

10

A07-1512
A07-1513
A07-1514

**State of Minnesota
In Supreme Court**

In re a Petition for Instructions to Construe
Basic Resolution 876 of the Port Authority
of the City of St. Paul

**BRIEF OF PETITIONER
876 BONDHOLDERS**

Kay Nord Hunt (I.D. No. 138289)
Phillip A. Cole (I.D. No. 17802)
Keith J. Broady (I.D. No. 120972)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

*Attorneys for Petitioner
876 Bondholders*

Scott G. Knudson (I.D. No. 141987)
Paul C. Thissen (I.D. No. 241416)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

*Attorneys for Respondent
The Port Authority of the
City of St. Paul*

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND FACTS 3

 A. The Relationship Between the Port and the 876 Bondholders Is Contractual 3

 1. The 876 Fund Was Created and Authorized Under Minn. Stat. Chapter 474 3

 2. Basic Resolution 876 Is the Contract Between the Port and the Bondholders 5

 a. Each issue of 876 Bonds is governed by the terms of the Basic Resolution 5

 b. There is no provision for a trust indenture 5

 B. The Basic Resolution Provides for the Repayment of Principal and Interest 6

 1. Common Revenue Bond Fund Was Created 6

 2. Reserve Funds Were Created 7

 3. Basic Resolution Provisions State When Port Can Be Discharged and When Basic Resolution Can Be Altered 8

 C. In 1978, the Legislature Amended Minn. Stat. § 501.37 to Apply to Port Bonds Enacted With Trust Indentures 8

 D. In 1987, the Legislature Repealed Chapter 474 and Enacted Chapter 469 9

 E. In 1989, Chapter 501B Was Enacted and Chapter 501 Was Repealed 9

F.	Through 1990, if Port Sold a Non-Revenue Facility, the Sale Proceeds Went into 876 Fund	10
G.	In 1991, the Last Bonds Were Sold and the Port Attempted to Restructure Obligations to the Bondholders	11
H.	Minn. Stat. § 501B.25 Was Amended in 1993	12
I.	In 1996, Port Conducted a Modified Dutch Auction Proceeding	13
J.	In 2002, Port Petitioned the Court for Authority to Conduct a Modified Dutch Auction Proceeding, Asserting as the Basis of the Court’s Authority Minn. Stat. §§ 501B.16 and 501B.25	13
K.	In 2004, Port Petitions the Court to Amend the Basic Resolution, Asserting the Court Had Authority Under Minn. Stat. §§ 501B.16 and 501B.25	15
L.	Port Petitioned the Court in 2006 for Court Approval to Not Abide by Terms of Basic Resolution and Liquidate Bond Fund	18
M.	In Response to 2006 Petition, Bondholders Objected and Sought Appointment of a Receiver and Asserted Court Has No Subject Matter Jurisdiction to Hear and Decide Port’s Petitions Under Chapter 501B	19
N.	The Trial Court Simultaneously Held Hearing on Subject Matter Jurisdiction and Petition for a Receiver	20
O.	Trial Court Concludes It Has Subject Matter Jurisdiction and Denies Appointment of a Receiver	23
1.	Trial Court Recognizes It Is Applying § 501B.25 Retroactively, But That Is Permissible	23
2.	Trial Court Held Bondholders Had to Satisfy Minn. Stat. § 576.01 Before Receiver Could Be Appointed	24
3.	Trial Court Grants Port’s Petition	25
4.	Bondholders Challenge on Appeal	25

5.	The Court of Appeals Affirms the Trial Court	25
	ARGUMENT	26
I.	THE COURT’S ORDERS GRANTED PURSUANT TO THE PORT’S PETITIONS UNDER MINN. STAT. § 501B.16 AND § 501B.25 ARE VOID FOR LACK OF SUBJECT MATTER JURISDICTION	26
A.	Standard of Review	26
B.	876 Bonds Are Not Within the Purview of Chapter 501 or 501B	26
1.	The Trust Statute Has Never Applied to Chapter 474 Bonds Without a Trust Indenture	27
2.	Minn. Stat. § 501B.25 Is Not to Be Given Retroactive Application	30
a.	By its terms, the 1993 Amendment is not to be applied retroactively	31
b.	The district court impermissibly applied the 1993 amendment retroactively	32
(1)	Court of Appeals ignored the Port’s failure to file a notice of review	32
(2)	Retroactivity is defined in terms of the effect the 1993 Amendment would have on Bondholders’ vested contractual rights	33
(3)	Trial court applied the 1993 Amendment retroactively	36
II.	THE 2002 AND 2004 ORDERS ARE ALSO VOID FOR LACK OF SUBJECT MATTER JURISDICTION	38
A.	No Basis for Court of Appeals’ Futility Holding	38
B.	District Court Did Not Abuse Its Discretion in Concluding Motions to Vacate Were Timely	41

III.	MINN. STAT. CHAPTER 501B CANNOT CONSTITUTIONALLY BE APPLIED TO THE BONDS AT ISSUE	43
A.	Application of the Statute Substantially Impairs the Contractual Relationship	45
B.	The Substantial Impairment Is Neither Reasonable nor Necessary to a Legitimate Public Purpose	46
C.	The Adjustments Made Are Not Reasonable or Appropriate	47
IV.	APPOINTMENT OF A RECEIVER ESTABLISHES THE NECESSARY FRAMEWORK FOR RESOLUTION OF THE DISPUTES	49
A.	As a Matter of Law, Bondholders Are Entitled to the Appointment of a Receiver	49
B.	Only if This Court Concludes the Bondholders Do Not Have a Contractual Right to a Receiver Must the Court Address Minn. Stat. § 576.01	50
	CONCLUSION	54
	CERTIFICATION OF BRIEF LENGTH	55

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. § 469	12, 23, 28-30
Minn. Stat. § 474	4, 6, 10, 12, 23, 27-30
Minn. Stat. § 474.03(2) (1974)	4
Minn. Stat. § 501	6, 9, 26, 29, 30
Minn. Stat. § 501.35	6, 8
Minn. Stat. § 501.37	8, 28
Minn. Stat. § 501B	9, 12, 19, 24, 26, 29-31, 36, 37, 43, 46, 49
Minn. Stat. § 501B.16	12-16, 18, 19, 24, 26, 36, 37, 44
Minn. Stat. § 501B.16, subd. 4	36, 37
Minn. Stat. § 501B.16, subd. 20	37
Minn. Stat. § 501B.16, subd. 23	37
Minn. Stat. § 501B.18	14
Minn. Stat. § 501B.21	15
Minn. Stat. § 501B.23	12, 37
Minn. Stat. § 501B.24	14
Minn. Stat. § 501B.25	<i>passim</i>
Minn. Stat. § 576.01	20, 24, 50
Minn. Stat. § 576.01, subd. 1	50
Minn. Stat. § 576.01, subd. 1(1)	24
Minn. Stat. § 645.08(1)	26
Minn. Stat. § 645.16	26
Minn. Stat. § 645.21	1, 31
Minn. Stat. § 645.31	31
Minn. Stat. § 645.35	1, 9, 28, 29

Rules:

Minn. R. Civ. P. 60.02	41
Minn. R. Civ. P. 60.02(d)	42

Cases:

<i>Allied Structural Steel Co. v. Spannaus</i> , 438 U.S. 234 (1978), <i>reh'g denied</i>	35, 46
<i>Bode v. Minn. Dep't of Natural Res.</i> , 612 N.W.2d 862 (Minn. 2000), <i>reh'g denied</i>	41-43

Brookfield Trade Center, Inc. v. County of Ramsey,
584 N.W.2d 390 (Minn. 1998) 26

Cady v. Bush,
283 Minn. 105, 106 N.W.2d 358 (1969) 38

Christensen v. Minneapolis Mun. Employees Ret Bd.,
331 N.W.2d 740 (Minn. 1983) 1, 44, 45

Comstock v. Bd. of Comm'rs of LeSueur County,
92 Minn. 88, 100 N.W. 652 (1904) 34

Cooper v. Watson,
290 Minn. 362, 187 N.W.2d 689 (1971) 1, 34, 36

Denelsbeck v. Wells Fargo & Co.,
666 N.W.2d 339 (Minn. 2003) 2, 49

Douglass v. County of Pike,
101 U.S. 677 (1879) 34, 36

Duluth Firemen's Relief Ass'n v. City of Duluth,
361 N.W.2d 381 (Minn. 1985) 31

Energy Reserves Group, Inc. v. Kansas Power & Light Co.,
459 U.S. 400 (1983) 45, 47

Fireman's Fund Ins. Co. v. Western Nat'l Mut. Group,
851 F. Supp. 1361 (D. Minn. 1994) 28

First Trust Co. v. Union Depot Place Ltd. P'ship,
476 N.W.2d 178 (Minn. Ct. App. 1991) 37

Gomon v. Northland Family Physicians, Ltd.,
645 N.W.2d 413 (Minn. 2002) 31

Grace v. Donovan,
12 Gil. 503, 12 Minn. 580 (1867) 28

Hilligoss v. Cargill, Inc.,
649 N.W.2d 142 (Minn. 2002) 2, 49

<i>Holt v. Henley</i> , 232 U.S. 637 (1914)	34, 36
<i>Home Bldg. & Loan Ass'n v. Blaisdell</i> , 290 U.S. 398 (1934)	46
<i>In re Estate of Barg</i> , 752 N.W.2d 52 (Minn. 2008), <i>reh'g denied</i>	33
<i>In re Hennepin County 1986 Recycling Bond Litig.</i> , 540 N.W.2d 494 (Minn. 1995)	45
<i>In re Trust Created by Hill</i> , 499 N.W.2d 475 (Minn. Ct. App. 1993), <i>rev. denied</i>	37
<i>In re Woodcock</i> , 45 F.3d 363 (10th Cir. 1995)	38
<i>Jacobsen v. Anheuser-Busch, Inc.</i> , 392 N.W.2d 868 (Minn. 1986)	1, 35, 44, 46
<i>Johnson v. Murray</i> , 648 N.W.2d 664 (Minn. 2002)	26
<i>Kulinski v. Medtronic Bio-Medicus, Inc.</i> , 577 N.W.2d 499 (Minn. 1998)	39, 41
<i>Lange v. Johnson</i> , 295 Minn. 320, 204 N.W.2d 205 (1973)	1, 26
<i>Lovgren v. Peoples Elec. Co.</i> , 380 N.W.2d 791 (Minn. 1986)	42
<i>Minn. Valley Gun Co. v. Northline Corp.</i> , 207 Minn. 126, 290 N.W. 222 (1940)	38
<i>Norris Grain Co. v. Nordaas</i> , 232 Minn. 91, 46 N.W.2d 94 (1951)	1, 26
<i>Ogden v. Saunders</i> , 25 U.S. 213 (1827)	35

<i>Peterson v. City of Minneapolis</i> , 285 Minn. 282, 173 N.W.2d 353 (1969)	44
<i>Ridgewood Dev. Co. v. State</i> , 294 N.W.2d 288 (Minn. 1980)	34
<i>State v. Traczyk</i> , 421 N.W.2d 299 (Minn. 1988)	32
<i>Telex Corp. v. Data Prods. Corp.</i> , 271 Minn. 288, 135 N.W.2d 681 (1965)	38
<i>U.S. Trust Co. of New York v. New Jersey</i> , 431 U.S. 1 (1977)	1, 47, 48
<i>Wm. Lindeke Land Co. v. Kalman</i> , 190 Minn. 601, 252 N.W. 650 (1934)	35

Other Authorities:

16B Am. Jur.2d Constitutional Law § 727 (2008)	35
2 Sutherland Statutory Construction § 44A.11 (6th ed. 2007)	35
50 Am. Jur. Statutes § 476	34
Laws, Minnesota 1987 Ch. 291, § 244	9
Laws, Minnesota 1987 Ch. 291, § 62	9
Laws, Minnesota 1989 Ch. 340, § 76	10
Minnesota Constitution, art. I, § 11	44
U.S. Constitution, art. I, § 10	1
U.S. Constitution, art. I, § 10, cl. 1	44

STATEMENT OF THE ISSUES

- I. A 1993 AMENDMENT TO MINN. STAT. § 501B.25, A STATUTE GOVERNING TRUSTS, ALLOWS THE DISTRICT COURT, ON PETITION BY THE PORT AUTHORITY, TO AUTHORIZE A DEVIATION FROM THE TERMS OF THE PORT AUTHORITY'S BOND CONTRACTS ISSUED WITHOUT A TRUST INDENTURE. DOES SUCH 1993 AMENDMENT APPLY TO EMPOWER THE DISTRICT COURT TO HEAR THE PORT'S PETITIONS, TO AUTHORIZE DEVIATIONS AND TO RELIEVE THE PORT AUTHORITY OF ITS DEBT OBLIGATIONS INCURRED UNDER PRE-1993 BOND CONTRACTS MADE WITHOUT A TRUST INDENTURE?

