

ORDINANCE NO. 765

AUTHORIZING THE ENTRY BY THE TOWN OF YORKTOWN INTO A BOT AGREEMENT AND RELATED DOCUMENTS, PLEDGING CERTAIN REPAYMENT SOURCES THERETO AND TAKING CERTAIN OTHER ACTIONS RELATED THERETO

WHEREAS, Indiana Code § 5-23 (the “Act”) authorizes political subdivisions to adopt certain powers with respect to the consideration and entry into Operating Agreements and BOT Agreements (each as defined in the Act); and

WHEREAS on October 16, 2017, the Town Council (the “Council”) of the Town of Yorktown, Indiana (the “Town”) adopted a resolution adopting the provisions of the Act and authorized the issuance of a Request for Proposals/Qualifications (the “RFPQ”) for the development, construction, financing, operation and transfer of a Town Hall and Public Safety Building (the “Project”); and

WHEREAS, on December 18, 2017, the Council adopted a resolution recommending the Town enter into a BOT Agreement with Yorktown Government Center LLC (the “Developer”), an affiliate of GM Development Company LLC to provide for the development, construction, financing, operation and transfer, of the Project, all pursuant to the proposal submitted by the Developer; and

WHEREAS, pursuant to the Act, the Council has published notice of a public hearing with respect to the recommendation and, on the date hereof, has held such public hearing and considered all public comments with respect to the recommendation; and

WHEREAS, to effect such recommendation, the Town has agreed to enter into a certain public private agreement, namely a BOT Lease Agreement (the “BOT Lease Agreement”), by and between the Developer and the Town; and

WHEREAS, such BOT Lease Agreement constitutes a BOT Agreement as defined in the Public Private Partnership Act; and

WHEREAS, in order to provide funds for the payment of costs of the Project and expenses associated with the BOT Lease Agreement and the transactions contemplated thereby, the Town will enter into a Participation Purchase Agreement (the “Participation Agreement”) among the Town, the Developer and First Merchants Bank (the “Lender”) pursuant to which the Developer will assign and absolutely transfer its rights under the BOT Lease Agreement, including the rights to receive Lease Rental payments thereunder (the “Lease Rental payments”), to the Lender; and

WHEREAS, in order to provide for the construction of the Project, it may be necessary for the Town to grant a temporary easement with respect to the Project site to the Developer pursuant to a Temporary Easement Agreement (the “Temporary Easement Agreement”); and

WHEREAS, the Town intends that the BOT Lease Agreement shall be payable from the Town's local income taxes available to the Town under Ind. Code § 6-3.6 and, to the extent such local income tax revenues are insufficient, the Town's distribution of county option income taxes pursuant to Ind. Code § 6-3.6 (collectively, the "Pledged Revenues"); and

WHEREAS, the Town Council of the Town (the "Council") now desires (i) award the Public Private Agreement to the Developer, (ii) to approve the BOT Lease Agreement, the Participation Agreement and the Temporary Easement Agreement, each in a form to be approved, upon the advice of the Town Manager, by the President of the Town Council (the "President") and the Clerk-Treasurer of the Town (collectively, the "Transaction Documents") and (iii) to provide for the payment of Lease Rental payments.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF TOWN OF YORKTOWN, INDIANA AS FOLLOWS:

SECTION 1. Award. Pursuant to the Act, the Council hereby awards the BOT Agreement and the Project to the Developer pursuant to and in accordance with the terms set forth in the Transaction Documents. The Town confirms and finds that the BOT Lease Agreement constitutes a BOT Agreement under the Act.

SECTION 2. Lease Findings. The Council hereby finds that the execution of the Transaction Documents, including the BOT Lease Agreement, will serve the public purposes of the Town and is in the best interests of the Town and its residents. The Council further finds and confirms that the terms of the BOT Lease Agreement are based on the value of the facilities leased and do not create a debt of the Town for purposes of the Constitution of the State of Indiana.

SECTION 3. Authorization of Transaction Documents. The Council hereby approves each of the Transaction Documents in substantially the form submitted to the Council at this meeting or, if not so submitted, in a form to be approved, upon the advice of the Town Manager, by the President and Clerk-Treasurer of the Town, such approval to be evidenced by their execution and delivery of such documents. The President and Clerk-Treasurer are further authorized and directed to execute and deliver each of the Transaction Documents on behalf of the Town with such changes as the President and Clerk-Treasurer, upon the advice of the Town Manager, deem appropriate and consistent with this Ordinance, their approval to be evidenced by their execution thereof.

SECTION 4. Notice of Execution of BOT Lease Agreement. The Council hereby authorizes the Clerk-Treasurer of the Town to prepare and publish a notice of execution of the BOT Lease Agreement in accordance with Ind. Code §.6-3.6-10-4(d). Pursuant to such section, any action to contest the BOT Lease Agreement must be brought within thirty (30) days' following such publication.

SECTION 5. Payment of Lease Rentals. The Council hereby pledges the Pledged Revenues to the payment of Lease Rentals pursuant to Ind. Code §§ 5-1-14-4 and 6-3.6-6-18, and this pledge shall be binding from the time this Ordinance is adopted.

