

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

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

MOTION FOR STAY PENDING APPEAL

Local Government Center, Inc. and its affiliated entities (collectively “LGC”), pursuant to RSA 5-B:4-a,VIII, RSA 541:18, and N.H. Sup. Ct. R. 7-A, respectfully move for a stay of 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.¹

I. Introduction: A Case of Firsts.

This is a case of firsts. It is the first enforcement action under RSA 5-B pursued by the New Hampshire Bureau of Securities Regulation (the “Bureau”), which only gained authority to investigate and enforce RSA 5-B in 2010. The adjudicatory hearing was the first of its kind. The interpretations of RSA 5-B reached by the Presiding Officer are issues of first impression. The case also, for the first time, examines the power of a hearing officer to impose requirements and remedies on a pooled risk management program under RSA 5-B, questions of due process and fair notice under the state and federal constitutions, and questions surrounding the

¹ Pursuant to New Hampshire Supreme Court Rule 7-A, attached to this Motion at Appendix 1-3, are LGC’s Motion to Stay the Presiding Officer’s Final Order, Presiding Officer Mitchell’s Order Denying a Stay, and Presiding Officer Mitchell’s Final Order.

constitutionality of a fundamentally unfair compensation scheme agreed to by the Secretary of State and the Presiding Officer.

While this Court examines the Presiding Officer's novel interpretation of RSA 5-B, and considers LGC's constitutional and other legal arguments challenging his decision, the Order should be stayed. LGC and its members will suffer irreparable harm if the Order is given immediate effect; the harm to LGC and its members outweighs the public interest in enforcing the Order for the limited duration of the appeal; and LGC is likely to prevail on its arguments that the Order should be vacated in whole or in part.

II. Background: Enforcement of the Order During LGC's Appeal Will Require a Radical Restructuring of LGC's Operations, Unnecessarily.

On September 2, 2011, the Secretary of State issued a Notice of Order granting the Bureau's Staff Petition. The Bureau amended its Staff Petition on February 17, 2012. The Amended Petition alleged that LGC's method of calculating reserves, which it had been following for a decade, was improper, and its reserve levels excessive; that its corporate structure, first put in place in 2003, violated RSA 5-B:5 because one board of directors and one set of bylaws governed more than one risk pool; and that LGC (and, apparently, the entire risk pool industry) had violated the New Hampshire securities laws. An evidentiary hearing was held over two weeks in April and May of 2012. The Presiding Officer issued his Order in mid-August. The Order found for the Bureau on the issues of the calculation of reserves, corporate structure, and other questions concerning the interpretation of RSA 5-B, but found for LGC on the securities law issues.

LGC moves for a stay because the Order requires it to radically restructure its business in ways that will be extraordinarily difficult to undo if, and when, LGC prevails on its appeal. Among its 21 distinct commands, the Order: (1) directs LGC to reorganize its pooled risk

management programs within 90 days or lose its exemption from state insurance laws and state taxation; (2) mandates the distribution of LGC's real estate subsidiary within 90 days; (3) imposes a fixed ceiling, rather than a floor, on the amount of reserves held by HealthTrust for the benefit of 75,000 covered lives; (4) compels LGC to develop plans for the return of \$33,200,000 to members of the HealthTrust risk pool and \$3.1 million to members of the Property-Liability Trust risk pool; (5) requires the Property-Liability Trust risk pool to incur debt in a multi-million dollar amount, and to transfer \$17.1 million to the HealthTrust risk pool; and (6) requires HealthTrust to immediately expend millions to purchase reinsurance, in spite of its Board's reasonable determination to pursue an alternate, less expensive way of insuring against risk. LGC believes each and every one of these elements of the Order is in error.

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. Absent a stay, LGC will be required *inter alia* to reorganize itself in fundamental ways and execute transfers of over \$53 million, none of which will be required if LGC prevails on its appeal.

