

## **Chapter 487 of the Acts of 2002**

### **AN ACT AUTHORIZING THE TOWN OF ACTON TO LEASE A CERTAIN SCHOOL BUILDING FOR RESIDENTIAL PURPOSES FOR 50 YEARS.**

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

**SECTION 1.** Notwithstanding any general or special law, rule or regulation to the contrary, the town of Acton may lease the historic town school building and so much land surrounding and providing access to the building as is set forth in the votes of the school committee and the board of selectmen, for a term of not more than 50 years, for the purpose of preserving the building and adapting it for residential use, including but not limited to low and moderate income housing use.

**SECTION 2.** The board of selectmen may issue a request for proposals for such purposes, to determine the terms and conditions of such request, to accept any proposal or negotiate changes in any proposal, or to reject all proposals, as it determines to be in the best interests of the town, and to take all other actions as may be necessary or desirable to carry out such project.

**SECTION 3.** This act shall take effect upon its passage.

Approved January 1, 2003.

## **Chapter 142 of the Acts of 2004**

### **AN ACT AUTHORIZING THE TOWN OF BEDFORD TO LEASE A CERTAIN PARCEL OF LAND.**



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

200 PORTLAND STREET  
BOSTON, MASSACHUSETTS 02114

THOMAS F. REILLY  
ATTORNEY GENERAL

(617) 727-2200  
www.ago.state.ma.us

October 17, 2003

Rita Farrell  
Massachusetts Housing Partnership  
48 North Pleasant St.  
Amherst, MA 01002

BY FACSIMILE

Re: Massachusetts Housing Partnership's proposed model for the disposition of municipal/housing land for affordable housing

Dear Ms. Farrell:

In response to your March 20, 2003 inquiry regarding the above referenced matter, I have enclosed this Office's letter to the Town of Barnstable dated October 17, 2003.

The town inquired about a similar legal matter. Its inquiry contained a few more details and was based on an actual, rather than hypothetical, proposed lease. As the enclosed letter indicates, we do respond to legal inquiries by way of information. However, we prefer to do so in the context of a specific set of facts.

I trust that the enclosed letter addresses some of your concerns. Please call or write with any additional questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joe Ruccio", with a long horizontal line extending to the right.

Joseph E. Ruccio, III  
Assistant Attorney General

508-596-7468



THE COMMONWEALTH OF MASSACHUSETTS  
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200 PORTLAND STREET  
BOSTON, MASSACHUSETTS 02114

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October 17, 2003

John C. Klimm  
Town Manager  
Town of Barnstable  
367 Main Street  
Hyannis, MA 02601

BY FAX AND REGULAR MAIL

Re: Long-term lease of Darby property and parcel adjacent to YMCA

Dear Mr. Klimm:

You have inquired as to whether the public construction bidding laws apply to the construction of affordable housing during a long-term public lease. The relevant facts, as you set them forth in your letter dated July 28, 2003, are as follows.

The Town of Barnstable intends to lease the above referenced properties to an experienced private entity after soliciting bids pursuant to the public leasing laws. The lease period would be a period of "up to ninety-nine years." The private entity would be responsible for initiating and constructing affordable housing, would assume all financial risk, and would own any improvements on the land. While the failure to perform any improvements would not constitute a default under the lease, the Town anticipates that it would be economically unfeasible for the lessee to maintain the land as open space – the only other acceptable use under the lease – given the significant base rent the town plans to charge.

I must note that the following is for your information only and should not be construed as a legal opinion of the Attorney General. The authority of the Attorney General to render legal opinions extends only to opinion requests by state officials, district attorneys, and committees of the Legislature. See M.G.L. c. 12 §§3, 6 and 9. M.G. L. c. 149, § 44H specifically addresses our authority with respect to the bidding laws for public construction. We have the power to conduct investigations<sup>1</sup> and to institute proceedings in Superior Court to enjoin the award or performance of a contract

<sup>1</sup> The bid protest process is one of our investigative tools.

John C. Klimm

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10/17/03

where such award or performance would violate the bidding laws. See also Department of Labor and Industries, et al. v. Boston Water and Server Commission, et al., 18 Mass. App. Ct. 671 (1984) (Attorney General has enforcement power, not rule making power, with respect to bidding laws). Nonetheless, when we receive an inquiry such as yours pertaining to a matter that is in an advisory posture, we strive to provide the service of pointing out applicable law to aid in your research and deliberation.

In your letter, you cite G.M. Builders v. Town of Barnstable, 18 Mass. App. 664 (1984). In G.M. Builders, the town leased a restaurant at Hyannis Airport to a private corporation under a ten-year lease with an option to renew for another ten years. The lease entitled the corporation, La Cipollina, to perform renovations approved by the town and to deduct the renovation costs from its rent. Shortly after executing the lease, La Cipollina executed a construction contract with G.M. Builders, Inc. to renovate the restaurant. Id. 665-666. The court held that the public payment bond law did not apply to the renovations contract. It did so in large part because "the lease between the town and La Cipollina acknowledged the latter's right to make certain renovations to premises within a public building but did not *require* that La Cipollina undertake or complete any renovations." Id. 668 (emphasis in original).

Under the lease at issue here, the lessee can only develop the land for housing or maintain it as open space. As you note in your letter, the practical effect of such a lease provision is to *require* major construction. The amount of control that a public agency exerts over a construction project during a public lease is a significant factor to be considered in determining whether the public bidding laws apply to the project. See, e.g., Foundation for Fair Contracting of Massachusetts v. New Leadership Charter School, May 7, 2003 (c. 149, § 44A applied because lessor executed renovations contract on behalf of charter school tenant, who was to control and pay for construction, albeit with donated funds).<sup>2</sup>

Further, the court in G.M. Builders only addressed the applicability of the public payment bond law. In fact, the G.M. Builders court specifically stated that the applicability of the public bidding laws was not before it. Such a statement indicates the unique concerns accompanying contracts for the construction of improvements to public property. The Legislature enacted the bidding laws for public building construction to secure the lowest price among responsible bidders and to promote open and honest competition. See Interstate Engineering Corp. v. City of Fitchburg, 367 Mass. 751, 757-758 (1975). M.G.L. c. 149, § 44D sets out a prequalification procedure for contractors and § 44B requires the successful contractor to post a performance bond.<sup>3</sup> Without these protections, a public lessor is more vulnerable to being left with faulty or incomplete

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<sup>2</sup> No one factor, length of lease for example, is determinative on this issue. See Letter from Assistant Attorney General Francis X. Flaherty, Jr. to Attorney Keith of April 9, 1998 (setting out control over and extent of construction and building ownership and use as factors, in addition to length of lease).

<sup>3</sup> Some public leases provide that the lessee will remove improvements before expiration of the lease. You make no mention of such a provision in the town's proposed lease.

John C. Klimm

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improvements on public property when the lease terminates as planned or if the lessee defaults.

The creation of affordable housing is a laudable goal. Although the Legislature may determine that the policy goal of creating affordable housing could be better achieved if such development was exempt from the reach of public bidding laws, it has not made this determination. We do not have the authority to exempt certain types of developments from applicable law. Instead, we are charged with enforcing applicable law.

Although we are not able to provide you with the kind of opinion you seem to seek,<sup>4</sup> we do applaud your effort in the pursuit of the creation of affordable housing. We wish you the best of luck in your worthy endeavor.

Very truly yours,

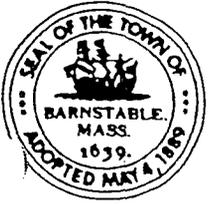


Joseph E. Ruccio, III  
Assistant Attorney General

cc: Robert D. Smith, Esq., Barnstable Town Counsel  
Rita Farrell, Mass Housing Partnership  
Robert Ritchie, Esq., Director, AGO Municipal Law Unit  
Brian C. O'Donnell, Esq., Office of the Inspector General

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<sup>4</sup> Even if we were to express an informational opinion that the proposed lease in no way implicates the public bidding law, as noted above, this opinion would be of limited value to the Town of Barnstable. For example, such an opinion would not provide immunity from a taxpayer's suit.



# TOWN OF BARNSTABLE

## OFFICE OF TOWN ATTORNEY

367 MAIN STREET  
HYANNIS, MASSACHUSETTS 02601-3907

ROBERT D. SMITH, Town Attorney  
RUTH J. WEIL, 1st Assistant Town Attorney  
T. DAVID HOUGHTON, Assistant Town Attorney  
CLAIRE R. GRIFFEN, Legal Assistant

TEL. (508) 862-4620  
FAX # (508) 862-4724

July 31, 2003

Joseph E. Ruccio, III, Asst. Attorney General  
Fair Labor and Business Practices Division  
Office of Attorney General  
200 Portland Street  
Boston, Massachusetts 02114

Re: Leasing of Portion of Town Property to Private Developer  
For Affordable Housing Development  
Our File Ref: #2003-0117

Dear Mr. Ruccio:

As you are aware, Bob Ritchie, the Director of the Municipal Unit, and I, have been talking about the subject matter of the letter from our Town Manager, John C. Klimm, to Daniel S Field, Chief, Fair Labor and Business Practices Division, dated July 28, 2003. Again, as you know, the subject matter is whether or not we can lease a parcel of town property for ninety-nine years to a private developer who could then, in turn, construct and operate a private affordable housing development for rent to families and in part to the elderly, without having to comply with the requirements of chapter 149 relating to construction of public buildings. Bob tells me that you have reservations that the policy considerations behind the filed sub-bid provisions of chapter 149 might dictate a different result from that in the *G M. Builders* case. While I would agree that the courts have repeatedly recognized multiple considerations behind the public bidding law, I believe the *G.M. Builders* holding was essentially that a contract which does not require the construction of a public building is not a contract to which the provisions of the chapter applies. The only reason that policy considerations might be brought in would be to resolve an ambiguity and I do not believe that any ambiguity remains once there is a determination that the document being dealt with is not a contract for the construction of a public building.

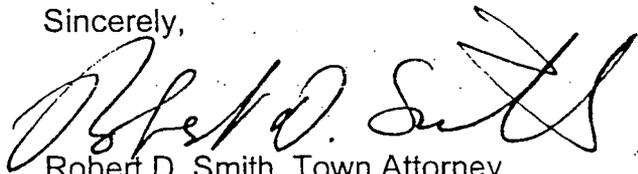
Joseph E. Ruccio, III, Asst. Attorney General  
Fair Labor and Business Practices Division  
Office of Attorney General  
July 31, 2003  
Page -2-

Nevertheless, I would submit that, even if resort were had to the policy considerations behind the multiple laws of the Commonwealth in play in this matter, then the resolution of those policy considerations cuts clearly in favor of a determination which would allow the development to go forward unburdened. Specifically, it is anticipated that this development will be a 40B development and chapter 40B, has, as one of its linchpins, the concept that in the interests of remedying the evil perceived by the Legislature – the dearth of affordable housing – other perfectly legitimate laws must be transcended, to wit: local zoning laws and land use regulation. I am not aware of any other exemption from the application of laws in the commonwealth which is so sweeping, but then, I am not aware of any other problem which is so compelling and pervasive as the lack of affordable housing.

The next step, of course, is to suggest, on the policy level on which we are now logically located, that the transcending need of affordable housing warrants departure from the filed sub-bid laws and the other public contracting requirements of c. 149.

I trust you will take this into consideration as you ponder this fundamentally important issue.

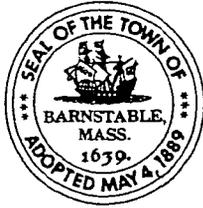
Sincerely,



Robert D. Smith, Town Attorney  
Town of Barnstable

RDS:cg

cc: John C. Klimm, Town Manager  
cc: Robert Ritchie, Esq., Director, Municipal Law Unit, Attorney General's Office  
cc: Kevin Shea, Economic and Community Development  
cc: Laura Shufelt, Barnstable Housing Authority  
cc: Ann Houston, Mass Housing Partnership  
cc: Rita Farrell, Mass Housing Partnership



JUL 31 2003

# The Town of Barnstable

## Office of Town Manager

367 Main Street, Hyannis MA 02601

Office: 508-862-4610

Fax: 508-790-6226

John C. Klimm, Town Manager

Joellen J. Daley, Assistant Town Manager

July 28, 2003

Mr. Daniel S. Field, Chief  
Fair Labor and Business Practices Division  
Office of Attorney General  
200 Portland Street  
Boston, Massachusetts 02114

Dear Mr. Field:

The Town of Barnstable respectfully requests a determination of whether or not construction work performed during a land lease agreement in a specific case as set forth below would be subject to the statutory bidding laws for public construction set forth by G.L. c. 7, §§38C to 38N, G.L. c. 30, §39M and G.L. c. 149, §44A, et seq.

The specific case upon which we are requesting a determination involves two town-owned properties which the Town of Barnstable has made available for the development of affordable housing.

On January 31, 2001, the Barnstable Town Council unanimously approved a town-wide Affordable Housing Plan with a goal of producing over 1,000 units of affordable housing over a ten-year period. The Town strives to achieve this goal by mandating and ensuring that at least 10% of all of the housing units in our town will be affordable to those residents at or below 80% of the median area income. The plan includes a number of potential projects and initiatives that will help us move closer to this goal.

A key component of the plan was to identify town-owned land that is suitable for developing affordable housing. The town has identified two town-owned parcels for this purpose. The first is an approximately 25-acre portion of a 107-acre parcel (called the "Darby" property) in the village of Osterville. The town is proposing to create 87 units of affordable housing for both families and the elderly on this site. The town has completed survey, environmental, and engineering pre-development studies on the land. The second site is a four-acre parcel adjacent to the YMCA in the village of West Barnstable, where twenty units of family housing have been proposed.

Mr. Daniel S. Field, Chief  
Fair Labor and Business Practices Division  
Office of Attorney General  
July 23, 2003  
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It is the intent of the Town of Barnstable to seek an experienced private entity to develop both sites through a publicly-bid request-for-proposals process pursuant to M.G.L. c. 30B, §16. Both parcels would be leased for a period of up to ninety-nine years. The private entity would be responsible for initiating and constructing the affordable housing as well as assuming all of the financial risk.

The improvements on the land would be privately owned. The land and improvements would also be subject to municipal real estate taxes. The failure to perform any improvements or construction would not constitute a default of the lease agreement, although it is anticipated that a significant base rent would make it economically infeasible to carry on what would almost certainly be the only other acceptable use under the leasehold, the maintenance of the land as open space.

From the Town's perspective, the most immediate beneficiaries of both projects would be the low and moderate-income tenants. The financial benefit, and risk, would be borne solely by the lessee.

We believe that the direction that we are going here is consistent with the law as found in the case of *G.M. Builders v. Town of Barnstable*, 18 Mass. App. Ct. 664 (1984). That case involved the question of whether or not construction which was contemplated under the lease of public property but not required under that lease, triggered the application of requirements under chapter 149 of the general laws. The court found that it did not, reasoning that:

“The lease agreement between the town and [the lessee] was not a contract for construction or renovation of a public building within the meaning of G.L. c. 149, §29. The lease ... acknowledged the latter's right to make certain renovations to premises within a public building but did not *require* that [the lessee] undertake or complete any renovations. The renovations remained, at all times, the sole responsibility of [the lessee] and not the responsibility of the town. [The lessee] thus became bound to the lease irrespective of its completion of the renovations.” In a footnote, the Court rejected an argument that the fact that the town reserved the authority to approve the renovations triggered chapter 149 applicability, emphasizing that what was important was whether the lease imposed an obligation to actually make the renovations.

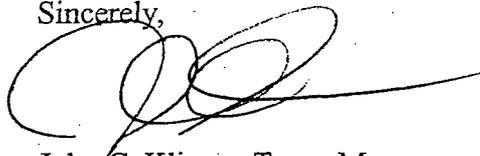
Mr. Daniel S. Field, Chief  
Fair Labor and Business Practices Division  
Office of Attorney General  
July 23, 2003  
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If, in fact these projects are subject to the laws relating to public construction, we do not believe that either project will go forward. The cost just to design both projects would be well in excess of \$100,000 funds which the town does not have available. The participation of a private developer, supported by private investment, in the manner which has evolved into the model method under Chapter 40B, is the only way these units will get built. Obviously, the public building construction and public work wage laws are incompatible with the private developer concept.

