

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT  
2012 TERM

NO. \_\_\_\_\_

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 Trust, Inc.; LGC-HT, LLC, Local Government  
Center Workers' Compensation Trust, LLC

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APPEAL BY PETITION PURSUANT TO RSA 5-B:4-a, VIII;  
RSA 541:6; AND SUPREME COURT RULE 10

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**Counsel for Appellants:**

William C. Saturley, Esq.  
Brian M. Quirk, Esq.  
Preti Flaherty Beliveau &  
Pachios, PLLP  
P.O. Box 1318  
Concord, NH 03302-1318  
[wsaturley@preti.com](mailto:wsaturley@preti.com)  
[bquirk@preti.com](mailto:bquirk@preti.com)  
(603) 410-1500

David I. Frydman, Esq.  
Local Government Center, Inc.  
25 Triangle Park Drive  
Concord, NH 03301  
[dfrydman@nhlgc.org](mailto:dfrydman@nhlgc.org)  
(603) 224-7447

Michael D. Ramsdell, Esq.  
Ramsdell Law Firm, P.L.L.C.  
69 Bay Street  
Manchester, NH 03104  
[mramsdell@ramsdelllawfirm.com](mailto:mramsdell@ramsdelllawfirm.com)  
(603) 606-1766

**STATE OF NEW HAMPSHIRE  
SUPREME COURT  
2012 TERM**

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**STATE OF NEW HAMPSHIRE  
SUPREME COURT  
2012 TERM**

\_\_\_\_\_) )  
**IN THE MATTER OF:** ) )  
Local Government Center, Inc., *et al* ) Case No: \_\_\_\_\_ )  
\_\_\_\_\_) )

**APPEAL BY PETITION**  
**PURSUANT TO RSA 5-B:4-a, VIII; RSA 541:6; AND SUPREME COURT RULE 10**

Local Government Center, Inc. and its affiliated entities (collectively “LGC”), pursuant to RSA 5-B:4-a, VIII, RSA 541:6, and New Hampshire Supreme Court Rule 10, hereby appeal the August 16, 2012 Final Order of Presiding Officer Donald E. Mitchell (the “Order”) and the September 24, 2012 Order Denying Motions for Reconsideration, in the matter of Local Government Center, Inc., *et al*, Case No. 2011000036, before the New Hampshire Bureau of Securities.

**A. PARTIES**

The Parties and Counsel are as follows:

Parties seeking review:

- 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 Trust, Inc.
- LGC-HT, LLC
- Local Government Center Workers’ Compensation Trust, LLC

Counsel of record:

William C. Saturley (NH Bar #2256)  
Brian M. Quirk (NH Bar #12526)  
PRETI FLAHERTY, PLLP  
PO Box 1318  
Concord, NH 03302-1318  
Tel: 603-410-1500  
Fax: 603-410-1501  
[wsaturley@preti.com](mailto:wsaturley@preti.com)  
[bquirk@preti.com](mailto:bquirk@preti.com)

David I. Frydman (NH Bar # 9314)  
LOCAL GOVERNMENT CENTER, INC.  
25 Triangle Park Drive  
Concord, NH 03301  
Tel: (603) 224-7447  
Fax: (603) 224-5406  
[dfrydman@nhlgc.org](mailto:dfrydman@nhlgc.org)

Michael D. Ramsdell (NH Bar #2096)  
RAMSDELL LAW FIRM, P.L.L.C.  
69 Bay Street  
Manchester, NH 03104  
Tel: (603) 606-1766  
Fax: (603) 669-6574  
[mramsdell@ramsdelllawfirm.com](mailto:mramsdell@ramsdelllawfirm.com)

Other parties of record:

THE BUREAU OF SECURITIES REGULATION  
N.H. DEPARTMENT OF STATE  
107 North Main Street #204  
Concord, NH 03301-4989  
Tel: (603) 271-1463  
Fax: (603) 271-7933

Counsel of record:

Earle F. Wingate, III  
Jeffrey D. Spill  
Adrian LaRochele  
Eric Forcier  
NH Bureau of Securities Regulation  
State House Room 204  
107 North Main Street  
Concord, NH 03301-4989  
Tel.: (603) 271-1463  
Fax: (603) 271-7933  
[Earle.Wingate@SOS.NH.GOV](mailto:Earle.Wingate@SOS.NH.GOV); [JSpill@SOS.NH.GOV](mailto:JSpill@SOS.NH.GOV);  
[Adrian.LaRochele@SOS.NH.GOV](mailto:Adrian.LaRochele@SOS.NH.GOV); [Eric.Forcier@SOS.NH.GOV](mailto:Eric.Forcier@SOS.NH.GOV)

