

HOUSE No. 4321

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act relative to the Yarmouth Marina..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. As used in this act, the following words shall, unless the context clearly
2 requires otherwise, have the following meanings:

3 “Developer”, the private entity selected to build, maintain, and operate the new Parker’s
4 River Marina (hereinafter, the “Marina”),

5 “Development Agreement”, the agreement entered into between the developer and the
6 Town, pursuant to section 4(a).

7 “Project”, the study, planning, design, construction, reconstruction, operation and
8 maintenance of a new Parker’s River Marina in the Town of Yarmouth in accordance with the
9 terms of the agreement described in section 4.

10 “Town”, the Town of Yarmouth.

11 SECTION 2. Notwithstanding the provisions of chapters 30, 30B and 149 of the General
12 Laws or any other general or special law to the contrary, the chief procurement officer of the
13 Town of Yarmouth, or his designee, may solicit proposals for, and in conjunction with the Board

of Selectmen, negotiate and authorize the Town to enter into a development agreement with a developer to undertake, as appropriate, all or a portion of the project using, in whole or in part, private sources of financing.

SECTION 3. (a).The chief procurement officer, or his designee, shall develop and publicly advertise a request for qualifications setting forth criteria for pre-qualification of developers, including minimum levels of experience, financial capability, bonding capacity and such other criteria as are deemed appropriate by the Board of Selectmen. The chief procurement officer, or his designee, may consult with legal, financial, technical or other experts in the pre-qualification of developers. The chief procurement officer shall also consult with the Board of Selectmen in the development of a request for qualifications and with respect to the financial capacity of the respondents to such request for qualifications before determining which respondents are qualified. The chief procurement officer shall select a minimum of three developers which have been determined to be the most qualified, based on their abilities to finance and construct the project.

(b). The chief procurement officer, or his designee, shall develop and publicly advertise a request for proposals setting forth criteria of the qualified developers to undertake the project. The chief procurement officer, or his designee, may consult with legal, financial, technical and other experts within and outside government in the development of the request for proposals, the selection of a developer and the negotiation of a development agreement. The chief procurement officer, or his designee, shall not select a developer in accordance with the provisions of this section without the written concurrence of the Board of Selectmen that the selected developer and its proposal have appropriate financial characteristics and provisions.

(c). The chief procurement officer, or his designee, shall, within thirty days after the designation of selected qualified developers, furnish each qualified developer, as determined in paragraph (a), with a request for proposals setting forth the minimum criteria for the project. Each such developer may then submit to the Town, on or before the time and date specified in the request for proposals, a proposal in the format specified by the chief procurement officer, or his designee. The chief procurement officer, or his designee, may waive any informalities in such proposals and reject any or all proposals if, in his sole discretion, such a rejection would be in the public interest. All proposals shall be reviewed in private and no proposal or any information contained therein shall be released to a third party other than as specified therein nor to execution of the development agreement in accordance with the provisions of this section, nor shall any such proposal be deemed to be a public record until such development agreement is executed.

(d). Each proposal shall be evaluated by criteria determined by the chief procurement officer, or his designee, in conjunction with the Board of Selectmen and set forth in the request for proposals including, but not limited to, the proposed cost of the project and the financial benefit to the Town, the reputation, industry experience and financial capacity of the developer, the time schedule for completion of the project, local citizen and government concerns, environmental concerns relative to the project, benefits to the public, the developer's ability to ensure labor harmony during the length of the project and such other criteria as deemed appropriate. The chief procurement officer, or his designee, may request oral presentations by such developers as he deems necessary for understanding, clarifying and improving the terms contained in any such proposals. An oral presentation shall include a written component,

including minutes of the meeting at which the presentation took place, which shall be made public after the execution of the development agreement.

(e). The chief procurement officer shall select the developer that he determines best meets the selection criteria for the benefit of the Town. If the chief procurement officer selects a developer that did not submit the proposal offering the highest overall return to the Town, the chief procurement officer shall explain the reason for the selection in writing to the Board of Selectmen before the execution of the agreement.