It is the Town of Barnstable's opinion that the fundamental purpose of the public bidding laws and procurement principles would be upheld while achieving the town's goal of providing affordable housing opportunities for our residents.

Since we intend to issue an RFP by Labor Day in order to maintain consistency with our affordable housing goals, the favor of a reply from you by August 13 would be most helpful.

Sincerely,



John C. Klimm, Town Manager  
Town of Barnstable

JCK

cc: Robert D. Smith, Town Attorney  
cc: Kevin Shea, Economic and Community Development  
cc: Laura Shufelt, Barnstable Housing Authority  
cc: Ann Houston, Mass Housing Partnership  
cc: Rita Farrell, Mass Housing Partnership

**Acton Housing Authority**

---

**From:** "Robert Whittlesey" <rbwhittlesey@earthlink.net>  
**To:** "'Don Johnson'" <djohnson@acton-ma.gov>; "'Nancy Tavernier'" <ntavern@comcast.net>; "'Acton Community Housing Corporation'" <ACHC@acton-ma.gov>; "'Dean Charter'" <dcharter@acton-ma.gov>  
**Cc:** "'Board of Selectmen'" <BOS@acton-ma.gov>  
**Sent:** Saturday, November 22, 2003 2:55 PM  
**Subject:** RE: Towne Building Project

Hi Don

I have spoken with Clark Ziegler. Pressing for a more definitive answer from the AG may not be easy or the best way to go. As I understand it, the AG only has a role when there is a challenge of some sort. Projects have been completed in the past without challenge. I suggest we need to review the various options we have. It is a serious problem that will impact numerous affordable housing projects in the near future.. It would be interesting to see if the Romney administration is prepared to be helpful.

-----Original Message-----

**From:** Don Johnson [mailto:djohnson@acton-ma.gov]  
**Sent:** Friday, November 21, 2003 5:23 PM  
**To:** Nancy Tavernier; Bob Whittlesey; Acton Community Housing Corporation; Dean Charter  
**Cc:** Board of Selectmen  
**Subject:** Towne Building Project

I have spoken with Town Counsel in greater detail regarding the subject project. There do not appear to be insurmountable issues with respect to the proposed lease but the letter from the AG is confirmed as very troublesome. Counsel agrees that, if followed, it would require the Lessee to bid the renovations under the public bid laws - including filed sub-bids and prevailing wage - and accept the lowest responsible bidders.

We decided to press this issue with Mass Housing Partnership to see if they understand the import of this news and, if so, how they plan to deal with it. I have placed calls to both Alice Wong and Rita Farrell in this regard. I did not reach either but I left word at both locations. It would be our hope that they could press the AG's office for a more realistic ruling that would help the public purpose of facilitating affordable housing, if they have not already done so. Otherwise, there are apparently numerous projects around the state that will come to a screeching halt.

I have also left a message for Mr. Daly at HRI indicating that Town Counsel and I wish to meet with him to discuss both the Lease and the AG's letter.

I will advise you further when I speak with MHP and/or Mr. Daly.

Regards,  
 Don

11/24/03

**Acton Housing Authority**

---

**From:** "Don Johnson" <djohnson@town.acton.ma.us>  
**To:** "Rita Farrell" <rfarrell@mhp.net>  
**Cc:** "Bob Whittlesey" <rbwhittlesey@earthlink.net>; "Acton Community Housing Corporation" <ACHC@town.acton.ma.us>  
**Sent:** Tuesday, May 13, 2003 12:55 PM  
**Subject:** RE: long term leases and applicability of state statutes

Rita:

I would be interested in any information you develop. In the meantime, I am meeting with our attorneys later this week to complete our work on the RFP and the Draft Lease for the Towne Building. One of our discussion points relates to Prevailing Wage.

I will be advising everyone (hopefully that the status is "go") as soon as we get through these last items.

Regards,  
Don

-----Original Message-----

**From:** Rita Farrell [mailto:rfarrell@mhp.net]  
**Sent:** Monday, May 12, 2003 3:53 PM  
**To:** Don Johnson  
**Cc:** Bob Whittlesey  
**Subject:** long term leases and applicability of state statutes

Hi Don - Alice suggested that I contact you to give you an update on the discussions that I have been having with staff from the Attorney General's and Inspector General's offices and the Department of Labor/Division of Occupational Safety. We have been attempting to get a definitive answer to whether state statutes governing public construction (Chapter 7, Chapter 149, prevailing wage) apply in the case where public land/property is being leased to a private entity for the construction of affordable housing.

While I have not yet received that definitive answer that I am looking for, every indication from my recent conversations point in the direction of non-applicability at least in the case of prevailing wages. Ron Maranian of the DOS office forwarded a ruling made by his office back in 1995 to Urban Edge Housing Corp. This case is similar to the model being used by a number of municipalities and housing authorities in the disposition of land and if you are interested let me know and I will fax you the ruling. Ron did strongly suggest that we encourage communities/housing authorities to make a formal request be made to his office re the applicability - have you in fact done this for the Towne School? If so, I would appreciate any response you have received from DOS.

I am also awaiting word from Jed Ruccio in the Attorney General's office regarding the applicability of public construction bidding. I hope to hear back from him by the end of this week and will let you know if and when I receive an answer from him.

FYI in all of our discussions we have been assuming a 99 year lease. Obviously Acton's situation is somewhat different because of the term of the lease, but I thought you would be interested nevertheless. Let me know if you are interested in the Urban Edge information.

**Don Johnson**

---

**From:** Schnorr, Thomas [TSchnorr@palmerdodge.com]  
**Sent:** Wednesday, March 10, 2004 4:46 PM  
**To:** Don Johnson  
**Subject:** RE: Towne Building legal matters

Jeff Sacks and I finally connected earlier this week.

Jeff confirmed that over the past 7 to 8 years, he's represented the housing authorities in Boston, Cambridge and elsewhere in connection with projects for which special legislation exempting the projects from Chapter 149 was obtained. Jeff said that in each instance the process took at least 2 years and required the support and political capital from the full legislative delegation from each city in order to get the legislation passed. He said there was opposition but that the political power of the legislative delegations from those cities was the deciding factor. He speculated that it might be politically difficult for a small town or small housing authority to generate enough political weight on Beacon Hill to get special legislation for a small project. None of the projects he's worked on involved the lease issue that Acton faces.

Jeff was also familiar with the AG's letter to Barnstable. He was aware that Aaron Gornstein of CHAPA, too, was aware of this issue. Jeff acknowledged that it was unfortunate that the AG wrote the letter, because the letter has put town counsels across the state into a dilemma -- they can't advise their town clients that there is no risk in doing deals by using long-term lease controls. Jeff also had heard that Barnstable had decided to go ahead in spite of the unfavorable AG letter, but he's also heard that other many towns and small housing authorities are unwilling to take the risk and are re-examining projects that were in the pipeline. He indicated that he thought that several of the smaller housing authorities that he represents might be interested in trying to put together a coalition of smaller housing authorities and municipalities to propose special legislation to deal with the issue. He said he'd follow up with several of his clients and Aaron, and suggested I contact Clark Ziegler at MHP and follow up with you to see if it made sense to try to get a group together.

Too, I spoke again with Tom Birmingham about this issue and his thoughts as to how such special legislation might be received on Beacon Hill. He confirmed that the unions are certainly not a monolith on the issue of filed sub-bids, but he did strike a cautionary note: one of Gov Romney's themes has been reform/elimination of the filed sub-bid law, so this more modest effort on the part of Acton and others to carve out a safe harbor exemption just for affordable housing projects might get wrapped up in the larger political tug of war between Romney and the unions in general.

*Tom Schnorr*

Thomas G. Schnorr  
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111 Huntington Avenue at Prudential Center  
Boston, Massachusetts 02199  
tel: (617) 239-0363  
fax: (617) 227-4420

email: tschnorr@palmerdodge.com

This email message and any attachments are confidential. If you are not the intended recipient, please immediately reply to the sender and delete the message from your email system. Thank you.

-----Original Message-----

**From:** Don Johnson [mailto:djohnson@acton-ma.gov]  
**Sent:** Tuesday, February 17, 2004 11:59 AM  
**To:** Schnorr, Thomas  
**Subject:** FW: Town Building legal matters

3/31/2004

Tom:

Have you had any success with Mr. Sacks? I met with members of the Acton Community Housing Corporation (ACHC) and briefed them on the problem. They are quite discouraged. They also agree that MHP is going to have to step up and take this on if we are to have any affordable projects in municipally-owned facilities. Am I correct that we would not have the problem if we disposed of the building? This is not a desirable solution but the answer to the question might help "bracket" the problem.

Do you have any suggestions for getting this project moving or do you think it is DOA with respect to getting by the bid laws?

Regards,

Don

-----Original Message-----

**From:** Don Johnson  
**Sent:** Friday, January 30, 2004 12:02 AM  
**To:** 'Schnorr, Thomas'  
**Cc:** Dean Charter  
**Subject:** RE: Town Building legal matters

Please do call Mr. Sacks.

-----Original Message-----

**From:** Schnorr, Thomas [mailto:TSchnorr@palmerdodge.com]  
**Sent:** Thursday, January 29, 2004 3:35 PM  
**To:** Don Johnson  
**Cc:** Dean Charter  
**Subject:** RE: Town Building legal matters

I have been able to speak with Judy Jacobson, the Deputy Director and General Counsel of MHP, about this issue. She reported that MHP has been pulling its hair out over this issue and currently is trying to think through possible legislative fixes (such as coming up with a "small project" concept that would exempt from public bidding, etc projects under a certain threshold). She indicated that the AG's position didn't completely surprise them based on MHP's prior interactions and exchanges with the AG, but MHP had some hope -- ultimately dashed -- that the AG would elect not to respond to Barnstable's request. Judy also mentioned that the municipalities and small housing authorities most affected by the AG's position have not demonstrated much drive to tackle this on a legislative basis.

Judy did mention that she recalled that Jeff Sacks had been successful in getting special legislation for both the Cambridge and Boston Housing Authorities. Unless you think otherwise, I'll give Jeff a call to get a better understanding of how that special legislation process worked.

*Tom Schnorr*

Thomas G. Schnorr

Palmer & Dodge LLP

111 Huntington Avenue at Prudential Center

Boston, Massachusetts 02199

tel: (617) 239-0363

fax: (617) 227-4420

email: tschnorr@palmerdodge.com

This email message and any attachments are confidential. If you are not the intended recipient, please immediately reply to the sender and delete the message from your email system. Thank you.

-----Original Message-----

**From:** Don Johnson [mailto:djohnson@acton-ma.gov]  
**Sent:** Thursday, January 29, 2004 1:46 PM  
**To:** Schnorr, Thomas  
**Cc:** Dean Charter  
**Subject:** FW: Town Building legal matters

Tom:

I am passing this along (both the Acton Home Rule and the Ipswich Home Rule) to you to see if you can confirm my assumptions and/or explain how Ipswich got this Law. I need an update and discussion with you before I meet with these folks. Can you give me a call at your leisure, please?

Regards,  
Don

-----Original Message-----

**From:** Don Johnson  
**Sent:** Thursday, January 29, 2004 1:38 PM  
**To:** Bob Whittlesey  
**Cc:** Ryan & Erin Bettez; Betty McManus; Dan Buckley; Kevin McManus; Nancy Tavernier; Pam Shuttle; Board of Selectmen; Dean Charter  
**Subject:** RE: Town Building legal matters

Bob:

We have been trying to get some further follow-up before meeting with you folks and filling you in on where we stand. That included some of the discussions in which I was involved at the Mass Municipal Conference the weekend before last. I have a call into Tom Schnorr for an update on a contact he was pursuing before I was to meet with you. I will be able to give you more specifics when we meet and I would tentatively suggest Wednesday afternoon of next week (Feb. 4).

With respect to the Ipswich Home Rule, I find it very interesting and will pass it along to Tom Schnorr for comment. On its surface, it appears to fly in the face of what we are hearing. There are nuances, however, that may apply here and they include (1) the fact that Ipswich is apparently selling the building (that is how Senate #1178, the Bill, is characterized in the record) and (2) the fact that the North Shore Housing Trust (the entity to whom it will be sold) may not be an entity subject to the bid laws of the Commonwealth. Our basic problem is that the AG says that - even with a long term lease - the building is still a municipal building and, as such, is subject to the very laws from which Ipswich gains relief in Section 2. If I am correct in my assumptions, the sale of the building may get them off the hook and Section 2 may just be a reaffirmation that anyone who subsequently leases from the Trust is not subject to the same rules that would apply if Ipswich retained ownership. I'm only guessing, though. Tom will be able to give us a better answer.

There is more to our problem that we can discuss when we meet.

How is your availability for next Wednesday?

Regards,  
Don

-----Original Message-----

**From:** Bob Whittlesey  
**Sent:** Thursday, January 29, 2004 11:07 AM  
**To:** Don Johnson  
**Cc:** Ryan & Erin Bettez; Betty McManus; Dan Buckley; Kevin McManus; Nancy Tavernier; Bob Whittlesey; Pam Shuttle; Board of Selectmen

**Subject:** Town Building legal matters

Hi Don:

Sorry that we have been unable to connect over the last two weeks. I believe that delays in resolving the legal questions raised by the AG's letter and the lease are costly to both the Town and Homeowners. So time is of the essence.

We need to decide quickly how we are going to proceed. One answer is to seek an amended Home Rule Petition. Enclosed is a bill that Ipswich had enacted.

There are other ways to proceed which would probably require some action by the Town (although I am not the expert here)

Could we meet promptly to discuss. Thanks

Towne Building Saga  
Acton Community Housing Corporation  
3/21/04  
Nancy Tavernier

ACHC's involvement with the Towne School Building began shortly after the April 2001 Town Meeting where voters defeated a resolution put forth by the School Committee to demolish the Towne School as part of the construction for the new elementary school and use the land for educational purposes. After the resolution was defeated, the voters transferred the Towne School from the School Committee to the Town of Acton and provided \$90,000 to maintain the building until such time as a viable reuse could be determined. Soon after this vote, the Town was informed by the School Superintendent that the schools wanted to reserve their option to reuse the building themselves after some period of time and did not want to see the building and land sold by the Town.

In May 2001, the ACHC was contacted by the Town Manager to determine whether an affordable housing option would be viable. ACHC contacted Mass. Housing Partnership Fund seeking advice and was informed as early as June 2001 that this housing option could indeed be viable and was being done in other communities in the state. MHP offered the use of their technical services program. Discussions began with MHP that included ACHC, town staff and members of the BOS.

In June 2001, the School Committee commissioned a feasibility study for the Towne School property to determine what potential uses could be accommodated in the limited amount of space and land area within current zoning restrictions. A report was prepared and presented to the School Committee showing limitations to any reuse other than educational, primarily due to parking requirements. This report became the basis of a comprehensive review of all potential options for the property with a committee chaired by Peter Ashton. Representatives from all the pertinent town boards were included on the committee.

After 6 months of exploring ideas and options, the Committee concluded that only the affordable housing option was feasible in light of the stipulation that no local tax dollars should be used to redevelop the property. In January 2002, the BOS voted to recommend the affordable housing reuse for the property and gave the ACHC the green light to proceed. Within a week of that decision, a citizens' petition was circulated for signatures calling for a Special Town Meeting to vote to demolish the Towne Building. The petition was filed and the Town Meeting was called by the BOS to take place within the Annual Town Meeting in April 2002.

ACHC was then put in the position of being the Defendant of the affordable housing reuse option. The development of a conceptual plan for the building had to be accelerated in order to present a cogent argument to the Town Meeting. MHP agreed to fund the feasibility study and contracted with a consultant who was put on a fast track while he set aside his other jobs to concentrate on this study. Ed Marchant prepared the

report and an architect prepared a conceptual design showing that 18-20 units was feasible for the rental housing development.

In the time leading up to Town Meeting, there was much political activity both for and against the demolition. There were attempts to dissuade the petitioner from proceeding but in the end she held firm. The Finance Committee voted unanimously to support the demolition of the building in spite of the ACHC bringing in experts to rebut their misconceptions and misstatements which were later carried to Town Meeting in a presentation rife with erroneous information. The School Committee decided to take no position and the BOS opposed the petition.

