

**HOUSE . . . . . No. 4321**

**[LOCAL APPROVAL RECEIVED.]**

**The Commonwealth of Massachusetts**

PRESENTED BY:

**Cleon H. Turner**

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

**An Act relative to the Yarmouth Marina.**

PETITION OF:

Cleon H. Turner	1st Barnstable District
Robert A. O’Leary	Cape and Islands
Demetrius J. Atsalis	2nd Barnstable District

# The Commonwealth of Massachusetts

In the Year Two Thousand and 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 requires otherwise,  
2 have the following meanings:

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

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

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

10 “Town”, the Town of Yarmouth.

11 SECTION 2. Notwithstanding the provisions of chapters 30, 30B and 149 of the General Laws or any  
12 other general or special law to the contrary, the chief procurement officer of the Town of Yarmouth, or  
13 his designee, may solicit proposals for, and in conjunction with the Board of Selectmen, negotiate and  
14 authorize the Town to enter into a development agreement with a developer to undertake, as appropriate,  
15 all or a portion of the project using, in whole or in part, private sources of financing.

16 SECTION 3. (a).The chief procurement officer, or his designee, shall develop and publicly advertise a  
17 request for qualifications setting forth criteria for pre-qualification of developers, including minimum  
18 levels of experience, financial capability, bonding capacity and such other criteria as are deemed  
19 appropriate by the Board of Selectmen. The chief procurement officer, or his designee, may consult with  
20 legal, financial, technical or other experts in the pre-qualification of developers. The chief procurement  
21 officer shall also consult with the Board of Selectmen in the development of a request for qualifications  
22 and with respect to the financial capacity of the respondents to such request for qualifications before  
23 determining which respondents are qualified. The chief procurement officer shall select a minimum of

24 three developers which have been determined to be the most qualified, based on their abilities to finance  
25 and construct the project.

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

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

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

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

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

- 65 (a) provide for construction of the project;
- 66 (b) specify a construction schedule with project milestones and an enforceable project  
67 completion date, subject to delays beyond the control of the developer;
- 68 (c) specify the cost of the project, as an aggregate total and separated into cost for each identified  
69 project segment, with maintenance costs annualized and separated from the cost of  
70 construction;
- 71 (d) provide for a lease of the facility to the developer for a term not to exceed forty years, and an  
72 option for renewal or extension of operation and maintenance services for one additional term  
73 not exceeding ten years upon the completion and final acceptance of the project, but the  
74 developer shall retain the primary responsibility for all reconstruction, capital maintenance,  
75 and operational maintenance work, if any, to be performed during the lease period. If the  
76 developer proposes that a third party perform any such work on its behalf, then the third party  
77 shall be approved in advance by the chief procurement officer.
- 78 (e) establish a schedule for annualized, periodic or other payments by the developer to the Town,  
79 including establishment of a fund to assure the adequacy of maintenance expenditures, but all  
80 payments made shall be in accordance with obligations established in the development  
81 agreement.
- 82 (f) describe the procedures to be utilized in the completion of construction of the project.
- 83 (g) outline the responsibilities of the Town and the developer in obtaining any remaining  
84 environmental permits or approvals.
- 85 (h) Require that the developer secure and maintain bonding and liability insurance coverage in  
86 amounts appropriate to protect the project's viability in accordance with subsection 7.
- 87 (i) Describe the method of financing for the project, including the developer's plans for issuing  
88 bonds on a tax-exempt basis.
- 89 (j) set forth the commitments of the Town necessary to secure the project's financing consistent  
90 with paragraph (b) of subsection (10).
- 91 (k) set forth the guarantee of performance and security to be provided by the developer.
- 92 (l) specify the claims process to be utilized in the event of unforeseen circumstances during  
93 project design or construction and provide for the reimbursement to the developer for  
94 reasonable costs and expenses incurred in developing the design of the project and the  
95 construction costs estimate and in the financing of the project should the Town, for any  
96 reason, determine to terminate the agreement.
- 97 (m) clarify the responsibilities of the Town and developer in responding to hazardous materials on  
98 the developmental site.

99 (n) Designate responsibility for operation and maintenance of the facility before, during and after  
100 project construction.

101 (o) Provide that the Town's construction inspections shall be conducted by personnel employed  
102 directly and on a full-time basis by the Town and

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

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

111 SECTION 7. An agreement with a developer shall require the developer's prime contractor to obtain a  
112 labor and material payment bond, in accordance with section 29 of chapter 149 of the General Laws,  
113 covering all construction, reconstruction, or maintenance, including capital maintenance, work of the  
114 project and shall require the payment of prevailing wages for labor performed on the project in  
115 accordance with sections 26 to 27H, inclusive, of said chapter 149.

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

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

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

132 (c) The Town may exercise, on its own behalf and on behalf of the developer, any power  
133 possessed by it to facilitate the development, construction, financing, operation and maintenance of the  
134 facility. For the purpose of facilitating the project or to assist the developer in the financing, development,  
135 construction, maintenance or operation of the facility, the developments agreement may include  
136 provisions for the Town to lease the facility to the developer or back from the developer or both; to  
137 exercise the power of eminent domain; to grant development rights and opportunities to the developer and

138 third parties; to grant necessary easements and rights of access to the developer and third parties; to issue  
139 permits and other authorizations; to provide remedies in the event of default of either of the parties; to  
140 grant contractual and real property rights to the developer and third parties and to exercise any other  
141 power deemed necessary by the parties. Any person damaged in his property by the exercise of any of the  
142 powers granted by this section may recover damages under chapter 79 of the General Laws against the  
143 town with respect to said powers exercised by the Town. Nothing in this section shall be construed in a  
144 manner that would allow the Town or the developer the ability to override any local zoning or land use  
145 law, ordinance or regulation.

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

149 (b) Revenue bonds, interim receipts, temporary bonds, revenue refunding bonds or other  
150 types of indebtedness necessary to finance the construction, maintenance and operation of the facility  
151 shall not be deemed to constitute a debt of the Town or any political subdivision thereof. All bonds and  
152 interim receipts shall contain on the face thereof a statement to the effect that neither the Town nor any  
153 political subdivision thereof shall be obligated to pay the same or the interest thereon except from  
154 revenues generated by the facility, or from other federal, state or local resources specifically made  
155 available therefore, and that neither the faith and credit nor the taxing power of the commonwealth or any  
156 political subdivision thereof is pledged to the payment of the principal of or interest on the bonds and  
157 interim receipts.

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

170 (b) While the developer has operation and control of the facility in accordance with the terms  
171 of the development agreement, the developer shall be liable to the same extent and with the same  
172 limitations as would be the Town in accordance with the provisions of chapter 258 of the General Laws,  
173 as if the facility were a facility operated by the Town. The Town shall not be liable for injury, damage or  
174 death sustained by any person during the operation of the facility by the developer, nor for any injury,  
175 damage or death caused by the negligence of the developer. Any such notice of such injury, damage or  
176 death required by law shall be given to the registered agent of the developer and to the Town but claims  
177 instituted pursuant to section 4 of said chapter 258 shall be presented to the Town. Upon receipt by the

178 Town of any such notice, the Town shall promptly notify the registered agent of the notice and shall  
179 promptly notify the person giving notice of the name and address of the registered agent.

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

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