III. The Order Should Be Stayed Pending the Disposition of LGC's Appeal.

RSA 541:18 permits this Court to suspend an order "pending the determination of [an] appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension." Justice requires a stay in this case because "[m]eaningful [appellate] review entails having the reviewing court take a fresh look at the decision of the [Presiding Officer] before it becomes irrevocable." *See Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (imposing stay to preserve *status quo*); *see also New Hampshire Milk Dealers' Association & a. v. New Hampshire Milk Control Board*, 107 N.H. 150, 151 (1966) (granting a conditional stay

because “this court is unable to properly assess the merits or the deficiencies of the various contentions of the parties” until “the case is argued on its merits on the appeal.”).

This Court has determined that stays under RSA 541:18 are appropriate where the appellant demonstrates that it “will suffer irreparable harm, occasioned by circumstances beyond his control, if the order is given immediate effect,” and “the harm to the [appellant] outweighs the public interest in enforcing the order for the duration of the appeal.” *Union Fidelity Life Ins. Co. v. Whaland, Ins. Commissioner*, 114 NH 549, 550 (1974). It is also relevant to the stay inquiry that LGC is likely to prevail on its appeal, as the Order contains numerous errors of statutory interpretation and deprives LGC of its constitutional rights. In short, as explained below in more detail, the requirements for a stay are met in this case.

A. LGC and Its Members Will Suffer Irreparable Harm, Absent a Stay.

If LGC is required to adhere to the numerous requirements of the Order before this Court has ruled on the merits of its appeal, LGC and its risk pools will be subjected to enormous disruption and expense, amounting to irreparable harm. The Order directs LGC (*inter alia*) to undertake a full-scale corporate restructuring of its risk pool programs; reorganize and distribute the assets of its real estate subsidiary; adopt a new reserve calculation methodology that is at odds with the business judgment of LGC’s Board of Directors; return over \$53 million² to its members; and purchase reinsurance. If LGC were to take these major steps and then prevail on its appeal, it will have fundamentally changed its corporate structure (to create, fund, and operate new entities as required by the Presiding Officer); its financial position (including the divestiture of over \$53 million of assets that LGC’s Board of Directors believes should be retained as

² This figure is derived by adding up the \$33,200,000 ordered to be returned to members of the HealthTrust risk pool by September 1, 2013, the \$3.1 million to be returned to members of the Property-Liability Trust risk pool by September 1, 2013, and the \$17.1 Property Liability Trust is to transfer to HealthTrust, with HealthTrust in turn to return the \$17.1 to members by December 31, 2013, if HealthTrust’s reverses otherwise exceed the low ceiling the Order sets.

reserves to cover unexpected future claims and losses); its method of setting reserves (a core discretionary aspect of LGC's business); and other aspects of its business, for no reason. This will cause irreparable harm to LGC and its members.

1. The Mandated Corporate Restructuring and Intra-Corporate Transfers Will Completely Transform LGC – at Great Expense of Time and Money.

It is no simple matter for an entity of LGC's size and complexity to restructure itself. Though separate stand-alone corporations exist which can be used for this purpose (Order Denying Motion to Stay, at ¶ 5), their status is just the first step in the corporate reorganization process. Reorganizing a \$400 million enterprise like LGC will require far more than filing a form with the Secretary of State; it will require the actual transfer of assets and liabilities between risk pool entities. If the Presiding Officer's Order is then reversed on appeal, LGC will no longer hold legal title to its own assets.

Specifically, the mandated corporate restructuring will require, among other things, the transfer of the pools to different governing boards of directors, different staffing arrangements, altered budgets and financial accounting, and new contractual relationships with third-parties. Everything about how LGC's pooled risk management programs operate—from who works for which pool, to how pool employees are paid, to issues of office management and computer services—will have to be reexamined and reconfigured. Such a reorganization on any timescale will cause a massive disruption to LGC's business and its ability to deliver services to its members; to achieve the reorganization in just 90 days will further exacerbate the disruption. Yet if LGC fails to comply with this directive, pursuant to the Order it will lose its exemption from state insurance laws and state taxation, an enormous and irreparable penalty to impose on LGC and its members.