At the Town Meeting on April 2, 2002, 809 voters were in attendance. The auditorium was at full capacity. The petitioner Amy Upham presented her arguments in favor of demolition, Peter Ashton presented the BOS arguments against, then Nancy Tavernier presented the affordable housing option urging voters to give the option a chance. The FinCom argued against the affordable housing option and for the demolition. After a couple of hours of excellent debate, the vote was taken. The petition to demolish the Towne Building was defeated by a vote of 342 YES and 467 NO. The vote required a 2/3 majority but could not even muster a simple majority. This is one of the highpoints of Acton Town Meetings in the opinion of ACHC.

It was now one year since the ACHC was first assigned the task of developing a plan for affordable housing but even this resounding Town Meeting vote was not the necessary "green light" to proceed. The next hurdle was the land area surrounding the Towne Building which had to be delineated and agreed upon by the School Committee and the Board of Selectmen. Negotiations on this began in June 2002 and immediately hit a wall with 3 of the School Committee members opposed to giving anything but a bare minimum of land area with the building. The entire summer was spent in negotiations and only because one SC member was absent when the final vote (3-2) was taken on the School Committee did they finally accept the assignment of land large enough to hold most of the required vehicle parking for the 18-20 units and sign off on the proposed site plan. However, the trade-off was that in addition to the limited parking area, the development would only have access from Mass. Ave. and none from the driveway of the schools nor could they have access to the school parking areas. This is a severe limitation of the property but ACHC agreed to proceed with those restrictions. It is now September 2002, 17 months after the original vote in April 2001.

ACHC and MHP began to develop the RFP and a long term lease for the property in anticipation of the RFP going out for responses by developers in early 2003. In the process of developing the lease, it was discovered that an environmental evaluation of the property needed to be performed so that any potential developer could be assured the land was free of contamination. MHP agreed to hire an environmental engineer to do the analysis. The Environmental Consultant and the ACHC turned to the schools for information, there was very little available. The analysis focused on the removal of oil tanks which was done in the mid-90's after being funded by Town Meeting. There were no records found in the School Department, the Fire Department or the DEP that proved the tanks had been removed and that soil had been tested. Steve Desy was unable to

provide definitive information. Anecdotal information was obtained from one firefighter who was present and the retired custodian of the school. Through conversations with them, it was determined that the oil tank area was outside the footprint of the Towne Building and land area so the study could be concluded by the consultant finding there was no known contamination on the site, at least the site that was in the jurisdiction of the Towne Building development. It appears that the tanks were removed but the required testing of the soil at the site was never done. This took until November 2002 to untangle.

In the meantime, the draft RFP and long term lease, prepared by ACHC member Bob Whittlesey, had been submitted to the Town Manager in Oct. 2002 and referred on to Town Counsel soon after. In February 2003, the ACHC was finally given specific feedback from Town Counsel and made the necessary revisions to the documents and returned them to the Town Manager for final review, unfortunately getting mired in pre and post Town Meeting delays. In June 2003 notice was sent to the Central Register in anticipation of the RFP being put out to bid which occurred in July for an early August response deadline. Two developers submitted proposals for the reuse of the Towne Building as affordable housing.

A selection committee was formed, the developers were interviewed in early September and the committee recommended Homeowners Rehab, Inc. to be the developer of the Towne Building. The Board of Selectmen voted to approve the selection of HRI and they were notified by the Town Manager that they had been awarded the project. This was 29 months after the original vote was taken in April 2001.

No sooner had this decision been made when a red flag went up and the most difficult of all hurdles was placed in the path of the redevelopment of the Towne Building. This time it was not a local hurdle but a state one. During the summer of 2003, the town of Barnstable was putting together an RFP to develop town owned land for affordable housing by using a private developer. The development would utilize a long term lease similar to Acton. Barnstable has an excellent reputation for initiating creative affordable housing solutions. Their Town Manager decided to run the idea past the Attorney General's office just to be sure there would be no statutory problems with what the town was proposing. He sent the AG a letter in July, requesting an answer by early August. The answer never came until Oct. 2003 and it was a very strong caution to the town of Barnstable warning that the project may indeed be considered public construction, even though it was using a private developer, due to the fact that the Town still retained ownership of the land. MHP was also copied on the letter and realizing this affected many of their municipal clients, they sent the letter out to all of them, including Acton, suggesting that each community get a ruling and guidance from their own Town Counsel. The Town Manager immediately transmitted this AG letter to Palmer and Dodge along with the proposed long term lease, seeking an opinion. I think it is fair to say that Tom Schnorr of Palmer and Dodge applied the brakes to the Towne Building proposal and everything came to a screeching halt. This was Oct. 2003.

The problem with these developments being considered public construction projects is that they then must adhere to all the public bid requirements, must pay prevailing wages,

and must use a sub-bid approach for every aspect of the construction. This is not something a non-profit developer has ever done nor would they willing to since it would increase the total project cost dramatically by as much as 30% for just the prevailing wage alone. The financing of these developments is very tight, leaving no room for such increased costs. HRI to date is willing to wait until this can be resolved but they are not willing to take on the risk with the pending question potentially triggering a challenge from anyone, most likely the Trade Unions looking for work as the Big Dig dries up.

What is triggering this ruling is the fact that a 50 year lease implies active Town ownership of the property. It is this factor that creates the public construction scenario. A lease with a 99 year term would be considered equivalent to the outright sale of the property and would not be a concern to the AG.

There have been a series of discussions since then between the Town and MHP, the Town and P&D, the Town and other towns in the same boat, and between ACHC and an assortment of housing advocates. There appear to be only a few solutions that would enable the project to proceed, each with its own risk.

Potential solutions:

1. Proceed with the project in spite of Town Counsel's and AG's caution.
2. Revote the Home Rule petition to a term of 99 years instead of 50 years and add language that specifically exempts it from the public bid laws. It would be advisable to get a 2/3's vote.
3. Revise the Home Rule petition to include language that exempts it from public bid requirements and revote.
4. Take a request to Town Meeting to sell the building and land for the sole purpose of providing rental affordable housing development. This requires a 2/3's vote.
5. Get state funds to subsidize the project to cover the additional cost

Unfortunately, any solution takes time and time is one luxury we do not have. The \$90,000 appropriation is nearing spend down. Is there any will on the part of the BOS to request more funding from Town Meeting and what would the source of the funding be? Is there the will to ask for another vote to resolve the disposition of property issues?

The ACHC has done everything asked of us since May 2001, we did not seek out this project but are dedicated to it. Bob Whittlesey has carried 90% of the load on his shoulders and remains determined to see it through. We know that had if it not been for the numerous local delays, the Towne Building would be occupied at this very moment and we would be basking in the pride of our first municipal affordable housing effort.

Instead, here we are in April 2004, 3 full years after the original vote to retain the building was made and the Towne Building stands empty and vulnerable.

The Selectmen have to make some very hard decisions about the future of this project and they have to do it soon.

Suggested statement:

In considering the reuse options for the Towne School Building, the Town was advised by the Schools that ownership of the building and land should be retained by the Town to reserve options for future use. The decision to use a lease arrangement rather than an outright sale of the property has created a significant statutory problem. Upon the advice of Town Counsel, a Home Rule petition was approved by Town Meeting and the Legislature in 2002 which gave the authority to the Selectmen to negotiate a lease of up to 50 years. New information from state sources, however, indicates a problem with a 50 year lease. It may not be considered the "disposition" of a property and therefore it may have to conform to all public bid requirements including a bid for the highest and best use, the payment of prevailing wages on the construction, and the filed sub-bid system for every aspect of the project. This dramatically increases the cost of any development on that site. A 99 year lease or the sale of the property would avoid these problems and could erase the suggestion that the Town would take back the building at some future date. An amendment to the original Home Rule petition might also accomplish the same thing. The Selectmen, Town Manager, and Town Counsel are currently considering a course of action. A non-profit developer has been selected to develop the Towne Building and is waiting patiently for these problems to be sorted out.

**Betty McManus**

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**From:** "rbwhittlesey" <rbwhittlesey@verizon.net>  
**To:** "Don Johnson" <djohnson@acton-ma.gov>; "Peter Ashton" <PKAshton@aol.com>  
**Cc:** "BOS" <BOS@acton-ma.gov>; "Ryan Bettez" <bettezfamily@yahoo.com>; "Betty McManus" <ahabetty@attglobal.net>; "Dan Buckley" <DJB01720@hotmail.com>; "Kevin McManus" <KevinM@NEHE.com>; "Nancy Tavernier" <ntavern@comcast.net>; "Robert B. Whittlesey" <rbwhittlesey@verizon.net>; "Pam Shuttle" <pam.shuttle@state.ma.us>  
**Sent:** Friday, July 02, 2004 11:03 AM  
**Subject:** Towne Building

Hi Don:

I am delighted to report some favorable news re the Towne Building. The issue of public bidding on projects carried out by private developers on property held under long term lease has now been presented to the top officials of the Romney Administration. A number of projects are involved and the need for a resolution of the problem is apparent. Affordable housing is a priority. As project feasibility is impacted by the additional costs and non industry procedures of public bidding, a decision supporting affordable housing is a real possibility. Resolution is expected to take several months. If there is a ruling eliminating the public bidding requirement and it is in hand by the end of the Summer, then we could target completing the 40B process in the fall and submitting applications for the February 2005 funding round.

The demonstrated interest and support of State agencies should bode well for our requests for funding.

Bob

7/6/2004

**Betty McManus**

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**From:** "Tavernier" <ntavern@comcast.net>  
**To:** <bos@acton-ma.gov>; "Don Johnson" <djohnson@acton-ma.gov>  
**Cc:** "Nancy Tavernier" <ntavern@comcast.net>; "Kevin McManus" <KevinM@NEHE.com>; "Betty McManus" <ahabetty@attglobal.net>; "Dan Buckley" <DJB01720@hotmail.com>; "Bob Whittlesey" <rbwhittlesey@verizon.net>; "Ryan Bettez" <bettezfamily@yahoo.com>; "Pam Shuttle" <pam.shuttle@state.ma.us>  
**Sent:** Friday, July 09, 2004 11:22 AM  
**Subject:** MHP update on Towne building

Dear Board members,

Today I received the following information from Rita Farrell on the status of the Towne School from Mass Housing Partnership point of view. You may recall that Clark Zeigler and MHP have committed to resolving the public bid issues that have surfaced. Rita attended the meeting held with Acton officials, including Bob Whittlesey and Peter Ashton, and MHP in May. This is very good news and Rita has agreed that I could share it with you.

**"On the Towne school topic we have made tremendous headway with DHCD these last two weeks and they are fully prepared to take on the subject of leasing and public construction with the AG's office. The chief counsel at DHCD is of the opinion that developments done on public land with ground leases do not trigger the public construction laws and they are prepared to put that in writing and meet with the AG's office. So stay tuned all is not lost - in fact we are feeling pretty positive about the prospects."**

This is very good news for not only Acton but some 27+ other community projects that have been held up over these issues.

Nancy

**Betty McManus**

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**From:** "Don Johnson" <djohnson@acton-ma.gov>  
**To:** "Acton Community Housing Corporation" <ACHC@acton-ma.gov>  
**Cc:** "Board of Selectmen" <BOS@acton-ma.gov>  
**Sent:** Tuesday, October 26, 2004 11:26 AM  
**Subject:** FW: Leasing of School Building

Forwarded for your information.

Regards,  
Don

-----Original Message-----

**From:** Don Johnson  
**Sent:** Tuesday, October 26, 2004 11:26 AM  
**To:** Dean Charter; 'Elizabeth Hughes'  
**Subject:** RE: Leasing of School Building

Dean:

I am aware of what MHP and DHCD has been talking about and, in the outline Rita Farrell has given Ms. Hughes, two of the three provisos will not work for Acton (and probably other communities). The first is a lease at fair market value. We are already told that the project in Acton is marginal at a lease of \$1. Fair market would be a real impediment. The other problem is the myopic view of the State when they say remove the improvements. This would add some major expense at the end of the term that would have to be factored into the financing plan and make it even more costly. Moreover, do they expect an affordable housing advocate to pull out a replacement heating system, take off the roof they replaced, etc. and have the Town accept a dismantled building at the end of the term. They simply are not being realistic.

I had an exchange with Bob Whittlesey of the Acton Community Housing Corporation (ACHC) yesterday regarding this subject. I am copying it below (between the lines of asterisks) for your information.

Don

\*\*\*\*\*

-----Original Message-----

**From:** Don Johnson  
**Sent:** Monday, October 25, 2004 1:49 PM  
**To:** Bob Whittlesey  
**Cc:** Peter Ashton; Ryan & Erin Bettez; Betty McManus; Dan Buckley; Kevin McManus; Nancy Tavernier; Pam Shuttle; Board of Selectmen; Tom Schnorr ([tschnorr@palmerdodge.com](mailto:tschnorr@palmerdodge.com))  
**Subject:** RE: Leased land and Bidding requirements

Sent: Tuesday, October 26, 2004 10:48 AM  
To: 'Elizabeth Hughes'  
Cc: Don Johnson  
Subject: RE: Leasing of School Building

Elizabeth,

Thanks for the information. I am not sure if that will solve our problem or not, but I am forwarding this on to the Town Manager

Regards,

Dean

-----Original Message-----

From: Elizabeth Hughes [mailto:EHughes@concordnet.org]  
Sent: Monday, October 25, 2004 3:15 PM  
To: Municipal Properties Department  
Subject: Leasing of School Building

Good afternoon Dean,

I wanted to follow-up with you regarding our conversation about the Town of Acton leasing the old school building.

I have spoken to Rita Farrell at the Massachusetts Housing Partnership and she informed me that hopefully within the next two to three weeks, MHP and the Department of Housing and Community Development will be working with the Attorney General's office to establish guidelines or protocols for the leasing of town owned land without trigger the state procurement and prevailing wage laws.

It was Rita's opinion that there would be three standards that would have to be met. First, the lease would have to be at fair market value. Second, the town could not be involved in any way with the construction, renovation or alteration of the land and/or buildings. Third, any improvements that were made would have to be removed at the end of the leasing so that the town did not get any benefits in the end from the project.

I will let you know if I hear anything further. If you have any questions, please don't hesitate to contact me.

Elizabeth Hughes  
Staff Planner

10/26/2004

Bob:

Thank you for the update. As you are aware, we have been unable to determine what was being done to address this problem. Your report is very helpful in that area.

For the record, a requirement that improvements be removed at the end of a long-term lease would be onerous. It is far better that the thinking proceed on the assumption that any improvements and investments are fully depreciated within the term of the lease.

By copy to the Board of Selectmen and Tom Schnorr, I am forwarding your report for their information.

Regards,

Don

-----Original Message-----

From: Bob Whittlesey

Sent: Monday, October 25, 2004 11:26 AM

To: Don Johnson

Cc: Peter Ashton; Ryan & Erin Bettez; Betty McManus; Dan Buckley; Kevin McManus; Nancy Tavernier; Bob Whittlesey; Pam Shuttle

Subject: Leased land and Bidding requirements

The advisory group on leasing municipal land and buildings for development met on October 20. It was hosted by Amy Anthony at her office. Present were Sarah Young and Alex Whiteside from DHCD; Judy Jacobson and Rita Farrell from MHPF; Bob Smith from Barnstable; Ruth Weil; Jeffery Sacks; Sue Cohen; Chris Norris; Bob Kuehn; Charlene Regan; a few others and myself. A draft of Guidelines prepared by Whiteside to be issued by DHCD in November after a review by the Office of the Attorney General was reviewed.

The major criteria that if met could eliminate the requirement for public bidding pursuant to Chapter 149 were

- a. that the construction of buildings or improvements and subsequent operations of the development not be under the control of the municipality
- b. that the purpose of the project is not financial benefit for the municipality
- c. and, that the municipality does not fund the project.

Minimal control or involvement would not be violated by approvals of permits and other reviews that are done for normal private development. It is also recognized that affordable housing is an appropriate and usual goal for a municipality and commitments for affordability and monitoring compliance of them would not be considered public construction.