Andru H. Volinsky  
Roy W. Tilsley, Jr.  
Christopher G. Aslin  
BERNSTEIN, SHUR, SAWYER & NELSON, P.A.  
P.O. Box 1120  
Manchester, NH 03104  
Tel: (603) 623-8700  
Fax: (603) 623-7775  
[avolinsky@bernsteinshur.com](mailto:avolinsky@bernsteinshur.com)  
[rtilsey@bernsteinshur.com](mailto:rtilsey@bernsteinshur.com)  
[Caslin@bernsteinshur.com](mailto:Caslin@bernsteinshur.com)

**B. DECISIONS AND ORDERS SUBJECT TO APPEAL (SEE APPENDIX)**

- a) Presiding Officer Mitchell's Final Order (August 16, 2012)
- b) Respondents' Motion for Reconsideration of Final Order (September 14, 2012)
- c) Presiding Officer Mitchell's Order Denying Motions for Reconsideration (September 24, 2012)

**C. QUESTIONS PRESENTED FOR REVIEW**

1. Constitutional Violations:

- a) Did the Presiding Officer violate LGC's right to fair notice and due process by imposing requirements upon LGC that do not exist in RSA 5-B and that were never established via rulemaking?

- b) Did the Presiding Officer retroactively apply RSA 5-B when he held that he could undo transfers executed before the Bureau obtained regulatory authority in June 2010?
- c) Did the Presiding Officer violate LGC's due process rights by failing to disqualify himself, when he had a direct pecuniary interest in the continuation of the case and an indirect pecuniary interest in its outcome?

2. Reserve Requirements:

- a) Did the Presiding Officer err as a matter of law by imposing reserve requirements found nowhere in RSA 5-B?
- b) Did the Presiding Officer err as a matter of law in requiring annual return of excess reserves in cash, when RSA 5-B is silent as to the means by which surplus must be returned?
- c) Did the Presiding Officer err as a matter of law in ruling that amounts invested in capital assets, necessary for the operation of the risk pool, are excess reserves which must be returned?

3. Corporate Structure:

Did the Presiding Officer err as a matter of law in ruling that LGC's corporate structure violated RSA 5-B, when the statute does not prohibit a single board of directors or set of bylaws for multiple risk pools?

4. Strategic Support of the Workers' Compensation Pool:

- a) Did the Presiding Officer err as a matter of law in ruling that strategic support for the Workers' Compensation pool violated RSA 5-B, when the Board of Directors exercised their reasonable business judgment and determined the support would benefit all of LGC's members?
- b) Did the Presiding Officer err as a matter of law in ruling that the Property-Liability pool is responsible to repay funds contributed by the HealthTrust pool to support the Workers' Compensation pool?

5. Additional Errors of Statutory Interpretation:
- a) Did the Presiding Officer err as a matter of law in barring LGC from setting its own membership requirements, when RSA 5-B does not prohibit such membership requirements and the Bureau of Securities Regulation withdrew its related claim?
  - b) Did the Presiding Officer err as a matter of law in finding that Property-Liability Trust violated RSA 5-B, when the Presiding Officer shifted the burden to LGC to prove that its method of calculating the net assets of the pool was consistent with the requirements of RSA 5-B?
  - c) Did the Presiding Officer err as a matter of law in requiring LGC to purchase reinsurance, when RSA 5-B expressly permits risk pool entities to self-insure?
  - d) Did the Presiding Officer err as a matter of law in ruling that certain real estate transfers violated RSA 5-B, when the statute does not prohibit such transfers and the transfers occurred before the Bureau had regulatory authority?
  - e) Did the Presiding Officer err as a matter of law in ruling that payment of certain administrative expenses violated RSA 5-B, when the statute permits expenses for the administration of a risk pool program?
  - f) Did the Presiding Officer err as a matter of law in ordering LGC to pay all of the Bureau's costs and attorneys' fees concerning all of the counts in the Amended Petition when one count was dismissed before the hearing, LGC prevailed on three of the five counts at the hearing, and the Individual Respondents prevailed on all of the counts asserted against them?
  - g) Did the Presiding Officer exceed his authority in ordering certain relief neither RSA 5-B nor RSA 421-B empowers him to grant, and thereby violate LGC's constitutional and statutory rights?

