

HOUSE No.

[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:

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

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

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

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

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

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

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

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

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

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

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

171 (b) While the developer has operation and control of the facility in accordance with the terms
172 of the development agreement, the developer shall be liable to the same extent and with the same
173 limitations as would be the Town in accordance with the provisions of chapter 258 of the General Laws,

174 as if the facility were a facility operated by the Town. The Town shall not be liable for injury, damage or
175 death sustained by any person during the operation of the facility by the developer, nor for any injury,
176 damage or death caused by the negligence of the developer. Any such notice of such injury, damage or
177 death required by law shall be given to the registered agent of the developer and to the Town but claims
178 instituted pursuant to section 4 of said chapter 258 shall be presented to the Town. Upon receipt by the
179 Town of any such notice, the Town shall promptly notify the registered agent of the notice and shall
180 promptly notify the person giving notice of the name and address of the registered agent.

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

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