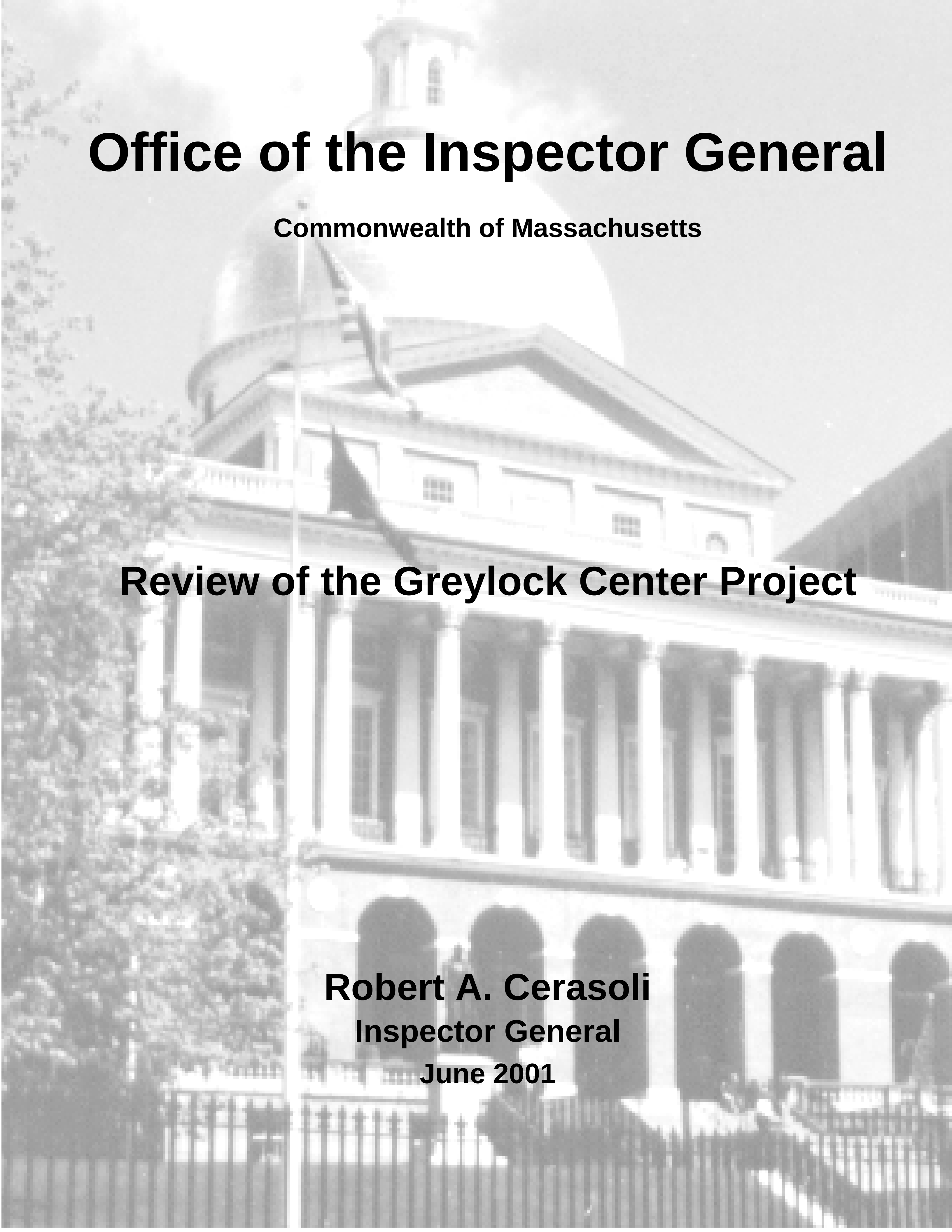

Office of the Inspector General

Commonwealth of Massachusetts

Review of the Greylock Center Project

Robert A. Cerasoli

Inspector General

June 2001

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The Commonwealth of Massachusetts

Office of the Inspector General

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June 27, 2001

Peter C. Webber
Commissioner
Department of Environmental Management
251 Causeway Street, Suite 600-700
Boston, MA 02114-2104

Dear Commissioner Webber:

I am writing to provide you with my Office's review of the Greylock Center project. My Office's review supports Governor Swift's decision, announced last week, to cancel the project reflected in the draft Land Disposition Agreement (LDA) and Master Lease issued for public comment by the Department of Environmental Management (DEM) on October 25, 2000.

As you know, my Office received complaints last December regarding the proposed disposition of state property in Greylock Glen to Greylock Management Associates, L.P. (GMA) pursuant to the draft LDA and Master Lease. Since then, the Office has undertaken a limited review of certain aspects of the Greylock Center project dating back to the 1996 developer selection process conducted by DEM. The Office's review included interviews with current and former DEM officials and review of project-related documents, including Greylock Center project records provided by DEM and the Division of Capital Asset Management and financial records made available by GMA for on-site inspection by the Office.

The attached review of the Greylock Center project is divided into three sections. The first section concludes that the current GMA partners are not the same firms as those proposed by GMA and accepted by the Commonwealth in 1996, and that the current GMA partners lack the qualifications of the GMA team members selected in 1996. The second section demonstrates that the terms of the Greylock Center development plan have changed substantially from the terms proposed by GMA and accepted by the Commonwealth in 1996. The third section provides the Office's findings regarding deficiencies in DEM's 1996 developer selection process that resulted in the designation of GMA as developer of Greylock Center.

The project records reviewed by my Office show that DEM officials and others invested substantial time in planning and supporting the progress of the Greylock Center project between 1996 and the present. These records reflect DEM's commitment to developing a project that promotes local and regional economic development in a manner that is environmentally responsible and sustainable. In hindsight, however, it is clear that many of the problems that arose during the five-year period since GMA was selected could have been avoided had DEM exercised greater care at key points during the developer selection process.

Taken as a whole, the Office's review cast considerable doubt on the prospects for successful completion of the Greylock Center project under the draft LDA and Master Lease. It also raised substantial questions about the legality of proceeding with GMA as the project developer. Had Governor Swift not taken action to stop the project, I would have strongly recommended against executing the LDA and Master Lease with GMA. I would have instead recommended that DEM undertake a comprehensive, objective evaluation of the financial and market feasibility of the Greylock Center project; compare the current costs and benefits to the public of alternative strategies for achieving the project objectives; and, if appropriate, select one or more firms with the qualifications and financial backing necessary to complete the project.

Over the years, my Office has repeatedly witnessed how difficult it is for public officials to walk away from well-intentioned public-private undertakings that turn out to be bad deals for the public. It is particularly difficult to do so when, as in the case of the Greylock Center project, a community's long-held hopes and expectations are bound up in the project's vision. As I conclude my term as Inspector General of the Commonwealth, I am encouraged by DEM's demonstrated willingness to reexamine the Greylock Center project and by Governor Swift's cancellation of the project when it became apparent that the public was not likely to receive the promised benefits.

Sincerely,

Robert A. Cerasoli
Inspector General

1. The current partners in Greylock Management Associates, L.P. (GMA) are not the same as those proposed by GMA and accepted by the Commonwealth in 1996, and they lack the qualifications of the selected team members.

1a. Four of the five general development partners named in GMA's 1996 proposal and selected by the Department of Environmental Management (DEM) to develop the Greylock Center project never executed the GMA partnership agreement, have had no substantial involvement in the project in recent years, and reportedly have no plans to become partners of GMA.

DEM's 1996 Request for Development Proposals summarized the required qualifications of the Greylock development team as follows:

> Proponent teams or firms shall demonstrate the following expertise:
>
> - Development and construction management
> - Site and building design
> - Financing
> - Marketing
> - Operations management
> - Program and curriculum development, especially in a conference center setting
> - Institute development
>
> All members of the development team need to demonstrate experience with large scale, mixed use development including conference center, hospitality, recreation and golf uses. Experience with sustainable development and operation is highly desired. Experience with conference center development and operations is essential. Experience in the areas of recreation, education, institutes/themed learning centers and the provision of hospitality services is required.

The May 1996 proposal submitted by GMA identified numerous "team members." In a June 11, 1996 letter inviting GMA to participate in the next phase of the developer selection process, the Deputy Commissioner of DEM asked GMA to address a series of issues, including:

> Please clearly identify the general development partners and their level of commitment to the project.

GMA's June 21, 1996 response named five general development partners and stated that each was "fully committed to their participation in and to the success of the Greylock Center project." GMA outlined the project roles of the general development partners as follows:

> Hamilton Betts, Inc. will be acting as master developer for the team and the project, coordinating the efforts of all of the partners and consultants and the liaison with DEM and other constituencies.
>
> Village Company of New England will initiate, administrate, oversee design of, and coordinate fund raising for the Berkshire Institute and the development and marketing of residential and interval units to both members of the Institute and the public.
>
> Willowbend Development Corporation will be the developer and manager of the golf course, clubhouse and other related recreational amenities.
>
> Tishman Construction Corporation of New England will be construction manager for the project.
>
> Delaware North Park Services will be overall asset manager for the Greylock Center project, utilizing its experience gained in managing Yosemite National Park, among others, to insure the long term preservation of the land.