SECTION 4. The Board of Selectmen may enter into a binding development agreement with the selected developer, subject to such terms and conditions as the Board of Selectmen shall determine to be in the best interests of the Town and shall be subject to a majority vote of the Board of Selectmen, which development agreement shall:

provide for construction of the project;

specify a construction schedule with project milestones and an enforceable project completion date, subject to delays beyond the control of the developer;

specify the cost of the project, as an aggregate total and separated into cost for each identified project segment, with maintenance costs annualized and separated from the cost of construction;

provide for a lease of the facility to the developer for a term not to exceed forty years, and an option for renewal or extension of operation and maintenance services for one additional term not exceeding ten years upon the completion and final acceptance of the project, but the developer shall retain the primary responsibility for all reconstruction, capital maintenance, and

operational maintenance work, if any, to be performed during the lease period. If the developer proposes that a third party perform any such work on its behalf, then the third party shall be approved in advance by the chief procurement officer.

establish a schedule for annualized, periodic or other payments by the developer to the Town, including establishment of a fund to assure the adequacy of maintenance expenditures, but all payments made shall be in accordance with obligations established in the development agreement.

describe the procedures to be utilized in the completion of construction of the project.

outline the responsibilities of the Town and the developer in obtaining any remaining environmental permits or approvals.

Require that the developer secure and maintain bonding and liability insurance coverage in amounts appropriate to protect the project's viability in accordance with subsection 7.

Describe the method of financing for the project, including the developer's plans for issuing bonds on a tax-exempt basis.

set forth the commitments of the Town necessary to secure the project's financing consistent with paragraph (b) of subsection (10).

set forth the guarantee of performance and security to be provided by the developer.

specify the claims process to be utilized in the event of unforeseen circumstances during project design or construction and provide for the reimbursement to the developer for reasonable costs and expenses incurred in developing the design of the project and the construction costs

99 estimate and in the financing of the project should the Town, for any reason, determine to
100 terminate the agreement.

101 clarify the responsibilities of the Town and developer in responding to hazardous
102 materials on the developmental site.

103 Designate responsibility for operation and maintenance of the facility before, during and
104 after project construction.

105 Provide that the Town's construction inspections shall be conducted by personnel
106 employed directly and on a full-time basis by the Town and

107 SECTION 5. If one or more of the following conditions are met, the chief procurement
108 officer shall obtain Town majority vote approval (i) the total cost of the project, as anticipated in
109 clause (c) of subsection 4, excluding ongoing maintenance expenses and interest payments, shall
110 not be more than \$ million, and the developer shall be responsible for any costs in
111 excess of such amount (ii) the selected developer plans to issue non-tax-exempt bonds.

112 SECTION 6. Agreements with the developer shall contain minority and women
113 business enterprise or disadvantaged business enterprise goals and minority and women work
114 force goals as specified by the Town in accordance with state and federal law.

115 SECTION 7. An agreement with a developer shall require the developer's prime
116 contractor to obtain a labor and material payment bond, in accordance with section 29 of chapter
117 149 of the General Laws, covering all construction, reconstruction, or maintenance, including
118 capital maintenance, work of the project and shall require the payment of prevailing wages for

119 labor performed on t he project in accordance with sections 26 to 27H, inclusive, of said chapter
120 149.

121 SECTION 8. Notwithstanding chapters 7, 30, and 149 of the General Laws or any other
122 general or special law to the contrary regarding procurement practices, the developer shall, in its
123 sole discretion and in accordance with its own procurement practices and sound business
124 judgment, determine the qualifications and selection of its own consultants, engineers, designers,
125 architects, lawyers, contractors, investment bankers, material supplier and other persons or
126 entities employed in connection with the project. The developer shall remain subject to all
127 applicable antidiscrimination laws including, but not limited to, chapter 151B of the General
128 Laws.

129 SECTION 9. (a) The plans and specifications for the project shall be approved by the
130 Board of Selectmen.

131 (b) The development agreement shall provide that, upon return of operation and
132 control of the facility to the Town, the facility shall be in good repair in accordance with
133 appropriate standards as shall be set forth in writing and incorporated by reference in the
134 development agreement prior to the commencement of the construction of the project. The Town
135 shall also set forth the guidelines and standards to which the developer shall periodically
136 maintain the facility and shall require the developer to repair the facility if the facility is found
137 not to be in accordance with such maintenance standards, as shall be indicated by the Town in
138 writing.