Minn. Stat. § 645.35.

Minn. Stat. § 645.21.

Cooper v. Watson, 290 Minn. 362, 187 N.W.2d 689 (1971).

- II. MAY THE COURT'S LACK OF SUBJECT MATTER JURISDICTION BE EXCUSED ON THE GROUND OF FUTILITY?

Norris Grain Co. v. Nordaas, 232 Minn. 91, 46 N.W.2d 94 (1951).

Lange v. Johnson, 295 Minn. 320, 204 N.W.2d 205 (1973).

- III. IF MINN. STAT. § 501B.25, AS AMENDED IN 1993, IS CONSTRUED TO ALLOW THE COURT TO RELIEVE THE PORT AUTHORITY OF ITS CONTRACTUAL DEBT OBLIGATIONS INCURRED BEFORE THE STATUTE'S AMENDMENT, DOES THE STATUTE VIOLATE U.S. CONSTITUTION ART. I, SEC. 10 AND MINNESOTA CONSTITUTION ART. I, SEC. 11 – THE FEDERAL AND STATUTE CONSTITUTIONAL PROHIBITIONS OF LAWS IMPAIRING THE OBLIGATIONS OF CONTRACT?

Christensen v. Minneapolis Mun. Employees Ret. Bd., 331 N.W.2d 740 (Minn. 1983).

U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977).

Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868 (Minn. 1986).

IV. IF THE DISTRICT COURT DID NOT POSSESS JURISDICTION TO MODIFY THE PORT AUTHORITY'S PRE-1993 BOND CONTRACTS, ARE THE PETITIONER/APPELLANT BONDHOLDERS ENTITLED TO THE APPOINTMENT OF A RECEIVER AS PROVIDED FOR BY THE TERMS OF THEIR CONTRACT WITH THE PORT AUTHORITY?

Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339 (Minn. 2003).

Hilligoss v. Cargill, Inc., 649 N.W.2d 142 (Minn. 2002).

STATEMENT OF THE CASE AND FACTS

Petitioner/Appellant 876 Bondholders (Bondholders)¹ challenges the lower courts' rulings that a 1993 amendment to Minn. Stat. § 501B.25, a statute governing trusts, empowers the district court to hear Respondent Port Authority of the City of St. Paul's (Port) petitions, and to authorize deviations from and relieve the Port from its obligations under its pre-1993 bond contracts with the Bondholders. If this Court concludes that the district court did not have subject matter jurisdiction to so order, the Bondholders seek the appointment of a receiver to protect all Bondholders.

To aid the Court, the facts will set out in chronological fashion the relevant statutory authority as well as other material facts necessary to address the issues before this Court.

A. The Relationship Between the Port and the 876 Bondholders Is Contractual.

1. The 876 Fund Was Created and Authorized Under Minn. Stat. Chapter 474.

The Port is a body politic and corporate and a governmental subdivision.

(T. 9/13/02, p. 10; T. 280; A. 54.)² Created in 1932, it has been described as an economic

¹ The trial court refers to Appellants as the Objecting Bondholders. Appellants hold at least 35% of the outstanding principal amount owed on the 876 Bonds. (A. 12, 31.) No bondholders appeared to support the Port's petition.

² The transcript of the proceedings on November 17, 2006, December 8, 2006, December 21, 2006 and January 26, 2007 address the hearings on the motion to vacate the 2002/2004 Orders and seek dismissal of the 2006 Petition for lack of subject matter jurisdiction. Those transcripts also contain the hearing on the Bondholders' petition for appointment of a receiver and the Port's 2006 petition to liquidate. Those volumes are

development engine of the City of St. Paul. (T. 9/13/02, p. 10.) The Port, however, is separate from the City of St. Paul, with separate financial affairs. It has the power of acquisition and eminent domain. (*Id.* at 11.)

The 876 Bond Fund was established by resolution of the Port numbered 876 on February 14, 1974. (A. 44;T. 9/13/02, p. 13.) The 876 Fund is a revenue bond fund, which has been described as a “system of pledged revenues and distribution of those revenues to bondholders.” (T. 282-83.) It was established to finance industrial development activities out of the fund. (T. 9/13/02, p. 14.) The 876 Fund was authorized by Minn. Stat. Chapter 474. (A. 54.) Specifically, Minn. Stat. § 474.03(2) (1974) authorized the Port to “[i]ssue revenue bonds, in anticipation of the collection of revenues of [a] project, to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment, or extension thereof.” (A. 232.)

The 876 Bonds are not backed by any tax revenues. The Port is not a guarantor, trustee or fiduciary with respect to the 876 Fund. (T. 9/13/02, p. 21; T. 250.) The Port has no fiduciary responsibility to the Bondholders. (*Id.*) The relationship between the Port and the Bondholders is that of debtor-creditor and is contractual. (T. 9/13/02, p. 14; T. 284.)

numbered consecutively and will be referred to as T. Also contained in the record are the transcripts of the September 13, 2002 and October 22, 2004 hearings on the Port’s Petitions. (T. 224; Trial Ex. 113 – 2004 transcript; 2002 transcript attached to 11/7/06 Port memo seeking denial of vacation.) References to those transcripts will be by their date.

2. Basic Resolution 876 Is the Contract Between the Port and the Bondholders.

a. Each issue of 876 Bonds is governed by the terms of the Basic Resolution.

Basic Resolution 876 (Basic Resolution) is the contract between the Port and the Bondholders. (T. 284;T. 9/13/02, p. 14; A. 44.) The Port, in borrowing money from Bondholders and issuing bonds, promised repayment under the terms contained in the Basic Resolution. (A. 44.) The Basic Resolution sets out how the Bondholders' rights are protected as well as the operation of the bond program itself. (T. 9/13/02, p. 14.)

There were approximately 140 bond issues under the Basic Resolution from 1974 until September 1991. (T. 128-29, 284.) For each issue of 876 Bonds, the Port adopted a supplemental resolution that was governed by the Basic Resolution, but set out the specific terms of the issue such as principal amount and interest rate. (A. 91;T. 10/22/04, p. 18.) The bond sales proceeds have generated \$400 million, with \$51 million in principal currently outstanding. (T. 285.) Under the terms of the Basic Resolution, all of the Bondholders have an equal right to all of the assets, so the holder of any particular series of bonds has a proportionate right to all of the assets along with the holders of all other bonds outstanding. (Section 5-8; A. 82.)

b. There is no provision for a trust indenture.

The Basic Resolution was not subject to any manner of "trust" oversight by the courts when it was adopted and bonds began to issue. The Basic Resolution does not

provide for a trust indenture. (A. 44.) It was and has remained a contract for the borrowing of and repayment of money. (*Id.*)

In 1974, the provisions of Minn. Stat. § 501.35, which authorized trustees to petition the courts for instructions or construction of a trust instrument, did not apply to bonds issued under Chapter 474. (A. 239.) No statute under Chapter 501 purported otherwise. (A. 237.)

B. The Basic Resolution Provides for the Repayment of Principal and Interest.

1. Common Revenue Bond Fund Was Created.

A central feature of the 876 Bond program is the Common Revenue Bond Fund, also referred to as the Bond Fund. (Sections 1-1, 5-2; A. 49, 76.) The Port covenanted and pledged that all “Available Net Revenues” from “Facilities” (Section 1.1 – Defined Terms; A. 49-50) would be deposited into a Common Revenue Bond Fund (876 Fund) (see Sections 4-3 and 4-4, Pledge of Net Revenues; A. 63-65), and pledged to the payment of principal and interest due on 876 Bonds. (T. 118; A. 64-65.) The Port covenanted to properly pay the principal and interest due on 876 Bonds (Section 4-1; A. 63); to lease, operate or otherwise cause to be used its Facilities and require rentals and payments as are sufficient to assure prompt payment of principal and interest due on 876 Bonds (Section 4-9; A. 68). With respect to any Facility to which it has title or a mortgage or other security interest, the Port contractually agreed to use its best efforts while any 876 Bond remains outstanding to lease or cause to be operated the Facility to

help pay the principal and interest on the 876 Bonds, “and in the event of sale, to secure the best price obtainable.” (Section 4-13; A. 72.)

Funds deposited into the 876 Fund are required to be used and withdrawn by the Port “solely to pay” the interest and principal due on 876 Bonds. (Section 5-2(3); A. 76-77.) The Port covenanted to keep proper books and records and have the records audited annually by a certified public accountant. (Section 4-5; A. 65.)

2. Reserve Funds Were Created.

The Basic Resolution also creates a series of reserves which include the Common Reserve Fund, the Prepaid Net Revenues and the Supplemental Reserve. (Sections 1-1, 5-3, 5-10; A. 48, 77-78, 82-83; T. 288.)

In addition to those reserves, the Basic Resolution also provided for the creation and use of an “Accumulated Net Revenues Fund.” (Sections 1-1, 5-5, 4-16; A. 48, 73-74, 81, 117.) The funds in the Accumulated Net Revenues Fund were pledged to payment of debt service on 876 Bonds, but could also be used for other development purposes until there was a deficiency in the Bond Fund. (T. 289, 332; A. 73-74.) With respect to “paying agent” fees incurred when making payments of principal and interest to Bondholders, the Basic Resolution requires that “[t]he AUTHORITY shall pay all Paying Agent fees out of Accumulated Net Revenues or other general funds of the AUTHORITY.” (Sections 1-1, 5-7(2); A. 51, 81.)

3. Basic Resolution Provisions State When Port Can Be Discharged and When Basic Resolution Can Be Altered.

The Basic Resolution allows the Port to be discharged from its covenants and pledges only by tender of full payment to the Bondholders. (Article 8; A. 86.) The Basic Resolution does not grant the Port the right to go into court and to seek a judicial modification/amendment of the Basic Resolution. Instead, the Basic Resolution provisions cannot be modified, altered, amended or rescinded without consent of the holders of 51% of the outstanding principal amount of the 876 Bonds. (Section 9-2; A. 89-90.)