The Deputy Commissioner of DEM emphasized the experience and qualifications of the GMA team in a July 31, 1996 memorandum to the DEM Commissioner conveying the Developer Selection Committee's recommendation that the Commissioner provisionally designate GMA as the developer of Greylock Center. His memorandum stated, in part:

> The development team as individual members are very strong. Hamilton Betts, Inc. is a strong real estate development company focused on tourism and hospitality, entertainment/retail destinations. Tishman Construction is a diversified pre-construction and construction management company that specializes in building science and construction technology. The corporation has extensive experience in a variety of settings, including building the National Music Foundation in the Berkshires. Delaware North Parks Services is a leader in the provision of recreation and park hospitality services, especially in a natural setting. Willowbend is an active developer of resort/golf course/hospitality properties in the US and the Caribbean.

DEM records of the developer selection process show, and recent interviews with current and former DEM officials confirm, that the perceived financial strength and specialized expertise of the proposed GMA general development partners of

Tishman Construction, Willowbend Development, and Delaware North weighed heavily in the decision to select GMA's proposal. In an interview with the Office, the former Deputy Commissioner of DEM stated that DEM assumed that these three firms would bear the financial risks of the Greylock Center project as GMA partners; he said that Hamilton Betts was regarded by DEM as financially weak. DEM's Project Manager for Greylock Center, who assisted in the proposal evaluation process, concurred with this view: in interviews with the Office, he stated that the GMA team was evaluated "as a whole" with respect to its qualifications and that DEM assumed that Tishman Construction and Willowbend Development would provide the necessary financial backing for the project. He noted that DEM saw "lots of big trees" in the GMA proposal and, thus, did not focus on the financial qualifications of Hamilton Betts, "a little tree."

In September 1996, DEM and the Division of Capital Planning and Operations[1] (DCPO) signed a Provisional Developer Designation (PDD) with GMA for the Greylock Center project. The PDD identified "the general and limited partners of GMA" as Hamilton Betts; Village Company; Tishman Construction; and Willowbend Development. Representatives of all four named GMA partners signed the PDD. With respect to the fifth general development partner listed in GMA's proposal, Delaware North, which was to serve as overall asset manager for the Greylock project, the PDD stated: "Delaware North Park Services is proposed as a future limited partner."

The PDD required the designated developer to file documents with the Secretary of the Commonwealth to create Greylock Management Associates Limited Partnership and to provide proof of such execution and recording to DEM and DCPO. In October 1996, GMA filed a Certificate of Limited Partnership with the Corporations Division of the Secretary of the Commonwealth. The certificate named Hamilton Betts as the sole general partner of GMA and was signed by Christopher B. Fleming,

[1] In 1998, DCPO was renamed the Division of Capital Asset Management (DCAM).

President of Hamilton Betts; it did not list the other general development partners listed in GMA's proposal and included in the PDD.

In March 2001, in the course of reviewing the status of the Greylock project, the Office requested from DEM a list of all general and limited partners in the GMA's partnership and a copy of each partnership agreement. DEM in turn requested this document from GMA. In response, Fleming sent DEM an Agreement of Limited Partnership for Greylock Management Associates, L.P., dated October 1, 1996, accompanied by a letter dated March 15, 2001. DEM forwarded GMA's partnership agreement and letter to the Office.

The GMA partnership agreement was signed by Fleming on behalf of the general partner, Hamilton Betts. An attachment to the partnership agreement purporting to show capital contributions and percentage interests of partners as of March 1, 2001 indicated that each of the four partners identified in GMA's proposal and in the PDD – Hamilton Betts, Tishman Construction, Willowbend Development, and Village Company – held a one percent interest in the partnership.

In the letter accompanying the GMA partnership agreement, under the heading of "Partners of Greylock Management Associates, L.P.," Fleming stated:

> The general partner of GMA is Hamilton Betts, Inc. The limited partners of GMA are Keating Franklin Properties, LLC, Franklin Realty Advisors, Inc., Village Company of New England, Tishman Construction Corporation and Willowbend Development Corporation.

However, the GMA partnership agreement did not support the representations in Fleming's letter: the agreement was not signed by Tishman Construction, Willowbend Development, or Village Company. The signature lines for these firms in the GMA partnership agreement were left blank.

In March 2001, the Office contacted and spoke with representatives of Tishman Construction, Willowbend Development, and Village Company. The representatives of Tishman Construction and Willowbend Development advised the Office that their firms had never signed the GMA partnership agreement, had had no involvement with the Greylock Center project in recent years, and had no intention of participating in the Greylock project as GMA partners. The representative of the Village Company advised the Office that GMA had decided against including the Village Company in the partnership soon after being selected to develop the Greylock Center project but that the Village Company may have a limited role in developing an institute for Greylock Center.

In short, the proposed GMA partnership of the team that was evaluated and selected by DEM, based in large part on its qualifications to develop Greylock Center, was never formed and does not exist.

1b. The current GMA partnership bears little resemblance to and lacks the qualifications of the partnership proposed by GMA and selected by DEM to develop the Greylock Center project.

The GMA partnership agreement provided to DEM by GMA in March 2001 was signed by representatives of three firms: Hamilton Betts; Keating/Franklin Properties LLC; and Franklin Realty Advisors, Inc. Hamilton Betts was listed as the sole general partner; Keating/Franklin Properties and Franklin Realty Advisors were listed as limited partners. The attachment to the GMA partnership agreement purporting to show capital contributions and percentage interests of partners as of March 1, 2001 indicated that Keating/Franklin Properties held a 63 percent interest, Franklin Realty Advisors held a 33 percent interest, and Hamilton Betts held a one percent interest.[2]

The GMA partnership agreement was dated October 1, 1996 and stated: "IN WITNESS WHEREOF this Agreement has been executed under seal as of the date first set forth above." However, records filed with the Secretary of the Commonwealth show that Keating/Franklin Properties was not organized until July

[2]As previously noted, this attachment also indicated that Tishman Construction, Willowbend Development, and Village Company each held a one-percent interest in the GMA partnership. However, none of these three firms signed the GMA partnership agreement.

19, 1999. This suggests that the partnership agreement GMA provided to DEM was not prepared and signed until years after the October 1, 1996 date.

Moreover, under the PDD, any changes to the GMA partnership represented in the PDD required the written approval of both DEM and the DCPO. No approvals for changes or substitutions to the GMA partners listed in the PDD were granted between September 1996, when the PDD was executed, and March 2000, when the PDD expired.

The three firms that have signed the GMA partnership agreement are not comparable to the firms proposed by GMA and selected by DEM in 1996. The proposed GMA partnership included major corporations with extensive experience in construction management, asset management, and golf course development. By contrast, each of the three firms comprising the current GMA partnership was organized for the purpose of real estate development, according to documents filed with the Secretary of the Commonwealth as of March 2001. These firms are discussed below.

Hamilton Betts and Franklin Realty Advisors. Two of the three firms, Hamilton Betts and Franklin Realty Advisors, are closely related and share the same address. Moreover, GMA's 1996 proposal:

- stated that "Hamilton Betts, Inc. is an affiliate of Franklin Realty Advisors, Inc. with overlapping ownership interest and management";
- listed Christopher B. Fleming and Charles F. Norton, Jr., as managing directors of both firms;
- indicated that Fleming and Norton formed a partnership and began developing real estate together in 1983; and
- stated that Franklin Realty Advisors "operates in the Caribbean through its affiliate Hamilton Betts, Inc. . . ."

From the outset, the two firms have been largely indistinguishable in the Greylock Center project. Fleming submitted GMA's June 21, 1996 response to DEM's questions regarding GMA on Franklin Realty Advisors letterhead. In his response, Fleming listed as project references for Hamilton Betts two projects that were not Hamilton Betts' projects but that, in fact, had been undertaken by Franklin Realty Advisors. The sole Hamilton Betts project reference checked by DEM during the 1996 selection process was a Franklin Realty Advisors project in Southbridge, Massachusetts. The July 1996 memorandum to the DEM Commissioner from the Deputy Commissioner conveying the Developer Selection Committee's recommendations stated: "Hamilton Betts' work at Southbridge Business Center demonstrates their ability to develop, manage, and work in partnership on such a project." The memorandum indicated that this reference was obtained for “Hamilton Betts, Inc./Franklin Realty Advisors, Inc.” In the years following the selection of GMA, GMA’s correspondence to DEM and other parties regarding the Greylock Center project sometimes was printed on Franklin Realty Advisors' letterhead or showed a return address of “c/o Franklin Realty Advisors, Inc.” The Office's review also found that GMA expenses related to the project were often paid through a Franklin Realty Advisors checking account.

In an April 2001 interview with the Office, DEM officials stated that during the developer selection process, DEM regarded Hamilton Betts and Franklin Realty Advisors as separate but interlinked organizations based on GMA’s representation to DEM that the principals and staff of the two firms were the same individuals.

