

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION**

IN THE MATTER OF:

Local Government Center, Inc.; et al

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Case No.: C-2011000036

**LGC’S MOTION TO DISMISS COUNT I OF THE AMENDED PETITION
ON THE GROUND THAT R.S.A. 5-B DOES NOT PROHIBIT THE CONDUCT
IN WHICH LGC IS ALLEGED TO HAVE ENGAGED**

Respondents Local Government Center, Inc. and affiliated entities (“LGC”) submit this motion to dismiss Count I of the Amended Petition on the ground that the governing statute (R.S.A. 5-B) does not prohibit the conduct in which LGC is alleged to have engaged.

I. Introduction

1. Count I of the Amended Petition charges LGC¹ with having violated R.S.A. 5-B:5 by having an “improper corporate structure.” Count I fails to state a viable claim against LGC for a simple reason: the Bureau of Securities Regulation (“BSR”) identifies no provision of R.S.A. 5-B:5 that LGC’s corporate structure violates.

2. It is well understood that “LGC is a single organization that owns and manages” multiple subsidiaries that “operate pooled risk management programs under chapter 5-B,” and that “LGC bylaws indicate that LGC manages its subsidiaries through a single board of directors” *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 700 (2010).

3. “In reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, [courts] assume the truth of the facts alleged by the plaintiff and construe all reasonable inferences in the light most favorable to the plaintiff.” *Farm Family Cas. Ins. Co. v.*

¹ The Amended Petition uses “LGC” to refer to a collection of “individuals and certain entities,” presumably encompassing all of the respondents and those entities listed in ¶¶3-21 of the Amended Petition.

Town of Rollinsford, 155 N.H. 669, 670 (N.H. 2007). A motion to dismiss should be granted “[i]f the facts do not constitute a basis for legal relief” *Id.*

II. R.S.A. 5-B Does Not Prohibit the Conduct in Which LGC is Alleged to Have Engaged

4. Count I begins with the observation that “R.S.A. 5-B:5, I(b) and (e) require that every pooled risk management program shall ‘be governed by a board,’ and by ‘written bylaws,’ which shall ‘be filed with the department.’” Amended Petition ¶74. According to BSR, LGC’s corporate structure violates these statutory requirements because it “utilizes one single board to govern the operations of the three (3) different 5-B Pools plus NHMA, LLC, LGC Parent and LGC Real Estate, Inc., all according to one set of bylaws.” Amended Petition ¶77. In BSR’s view, this “structure violates the intent and requirements of R.S.A. 5-B, as well as basic concepts of fiduciary duty and conflicts of interest.” *Id.* Absent from BSR’s case, however, is any support for the conclusion that R.S.A. 5-B, or any actual fiduciary duties or rules against conflicts of interest, have been violated.

A. R.S.A. 5-B Does Not Prohibit a Single Board of Directors from Governing Multiple Risk Pools

5. The first prong of BSR’s theory in Count I is that it is improper for a single board of directors to govern multiple risk pools. But nothing in R.S.A. 5-B prohibits such an arrangement.

6. The statute provides that “[e]ach pooled risk management program shall . . . (b) [b]e governed by a board” R.S.A. 5-B:5, I. This is a clear, unambiguous requirement with which LGC has complied. It is undisputed that LGC’s pooled risk management programs are “governed by a board,” as the statute requires. Nowhere in the statute does it say that two or more risk pools may not be governed by a single board.

7. The New Hampshire Supreme Court has made clear that in interpreting a statute, courts “will neither consider what the legislature might have said nor add words that it did not see fit to include.” *Rainville v. Lakes Region Water Co., Inc.* 2012 N.H. LEXIS 17 at *4-*5 (N.H. Feb. 10, 2012). Contrary to this directive, BSR seeks to add to the statute a word that would require each risk pool to have its own separate board:

By operating without *independent* boards of directors . . . , HealthTrust, LLC and LGC Prob. Liab. Trust, LLC are in direct violation of R.S.A. 5-B:5, I(b)

Amended Petition ¶ 86 (emphasis added). The statute does not require each risk pool to have an “independent” board of directors; it simply requires that each risk pool shall be “governed by a board” BSR’s effort to read into the statute a word that simply is not there must be rejected, as it violates *Rainville*’s prohibition against reading words in a statute that the legislature did not use. See 2012 N.H. LEXIS 17 at *4-*5.

8. Moreover, the statute expressly allows for a single risk pool—which presumably would be governed by a single board of directors—to offer multiple coverages. R.S.A. 5-B:3, III provides:

Pooled risk management programs established for the benefit of political subdivisions may provide *any or all* of the following coverages:

(a) Casualty, including general and professional liability; errors and omissions; workers' compensation and employer's liability; medical payments; or unemployment compensation as authorized under federal law.