Leasing raises several issues. While future ownership of the development would not make bidding laws applicable, the return of a valuable asset might. The discussion covered the proposal to remove the improvements as a requirement at the termination of the lease. Obviously, this would not make sense in the Towne Building case. It was argued that what happens at the end of the lease be silent and that it be presumed that during the 50 or more years leasing period, the value of the improvement would have been fully expended.

The discussion covered the likely funding of development by the State and possible the municipality ( CPA and other wise) Construction of charter schools where the construction and operation of the schools is a public activity with public funding, public bidding would be applicable. For leasing, there would be a test relative to the rent. It should be a reasonable market rent but could be below market where limited by the financial constraints placed on the project by affordability requirements.

It was agreed that a revised draft would be prepared and that I would be furnished a copy as soon as it was distributed. We would then need to get a prompt opinion from Tom Schnorr as to his opinion that the guidelines provide a basis to proceed with the Towne Building project.

I hope this is possible. It was a positive meeting and I believe DHCD is making a concerted effort to resolve the problem. The proposed guidelines will state that "It is DHCD's view that development of such housing on municipally leased land will not be subject to the bidding laws so long as proper precautions, as outlined in this letter, are taken."

\*\*\*\*\*

-----Original Message-----

From: Dean Charter

## Betty McManus

---

**From:** "Don Johnson" <djohnson@acton-ma.gov>  
**To:** "Bob Whittlesey" <rbwhittlesey@verizon.net>  
**Cc:** "Peter Ashton" <pkashton@aol.com>; "Ryan & Erin Bettez" <bettezfamily@yahoo.com>; "Betty McManus" <ahabetty@attglobal.net>; "Dan Buckley" <djb01720@hotmail.com>; "Kevin McManus" <kevinm@nehe.com>; "Nancy Tavernier" <ntavem@comcast.net>; "Pam Shuttle" <pam.shuttle@state.ma.us>; "Board of Selectmen" <BOS@acton-ma.gov>; <tschnorr@palmerdodge.com>  
**Sent:** Monday, October 25, 2004 1:48 PM  
**Subject:** RE: Leased land and Bidding requirements

Bob:

Thank you for the update. As you are aware, we have been unable to determine what was being done to address this problem. Your report is very helpful in that area.

For the record, a requirement that improvements be removed at the end of a long-term lease would be onerous. It is far better that the thinking proceed on the assumption that any improvements and investments are fully depreciated within the term of the lease.

By copy to the Board of Selectmen and Tom Schnorr, I am forwarding your report for their information.

Regards,  
Don

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**Sent:** Monday, October 25, 2004 11:26 AM  
**To:** Don Johnson  
**Cc:** Peter Ashton; Ryan & Erin Bettez; Betty McManus; Dan Buckley; Kevin McManus; Nancy Tavernier; Bob Whittlesey; Pam Shuttle  
**Subject:** Leased land and Bidding requirements

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10/25/2004

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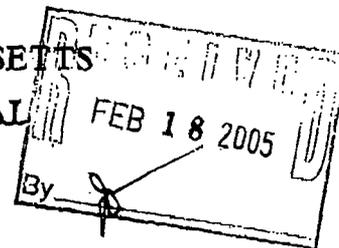
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THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL  
ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108-1598



THOMAS F. REILLY  
ATTORNEY GENERAL

(617) 727-2200  
www.ago.state.ma.us

February 17, 2005

Alexander Whiteside  
Chief Counsel  
Massachusetts Department of  
Housing & Community Development  
100 Cambridge Street, 3<sup>rd</sup> Floor  
Boston, MA 02114

Re: Municipal Leasing for Affordable Housing

Dear Mr. Whiteside:

This is in response to your letter of November 17, 2004, in which you ask for comments on the memorandum accompanying your letter. The memorandum addresses the applicability of the bidding laws for public construction to municipal leases that contemplate the construction of affordable housing by a private developer on public land (affordable housing leases). In the memorandum, you conclude that such a lease will not implicate these laws so long as it contains certain terms. Based on our bid protest decision, New England Regional Council of Carpenters v. City of Pittsfield (August 13, 2004) (the Wahconah Park decision), we agree.<sup>1</sup>

The Wahconah Park decision clarified the factors that we would consider, and the weight to be attributed to each, to determine whether the bidding laws for public construction apply to an affordable housing lease.<sup>2</sup> At issue there was a \$1 license agreement for a Park owned by the City of Pittsfield (the City), but the underlying issue was the same as that addressed in your memorandum. The license required the private licensee to "provide professional baseball games at the Park" and to perform yearly renovations to the Park pursuant to a "[financial] formula." Wahconah Park at 4.<sup>3</sup>

Before reaching the license agreement, we discussed Helmes v. Com., 406 Mass. 873 (1990), Town of Plymouth v. Snow, No. 90-0252-A (Mass. Super Jan. 14, 1993), and G.M. Builders, Inc. v. Town of Barnstable, 18 Mass. App. 664 (1984). We cited Helmes

<sup>1</sup> This letter should not be construed as a legal opinion. Our ability to render legal opinions extends only to opinion requests by state officials, district attorneys, and committees of the Legislature. See M.G.L. c. 12 §§3, 6 and 9.

<sup>2</sup> With respect to such complex bidding issues, we generally do not form positions unless the issue or a similar issue has been the subject of a bid protest. The adversarial bid protest process ensures a thorough treatment of an imminent issue. When we hear a bid protest and render a decision, we are acting in our enforcement capacity. See M.G.L. c. 149, § 44H (charging the Attorney General with the responsibility for enforcing the bidding statutes for public works and building projects, and the designer selection law).

<sup>3</sup> A copy of the decision is attached to this letter.

Alexander Whiteside  
Page 2 of 3  
2/17/2005

for the proposition that "where an agent enters into a construction contract on behalf of a public agency, the contract may be subject to the competitive bidding statutes [for public construction] nonetheless." Wahconah Park at 8 (citing Helmes, 406 Mass. at 876).

To flesh out this concept of agency, we turned to the Snow decision.<sup>4</sup> See Wahconah Park at 9-10. There, rather than comply with the construction bid laws, the Town of Plymouth (the Town) issued a Request for Proposals (RFP) to interested developers for the construction and operation of a garage on Town owned land. See Snow at 1-2. Proposals were to include construction qualifications and architectural plans, and the Town retained the right to reject a selected proposal after reviewing additional submissions. See id. at 3. The court held that the bidding laws for public construction applied because the lease was based on the lessee's agreement to construct a garage according to guidelines in the RFP and because "at some point . . . the lease Town will assume ownership of the parking garage." Id. at 6. The court noted that if the lease was not subject to these laws, a public agency could sidestep their safeguards and "merely lease public land to a favored contractor who would construct the desired building." Id. at 7 and n.2.

Finally, we drew guidance from G.M. Builders, Inc. v. Town of Barnstable, 18 Mass. App. 664 (1984), which involved renovations by a private lessee on a publicly owned restaurant and the applicability of an analogous law – the payment bond law for public construction – to these renovations. See Wahconah Park at 10-12. The court held that this law did not apply, largely because while the lease acknowledged the lessee's right to make specified renovations, it "did not require" the lessee to undertake any renovations; they remained the "sole responsibility" of the lessee. See 18 Mass. App. 668-69 (Emphasis in original). The G.M. Builders court also distinguished a general right, reserved in a public lease, to ensure that renovations are "consistent with the public interest," from a right giving more control over the exact construction to be performed. See id. at 669 and n.5.

When we turned to the Wahconah Park license agreement, we made the following observations:

In its current form, the license raises serious concerns about the applicability of the [construction] bidding statutes. However, this is a close case. During the hearing of this matter, it became apparent that the City did not consider the reasoning of the G.M. Builders case in entering the license agreement. Further, while both the City and the Club view the license as having a 15 year term, the language of the license provides [for an initial obligation of approximately 18 months]. Finally, based on testimony provided at the hearing, the parties to the license did not intend for the City to have the right to withhold approval for concession stand alterations except where there are violations of health, safety and welfare regulations.

<sup>4</sup> A copy of this decision is also attached.

Alexander Whiteside  
Page 3 of 3  
2/17/2005

Wahconah Park at 13. It appeared that the City had unintentionally included the very clauses that raised concerns about whether or not the construction bid laws applied, or at least had yet to attempt to structure them in a way that avoided these concerns. We therefore remanded the matter to the City for further consideration.

The lease terms you propose in your memorandum would seem to avoid these concerns. After discussing a letter that addresses GM Builders, you advise that the term of the affordable housing lease should be "no less than what is computed to be the actual useful life of the housing." You further note that it "might also be useful for the lease to contain a provision that the lessee shall own the buildings so constructed or for the lease to provide that the lessee . . . may remove any improvements." You also state that, beyond restricting the housing to "income-eligible households," the municipality should not "manage the construction or thereafter operate the housing." With respect to the rent, you suggest that the municipality should "charge [the lessees] a reasonable amount for the affordable housing use."

We agree that an affordable housing lease containing these terms would not give a municipality the type of control over construction referenced in Helmes, Snow and GM Builders as that which would implicate the bidding laws for public construction.<sup>5</sup> Such a lease would, however, seem to be subject to the bidding law for public leases.<sup>6</sup> Please contact the Inspector General at (617) 727-9140 with any questions that you may have about compliance with this law.

Very Truly Yours,



Joseph E. Ruccio, III  
Assistant Attorney General

<sup>5</sup>We also agree with your assertion that state and federal assistance for the construction of affordable housing, such as tax credits, grants or loans, is not enough in itself to subject an otherwise private project to the bidding laws for public construction. See Helmes, 406 Mass. at 876; CF. Salem Bldg. Supply Co. v. I.B.L. Constr. Co., 10 Mass. App. Ct. 360, 362 (1980) (privately owned, but publicly financed, low income housing project not subject to G.L. c. 149, § 29, the payment bond law for public construction).

<sup>6</sup> See M.G.L. c. 30B, § 16.

February 17, 2005

Alexander Whiteside  
Chief Counsel  
Massachusetts Department of  
Housing & Community Development  
100 Cambridge Street, 3<sup>rd</sup> Floor  
Boston, MA 02114

Re: Municipal Leasing for Affordable Housing

Dear Mr. Whiteside:

This is in response to your letter of November 17, 2004, in which you ask for comments on the memorandum accompanying your letter. The memorandum addresses the applicability of the bidding laws for public construction to municipal leases that contemplate the construction of affordable housing by a private developer on public land (affordable housing leases). In the memorandum, you conclude that such a lease will not implicate these laws so long as it contains certain terms. Based on our bid protest decision, New England Regional Council of Carpenters v. City of Pittsfield (August 13, 2004) (the Wahconah Park decision), we agree.<sup>1</sup>

The Wahconah Park decision clarified the factors that we would consider, and the weight to be attributed to each, to determine whether the bidding laws for public construction apply to an affordable housing lease.<sup>2</sup> At issue there was a \$1 license agreement for a Park owned by the City of Pittsfield (the City), but the underlying issue was the same as that addressed in your memorandum. The license required the private licensee to “provide professional baseball games at the Park” and to perform yearly renovations to the Park pursuant to a “[financial] formula.” Wahconah Park at 4.<sup>3</sup>

Before reaching the license agreement, we discussed Helmes v. Com., 406 Mass. 873 (1990), Town of Plymouth v. Snow, No. 90-0252-A (Mass. Super Jan. 14, 1993), and G.M. Builders, Inc. v. Town of Barnstable, 18 Mass. App. 664 (1984). We cited Helmes

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<sup>1</sup> This letter should not be construed as a legal opinion. Our ability to render legal opinions extends only to opinion requests by state officials, district attorneys, and committees of the Legislature. See M.G.L. c. 12 §§3, 6 and 9.

<sup>2</sup> With respect to such complex bidding issues, we generally do not form positions unless the issue or a similar issue has been the subject of a bid protest. The adversarial bid protest process ensures a thorough treatment of an imminent issue. When we hear a bid protest and render a decision, we are acting in our enforcement capacity. See M.G. L. c. 149, § 44H (charging the Attorney General with the responsibility for enforcing the bidding statutes for public works and building projects, and the designer selection law).

<sup>3</sup> A copy of the decision is attached to this letter.

for the proposition that “where an agent enters into a construction contract on behalf of a public agency, the contract may be subject to the competitive bidding statutes [for public construction] nonetheless.” Wahconah Park at 8 (citing Helmes, 406 Mass. at 876).

To flesh out this concept of agency, we turned to the Snow decision.<sup>4</sup> See Wahconah Park at 9-10. There, rather than comply with the construction bid laws, the Town of Plymouth (the Town) issued a Request for Proposals (RFP) to interested developers for the construction and operation of a garage on Town owned land. See Snow at 1-2. Proposals were to include construction qualifications and architectural plans, and the Town retained the right to reject a selected proposal after reviewing additional submissions. See id. at 3. The court held that the bidding laws for public construction applied because the lease was based on the lessee’s agreement to construct a garage according to guidelines in the RFP and because “at some point . . . the lease Town will assume ownership of the parking garage.” Id. at 6. The court noted that if the lease was not subject to these laws, a public agency could sidestep their safeguards and “merely lease public land to a favored contractor who would construct the desired building.” Id. at 7 and n.2.

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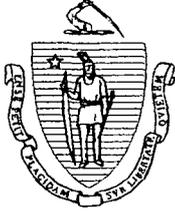
Very Truly Yours,

Joseph E. Ruccio, III  
Assistant Attorney General

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<sup>5</sup>We also agree with your assertion that state and federal assistance for the construction of affordable housing, such as tax credits, grants or loans, is not enough in itself to subject an otherwise private project to the bidding laws for public construction. See Helmes, 406 Mass. at 876; Cf. Salem Bldg. Supply Co. v. J.B.L. Constr. Co., 10 Mass. App. Ct. 360, 362 (1980) (privately owned, but publicly financed, low income housing project not subject to G.L. c. 149, § 29, the payment bond law for public construction).

<sup>6</sup> See M.G.L. c. 30B, § 16.



Commonwealth of Massachusetts  
**DEPARTMENT OF HOUSING &  
COMMUNITY DEVELOPMENT**

Mitt Romney, Governor ♦ Kerry Healey, Lt. Governor ♦ Jane Wallis Gumble, Director

State Bid Laws and Leasing Municipally-Owned Land for Affordable Housing Development

Various municipalities would like to lease certain land to private developers for the purpose of their providing affordable housing to low or moderate income households. The question has arisen as to whether developing affordable housing on municipally owned land constitutes public construction and triggers the public bid laws. For example, M.G.L. c. 149 § 44A (2) states that “[e]very contract for the construction...of any building by a public agency estimated to cost more than twenty-five thousand dollars...shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in the provisions of section forty-four B to forty-four H inclusive...”

DHCD recognizes that there is a variety of reasons why it may be impractical for a municipality to convey land outright to developers for affordable housing use. Such a municipality should have the ability to lease land in order to permit development of affordable housing. It is DHCD’s view that development of such housing by a private developer on municipally leased land will result in an essentially private use and will not be subject to the bidding laws so long as proper precautions are taken. The following information is intended to provide guidance to municipalities that are considering leasing municipally owned land for such development.

There are four areas that a municipality should address in order to make a determination whether a lease should be treated the same as a public construction contract. They are:

- (1) Ownership. Does the public entity as owner receive benefit from construction required by the lease?

One possibly problematical part of a lease of municipal land to a private developer for affordable housing lies in the fact that at the end of the lease term the municipality will own the buildings constructed by the private developer. Although DHCD does not believe that by itself potential future municipal ownership would make the bidding laws applicable, if the lease term is short and the municipality would be receiving a valuable asset at the end of the short lease term, the circumstances would support a conclusion that the bidding laws are applicable. In order to avoid such receipt of a valuable asset it would be advisable for any municipal lease for affordable housing to have a term no less than what is computed to be the actual useful life of the housing. It might also be useful for the lease to contain a provision that the lessee shall own the buildings so constructed or for the lease to provide that the lessee may, at its option, remove any improvements.

- (2) Control. Is the public entity in effective control of the construction?