Thus, Hamilton Betts and Franklin Realty Advisors have been treated by DEM as the same firm and are in fact so closely related that the addition of Franklin Realty Advisors to the GMA partnership has no significance in terms of expertise to complete the project.

Keating/Franklin Properties. The third firm represented in the GMA partnership agreement is Keating/Franklin Properties. It was organized in Delaware on July 19, 1999 and registered as a foreign limited liability company in Massachusetts on November 5, 1999. According to its registration with the Secretary of the Commonwealth, Keating/Franklin has three members: Daniel J. Keating, III, BMV Properties LLC, and KDCo New England, LLC. Fleming serves as its resident agent in Massachusetts. Daniel J. Keating, III is an individual. BMV Properties is a limited liability company organized in Massachusetts on July 19, 1999. In its certificate of organization, BMV Properties lists its address as c/o Franklin Realty Advisors and Fleming as its resident agent and manager. KDCo New England was organized in Delaware on June 28, 1999 and registered as a foreign limited liability company in Massachusetts on July 2, 1999; its business address in Massachusetts is Franklin Realty Advisors' address. Daniel J. Keating, III is listed as a manager of KDCo New England.

DEM has little information regarding Keating/Franklin Properties. Project records show that in March 2000, DEM assigned a consultant to conduct "brief due diligence" on Keating Building Corporation and Keating Development Company. Daniel J. Keating, III is affiliated with both firms, but neither firm is a GMA partner.

In an April 2001 interview with the Office, DEM officials stated that they believed that Keating/Franklin Properties had bought an interest in Franklin Realty and that they understood that the primary rationale for adding Keating/Franklin Properties to the GMA partnership was to strengthen GMA's finances, credibility, and "bankability." However, they acknowledged that DEM had not obtained detailed information regarding the current structure and finances of Keating/Franklin Properties or of the other two firms on whose behalf Fleming signed the GMA partnership agreement: Hamilton Betts and Franklin Realty Advisors.

In sum, the current GMA partnership consists of three real estate development firms, two of which are closely related. The third firm is a recently established limited liability corporation about which DEM has little information. In combination, these three firms do not offer the Commonwealth the expertise, successful track record, and financing capability that DEM expected from the original GMA team selected in 1996.

Other GMA agreements. In his March 15, 2001 letter to the Deputy Commissioner of DEM responding to the Office's request for information, Fleming wrote:

> In addition, as you know, GMA has entered into an agreement with Berkshire Golf, LLC, and affiliate of Corcoran Jennison Hospitality, Inc., to sublease the golf course from GMA and operate it. This entity is called Greylock Golf Course Partners, LLC. A copy of the Operating Agreement of GCCP is enclosed.

The January 7, 1999 operating agreement between GMA and Berkshire Golf[3] called for them to organize Greylock Golf Course Partners.[4] The agreement included provisions regarding the operation of the company; contributions required of GMA and Berkshire Golf; sublease of the golf course from GMA to Greylock Golf Course Partners; and the transfer and assignment by GMA of all of its development rights and work products, including all contracts and leases relating to the golf course project, to Greylock Golf Course Partners. In May 2001, the Office reviewed documents evidencing payments by Berkshire Golf under the agreement. The payments included $150,000 to GMA "to pay third party expenses as set forth in Schedule B"[5] and $75,000 "to pay a portion of the development fee to Franklin Realty Advisors, Inc."[6]

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[3]Records filed with the Secretary of the Commonwealth by Berkshire Golf, LLC show that this firm was organized on December 28, 1998 "to acquire, own, develop, manage, operate, lease, mortgage, sell, finance or otherwise deal with certain real property located at Greylock Center in Adams, Berkshire County, Massachusetts . . . ." The resident agent and manager for the firm is listed as Corcoran Jennison Hospitality Company, Inc.

[4]Records filed with the Secretary of the Commonwealth show that Greylock Golf Course Partners, LLC was organized on January 11, 1999 "to acquire, lease, own, develop, manage, operate, mortgage, sell, finance, or otherwise deal with an 18-hole USGA golf course with clubhouse, maintenance building, practice greens, and related facilities on land currently owned by The Commonwealth of Massachusetts at Greylock Center. . . ." The Articles of Organization for Greylock Golf Course Partners list individuals affiliated with Corcoran Jennison Hospitality Company, Inc. as President and Treasurer; Christopher B. Fleming is listed as the Vice President and Secretary.

[5]The Office requested a copy of Schedule B and other schedules to the agreement. GMA responded that operating agreement included no schedules and provided the Office with a list of expenses purportedly paid with the $150,000.

[6]Under the GMA partnership agreement, Hamilton Betts as the general partner is entitled to be paid by the partnership a management fee of $10,000 per month.

The operating agreement between GMA and Berkshire Golf stated that DEM and Division of Capital Asset Management (DCAM) -- formerly DCPO -- had approved the assignment by GMA to Greylock Golf Course Partners of its rights and interest as designated developer. This statement was inaccurate. Project records show that on December 29, 1998, the DEM Commissioner signed a letter consenting to a joint venture arrangement between GMA and Greylock Golf Course Partners. However, the records show that the DCAM Commissioner declined to sign the consent letter because it contained provisions that were unfavorable to the Commonwealth's interests.

Fleming's March 15, 2001 letter to the Deputy Commissioner of DEM noted that GMA planned to sell the Greylock Lodge site to Nature's Classroom, Inc.[7] to develop and operate an environmental education community. Fleming did not provide a copy of any agreement between GMA and Nature's Classroom. However, in May 2001 the Office reviewed documents evidencing payments by Nature's Classroom in support of the Greylock Center project and found that between December 1996 and August 1999, Nature's Classroom had paid a total of $100,000 to GMA, reportedly as reimbursement of GMA's costs. The documents also showed that Nature's Classroom had paid an additional $148,423 to other parties in support of the development of Greylock Lodge, including $50,000 of the purchase price of property acquired by GMA on West Road.[8]

Thus, Greylock Golf Partners and Nature's Classroom are not GMA partners. Although each has an interest in one component of the Greylock Center project, neither bears any responsibility or risk for the entire project.

[7]Nature's Classroom of Massachusetts, Inc., was incorporated as a nonprofit corporation on August 2, 1977.

[8]According to a purchase and sale agreement dated January 28, 2000, the purchase price was $78,000. Fleming informed the Office that the property is adjacent to the location of Greylock Lodge on the Greylock Center property and was acquired for use by Greylock Lodge.

2. The terms of the current development plan for Greylock Center differ substantially from the terms proposed by GMA and accepted by the Commonwealth in 1996.

2a. The current financing plan for Greylock Center substantially increases the Commonwealth's financial commitment from the funding and terms proposed by GMA and accepted by the Commonwealth in 1996.

GMA's 1996 proposal included a Proposed Cost and Financing Summary that showed a total Commonwealth investment in Greylock Center of $6.5 million, the state authorization for the Greylock project cited in DEM's request for development proposals. However, GMA's proposal referenced the possibility that $7.5 million in additional "gap financing" by the Commonwealth might be required for the "hospitality and commercial" components of GMA's plan unless these components were phased. GMA's proposal stated:

> As set forth in the "Proposed Financing Structure" section of the GMA development proposal, the financing plan is divided into four components: (i) Hospitality and Commercial; (ii) Golf, Tennis and Fitness; (iii) Berkshire Institute; and (iv) Residences. Of these four components, only the Hospitality and Commercial component <u>may</u> need gap financing. The other three components can proceed without gap financing on the assumptions stated. The Hospitality and Commercial component could also proceed without the gap financing, but on a scaled back basis. The balance of the Hospitality and Commercial Components could then be built in a later phase as Institute financing and/or residential sales become available, or gap financing is obtained. . . . As stated above, our proposal could proceed with or without gap financing, the only difference being that the Hospitality and Commercial Components would need to be phased. [Emphasis in original.]

The "Proposed Financing Structure" section of GMA's development proposal stated that the "hospitality and commercial components" included the inn, conference center, cabins, campsites, lodge, "commercial structures," and "certain recreational facilities."

GMA's 1996 proposal also stated:

> The gap financing will be repaid or retired through the distribution of profits from the sale of the residential units and intervals.

During GMA's videotaped presentation to the Developer Selection Committee on June 25, 1996, Fleming restated that the $7.5 million in gap financing cited in GMA's proposal would not be required if the project were phased and that any gap financing would be paid back "like any subordinated debt."

In the September 1996 Provisional Developer Designation (PDD), the Commonwealth and GMA agreed to a phased project. The PDD specified:

> An initial "Phase I" component will be constructed by the Designated Developer utilizing the current levels of available public funds as outlined in section 4 below, which Phase I generally consists of a fifty (50) room inn with meeting facilities, 5,000 square feet of commercial space, 5,000 square feet of institutional (educational) space, 18 holes of USGA golf, two tennis courts, a 20,000 square foot clubhouse/fitness center, trails, cross-country ski trails and fifty residential house lots. . . .