(b) Property, including marine and inland navigation; transportation; boiler and machinery; fire; theft; or natural hazards.

(c) Vehicle, including any liability or loss arising from the ownership or operation of vehicles.

(d) Surety and fidelity.

(e) Environmental impairment.

(f) Hospital, medical, surgical or dental benefits for employees and their dependents.

(g) Life, income maintenance, accidental death and dismemberment, vision loss or impairment, or legal benefits for employees and their dependents.

(Emphasis added). The statute thus contemplates that “[p]ooled risk management programs” may provide “any or all” of the enumerated categories of coverage. The unmistakable import of the language “any or all” in this context is that a pool may provide one *or more* of the listed coverages.

9. If the legislature had provided simply that “[p]ooled risk management programs . . . may provide *any*” of the listed coverages, such language would have conveyed the idea that a program may provide health coverage, or workers compensation coverage, or some other coverage; it would be unclear whether “any” in this context meant “any one” or “one or more.” The actual statute, however, provides that “[p]ooled risk management programs . . . may

provide any *or all*” of the listed coverages, a formulation—“any *or all*”—that makes clear that a program may offer more than one coverage (“all”).

10. The alternative reading—that the word “all” just signifies that different programs may offer different coverage—would render the words “or all” superfluous, it being obvious (and thus unnecessary for the legislature to spell out) that different programs may offer different coverages. To give the words “any *or all*” meaning, as required by basic principles of statutory construction, it is necessary to read them as providing that a single 5-B Pool may offer “all” of the listed coverage. *See Appeal of Village Bank & Trust Co.*, 124 N.H. 492, 495 (N.H. 1984) (“It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”)(internal quotation marks omitted); *Appeal of Public Serv. Co.*, 125 N.H. 46, 54 (N.H. 1984) (noting “the customary presumption that the legislature does not waste words or enact redundant provisions.”).

11. If a risk pool can provide more than one type of coverage, then the statute necessarily contemplates a single board of directors overseeing multiple coverage pools—which is what BSR objects to here. *See R.S.A. 5-B:5, I* (“Each pooled risk management program shall . . . (b) [b]e governed by a board”—no requirement that each pool be governed by a *separate* board).

12. Given that the statute permits a single risk pool—which would necessarily be governed by a single board of directors—to offer multiple coverages (such as health coverage and workers compensation coverage), the legislature must have understood that a single board of directors could govern multiple coverage pools. Nothing in the statute requires that these multiple coverage pools have identical membership rosters; the statute says simply that “[p]ooled risk management programs established for the benefit of political subdivisions may provide *any or all* of the following coverages” BSR’s assertion that LGC’s corporate structure is contrary to “the intent and requirements of R.S.A. 5-B,” because it “utilizes one single board to govern the operations of the three (3) different 5-B Pools,” is unsupported by the actual text of the statute. Amended Petition ¶77.

B. R.S.A. 5-B Does Not Prohibit Multiple Risk Pools from Sharing a Set of Bylaws

13. BSR further complains that LGC is structured so that multiple risk pools are governed “according to one set of bylaws.” Amended Petition ¶77. According to BSR, this arrangement “violates the intent and requirements of R.S.A. 5-B” *Id.*

14. The statute requires that “[e]ach pooled risk management program shall . . . (e) [b]e governed by written bylaws which shall detail the terms of eligibility for participation by political subdivisions, the governance of the program and other matters necessary to the program’s operation.” R.S.A. 5-B:5, I (emphasis added). This is another clear, unambiguous requirement with which LGC has complied.

15. It is undisputed that LGC’s pooled risk management programs are “governed by written bylaws,” as the statute requires. The statute does not say that two or more risk pools may not share a set of bylaws.

16. BSR seeks to add to the statute a word that would require each risk pool to have its own separate bylaws:

By operating without . . . *independent* bylaws, HealthTrust, LLC and LGC Prob. Liab. Trust, LLC are in direct violation of R.S.A. 5-B:5, . . . I(e).

Amended Petition ¶ 86 (emphasis added). But the statute does not require each risk pool to have “independent” bylaws; it simply requires that each risk pool shall be “governed by bylaws” *See Rainville*, 2012 N.H. LEXIS 17 at *4-*5 (courts may not “add words [to a statute] that [the legislature] did not see fit to include.”). LGC has met the statutory requirements with respect to its bylaws.