Under the Basic Resolution, Bondholders have the right to institute any proceeding, including an action for a receiver, to enforce the covenants of the Basic Resolution with the written concurrence of holders of not less than 20% of the outstanding aggregate principal amount. (Section 4-12; A. 71.)

C. In 1978, the Legislature Amended Minn. Stat. § 501.37 to Apply to Port Bonds Enacted With Trust Indentures.

In 1978, the Legislature amended Minn. Stat. § 501.37 to apply the provisions of Minn. Stat. § 501.35 (which authorized trustees to petition the court for instructions) to Port bonds enacted with trust indentures. (A. 240.) As previously stated, the 876 Bonds were enacted without a trust indenture. The 1978 amendment did not purport to be retroactive and its effective date was the date following its enactment. (*Id.*)

D. In 1987, the Legislature Repealed Chapter 474 and Enacted Chapter 469.

In 1987, the Legislature repealed Chapter 474 (the authority under which the 876 Bonds were authorized) and enacted Chapter 469. *See* Laws, Minnesota 1987 Ch. 291, § 62 (enacts 469) and § 244 (repeals 474 and 458). (A. 241, 244-45.) No provision is made in Chapter 469 regarding the status of bonds previously authorized by the Port under Chapter 474. No provision of Chapter 469 purports to adopt or reauthorize under Chapter 469 previous resolutions enacted under Chapter 474.

The Port, however, continued to issue bonds under the basic covenants contained in the Basic Resolution, and all bond issues under the Basic Resolution after 1987 continued to cite Chapter 474 as authority. (A. 44.) It is the Bondholders' position that the repeal of Chapter 474 did not apply to the Basic Resolution or in any fashion amend it. Chapter 474 continued as the enabling law for the Basic Resolution. This conclusion is drawn from Minn. Stat. § 645.35, which states in part:

The repeal of any law shall not affect any right accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the law repealed.

E. In 1989, Chapter 501B Was Enacted and Chapter 501 Was Repealed.

In 1989, the Legislature enacted Minnesota Chapter 501B (governing trusts) and repealed Chapter 501. (A. 246.) Minn. Stat. § 501B.25 (1990), as enacted in 1989 to be effective January 1, 1990, stated:

Sections 501B.16 to 501B.23 do not apply to trusts in the nature of mortgages or to trusts commonly known as voting

trusts. Sections 501B.16 to 501B.25 apply, however, unless otherwise provided in the trust instrument, to trusts established in connection with bonds issued under Chapter 474. As used in Sections 501B.16 to 501B.23, person includes an artificial as well as a natural person and “beneficiary” includes a bondholder.

(A. 268; *see also* 249-50.)

Effective January 1, 1990, the 1989 enactment purports to apply to trusts established in connection with bonds issued under Chapter 474, but it did not purport to apply to Chapter 474 bonds without a trust indenture. Accordingly, 501B did not purport to apply to 876 Bonds which were issued under Chapter 474 without a trust instrument. Moreover, the Legislature explicitly stated that the newly enacted 501B.25 was not applicable to “trusts, property interests and powers of appointment whenever created” if such applicability would contravene the “United States Constitution and the Minnesota Constitution.” *See* Laws, Minnesota 1989 Ch. 340, § 76. (A. 250.)

F. Through 1990, if Port Sold a Non-Revenue Facility, the Sale Proceeds Went into 876 Fund.

From 1982 through 1990, the Port’s chief financial officer was Perry Feders. He explained that the Port’s pledge to the 876 Fund was a pledge of all unencumbered assets of the Port. (T. 382, 401.) He also explained that the debt owed on the 876 Bonds was, in layman’s terms, a first mortgage with respect to all non-revenue bond facilities owned by the Port that were not specifically pledged for a bond separate from Basic Resolution 876. (T. 396-397.) If a non-revenue bond facility was sold by the Port, the sale proceeds would flow through the Common Revenue Fund (876 Fund) in accordance with the flow

chart (Trial Ex. 103; A. 263) and were available to pay principal and interest on the bonds. (T. 398, 401, 403-406.)

During Mr. Feders' employment, the Port did not unilaterally take non-revenue bond facilities off of the pledge facility list. All of the facilities listed remained pledged. (T. 401-402.)

G. In 1991, the Last Bonds Were Sold and the Port Attempted to Restructure Obligations to the Bondholders.

The Port last sold 876 Bonds and financed economic development projects with 876 Bonds in September 1991. (T. 128-29, 284; Trial Ex. 108.) Sometime after 1990, the Port changed its position and concluded it could sell non-revenue properties free and clear of the pledge of its revenues to the 876 Bondholders. (T. 350, 355, 734.) In 1991, the Port projected that the 876 Fund would not have sufficient revenues to pay all principal and interest owed on 876 Bonds. (T. 250-251, 295.)

In 1991, the Port commenced a study and as a result attempted to restructure with the holders of 876 bonds. All such efforts failed. (T. 295-298; A. 100-01.) The Port states that the shortage in funds was caused by the large number of defaults which occurred in revenue bond facilities in the 1980s. (T. 293.)

The Port asserts that the Accumulated Net Revenues Fund was depleted in December 1991. (A. 98.) In the fall of 1992, the Port proposed a form of trust, with First Trust National Association as trustee, to hold the assets of the 876 program. (A. 101.)

First Trust petitioned the court for approval, but in the face of opposition from holders of a majority of 876 Bonds, First Trust withdrew the petition. (*Id.*)³

H. Minn. Stat. § 501B.25 Was Amended in 1993.

In 1993, Minn. Stat. § 501B.25 was amended. (A. 251.) That amendment struck the applicability of Chapter 501B to Chapter 474 bonds and replaced it with bonds issued under Chapter 469, the authority enacted in 1989 for Port bonds. (A. 256-57.) Second, it altered the substance of Minn. Stat. § 501B.25 and for the first time made Chapter 501B applicable to bond issues made without a trust indenture at the “sole election of the [Port].” (A. 257.) The 1993 Amendment grants for the first time to the Port the authority to “elect” to apply §§ 501B.16 to 501B.23 to Port bonds issued without trust indentures. (A. 261.) It creates the legal fiction that the bond resolution is “the trust instrument” and that the Port can declare itself the “trustee,” although the statute also states this “trustee” owes no “fiduciary responsibility . . . toward the Bondholders.” The 1993 Amendment also provides that § 501B.25 does not apply if the bond resolution provides otherwise. (*Id.*)

The statute has not been amended since 1993. The effective date for the 1993 amendment was May 20, 1993, the day after its enactment, without any provision for its retroactive application. (A. 257.) Bondholders assert that § 501B.25 cannot be applied to the 876 Fund.

³ According to the testimony of the Port, it proves practically impossible to assemble 51% of the Bondholders on these issues.

I. In 1996, Port Conducted a Modified Dutch Auction Proceeding.

In March 1996, the Port on its own initiative issued a tender invitation by which it offered to use at least \$20,000,000 of prepaid revenues to purchase 876 Bonds tendered in a modified Dutch auction proceeding.⁴ (T. 313; Trial Ex. 3; A. 102.) At the conclusion of this tender, the Port used \$28,148,000 of Prepaid Net Revenues to purchase and retire \$31,815,000 of 876 Bonds. (*Id.*)

Also in 1996, the Port again on its own initiative amended the leases with its tenants that paid tonnage fees so that half of those fees would be paid into a river maintenance fund, notwithstanding that such fees were pledged to the Bondholders. (T. 264-265, 268; Trial Ex. 135; A. 264.) This resulted in the fees pledged to the 876 Bond Fund being cut in half. (*Id.*)

J. In 2002, Port Petitioned the Court for Authority to Conduct a Modified Dutch Auction Proceeding, Asserting as the Basis of the Court's Authority Minn. Stat. §§ 501B.16 and 501B.25.

On June 18, 2002, the Port received a request from Franklin Funds, which held more than 20% of the 876 Bonds outstanding, asking the Port to conduct a Dutch auction tender, this time using existing Prepaid Net Revenues and Special Funds of approximately \$51,000,000. (A. 103.) Although the Port contends such a tender offer was permitted under the terms of the Basic Resolution, it has also subsequently admitted it would not have conducted such a tender offer without court approval. (A. 104; T. 315-316.)

⁴ A Dutch auction tender is a process where the Port asks bondholders for offers to purchase their bonds at a discount. (T. 315-316.)

In 2002, the Port for the first time purports to “exercise its election” under Minn. Stat. § 501B.25 to declare itself a trustee and petitioned the court “pursuant to Minn. Stat. §§ 501B.16 and 501B.25.” (A. 94, 107.) The Port’s Petition requested court approval to conduct a Dutch auction. (T. 340; A. 107-08.) It also requested court authorization for the Port to recover the expenses of the proposed tender offer or those incurred with future offers, including the expense of presenting the Petition to the court, from funds on deposit under the Basic Resolution. (*Id.*) Notably, no provision of the Basic Resolution was cited by the Port to support such a request. And there is no provision in the Basic Resolution that so allowed.

There was no personal service of the Petition on the 876 Bondholders. Instead, invoking § 501B.18, a notice of the hearing on the Port’s petition was published in some newspapers and a copy of the notice and petition was to be mailed to “the addresses of such persons as last known to the Port Authority” 15 days before the hearing. (A. 111.) The Port declared it would mail a notice of hearing “to as many bondholders as is feasible.” (A. 107-08, 111; T. 9/13/02, pp. 6-7.)

At that September 13, 2002 hearing, the trial court was not informed that Minn. Stat. §§ 501B.25 and 501B.16 did not or may not apply to the 876 Bond Fund. (T. 9/13/02.) The trial court, the Honorable Margaret Marrinan, states that based on Minn. Stat. § 501B.24, the court assumed “jurisdiction over this trust” which is a

proceeding in rem and issued its Order on October 8, 2002. (A. 113.) The trial court's order only notes the appearance of the Port.⁵ (*Id.*)

The trial court declares that “[p]ursuant to Minn. Stat. § 501B.25, for such purposes only, the bond covenants shall be deemed the ‘trust,’ Basic Resolution 876 shall be deemed the ‘trust instrument’ and the Port shall be deemed the ‘trustee.’” (A. 114.) The court orders that, pursuant to Minn. Stat. § 501B.21, it has “authority to bind all past, existing and future bondholders to matters raised in this petition.” (A. 126.)

The trial court granted the Port's requests and held the Port was “authorized to undertake one or more Dutch auction tender purchases using all Prepaid Net Revenues and Special Funds.” (A. 127.) The Port “is authorized to recover the expenses of the proposed tender or those incurred with future offers, including the expenses of pursuing this petition and responding to the Franklin Funds' request, from Prepaid Net Revenues and Special Funds on deposit under the Basic Resolution, and to recover up to 0.75% of the principal tendered by 876 Bondholders as a cost of tender.” (*Id.*) No provision of the Basic Resolution is cited to support the payment of such expenses.

K. In 2004, Port Petitions the Court to Amend the Basic Resolution, Asserting the Court Had Authority Under Minn. Stat. §§ 501B.16 and 501B.25.