To require Local Government Center Property-Liability Trust, LLC to “re-pay the \$17.1 million subsidy to the Local Government Center HealthTrust risk pool management program” (Order at 78 ¶13) will impose a liability on a risk pool that received no corresponding benefit, as the funds in question were transferred to the Workers’ Compensation pool, not the Property-Liability pool. This aspect of the Order will result in significant increases in premiums for coverages for Property-Liability pool members (separate from the Workers’ Compensation pool members, who received the benefit of the transferred funds), and likely will result in destabilization of the Property-Liability risk pool, causing irreparable harm to members of that pool and LGC as a whole.

Compliance with the Presiding Officer’s directive concerning Local Government Center Real Estate, Inc. (Order at 79, ¶15) will force LGC to transfer its ownership interest in a property valued at more than \$10 million. The conveyance may trigger significant real estate transfer tax liability pursuant to RSA 78-B. If this portion of the Order were then overturned on appeal, and the transfers reversed, additional tax liability may be triggered. This will cause further irreparable harm to LGC and its members.

2. The Change in the Setting of Reserves, and the Consequent Distribution of Millions of Dollars, Will Deplete LGC’s Ability to Protect its Members, and Disrupt Political Subdivision Budgeting.

The Presiding Officer suggests that it will be a minor inconvenience if LGC were to return over \$53 million to its members and then prevail on its appeal, because according to him, the \$53 million “may simply be returned as fungible contributions by the recipient political subdivision members.” Order Denying Motion to Stay, September 24, 2012, at ¶ 5. Contrary to the Presiding Officer’s belief, it is no simple or easily reversible matter to distribute over \$53

million to dozens of political subdivisions with different memberships, and then subsequently demand that amount back.

To comply with the Order, LGC will have to distribute the funds to its member political subdivision. Should LGC then prevail on appeal, LGC will need to sharply increase premiums to restore its reserves to the level the Board of Directors determined to be prudent – exactly the lack of predictability LGC’s members dread. Sharply increasing premiums, to rebuild reserves that had been previously developed over years, will prompt members to leave the pools, further exacerbating the premium problem, unnecessarily.

Moreover, LGC’s reserves guard against unexpected future claims and losses. Such claims and losses, by definition, cannot be predicted in advance. But if a contingency of the type the Board of Directors has prepared for were to come to pass, and LGC lacked sufficient reserves to deal with it—because it had divested itself of a substantial portion of its reserves to conform to the dangerously low reserve ceiling set by the Order—LGC will be in the untenable financial position of not having enough money to cover the claims for which it was responsible. That, too, will constitute irreparable harm, and will be devastating to the organization and the individuals who placed their trust in LGC to hold appropriate reserves to cover both anticipated and unanticipated claims.

3. The Mandated Purchase of Reinsurance Costs Millions – Unnecessarily.

If LGC HealthTrust is required to purchase reinsurance, it will have to pay hundreds of thousands of dollars in premiums. Moreover, any reinsurance vendor will be subject to the New Hampshire Vaccine Association assessment (RSA 126-Q) and the New Hampshire Health Plan assessment (RSA 404-G:2), which will add more than two million dollars in costs (on top of the actual reinsurance premiums) that will be passed on by the reinsurer to the HealthTrust risk pool.

If this requirement is then vacated on appeal, HealthTrust will have unnecessarily expended millions of dollars, an irreparable and unnecessary harm to HealthTrust and its members.

B. The Harm to LGC and Its Members, Absent a Stay, Outweighs Any Public Interest in Enforcing the Order While the Appeal Is Pending.

LGC provides vital services to its member municipalities, and it is in the interest of the member municipalities that LGC retain a stable organizational structure, and its reserves remain at a stable, predictable level, while this appeal progresses. If LGC is compelled to restructure itself and to dissipate its assets, and then undo that restructuring, LGC's ability to provide services to its member municipalities will be undermined. It is in no one's interest for LGC to undergo such changes precipitously.