**D. CONSTITUTIONAL PROVISIONS OR STATUTES (SEE APPENDIX)**

- a) Fifth Amendment to the United States Constitution
- b) Fourteenth Amendment to the United States Constitution
- c) Part I, Article 15 of the New Hampshire Constitution
- d) Part I, Article 23 of the New Hampshire Constitution
- e) Part I, Article 35 of the New Hampshire Constitution

- f) New Hampshire Revised Statutes Annotated § 5-B
- g) New Hampshire Revised Statutes Annotated § 421-B:26-a
- h) New Hampshire Revised Statutes Annotated § 541

**E. RELEVANT CONTRACTS**

The instant case on appeal has no insurance policies, contracts, or other documents central to it.

**F. STATEMENT OF THE CASE**

Local Government Center, Inc. (“LGC”) is a non-profit organization, governed by an active Board of Directors made of up local, municipal, school, and county representatives, including elected officials, employees, and management. As a supportive resource for local governments, LGC provides programs and services that strengthen the ability of New Hampshire municipalities, schools, and county governments to serve the public. LGC has existed since 1941.

This case is about LGC’s administration of its pooled risk management program, specifically, its risk pools in the forms of Local Government Center HealthTrust, Local Government Center Property-Liability Trust, and Local Government Center Workers’ Compensation Trust. The HealthTrust risk pool (“HealthTrust”) covers over 75,000 individual public employees, their dependents, and retirees. As part of that coverage, HealthTrust offers 36 separate medical plans, and 25 prescription drug plans. Each year HealthTrust handles approximately \$360 million in claims on behalf of those 75,000 individuals. The Property-Liability Trust risk pool (“PLT”) covers approximately 4,100 buildings and their contents within the state, with a value of nearly \$4 billion. The Workers’ Compensation risk pool covers 26,000 public employees. Through these risk pools, LGC provides effective, affordable, and comprehensive risk coverage to public employees of New Hampshire and their families.

On June 14, 2010, the New Hampshire legislature amended the pooled risk management program statute, RSA 5-B, to permit the Secretary of State, for the first time, to investigate and regulate RSA 5-B entities. Under RSA 5-B:4-a,VI, any regulatory actions are conducted in accordance with RSA 421-B:26-a, by the Bureau of Securities Regulation (“the Bureau”).

Once given this authority, the Secretary chose to forgo any rulemaking, or any other prospective regulation under RSA 5-B. Nevertheless, the Bureau filed a Petition against LGC in September 2011, alleging violations of RSA 5-B and 421-B. The Bureau amended the Petition in February 2012.

The Amended Petition alleged that LGC’s method of calculating risk pool reserves was improper and its reserve levels excessive; that its corporate structure violated RSA 5-B:5, because one board of directors and one set of bylaws governed more than one risk pool; and that LGC had violated certain provisions of the New Hampshire securities laws. LGC filed four separate motions to dismiss, arguing that RSA 5-B is silent as to the specific methodology for the setting of reserves, and leaves this decision to the sound business judgment of a risk pool’s board of directors. LGC further argued that nothing in RSA 5-B prohibited LGC’s corporate structuring or its means of conducting its business.

The Presiding Officer—a former state employee—was appointed by the Secretary without Governor or Executive Council approval. While he was to be paid an amount not to exceed \$30,000 pursuant to the original contract, he received two contract extensions and was eventually paid more than \$130,000 for his work on this matter, because it was based on the duration of the proceeding. On at least three occasions during the proceeding, the Presiding Officer denied LGC’s motion to dismiss, including one arguing that he disqualify himself from hearing the case because of his pecuniary interest in its duration and its outcome.