Section 4 of the PDD included the following provision:

> The Commonwealth of Massachusetts, Department of Environmental Management shall contribute an amount not to exceed $6,550,000 in total public funds . . .. The parties hereto acknowledge that . . . such funds do not represent the full amount of funding necessary to complete the Project as proposed by the Designated Developer. This agreement shall not be deemed a guarantee or assurance of further public funding above $6,550,000 . . . .

The current Greylock Center project plan represented in the draft Land Disposition Agreement (LDA) and Master Lease issued by DEM for public comment on October 25, 2000 specify a phased approach to project development as GMA had originally proposed. However, as of March 14, 2001, the Greylock Center project cost estimate included $11,125,000 Phase I costs to be covered by unidentified "other sources." Project records indicate, and DEM officials interviewed by the Office have confirmed, that DEM were exploring various options for obtaining the additional funds, including an unrestricted supplemental appropriation. These additional funds would supplement the $6.5 million to be funded by DEM and an estimated $1,418,000 to be funded by the Town of Adams.

In interviews, DEM officials attributed the $11 million cost increase in the Greylock Center project since 1996 to changes in the costs of the public components of the project, including infrastructure and recreation. They provided the following rationale for the $11 million increase:

- The environmental review process, which took three and one-half years to complete, was expensive.
- Costly changes were made to the project to meet environmental requirements and concerns. For example, DEM officials said that the Rivers Protection Act increased the project cost by requiring 200-foot setbacks from any stream requiring significant changes in the site layout, including the golf course design. The new layout resulted in higher construction cost estimates for the golf course.
- The decision to use the town water supply rather than on-site wells increased costs. The improvements on the site will have an additional benefit of addressing town water pressure problems in the area.
- GMA's estimates for construction of the golf course were consistently too low because they did not factor in the cost of paying prevailing wages in public construction. The DEM officials indicated that the prevailing wage requirement alone accounts for $2.5 million in the golf course construction cost estimate.[9]

The Office has not conducted a review of the construction cost estimates developed by DEM and GMA during the course of the Greylock Center project. In the Office's view, however, it would be problematic to almost triple state funding for the project from the $6.5 million – the amount promised to all proposers in the Request For Development Proposals and agreed to in the PDD between GMA and the Commonwealth – to approximately $18 million. The magnitude of this proposed increase raises questions about whether the Commonwealth could have received more favorable proposals in 1996 had interested developers known that the Commonwealth would substantially increase its contribution to the project costs to cover unanticipated cost increases.

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[9] In an August 15, 2000 memorandum to DEM officials, Fleming set forth the first three arguments summarized in the text above as justifications for an $11 million increase in public funding for the project.

DEM officials also asserted that an increase in public funding for the project is appropriate because the $8.5 million authorized for the Greylock Center project in 1985 would equal $18.5 million in current dollars.[10]

In the Office's view, that the inflation-adjusted value of the 1985 authorization for the Greylock project is not relevant to the issue of whether the Commonwealth should assume responsibility for any gap financing that may be needed to allow the project to proceed as currently designed. In 1996, more than a decade after the original authorization, GMA proposed to undertake the Greylock Center project on a phased basis using only the $6.5 million offered by DEM. Neither GMA's proposal nor the PDD placed the risk of cost increases on the Commonwealth.

2b. The draft LDA and Master Lease do not assure the Commonwealth that the major components of the Greylock Center project will ever be completed.

As noted earlier, DEM issued the draft LDA and Master Lease between DEM and GMA[11] for public comment on October 25, 2000. The Greylock Center project requirements reflected in these documents depart in several significant respects from the project requirements outlined in the now-expired 1996 PDD. Moreover, these documents appear to provide inadequate protection to the Commonwealth in the event of GMA's nonperformance.

The draft LDA does not commit GMA to completing the full Phase I project required by the 1996 Provisional Developer Designation. The 1996 PDD stated

[10] In his August 15, 2000 memorandum to DEM officials, Fleming argued that the present value of the original 1985 authorization of $8.5 million would equal $18 million today and concluded: "So, in fact, on a present value basis the project does not need <u>any</u> additional funding. It only needs to receive the present value of the funding allocated in 1985, not a penny more." [Emphasis in the original.]

[11] The draft LDA listed GMA's mailing address as "c/o Franklin Realty Advisors, Inc.," whereas the draft Master Lease listed GMA's mailing address as "c/o Keating Franklin Properties, LLC." As discussed in Section I, GMA's sole general partner is Hamilton Betts, Inc. Although Franklin Realty Advisors and Keating/Franklin Properties, are listed as limited partners in GMA's partnership agreement, neither firm was among the five general development partners proposed by GMA and selected by DEM in 1996.

that the first phase of construction under the LDA would “generally consist of not less than”:

- a 50-room, 40,000 square foot inn,
- 5,000 square feet of commercial space,
- 5,000 square feet of “institute (educational),”
- 18 holes of USGA golf,
- two tennis courts,[12]
- a 20,000 square foot clubhouse/fitness center,
- trails,
- cross country ski trails, and
- 50 residential house lots.

However, the draft LDA and Master Lease would significantly alter the required components of Phase I with respect to the inn, the golf clubhouse, and the housing.

Greylock Inn. Rather than requiring GMA to construct a 50-room, 40,000 square foot inn, the draft LDA requires GMA to construct an “inn with up to forty rooms for overnight guests, including some commercial space” in Phase I. Thus, GMA could build an inn with fewer than 40 rooms in Phase I under the terms of the draft LDA. Indeed, project documents indicate that GMA intends to build fewer than 40 rooms in Phase I. In a August 2, 1999 memorandum[13] explaining the development plans Fleming and his associate, Pamela Scott, indicated that GMA might build the inn in two phases:

> Greylock Inn: The 40-room New England style Inn will be configured with 20 guestrooms in a traditional main building and 20 guestrooms in classic wings, ells and additions to allow for all 40 rooms to be constructed at once, **or in two phases as market demand increases**. [Emphasis added.]

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[12] The draft LDA and Master Lease contain no reference to tennis courts.

[13] The copy in DEM files provided to the Office was printed on GMA letterhead and stamped "DRAFT."

Moreover, a November 9, 2000 economic benefit analysis prepared several weeks after DEM issued the draft LDA and Master Lease for public comment includes a note indicating the size of the inn to be 22,000 square feet – just over half the inn square footage required by the PDD.

Greylock residences. Rather than requiring GMA to build not less than 50 residential house lots, the draft LDA requires GMA to build "up to fifty residences" in Phase I. Thus, GMA could build fewer than 50 residences in Phase I under the terms of the draft LDA.

Golf clubhouse. Rather than requiring GMA to build a 20,000 square foot golf clubhouse/fitness center, the draft LDA and Ground Lease require GMA to build a "golf clubhouse and visitor center" of unspecified size in Phase I.[14] Thus, GMA could build a clubhouse smaller than 20,000 square feet in Phase I under the terms of the draft LDA and Ground Lease. The notes to the November 9, 2000 economic benefit analysis listed the size of the "golf clubhouse/maintenance building" as 17,000 square feet.

In June 1997, GMA provided DEM with a proposed "amended and restated" PDD. In a June 12, 1997 analysis of GMA's proposed PDD, DEM's Counsel pointed out that the proposal would change several components of Phase I, including:

- the inn would be reduced from 50 rooms to 25-50 rooms;
- the 50 house lots would be reduced to "infrastructure for up to 50 house lots";
- the 20,000 square foot combined clubhouse/fitness center would be reduced to an undefined "clubhouse."

[14]The fitness center originally planned for Phase I appears to have been incorporated into the "hotel and conference center complex with up to one hundred sixty (160) rooms for overnight guests, supporting meeting, food and beverage, and fitness facilities and other amenities" that the draft LDA requires GMA to build in Phase II.

DEM did not approve GMA's proposed amended and restated PDD. However, the above-cited changes to Phase I proposed by GMA in 1997 appear to have been incorporated into the draft LDA and Ground Lease issued in October 2000.

Although the 1996 Provisional Developer Designation required GMA to provide a minimum of $6,840,000 in project equity for Phases I and II, the draft LDA omits these project equity requirements. The September 1996 PDD stated that GMA was responsible for obtaining "up to" $33 million in private funding for the Greylock Center project, and it specified the minimum equity contributions for which GMA was responsible in each phase of the project:

> The Designated Developer shall be responsible for obtaining up to $33,000,000 in private funding for Project costs, including but not limited to, $450,000 in equity contributions for pre-development/pre-Land Disposition Agreement costs, $9,400,000 for Phase I costs and $23,200,000 in Phase II costs. The Designated Developer's Phase I and Phase II project costs will be funded by debt and equity contributions. **GMA shall provide not less than $2,200,000 in equity for Phase I of the Project and not less than $4,640,000 in equity for Phase II of the Project.** [Emphasis added.]

However, the draft LDA and Master Lease do not require GMA to provide these minimum equity contributions of $2,200,000 in Phase I and $4,640,000 in Phase II.