139 (c) The Town may exercise, on its own behalf and on behalf of the developer, any
140 power possessed by it to facilitate the development, construction, financing, operation and

141 maintenance of the facility. For the purpose of facilitating the project or to assist the developer in
142 the financing, development, construction, maintenance or operation of the facility, the
143 developments agreement may include provisions for the Town to lease the facility to the
144 developer or back from the developer or both; to exercise the power of eminent domain; to grant
145 development rights and opportunities to the developer and third parties; to grant necessary
146 easements and rights of access to the developer and third parties; to issue permits and other
147 authorizations; to provide remedies in the event of default of either of the parties; to grant
148 contractual and real property rights to the developer and third parties and to exercise any other
149 power deemed necessary by the parties. Any person damaged in his property by the exercise of
150 any of the powers granted by this section may recover damages under chapter 79 of the General
151 Laws against the town with respect to said powers exercised by the Town. Nothing in this
152 section shall be construed in a manner that would allow the Town or the developer the ability to
153 override any local zoning or land use law, ordinance or regulation.

154 SECTION 10. (a) In order to facilitate project refinancing, the selected developer
155 may form a special purpose entity and the Town may enter into agreements with such entity to
156 effectuate the purposes described in this section.

157 (b) Revenue bonds, interim receipts, temporary bonds, revenue refunding bonds or
158 other types of indebtedness necessary to finance the construction, maintenance and operation of
159 the facility shall not be deemed to constitute a debt of the Town or any political subdivision
160 thereof. All bonds and interim receipts shall contain on the face thereof a statement to the effect
161 that neither the Town nor any political subdivision thereof shall be obligated to pay the same or
162 the interest thereon except from revenues generated by the facility, or from other federal, state or
163 local resources specifically made available therefore, and that neither the faith and credit nor the

164 taxing power of the commonwealth or any political subdivision thereof is pledged to the payment
165 of the principal of or interest on the bonds and interim receipts.

166 SECTION 11. (a) While the developer has operation and control of the facility in
167 accordance with the terms of the development agreement, the developer shall be liable to the
168 same extent and with the same limitations as would be the Town to any person sustaining bodily
169 injury or damage to his property by reason of a defect or want of repair therein or thereupon as
170 though the facility were a facility operated by the Town and the developer shall be liable for the
171 death of any person caused by such defect or want of repair to the same extent and with the same
172 limitations as would be the Town shall not be liable for injury, damage or death sustained by any
173 person due to defect or want of repair therein or thereupon sustained during the operation of the
174 facility by the developer. Any notice of such injury, damage or death required by law shall be
175 given to the registered agent of the developer and to the Town but claims instituted pursuant to
176 section 4 of said chapter 258 shall be presented to the Town. Upon receipt by the Town of any
177 such notice, the Town shall promptly notify the registered agent of the notice and shall promptly
178 notify the person giving notice of name and address of the registered agent.

179 (b) While the developer has operation and control of the facility in accordance with
180 the terms of the development agreement, the developer shall be liable to the same extent and
181 with the same limitations as would be the Town in accordance with the provisions of chapter 258
182 of the General Laws, as if the facility were a facility operated by the Town. The Town shall not
183 be liable for injury, damage or death sustained by any person during the operation of the facility
184 by the developer, nor for any injury, damage or death caused by the negligence of the developer.
185 Any such notice of such injury, damage or death required by law shall be given to the registered
186 agent of the developer and to the Town but claims instituted pursuant to section 4 of said chapter

187 258 shall be presented to the Town. Upon receipt by the Town of any such notice, the Town shall
188 promptly notify the registered agent of the notice and shall promptly notify the person giving
189 notice of the name and address of the registered agent.

190 SECTION 12. Nothing in this act or any action taken or contract or agreement entered
191 into under the provision of this act shall change or alter any contract or agreement between the
192 Town and any public entity which is in force and effect on the effective date of this act or impose
193 any additional costs or obligations on any such city, Town or public entity.

194 SECTION 13. This act shall take effect upon its passage.