The amount of control that a public agency exerts over a construction project during a public lease is a significant factor to consider in determining whether the public bidding laws apply. The municipality should avoid control of construction and of operation of the housing during the term of the lease. While it is fair for there to be provisions permitting the municipality to ensure that the housing is properly built and is thereafter restricted to income-eligible households, the municipality should not itself manage the construction or thereafter operate the housing. The private developer should be in charge of construction and may thereafter manage the property. In the event that the developer seeks outside management, if a municipal or other public entity such as the local housing authority is to be considered, there must be a selection process based on merit.

Certain State and federal assistance that is currently available to private developers for construction of affordable housing (for example the federal and state low-income housing tax credits) does not subject the developers to the bidding laws. Financial assistance by means of loans or grants to private developers from sources such as local affordable housing trusts or Community Preservation Act funds will not cause the bidding laws to be applicable. However, grants to municipalities for the purpose of housing production, such as CDBG, may trigger different requirements.

(3) Lease Terms. How long is the lease? What rent is being charged?

Together with a sufficiently long lease and the ability of the lessee to remove any building improvements at the end of the lease term, the municipality should consider the appropriate rent for the land. The municipality may decide to charge a reasonable amount for the affordable housing use. This would be much less than rent for a market-rate housing use. Rent for affordable housing use would be based on the value of the land as used for affordable housing. In this way a municipality could charge a fair market rent for the restricted affordable use and still charge much less than what would be charged for market housing. Although DHCD does not believe that charging a nominal rent would be a municipal involvement sufficient to implicate the bidding laws, it might be considered a factor. Such a result can be avoided by computing a low rent that is nevertheless appropriate for the affordable housing use.

(4) Use of Building. Is the building to have a public or private use during the lease term?

Municipalities should not use a lease with a private developer as a means to circumvent the bidding laws on a construction project that the public entity would otherwise undertake itself. For example, the Attorney General's Bid Protest Unit in four separate decisions<sup>1</sup> has held that, although certain buildings were being constructed by private entities, the construction was subject to the bidding laws because the buildings would be used for a public purpose as charter schools and because the funding was public.

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<sup>1</sup> In re Sabis International Charter School (9/17/97), In re Sabis International Charter School (2/1/00), In re Enlace DeFamilias DeHolyoke/Holyoke Community Charter School (7/15/02) and In re Renovations to 160 Ashlanve Avenue, Springfield, MA, New Leadership Charter School (5/7/03)

## Acton Housing Authority

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**From:** rlodi@mhp.net  
**Sent:** Tuesday, March 08, 2005 12:15 PM  
**To:** aha1@attglobal.net  
**Subject:** MHP ebulletin: AG clarifies lease of public land for housing



## Massachusetts Housing Partnership

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### Attorney general, DHCD issue guidance on leasing of public land for affordable housing

*(MHP periodically issues e-bulletins aimed at helping local communities develop affordable housing. To view previous e-bulletins, [click here](#). If you have a comment or a story to share about an affordable housing effort in your community, [click here](#)).*

The state attorney general's office has issued a letter stating that under certain conditions a community can lease municipal land to a private developer for the construction of affordable housing without requiring the developer to comply with public construction laws.

Assistant Attorney General Joseph E. Ruccio issued the letter on February 17 in response to a state Department of Housing and Community Development (DHCD) memorandum intended to provide guidance to municipalities.

DHCD drafted the memorandum after receiving numerous requests from communities seeking advice as to whether public construction laws would apply to private developers building affordable housing on municipally-leased land, according to DHCD chief counsel Alexander Whiteside.

The DHCD memorandum outlines the terms and conditions under which a private developer might construct affordable housing on municipally-leased land without being subject to public construction laws. DHCD then sought comment from the attorney general's office.

Citing several previous cases, Assistant Attorney General Ruccio agreed with DHCD that a lease arrangement does not necessarily trigger public construction laws.

Relevant facts noted by Ruccio include:

1. A lease term should be at least as long as the useful life of the building.
2. The municipality does not manage the construction or operate the housing.
3. The private owner is able to remove the improvements at the end of the lease term.
4. The private owner is charged a reasonable rent for the affordable housing use.

This means that municipalities and private developers now have clearer guidance as to what circumstances trigger public construction laws.

To view the DHCD memorandum and the letter from the attorney general's office, [click here](#).

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**MEMORANDUM**

To: Don P. Johnson, Town Manager

From: Stephen D. Anderson, Town Counsel

RE: Acton/Towne School – Applicability of Public Bidding Laws to RFP Lease  
for Affordable Housing

Date: July 11, 2005

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You have asked whether the Town of Acton’s Request for Proposals 8/4/03-819 for the Long-Term Leasing and Renovation of the Towne School Property for Affordable Housing Use (“RFP) and the proposed form of Lease attached thereto (the “Lease”) would, as structured, trigger bidding laws applicable to public instruction and, if so, whether the RFP and/or the Lease can legitimately be restructured to effectuate the intent of the parties not to trigger said bidding laws.

The answer to the first question is yes, and the answer to the second question is a qualified yes.

**BIDDING LAWS FOR PUBLIC CONSTRUCTION**

In general every substantial contract for the construction, reconstruction, or repair of any public work<sup>1</sup> or any building by a public agency<sup>2</sup> must be awarded to the lowest

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<sup>1</sup> G.L. c. 30 § 39M(a), effective until July 19, 2004, provided in pertinent part as follows:

Every contract for the construction, reconstruction, alteration, remodeling or repair of any public work ... by ... any ... town ..., and estimated by the awarding authority to cost more than ten thousand dollars, and every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency, as defined by subsection one of section forty-four A of chapter one hundred and forty-nine, estimated to cost more than ten thousand dollars but not more than twenty-five thousand dollars, shall be awarded to the lowest responsible and eligible bidder on the basis of competitive bids publicly opened and read by such awarding authority .....

G.L. c. 30 § 39M(a), effective on and after July 19, 2004, provides in pertinent part as follows:

responsible and eligible bidder on the basis of competitive bids publicly opened. Similarly, every substantial contract for design services<sup>3</sup> for public bidding construction, reconstruction or repair must follow specific statutory requirements.

Where the building or facility being constructed, reconstructed or repaired is not publicly owned, bidding laws for public construction do not apply, even if public funds are used to subsidize the work. See Helmes v. Commonwealth, 406 Mass. 873, 876 (1990) (§ 39M(a) does not apply to a ship like the *U.S.S. Massachusetts* owned by a charitable corporation being rehabilitated with public finding); Salem Bldg. Supply Co. v. J.B.L. Constr. Co., 10 Mass. App. Ct. 360, 362 (1980) (privately owned, but publicly

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Every contract for the construction, reconstruction, alteration, remodeling or repair of any public work ... by ... any ... town ..., and estimated by the awarding authority to cost more than ten thousand dollars, and every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency, as defined by subsection one of section forty-four A of chapter one hundred and forty-nine, estimated to cost more than \$25,000 but not more than \$100,000, shall be awarded to the lowest responsible and eligible bidder on the basis of competitive bids publicly opened and read by such awarding authority ....

<sup>2</sup> G.L. c. 149, § 44A(2), effective until July 19, 2004, provided in pertinent part as follows:

Every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost more than twenty-five thousand dollars ... shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in the provisions of section forty-four A to forty-four H, inclusive ....

G.L. c. 149, § 44A(2), effective on and after July 19, 2004, provided in pertinent part as follows:

Every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost more than \$100,000, ... shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in section 44A to 44H, inclusive.

<sup>3</sup> G.L. c. 7, § 38K provides in pertinent part:

Every contract for design services for any building construction, reconstruction, alteration, remodeling, or repair estimated to exceed one hundred thousand dollars by any ... town ... other than housing authorities shall be awarded only after a selection procedure adopted in writing, prior to publication requesting applications, complying with the purposes and intent of sections thirty-eight A 1/2 to thirty-eight O, inclusive, and [specific listed statutory] requirements ....

financed, low and moderate income housing complex is not a public work under G.L. c. 49, § 29).

Conversely, where the land or building is publicly owned, a public-private contract may trigger bidding laws applicable to public construction. See Town of Plymouth v Snow, Plymouth Superior Court No. 90-0252-A (1/4/93) (an RFP ground lease of town-owned property to a private developer requiring construction of a parking garage is subject to statutory bidding and design selection requirements because the land is town-owned, the town will assume ownership of the parking garage “at some point,” and to hold otherwise would create a “significant loophole” in the bidding laws); City of Pittsfield v New England Council of Carpenters, Attorney General Bid Protest Decision (8/13/04) (license between city and baseball club to improve and operate a city-owned baseball park raised concerns about whether it is subject to bidding laws because of the extent to which the City retained control over the construction; case remanded to City to restructure the license accordingly).

However, not all public-private contracts involving construction on public land or buildings will necessarily trigger bidding laws applicable to public construction, particularly where the contract permits but does not require the private party to make renovations to the town-owned property. Cf. G.M. Builders, Inc. v Town of Barnstable, 18 Mass App.Ct. 664, 668-669 (1984) (tenant’s reconstruction of town-owned restaurant facility at municipal airport under lease with Town did not obligate Town to provide bond under G.L. c. 149, § 29; however, the decision did not reach legality of avoiding compliance with public bidding laws).

Building on this authority, the Attorney General's office and the Department of Housing and Community Development have offered guidance to communities as to the applicability of bidding laws for public construction to municipal leases that contemplate the construction of affordable housing by a private developer on public land. See AG Letter (2/17/05) and DHCD Guidance (11/17/04). Generally speaking, the AG and DHCD focus on the degree of ownership and control exercised by the town over the construction and the improvements to the Town property. The greater the degree to which the town controls the construction and/or benefits directly from the improvements, the more likely it is that the lease will trigger public bidding laws. The AG and DHCD concur that a lease containing the following types of provisions would avoid concerns as to whether or not the construction bid laws apply. As the AG Letter states:

The lease terms you [DHCD] propose in your memorandum would seem to avoid these concerns. ... [Y]ou advise that the term of the affordable housing lease should be "no less than what is computed to be the actual useful life of the housing." You further note that it "might also be useful for the lease to contain a provision that the lessee ... may remove any improvements." You also state that, beyond restricting the housing to "income-eligible households," the municipality should not "manage the construction or thereafter operate the housing." With respect to the rent, you suggest that the municipality should "charge [the lessees] a reasonable amount for the affordable housing use."

These criteria are discussed further below.

### **THE ACTON RFP AND PROPOSED FORM OF LEASE**

As presently structured, the Acton RFP and the proposed form of Lease contain a number of provisions that reflect a significant degree of control by the Town over the proposed construction. These provisions raise concerns over the applicability of the bid laws for public construction. Although the RFP calls for a 50 year lease (which is a

favorable term in this context), the RFP and the proposed Lease predate the AG and

DHCD Guidance and contain the following problematic provisions:

- (1.) The RFP (pp. 1, 5-6) and the Lease (§§ 3.1-3.9) require the reconstruction and renovation of the pre-existing building into 18 to 20 units of mixed-income rental housing.
- (2.) The RFP (pp. 2, 5-6), and the Lease (§§ 3.2, 3.3, 3.5, 6.3, 8.6 and 9.1) require various approvals by the Town during the development process and throughout the lease term, including approvals with respect to the schedule of performance (§ 3.2), the construction drawings (§3.3), the members of the development team (§3.5), alterations during term a term of the lease (§6.3), the property management company and guidelines (§8.6), as well as resident selection policies (§9.1).
- (3.) The Lease (§§ 3.6, 15.1) vests title to the tenant's improvements in the Town and makes no provision for their removal by the tenant.

Accordingly, as presently structured, the RFP and the proposed form of Lease appear to raise bidding law concerns.

#### **OPTIONS TO ADDRESS BIDDING LAW CONCERNS**

Based on the guidance provided by the AG and DHCD and the precedents discussed above, the Town has three basic options to address the bidding law concerns.

These options, ranked from most aggressive to most conservative, are as follows:

- (1) The Town can attempt to restructure the proposed form of Lease to conform to the guidance offered by the Attorney General, DHCD, and the cases cited, and then execute the Lease as restructured;
- (2) The Town can modify the Lease to require the tenant to go out to bid in a manner acceptable to the Town Manager and conforming to public bid laws for the construction of the tenant's improvements to the property; or
- (3) The Town can reject all proposals and re-bid the project with a restructured RFP and Lease and/or as a public building project.

In evaluating the first option, below, I am mindful of the Home Rule legislation adopted with respect to the Towne School project, which provides in pertinent part as follows (Chapter 487 of the Acts of 2002, emphasis added):

SECTION 1. Notwithstanding any general or special law, rule or regulation to the contrary, the town of Acton may lease the historic Towne school building and so much land surrounding and providing access to the building as is set forth in the votes of the school committee and the board of selectmen, for a term of not more than 50 years, for the purpose of preserving the building and adapting it for residential use, including but not limited to low and moderate income housing use.

SECTION 2. The board of selectmen may issue a request for proposals for such purposes, to determine the terms and conditions of such request, to accept any proposal or negotiate changes in any proposal, or to reject all proposals, as it determines to be in the best interests of the town, and to take all other actions as may be necessary or desirable to carry out such project.

This special legislation thus provides somewhat more latitude to the Town of Acton than traditional Home Rule legislation authorizing a long-term lease of town property. It also specifically envisions the RFP process as the means to accomplish “the purpose of preserving the building and adapting it for residential use, including but not limited to low and moderate income housing use,” notwithstanding any general or special law, rule or regulation to the contrary. (Read most aggressively, this clause authorizes the Town to do so by means of an RFP alone, notwithstanding the public bidding laws applicable to public construction.)

In discussing the first option, below, I am also mindful of the Town’s right, in issuing an RFP under G.L. c. 30B § 16, to “specify the restrictions, if any, that it will place on the subsequent use of the property.”

Taken together, the Town's special legislation and its right under c. 30B to impose re-use restrictions may help to legitimize the restructured lease approach discussed below.

### **THE RESTRUCTURED LEASE**

The AG's Bid Protest Decision in Pittsfield confirms that, in a "close case," the agreement between the Town and the private party may be restructured to eliminate the bidding law concerns, particularly if the restructured lease is consistent with the original intent of the parties. In Acton's case, both the terms of the 50 year Lease and various express provisions of the Lease demonstrate the Town's intention to establish an arms-length Landlord-Tenant relationship with the private tenant, not any form of agency relationship. This is apparent, for example, from the following Lease provisions:

- (1) The general lease of the premises (§ 1.1) and the Town's limited reserved rights (§ 1.2);
- (2) The 50 year term (RFP p.1; Lease § 2.1);
- (3) The sole responsibility for construction and permitting placed on the Tenant (§§ 3.8, 3.10);
- (4) The "absolutely net" rent (§§ 4.1-4.4), with all impositions, taxes and utilities being the Tenant's responsibility (§§ 5.1-5.4);
- (5) The obligation on the Tenant for repairs and maintenance (§ 6.1), insurance and indemnity (§§ 7.1-7.3), and compliance with legal requirements (§ 8.3);
- (6) The non-recourse provision against the Town (§18.9); and
- (7) The Lease's specific definition of the relationship between the parties (§ 18.16; emphasis added):

Nothing contained under this Lease shall be construed to create a partnership or joint venture between the Town of Acton and Tenant or to make the Town of Acton an associate in any way of Tenant in the conduct of Tenant's business, nor shall the Town of

Acton be liable for any debts incurred by Tenant in the conduct of Tenant's business, and it is understood by the parties hereto that this relationship is and at all times shall remain that of landlord and tenant.