The "amended and restated" PDD proposed by GMA back in June 1997 would have eliminated the dollar amounts specified in the PDD for GMA's required debt and equity contributions to each phase of the project. In place of the 1996 PDD language (quoted above) requiring GMA to contribute a minimum of $6,840,000 in project equity for Phases I and II, GMA proposed the following vague and open-ended provision:

> The Designated Developer shall be responsible for obtaining the private debt and equity required for the Project, consistent with the financial projections attached hereto as Exhibit A, as such financial projections may be amended from time to time.

However, DEM's Counsel objected to GMA's proposed revisions, arguing that several proposed revisions clearly altered the financial underpinning of GMA's proposal and of the September 1996 PDD. In a June 1997 analysis of GMA's proposed PDD, the DEM Counsel provided the following critique of the proposed language regarding GMA's funding obligations:

> This is a significant departure from the Sep. 3, 1996 PDDA [Provisional Developer Designation Agreement] and without a fixed financial projection leaves the Commonwealth without any basis to explain why it would agree to release the Designated Developer from the equity commitments existing in the current agreement, and as it particularly relates to Phase One, does not document the level of private equity/debt ratio which is to be used to finance development over an underlying physical infrastructure investment by the Commonwealth of at least $6,500,000 together with the value of the lands.
>
> The Commonwealth and GMA always have the capability to amend the Sep. 3, 1996 PDDA. **Since the value of and commitment to private equity was a major component of the developer selection process, the levels of private equity should not be modified or eliminated without clear sound business standard justification which would be defensible.** [Emphasis added.]

Although GMA's proposed revisions were not accepted by DEM or incorporated into the 1996 PDD, they appear to be reflected in the draft LDA and Master Lease issued in October 2000.

The $1 million lease bond required by the draft LDA and Master Lease does not cover major project components. The Executive Summary to the draft LDA and Master Lease summarizes the respective responsibilities of the participants in the Greylock Center project as follows:

> **Who Builds What**
>
> In the agreements, the Commonwealth, through DEM, will be funding and building public infrastructure and phase I recreation improvements. The public will issue three bid packages:
>
> - DEM will bring water, gas and sewer up West Mountain Road in one contract;
> - In the second package, DEM will bid and build the golf course, the hiking trails and the cross-country trail network; and
> - In the third package, the Town of Adams will design, permit and build the connector road.

> The privately built components will include the golf clubhouse and maintenance building, the residences, the Greylock Lodge, the inn, the hotel, commercial space, the campground, cabins and Phase II recreation amenities.
>
> GMA, along with its partners and owners, will operate Greylock Center and maintain the public amenities according to agreed upon plans. The plans govern almost every aspect of GMA's responsibilities. **GMA's performance guarantees include a $1 million posted bond as well as a variety of revertor provisions.** [Emphasis added.]

However, the $1 million lease bond required by the draft LDA and Master Lease does not appear to cover all project components for which GMA is responsible. Rather, the lease bond appears to cover only GMA's performance of its obligations under the lease, which are as follows:

- A golf clubhouse and visitor center, practice putting greens, and associated parking, trails, and landscaping;
- A golf course maintenance building, and associated driveway, parking, utility connections and landscaping; and
- Rustic cabins and campgrounds.

The $1 million lease bond does not appear to cover GMA's performance of its other obligations, such as the construction of an inn, conference center, and residences under the draft LDA and Master Lease. The lease bond thus appears to provide inadequate protection to the Commonwealth in the event of GMA's nonperformance or failure to complete work that has been started. In the latter case, the Commonwealth could bear the cost of remediating any damage to the Greylock Center property reverting to the Commonwealth.

2c. The failure of the highly speculative Berkshire Institute concept resulted in substantial changes to the development plan proposed by GMA and accepted by the Commonwealth in 1996.

The April 1996 Request for Development Proposals (RFDP) for Greylock Center advised prospective proposers that their development plans would be evaluated according to the following five objectives:

- Market feasibility,

- Economic vitality at both the micro and macro levels
- Environmental sensitivity
- Minimizes risk & public subsidy, and
- Maximizes opportunity.

The RFDP noted:

> These five objectives set the ultimate performance measures through which the best development team will be found and the best Greylock Center project built. [Emphasis in original.]

The RFDP also advised prospective proposers that their proposals should provide work plans for an environmental institute or "thematic learning center" that would provide financial support for the other components of the development. The RFDP stated:

> Greylock Center is intended to meet a standard of excellence and reknown with equal standing to other well known institutes and centers. The intention is that conferencing and programming ability of this stature will make Greylock a destination resort, thus financially supporting the other lodging, residential and recreational components.

The Village Company of New England and its proposed Berkshire Institute were key elements in GMA's proposed plan. Consistent with the direction to proposers provided in the RFDP, GMA proposed a non-profit institute, the Berkshire Institute, as the linchpin of GMA's development plan. According to GMA's proposal, the Berkshire Institute would consist of:

> A 25,000 square foot research and education facility to include flexible meeting and seminar rooms, auditorium/exhibit/reception space, a field science lab, technical library, research and administration areas.

GMA's proposal emphasized the essential function of the Berkshire Institute in generating demand for the inn, conference center, and residences at Greylock Center:

> The anchor of the project will be the Berkshire Institute which will generate the demand and usage for the components while creating the environmental vision and image of the resort. . . . Although the Institute will sponsor single day activities and programs, a majority of the research and education programming will focus on residential programs, thus its

> projected demand for the Greylock Inn and Conference Center facilities and projected usage of the Residences. . . .
>
> Attendees of the Institute's September Academy and other programs will permanently reserve their accommodations by purchasing their preferred lodging for their respective periods of attendance. The Residences, guestrooms in the Inn and Conference Center, rustic cabins and even the campsites may be purchased for certain intervals, effectively creating partners or permanent members of the companies, groups and individuals who purchase the intervals.

An exhibit to GMA's proposal provided a detailed description of GMA's plans for the Institute as an outreach and exchange center, educational destination point, and forum where business, environmental, and government delegations would "explore and formulate policy issues that affect sustainable resource management." The exhibit also contained an Institute organization chart; staff job descriptions; and projections that forecast 100 Institute scientists, educators, and outreach personnel within five to ten years.

According to GMA's proposal, the Berkshire Institute would provide $2.5 million of the funding for the hospitality and commercial components of Greylock Center. This amount would consist of "a combination of corporate sponsorships and donorships, charitable contributions, and other institutional funds available for environmental, education and recreation projects." In addition, the $6 million cost to develop the Berkshire Institute itself would be funded with "Institute equity." Thereafter, according to GMA's proposal, corporate and institutional members of the Institute would purchase "interval ownership units," or time-shares, in the residences at Greylock Center, and the proceeds from the sale of residential units and interval ownership units would be used to provide financial backing for the Institute. Moreover, the availability of residential units for rent would, according to GMA's proposal, provide an important source of cash flow to the project as a whole. Thus, the financial viability of GMA's proposal hinged in large part on the Berkshire Institute's capacity to furnish $6 million in equity, to attract members, and to market the Greylock Center time-shares to its members.

According to GMA's proposal, Village Company would "found, fund, administrate and oversee the design of the Institute as well as coordinate the marketing and sales efforts of the residential intervals to both the membership of the Institute and the public." GMA's proposal described Village Company as "experts in institutes and new community development" and provided biographies of five Village Company principals. However, GMA provided no financial statements to DEM from Village Company. The rationale offered by GMA was as follows:

> The Village Company of New England is an unincorporated association of professionals and accordingly does not have banking references or financial statements as an entity.

DEM accepted GMA's proposal despite clear indications that the proposed Berkshire Institute and the Village Company entailed substantial risk. DEM's consultant, Byrne McKinney & Associates, advised DEM that GMA's proposal entailed considerable financial risk because of its heavy reliance on the Institute and gap financing. In a July 25, 1996 memorandum to DEM, Byrne McKinney stated, in part:

> [The viability of GMA's financial plan] relies heavily on the success of the Institute and the availability of Gap financing to offset the financial weakness and therefore risk associated with hospitality/conference center and educational uses of the site. In addition, it should be noted that the retirement of the Gap financing commitment is to rely upon the sale of residential units and timeshare units for which little or no information has been provided to allow for an evaluation of pricing and absorption assumptions. The basic operating and revenue assumptions for the proposal, however, do appear reasonable.
>
> The Institute is a pioneering concept and as such its contribution to the financial performance of the project is not a certainty at this point. In addition, the availability of Gap financing is unknown as is the ability of residential and timeshare unit sales to effectively retire such a commitment. **In short, the financial risks associated with this proposal are considerable, at least based on what is known at this moment in time about Institute and Gap financing issues.** [Emphasis added.]

Project records include a letter dated August 13, 1996 from the President of Village Company to the Deputy Commissioner of DEM, responding to the latter's request for additional information regarding Village Company's financial structure and past history. The letter stated that Village Company was an association of executives and professionals that had existed for approximately five years, that had no cash flow or operating statements, and that had completed no projects of its own. The letter offered to hold a confidential meeting to discuss Village Company's members, teams, and projects.