An evidentiary hearing was held over two weeks in April and May of 2012. In his Final Order issued in mid-August 2012, the Presiding Officer ruled *inter alia* that LGC had violated RSA 5-B by failing to limit its reserves to fifteen percent (15%) of claims or a risk-based capital (“RBC”) ratio of 3.0 (Order at 74-77); that LGC’s corporate structure violated RSA 5-B (Order at 73-74); that one of the pools failed to use an appropriate method of valuation (Order at 77-78); that LGC could not set its own membership requirements (Order at 74); that certain expenses were not permitted (Order at 43-45); and that LGC had violated RSA 5-B by providing strategic support to its Workers’ Compensation risk pool (Order at 78-79). The Presiding Officer further ordered LGC to return excess reserves in cash on an annual basis (Order at 75-76); to purchase reinsurance (Order at 75); to undo real estate and financial transfers made before the Bureau obtained regulatory authority over risk pools in June 2010 (Order at 78-79); to return capital assets (Order at 43-44); and to pay all of the Bureau’s costs (Order at 80). The Presiding Officer ruled in LGC’s favor on the securities claims (Order at 70).

On September 14, 2012, LGC filed a Motion for Reconsideration and a Motion to Stay the Order with the Presiding Officer. On September 24, 2012, the Presiding Officer denied both motions.

#### **G. JURISDICTIONAL BASIS FOR APPEAL**

The jurisdictional bases for this appeal are RSA 421-B:26-a, RSA 5-B:4-a, VIII, and RSA 541:6.

#### **H. REASONS FOR ACCEPTING THE APPEAL**

There are substantial differences of opinion regarding the questions presented in Section C, *supra*, and RSA 5-B has not been tested before or interpreted by this Court. As set forth below, acceptance of this appeal would protect LGC from substantial and irreparable injury, and

allow this Court to decide, modify, or clarify multiple issues of first impression concerning the requirements of, and constitutional limitations on, RSA 5-B.<sup>1</sup>

**1. Constitutional Violations:**

- a) The Presiding Officer violated LGC's right to fair notice and due process by imposing requirements upon LGC that do not exist in the statute and were never established via rulemaking.**

Due process requires an agency to give regulated entities fair notice of the standards by which their conduct will be measured. Here, the Presiding Officer invented standards that can be found in neither a statute nor any agency rules.

RSA 5-B lacks specificity as to reserve requirements; instead, the statute leaves the setting of reserve levels to the sound business judgment of a risk pool's board of directors. With no guidance in the statute, and no rules to supply the necessary detail, the Presiding Officer violated LGC's right to fair notice and due process by imposing heretofore non-existent requirements, and then sanctioning LGC for violating them. While "promulgation of a rule . . . is not necessary to carry out what a statute demands on its face," this Court has held that "[i]f the statute lacks sufficient detail on its face" to support an agency action, "then an agency must adopt rules supplying the necessary detail." *See Appeal of Blizzard*, 163 N.H. 326, 330 (2012) (quotation marks omitted).

While RSA 5-B requires the return of surplus in excess of reserves, nowhere does the statute specify that LGC must set its reserves at 15% of claims or an RBC ratio of 3.0, as the Presiding Officer required in the Order. Having provided no guidance as to where reserves levels are to be set, the Secretary cannot penalize LGC for reserving too much. *See Nevins v. N.H. Dep't of Res. and Econ. Dev.*, 147 N.H. 484, 487 (2002) ("One purpose for requiring rules is to give persons fair warning as to what standards the agency will rely on when making a

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<sup>1</sup> The following headings correspond to the Questions Presented for Review, in Section C, *supra*.

decision.”); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (“In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.”).

The legislature itself acknowledged in 2010 that RSA 5-B:5 lacks sufficient detail regarding the appropriate level of reserves, when it enacted legislation directing the Secretary of State to recommend limitations on risk pool reserves. *See* Ch. 149:6, Laws of 2010. These recommendations are still pending with the legislature. The absence of specificity evidenced by the legislature’s directive makes clear that the Presiding Officer’s mandate could not have been foreseen by LGC. Rather than applying RSA 5-B:5, the Order imposes standards of the Presiding Officer’s own invention. It therefore lacks validity, and its imposition on LGC raises important questions of state and federal constitutional law.

The Court should accept this appeal to address the substantial and irreparable injury, and constitutional violation, created by the Presiding Officer’s imposition of standards without prior notice.

**b) The Presiding Officer retroactively applied a statute, when he held that he could undo real estate and financial transfers executed before the Bureau obtained regulatory authority in June 2010.**

The Presiding Officer had no power to undo legitimate, lawful transfers between LGC’s risk pools, authorized and executed by LGC’s Board of Directors before the Bureau obtained regulatory authority over LGC in June 2010. The Presiding Officer’s Order is a retroactive application of a law, in violation of Part I, Article 23 of the New Hampshire Constitution (“Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.”); *see also*

*Norton v. Patten*, 125 N.H. 413, 415 (1984) (“[E]very statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.”) (internal quotation marks omitted).