SECTION 6. Parity Obligations. The Town reserves the right to authorize and issue additional obligations, payable from the Pledged Revenues or otherwise pledge the Pledged Revenues to secure lease rental payments or other obligations, ranking on a parity with the pledge made to the BOT Lease Agreement (such bonds, lease rental payments or other obligations, “Parity Obligations”), subject to the following conditions precedent:

(a) Any such Parity Obligations shall not cause the Town to exceed its debt limitation under Article 13, Section 1, of the Indiana Constitution as of the date of issuance.

(b) All interest and principal payments with respect to the BOT Lease Agreement and any outstanding Parity Obligations shall have been paid in accordance with their terms.

(c) Either: (1) the Pledged Revenues of the Town in the fiscal year immediately preceding the issuance of the additional Parity Obligations shall be not less than one hundred twenty-five percent (125%) of the maximum annual payment requirements of the BOT Lease Agreement and the annual interest and principal requirements of the then outstanding Parity Obligations and the additional Parity Obligations proposed to be issued; or (2) the Pledged Revenues for the first full fiscal year immediately succeeding the issuance of any such additional Parity Obligations shall be projected by a certified public accountant to be at least equal to one hundred twenty-five percent (125%) of the maximum annual payment requirements due on the BOT Lease Agreement and the annual interest and principal requirements of the then outstanding Parity Obligations and the additional Parity Obligations proposed to be issued.

For purposes of this subsection, the records of the Town shall be analyzed and all showings prepared by a certified public accountant or independent financial advisor employed by the Town for that purpose.

Except as otherwise provided in this Section, so long as any of the BOT Lease Agreement is outstanding, no bonds or other obligations secured by pledge of any portion of the Pledged Revenues of the Town shall be authorized, executed or issued by the Town except such as shall be made subordinate and junior in all respects to the payments due on the BOT Lease Agreement unless all of the BOT Lease Agreement is prepaid and retired coincidentally with the delivery of such bonds or other obligations.

SECTION 7. Tax Covenants.

(A) It is the intent of the Town that the interest portion of each Lease Rental payment be excludable from federal income tax. In order to preserve such exclusion, the Town represents, covenants and agrees that:

(1) The Town will not take any action or fail to take any action with respect to the BOT Lease Agreement that would result in the loss of the exclusion from gross income for federal income tax purposes of the interest portion of each Lease Rental payment pursuant to Section 103 of the Internal Revenue Code of

1986 as in effect on the date of issuance of the BOT Lease Agreement (the "Code"), including, without limitation, the taking of such action as is necessary to rebate or cause to be rebated arbitrage profits on BOT Lease Agreement proceeds or other monies treated as BOT Lease Agreement proceeds to the federal government as provided in Section 148 of the Code, and will set aside such monies, which may be paid from investment income on funds and accounts notwithstanding anything else to the contrary herein, in trust for such purposes.

(2) The Town will file an information report Form 8038-G with the Internal Revenue Service as required by Section 149 of the Code.

(3) The Town will not make any investment or do any other act or thing during the period that the BOT Lease Agreement is outstanding hereunder which would cause the BOT Lease Agreement to be an "arbitrage bond" within the meaning of Section 148 of the Code and the regulations applicable thereto as in effect on the date of delivery of the BOT Lease Agreement.

(B) The Town hereby designates the BOT Lease Agreement as a qualified tax-exempt obligation for purposes of Section 265(b) of the Code. In connection with such designation, the Town further represents, covenants and agrees that:

(1) The reasonably anticipated amount of qualified tax-exempt obligations (including qualified 501(c)(3) obligations and tax-exempt leases but excluding other private activity bonds) which will be issued by the Town, and all entities subordinate to the Town, during the year in which the BOT Lease Agreement is issued does not exceed \$10,000,000; and

(2) The Town will not designate more than \$10,000,000 of qualified tax-exempt obligations during the year in which the BOT Lease Agreement is issued.

SECTION 8. Other Actions. The President, Clerk-Treasurer and any other officer of the Town are hereby authorized to take any and all actions and execute any documents or certificates that such officers deem necessary or desirable to effect the foregoing resolutions and the transactions contemplated by the BOT Lease Agreement. Any such actions taken or documents or certificates executed and delivered are hereby ratified, confirmed and approved.

SECTION 9. No Conflict. All ordinances, resolutions, and orders or parts thereof in conflict with the provisions of this Ordinance are to the extent of such conflict hereby repealed. After the issuance of the BOT Lease Agreement and so long as the BOT Lease Agreement remains unpaid, except as expressly provided herein, this Ordinance shall not be repealed or amended, nor shall the Town adopt any law, ordinance or resolution which in any way adversely affects this Ordinance.

SECTION 10. Severability. If any section, paragraph or provision of this Ordinance shall be held to be invalid or unenforceable for any reason, the invalidity or unenforceability of such section, paragraph or provision shall not affect any of the remaining provisions of this Ordinance.

SECTION 11. Effectiveness. This Ordinance shall be in full force and effect from and after its passage.

PASSED AND ADOPTED by the Town Council of the Town of Yorktown, Indiana this 27th day of December, 2017, by a vote of ____ ayes and ____ nays.

Rich Lee, President of Town Council

ATTEST:

Beth Neff, Clerk-Treasurer