she also grants to the municipality a right of first refusal to purchase the land at the time of conversion or sale. A notice of a pending conversion or sale must be provided to the municipality, and the municipality has a period of 120 days to elect an option to purchase the property at full and fair market value (in the event of a conversion) or to elect a first refusal option to meet a bona fide offer to purchase (in the event of a sale), as noted in section 14 of 61A. A municipality may elect said

options on its own, or may assign its option to a nonprofit conservation organization, for the purpose of continuing the agricultural or horticultural use. The legislative intent here was to afford an opportunity to municipalities, acting on their own or through conservation groups, to purchase farmland for permanent protection.

These latter provisions of 61A are at the heart of the *Wyllie* case. In *Wyllie*, 61A farmland in Franklin was placed under a purchase-and-sale agreement with a contract purchaser/developer. The purchase-and-sale agreement contained typical provisions for a large acquisition project requiring subdivision approval and permit review. There were contingencies in the buyer's favor regarding the town of Franklin's waiver of its right of first refusal and all permit approvals required for subdivision development of the property into 35 buildable single-family lots. The purchase price, as is also the case in a transaction of this type, was provided at a specific dollar amount but contained a sliding scale provision that ultimately tied itself to the number of buildable lots that were eventually approved for development. Notice was provided to Franklin in the manner set forth above, indicating to the municipality that there was a bona fide offer to purchase the farmland and that the municipality had to make its election within the 120-day period provided in 61A. A copy of the purchase-and-sale agreement was attached to the notice.

Upon receipt and review of the notice of sale, Franklin objected to the form and content of the purchase-and-sale agree-

ment. Franklin claimed that the purchase-and-sale agreement did not constitute a bona fide offer to purchase because the buyer's obligations were conditional and there was no fixed purchase price. Franklin notified the landowner of its objections and at the same time expressed an interest in acquiring the land. Franklin requested that it be notified again after the number of lots and purchase price were finally determined.

Preemptive Strike

Franklin then commenced its own negotiations with the landowner for purchase of the property outside of 61A. These discussions continued over two weeks until the landowner terminated negotiations, informing the municipality that the contract purchaser/developer was not releasing its rights under the purchase-and-sale agreement. Faced with this impasse, Franklin made a preemptive strike and brought suit in the Massachusetts Land Court asking for declaratory relief from the court. Franklin again claimed that the purchase-and-sale agreement was not a bona fide offer within the definition of 61A, and that the agreement would not ripen into a bona fide offer without a subdivision approval and a fixed purchase price. The contract purchaser/developer intervened in the case, and both parties moved for cross summary judgment

on these two issues before the Land Court. Judge Leon J. Lombardi ruled in favor of the contract purchaser/developer, ruling that the notice to Franklin was sufficient and that the 120-day period under 61A had commenced. Franklin filed an appeal, and on its own initiative, the SJC had the case transferred from the Appeals Court.

In a unanimous decision authored by Justice John M. Greaney, the SJC affirmed the earlier Land Court decision. Greaney recognized that the contingencies and purchase price provisions of the purchase-and-sale agreement were common for real estate transactions of today. The agreement contained valid and enforceable terms, imposed an obligation on the purchaser/developer to maximize the number of lots in the subdivision and required good faith and fair dealing in the pursuit of permitting approvals. The permitting and pricing contingencies did not make the agreement any less than a bona fide offer. While the court recognized that remedial statutes such as 61A should be liberally construed to effectuate their goals, the court could not escape the plain meaning of the statute. There is no language in 61A to suggest that a municipality's right of first refusal encompasses more than what is set forth in a third-party purchase agreement between a buyer and a seller. Moreover, the SJC was

not persuaded with Franklin's arguments that a carefully constructed agreement between a seller and buyer could contain potentially unlimited contingencies and afford an opportunity for collusion by both parties to circumvent the legislative intent of 61A.

The Wyllie case is instructive on what constitutes a bona fide offer to purchase, the timing of the notice to a municipality on a pending sale, and the triggering event for the 120-day option period under 61A. These are valuable lessons for landowners and contract purchasers who are considering the sale (or purchase) of land subject to the tax relief provisions of 61A. The burden of exhausting subdivision approval and permitting review is expensive. If this burden must be met before a purchase agreement ripens into a bona fide offer under 61A, the burden would fall to either the landowner or purchaser. The reality now, in light of Wyllie, is that this burden falls to the municipality. The municipality must incur the necessary expense of determining, "with its own officials and experts," the number of lots the property would yield and the purchase price to be paid. ♦

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