DEM records also indicate that DEM gathered information regarding Village Company through three in-depth interviews and an additional 15 telephone calls. The summary of these reference checks contained in an internal DEM memorandum dated November 18, 1996, written by DEM's Project Manager for Greylock Center indicates that DEM had ample reason to question Village Company's capacity to develop the Institute and market time-share residences for Greylock Center. According to the internal memorandum:

- Village Company was an informal association of professionals with no assets or cash flow.
- DEM had contacted two firms in Vermont and New Hampshire to obtain peer evaluations of Village Company, but the principals of the contacted firms had never heard of Village Company or its principal.
- DEM's reference checks on projects in which Village Company was a participant identified two projects that were never built and two projects that could not be verified.
- The vice president of sales and marketing for a major recreation firm told DEM that he had known and worked with Village Company's principal for seven years on a variety of projects and that Village Company's principal had "the best mix [of] ideas and Yankee common sense he's seen."

Records of the developer selection process indicate that, with the exception of DCPO's representative, members of the Developer Selection Committee gave GMA relatively high scores for the criterion "feasibility of project." According to DEM officials, Byrne McKinney's memorandum was provided to the Developer Selection Committee, which also received oral briefings from Byrne McKinney. Project records do not indicate whether DEM advised the Committee of the uncertain reference information on Village Company obtained by DEM.

In a July 31, 1996 memorandum to the DEM Commissioner recommending that GMA be provisionally designated developer of Greylock Center, the Deputy Commissioner of DEM stated that the Berkshire Institute would be the anchor for the Greylock Center project, that the Institute would fund the 25,000 square foot research and education facility with $6 million in equity, and that members and supporters of the Institute would support the hospitality and commercial components of the project by buying the residential and time-share units to be sold on the site. With respect to Village Company's experience and qualifications, the memorandum provided only the single favorable quotation DEM had received from one firm's vice president regarding Village Company's principal.

Project records show that, within a year after GMA was designated as Greylock Center developer, Fleming made it clear to Village Company that GMA was unwilling to assume the financial risks posed by Village Company's "novel" and "unproven" fundraising strategy for the project. In a letter (on Franklin Realty Advisors, Inc. letterhead) dated June 13, 1997 to Village Company's principal, Fleming stated:

> I am 100% supportive of [Village Company] forming an Institute within the Project, as I always have been. . . . I am not, however, confident in your primary plan to raise funds for the Institute through the sale of real estate in time-share or other format at a premium over its true cost to create an endowment for Institute. Ordinarily I would not care what your fundraising strategy is, notwithstanding the facts that (i) to my knowledge no other non-profit educational institute has raised its funding through the sale of real estate and (ii) my understanding is that, in general, most donors prefer to have their funds dedicated to educational programs, not bricks and mortar. However, in this case I am forced to be concerned with your fundraising strategy because you have maintained that in order to successfully carry on your fundraising, the site plan and program for the project must be designed to accommodate this novel methodology. This has the effect of making the success of the balance of the project dependent on the success of your unproven institute fundraising plan. This is a risk which, of course, we cannot take. . . .

Fleming's letter warned that if Village Company did not participate financially in the project, Village Company would not be permitted to join the GMA partnership:

> I have enclosed for your review a draft of a Partnership Agreement and the pre-construction project budget. . . . I have no desire to bear the entire financial risk and burden with respect to the project and would welcome your financial participation. However, if you decline to share in the financial risks of the project, then you can not expect to share in the financial rewards of the project. I hasten to add that this in no way affects your ability to undertake the Institute portion of the project. . . .

As discussed in the previous Section 1, GMA's Agreement of Limited Partnership dated October 1, 1996 was never signed by Village Company. In an April 2001 telephone conversation with the Office, the former President of Village Company confirmed that Village Company had never been a GMA partner.

The development plan proposed by GMA and accepted by DEM in 1996 assumed that the Berkshire Institute would generate demand for the hotel and that Berkshire Institute members would purchase time-share residences. These assumptions have proven unrealistic. Since 1996, the roles of the Berkshire Institute and Village Company in the Greylock Center plan have been significantly reduced. Instead, GMA has developed plans with Nature's Classroom to develop Greylock Lodge, which is fundamentally different from the Berkshire Institute concept and cannot be expected to drive substantial demand for hotel rooms, residences, and commercial space at Greylock Center. The draft LDA issued last October reflects diminished confidence regarding GMA's capacity to finance and build the major components of the Greylock Center project.

2d. DEM assumed responsibility for some of the predevelopment work that GMA was required to perform under the Provisional Developer Designation.

The 1996 PDD specified a series of predevelopment activities and tasks for which GMA was responsible. The PDD stated:

> Said activities and tasks shall have a total value of not less than $400,000, and the Designated Developer shall provide to the Department of

> Environmental Management and the Division of Capital Planning and Operations such contract and cost information and documentation as may reasonably be required to establish the value of the tasks and activities undertaken by the Designated Developer.

The PDD also provided that DEM's project contribution of $6,550,000 would include predevelopment tasks and responsibilities with a value of at least $400,000. A separate section of the PDD provided that GMA would make an additional $50,000 available within 90 days after executing the PDD, as a match to $50,000 pledged by DEM for the "conference center/institute programming and development."

DEM reduced the scope and cost of GMA's predevelopment work. Shortly after executing the PDD extension, GMA requested that DEM assume financial and operational responsibility for a major predevelopment task that GMA was supposed to undertake: the golf course design. In an internal DEM memorandum dated September 23, 1997. DEM's Greylock Center Project Manager and Team advised the Deputy Commissioner of DEM that GMA had lost most of its partners and, as a result, lacked the financial capacity to complete the full development proposed by GMA in 1996. The memorandum endorsed GMA's request that DEM fund the golf course design that GMA was originally required to complete. The following are excerpts from the internal DEM memorandum:

> Developing Greylock Center as a viable private sector driven project needs our attention. GMA has lost of most of their partners and as a result is running low on risk capital. DEM, to keep the project moving forward, needs to begin developing new strategies a.s.a.p. to keep the project viable and on track.
>
> CURRENT SITUATION AND BACKGROUND:
>
> GMA's ability to fully execute its full build out for Greylock Center as originally proposed has been abandoned in favor of a smaller, scaled back project. GMA is now proposing a phased approach to development. Phase I, as proposed, consists of a golf course, a mountain inn and an environmental center. As far as Phase II is concerned its probable development is an open question. At the current time the economic viability of the housing component appears questionable . . . . Finally getting an extra $15 million for the conference center currently looks difficult, at least until a unique niche is defined.

> The key limited partner, Willowbend Development Corp., the golf course developer, has unofficially withdrawn from GMA. This organizational change has weakened GMA. Without Willowbend Development Corp.'s pre-development funds GMA's capacity to fully fund the site & building design of the project is questionable. **Even at the Phase I scale of development, GMA needs DEM to pick up more of the up front costs of development. As it now stands GMA has a request on the table to have DEM fund the golf course design**. . . . [E]ven if we do pick-up the golf course design the project still will not have a fully functional design team. [Emphasis added.]

DEM ultimately agreed to shift responsibility for the golf course design from GMA to DEM. On September 8, 1998, DEM awarded a contract to Copley Wolff Joint Venture for "site design services, including golf course, trails, roads, and utilities for Greylock Center Project located in Adams, MA." The contract had a maximum value of $916,769. A detailed project scope summary prepared by Copley Wolff in June 1998 indicates that the GMA tasks shifted to Copley Wolff accounted for a substantial share of the contract amount.

After DEM agreed to shift responsibility for the golf course design from GMA to DEM, GMA asked DEM and DCAM for a written acknowledgment that it had fulfilled all of its obligations under the PDD or that its nonperformance had been waived. In December 1998, GMA drafted a letter to DEM and DCAM regarding GMA's plan to enter into a joint venture arrangement with Berkshire Golf to develop the golf course portion of the Greylock Center project. GMA's letter sought approval of GMA's plan and stated, in part:

> We are requesting that, by signing below, DEM and DCAM acknowledge that, as of the date hereof . . . GMA has performed (or caused to be performed) all of the obligations required to be performed by GMA or the "Designated Developer" under the Designation Agreement on or before the dates and times required therefor, or such nonperformance has been waived by DCAM and DEM, and GMA is not otherwise in default under any term, provision or condition of the Designation Agreement.

The Commissioner of DEM signed this letter on December 29, 1998. However, the Commissioner of DCAM refused to sign the letter. An e-mail message dated February 12, 1999 from a DCAM attorney to DEM summarized DCAM's objections to certain provisions of the letter; one of DCAM's objections concerned the provision cited above. The DCAM attorney's e-mail message stated:

> We should finalize an extension of the Designation Agreement rather than represent that the developer has fully performed under the development agreement by the dates required or that we have waived such nonperformance . . . . A general statement that the Commonwealth has waived the developer's nonperformance can extend to any number of requirements and leaves open the question as to what we have waived and for how long.

Project records show that on February 23, 1999, DEM, DCAM, and GMA signed a letter extending the PDD from September 1, 1998 to March 1, 2000. The extension letter did not contain the waiver language that GMA had requested.[15]

2e. Although DEM has expressed the view that some reductions in GMA's obligations are warranted in part by GMA's predevelopment expenditures, DEM has not verified GMA's claims concerning its predevelopment costs incurred on the Greylock Center project.