In ordering that LGC transfer its ownership interest in its real property, and that one of the LGC risk pools (Property-Liability Trust) repay \$17 million to another (HealthTrust), when all but \$3.8 million of that amount was transferred prior to calendar year 2010 (Order at 41), the Presiding Officer violated LGC’s constitutional rights pursuant to Part I, Article 23.

The Court should accept this appeal to examine the substantial and irreparable injury done to LGC by these retroactive applications of the law.

- c) **The Presiding Officer erred by failing to disqualify himself when he had a direct pecuniary interest in the continuation of the case and an indirect pecuniary interest in its outcome.**

It is a basic principle of due process that a judicial officer should not have a pecuniary interest in the outcome of the case. *See Appeal of Grimm*, 141 N.H. 719, 721 (1997). Here, the Presiding Officer, who acknowledged that he was “not a person of significant wealth,” had an impermissible pecuniary interest created by a system that directly tied his compensation to the duration of the proceeding and to the future good will of one of the parties (the Bureau).

Because the Presiding Officer was not a permanent employee of the Bureau, but was paid bi-weekly based on the duration of the proceeding, he had a powerful financial incentive to deny LGC’s pre-hearing dispositive motions; if he had granted them he would have been paid at least \$52,500 less than he received from the Secretary of State. The Presiding Officer renegotiated his contract with the Secretary of State at least twice during the proceeding and at least once while the hearing was ongoing, causing him to receive \$100,000 more than had been authorized by the

original contract. These renegotiations were conducted without creating a record and with no notice to LGC. The Presiding Officer, having remained in the Secretary's good graces, continued to be paid based on the duration of the case.

The Presiding Officer's decision not to disqualify himself under these circumstances was erroneous and an unsustainable exercise of his discretion, and raises an important question of state and federal constitutional law. *See* Part I, Article 35 of the New Hampshire Constitution ("It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit."); *Haas v. County of San Bernardino*, 45 P.3d 280, 283 (Cal. 2002) (holding that "the practice of selecting temporary administrative Presiding Officers on an ad hoc basis and paying them according to the duration or amount of work performed" created an impermissible pecuniary interest and violated due process rights).

Accepting this appeal will protect LGC from the substantial and irreparable injury caused by the fundamentally unfair and unconstitutional compensation scheme agreed upon between the Secretary of State and the Presiding Officer.

## **2. Reserve Requirements:**

The Presiding Officer made a number of errors of statutory interpretation in the Order regarding reserve requirements, and repeatedly read requirements into RSA 5-B which are simply not there. The Order raised the following questions of first impression concerning the requirements of RSA 5-B.

### **a) The Presiding Officer erred as a matter of law by imposing reserve requirements found nowhere in the statute.**

RSA 5-B does not require a particular method for calculating reserves, nor does it establish a maximum amount of reserves a risk pool may hold. In the absence of a statutory directive or duly adopted rule, New Hampshire law leaves it to LGC's Board of Directors, in the

exercise of its sound business judgment, to determine the proper level of reserves. The Presiding Officer ignored the voluminous evidence at the hearing that LGC's Board exercised its sound business judgment in this regard. The Presiding Officer did not rule to the contrary, but simply disregarded the business judgment rule, arbitrarily declaring instead that RSA 5-B:5 requires that LGC HealthTrust's reserves be limited to "fifteen percent (15%) of claims or an RBC 3.0 as determined by the BSR, whichever is less." (Order at 76, ¶9). The Presiding Officer thus held that \$33,200,000 was "excess earnings and surplus" that must be returned to members (Order at 74-76 ¶¶6-8). In doing so, the Presiding Officer failed to acknowledge that RSA 5-B:5 permits multiple reserves and is silent as to a specific reserve level. In ordering an arbitrary reserve level and failing to analyze whether the Board acted within its discretion in exercising its business judgment to set LGC's reserves, the Presiding Officer committed an error of law.

