



The Commonwealth of Massachusetts
Office of the Inspector General

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February 10, 2004

Martin J. Benison, Comptroller
One Ashburton Place, 9th Floor
Boston, MA 02108

Dear Mr. Benison:

The Office has reviewed two "grant" contracts relative to the development of Greylock Glen in the Town of Adams. The first was dated April 29, 2003 and the most recent is dated January 6, 2004. The first was between the Department of Environmental Management and the Massachusetts Development Finance Agency (MassDevelopment). The second is between the Department of Conservation and Recreation (DCR)¹ and MassDevelopment. The Special Act that enables the development of Greylock Glen does not specifically authorize DEM (now DCR) to effect a grant with MassDevelopment. In a recent meeting with Secretary Foy, I raised this issue as a concern of this Office. I am seeking your office's opinion about whether in this case, DCR may transfer funds by way of a "grant contract" to MassDevelopment for the Greylock Glen project. I am concerned not only about the specific instance at hand, but also about the implications of the underlying policy that would allow the transfer of funds via a grant agreement to a public entity absent specific legislative authorization.

As you know, grant contracts are regulated by 815 CMR 2:00 et seq. Specifically, 815 CMR 2.04 states that certain conditions must exist in order to contemplate a grant agreement, including:

- (1) A department must have Legislative Authorization to award Grants or provide financial assistance.

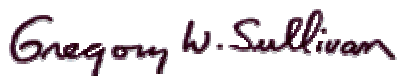
¹ Pursuant to Chapter 21 of the General Laws, as amended by Section 63 of Chapter 26 of the Acts of 2003, DCR was formed by merging the Department of Environmental Management and the Metropolitan District Commission. It is a Department within the Executive Office of Environmental Affairs.

- (2) A department may not use a Grant to procure or expend funds for commodities or services

Section 9 of the Greylock Glen project's enabling legislation, Chapter 676 of the Acts of 1985 (enclosed), authorizes DEM to use bond proceeds to make "grants" to the town of Adams but does not authorize grants to other entities. Absent legislative authorization, the process of utilizing a grant as a contracting method with a public entity raises broader Constitutional separation of power questions involving an agency's statutory authority to transfer funds.

Moreover, according to the scope of services in DCR's grant contract, MassDevelopment's overall role is to serve as a consultant to DCR. MassDevelopment will also perform certain services including conducting a solicitation for a developer on behalf of DCR and assisting DCR in preparing a revised master plan. In addition, MassDevelopment will complete certain pre-development tasks. As stated above, the Commonwealth's regulations governing grant contracts do not permit departments to use a grant mechanism to procure or expend funds for services. The Commonwealth's regulations governing service contracts, 801 CMR 21.00, define "services" to include consultant services. As part of the above question, this Office seeks the Comptroller's assistance in determining whether the tasks identified in the grant contract between DCR and MassDevelopment comport with the definition of services in 801 CMR 21.00 rather than 815 CMR 2.00, the regulation governing Grants and Subsidies.

Sincerely,



Gregory W. Sullivan
Inspector General

Cc: Louis Rizoli, House Counsel
David E. Sullivan, Senate Counsel
Stephen H. Burrington, Deputy Chief of Commonwealth Development
Anne Marie Dowd, General Counsel, MassDevelopment
Philmore Anderson, III, State Purchasing Agent
David Perini, Commissioner, Division of Capital Asset Management
Katherine Abbott, Commissioner, Department of Conservation and Recreation

Enclosures: First Amendment to Grant Agreement (Grant contract)
Chapter 676 of the Acts of 1985
"Inter-Agency Communication" from Anne Marie Dowd, Esq. and Edward Carman, Esq. to Eric Neyman, Esq. and Jeannette Hedderman, Esq.,
January 7, 2002.