In interviews with the Office, DEM officials have indicated that its decisions to eliminate the requirements for GMA to contribute $6.8 million in equity to the project and to fund the golf course design were based in part on GMA's high level of expenditures in support of the project. As noted previously, the PDD identified predevelopment tasks to be completed by GMA and required GMA to provide documentation of the value of these tasks:

> Said activities and tasks shall have a total value of not less than $400,000, and the Designated Developer shall provide to the Department of Environmental Management and the Division of Capital Planning and Operations such contract and cost information and documentation as may reasonably be required to establish the value of the tasks and activities undertaken by the Designated Developer.

DEM records reviewed by the Office contain several listings prepared by GMA of GMA's predevelopment costs; however, they contain no evidence that DEM has required GMA to provide "contract and cost information and documentation" in

[15] The PDD was not extended again after its expiration on March 1, 2000.

support of its claimed predevelopment costs. In January 12, 2001, in response to a request from the Office, DEM indicated that GMA would provide the Office with "an updated accounting of cost information spent by GMA on pre-development tasks."

On March 9, 2001, the Office again requested the information from DEM. On March 15, 2001, DEM provided the Office with a table entitled "Accounting of Pre-Development Costs Incurred As Of March 1, 2001" that had been submitted by GMA to DEM that same day. The table**,** a copy of which is presented on the following page as Table 1, indicated that GMA had incurred a total of $1.6 million in "pre-construction expenses including Golf and Lodge"; $857,900 in "third party costs"; and $1.3 million in "pre-construction expenses not including Golf and Lodge." Apparently, then, GMA was claiming that its "pre-development task expenses" under the PDD totaled $1.3 million. The table does not indicate what portion of the third-party costs GMA had attributed to the predevelopment tasks.

In an interview on March 16, 2001, DEM officials told the Office that GMA had incurred over $800,000 in actual cash outlays and pending invoices pertaining to the Greylock Center project. They also indicated that GMA had given permission for the Office to review cancelled checks and ledgers in support of its accounting of the costs it had incurred.

GMA records reviewed by the Office do not substantiate GMA's March 2001 accounting of the predevelopment costs GMA claims to have incurred. In April and May of 2001, the Office scheduled four visits to GMA's office in order to verify GMA's claimed predevelopment costs as shown on Table 1. On the first occasion, GMA produced no records for the Office's review. Rather, Fleming discussed the Greylock Center project with the Office, and the Office explained the information and supporting documentation required by the Office in order to verify GMA's claimed predevelopment costs on behalf of the project.

Table 1.

GREYLOCK CENTER 15-Mar-2001
ADAMS, MASSACHUSETTS
ACCOUNTING OF PRE-DEVELOPMENT COSTS INCURRED
AS OF MARCH 1, 2001

CATEGORY/TASK	Costs to Date (rounded)
ACQUISITION/SITE CONTROL	
Legal	74,300
DESIGN & CONSTRUCTION	
Wetlands Analysis/Flagging	1,500
Survey/Aerial Photography	3,500
Consulting	18,000
Master Site Plan	279,800
Golf Course & Site Work	100,000
Golf Clubhouse (attributed to Golf Budget)	15,000
Greylock Lodge (attributed to Lodge Budget)	140,800
EDUCATION PROGRAM	50,500
PERMITS/APPROVALS	39,000
MARKETING/PUBLIC RELATIONS	26,500
FINANCE	6,000
ADMINISTRATION	
Overhead/Project Management	742,500
Legal	168,000
Total GMA pre-construction expenses including Golf and Lodge	1,665,400
Third party costs only	857,900
Total GMA pre-construction expenses not inclulding Golf and Lodge	1,295,750

Source: Greylock Management Associates

To enable a detailed analysis of GMA's claimed costs, the Office requested that GMA provide an explanation of GMA's methodology for allocating indirect costs, such as overhead costs, to the Greylock Center project. In response, Fleming indicated that GMA allocated its indirect costs on the basis of the time that he and his associates have spent on the project. He stated that, although GMA did not maintain detailed records of the time spent on the project, he would be able to show the Office how he derived the indirect costs included in GMA's claimed costs. However, he also expressed the view that his internal allocation of overhead costs was irrelevant because GMA was committed to spending $450,000 on predevelopment activities and, he stated, GMA had already spent well above that amount.[16]

On the Office's subsequent visits, GMA produced the following records:

- Franklin Realty Advisors' 1996 general ledger, which listed costs of $18,666.54 for the Greylock Center project.[17]
- Checks totaling $103,184.01 issued on Franklin Realty Advisors' accounts from May 1997 through May 2000.
- Checks totaling $245,326.55 issued on GMA's account from January 1999 through December 2000. The first check issued on this account was a $33,000 payment to Franklin Realty Advisors for "overhead."
- Checks totaling $248,423.37 issued by Nature's Classroom from December 1996 through December 2000. Of this amount, $100,000 had been paid to GMA.
- Checks totaling $292,012.60 issued on behalf of Greylock Golf Course Partners from January 1999 through March 2001. Of this amount, $150,000 had been paid to GMA, and $75,000 had been paid to Franklin Realty Advisors.

Many of the amounts listed above clearly are not attributable to the predevelopment tasks GMA was required to perform under the 1996 PDD. However, GMA has never

[16] As previously noted, the PDD in fact obliged GMA to perform certain tasks with a value of *not less than* $400,000 and to match an additional $50,000 DEM expenditure.

[17] According to Thomas Doherty, who provided the Office with some GMA records, no general ledger was kept for the firm after 1996.

provided the Office with copies of contracts, invoices, and other information that would be necessary to substantiate GMA's claimed costs. Fleming had indicated to the Office that he was preparing a memorandum explaining how he arrived at the numbers in the table. However, the Office has never received that explanation.

The records GMA provided to the Office do not substantiate GMA's claim to have incurred predevelopment costs of $1,295,750 on the Greylock Center project. The Office did find errors in GMA records and has reason to believe that GMA or Franklin Realty Advisors has made additional payments in support of the Greylock Center project for which GMA has not provided documentation to the Office.

3. DEM selected GMA as the Greylock Center developer despite incomplete and inadequate information regarding GMA's financial capacity.

The 1996 developer selection process for the Greylock Center project appears to have been planned with care. The 73-page RFDP issued by DEM in April 1996 provided prospective proposers with detailed information on DEM's priorities and preferences with respect to the Greylock Center development. This information included guidelines for land use, development programming, site and building design, conference center/program and curriculum development, management and operations, financial, and team composition and qualifications. The RFDP also set forth a systematic selection process that included a threshold review of all proposals against the minimum requirements of the RFDP, a comparative review and ranking of those proposals passing the threshold review, presentations and interviews of top-ranked proposals, and conditional designation of a developer.

The evaluation criteria for the threshold proposal review included experience/qualifications, capability to complete the project, and fulfillment of the master plan. The RFDP advised proposers that their financial qualifications, including net worth, would be one of the factors evaluated in the determination of their capability to complete the project.

The evaluation criteria for the comparative proposal review accorded a maximum of 30 points (out of 100) to the proposer's capability to complete the project, as demonstrated by the financial qualifications of the developer and the feasibility of the project. The RFDP advised proposers that the following indicators of their financial qualifications would be evaluated:

- Proven comparable financing experience.
- Financial capacity, based on net worth and current financial obligations.
- Proven ability to develop and execute a fundable financing plan, particularly in the Northeast.
- Proven sources of equity investment.

- Proven sources of asset-based lending.
- Amount of working capital available to fund an early action program and build the required marketing demand for the project in order for it [to] operate profitably over the long run.
- Amount of equity being brought to the project.

DEM records reviewed by the Office indicate that DEM did not evaluate GMA's qualifications on the basis of all of the criteria listed above.

3a. GMA did not provide required financial information.

The RFDP instructed proposers to

> submit a current audited balance sheet and three (3) year history of income and expenses for the lead proposing developer and any component developer(s) who will participate in the project should be submitted.

However, GMA declined to provide this information in its 1996 proposal, offering the following explanation for its failure to comply with the RFDP requirement:

> The Village Company of New England is an unincorporated association of professionals and accordingly does not have banking references or financial statements as an entity.
>
> Each of the general development partners is a privately held corporation and does not generally release audited balance sheets or income and expense statements. In the event that the GMA team is conditionally designated to act as developer of the project, such designation may be made subject to a confidential review of the financial statements of the general development partners.

DEM continued to consider the GMA proposal, notwithstanding GMA's failure to comply with the requirement. DEM officials interviewed by the Office acknowledged that DEM never received and reviewed GMA's financial statements. Although DEM ultimately selected GMA as the Greylock Center developer, DEM did not condition its selection on the confidential review suggested in GMA's proposal.

3b. DEM did not obtain disclosures required in the RFDP regarding past, pending, or threatened legal or administrative actions pertaining to GMA team members.

The RFDP advised prospective proposers that DEM would require them to

> provide any information regarding any legal or administrative actions past, pending, or threatened which could relate to the conduct of the proponent's (or its principal's or its affiliate's) business and/or their compliance with laws.