As a result, consistent with the AG's Bid Protest Decision in Pittsfield, these provisions suggest that the Town should be able to restructure the problematic provision of the Lease to fulfill the original intention of the parties and to eliminate the bidding law concerns. Attached as Exhibit A is a redlined redraft of the Town's proposed form of Lease with various changes made in an effort to conform to the AG's and DHCD's guidance and otherwise to protect the Town against adverse repercussions with respect to the public bidding laws. For ease of reference, the following table matches the issue of concern with the proposed solution in the redlined Lease:

ISSUE	CITATION	SOLUTION	COMMENTS
The term of the affordable housing lease should be "no less than what is computed to be the actual useful life of the housing."	AG (2/17/05) p. 3; DHCD p.2	1. Lease Term is 50 years (§ 2.1).  2. New "whereas" clause confirms the term of the Lease exceeds the useful life of the improvements	
The Lease should contain a provision that the "Lessee ... may remove any improvements"	AG (2/17/05) p. 3; DHCD p.2	Lease changed so that:  1. Tenant owns the improvements and may remove them upon expiration or earlier termination of the lease (§ 3.6).  2. If tenant fails to timely remove the improvements, title thereto vests in the	

ISSUE	CITATION	SOLUTION	COMMENTS
		Town (§§ 3.6, 15.1).  3. If tenant defaults and the lease is terminated, improvements become property of the Town (§14.2).	
Lease may restrict the housing to income-eligible households.	AG (2/17/05) P.3; DHCD p.2	See Article 9. Resident selection and Affordability Commitment.	No change needed.
<p>The Town should not manage the construction or operate the housing.</p> <p>The Public Bidding Laws “may apply to private-public projects where a public authority maintains sufficient control to indicate that an agency relationship exists between it and the private entity.”</p>	AG (2/17/05) p.3; DHCD p.2  AG Bid Protest Decision (8/13/04) p.8	Article 3 of the Lease (“Tenant’s Work”) has been changed as follows: <ul style="list-style-type: none"> <li>• Tenant has the right but not the duty to perform tenant’s work (§ 3.1)</li> <li>• Tenant sets schedule of work, subject to outside date (§2.2, 3.2).</li> <li>• Town comments on but cannot disapprove Tenant’s construction drawings (§3.3).</li> <li>• Tenant picks its development team; Town has no approval rights (§3.5)</li> <li>• Tenant owns its improvements</li> </ul>	<p>AG or a court may view the Town’s right to terminate if the Tenant’s Work is not timely performed as a problem.</p> <p>To the extent the town retains the right to comment on the proposed C/Ds, the Lease follows the wording of the SJC case <u>GM Builders</u>. (§3.3)</p>

ISSUE	CITATION	SOLUTION	COMMENTS
		(§3.6)  • Town has no approval rights over Tenant's management company (§8.6)	
Funding of the construction should not be public; although State and federal assistance does not necessarily subject the developer to the bidding laws.  Conversely, see AG Bid Protest Decision (8/13/04) ("Expenditure of public funds is not a prerequisite for these [bidding] statutes to apply").	DHCD p.2	1. There are no Town funds referenced in the Lease to fund construction.  2. There is no rent set-off referenced in the Lease for construction.  3. Leasehold mortgages are anticipated, which presumably will fund the construction (§ 13.2)	Query: Are any CPA funds to be used to support the project?  Note: DHCD says use of CPA funds "will not cause the bidding laws to be applicable."
Town may charge a reasonable rent for the affordable housing use.	AG (2/17/05) p. 3; DHCD p. 3	No change necessary.	The RFP has presumably determined the rent in accordance with c. 30B.
Decision whether bid laws apply "should be guided by the legislative purposes of the competitive bidding statutes:"  • Obtain [lowest] price among responsible contractors.  • Establish open and	AG Bid Protest Decision (8/13/04), pp.8-9		The Town selected the Tenant based on a competitive RFP process, which has many of the same purposes as the bid laws.  Except possibly for CPA funds, the Town will presumably pay nothing for the Tenant's

ISSUE	CITATION	SOLUTION	COMMENTS
<p>honest procedure.</p> <ul style="list-style-type: none"> <li>• Reduce opportunity for corruption, favoritism, political influence.</li> </ul>			<p>construction.</p> <p>The RFP was an open and honest procedure. (Counter-point: post hoc changes to the Lease may vitiate this point a bit.)</p> <p>Selected Tenant emerged from public RFP process, not from political influence.</p>
<p>Who bears the responsibility and liability for construction mishaps during the likely period of construction may bear on whether bid laws apply.</p>	<p>See AG Bid Protest Decision (8/13/04) p.11</p>	<p>No change necessary.</p>	<p>Town's Lease puts burden on Tenant to provide insurance naming the Town and to defend and indemnify the Town (Article 7).</p>

**RISKS OF PROCEEDING WITH RESTRUCTURED LEASE**

Because the SJC has not provided any definitive guidance on the question presented, in the event the Town proceeds simply with a restructured form of Lease, lingering litigation risks will continue to confront the Town and the Tenant:

- (1) A disappointed proposer in the RFP process could challenge the RFP award based on the restructured lease, claiming that it would have bid more if it had known of the modified lease terms now being considered. Since proposed changes are consistent with the original intent of the RFP, since the Town's special legislation, St. 2002, c. 487, § 2, allows the Selectmen to negotiate changes in any proposal, and since the RFP anticipated "a few reasonable changes" to the Lease (if requested by the developer), this particular risk is mitigated to some extent.

- (2) A challenge claiming that construction bid laws are implicated could still be initiated in a variety of ways including for example:
- (a) A union's bid protest brought to the AG's office (see Pittsfield v New England Council of Carpenters, AG B&LPB, Bid Protest Decision (8/13/04) (remanding to the city for further action consistent with the AG's decision the "close case" of whether a license to improve and operate a baseball park violated bid laws));
  - (b) An Inspector General and/or Commissioner of the Department of Labor and Industries Notice or Decision (see Plymouth v Commissioner of DOLI, Plymouth Superior Court, Memorandum of Decision, 1/4/93 (Town RFP ground lease for construction, operation and management of new parking garage is subject to public bidding and design selection requirements of G.L. c. 149, §§ 44A-44J and G.L. c. 7, § 38K));
  - (c) A petition by ten or more taxpayers to Superior Court under G.L. c. 29, § 63, to enjoin the expenditure of public funds on the project (See Helmes v Commonwealth, 406, Mass. 873 (1990) (reconstruction of a former US battleship, now owned by a charitable corporation, with the assistance of public funds, was not subject to statutory competitive bid requirements and did not violate the anti-aid amendment to the Mass. Constitution).

There can be no guaranty that any of these claims will go unasserted or that the result would necessarily be favorable to the Town. Accordingly, this risk may be of concern to the Town, the Tenant, or the Tenant's construction lender(s).

### **CONCLUSION**

The Town's RFP and proposed form of Lease inadvertently raise concerns over the applicability of public bid laws to the Towne School project. At a minimum, the proposed form of Lease must be restructured to correct the provisions of concern. If the Town wants to adopt the most conservative approach, re-bidding based on a modified RFP and proposed form of Lease is appropriate.

12/12/05-(7)

MEMORANDUM

December 8, 2005

TO: Board of Selectmen

FROM: Peter k. Ashton

SUBJ: Update on Towne School Building

cc: Don Johnson

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At our meeting Monday evening we will be discussing the status of the Towne Building and the affordable housing reuse possibility, and therefore this memorandum, gives the Board (including our new members who may not be familiar with this long saga) some background and history on where we've been and where we are today. Much of this memorandum is drawn from an earlier memo written by Nancy Tavernier. I have simply updated it for the last year and a half.

Municipal involvement with the Towne School Building began at the April 2001 Town Meeting when voters defeated a resolution put forth by the School Committee to demolish the Towne School as part of the construction for the new elementary school and use the land for educational purposes, presumably play space. After the resolution was defeated, the voters transferred the Towne School from the School Committee to the Town of Acton and provided \$90,000 to maintain the building until such time as a viable reuse could be determined. In May 2001, the Town was informed by the School Administration that the schools wanted to reserve their option to reuse the building after some period of time and did not want to see the building and land sold by the Town.

In May 2001, the ACHC was contacted by the Town Manager to determine whether an affordable housing option would be viable. ACHC contacted Mass. Housing Partnership seeking advice and was informed as early as June 2001 that this housing option could indeed be viable and was being done in other communities in the state. MHP offered the use of their technical services program. Discussions began with MHP which included meetings with ACHC, town staff and members of the BOS.

In June 2001, the School Committee commissioned a feasibility study for the Towne School property to determine what potential uses could be accommodated in the limited amount of space and land area within current zoning restrictions. A report was prepared and presented to the School Committee showing limitations to any reuse other than educational, primarily due to parking requirements. This report became the basis of a comprehensive review of all potential options for the property with a committee chaired by myself. Representatives from all the pertinent town boards were included on the committee.

After 6 months of exploring ideas and options, the Committee concluded that the affordable housing option was the only feasible option in light of the stipulation that no local tax dollars should be used to redevelop the property. In January 2002, the Selectmen voted unanimously to recommend the affordable housing reuse for the property. Within a week of that decision, a citizens' petition was circulated for signatures calling for a Special Town Meeting to vote to demolish the Towne Building. The petition was filed and the Town Meeting was called to take place within the Annual Town Meeting in April 2002.

The development of a conceptual plan for the building had to be accelerated in order to present a cogent argument to the Town Meeting on the viability of the reuse. MHP agreed to fund the feasibility study and contracted with a consultant who was put on a fast track while he set aside his other jobs to concentrate on this study. Ed Marchant prepared the report and an architect prepared a conceptual design concluding that 18-20 units were feasible for the rental housing development.

At the Town Meeting on April 2, 2002, the petitioner presented her arguments in favor of demolition, I presented the BOS arguments against, and then Nancy Tavernier presented the affordable housing option urging voters to give the option a chance. The FinCom argued against the affordable housing option and for the demolition. After a couple of hours of excellent debate, the vote was taken. The petition to demolish the Towne Building was defeated by a vote of 342 YES to 467 NO. The vote required a two-thirds majority.

The next hurdle related to the land area surrounding the Towne Building which had to be delineated and agreed upon by the School Committee and the Board of Selectmen. Negotiations on this began in June 2002 and immediately hit a wall with 3 of the School Committee members opposed to giving anything but a bare minimum of land area surrounding the building. The entire summer was spent in negotiations and when the final vote (3-2) was taken in September 2002 the School Committee finally accepted the assignment of land large enough to hold most of the required vehicle parking for the 18-20 units and signed off on the proposed site plan. However, the trade-off was that in addition to the limited parking area, the development could have access only from Mass. Ave. and they could not use the parking areas of the schools

The draft RFP and long term lease, prepared by ACHC member Bob Whittlesey, was submitted to the Town Manager in September 2002 and referred on to Town Counsel. Immediately another obstacle was encountered. It was known that the Board of Selectmen needed Town Meeting authorization for any lease period greater than 10 years, the Towne Building lease terms were proposed to be for 50 years. The Selectmen were urged by ACHC to place a warrant article on the October Special Town Meeting to seek voter support for a 50 year lease.

However, in the process of reviewing the proposed warrant article Town Counsel ruled that the vote to authorize a long term lease had to be made via a Home Rule petition

through the Legislature and that Town Meeting should approve it with a two-thirds vote. The Selectmen presented the Home Rule Petition to the October 14, 2002 Special Town Meeting called for the purpose of approving the new Public Safety Facility. The petition was approved with a vote of 165 in favor and 3 against. The Petition then was sent to the Legislature and the petition was approved by the end of the session and signed into law January, 2003.

In February 2003, the ACHC was finally given specific feedback on the lease and RFP from Town Counsel, made the necessary revisions to the documents, and returned them to the Town Manager for final review, unfortunately getting mired in pre and post Town Meeting delays. In June 2003 notice was sent to the Central Register in anticipation of the RFP being put out to bid which occurred in July for an early August response deadline. Two developers submitted proposals for the reuse of the Towne Building as 18-20 rental, mixed-income units, both developers were experienced non-profit organizations in the business of creating affordable housing. They were Homeowners Rehab, Inc. and Women's Institute for Housing and Economic Development.

A selection committee was formed, the developers were interviewed in early September 2003, and the committee recommended Homeowners Rehab, Inc. (HRI) of Cambridge to be the developer of the Towne Building. The Board of Selectmen voted to approve the selection of HRI who was notified by the Town Manager that they had been awarded the project. No sooner had this decision been made when a red flag went up and the most difficult of all hurdles was placed in the path of the redevelopment of the Towne Building. This time it was not a local hurdle but a state one. During the summer of 2003, the town of Barnstable was putting together an RFP to develop town owned land for affordable housing using a private developer. The development would utilize a long term lease similar to Acton's. Barnstable has an excellent reputation for initiating creative affordable housing solutions. Their Town Manager decided to proactively run the idea past the Attorney General's office just to be sure there would be no statutory problems with what the town was proposing. He sent the AG a letter in July, requesting an answer by early August.

The answer did not come until October 2003, and it was a very strong caution to the town of Barnstable warning that the project may indeed be considered public construction, even though it was using a private developer, due to the fact that the Town still retained ownership of the land. MHP was also copied on the letter and realizing this affected many of their municipal clients, they sent the letter out to all of them, including Acton, suggesting that each community get a ruling and guidance from their own Town Counsel. The Town Manager immediately transmitted this AG letter to Palmer and Dodge along with the proposed long term lease, seeking an opinion. I think it is fair to say that Tom Schnorr of Palmer and Dodge was quite concerned about the message from the AG's office and he applied the brakes to the Towne Building proposal and everything came to a screeching halt in October 2003.

The problem with such developments being defined as public construction projects is that they then must adhere to all the public bid requirements, must pay prevailing wages, and must use a sub-bid system for every aspect of the construction. This is not something a non-profit developer does nor do we think they would be willing to, since it could increase the total project cost dramatically. The financing of these developments is very tight, leaving no room for such increased costs. What triggered this conundrum is the 50 year lease which allows ongoing Town ownership of the property. Seeking further review, there were a series of discussions between the Town and MHP, the Town and Palmer & Dodge, the Town and other towns, and between ACHC and an assortment of housing advocates during the winter and spring of 2003-2004.

In May 2004, Nancy wrote the Board suggesting that some action needed to be taken since the project was in limbo. It was decided first to go back to the School Committee and sound them out as to their willingness to change their view with regard to their request not to sell the land. Although no vote was taken, the sense of the School Committee was that there was little support for changing their position on the sale of the land. A formal meeting was then held on May 24, 2004 at Palmer & Dodge with the Town Manager, myself, Bob Whittlesey, representatives from Mass Housing Partnership, DHCD, and legal counsel. The purpose of the meeting was to explore possible strategies for moving the project forward or declaring it dead. During this period of time (and continuing to the present) HRI remained very interested, provided some action could be taken to mitigate the risk associated with the AG's letter regarding the Barnstable project. MHP made it clear that they believed that the AG was wrong in its Barnstable letter and that they, along with DHCD, were working to try to rectify the situation.

During the summer of 2004, Bob Whittlesey, through his contacts, confirmed that MHP and DHCD were working on trying to solve this problem as numerous other similar projects were also potentially at risk. The Board agreed to wait to see if any further progress could be made, particularly given that at this point we had spent less than half of the \$90,000 appropriated for maintenance of the building.

In October 2004, we were informed that DHCD was drafting a set of guidelines relating to the state bid laws and the leasing of municipally owned land as it related to affordable housing. Finally on November 30, 2004, DHCD released its guidelines indicating its views on how one could lease land and/or a building to a private developer for affordable housing without triggering the public bid laws. At the same time, DHCD requested that the AG comment on the guidelines. The AG responded on February 17, 2005 generally confirming that the guidelines "would not give a municipality the type of control over construction" that prior cases had held would trigger the public bid laws.

With this new guidance and views from DHCD and particularly the AG, it appeared that the project could go forward, although some minor modifications would be required to the lease. At this point, the ACHC requested that Steve Anderson be assigned the legal review task taking Palmer and Dodge out of the picture. Counsel subsequently restructured the lease so that it would conform to the guidance provided by the AG and DHCD (which were not in effect back in 2003 when the lease and RFP had been written).

Over the summer, we have negotiated with HRI over changes in certain provisions of the lease, and to try to mitigate or eliminate any concerns that they might have about going forward. Since this issue has not been litigated, there is still some risk that a challenge claiming that the construction bids laws would be implicated if HRI went forward continues to cause HRI some concern and as of now, they have expressed an unwillingness to sign the lease without some sharing of the risk with the Town.