Following the Port's success in 2002, in 2004 the Port filed another petition, again asserting as authority Minn. Stat. §§ 501B.16 and 501B.25. (A. 129.) This time the Port

⁵ No individuals who owned bonds appeared. (T. 9/13/02, p. 125.) Mr. John Schumacher, who manages an investment partnership that owns 876 Bonds did appear. (*Id.*)

sought to change the timing of the principal and interest payments. (A. 139.) The Port acknowledged that under the terms of the Basic Resolution such a change required Bondholder consent; the Port did not seek such consent and instead asserted to the trial court that the trial court had the power under Minn. Stat. § 501B.16 “to construe the Basic Resolution to authorize this adjustment.” (A. 142-43.)

This time, the Port sought to recover the costs of the Petition “as well as other ongoing costs necessarily incurred by the Port Authority in connection with the administration of the 876 Fund and the 876 Bonds, from prepaid net revenues, special funds and, after depletion of those funds, from net revenues.” (A. 144.) No language authorized the Port’s request. (T. 242-243.) At the October 22, 2004 hearing on the Port’s Petition, Kenneth Johnson, president of the Port, testified that no provision of the Basic Resolution prohibited the Port’s requests. (T. 10/22/04, p. 19.) No Bondholder was present at that hearing. (A. 151.)⁶

The trial court adopted the Port’s proposed order verbatim. (T. 10/22/04, p. 53; T. 344; A. 151.) In that Order, the trial court states that “the Basic Resolution permits the Port to make these proposed adjustments in interest and principal dates.” (A. 164.) The Order continues:

Although the Basic Resolution would allow the Port Authority to make the adjustments for which the instructions of this Court are sought with the consent of 100% of the holders of the 876 Bonds, the 876 Bonds are widely distributed and would be

⁶ In fact, section 5-2(3) requires that such funds be used solely to pay interest and principal on the Bonds. (A. 76-77.)

impossible to identify and communicate with all such holders. Thus, the Port Authority invokes this Court's power to construe the Basic Resolution to authorize this adjustment.

(A. 165.) The trial court then further ordered:

The Port Authority is authorized to recover the expenses of this hearing, and the ongoing administrative expenses necessarily incurred in connection with the administration of the 876 Fund and the 876 Bonds, from Prepaid Net Revenues and Special Funds and, when such funds are depleted, from Net Revenues.

(A. 167.) No provision of the Basic Resolution is cited to support such recovery.

In fact, prior to Judge Marrinan's 2004 Order, the Port did not take third-party costs/administration expenses from the Net Revenues (i.e., the common bond fund) and has since utilized the trial court's order as the source of its authority to so remove.

(T. 127, 160-61, 236, 240-241.) Mr. Johnson, the Port's president, has also since admitted that there is no language in the Basic Resolution that permits the Port to charge the Bond Fund for these expenses. (T. 243.) He now claims the Basic Resolution lacks clarity. (T. 340-343.) According to Mr. Johnson, this lack of clarity was resolved internally by the Port and "was part of [Port's] request to the Court in 2004." (T. 344.) In 2004, the Port, however, did not tell Judge Marrinan of this lack of clarity. (*Id.*; see T. 10/22/04, p. 19.) There was also no detail provided to the court as to what those administrative costs may be. (T. 344-345.)

The Port's projection of costs that it will take from the common bond fund for 2007 through 2022 are \$3,858,336. (T. 127.) If not so removed by the Port, those funds would be available to pay principal and interest to the Bondholders. (*Id.*)

L. Port Petitioned the Court in 2006 for Court Approval to Not Abide by Terms of Basic Resolution and Liquidate Bond Fund.

In 2006, the Port's Petition requested a court order allowing the Port to liquidate the 876 Bonds. The Port, again utilizing Minn. Stat. § 501B.16 and 501B.25, reminds the trial court in its 2006 Petition that in 2004 the trial court had exercised "its authority to construe, interpret and reform the Basic Resolution" and had previously "directed the Port to pay all costs of administering the Common Revenue Bond Fund from revenues of the Common Revenue Bond Fund." (A. 168, 175-76.) This time, the Port asked for court approval of a liquidating event under which the Port would not make full payment of principal and interest due on the 876 Bonds and would relieve the Port of its contractual obligations to Bondholders. (T. 256-258; A. 178.)

In that Amended Petition, the Port seeks to terminate the pledge of revenues effective in 2022, although there is no language in the Basic Resolution that states that the pledge of revenues terminates in 2022. (A. 44, 179; T. 110, 112.) The Port admits that its 2006 Petition seeks to relieve the Port of its covenants in Section 4 of the Basic Resolution to operate the properties for the benefit of the Bondholders. (T. 256-257.) The Port could get relief from its covenants by negotiating an amendment to the Resolution with 51% of the Bondholders. (Section 9-2; A. 89-90; T. 257.) It has made no such attempt. (*Id.*)

M. In Response to 2006 Petition, Bondholders Objected and Sought Appointment of a Receiver and Asserted Court Has No Subject Matter Jurisdiction to Hear and Decide Port's Petitions Under Chapter 501B.

The Bondholders objected to this Petition, asserting the 1993 Amendment to § 501B.25 does not apply to these pre-1993 bonds and, therefore, the court lacks subject matter jurisdiction under § 501B to hear and to rule on the Port's Petition. The Bondholders also sought appointment of a receiver pursuant to Section 4-12 of the Basic Resolution. (A. 71, 183, 201.) This receiver would owe a fiduciary duty to all the Bondholders. The purpose of the receiver would be to investigate, examine and analyze the matters raised in the Petition of the Port and to investigate, examine and analyze the collection and proper segregation and application of all net revenues pledged in the covenant by the Port to be paid into the common bond fund under the Basic Resolution. (Section 4-12; A. 71, 201.)

On September 22, 2006, the trial court, the Honorable Margaret M. Marrinan set a hearing for November 17, 2006 to hear arguments and take testimony on the following: (1) the court's subject matter jurisdiction to grant the relief sought by the Port in its Petition; (2) the Bondholders' Petition for appointment of a receiver and; and (3) the Petition of the Port. (A. 195.) The case was then reassigned to Judge Teresa Warner. (A. 198.)

On October 20, 2006, Bondholders filed motions to vacate as void the previous orders instructing the Port pursuant to Minn. Stat. § 501B.16 and 501B.25, as entered on October 8, 2002 and October 20, 2004, and to dismiss the petitions for lack of subject

matter jurisdiction. (A. 212.) Those motions, which are in district court files CX-04-200070 and C2-02-200043, were also scheduled before Judge Warner.

N. **The Trial Court Simultaneously Held Hearing on Subject Matter Jurisdiction and Petition for a Receiver.**

On November 17, 2006, the trial court heard arguments of counsel on all three files relating to the court's subject matter jurisdiction to hear and decide the Port's Petitions: (T. 45-80.) After hearing such arguments and without issuing a ruling on the court's subject matter jurisdiction, the court then asked the parties to address the issue of receivership.

It is the Bondholders' position that since the Bondholders before the court own over 20% of the bonds, the Basic Resolution provides these Bondholders the right by contract to the appointment of a receiver. (T. 104-05.) In the alternative, the Bondholders asserted they had the right under Minn. Stat. § 576.01 for the appointment of a receiver and the statutory requirements for a receiver have been met.

The Bondholders proceeded to present witnesses and the hearing on the appointment of receiver continued to December 8, 2006, December 21, 2006 and January 26, 2007. The record shows that the Port has taken great liberties with the Bond Fund and these liberties constitute waste in the millions of dollars. The Bondholders' evidence as to waste includes but is not limited to the following:

- The Port has confused its duties as a municipal entity preserving and protecting the St. Paul riverfront with its private contractual obligations in the Basic Resolution.

In 1996, the Port amended the leases of non-revenue bond facilities to direct half of the tonnage fees paid by tenants into a separate river maintenance fund (which in turn reduced the tonnage fees paid into the 876 Fund by half). (*See* Trial Ex. 135, Amendment to Lease; A. 264.) All of these revenues were pledged to the 876 Fund. (Basic Resolution Sections 4-2, 4-3, 4-4, 4-9 and 4-13; A. 63-64, 68, 72.)

- The Port asserts its covenants and pledges of revenues expire in 2022. (T. 362-365, 368-369.)

The Port admits there is no provision in the Basic Resolution that so supports. (T. 111-13.) The Basic Resolution provides for discharge of the Port's covenants and pledges only upon full payment to the Bondholders. (*See* Basic Resolution Section 8-1; A. 86.)⁷

- The Port's proposed termination of the pledge of revenues to the 876 Fund in 2022 would deprive the Bondholders of the value of long-term leasehold improvements paid for with Bondholder money. (T. 369.)

As stated in Trial Exhibit 135 and acknowledged by the Port's president, prior to 1996, charges incurred for harbor maintenance were being paid by the Port itself per its responsibility under the leases. (A. 264; T. 268.) Nothing in the Basic Resolution permits the Port to divert pledge revenues. The preservation of the riverfront is the Port's responsibility under the leases and under Basic Resolution § 4-3 payment for

⁷ The Court of Appeals states as fact that the scheduled end of the 876 Fund was September 1, 2022, when all Bondholders would be paid off in full. (A. 2.)

depreciation, replacement or improvement of the harbor are the responsibility of the Port. (See T. 724-25; A. 63-64, 264.)

- The Port contends it can dispose of non-revenue bond facilities at will without accounting therefor to the 876 Fund. (T. 350.)

The Basic Resolution provides, however, that the Port covenants to operate these facilities in the best interest of the bond fund and, if sold, to secure the best price obtainable. (Basic Resolution Sections 4-9 and 4-13; A. 68, 72.)

- The Port is drawing what it terms “third-party costs” from the 876 Fund in direct contravention of the Basic Resolution. (T. 342-344.)

From 2004 to the present, the Port has diverted from the Bond Fund approximately \$600,000 to cover these costs. (T. 243-244.) The Port projects that from 2007 to 2022 it will cost an additional \$3,858,336. (Trial Ex. 126; T. 126-27; A. 266.)

- The Port has not accounted to the 876 Fund for the National Can (REXAM) Facility, also referred to at trial as the “Blue Building.”

The National Can Facility was a revenue bond facility financed with 876 Bonds. (See Trial Ex. 117; A. 267.) This asset could produce several million dollars in revenue for the 876 Fund not accounted for by the Port. (Trial Ex. 117; T. 261-63.)

It is the Bondholders’ position that the disputes listed above must be resolved before there can be any termination of the pledges and covenants of the Port in the Basic Resolution. Bondholders presented Attorney John Hoeschler as the proposed receiver, who testified as to his credentials and experience. (T. 460-496; Trial Ex. 140; A. 271.)

The Port has acknowledged that it is impractical to obtain consent of the holders of the 51% of the aggregate outstanding principal amount of the 876 Bonds as required

under Section 9-2 to amend the Basic Resolution. (T. 278.) Therefore, the Bondholders assert appointment of a receiver would provide the practical framework for resolution.

(T. 366.)

O. Trial Court Concludes It Has Subject Matter Jurisdiction and Denies Appointment of a Receiver.

By Orders dated May 16, 2007 that the trial court held that the court had jurisdiction under Minn. Stat. § 501B.25 and denied Bondholders' motion to vacate the court's Orders of October 9,⁸ 2002 and October 22, 2004. (A. 40, 42.) The trial court also held it had jurisdiction to grant Port's petition for instructions requested in 2006.

(A. 9.)

1. Trial Court Recognizes It Is Applying § 501B.25 Retroactively, But That Is Permissible.

The trial court rejected Bondholders' assertion that § 501B.25 only applies to bonds issued under Chapter 469 and does not apply to 876 Bonds because they were issued under Chapter 474. (A. 17.)