Nor would the Bureau experience any harm if the Order is stayed. The Bureau's interest lies in the proper enforcement of the statute it is charged with administering, not in its rushed enforcement before this Court has ruled. Until the appellate process has run its course, the requirements of RSA 5-B, and the authority of the Bureau and the Presiding Officer under RSA 421-B:26-a, remain uncertain. The public has no interest in enforcing a potentially flawed Order before that uncertainty has been resolved.

RSA 5-B was amended just two years ago to provide the Secretary of State, for the first time, with authority to investigate violations of RSA 5-B and pursue enforcement actions. The unusual number of issues of first impression in this appeal provides yet another reason why a stay is appropriate, so that the first-ever adjudicatory interpretation of the statute does not visit irreparable harm upon LGC and its members until this Court has completed its review.

To secure a stay, LGC must establish that "the harm to [LGC] outweighs the public interest in enforcing the order for the duration of the appeal." *Union Fidelity*, 114 NH at 550. In

this case, the “public” that is affected by the Order is LGC’s member political subdivisions, who rely on LGC for risk management. Staying the Order actually serves their interests, as well.

C. LGC Is Likely to Prevail on Its Appeal.

As LGC has explained in greater detail in its Appeal by Petition, LGC is likely to prevail on its appeal. In particular, and without limitation, LGC is likely to prevail on its arguments that the Presiding Officer (1) 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; (2) violated LGC’s right to due process by failing to disqualify himself where he had a pecuniary interest in the duration and outcome of the case; (3) erred in his interpretation of RSA 5-B by imposing reserve requirements and other requirements found nowhere in the statute; (4) erred in requiring annual return of excess reserves in cash where the statute is silent as to the means by which surplus must be returned; (5) erred in ruling that LGC’s corporate structure violated RSA 5-B where the statute does not prohibit a single board of directors or set of bylaws to govern multiple risk pools; and (6) erred in holding that he could undo transfers executed before the Bureau obtained regulatory authority in June 2010. The strength of LGC’s arguments on these and other novel legal issues decided by the Presiding Officer for the first time are laid out in detail in that document, and their content incorporated herein. Their content, and the likely result of the appeal overturning the Order, further supports LGC’s argument for a stay.

IV. Conclusion: A Stay is Appropriate Under the Circumstances.

If the Order becomes final before this Court has ruled on LGC’s appeal, LGC and its members will suffer irreparable harm. LGC will completely restructure the operation of its risk pools, distribute its real estate assets, and strip its risk pools of over \$53 million of assets that LGC’s Board of Directors determined are necessary to cover unexpected future claims or losses.

In the short term, these significant changes will impact the quality of LGC's services, and in the long-term will devastate the structure and operations of LGC's multiple risk pools.

Upon the completion of the appellate process, the pending questions regarding RSA 5-B and 421-B:26-a will be resolved. If the questions are answered consistent with the Order, LGC will promptly comply with its terms. But until that point is reached, and the requirements of the Order could still be overturned, modified, or reversed, denying a stay and forcing LGC to adhere to the numerous and far-reaching requirements of the Order will cause irreparable harm to LGC and its members, while not advancing either the public interest or the interests of justice. The Order should therefore be stayed until this Court has ruled on LGC's pending appeal.

WHEREFORE, LGC respectfully requests that this Court:

- A. Stay the Final Order of August 16, 2012 until the appellate process in this case is completed; and
- B. Grant any other such relief as may be necessary and proper.

Respectfully submitted,

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

Dated: October 15, 2012

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CERTIFICATE OF SERVICE

I certify that on the 15th day of October, 2012, I filed an original and eight printed copies of this *Motion for Stay Pending Appeal* with the New Hampshire Supreme Court, forwarded one copy of this pleading *via* U.S. mail 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