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September 25, 2009

**Via Hand Delivery**

State of New Hampshire  
Department of State  
State House Room 204  
107 North Main Street  
Concord, NH 03301

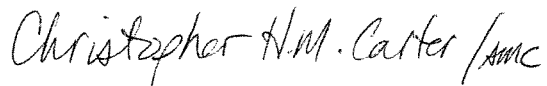
**Re: In the Matter of: Local Government Center Health Trust, LLC, Local Government Center Property Liability Trust, LLC, Local Government Center, Inc., New Hampshire Municipal Association, LLC and LGC Real Estate, Inc.**

To Whom It May Concern:

Enclosed for filing, please find Local Government Center, et al.'s Motion to Stay with respect to the above-referenced matter.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Christopher H.M. Carter  
CHMC/smc  
Enclosures

cc: Client  
Kevin B. Moquin, Esq.  
Mark S. McCue, Esq.

#821147

**RECEIVED**  
SEP 25 2009  
NEW HAMPSHIRE  
DEPARTMENT OF STATE

**STATE OF NEW HAMPSHIRE  
DEPARTMENT OF STATE**

IN THE MATTER OF:

LOCAL GOVERNMENT CENTER  
HEALTHTRUST, LLC, LOCAL  
GOVERNMENT CENTER PROPERTY  
LIABILITY TRUST, LLC,  
LOCAL GOVERNMENT CENTER, INC.,  
NEW HAMPSHIRE MUNICIPAL  
ASSOCIATION, LLC and  
LGC REAL ESTATE, INC.

**RESPONDENTS' MOTION TO STAY**

Respondents Local Government Center HealthTrust, LLC (“HealthTrust”), Local Government Center Property Liability Trust, LLC (“PLT”), Local Government Center, Inc. (“LGC”), New Hampshire Municipal Association, LLC (“NHMA”) and LGC Real Estate, Inc. (“LGC Real Estate”)(collectively, the “Respondents”) hereby move to stay the September 28, 2009 hearing on the Staff Petition filed by the Department of State in the above-captioned matter. In support of this Motion, Respondents state as follows:

1. By the Staff Petition, the Department seeks a subpoena *duces tecum* to require Respondents to produce various documents and information that allegedly relate to a complaint that an unidentified third party filed with the Department.
2. The disposition of this case turns on a narrow legal question, namely, whether a recent amendment to RSA 5-B:4 validly confers on the Department general regulatory/enforcement powers over pooled risk management programs, including the power to require the production of the information that the Department seeks from Respondents.

3. On September 25, 2009, Respondents' filed a Petition For Declaratory Judgment with the Merrimack County Superior Court pursuant to RSA 491:22 and RSA 541-A:23. A copy of the Petition is attached. By the Petition, Respondents seek a declaration that the amendment to RSA 5-B:4 does not confer general regulatory/enforcement powers over pooled risk management programs, including the power to require the production of the information that the Department seeks from Respondents.

4. It is clear under RSA 541-A that a petition for declaratory judgment and this administrative proceeding constitute alternative, mutually exclusive means for resolving the instant dispute. This is demonstrated by the fact that had this proceeding gone forward without Petitioners first initiating a judicial action, in the event of an adverse ruling Petitioners would have been barred from bringing an action in superior court to challenge that ruling. Now that a judicial action has been filed in superior court, it would be improper for this administrative action to proceed simultaneously.

5. The Department, by Attorney Kevin B. Moquin, objects to this Motion.

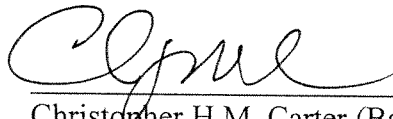
WHEREFORE, Respondents respectfully request that this matter be stayed pending the resolution of the related action in Merrimack County Superior Court.

Respectfully submitted,

LOCAL GOVERNMENT CENTER  
HEALTHTRUST, LLC, LOCAL  
GOVERNMENT CENTER PROPERTY  
LIABILITY TRUST, LLC,  
LOCAL GOVERNMENT CENTER, INC.,  
NEW HAMPSHIRE MUNICIPAL  
ASSOCIATION, LLC and  
LGC REAL ESTATE, INC.