Compounding his error, the Presiding Officer failed to acknowledge the contradiction between the rigid requirements he imposed on LGC, and the Bureau's agreements with PRIMEX and SchoolCare, the two other pooled risk management programs, entered into just weeks before the hearing. Those agreements permit PRIMEX and SchoolCare to set reserves based on the sound business judgment of their boards. The Bureau's agreements with PRIMEX and SchoolCare expressly permit their boards to set a reserve level above RBC 3.0 based upon their sound business judgment. This is consistent with the evidence presented at the hearing that LGC's Board of Directors decisions concerning its reserve levels were necessary, appropriate, and reasonable. The Presiding Officer erred as a matter of law in reading requirements into the statute that are nowhere to be found.

- b) The Presiding Officer erred as a matter of law in requiring an annual return of excess reserves in cash, when the statute is silent as to the means by which surplus must be returned.**

The statute mandates no specific mechanism by which surplus is to be returned. The evidence demonstrated that LGC's members wanted surplus returned by rate stabilization. LGC's Board additionally sought guidance from its outside corporate counsel and its actuary, and thereafter implemented the desired means of returning surplus via rate stabilization. The Presiding Officer erred in ordering LGC to use a method for returning surplus that was neither required nor desired.

- c) The Presiding Officer erred as a matter of law in ruling that amounts invested in capital assets, which are necessary for the operation of the risk pool, are excess reserves which must be returned.**

In ordering that LGC return \$2,237,390 "invested in capital assets," the Presiding Officer abused his discretion and/or committed an error of law, because the capital assets in question include computer systems, furniture, and other equipment that are necessary for the ongoing operation of HealthTrust. In declaring these capital assets "excess surplus" to be returned, the Presiding Officer committed an error of law.

These errors concerning the Presiding Officer's interpretation of RSA 5-B, as detailed in sections 2(a)-(c), *supra*, will require HealthTrust to divest itself of over \$33 million and negatively affect LGC's ability to provide risk coverage to its members. The Court should accept this appeal to protect LGC and its members from the substantial and irreparable injury that would result from enforcing the Presiding Officer's arbitrary interpretation of RSA 5-B.

**3. Corporate Structure: The Presiding Officer erred as a matter of law in ruling that LGC’s corporate structure violated RSA 5-B, when the statute does not prohibit a single board of directors or set of bylaws for multiple risk pools.**

“LGC is a single organization that owns and manages” multiple subsidiaries that “operate pooled risk management programs under chapter 5-B...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). In ordering LGC to “organize its two pooled management programs into a form that provides each program with an independent board and its own set of written bylaws” (Order at 73, ¶1), the Presiding Officer committed an error of law, as nothing in the statute requires such a form of organization.

The statute requires each pooled risk management program to be governed by a board and written by-laws. The undisputed evidence at the hearing demonstrated that LGC’s pooled risk management program is governed by a board, subject to written by-laws, as the statute requires. The Presiding Officer’s conclusion that two or more risk pools cannot be governed by a single board or set of bylaws was legal error.

The Court should accept this appeal to avoid the substantial and irreparable injury—in terms of expenditures of time, money, and personnel—which an unnecessary and unwarranted reorganization would cause LGC.

**4. The Strategic Support of the Workers’ Compensation Risk Pool:**

- a) The Presiding Officer erred as a matter of law in ruling that strategic support for the Workers’ Compensation risk pool violated RSA 5-B, when the Board of Directors exercised their reasonable business judgment and determined the support would benefit all of LGC’s members.**

RSA 5-B:3 provides that a pooled risk management program may administer itself in the manner best suited to reduce the overall risk to its members, including choices suited to

distributing, sharing, and pooling risks. In 1999, the then-separate boards of HealthTrust and Property-Liability jointly created a Workers' Compensation risk pool, having determined that it would be in the best interests of their members to establish and support such a pool, pursuant to RSA 5-B:3. In 2003, the independent boards voted to consolidate operations. In 2004, the single integrated Board continued that strategic support, based on its long-term vision of integrated risk and health management for public employees and their families.

The Presiding Officer found this financial strategic support violated RSA 5-B. In doing so, he erred as a matter of law.

- b) The Presiding Officer erred as a matter of law in ruling that one risk pool (Property-Liability Trust) must repay funds contributed by HealthTrust to a separate risk pool (Workers' Compensation Trust).**

The Presiding Officer further erred in ordering that Property-Liability Trust, LLC, rather than the Workers' Compensation pool within the LLC, was the entity responsible to re-pay the \$17.1 million of strategic support contributed by HealthTrust. This ruling was erroneous because the funds in question were received by the Workers' Compensation pool, not the Property-Liability pool.