The trial court then addressed Bondholders' argument that even if Minn. Stat. § 501B.25 applies to bonds issued under Chapter 474, it does not apply to the 876 Bonds because they were issued without trust indentures. Since the last of the 876 Bonds were issued by 1991 and 501B.25 was not amended until 1993 to pertain to bonds issued without trust indentures, the Port was seeking retroactive application of its 1993

⁸ The trial court's order sought to be vacated is actually filed and dated October 8, 2002. (A. 113.)

amendment. The trial court found such retroactivity to be in accord with Minnesota law because § 501B.25 was “procedural” and the application of Minn. Stat. Chapter 501B “to the 876 Bonds and the Basic Resolution does not impair the contractual relationship or deprive the 876 Bondholders of any contract rights.” (A. 19.)

Based on the above reasoning, the trial court concluded that the 2006 Port’s Petition was properly before the court pursuant to Minn. Stat. §§ 501B.16 and 501B.25 and concluded that “the Port Authority’s 2002 and 2004 Petitions were properly before the Court pursuant to Minn. Stat. §501B.25 and §501B.16” and denied the Bondholders’ motion to vacate the 2002 and 2004 Orders. (A. 20.)

2. Trial Court Held Bondholders Had to Satisfy Minn. Stat. § 576.01 Before Receiver Could Be Appointed.

Although the trial court found that the Bondholders are entitled under the Basic Resolution § 4-12 to petition the court for appointment of a receiver, the trial court held Minn. Stat. § 576.01 still must be satisfied before the court would appoint a receiver.

(A. 31-32.) The trial court, turning to Minn. Stat. § 576.01, subd. 1(1), then denied the appointment, reasoning:

Based on the record before it, this Court finds that the Port Authority’s Petition protects the best interests of the 876 bondholders and the 876 bondholders will suffer a greater loss if the status quo is maintained and there is no liquidation of the 876 bonds. While the 876 fund has sustained a loss, it was not as a result of mismanagement by the Port Authority. In granting the Port Authority’s Petition, this Court finds that it maximizes the 876 Bondholders’ return and attains the same result sought by the Objecting Bondholders in their petition for a receiver.

(A. 33-34.)

3. Trial Court Grants Port's Petition.

The trial court granted the Port's Petition authorizing it to retain Piper Jaffray & Company to serve as a placement agent to solicit offers from third parties for the revenue streams that contribute currently to net revenues, with the ultimate aim of distributing those asset sales to the 876 Bondholders as a liquidation of their 876 Bonds. (A. 26.)

4. Bondholders Challenge on Appeal.

On appeal, Bondholders challenge the trial court's conclusion that the court possessed subject matter jurisdiction to hear and decide the Port's 2002, 2004 and 2006 Petitions. (A. 1.) They also challenge the denial of a receiver. (*Id.*)

5. The Court of Appeals Affirms the Trial Court.

The Court of Appeals affirmed the trial court, but ruled that the 1993 Amendment was not being applied retroactively because the statute was being applied in court proceedings conducted after the 1993 amendment's enactment. (A. 5-6.) The Court of Appeals, unlike the trial court, did find that 876 Bondholders' contractual rights were being impaired, but excused the intervention of the trial court because it served to prevent a more significant impairment. (A. 6.) The Court of Appeals affirmed denial of the Bondholders' timely motions to vacate the 2002 and 2004 Orders, but on a newly enunciated ground of futility. (A. 4.) The denial of the appointment of a receiver was also affirmed. (A. 6-8.)

ARGUMENT

I. THE COURT'S ORDERS GRANTED PURSUANT TO THE PORT'S PETITIONS UNDER MINN. STAT. § 501B.16 AND § 501B.25 ARE VOID FOR LACK OF SUBJECT MATTER JURISDICTION.

A. Standard of Review.

The court must render as void an order or judgment if the court has no jurisdiction over the subject matter. *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N.W.2d 94, 99 (1951) (where court lacks subject matter jurisdiction its orders are a nullity). A void order or judgment is legally ineffective. *Lange v. Johnson*, 295 Minn. 320, 204 N.W.2d 205, 208 (1973).

The existence of subject matter jurisdiction is a question of law which this Court reviews *de novo*. *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002). Likewise, interpretation and construction of statutes raises questions of law which this Court reviews *de novo*. *Brookfield Trade Center, Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998) (interpreting statute).

B. 876 Bonds Are Not Within the Purview of Chapter 501 or 501B.

This Court must interpret the words of a statute according to their plain and ordinary meaning. *See* Minn. Stat. § 645.08(1) (mandating words and phrases be construed according to their common and approved usage). The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature. Minn. Stat. § 645.16. As the history of the statutes at issue reveals, neither Minn. Stat. Chapter 501 nor 501B have ever purported to draw the 876 Bonds within the

purview of its provisions. As a matter of law, the court had no jurisdiction to consider the Port's 2002, 2004 and 2006 Petitions.

There are two distinct reasons why the 876 Bonds do not fall within the purview of Minn. Stat. § 501B.25. First, the statutes governing trusts have never in any of its iterations purported to apply to bonds issued under Chapter 474 without a trust indenture. Second, even if the Court were inclined to construe Minn. Stat. § 501B.25 as amended in 1993 as applicable to all Port revenue bonds without trust indentures, it could not apply to the 876 Bonds because the 1993 amendment cannot be applied retroactively.

1. The Trust Statute Has Never Applied to Chapter 474 Bonds Without a Trust Indenture.

The Basic Resolution states under its provision entitled "Legal Authorization" that the Port is "authorized under the Act to initiate revenue producing properties, issue and sell Revenue Bonds for that purpose and refund and discharge such Revenue Bonds in the manner and upon the terms set forth in the Act, Basic Resolution 876 and any supplemental resolution issued pursuant thereto." (Section 1-2; A. 54.) "Act" is a Basic Resolution defined term and means "all relevant provisions of Minnesota Statutes Chapters 458 [the Port's enabling legislation], 474 [the Minnesota Industrial Revenue Bond Act] and 475 [Public Indebtedness Borrowing Act] and any amendments thereto, including Laws of Minnesota, 1971 Extra Sess., Chapter 35, Section 9." (A. 48.)

As previously stated, the Basic Resolution was adopted in 1974 without any trust indenture. (A. 44.) Under the terms of the Basic Resolution, the Port collects the revenue

and sends it off to the Bondholders without any intermediary. (A. 44.) Bonds were issued and sold under its terms until September 1991. (T. 284.) In 1974, Minn. Stat. Chapter 501 did not purport to vest any authority in the courts to oversee Port bonds. (A. 237.)

In 1978, Minn. Stat. § 501.37, which governs trusts, was amended to provide that it applies to trusts established in connection with bonds issued under Chapter 474. (A. 240.) The critical point is that there was no trust established with the 876 Bonds. Accordingly, § 501.37 was not applicable by its terms to 876 Bonds because it only applied to trusts established with bonds issued by a Port. In addition, that provision does not purport to be retroactive. (*Id.*)

In 1987, Chapter 474, the authorizing authority for the 876 Bonds, was repealed. (A. 244.) Chapter 469 was then enacted and granted authority to the Port to issue revenue bonds. (A. 241.) No provision of Chapter 469 purports to adopt or reauthorize previous resolutions enacted under Chapter 474.

Chapter 474 as it applied to the 876 Fund did not die as Minn. Stat. § 645.35, Minnesota's savings statute, distinctly provides. Minn. Stat. § 645.35 explicitly provides that the repeal of a statute does not affect any rights accrued or duties imposed before the repeal. *Grace v. Donovan*, 12 Gil. 503, 12 Minn. 580 (1867); *Fireman's Fund Ins. Co. v. Western Nat'l Mut. Group*, 851 F. Supp. 1361, 1366-67 (D. Minn. 1994) ("Minnesota's savings statute preserves rights that accrue before repeal of a statute associated with those rights.").

Accordingly, Chapter 474 continued to govern 876 Bonds issued pursuant to the Basic Resolution. Even after the adoption of Chapter 469 in 1987, the Port continued to issue bonds under the Basic Resolution, citing its authority under the repealed Chapter 474. This action was entirely correct since the repeal of Chapter 474 did not revoke the authority lawfully held by the Port in 1974 when it adopted the Basic Resolution. And despite the fact that the Bondholders have directed the lower courts to Minn. Stat. § 645.35, the lower courts simply ignore and fail to address Minn. Stat. § 645.35 in their analysis. (A. 5-6, 17-18.) In accord with Minn. Stat. § 645.35, all rights possessed by the Bondholders under Chapter 474 control.

In 1989, Minn. Stat. Chapter 501 was repealed and 501B applied “unless otherwise provided in the trust instrument” to trusts established in connection with bonds issued under Chapter 474. (A. 246, 268.) Through this enactment, the 876 Resolution which does not contain a trust remains outside the ambit of either 501 or 501B, even if retroactive application is sought.⁹

In 1993, Section 501B.25 was amended. By that amendment, the reference to Chapter 474 bonds that had been contained in Minn. Stat. § 501B.25 was removed and it was amended to make it applicable to Chapter 469 bonds. (A. 256-57.) And at the same time, Section 501B.25 was expanded to define the pledges and bond covenants in a

⁹ In addition, in so enacting, the Legislature specifically stated that it only applied “to the extent permitted under the United States Constitution and the Minnesota Constitution.” (A. 250.)

Chapter 469 Port bond that does not contain a trust to be nonetheless treated as a trust at the sole election of the Port. (*Id.*)

It was not until 1993 that any iteration of the court's jurisdictional scope on trust administration oversight was defined to include Port bonds that pertained to a bond resolution that did not have a trust.

But by the terms of the statutes, Chapter 474 Bonds without trust indentures have never fallen within the provisions of Chapter 501B or its predecessor 501. Therefore, the court lacked subject matter jurisdiction to hear and decide the Port's Petitions.

2. Minn. Stat. § 501B.25 Is Not to Be Given Retroactive Application.

Even if the Court were to conclude that 876 Bonds issued under Basic Resolution should be treated as being governed by Minn. Stat. Chapter 469 after it was enacted, Minn. Stat. § 501B.25 would not apply to the 876 Bonds because the 1993 amendment is not retroactive.

It was not until 1993 that Minn. Stat. § 501B.25 was amended to allow any application of Chapter 501B to Port bonds without trust indentures. (A. 261.) By that time, all the 876 Bonds had been issued – the last having been issued in September 1991. (T. 128-29, 284.) There is no language in the 1993 amendment to Minn. Stat. § 501B.25, which states that the amendment is to be given retroactive effect. (A. 261.) Nonetheless, the lower courts have taken the Bondholders' contractual rights away based on a statute

that was enacted after the parties had entered into their contracts, which statute does not express any retroactive effect. This is legal error.

a. By its terms, the 1993 Amendment is not to be applied retroactively.

The retroactivity of a statute presents a question of law which this Court reviews *de novo*. *Gomon v. Northland Family Physicians, Ltd.*; 645 N.W.2d 413, 415-16 (Minn. 2002).

Minnesota law is clear that “[no] law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature.” Minn. Stat. § 645.21. Minn. Stat. § 645.31 provides that when an existing statute is amended, “the new provisions shall be construed as effective only from the date when the amendment became effective.” Before a statute will be afforded retroactive application, clear evidence must show that the Legislature intended retroactive application “such as mention of the word ‘retroactive.’” *Duluth Firemen’s Relief Ass’n v. City of Duluth*, 361 N.W.2d 381, 385 (Minn. 1985).