By and through their attorneys,

Dated: September 25, 2009



Christopher H.M. Carter (Bar No. 12452)  
Hinckley, Allen & Snyder LLP  
11 South Main Street, Suite 400  
Concord, NH 03301  
Tel. (603) 225-4334

**CERTIFICATE OF SERVICE**

I, Christopher H.M. Carter, hereby certify that I delivered the above to Kevin B. Moquin, Staff Attorney, State House Room 204, 107 North Main Street, Concord, New Hampshire, 03301.



Christopher H.M. Carter, Esq.

#821143

MERRIMACK, ss

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Docket No.

Local Government Center, Inc.  
Local Government Center HealthTrust, LLC  
Local Government Center Property Liability Trust, LLC  
New Hampshire Municipal Association, LLC  
LGC Real Estate, Inc.

v.

New Hampshire Department of State

**PETITION FOR DECLARATORY JUDGMENT**

**I. INTRODUCTION**

Pursuant to RSA 491:22 and RSA 541-A:23, Petitioners Local Government Center HealthTrust, LLC, Local Government Center Property Liability Trust, LLC, Local Government Center, Inc., New Hampshire Municipal Association, LLC and LGC Real Estate, Inc. (collectively “Petitioners”) seek a declaration that the New Hampshire Department of State exceeded the authority conferred upon it by RSA Chapter 5-B with respect to pooled risk management programs, when it demanded that Petitioners produce confidential financial documentation and other information in connection with a third-party complaint filed with the Department.

**II. PARTIES**

1. Petitioner Local Government Center, Inc. (“LGC”) is a New Hampshire voluntary corporation with a principal place of business of 21 Triangle Park Drive, Concord, NH 03302-0617. LGC is the parent company of the other Petitioners.

2. Petitioner Local Government Center HealthTrust, LLC (“HealthTrust”) is a New Hampshire limited liability company with a principal place of business of 21 Triangle Park

Drive, Concord, NH 03302-0617. HealthTrust operates a pooled risk management program under RSA 5-B for the provision of health benefits to its member municipalities and school districts.

3. Petitioner Local Government Center Property Liability Trust, LLC (“PLT”) is a New Hampshire limited liability company with a principal place of business of 21 Triangle Park Drive, Concord, NH 03302-0617. PLT operates a pooled risk management programs under RSA 5-B for the provision of property, liability and workers compensation coverage to its member municipalities and school districts.

4. Petitioner New Hampshire Municipal Association, LLC (“NHMA”) is a New Hampshire limited liability company with a principal place of business of 21 Triangle Park Drive, Concord, NH 03302-0617. NHMA provides various training, informational services, lobbying, and other supportive activities to its member municipalities which also are members of HealthTrust and/or PLT.

5. Petitioner LGC Real Estate, Inc. (“LGC Real Estate”) is a New Hampshire limited liability company with a principal place of business of 21 Triangle Park Drive, Concord, NH 03302-0617. LGC Real Estate owns and manages property used by the other Petitioners for their operations.

6. Respondent New Hampshire Department of State (the “Department”) is a governmental agency with a principal place of business of State House Room 204, 107 North Main Street, Concord, NH 03301.

### **III. JURISDICTION AND VENUE**

7. This Court has jurisdiction over this matter pursuant to RSA 491:22 and RSA 541:24.

8. Venue is appropriate in this Court pursuant to RSA 541-A:24, and because Petitioners' principal place of business is located in this County.

#### IV. FACTUAL BACKGROUND

9. By letter dated July 28, 2009, the Department demanded that Petitioners produce a voluminous amount of documentation and other information pertaining to NHMA, PLT, HealthTrust and LGC Real Estate. (The letter is appended as Attachment 1 to the Department's September 11, 2009 Staff Petition, which together with the Department's September 11, 2009 Notice of Order are attached as Exhibit A to the instant Petition.) Specifically, the Department demanded that Petitioners produce:

1. Copies of check or cash disbursement journals, logs, or similar records for the last three fiscal years for LGC, NHMA, PLT, HealthTrust, and LGC Real Estate.
2. Copies of the operating budgets or similar records for the last three fiscal years for LGC, NHMA, PLT, HealthTrust, and LGC Real Estate.
3. Copies of all agreements, contracts, memoranda of understanding, leases, or similar documents between HealthTrust and LGC, NHMA, PLT, and LGC Real Estate.
4. Copies of the NHMA Operating Agreement, the HealthTrust Operating Agreement, the PLT Operating Agreement, and any rules and other agreements pursuant or incident to the operative documents as defined in the LGC Bylaws.
5. Samples of Member Agreements with LGC, NHMA, PLT, HealthTrust, and LGC Real Estate.
6. Copies of all strategic documents and all minutes relating to the reorganization of the former New Hampshire Municipal Association, Inc. and its subsidiaries and affiliate organizations, to include PLT, HealthTrust, and LGC in 2003.
7. A list of all employees of LGC, NHMA, PLT, HealthTrust, and LGC Real Estate, to include for each employee his or her major duties, amount of time allocated to various duties, and annual compensation.