This particular order would force the wrong LGC risk pool to return funds, and would cause a substantial and irreparable injury to the Property-Liability pool and its members. Granting the appeal on this question will protect LGC from that injury.

##### **5. Additional Errors of Statutory Interpretation:**

- a) The Presiding Officer erred as a matter of law in barring LGC from setting its own membership requirements, when the statute allows such, and the Bureau of Securities Regulation withdrew its related claim.**

The statute permits political subdivisions to form or join an association having among its purposes participation in risk management programs. RSA 5-B:3, I. The statute further enables

such an association to set its own terms of eligibility for membership in its risk pools. RSA 5-B:5,I(e). In barring LGC from requiring membership in the New Hampshire Municipal Association and/or the payment of dues in order to participate in a risk pool (Order at 74, ¶4), the Presiding Officer erred as a matter of law and violated LGC's due process rights. Further, this issue, although raised in the Bureau's original petition, was dropped from the Amended Petition, and thus was not before the Presiding Officer for decision.

- b) The Presiding Officer erred as a matter of law in finding that Property-Liability risk pool violated RSA 5-B, when he shifted the burden to LGC to prove that its method of calculating the net assets of this pool was consistent with the statute's requirements.**

The Bureau presented no evidence that Property-Liability risk pool improperly calculated its net assets. The pool, in fact, submitted evidence of its actuarial calculations. The Presiding Officer mistakenly found that LGC "did not attest to the use of an actuarially based means of determining the required net assets for this risk pool management program." Order at 77. In placing the burden on LGC to prove that its method of calculating net assets was appropriate and consistent with the requirements of RSA 5-B, the Presiding Officer committed clear error. As a result of this and additional errors, the Presiding Officer Order that \$3.1 million must be returned to members of Property-Liability risk pool was legal error.

- c) The Presiding Officer erred as a matter of law in requiring LGC to purchase reinsurance, when the statute expressly permits RSA 5-B entities to self-insure.**

The Presiding Officer erred as a matter of law in ordering that LGC immediately purchase reinsurance. *See* Order at 75, ¶7. RSA 5-B lists reinsurance (or "excess insurance") as a cost that *may* be incurred by a pooled risk management program, but not one that is required. *See* RSA 5-B:5,I(c). Indeed, the programs are specifically authorized to self-insure. *See* RSA 5-B:3,I (authorizing political subdivisions to "establish and enter into agreements for obtaining or

implementing insurance by *self-insurance*; for obtaining insurance from an insurer authorized...as an admitted or surplus lines carrier; ... *or for obtaining insurance by any combination* of the provisions of this paragraph.”) (emphasis added).

By ordering the immediate purchase of reinsurance, the Presiding Officer exceeded his authority in ordering a remedy not expressly provided to him by the statute.

- d) **The Presiding Officer erred as a matter of law in ruling that certain real estate transfers violated RSA 5-B, when the statute does not prohibit such transfers, and the transfers occurred before the Bureau had regulatory authority.**

The statute authorizes risk pools to “hold and dispose of real property . . . .” RSA 5-B:6,II. The Presiding Officer failed to specify a section of the statute the real estate transfers violated, because no such section exists. Further, as the transfers were made before the Bureau obtained regulatory authority in 2010, the Presiding Officer’s Order invalidating them was unconstitutional. *See* Section H, *Ib, supra*.

- e) **The Presiding Officer erred as a matter of law in ruling that certain payments violated RSA 5-B, when the statute permits expenses to be made for the administration of the pool.**

Risk pools under RSA 5-B have broad authority to expend funds to administer their complex and multifaceted operations. RSA 5-B:5,I(c) expressly permits the use of funds for the “administration” of the risk pools. The statute also authorizes that these programs “whether or not a body corporate, may sue or be sued; make contracts; hold and dispose of real property; and borrow money, contract debts, and pledge assets in its name.” RSA 5-B:6,II. In ruling that LGC violated RSA 5-B by establishing an employee retirement plan, and in executing and making payments under a non-compete/consulting contract with its former executive director, the Presiding Officer erred as a matter of law.