The text of the amended statute does not contain the word “retroactive.” It in fact clearly indicates that the amended statute should be applied prospectively only. The 1993 amendment provides that contracting parties may exempt their contract from the statute by provision in their contract, a proviso that can only be applicable to subsequently made contracts. (A. 261.)¹⁰ There would have been no reason for a bond contract before 1993 to have such an opt-out provision because there was no statute that applied to bonds

¹⁰ Minn. Stat. § 501B.25 provides that 501B applies “unless otherwise provided in the trust instrument.” (A. 261.)

without a trust indenture. By declaring that the court's exercise of its authority under Chapter 501B was subject to the contract itself, the Legislature unequivocally declared its intention of prospective application only. This fact was ignored by the Court of Appeals.

Since the amended statute cannot be applied retroactively, the Court must address whether the district court so applied. The answer is yes.

b. The district court impermissibly applied the 1993 amendment retroactively.

The district court understood it was applying the statute retroactively, but concluded it could do so because the statute was procedural rather than substantive.

(A. 19.) But Minnesota law is clear that it is immaterial in this state whether a law alters procedural or substantive rights; the Legislature must still express its intent to make the statute retroactive. *State v. Traczyk*, 421 N.W.2d 299, 300 (Minn. 1988), as amended, *reh'g denied*.¹¹

(1) *Court of Appeals ignored the Port's failure to file a notice of review*

Without filing a notice of review challenging the district court's conclusion that it indeed was applying the statute retroactively, the Port argued on appeal there was no retroactive application by the district court. As the Bondholders asserted to the Court of Appeals, because the Port failed to file a Minn. R. Civ. P. 106 notice of review, it should not have been allowed to argue against the trial court's conclusion that the 1993

¹¹ Further, and as explained in detail to the Court of Appeals, the statute is, in fact, substantive. (Appellants' Brief, pp. 37-39; Reply Brief, pp. 11-15.)

amendment was being applied retroactively. *In re Estate of Barg*, 752 N.W.2d 52, 74 (Minn. 2008), *reh'g denied*. (See Appellants' Reply Brief to Court of Appeals, p. 5.) The Court of Appeals, over the Bondholders' objection, ruled in favor of the Port. The Court of Appeals held the trial court did not in fact apply the 1993 Amendment retroactively. The Court of Appeals reasoned that "[r]etroactive application of Minn. Stat. § 501B.25 would have occurred if a district court had assumed jurisdiction over petitions filed under that statute prior to 1993 because the statute did not confer the right to petition until 1993." (A. 5.) In other words, according to the Court of Appeals, as long as a court applies a statute after its enactment, there is no retroactive application. The Court of Appeals cites nothing to so support and, since courts are never to apply statutes before they are enacted into law, the Court of Appeals' ruling effectively eliminates the doctrine of retroactivity from Minnesota law.

(2) *Retroactivity is defined in terms of the effect the 1993 Amendment would have on Bondholders' vested contractual rights.*

Retroactivity, contrary to the Court of Appeals' understanding, is defined in terms of the effect the 1993 Amendment would have on the Bondholders' vested contractual rights, not in terms of the time when the Port happens to assert § 501B.25 and petition the court.¹² A retroactive law has been defined in Minnesota as one that takes away or impairs vested rights acquired under previously existing laws, creates a new obligation,

¹² Ironically, the Court of Appeals later acknowledges that the 2006 Petition brought under the auspices of § 501B.25 substantially impairs the Bondholders' contractual rights. (A. 6.)

imposes a new duty or attaches a new disability to a transaction in the past. *Cooper v. Watson*, 290 Minn. 362, 187 N.W.2d 689, 693 (1971). As to transactions, it is also defined “as one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued, or which relates back to and gives to a previous transaction some different legal effect from that which it had under the law when it occurred.” *Id.* And, as this Court explained in *Cooper*, “[a]nother definition of a retrospective law is one intended to affect transactions which occurred, or rights which accrued, before it became operative, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence.” *Id.*, quoting 50 Am. Jur. Statutes § 476; *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 294 (Minn. 1980).

Here, the rights of the parties were vested and fixed at the time the bonds were sold, which all occurred, at the latest, by September 1991. *Comstock v. Bd. of Comm’rs of LeSueur County*, 92 Minn. 88, 100 N.W. 652, 653 (1904). This Court and the United States Supreme Court have long declared that a party has a right to rely on the terms of its contract and it is beyond the power of the Legislature through subsequent legislation to change that relationship. *Comstock*, 100 N.W. at 653; *Holt v. Henley*, 232 U.S. 637, 639 (1914) (“that the reasonable and usual interpretation of statutes is to confine their effect . . . to property rights established after they were passed”); *Douglass v. County of Pike*, 101 U.S. 677, 687 (1879) (holding rights of parties are determined according to the law

when the bonds were put on the market as commercial papers; cannot apply later enacted law without impairing the obligation of contracts long entered into).

This is so because the purpose of a contract is to create precisely articulated duties and rights to guide future conduct. And more than any other kind of action, it is recognized that contracting is done with knowledge of and specific reliance on existing law. *Wm. Lindeke Land Co. v. Kalman*, 190 Minn. 601, 252 N.W. 650, 653 (1934) (“The existing statutes and the settled law of the land at the time a contract is made become a part of it and must be read into it except where a contract discloses an intention to depart therefrom.”); 2 Sutherland Statutory Construction § 44A.11 (6th ed. 2007). This fact, plus the very apparent favoritism inherent in relieving one party to a contract of his duties at the expense of the other, justifies the special attention that has been given to contract impairment legislation. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247-50 (1978), *reh’g denied*. See also *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 875 (Minn. 1986) (expressing concern with special interest legislation enacted which impairs vested contractual rights).

Accordingly, any statute which abridges or changes the intention of the parties as indicated by the provisions of their contract necessarily impairs the contract. This is true whether the law professes to apply to obligations of the contract or to regulate the remedy for enforcement of the contract. *Ogden v. Saunders*, 25 U.S. 213, 256 (1827); 16B Am. Jur.2d Constitutional Law § 727 (2008).

(3) *Trial court applied the 1993 Amendment retroactively.*

Here, all Bonds were issued at least two years before the 1993 amendment to § 501B.25 and the Bondholders' rights and the Port's obligations are spelled out in the Basic Resolution. Application of Minn. Stat. § 501B.25 to the Bondholders does take away or impair vested rights of the Bondholders acquired by contract. *Cooper*, 187 N.W.2d at 693. *See Holt*, 232 U.S. at 639, and *Douglass*, 101 U.S. at 687.

There can be no question that the invocation of Chapter 501B to the 876 Bond Fund works a wholesale change in the relationship between the 876 Bondholders and the Port as well as the court's authority over that relationship. As set forth above, the Port for the first time in 2002 purports to "elect" to be deemed the trustee, without fiduciary responsibility, and have Minn. Stat. § 501B.16 apply to Bond covenants. (A. 114.) As asserted by the Port and accepted by the trial court, the Port now, contrary to the terms of the Basic Resolution, has the power to declare itself a trustee and petition the court and the court now has the power "to construe, interpret or reform the terms of [bond covenants] or authorize a deviation from the terms of [bond covenants]" Minn. Stat. § 501B.16(4). (A. 273.) Such transfer of power from the Bondholders to the Port and to the court is in direct contravention of the terms of the Basic Resolution. This is an impairment of the Bondholders' contractual rights.

If someone in 1990 bought a Port bond subject to a trust, he knew that Chapter 501B applied and under Minn. Stat. § 501B.16, the court could, upon petition of the trustee, authorize a deviation from the terms of a trust. *See* Minn. Stat. § 501B.16.

(A. 273.) But one who purchased a Port bond in 1990 with no trust indenture knew that 501B had no application. Minnesota's general contract principles would govern the Port and the Bondholders' rights and relationship in the case of a dispute.

Without the 1993 amendment to Minn. Stat. § 501B25, Chapter 501B cannot be invoked by the Port. The Port could not declare itself to be a trustee (without fiduciary obligations) and elect to apply §§ 501B.16 and 501B.23 to Port bonds issued without a trust indenture. The very reason that the Port decided to declare itself a trustee under the 1993 Amendment to § 501B.25 was to invoke 501B.16, subd. 4 so as to allow the court to issue orders deviating from the terms of the Basic Resolution and to confirm the Port's deviations. (A. 107-08, 144-46, 175-76, 180-81.)

Only by invoking § 501B.16, by means of 501B.25, could the Port petition for instructions, which gives the court in rem jurisdiction and supervisory control to protect the trustee (i.e., Port) when the meaning of a trust instrument is in doubt. *First Trust Co. v. Union Depot Place Ltd. P'ship*, 476 N.W.2d 178, 183-84 (Minn. Ct. App. 1991). Only by invoking § 501B.16 can the Port ask the court to reform or deviate from the terms of the Basic Resolution (§ 501B.16, subd. 4) or to "terminate" a trust (*Id.* at subd. 20) or to "instruct" the Port (*Id.* at subd. 23). And because such petitioning is considered to invoke the equitable jurisdiction of the court, there is no right to a jury trial. *In re Trust Created by Hill*, 499 N.W.2d 475, 490 (Minn. Ct. App. 1993), *rev. denied*.

There is nothing in the Basic Resolution that allows the Port the right to go into court as a "trustee" to seek and obtain modification of the Basic Resolution. (A. 44.) To

amend the contract requires consent of 51% of the Bondholders, which amendment the Port has not sought. (Section 9-2; A. 89.) Nor is there anything in the Basic Resolution which allows the Port to seek confirmation of its actions by the trial court. (A. 44.)

In contrast, under basic contract principles, contract modification can only occur when the parties agree to alter a contractual provision. *Minn. Valley Gun Co. v. Northline Corp.*, 207 Minn. 126, 290 N.W. 222, 224 (1940); *Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 135 N.W.2d 681, 687 (1965). A party cannot unilaterally modify even unworkable provisions of a contract. *In re Woodcock*, 45 F.3d 363, 367 (10th Cir. 1995). Nor can equitable relief be granted by the court where the rights of a party are governed by a contract. *Cady v. Bush*, 283 Minn. 105, 106 N.W.2d 358, 361 (1969).

The Bondholders are entitled to enforcement of the Basic Resolution according to its terms. The trial court in 2002, 2004 and 2007 has, pursuant to the Port's request, ordered deviations from the terms of the Basic Resolution. The trial court was without subject matter jurisdiction to entertain or to act on the Port's Petitions. Since the trial court was without subject matter jurisdiction to issue its 2002, 2004 and 2007 orders, they are void.

II. THE 2002 AND 2004 ORDERS ARE ALSO VOID FOR LACK OF SUBJECT MATTER JURISDICTION.

A. No Basis for Court of Appeals' Futility Holding.

The trial court applied the same retroactivity/subject matter jurisdiction analysis to the 2002 and 2004 Orders as it did to the 2006 Petition. (A. 20, 40, 42.) The Court of

Appeals, however, separates out the 2002 and 2004 Orders and declares the Bondholders' subject matter jurisdiction challenge to these orders to be "futile." (A. 4.)

The Court of Appeals provides no citation or legal support for its "futility" holding. (*Id.*) Nor does such a ruling on futility square with this Court's explicit holding that an order issued by a court without subject matter jurisdiction is void ab initio.