At this point, I believe we have done all that we can to mitigate HRI's risk which frankly I believe to be very small. Several similar projects (affordable housing constructed by private developers on municipal-leased property) are underway and some have even been completed – perhaps the most noteworthy is a Westford low income rental housing project built by a private developer on Westford Housing Authority land conveyed to them by the Town as well as a similar project underway in Bedford. We cannot, however, allow this to drag on any further. Based on discussions with Town Counsel, the Town Manager, and representatives from the ACHC (Nancy and Bob), I would recommend to the Board the following course of action:

1. Authorize the Manager to go back to HRI and tell them either to accept the lease or we will allow them to withdraw without prejudice and reject their bid immediately;
2. Assuming, as I expect they will, that HRI does not agree to go forward, then I would recommend that we immediately put out a new RFP and lease that contains the appropriate language regarding the DHCD and AG guidelines.

I favor this course of action because at this point the lease is rewritten and the revisions in the RFP will take little effort. Putting out a new RFP will place everyone on a level playing field with good information about the issues regarding the public bid laws so that bidders can take this into full consideration in deciding whether to bid and whether the project is economic given the risks. This can be done quickly so that responses will be obtained before April so that by Town Meeting we will know if this is a viable reuse under the new circumstances as enunciated by the AG and DHCD. Bob seems to think that there are other possible interested bidders, HRI would not be precluded from bidding again, and I am aware of one who might be interested. If not, then we will be in a position to take action at Town Meeting such as to ask to return the building to the schools, to examine other reuse alternatives (and see if the town is willing to spend any money in such an endeavor), or (not my choice) ask permission to demolish the building.

I know this has been an extremely long saga. My involvement dates back to April 2001, and I would like nothing better than to say it is over and the affordable housing option does not work. However, I think we are the victims of bad timing in the sense that we issued the RFP and received bids just before the Barnstable letter, and since that time the issue has been greatly clarified which now makes this a potentially viable project again. However, since the RFP and lease were written prior to all of this history, it really

makes most sense to try again – affordable housing projects are now being built under these guidelines, and re-issuing the RFP and lease that explicitly consider these guidelines is the best way to determine whether a developer would be interested in the project. Further there do not seem to be any other viable options that meet the various constraints that have been placed on this property.

**THE RULES GOVERNING DISPOSITION OF REAL PROPERTY BY MUNICIPAL ENTITIES ARE COMPLEX AND SUBJECT TO CHANGE. MHP HAS MADE EVERY REASONABLE EFFORT TO ENSURE THAT THE INFORMATION CONTAINED IN THE GUIDELINES AND THE MODEL REQUEST FOR PROPOSALS IS CORRECT AS OF THE DATE OF THIS PUBLICATION. HOWEVER, AS IN ALL COMPLEX MATTERS OF THIS SORT, SPECIFIC LEGAL ADVICE SHOULD BE SOUGHT BEFORE USING THE MODEL REQUEST FOR PROPOSALS FOR A PARTICULAR PROPERTY DISPOSITION.**

## **MHP GUIDELINES FOR PREPARING A REQUEST FOR PROPOSALS (RFP) FOR PUBLIC LAND DISPOSITION**

The Massachusetts Housing Partnership (MHP) has developed these guidelines to assist cities and towns, housing authorities and other public entities in preparing RFPs for the disposition of property for use as affordable housing.

An RFP provides a formal process for soliciting information from prospective developers/owners to allow manageable and meaningful comparisons of all offers. In a property disposition, an RFP details the property to be disposed of and describes any reuse requirements. The following outlines the major components of an RFP, including provisions required by M.G.L. Chapter 30B. It is important to have an attorney review the final RFP for compliance with all applicable regulations, including Chapter 30B.

The Inspector General's Office produces a very thorough manual for 30B procurement, "Municipal, County, District, and Local Authority Procurement of Supplies, Services, and Real Property". Chapter 8 Real Property Transaction gives detailed information about using the RFP process for property disposition  
<http://www.mass.gov/ig/publ/30bmanl.pdf>.

Appendix A of these guidelines provides important contact information for relevant state agencies. *[Please note that only Chapter 30B requirements are covered in these guidelines; Massachusetts Department of Housing and Community Development (DHCD) or federal requirements are not covered.]*

### **PARTS OF THE REQUEST FOR PROPOSALS**

#### ***I. Invitation to Bid***

The invitation to bid introduces the RFP and provides a brief overview of key information. Ideally, this information will be conveyed in a way that sparks interest from prospective developer/owners. Specifically, the invitation to bid should provide the following:

Outline of offering:

1. Name the entity issuing the RFP.
2. Identify and briefly describe the property concerned.
3. Describe the disposition method (i.e., ground lease or sale), and identify key terms of the disposition.

4. Highlight the goals for the disposition.

- Summarize submission requirements, including number of copies needed; date, time, and place for submission; and how the proposal should be marked. Typically there is a 6 – 8 week response period from the time of issuance of the RFP. The response time should be gauged according to the level of information you are seeking.
- State that responses must be complete and signed and that late submissions will not be accepted. Reserve the right to reject any or all proposals or to cancel the RFP, if it is in the best interests of the issuing entity.
- Make a disclaimer against any information provided in the RFP. Note that the disposition is subject to the Uniform Procurement Act, M.G.L. Chapter 30B.
- Identify the contact person for inquiries and questions. Include name, phone and fax numbers, and e-mail address, if available. Request that all inquiries be made in writing no later than a given date. Indicate that if questions arise at any time prior to the due date for the proposals all answers will be in writing and the questions and answers will be shared with everyone who has requested a copy of the RFP.

## ***II. Pre-bid Site Tour and Briefing***

It is strongly recommended that you conduct an on-site briefing session or property walkthrough. If one is planned, designate a time, place, and contact person for more information about this session. The site tour should be scheduled relatively soon after the issuance of the RFP to allow prospective developers/owners time to view the site before finalizing their submission. Often, bidders are required to register 24 hours in advance if they plan to attend a briefing to prevent holding a briefing with no participants. It is recommended that there be at least one week between the time of notification and the date of the tour, so potential bidders have a chance to schedule the tour.

## ***III. Property Description and Housing Need***

Provide as much information on the subject property as possible; thorough and detailed information ensures higher-quality proposals. Detailed information about the property might come from the tax collector, the assessor, the municipal planning department, the city or town clerk, the conservation commission, the municipal building/engineering department, the regional planning agency, and local realtors.

If studies have been undertaken for this site (e.g., water and sewer, access, soil conditions, contamination, conceptual site plan), results should be included with the RFP. These studies provide valuable information for prospective developer/owners. In the case of very long reports, copies can be made available at a specific office rather than including them in the body of the RFP.

The property description should provide as much of the following information as is available:

- Location and site information: Provide street address, map and parcel reference if available, deed description or survey if available (or if a survey has not been done, describe location with enough specificity to identify the property) A copy of an assessor's map is helpful. Attach any available studies or blueprints as appendices, or identify where they can be found and make them generally available.
- Buildings and improvements (if applicable): Description of any buildings and structures, including size, age, construction type, condition, occupancy, use history, etc.
- Site plans: Drawings, plot plans (if available).
- Zoning: Zoning maps and references to applicable sections of the zoning regulations. State if there is an expected zoning path (e.g. special permit; Ch.40B comprehensive permit).
- Deed restrictions, easements, or covenants: Identify any existing restrictions and/or any restrictions that will be imposed on the property by the municipal entity, such as affordability covenants or utility easements.
- Regulatory constraints: Identify all regulatory constraints, such as historic district restrictions, watershed protection areas, etc..
- Utilities and infrastructure: Identify what utilities are available at the site or within a reasonable distance, including water, sewer, gas, and electric.
- Bidder's responsibility for due diligence: State that bidders are responsible for their own review and analysis related to all aspects of the project.

A description of the community's housing needs and the most recent Census information containing relevant data should be included. If you have any information available either from the Census or from studies or anecdotal sources concerning the need for the type of housing that you are proposing it should be included here. Sources for anecdotal information could include your local planning department or local realtors.

#### **IV. Objectives and Guidelines**

In this section of the RFP you should state the project's goals and guidelines under the following recommended headings:

1. Programmatic Objectives: include target population, type of housing (e.g. rental or homeownership) and level(s) of affordability.
2. Design Guidelines: be as specific as possible about aspects of the project design that are important to the municipal entity. This might include: the type

of construction, preferred unit configuration, site and building design, and desired amenities.

3. Role After Disposition: state what, if any, role the municipal entity expects to play after transfer of the property.
4. Price and Financial Guidelines: if price is a factor in the decision this should be stated here.
5. Lease Terms: (if disposing of property through a long term lease) outline the required lease provisions (attach a sample lease if available). See Appendix B: Suggested Lease Provisions. This includes but is not limited to the following:
  - a. Lease term
  - b. Affordability
  - c. Payment terms
  - d. Lease termination
  - e. Tax compliance
  - f. Lease amendments
  - g. Assignment of the lease
6. Implementation Guidelines: Detail what the process will be once the winning bidder has been selected. This should include the timeframe for execution of a developer agreement (if applicable) and other requirements and documentation that will be needed prior to the signing of the lease or purchase and Sales agreement.
7. Other Resources : If you can provide additional assistance to the successful bidder beyond the land, list it in this section. Examples of such resources include assistance with project permitting, local funding through the Community Preservation Act, and providing Section 8 project-based rental assistance.

## **VI. Criteria for Evaluating Prospective Developer/Owners**

The fundamental purpose of the RFP process is to establish a fair and objective method for selecting a developer/owner for the property. It is strongly recommended that this evaluation occur in two or three stages. Establish a set of minimum criteria that all proposals must meet. Any proposal that fails to meet these criteria should be rejected. Second, if applicable, you need to evaluate whether the proposal meets the minimum price criteria set forth in the RFP. Third, proposals must meet a set of comparative criteria that provide a relative measure of the strengths of each proposal.

It is important that submission requirements match all of the items outlined in these evaluation criteria. Both the submission requirements and the selection criteria should be as detailed as possible to ensure that 1) you get a complete picture of the bidder, the development team, and the proposed development, and 2) the bidders understand what is required of them and how this information will be evaluated.

Setting the Evaluation Criteria for reviewing proposals is multi-step process:

## ***Step One: Develop Minimum Threshold Criteria***

List criteria that establish the basic eligibility of the proposal for further review. Ideally, these should be “yes-or-no” standards that you will apply to every proposal. Any bidder with a “no” should be eliminated from further consideration.<sup>1</sup>

Some examples of minimum threshold criteria are:

- a. **Conformance with Submission Requirements:** Did the bidder include all of the required items outlined in the submission requirements? If not, you may need to reject the application.
- b. **Development Experience:** This is one of the most important criteria to consider. Development is often a complex and risky undertaking. Your criteria should specify the minimum level of experience necessary to carry out the requirements of the RFP. This might be expressed in years or types of experience (e.g., five years of affordable housing development, or successful completion of two affordable elderly-housing developments of at least 20 units each).

In defining relevant experience, it is important to consider the characteristics of the proposed project. For example, a developer/owner might need experience developing special-needs or service-enriched housing or using a specific type of funding (e.g., HUD 202 funding or Low Income Housing Tax Credits). Similarly, a project that will require a comprehensive permit would benefit from a developer/owner with that Ch. 40B permitted projects. A homeownership project benefits from a developer with experience in building and marketing ownership units.

- c. **Current taxes:** Request certification of current payment of all state and local taxes (or an acceptable explanation of why tax payments are not current).
- d. **Bidder Availability:** Are there any time constraints on the project? If so, you should request start-date commitment and a proposed staffing plan, including a description of existing time commitments for each member of the development team.
- e. **Affordability:** Specify the minimum affordability criteria required by both number (or percentage) of units and level of affordability (generally stated in relation to median income as defined by HUD). It may be helpful to test these goals with a feasibility analysis that evaluates the income necessary to support project costs. Unrealistic goals will discourage good developer/owners from submitting proposals.
- f. **Bidder financial resources:** The more complex and expensive a project, the more important the developer/owner’s financial capacity becomes. A bidder must

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<sup>1</sup> IG procurement manual p 42.

demonstrate strong financial capacity including sufficient net worth and access to financing. The ability to secure predevelopment funding or be able to carry the project through the predevelopment stage until construction financing is available is very important. In addition, you need to evaluate whether the developer/owner has sufficient resources to meet any required equity contribution.

### ***Step Two: Develop Price Criteria***

If price is a consideration, evaluate which bidder has made the best offer for the property. If price is not a consideration skip to step three.

#### *Examples of Price Criteria*

- **Terms of Purchase or Lease:** It is important to specify price or lease-payment terms for comparison purposes.
- **Price Requirements:** In most cases, maximizing the public purpose will be more important than securing the highest price for the property. (In some cases payment might not even be expected from the bidder).

### ***Step Three: Comparative Evaluation Criteria***

Consider giving additional weight to proposals that exceed the minimum criteria. Use comparative criteria to look at the relative merits of the proposals, rather than just selecting the responsive and responsible proposal that offers the best price. The Inspector General recommends that the measurement of comparative criteria not be a point-based system, which can be “deceptive, creating the illusion that qualitative judgments can be compared with mathematical accuracy.”<sup>2</sup> The examples below employ the measurement of “highly advantageous,” “advantageous,” and “not acceptable” that is required for service and supply RFPs under Chapter 30B. However, any system that can be clearly defined and applied to all proposals is acceptable.

#### Examples of Comparative Criteria

The following are some examples of criteria that you might use to judge the competitiveness of a bidder’s proposal if public purpose is the objective. We recommend that you give weight to these criteria according to the relative level of importance to the issuer of the RFP.

- A. Affordability:** Determine whether it is more important to serve people with lower incomes (deeper affordability targets) or to serve more people at the prescribed “affordable” level (more affordable units). Examples of measures are:

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<sup>2</sup> IG procurement manual 43

Highly advantageous: 80 percent or more of the units are affordable to families earning less than \_\_\_ percent of median income

Advantageous: More than 50 percent but less than 80 percent of the units are affordable to families earning less than \_\_\_ percent of median income

Not acceptable: Fewer than 25 percent of the units are affordable to families earning less than \_\_\_ percent of median income

- B. Development Experience:** A development team's track record with comparable projects is one of the best measures of its ability to complete the project as proposed. Funders and lenders consider this key when awarding competitive funding and making loans. The amount and type of experience a developer/owner needs varies with the complexity of the project. Experience can be measured by number of years, number of projects completed, and role in the development process. Examples of measures are:

Highly advantageous: Majority of development team has more than five years' experience in affordable housing development; combined team has had a significant role in at least 10 affordable housing developments.

Advantageous: Less than half the development team has more than five years' experience in affordable housing development; combined team has had a significant role in at least five affordable housing developments.

Not Acceptable: Only one or two members of the development team have any experience in affordable housing development; combined team had only minimal role in affordable housing developments.

- C. Developer/Owner's Financial Capacity:** Typically, RFPs call for submission of three years' worth of audited financial statements (corporations) or personal financial statements (individuals), lender references, a description of other real estate owned—including information about any history of delinquency, default, litigation, or outstanding liens or judgments on property listed—and a credit release.

Highly Advantageous: Developer has a "clean" credit history, including no bankruptcy within the past seven years and no pending litigation. Developer has the financial resources to see the project through to completion.

Advantageous: Developer has an acceptable credit history, including no bankruptcy within the past seven years, and no pending litigation that would impact his/her ability to complete this project. Developer has the financial resources to see the project through to completion.

Not acceptable: Developer does not have an acceptable credit history and does not have the financial resources to see the project through to completion.

**D. Feasibility of Development Plan:** The ability of the development team to understand the complexities of affordable housing development and the challenges posed by your particular site is key to the success of the project. At the heart of the competitive criteria is an evaluation of whether the project, as proposed, is feasible.

Examples of measures are:

Highly advantageous: Clear and comprehensive development plan, including reasonable development and operating budgets and a thorough understanding of physical constraints as well as regulatory issues.

Advantageous: Clear plan with generally acceptable development and operating budgets, some understanding of physical constraints as well as regulatory issues.

Not acceptable: Unclear plan with no understanding of development and operating budgets and/or physical constraints and regulatory issues.