8. An explanation of a statement in Petitioners' Annual Audit for Fiscal Year 2007, "In addition to the amount designated for RBC (Risk Based Capital), the Board also established \$7,100,000 as designated for future administrative needs."

9. Copies for the last three years of the Request for an Exemption of Licensure as a Third Party Administrator in New Hampshire required to be submitted no later than June 14<sup>th</sup> of each year to the Department of Insurance.

10. In making its demand, the Department alleged it had recently received a complaint alleging that HealthTrust had purportedly "used money to fund programs and activities that are not consistent with the requirements of RSA 5-B." As authority for its request, the Department cited a recent amendment to RSA 5-B:4 (2007), which purports to allow the Department to request information "necessary to exercise regulatory authority...over any pooled risk management program."

11. Petitioners initially responded to the Department through an August 7, 2009 letter from its counsel. Petitioners requested a copy of the complaint and advised it would address the allegations made in it. See Staff Petition, Attachment 2. The Department refused to furnish a copy of the complaint or to disclose with any particularity the substance of the allegations purportedly being made therein. See id., Attachment 3.

12. By letter dated August 20, 2009, Petitioners responded again to the Department and questioned whether the amendment to RSA 5-B:4 (2009) conferred general enforcement powers on the Department or authorized its demand for documentation. Petitioners requested the opportunity to meet with the Department to discuss this matter. See id., Attachment 4. The Department declined this request, asserting that a meeting "would not be fruitful" and that the Department expected Petitioners to "comply with our requests." Id., Attachment 5.

13. By letter dated August 27, 2009, Petitioners' counsel again responded to the Department and set forth in further detail the basis for Petitioners' position that RSA 5-B does

not grant the Department the authority to demand production of the documents and information. Id., Attachment 6. Petitioners also requested, once again, the opportunity to meet with the Department about this issue. Id. The Department did not respond to this letter.

14. On September 11, 2009, the Secretary of State's Office filed a Staff Petition with the Department which requested the issuance of a subpoena *duces tecum* to require Petitioners to produce the requested documents. In response to the Staff Petition, the Department's Bureau of Securities Regulation issued a Notice of Order commencing an adjudicative proceeding and scheduling a hearing on the Staff Petition.

15. An agency's powers and authority are conferred upon it entirely by statute. See, e.g., Appeal of Monsieur Henri Wines, Ltd., 128 N.H. 191, 194 (1986). In this regard, regulatory authority must be expressly delegated by the legislature and cannot be implied. A statute will be deemed violative of part I, article 37 of the New Hampshire State Constitution and thus unconstitutional if it "provides no guidance, standards, or conditions" for the agency to follow and thus "fails to declare a general policy and prescribe standards for administrative action." Guillou v. The State of New Hampshire, Division of Motor Vehicles, 127 N.H. 579, 581 (1986), citing Opinion of the Justices, 121 N.H. 552, 557 (1981).

16. In addition, an agency "may not add to, change, or modify [statutory law] by regulation or through case-by-case adjudication." Id., quoting In re Jack O'Lantern, Inc., 118 N.H. 445, 448 (1978). Administrative agencies do possess certain rulemaking authority, but such authority is limited to "fill[ing] in [the] details," and a statute that grants an agency "greater discretion than needed to 'fill in details' is invalid." Appeal of Monsieur Henri Wines, Ltd., 128 N.H. at 194, quoting Kimball v. N.H. Bd. of Accountancy, 118 N.H. 567, 568 (1978). In other words, the legislature may not delegate the 'power to make the law': it may only confer 'authority or discretion, to be exercised under and in pursuance of the law'." Id., quoting State v.