Kulinski v. Medtronic Bio-Medicus, Inc., 577 N.W.2d 499, 502 (Minn. 1998).

The Court of Appeals then explains its futility holding stating the "2002 and 2004 orders were, and remain, as a practical matter, exhausted, dormant, and beyond effective involvement in this litigation." (A. 4.) The Court of Appeals could not be more factually wrong. The 2002 and 2004 Orders are not exhausted, dormant and beyond effective involvement in this litigation, as the facts of record before the Court of Appeals clearly showed. The Port to this day continues to undertake actions based upon those orders.

The following chart illustrates that point.

Action by Port Authority	Section(s) of the Basic Resolution breached	Court Order claimed by Port to authorize or approve breach and alteration of Basic Resolution
Diversion of one-half of the tonnage fees pledged into a river maintenance fund from 1996 to the present and going forward (T. 268; T. 8/30/06, p. 32; A. 195)	Sections 4-2, 4-3, 4-4, 4-9 and 4-13. (A. 63-64, 68, 72.)	Court Order 2002, ¶ 4. (A. 127.) Court Order 2004, ¶ 4. (A. 167.)

Action by Port Authority	Section(s) of the Basic Resolution breached	Court Order claimed by Port to authorize or approve breach and alteration of Basic Resolution
Sale proceeds from Non-Revenue Bond Facilities not included in pledged revenues (T. 350; T. 8/30/06, p. 32; A. 195)	Sale proceeds from Non-Revenue Bond Facilities are pledged under Sections 4-1, 4-9 and 4-13 and under the representations made to rating agencies and bondholders when the bonds were sold. (A. 63, 68, 72; T. 392-404).	Court Order 2002, ¶ 4. (A. 127.) Court Order 2004, ¶ 4. (A. 167.)
Payment of paying agent fees from the Bond Fund (T. 342-44)	Section 5-7(2) which provides the Port shall pay all paying agent fees. (A. 81).	Court Order 2004, ¶ 5. (A. 167.)
Payment of third-party costs, including attorneys' fees and costs incurred by the Port from the Bond Fund (T. 126-27, 160-61, 235-36)	Section 5-2(3) which requires that use of funds in the Bond Fund be solely to pay the interest and principal owed on the Bonds. (A. 76-77.)	Court Order 2004, ¶ 5. (A. 167.)

In fact, based on the trial court's 2004 Order, the Port's projection of costs that it will take from the Bondholders' common bond fund for 2007 through 2022 is \$3,858,336. (T. 127.) If not removed by the Port, those funds would be available to pay principal and interest to the Bondholders. (*Id.*) In 2007 alone, Port removed \$207,000 of third-party administration costs from the Bond Fund using as authority the trial court's 2004 Order. (T. 126-27.) For the Court of Appeals, in light of this record, to declare that the 2002 and 2004 Orders are "exhausted, dormant and beyond effective involvement in this litigation" shows a lack of understanding of the record before it.

The Court of Appeals, in a footnote, also states that "counsel for Appellants conceded that, as a practical matter, it would be impossible to undo the action taken in

reliance on the 2002 and 2004 orders.” (A. 4.) Counsel made no such concession. The Court of Appeals questioned at oral argument what would happen to those actions undertaken by the Port based on the district court’s rulings. Such inquiry is not even a proper inquiry on this challenge to subject matter jurisdiction. Nonetheless, what Bondholders stated is that if the court holds the 2002 and 2004 Orders void, what that does is remove the blessing and court approval of the Port’s actions. As this Court has held, those orders, if without subject matter jurisdiction, are void ab initio. *Kulinski*, 577 N.W.2d at 502. Counsel agreed only that to the extent that the Port’s actions are in conformity with the terms of the Basic Resolution, it has not breached. But such a determination was not an issue before the court on appeal when addressing the jurisdictional issue.

B. District Court Did Not Abuse Its Discretion in Concluding Motions to Vacate Were Timely.

Although the Port asserted that the Bondholders’ notices to vacate the 2002 and 2004 Orders were untimely, the trial court did not find any procedural flaw in the Bondholders’ motions and ruled on the Bondholders’ motions to vacate the 2002 and 2004 Orders on the merits. (A. 20, 40, 42.) This is in accord with this Court’s decision in *Bode v. Minn. Dep’t of Natural Res.*, 612 N.W.2d 862, 870 (Minn. 2000), *reh’g denied*. What constitutes a reasonable time in the context of Rule 60.02 varies from case to case and such determination lies in the discretionary authority of the trial court. *Id.* Here, the

trial court did not abuse its discretion in addressing the 2002 and 2004 Orders. And again, the Port did not challenge that holding pursuant to a Rule 106 notice of review.

Bode involved an attempt to void a judgment that was rendered 18 years earlier in a contested action. 612 N.W.2d at 864. Here, the Bondholders motions under Rule 60.02(d) were made four years and two years after the orders were issued, well within a reasonable time limit measurable under Minnesota law. The standard statute of limitations in Minnesota is six years. *Lovgren v. Peoples Elec. Co.*, 380 N.W.2d 791, 795 (Minn. 1986) (six years is general statute of limitations).

The attendant circumstances weigh in favor of the need to vacate the orders specifically because of the nature of the proceedings and the means adopted by the Port in securing the orders. Unlike the situation in *Bode*, the Port's 2002 and 2004 petitions for instructions were not contested matters. Unlike in *Bode*, there was no service of the court's order of hearing on all Bondholders, and there was no requirement for such service and no proof of such service. (A. 107-08, 111, 145, 150.) All the Port asserted it would do is give "notice of the hearing" on its petitions "to as many bondholders as is feasible" and publish notice of hearing in three publications. (A. 107-08, 145.) It would be a miscarriage of justice to pretend as if this were a situation where each bondholder had been personally served with a summons and complaint and had been required to file an answer. It was not unreasonable for the Bondholders to now challenge the judgment upon discovery of the true nature of the orders.

In voiding the judgments in 2002 and 2004, the question, as this Court posed it in *Bode*, is whether the benefits of finality are outweighed by the claims of justice. 612 N.W.2d at 870. Here, the need for justice outweighs any claim of finality. There is no legal basis for the court to exercise 501B in rem trust jurisdiction over this contract. As the record reflects, Judge Marrinan was not adequately or sufficiently formed in the proceedings regarding her jurisdiction. A review of the record reveals not even a glimmer in the solicitations of the Port to Judge Marrinan in 2002/2004 about the fact that Minn. Stat. § 501B.25 was not amended until 1993 to add Port bonds without trust indentures. The Port simply cited the statute, claimed the Basic Resolution fell within its terms, and goes from there. (A. 108, 144.)

Moreover, the only rights at issue are the rights of the parties to the contract. The Port, in bringing its petitions, specifically acknowledged that only the Port and the 876 Bondholders had an interest in the proceedings. (A. 107, 145.) The Port cannot possibly assert prejudice when it has obtained and maintained funds which rightfully belong to the Bondholders. Nor is the issue rendered moot because the Port does not want to honor the Basic Resolution terms. The commanding equities of this case confirm that these motions to vacate were brought within a reasonable time and the issue is certainly not moot.

III. MINN. STAT. CHAPTER 501B CANNOT CONSTITUTIONALLY BE APPLIED TO THE BONDS AT ISSUE.

If this Court concludes that the 1993 amendment to Minn. Stat. § 501B.25 is to be applied retroactively, then the Court must address whether the Legislature could

constitutionally provide that amendment should have retrospective application. *Peterson v. City of Minneapolis*, 285 Minn. 282, 173 N.W.2d 353, 356 (1969). When Minn. Stat. § 501B.25 was enacted, the Legislature, mindful of the limits on its power to impair the obligations of contracts, explicitly stated that Minn. Stat. § 501B.25 was not applicable to “trusts, property interests and powers of appointment whenever created” if such applicability would contravene the “United States Constitution and the Minnesota Constitution.” (A. 250.) The Attorney General was put on notice as to this issue. (A. 269, 270, 273.) Retrospective application of § 501B.25 to the 876 Fund is unconstitutional.

Application of Minn. Stat. §§ 501B.25 and 501B.16 impairs the contract rights of bondholders under the Basic Resolution. Both the United States and Minnesota Constitutions prohibit this impairment of contract. U.S. Const., art. I, § 10, cl. 1, and Minn. Const., art. I, § 11.

A statute cannot be constitutionally applied under the contract clause if it substantially impairs a contractual obligation and the state cannot show a significant and legitimate purpose which reasonably relates to the impairment. *Christensen v. Minneapolis Mun. Employees Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn. 1983). This question is a legal question. *Jacobsen*, 392 N.W.2d at 872. However, since even legislative enactment comes with a presumption of constitutionality, the burden rests on the Bondholders to demonstrate beyond a reasonable doubt that the challenged act violates the Constitution. *Id.*

Analysis of an impairment of contract involves three inquiries: (1) whether the law operates to substantially impair the contractual relationship; (2) whether there is a demonstrated significant and legitimate public purpose behind the legislation; and (3) whether the adjustment of rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose. *Christensen*, 331 N.W.2d at 750-51 (applying three-part test enunciated in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983)).

The United States Supreme Court has made clear that it will almost never allow a government unit to impair its own contracts. “When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets.” *Energy Reserves Group*, 459 U.S. at 413, n. 14. Applying that three-part test, the application of § 501B retrospectively is unconstitutional.

A. Application of the Statute Substantially Impairs the Contractual Relationship.

There is no dispute that the relationship between the Port and the Bondholders is contractual. A bond is a contract which must be construed so as to carry out the intentions of the parties. *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 498 (Minn. 1995). As the U.S. Supreme Court has held, “[C]ontracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those obligations are binding under law and the parties are

entitled to rely on them.” *Allied Structural Steel*, 438 U.S. at 245. Here, Chapter 501B has been used by the Port to strip itself of its pledges and covenants in a manner entirely different from that it contractually agreed to and which contract it authored. The Bondholders’ contractual rights have been substantially impaired.

B. The Substantial Impairment Is Neither Reasonable nor Necessary to a Legitimate Public Purpose.

Secondly, when a substantial impairment exists, those urging the constitutionality must demonstrate a significant and legitimate public purpose. *Jacobsen*, 392 N.W.2d at 872. So, contrary to the Court of Appeals’ analysis, the burden is on the Port. (A. 6.)

There exists no showing that the disruption of the Bondholders’ contractual expectations was necessary to meet any important broad and general economic problem. *Jacobsen*, 392 N.W.2d at 874-75. And the public purpose requirement is primarily designed to prevent a state from embarking on a policy motivated by a simple desire to escape its financial obligations or to injure others through the repudiation of debts or the destruction of contracts or the denial of means to enforce them. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 438 (1934). *See also Allied Structural Steel Co.*, 438 U.S. at 242 (economic concerns must be related to “unprecedented emergencies” such as mass foreclosures caused by the Great Depression).

Seeking to shirk its responsibilities under the Basic Resolution, the Port in its Petitions never asserted any benefit to the public, only to itself. The Port, in fact, has admitted it is in its best interests to be acquitted of its obligations under the Basic

Resolution. (T. 369.) There has never been an amendment to the Basic Resolution with the consent of 51% of the holders of the principal outstanding amount of bonds. (T. 109.) The Port simply views the costs it had agreed to pay under the Basic Resolution as an “unreasonable burden” and no longer wishes to pay them. (Port’s Verified Amended Petition, ¶ 39; A. 178.) Its purpose is naked self-interest, which cannot be described as either “significant” or “legitimate” even if it could benefit the public in some fashion.