C. BSR Identifies no Breach of Fiduciary Duty or Conflict of Interest Principles

17. BSR charges LGC with violating “basic concepts of fiduciary duty and conflicts of interest” (Amended Petition ¶77), but cites no case law or other legal authority (other than R.S.A. 5-B:5 itself) in support of these allegations. Given that the statute expressly permits a single board to govern 5-B Pools offering multiple coverages, and nothing in the statute requires an “independent” board of directors or bylaws, BSR’s allegation that LGC’s structure violates “basic concepts of fiduciary duty and conflicts of interest” is unconvincing. It cannot be an

“inherent” breach of fiduciary duty or conflict of interest principles to structure a risk pool business as authorized by state law. Amended Petition ¶¶77, 78, 85.

18. BSR further objects to alleged “transfer[s] of funds from a 5-B Pool governed by the LGC Board to one of the non-5-B Pool entities also governed by the LGC Board.” Amended Petition ¶78. BSR alleges that, “[i]n addition to inter-pool transfers, the LGC Board has distributed funds from the 5-B Pools to LGC Parent and LGC Real Estate, Inc. as ‘distributions to parent’ for property purchases, building improvements, and other activities that accrue to the benefit of LGC, Inc. and, at least in part, do not benefit or relate to operation of the 5-B Pools.” Amended Petition ¶37.

19. The problem with this theory is that nothing in the statute says that a 5-B Pool may not spend money on property purchases or building improvements. On the contrary, it makes good sense that a 5-B Pool might wish to purchase or improve a building in connection with its risk pool business. Again, if a single 5-B Pool could offer multiple coverages and purchase or improve buildings—and nothing in the statute says it could not—there is no reason why a single corporate parent may not operate multiple 5-B Pools and purchase or improve buildings in connection with those operations.

20. Nor does the statute require that if a single Board of Directors governs more than one risk pool, the risk pools so governed must have identical membership lists. *See* Amended Petition ¶82.

21. BSR’s conclusory assertion that “[t]he intent and purpose of the board and bylaw requirements in R.S.A. 5-B:5, I(b) and (e) is to prevent just the type of inherent conflicts of interest and transfers of funds between Pools and between the Pools and related non-pool entities that occurred here” (Amended Petition ¶ 85) reflects one possible way of ordering the risk pool universe, but not the one presently found in the statute. Because the statute provides clear requirements that LGC has met, it is unnecessary to look to its “intent and purpose” to discern its meaning.²

² In LGC’s Motion to Dismiss Count II of the Amended Petition on the Grounds that the Bureau of Securities Regulation Has Improperly Failed to Promulgate Rules under R.S.A. 5-B, and the Statute Unconstitutionally Delegates Unlimited Legislature Authority to the Bureau and Is Unconstitutionally Vague, LGC argues that Count II should be dismissed because BSR improperly failed to promulgate rules to give meaning to statutory language that provides no clear standard against which LGC could measure its conduct. That argument also applies to BSR’s claims in Count I that “independent” boards of directors

III. Conclusion

Taking the facts as alleged in the Amended Petition, nothing in R.S.A. 5-B prohibits the conduct in which LGC has engaged. Because the facts as alleged do not constitute a legal basis for relief under the statute, Count I of the Amended Petition should be dismissed.

WHEREFORE, LGC respectfully requests that the Hearing Officer:

- A. Dismiss Count I of the Amended Petition against LGC on the ground that the facts as alleged with respect to LGC’s corporate structure do not constitute a legal basis for relief under the statute; and
- B. Grant any other such relief as may be necessary and proper.

Respectfully submitted,

LOCAL GOVERNMENT CENTER, INC.;
LOCAL GOVERNMENT CENTER
REAL ESTATE, INC.;
LOCAL GOVERNMENT CENTER
HEALTHTRUST, LLC;
LOCAL GOVERNMENT
HEALTHTRUST, LLC;
LOCAL GOVERNMENT CENTER
PROPERTY-LIABILITY TRUST,
LLC;
HEALTHTRUST, INC.;
NEW HAMPSHIRE MUNICIPAL
ASSOCIATION PROPERTY-
LIABILITY TRUST, INC.;
LGC-HT, LLC; AND
LOCAL GOVERNMENT CENTER
WORKERS’ COMPENSATION
TRUST, LLC,

and bylaws are required for each risk pool entity, and to BSR’s other allegations in Count I, and LGC incorporates that argument (that BSR’s claims fail because it never promulgated rules to apprise LGC of its interpretation of the statutory language) into this motion by this reference.

By Their Attorneys:
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Dated: March 12, 2012

By: /s/ William C. Saturley

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CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of March delivered copies of this pleading to all counsel.

/s/William C. Saturley