Normand, 76 N.H. 541, 546 (1913); see also Woodman v. Perin, 124 N.H. 545, 549 (1984)(“[a]dministrative officials do not possess the power to contravene a statute”). If an agency issues regulations that “contradict the terms of a governing statute” and thus “exceed the agency’s authority,” such regulations will be deemed void. In re: Alexis O., 157 N.H. 781, 790 (2008).

17. The sole source of the Department’s oversight over pooled risk management programs is RSA Chapter 5-B. The Legislature enacted the statute in 1987 in order to permit associations organized under other laws of the state to establish pooled risk management programs for the benefit of political subdivisions of the state, and to exempt those programs from state insurance and tax laws and regulations. See generally RSA 5-B.

18. The Department’s role with respect to pooled risk management programs is, by statute, quite limited. See generally RSA 5-B:1 et seq. The Department is the designated repository of the “informational filing” that a pooled risk management program is required to make on an annual basis. The filing is defined as:

[A]n annual filing with the department made *solely* for the purpose of providing public access to certain information concerning the nature and organization of pooled risk management programs.

RSA 5-B:2 (emphasis supplied). Hence, the filing that pooled risk management programs are required to make with the Department is “informational” only, and its “sole purpose” is for the public to have access to limited information concerning the “nature and organization” of such management programs.

19. RSA 5-B specifically delineates the information that is to be contained in the informational filing. This information is limited to:

- (a) The name and legal address of each pooled risk management program;
- (b) A list of current officers, their titles and addresses;

- (c) A brief description of the coverage provided;
- (d) The annual audit required under RSA 5-B:5, I(d);
- (e) A written plan of operation or bylaws; and
- (f) The annual actuarial evaluation required under RSA 5-B:5, I(f)

RSA 5-B:2, II(a)-(f). This constitutes the universe of documents that, by statute, pooled risk management programs are required to furnish to the Department and, implicitly, the universe of documents that the Department can demand from such programs.

20. The Department's only other role with respect to pooled risk management programs is set forth in RSA 5-B:5. This provision requires a pooled risk management program to file with the Department, for distribution to the program's participants, an annual audit of the program's financial transactions. RSA 5-B:5, I(d). A pooled risk management program also is required to "[p]rovide for an annual actuarial evaluation" that assesses the "adequacy of contributions required to fund such program and the reserves necessary to be maintained to meet expenses incurred." RSA 5-B:5, I(f). If a pooled risk management program fails to provide for an annual audit or an annual actuarial evaluation, the Department is authorized to "perform or cause to be performed the required audit or evaluation." RSA 5-B:5, II.

21. Thus, the Department's role is statutorily limited to: (1) receiving the informational filing, a purely recordkeeping function; and (2) performing the required audit or actuarial evaluation *only* if it is not otherwise done by the program. The statute confers no other powers, duties or responsibilities on the Department.

22. As originally enacted, RSA 5-B expressly stated that the Department had no regulatory or enforcement power as follows:

Nothing contained in this chapter shall be construed as enabling the department to exercise any rulemaking, regulatory or enforcement authority over any pooled risk management program formed or affirmed in accordance with this chapter.

See RSA 5-B:4 (1987). This provision merely underscored the fact that the Department serves as a repository of the annual informational filing required by pooled risk management programs.

23. A recent, temporary amendment to RSA 5-B:4, which became effective on June 29, 2009, deleted the above provision and replaced it with the following:

The Department may make requests for additional information necessary to exercise regulatory or enforcement authority pursuant to, but not limited to, the hearings procedures under *RSA 421-B: 26-a* over any pooled risk management program formed or affirmed in accordance with this chapter.

See RSA 5-B:4 (2009).<sup>1</sup> This amendment is only in effect for a two-year period. It expires on July 1, 2011, at which time the statutory provision will revert back to its original codification.

24. The amendment to RSA 5-B:4 (2009) does not bestow upon the Department the right to demand the requested information from Petitioners. As shown, the statute does not confer any regulatory or enforcement authority on the Department. Deleting the provision in the statute that spells out this fact does not change the Department's powers.

25. The amendment purports to allow the Department to make requests for additional information that are "necessary to the exercise of regulatory or enforcement authority . . . over any pooled risk management program formed or affirmed in accordance with this Chapter." RSA 5-B:4 (2009). In order to request "additional information," the Department would have to make the requisite causal link between the request and some delegated "regulatory or enforcement authority" that it has "over any pooled risk management program." The Department cannot make the requisite causal link because it does not have "regulatory or enforcement authority" over Petitioners.