C. The Adjustments Made Are Not Reasonable or Appropriate.

Even if the Port’s purpose could somehow rise to the threshold of having a significant legitimate public purpose, the adjustment of the rights and responsibilities of the Port is not based upon reasonable conditions and is not of a character appropriate to the public purpose justifying the impairment. *Energy Reserves Group*, 459 U.S. at 412-13.

The U.S. Supreme Court, in *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), ruled on unconstitutional impairment of contract in the context of a Port issuing revenue bonds and later attempting to reduce or impair their obligations to bondholders under the bond contract. In that case, the legislatures of New York and New Jersey retroactively repealed ordinances limiting the ability of the Port of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for consolidated bonds issued by the authority. The U.S. Supreme Court flatly rejected attempts by the authority to discharge their financial obligations, citing the U.S. Constitution’s prohibition against impairment of contracts. It stated that the repeal of the

covenant could not be sustained given the Court's previous municipal bond case law. *Id.* at 28.

The State of New Jersey argued that it could not satisfy its new mass transit plans without repealing its previous covenant with U.S. Trust. The U.S. Supreme Court dismissed the assertions that use of the revenues for other public purposes justified the impairment of contract. The Court refused to allow the state to shirk its bond contract responsibility in favor of goals such as mass transportation, energy conservation and environmental protection, reasoning that "a state cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *Id.* at 29. The United States Supreme Court found that the repeal of the covenant was not "necessary to achievement of the plan nor reasonable in light of the circumstances" due to the fact that less drastic measures were available. *Id.* at 29-30.

The Port, in paragraph 12 of its Amended Petition, specifically alleges as grounds for the court to terminate the Port's pledge in favor of the Bond Fund all revenues for land leases and fleeting and tonnage laws that "[t]hese lease revenues are funds that could be used for other public purposes if not pledged to the 876 funds." (A. 171-72.) The Port, by its own admission, is attempting to terminate its pledges for a reason prohibited under the U.S. and Minnesota Constitutions.

IV. APPOINTMENT OF A RECEIVER ESTABLISHES THE NECESSARY FRAMEWORK FOR RESOLUTION OF THE DISPUTES.

A. As a Matter of Law, Bondholders Are Entitled to the Appointment of a Receiver.

If this Court concludes that the court is without jurisdiction under Minn. Stat. Chapter 501B/501B.25, the Court must necessarily address the need for the appointment of a receiver. The Port is not a fiduciary, but rather is a party with interests directly and materially adverse to the Bondholders. Pursuant to their contract, Bondholders are entitled to the appointment of a receiver as a matter of law. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003) (construction and effect of a contract is a question of law unless contract is ambiguous). Moreover, since the Port is the drafter of the Basic Resolution, if the contract is deemed ambiguous, it must be construed against the Port. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 148 (Minn. 2002).

In 1974, the Port agreed under Section 4-12 of the Basic Resolution that a receiver should be appointed with the consent of holders of 20% in aggregate outstanding principal amount of the bonds. (A. 71.) The trial court found that the Bondholders have presented joinders and consents for holders representing over 35% of the aggregate principal amount of the bonds, well in excess of the 20% threshold. (A. 31.) This fact by itself is enough to end the court's inquiry into this issue. Since the Bondholders have met their burden under the Basic Resolution, as a matter of law a receiver should be appointed.

The lower courts, in rejecting Bondholders' right to a receiver, held that the Port did not consent to the appointment of a receiver but only consented to allow a group of bondholders to apply for the application of a receiver. (A. 7, 32.) But the contract states that by "application for appointment of a receiver" the Bondholders may "protect and enforce the rights" of all Bondholders and may "enforce the performance of all covenants and duties of the [Port] Authority." (A. 71.) That is exactly what the Bondholders seek to do.

As it now stands, the Port and the district court have made decisions regarding the 876 Fund with no one to speak on behalf of the Bondholders as a whole. It is exactly in this situation that a receiver is both necessary and essential and certainly is the reason for that contractual provision. In fact, the Port and the district court have recognized that it is impossible or impractical to obtain the consensus of all Bondholders. (A. 102, 143, 165; T. 278.) The appointment of a receiver fills this need. A receiver will owe fiduciary responsibility to all Bondholders and can sit down with the Port and seek to work out problems under the Basic Resolution. As a matter of law, the trial court must be reversed and a receiver appointed.

B. Only if This Court Concludes the Bondholders Do Not Have a Contractual Right to a Receiver Must the Court Address Minn. Stat. § 576.01.

In rejecting the Bondholders' motion for a receiver, the trial court turned to Minn. Stat. § 576.01, subd. 1. (A. 33.) The trial court adopts the Port's argument that the liquidation of the 876 Fund proposal confers benefits to the Bondholders. (A. 33.) In

fact, the opposite is true; the Port's proposal and the trial court's adoption of it serves the Port's own self-interest and confers substantial benefits on the Port to the detriment of the Bondholders. (See Appellants' Brief, *supra*, at pp. 20-21, setting out evidence of waste.)

The Court of Appeals recognizes that the Bondholders have satisfied two out of three elements of § 576.01, but holds it did not show by clear and convincing evidence that the Port has committed or intends to commit waste to the Bondholders' detriment.

(A. 7.)

But the facts of record show that the Port has and continues to commit waste. As the Port likes to remind everyone, the bonds are secured only by the pledged revenues described in the Basic Resolution. The credit of the Port itself is not pledged to repayment. The Basic Resolution is the document that describes what revenues are pledged. It also clearly describes the limited examples where the Port itself may employ the revenues to cover a cost. Where the Basic Resolution does not permit the Port to invade the Bond Fund to cover expenses or otherwise pay the costs of its public mission, the Port may not use the Bond Fund and may not divert the revenues from the Bond Fund. To act contrary to that contract is waste.

The Port developed the strategy of engaging the trial court to license its use of the Bond Fund for unauthorized purposes. (T. 241-42.) Contrary to the Court of Appeals' ruling, this is waste. (A. 7.) In 2004, the Port obtained approval from Judge Marrinan to take administrative expenses out of the Bond Fund. (*Id.*) In the 2004 hearing, the Port President told Judge Marrinan there was nothing in the Basic Resolution that barred

taking such expenses from the Bond Fund. (T. 10/22/04, p. 19.) When asked in the hearing in 2006 to point to the language that permitted such use of the Fund, Mr. Johnson admitted that “[r]ead solely on its face [in section 5-2(3) of the Resolution] there is not such language.” (T. 242-43.) The Port turned the Basic Resolution on its head before Judge Marrinan and argued that if a taking was not specifically prohibited, it was permitted. The correct construction of the Resolution is that revenues are pledged to the Bond Fund except as the Port is specifically authorized to take the revenues. It is to be noted that this taking from the Fund is also directly contrary to the representations made in the offering documents when the various bond issues were sold. (*See* Trial Ex. 106.)

In 2004, the Port gained permission from Judge Marrinan to pay “administrative expenses” from the Bond Fund. (A. 167.) It has construed this permission to permit it to deduct “paying agent fees” from the Bond Fund. (T. 344.) In the case of “paying agent fees,” the Resolution is explicit in stating that such fees can be paid out of “accumulated net revenues or other general funds of the authority.” (A. 51, 81.) There have been no accumulated net revenues since 1991. (A. 98.) Notwithstanding that the alternative source of “general funds” was language created by the Port, the Port president testified that “general funds” was not a “defined term” and entitled the Port to draw these fees from the Bond Fund. (T. 342-44.)

The Court of Appeals rules that the Port’s diversion of one-half of the tonnage fees pledged into a river maintenance fund from 1996 to the present and going forward does not constitute waste. (A. 7.) In fact, it is a breach of Basic Resolutions §§ 4-9 and 4-13

in which the Port covenants and agrees to use its best efforts to lease and cause to be operated each facility to provide funds to help pay the principal and interest on the Bonds and to assure prompt payment of the principal and interest. (A. 68, 72.) Section 4-3 specifically provides that “the operating costs of any Facility shall not include any allowance or payment for depreciation, renewal, replacement or improvement of or additions to capital assets;” (A. 64.) The diversion of one-half of the tonnage fees breaches all of these sections.

Perhaps more significant than the ways carried on in the past, however, is forestalling what is planned in the future of the Fund. The Port proposes, and the lower courts have allowed, that the entitlement to the pledged revenues stops in 2022. (A. 20, 28.) The Port admits the Basic Resolution does not so support. (T. 111-13.) Under the contract, the pledge remains in place until the bonds are paid in full – Basic Resolution § 8-1. (A. 86.)

Under the contract, the revenues of “non-revenue bond facilities” are pledged to the Fund. (A. 50, 68.) Under Section 4-13 of the Basic Resolution, the Port covenants that as long as the bonds remain “outstanding and undischarged,” it will use its best efforts to lease the facilities to pay the bonds and in the event of sale “to secure the best price.” (A. 72.) The term “facilities” is a defined term and means all revenue-producing properties.” (A. 50.) By such definition, it includes both revenue bond and non-revenue bond facilities. The Court of Appeals dismisses the Bondholders’ concerns, stating “Basic Resolution 876 pledges only the income, not the sale proceeds, from these

facilities to the 876 fund.” (A. 7-8.) But this is contrary to the Port’s covenant in the Basic Resolution to lease the property to pay the bonds and to get the best price on sale.

The Bondholders need a receiver to engage the Port on these issues and others.

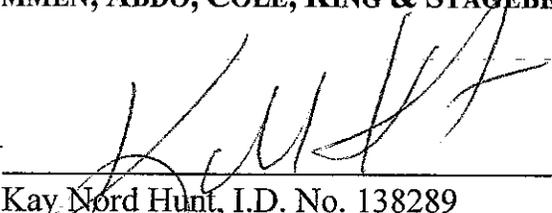
CONCLUSION

Appellant respectfully requests that the Court hold that Minn. Stat. § 501B.25 has no application to the 876 Bond Fund and therefore the trial court was without subject matter jurisdiction to hear and decide the Port’s 2002, 2004 and 2006 Petitions.

Appellant requests that this Court reverse and vacate as void the orders of 2002 and 2004 and remand for dismissal the 2002 and 2004 Petitions. That portion of the 2007 order granting the Port’s Petitions under Minn. Stat. Chapter 501B should be vacated and the Petition be ordered dismissed. Appellant also respectfully requests that the Court also reverse that portion of the 2007 order that denied Appellant the appointment of a receiver and order Mr. John Hoeschler be appointed receiver.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: September 17, 2008

BY 

Kay Nord Hunt, I.D. No. 138289
Phillip A. Cole, I.D. No. 17802
Keith J. Broady, I.D. No. 120972
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

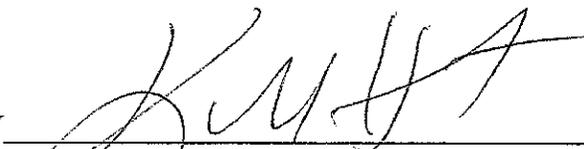
Attorneys for Petitioner 876 Bondholders

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,757 words. This brief was prepared using Word Perfect 10.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: September 17, 2008

BY 

Kay Nord Hunt, I.D. No. 138289
Phillip A. Cole, I.D. No. 17802
Keith J. Broady, I.D. No. 120972
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Petitioner 876 Bondholders