Project records show that on June 11, 1996, DEM sent letters to GMA and three other proposers inviting them to participate in the next round of the selection process and requesting certain information and clarifications. The other three proposers were asked to provide information on past, pending, or threatened legal or administrative actions; however, GMA was not.[18] In an interview with the Office, DEM officials acknowledged that GMA never provided this information.

Had GMA fulfilled the disclosure requirement, DEM would have been informed that the two officers and managing directors of Hamilton Betts,[19] Christopher B. Fleming and Charles F. Norton, Jr., each had filed for personal bankruptcy three years earlier on September 8, 1993.[20] DEM officials stated in an interview with the Office that DEM had required a competing development team to change its lead person after

[18] In an interview with the Office, DEM's Project Manager for Greylock Center said that he could not recall why DEM did not ask GMA for the disclosure. He speculated that, because GMA was the only proposer that had answered an adjacent question in the RFDP concerning past or present affiliations with DEM, DCPO, or the Weld/Cellucci Administration, DEM may have thought that the absence of a disclosure by GMA meant that GMA had nothing to disclose.

[19] On June 1, 1996, Hamilton Betts filed a Certificate of Change of Directors and Officers of Domestic Business Corporations with the Secretary of the Commonwealth. The certificate listed Fleming as President, Clerk, and Treasurer, and Norton as Treasurer and Director. No other officers or directors were named.

[20] Both cases were closed on April 7, 1995 after discharges were granted.

learning of the lead person's previous bankruptcy.[21] DEM officials stated that DEM would not have allowed GMA to use Fleming as the lead person if DEM had known about Fleming's previous bankruptcies. Given the roles of Fleming and Norton as the officers and managing directors of Hamilton Betts, and given Hamilton Betts' role as "master developer" of the GMA team, such a decision on DEM's part would likely have precluded Hamilton Betts from being the master developer – or lead firm – of the GMA team.

3c. DEM did not obtain information concerning the level of commitment to the project of each general development partner proposed by GMA.

The RFDP required all proposers to submit a letter of interest signed by the principals and containing information including the "[i]dentification of all principals, partners, or coventurers participating in the transaction and the nature and share of the participants' share in the project should be described." GMA's proposal cover letter was not signed by all GMA principals, and neither the cover letter nor the proposal itself contained the required information on each participant's share in the project.

In a letter to Fleming dated June 11, 1996, the Deputy Commissioner of DEM requested that GMA address a series of questions in writing and at the forthcoming interview with the Developer Selection Committee. One such question was:

> Please clearly identify the general development partners and their level of commitment to the project.

In response, GMA submitted a supplemental proposal that listed the proposed general development partners and their proposed roles. (This portion of GMA's response is excerpted in the previous Section I.) However, GMA provided only the following vague and uninformative response to the question regarding the partners' commitment to the project:

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[21] Records of the developer selection process indicate that the competing team changed its lead firm after DEM discovered the firm's apparent involvement in three corporate bankruptcies on separate developments.

> Each of the general development partners is fully committed to their participation in and to the success of the Greylock Center project. The GMA entity will be formally formed at such time as GMA is selected as developer of Greylock Center.

As previously discussed, DEM selected the GMA team based in part on the qualifications and presumed financial strength of Tishman Construction, Willowbend Development, and Delaware North, all of which were proposed by GMA as general development partners. However, DEM never obtained the information necessary for an accurate understanding of each proposed general development partners' financial commitment to the project. In the end, only one of the five proposed general development partner signed the GMA partnership agreement that was executed after GMA was selected to develop Greylock Center.

3d. DEM's due diligence efforts produced no meaningful information regarding GMA's financial capacity.

DEM records of the developer selection process show that DEM hired a consultant, Byrne McKinney & Associates, Inc., to assist DEM in evaluating the financial and market feasibility of the competing proposals. A second consultant, Alexander S. Bascom, Jr. of the Bascom Company, was selected by DEM to provide due diligence information on some proposed development team members under a subcontract with Byrne McKinney.

Project records contain a memorandum dated July 25, 1996 from Byrne McKinney to DEM regarding the relative financial risks posed by the proposals submitted by the four finalists in the selection process. The memorandum raised concerns regarding the financial viability of GMA's plan but provided no specific information on GMA's financial capability other than a comment to the effect that the GMA team appeared capable of creating a successful project.

Project records also contain a memorandum to Bascom from DEM's Project Manager for Greylock Center, dated July 10, 1996 and labeled "Due Diligence." The memorandum listed references provided by the four project finalists and requested that Bascom "focus on their capability to get the job done and their financial qualifications to do it." The memorandum identified GMA as the "top contender" and listed Fleming of Hamilton Betts as the primary team member. The other GMA team members listed in the memorandum were Village Company, Tishman Construction, Delaware North, Willowbend Development, and Dodson Associates.[22]

Project records also contain a letter dated September 3, 1996 from Bascom to the Deputy Commissioner of DEM, providing Bascom's summary comments on the developer selection process. The two-page letter praised DEM's selection and "careful, patient process grounded in market realities." The letter's only comments regarding GMA were as follows:

> I believe this team is the only one who ranks highly in each critical area of knowledge, skills and experience necessary for this project. As well, they provide the indigenous understanding and immediate daily access for DEM staff.

According to DEM officials, Bascom provided oral comments to DEM in addition to the September 1996 letter cited above. Nevertheless, there is no evidence that Bascom provided DEM with any specific information regarding any of the proposers' capability and financial qualifications.

DEM officials stated in interviews, and project records confirm, that DEM checked references on GMA's proposed general development partners and other team members during the developer selection process. DEM checked only one reference on Hamilton Betts, identified in GMA's proposal as the "master developer" for the team and the project. As noted earlier, this reference was the Southbridge Business Center project in Southbridge, Massachusetts, which involved Franklin Realty Advisors, Inc. rather than Hamilton Betts. (GMA's proposal explained that Hamilton Betts was "an affiliate" of Franklin Realty Advisors, "with overlapping ownership interests and management.") A July 1996 site visit report prepared by DEM

[22] Dodson Associates was proposed as a member of GMA's team of design consultants.

indicated that the Southbridge Town Manager had high praise for the work of "Franklin Realty Co." in managing and redeveloping the project.

Project records also contain Dun & Bradstreet Business Information Reports, obtained by Byrne McKinney, for Hamilton Betts, Tishman Construction, Willowbend Development, and Delaware North . The report on Hamilton Betts dated August 26, 1996, listed Alexander Spaulding as the founder and owner of Hamilton Betts and reported:

> As of November 9, 1995, attempts to contact principals were unsuccessful. Outside sources confirmed operations. . . . As of November 9, 1995, a search of Dun & Bradstreet's Public Record Database found no suits, liens, judgments or UCC's to which Spaulding, Alexander at 160 Federal St., Boston, MA was a named defendant or debtor.

However, the information regarding Hamilton Betts contained in the Dun & Bradstreet report was not current. According to records on file with the Secretary of the Commonwealth, Alexander Spaulding was President, Treasurer, and Director of Hamilton Betts only until June 1, 1996, after which date Spaulding was not an officer or director of Hamilton Betts. Thus, at the time that DEM received the Dun & Bradstreet report, Fleming was President, Clerk, and Director of Hamilton Betts; Norton was its Treasurer and Director. In an interview, DEM's Project Manager for Greylock Center told the Office that he did not learn that Spaulding was no longer a part of Hamilton Betts until several years after GMA was selected.[23]

According to DEM officials, the Developer Selection Committee evaluated each development team's financial capability on the basis of information provided by the teams in interviews with the Committee and the July 1996 memorandum prepared by Byrne McKinney. The information and records reviewed by the Office show, however, that DEM and its consultants had generated no meaningful information on

[23] The Project Manager explained that DEM continued to have contacts with Spaulding at a Boston law firm on Hamilton Betts' behalf, and therefore assumed that Spaulding was still with Hamilton Betts in the Greylock Center project. He reported that he learned through someone at Village Company that Spaulding was no longer part of Hamilton Betts.

GMA's financial capability for the Committee to use in conducting its evaluation. Thus, although records of the developer selection process indicate that most members of the Developer Selection Committee awarded relatively high scores to GMA for "financial qualifications of developer,"[24] these scores do not appear to have been based on the detailed criteria set forth in the RFDP, such as the development team members' net worth and current financial obligations.

In the memorandum to the DEM Commissioner dated July 31, 1996 recommending that GMA be provisionally designated developer of Greylock Center, Deputy Commissioner of DEM highlighted GMA's willingness to commit to a Phase I plan, its strong design team, and its concept for an institute as reasons for selecting GMA's proposal. The memorandum summarized GMA's capability to complete the project by emphasizing GMA's talent:

> GMA has the talent to complete the project once the financing package is in place. Both the design team and the educational development team appear to have the resources necessary to make the project a reality.

The memorandum did not address or assess GMA's financial capacity to complete the project.

[24]The exception was the Committee member representing DCPO, who gave GMA a relatively low score for this criterion.