

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:)
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)
Local Government Center, Inc.;)
Local Government Center Real Estate, Inc.;)
Local Government Center Health Trust, LLC;)
Local Government Center Property-Liability Trust, LLC;)
Health Trust, Inc.;)
New Hampshire Municipal Association Property-Liability) Case No: C2011000036
Trust, Inc.;)
LGC – HT, LLC;)
Local Government Center Workers’ Compensation)
Trust, LLC;)
And the following individuals:)
Maura Carroll; Keith R. Burke; Paul G. Beecher;)
Peter J. Curro; April D. Whittaker; Timothy J. Ruehr;)
Julia A. Griffin; and John Andrews)
)
RESPONDENTS)

**BUREAU OF SECURITIES REGULATION OBJECTION TO
RESPONDENT ANDREWS’ MOTION TO DISMISS COUNT 2**

NOW COMES Petitioner, the New Hampshire Bureau of Securities Regulation, through counsel Bernstein, Shur, Sawyer & Nelson, P.A., and objects to Respondent John Andrews’ Motion to Dismiss Count 2. In support of its Objection, Petitioner states as follows:

Introduction

1. On February 1, 2012, Respondent John Andrews filed a motion to dismiss Count 2 of the Bureau of Securities Regulations’ (the “Bureau” or “BSR”) Staff Petition.
2. The familiar standard of review on a motion to dismiss requires that, taking the factual allegations in the Petition as true and all reasonable inferences in the light most favorable to the Petitioner, the Petition is reasonably susceptible of a construction that would permit recovery. See, e.g., J & M Lumber and Const. Co., Inc. v. Smyjunas, 161 N.H. 714, 724 (2011).

3. Despite the standard, Andrews only tangentially argues the sufficiency of the pleadings, attempts to recast the facts in a light favorable to Andrews and the LGC, and misconstrues the BSR's legal claims.

4. Moreover, Andrews' motion focuses almost exclusively on legal argument of the merits of Count 2 of the Petition. While legal argument on the merits of a claim may be appropriate on summary judgment, it is entirely inappropriate on a motion to dismiss.

5. The central underpinning of all of Andrews' arguments is his narrow and oversimplified characterization of the scope and meaning of the controlling statute, R.S.A. ch. 5-B. Interpretation of the statute, however, is at the heart of the dispute and one of the central legal questions on which the Presiding Officer must rule. Merely stating that Respondents' actions were permissible does not make them so, and certainly does not form the basis for a motion to dismiss before substantive argument is heard by the Presiding Officer.

6. Moreover, Andrews' narrow reading of R.S.A 5-B:5 fails to take into account the purpose of the statute or how R.S.A. 5-B:5 fits within the context of the statutory scheme. It is well-established that "all parts of a statute" are construed together to "effectuate its overall purpose and avoid an absurd or unjust result," and that statutory "words and phrases" are not read "in isolation, but rather within the context of the statute as a whole" in order to "interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme."¹ The LLK Trust v. Town of Wolfeboro, 159 N.H. 734, 736 (2010).

¹ To the extent Andrews suggests that the Legislature's failure to enact amendments to R.S.A. 5-B is somehow demonstrative of the Legislature's original intent when enacting R.S.A. 5-B, his argument is misplaced. "The legislature expresses its will by enacting laws, not by failing to do so." Merrill v. Manchester, 114 N.H. 722, 728 (1974). See also Corson v. Thomson, 116 N.H. 344, 350 (1976) ("Defendants' argument that proposed amendments to the section which failed to be enacted are indicative of the legislative intent that the director should be removed by the fish and game commission is not persuasive.").

7. Far from stating a clear case for a pre-hearing dismissal of Count 2 of the Petition, Andrews' motion simply highlights that one party's self-serving interpretation of the statute is no more controlling than another's. The Presiding Officer will be the final arbiter of what the statute means, and his decision will be best informed by a full airing of all parties' arguments and legal analysis on the issue.

8. In any case, Andrews' attacks are premature. As Andrews is well aware, the BSR plans to submit an amended Petition on or before February 17, 2012, in which amended Petition the BSR will clarify the scope of its claims against Andrews and the other Respondents.

9. There is little sense in analyzing the sufficiency of a pleading when the parties have notice of a pending amendment to the pleading. For this reason alone, consideration of Andrews' motion to dismiss Count 2 should, at a minimum, be held in abeyance until after the February 17, 2012 deadline to amend the Petition.

WHEREFORE, for the foregoing reasons the Bureau of Security Regulation respectfully requests that the Presiding Officer deny Andrew's motion to dismiss without prejudice to refile after the February 17, 2012 deadline to amend the Petition.

Respectfully submitted,
The Bureau of Securities Regulations
State of New Hampshire
By its attorneys,
Bernstein, Shur, Sawyer & Nelson, P.A.

Dated this 8th day of February, 2012

/s/ Andru H. Volinsky
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Certificate

I hereby swear that the foregoing motion was provided to counsel of record on the below service list by hand or electronically, this 8th day of February, 2012.

/s/ Andru H. Volinsky

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