- f) The Presiding Officer erred as a matter of law in ordering LGC, which prevailed on three of the five counts of the Amended Petition, to pay all of the Bureau’s costs and attorney’s fees concerning all of the counts of the Amended Petition.**

The Bureau voluntarily dismissed one count of the Amended Petition before the adjudicatory hearing, prevailed on just two of the five counts against LGC and failed to prevail on any of the multiple counts against the two Individual Respondents at the hearing. In failing to reduce the award of costs to reflect LGC having prevailed on three of the five counts of the Amended Petition, the voluntary dismissal of one count and the Individual Respondents having prevailed on all counts pending against them, the Presiding Officer abused his discretion and erred as a matter of law in ordering LGC to pay all of the Bureau’s costs.

- g) The Presiding Officer exceeded his authority in ordering certain relief that RSA 5-B does not empower him to grant.**

RSA 5-B:4-a provides for the following remedies in a proceeding to enforce RSA 5-B: an order to cease and desist, fines, rescission, restitution, or disgorgement. The Presiding Officer erred as a matter of law in ordering the following relief not authorized under RSA 5-B: permitting the Bureau to “impose a higher limit or different methodology for calculating required net assets” on LGC HealthTrust (Order at 77, ¶10); authorizing the Bureau to pre-approve loan terms before LGC Property-Liability Trust can borrow funds (Order at 78, ¶ 13); directing the Bureau to pre-approve the actuarial analysis LGC Property-Liability Trust plans to use to determine its required net assets (Order at 78, ¶12); penalizing LGC’s risk pools with forfeiture of their statutory exemption from the state’s insurance laws and from state taxation granted by RSA 5-B:6 (Order at 73, ¶2); requiring the immediate purchase of reinsurance (Order at 75, ¶7); and mandating how the management of LGC Real Estate, Inc., is to be structured. (Order at 79, ¶15).

A substantial basis exists for a difference of opinion on the Presiding Officer's interpretation of the requirements RSA 5-B imposes on a risk pool program. This Court should review these issues. This review will offer the Court an opportunity to decide, modify, or clarify issues of first impression concerning RSA 5-B, and will protect LGC from the substantial and irreparable injuries, caused by the Presiding Officer's erroneous pronouncements.

**I. STATEMENT OF PRESERVATION OF THE ISSUES**

Counsel for LGC hereby certifies that every issue specifically raised herein was presented to the administrative agency, and was preserved for appellate review by a properly filed Motion for Reconsideration.

**J. CONCLUSION**

For the reasons stated above, LGC requests that this Court accept this appeal, and direct the submission of briefs and the scheduling of oral argument.

Respectfully submitted,

LOCAL GOVERNMENT CENTER, INC., *et al*  
By Their Attorneys:

Dated: October 15, 2012

By: /s/ William C. Saturley  
William C. Saturley (NH Bar #2256)  
Brian M. Quirk (NH Bar #12526)  
PRETI FLAHERTY, PLLP  
PO Box 1318  
Concord, NH 03302-1318  
Tel: 603-410-1500  
Fax: 603-410-1501  
[wsaturley@preti.com](mailto:wsaturley@preti.com)  
[bquirk@preti.com](mailto:bquirk@preti.com)

/s/ David I. Frydman  
David I. Frydman (NH Bar # 9314)  
LOCAL GOVERNMENT CENTER, INC.  
25 Triangle Park Drive  
Concord, NH 03301  
Tel: (603) 224-7447  
Fax: (603) 224-5406  
[dfrydman@nhlgc.org](mailto:dfrydman@nhlgc.org)

/s/ Michael D. Ramsdell  
Michael D. Ramsdell (NH Bar #2096)  
RAMSDELL LAW FIRM, P.L.L.C.  
69 Bay Street  
Manchester, NH 03104  
Tel: (603) 606-1766  
Fax: (603) 669-6574  
[mramsdell@ramsdelllawfirm.com](mailto:mramsdell@ramsdelllawfirm.com)

**CERTIFICATE OF SERVICE**

I certify that on the 15<sup>th</sup> day of October, 2012, I filed an original and eight printed copies of this *Appeal by Petition* with the New Hampshire Supreme Court, forwarded one copy of this pleading *via* U.S. mail and e-mail to all counsel of record, forwarded two copies to the New Hampshire Bureau of Securities Regulation; and forwarded one copy to the New Hampshire Department of Justice.

/s/ William C. Saturley

**STATE OF NEW HAMPSHIRE  
SUPREME COURT  
2012 TERM**

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