**E. Ability to Secure Financing:** The ability to secure financing can be demonstrated either by a strong track record with similar developments or by documented financing commitments for the proposed project. Examples of measures are:

Highly Advantageous: Strong letters of interest from both construction and permanent lenders.

Advantageous: At least one letter of interest in providing either construction or permanent financing.

Not Acceptable: No letters of interest in providing either construction or permanent financing.

**F. Proposed Design:** At the RFP stage, designs are generally at the very preliminary schematic stage, reflecting approach rather than detail. Still, there are questions you can consider when reviewing proposals such as whether the site and unit designs appropriate for the parcel and the target population? Examples of measures are:

Highly Advantageous: Design conforms to guidelines set forth in the RFP, and is appropriate for the parcel and the target population.

Advantageous: Design conforms to a majority of the guidelines set forth in the RFP and is appropriate for the parcel and the target population.

Not Acceptable: Design does not conform to the guidelines set forth in the RFP and is not appropriate for the parcel and the target population.

## **VI. Submission Requirements**

It is recommended that the RFP include standard forms to ensure consistency in the bidders' submissions. You might want to consider the use of standard forms that are included in the One-Stop application [www.onestopapp.com](http://www.onestopapp.com). The introduction should restate the date and time where sealed proposals must be delivered and describe how proposal packages should be marked. You should also describe how bidders might correct, modify, or withdraw proposals. We recommend that you require the information as noted on the facing page (list of submission requirements from the model RFP that follows these guidelines):

- Items 1-2: Background information on the proposal.
- Items 2-11: Detailed project information which will allow assessment of feasibility.
- Items 12-18: Information on the development team which will allow you to understand the developer's experience and qualifications to undertake this project. Financial information from private individuals must be treated as private, confidential information with access limited to essential individuals in accordance with the Fair Information Practices Act ("FIPA"), M.G.L. c. 66A. You may want to designate a sub-group of the evaluation team to review and analyze all financial information included in proposals. This sub-group should include a least one person with strong financial background and the ability to analyze financial statements. The entire sub-group should be trained in standards of confidentiality, security, and requirements of FIPA.
- Items 19-20: Certifications that are required as per M.G.L. Chapter 30 B.

### ***VII. Selection Process***

Describe the process that will follow the disposition of the property. Include how and when the proposals will be reviewed.

- State that all packages submitted by the deadline will be opened in public and logged in. Identify the party responsible for reviewing the submissions, and state that all information contained in the proposals is public.
- State how and when the winning bidder will be notified. Give a description of the process for conveying the property.

### ***VIII. Contract Terms and Conditions***

Outline any terms or conditions that will be incorporated into the purchase and sale or disposition agreement. Consult with your attorney regarding any local laws relating to real property transactions.

- List all terms and conditions that will be required in the agreement (e.g., reuse restrictions; certification of tax compliance).
- Explain that all contract amendments must be in writing and approved and signed by an authorized official.
- If the property is being offered for lease, spell out mandatory lease terms. If you have a draft lease include it as an Appendix to the RFP.

THE RULES GOVERNING DISPOSITION OF REAL PROPERTY BY MUNICIPAL ENTITIES ARE COMPLEX AND SUBJECT TO CHANGE. MHP HAS MADE EVERY REASONABLE EFFORT TO ENSURE THAT THE INFORMATION CONTAINED IN THE GUIDELINES AND THE MODEL REQUEST FOR PROPOSALS IS CORRECT AS OF THE DATE OF THIS PUBLICATION. HOWEVER, AS IN ALL COMPLEX MATTERS OF THIS SORT, SPECIFIC LEGAL ADVICE SHOULD BE SOUGHT BEFORE USING THE MODEL REQUEST FOR PROPOSALS FOR A PARTICULAR PROPERTY DISPOSITION.

## SAMPLE REQUEST FOR PROPOSALS

\_\_\_\_\_ Name of municipal entity  
name

### 1. Invitation to Bid

The \_\_\_\_\_ is seeking proposals for the long-term  
name

lease/purchase of \_\_\_\_\_ (description of property, for example, 3 acres of  
property description

vacant land at 123 Great Road, Town, MA.). The \_\_\_\_\_  
name

intends to convey the property for \_\_\_\_\_ (for example: the development of 20–30  
intended use  
units of rental family housing).

The purpose of this RFP is to select a developer/owner who will \_\_\_\_\_ (for  
example:  
maximize the number of units affordable to households at or below 80 percent of  
median income; include number of affordable units and income level targets; bedroom  
mix, site amenities, etc). The \_\_\_\_\_ (municipal entity) seeks proposals designed  
to reflect the architecture and scale of the local area. A history of strong property  
management is a high priority for the selected developer/owner.

Applicants should submit an original and \_\_\_ copies on or before \_\_\_ p.m. on \_\_\_\_\_  
to: time date

Name of municipal entity  
Attention: Name of contact person  
Address of municipal entity

Bids will be opened and recorded at this time. No proposals submitted after this time will be accepted.

Proposals should be labeled \_\_\_\_\_ (use project name). Responses to the Request for Proposals must include all required documents, completed and signed per

the instructions and attached forms included in this bid package. The \_\_\_\_\_ reserves the right to reject any or all proposals or to cancel this Request for Proposals, if it is in the authority's best interest.

The \_\_\_\_\_ (use municipal name) makes no representations or warranties, express or implied, as to the accuracy and/or completeness of the information provided in this RFP. This RFP (including all attachments and supplements) is made subject to errors; omissions; prior sale, lease or financing; withdrawal without prior notice; and changes to, additions to, and different interpretations of laws and regulations.

The \_\_\_\_\_ (use municipal name) has determined that the award of this contract is subject to the Uniform Procurement Act. M.G.L. Chapter 30B. Therefore, the provisions of M.G.L. Chapter 30B are incorporated here by reference.

All inquiries should be in writing and directed, no later than \_\_\_\_\_, to:

Name of municipal entity  
Attention: Name of contact person  
Address  
Phone and fax numbers  
e-mail address

## **2. Site Tour and Briefing**

Interested developers are encouraged to attend an on-site briefing session on

\_\_\_\_\_ at \_\_\_\_\_. Registration to attend the briefing is required no later  
date time

than the close of business on \_\_\_\_\_. To register, or for additional  
date and time

information, contact \_\_\_\_\_.  
contact person, phone, and e-mail address

## **3. Property Description**

Location and site information: This RFP involves the sale/lease of the listed parcel(s) of \_\_\_\_\_ municipally-owned (vacant) land, located at \_\_\_\_\_. The site is approximately \_\_\_\_\_ square feet/\_\_\_\_\_ acres. (For the current owner's title, see the deed recorded with the \_\_\_\_\_ County Registry of Deeds, book\_\_\_\_\_, pages \_\_\_\_ – \_\_\_\_). A copy of the assessor's map/survey/deed/plot plan and property description is attached.

Buildings and improvements: There are \_\_\_\_\_ buildings or improvements on the site. (Briefly describe the age, construction type, condition, and occupancy history. Attach or identify any studies of buildings.)

Site plans: (if available) Conceptual site plan is attached.

Zoning: The property is currently zoned \_\_\_\_\_, which allows \_\_\_\_\_ uses by right. *(It is assumed that the selected developer/owner will/will not require a zoning change or Comprehensive Permit pursuant to M.G.L. c. 40B.)*

Deed restrictions, easements, or covenants: Describe the proposed deed restrictions. *(For example: The sale will be conditioned by deed restrictions requiring certain level of affordability to be maintained over \_\_\_period of years.*

Regulatory constraints: Identify any regulatory constraints *(For example: the site falls within the Watershed Protection District, requiring ... summarize restrictions)*

Utilities and infrastructure: Public utilities available at the site include \_\_\_\_\_. *(Also mention distance to utilities not available at the site and any plans to make them available. Provide any information available about septic capacity (if applicable), etc.)*

Bidder's responsibility for due diligence: Prospective developer/owner should undertake an independent review and analysis concerning physical conditions, environmental conditions, applicable zoning, required permits and approvals, and other development and legal considerations.

#### **4. Objectives and Guidelines**

The guidelines included in this section have been developed by the \_\_\_\_\_ (use municipal name) and must be addressed and met in the proposal for this property.

1. Program and use guidelines: The proposed project should offer, but should not be limited to \_\_\_\_\_ *(For example: maximum level of affordability, family housing, elderly housing, various services, etc.)*.
2. Design guidelines: The proposed project should include \_\_\_\_\_. *(For example: preferred bedroom configuration, common space needs/preferences, laundry facilities and other amenities, site design preferences)*.
3. Role of municipal entity. The (use municipal name) \_\_\_\_\_ intends to \_\_\_\_\_ )
4. Price guidelines: The minimum price that will be accepted by the \_\_\_\_\_ (use municipal name) is \$ \_\_\_\_\_ *(Provide a figure, if price is a factor in selection)*.
5. Lease terms (if applicable): the mandatory lease terms include the following:
  - Term of lease
  - Affordability
  - Role of municipal entity
  - Payment terms
  - Lease termination

- Tax compliance
- Lease amendments
- Assignment of lease

6. Implementation guidelines:

- The proposed development should be completed in a reasonable timeframe.
- The \_\_\_\_\_ (use name of municipal entity) will transfer the property when the developer has secured all necessary financing and permits.
- The developer will be required to execute applicable documents (for example: developer's agreement; purchase and sale agreement, lease)

7. Other resources:

- The \_\_\_\_\_ (use municipal name) is available to assist with project permitting.
- The \_\_\_\_\_ (use municipal name) will make \_\_\_\_\_ (give number) project-based Section 8 Rental Subsidies available.

**5. Criteria for Evaluating Prospective Developers**

All projects must meet the following minimum threshold criteria:

Minimum threshold criteria:

- *Complete conformance with all submission requirements*
- *A minimum of \_\_\_ years' experience in the development of affordable housing*
- *Certification of compliance for all state and local taxes*
- *Availability to commence work within \_\_\_\_\_ (time period) of selection*
- *Ability to ensure that at least \_\_\_% of the units will be made affordable to households earning less than \_\_\_ of median income*
- *Demonstration that the bidder has the financial capacity to carry out the project as proposed*

Price Criteria (if applicable)

- *Adequate offer for property*

Projects meeting the minimum threshold criteria and the price criteria will also be judged on the following:

Competitive evaluation criteria:

- *Affordability:* Extent to which the project exceeds the minimum affordability requirements as stated above.
- *Development experience:* Extent to which the developer's experience exceeds the minimum criteria; the developer's prior track record in the construction of housing and the experience of the development team with regard to affordable housing development should be described in detail.
- *Developer financial capacity:* Equity contribution by the developer, review of all other real estate owned and any bankruptcy within the past ten years by any member of the development team; ability to secure financing as evidence by letter(s) from prospective lender(s).

- *Feasibility of proposed project*; analysis of development budget: environmental, permitting issues, *construction estimates, soft costs*; analysis of operating budget (for rental projects only): whether appropriate for target population, reasonableness of management, administrative costs, maintenance, and utility costs.
- *Financing*: Demonstration of ability to secure financing.
- *Site and unit design*: Appropriateness for parcel and target population

## **6. Submission Requirements**

All proposals must include the following materials:

1. Letter of interest signed by the principal(s) of the bidder
2. Narrative description of proposed development
3. Development budget sources and uses (*form*)
4. 20 year operating pro forma and rent schedule (*form*) (rental only)
5. Proposed sales prices, analysis of affordability, absorption schedule (sales only)
6. Preliminary site plan and elevations
7. Preliminary specifications
8. Proposed unit configuration
9. Preliminary identification of permitting and regulatory relief
10. Project schedule
11. Letter(s) of interest from lender(s)
12. Description of development team
13. Previous experience of members of team and references (*form*)
14. Developer financials (*form*)
15. Description of other real estate owned, including information re any legal or administrative actions (*form*)
16. Role of owner/developer/consultant (*form*)
17. Prior development experience (*form*)
18. Developer contacts (*form*)
19. Disclosure of beneficial interests (M.G.L. c.7, 40J (*form*))
20. Certification of tax compliance (M.G.L. c. 62C, 49A) (*form*)

## **7. Selection Process**

All packages submitted by the deadline will be opened and logged in publicly. All information contained in the proposals (with the exception of financial information protected under the Fair Information Practices Act) will be made public. The \_\_\_\_\_ (use municipal name) or its designee(s) will review and evaluate all proposals that have been received by the submission deadline. Evaluation of the proposals will be based on the information provided in the bidders submission in accordance with the submission requirements of this RFP and any interviews, references, and additional information requested by the \_\_\_\_\_ (use municipal name). The \_\_\_\_\_ (use municipal name) will notify all bidders in writing of its decision.

## APPENDIX A: IMPORTANT STATE AND LOCAL RESOURCES

**Office of the Attorney General:**  
Enforces and interprets the public construction bid laws, designer selection, and the prevailing wage laws.

Office of the Attorney General  
Fair Labor and Business Practices  
Division  
One Ashburton Place  
Boston, MA 02114  
Telephone: (617) 727-3465  
Internet: [www.ago.state.ma.us](http://www.ago.state.ma.us)

**State Ethics Commission:**  
Administers and enforces financial disclosure and conflict-of-interest laws, renders written advisory opinions upon request.

State Ethics Commission  
One Ashburton Place, Room 619  
Boston, MA 02108  
Telephone: (617) 727-0060  
Fax: (617) 723-5851  
Internet: [www.state.ma.us/ethics](http://www.state.ma.us/ethics)

**Office of the Inspector General:**  
Statutory mandate to enforce compliance with Chapter 30B. The Office also provides training and technical assistance to public agencies, certifies public purchasing officials through the MCPPO program, conducts performance reviews, and investigates complaints and allegations of wrongdoing.

Office of the Inspector General  
John W. McCormack State Office Bldg.  
One Ashburton Place, Rm 1311  
Boston, MA 02108  
Telephone: (617) 727-9140  
Hotline: (800) 322-1323  
Fax: (617) 723-2334  
Internet: [www.state.ma.us/ig](http://www.state.ma.us/ig)

**Department of Labor and Workforce Development:** Establishes prevailing wage rates, issues licenses for asbestos and lead work, provides apprentice training registration.

Division of Occupational Safety  
Department of Labor and workforce  
Development  
399 Washington Street, 5<sup>th</sup> floor  
Boston, MA 02108  
Telephone: (617) 727-7047  
Internet: [www.state.ma.us/dos](http://www.state.ma.us/dos)

**Department of Housing and Community Development:** Handles local issues and community development; provides state and federal funding and technical assistance to communities, supports economic development efforts, and affordable housing; oversees public housing authorities.

**Department of Housing and Community Development**  
100 Cambridge St., Suite 300  
Boston 02114  
Telephone: (617) 573-1100  
Internet: [www.state.ma.us/dhcd](http://www.state.ma.us/dhcd)

**APPENDIX B**  
**Suggested Lease Provisions**  
**For Disposition of Land by Lease**

If you are acquiring a property by lease, spell out mandatory lease terms in the RFP. A typical lease should do all of the following:

Name the parties to the lease and the responsible parties to receive any notices under the lease.

Incorporate by reference the proposal chosen, including a detailed description of the leased property.

Specify the duration of the lease, including any renewal, extension, or other options. If the lease will include a renewal option, specify how the rent will be determined for the renewal period.

Identify the payment terms, including when payments are due.

Spell out all of the responsibilities and obligations of the parties for repairs, maintenance, cleaning, utilities, rubbish disposal, snow removal, liability and casualty insurance, etc.

Specify that lease amendments must be in writing and signed by individuals authorized to contract on behalf of the local government.

Prohibit assignment or subletting without written approval.

Specify what constitutes cause to terminate the lease, what notice must be provided prior to termination, and what opportunity must be granted to correct any problem.

Prohibit any activity that would constitute a violation of the conflict of interest law (M.G.L. c. 268A).

Specify that the lease constitutes the entire agreement and that there are no agreements other than those incorporated therein.

Require a certification of tax compliance by the lessee (M.G.L. c. 62C, section 49A).

\*Office of the Inspector General, Municipal, County, District and Local Authority Procurement of Supplies, Service and Real Property; Publication No. 17713-158-3M-6/95-IGO