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<sup>1</sup> There is no legislative history pertaining to this recent amendment that would provide any insight into the legislative intent behind its enactment. The amendment appears to be a non-germane addition to a bill dealing with the periodic payment of judgments.

26. The only oversight afforded to the Department concerns the annual filings that pooled risk management programs are required to make. The Department has the power to provide for an annual audit or an annual actuarial evaluation only if a pooled risk management program fails to perform the same. This is not the case here. Each of Petitioners' pooled risk management programs has made the requisite annual filings since their inception. The Department has never raised a single issue concerning the adequacy of the information submitted.<sup>2</sup>

27. Moreover, the information demanded by the Department in this case far exceeds anything that would be even remotely relevant to information filing requirements. None of the Department's requests for additional information bears any connection or relevance to the filing obligations of pooled risk management programs.

28. The fact that RSA 5-B does not authorize the Department to demand the subject information from Petitioners is underscored by the fact that the statute contains no mechanism to preserve the confidentiality of sensitive proprietary, financial and confidential information. If the Legislature intended for RSA 5-B to confer on the Department the broad investigation and subpoena power that the Department has attempted to exercise here, the Legislature certainly would have incorporated provisions in RSA 5-B to protect the confidentiality of information obtained. The fact that the statute contains no confidentiality provisions that would govern information submitted to the Department underscores the fact that the Legislature did not intend for the Department to be the recipient of such confidential information.

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<sup>2</sup> LGC, NHMC and Local Real Estate are not pooled risk management programs and have no obligation to file under, or comply with, the requirements of RSA 5-B. In addition, LGC's operations that are conducted pursuant to the department of Labor and Department of Employment Security regulations are specifically exempt from filing under RSA 5-B.

29. Further, the reference in the amended provision to RSA 421-B:26-a confers no authority on the Department to regulate pooled risk management programs; rather, it merely describes certain procedural processes under the Department's securities regulation authority.

30. Because RSA 5-B:4 (2009) wholly fails to articulate any regulatory or enforcement powers, its reference to such powers is hopelessly vague and ambiguous. As such, it fails to pass constitutional muster.

## V. CAUSES OF ACTION

### COUNT I

#### *Declaratory Judgment*

31. Petitioners repeat and reallege the facts set forth in the above paragraphs as if stated in full herein.

32. A present and actual controversy exists between Petitioners and the Department as to whether RSA 5-B:4 (2009) validly confers on the Department the authority to exercise general regulatory or enforcement authority over pooled risk management programs, or to demand that Petitioners produce documents and information beyond the information delineated in RSA 5-B:2, II.

33. Petitioners seek a declaration that RSA 5-B does not confer general regulatory or enforcement authority on the Department, and that the Department cannot require Petitioners to produce the information set forth in its July 28, 2009 letter.

34. Petitioners further seek a declaration that to the extent the amendment to RSA 5-B:4 (2009) seeks to grant the Department general regulatory or enforcement authority over pooled risk management programs, it is unconstitutionally vague and invalid.

WHEREFORE, Petitioners respectfully request that this Honorable Court:

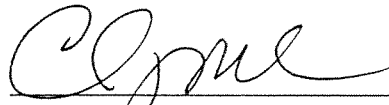
- A. Enter a declaration that RSA 5-B does not afford the Department the authority demand that Petitioners produce documents and information beyond the materials enumerated in RSA 5-B:2, II;
- B. Enter a declaration that the amendment to RSA 5-B:4 (2009) is unconstitutionally vague and invalid; and
- C. Grant such further and other relief as this Court deems just and appropriate.

Respectfully submitted,

LOCAL GOVERNMENT CENTER  
HEALTHTRUST, LLC, LOCAL  
GOVERNMENT CENTER PROPERTY  
LIABILITY TRUST, LLC,  
LOCAL GOVERNMENT CENTER, INC.,  
NEW HAMPSHIRE MUNICIPAL  
ASSOCIATION, LLC and  
LGC REAL ESTATE, INC.

By and through their attorneys,

Dated: September 25, 2009



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Christopher H.M. Carter (Bar No. 12452)  
Hinckley, Allen & Snyder LLP  
11 South Main Street, Suite 400  
Concord, NH 03301  
Tel. (603) 225-4334

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