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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

REPLY BRIEF OF PETITIONER 876 BONDHOLDERS

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

The question before this Court is whether the Court has subject matter jurisdiction to consider and to rule on Respondent Port Authority of the City of St. Paul's (Port) 2002, 2004 and 2006 Petitions brought to the court under the auspices of Minn. Stat. §§ 501B.16-501B.25, the statutes governing trusts. Appellant 876 Bondholders (Bondholders) respectfully assert the answer is no. The Port's presentation to this Court of its self-serving construction of the Basic Resolution, its purported inability to pay off the bonds, and the claimed prudent nature of its actions are not relevant to this jurisdictional issue. *See, e.g., In re Wage and Hour Violations of Holly Inn, Inc.*, 386 N.W.2d 305, 313 (Minn. Ct. App. 1986) (even if court is sympathetic to a party's position, court cannot retroactively apply statute). If the district court was without jurisdiction, its rulings in answer to the Port's 2002, 2004 and 2006 rulings are void and without legal effect.

A. The Material Undisputed Facts Mandate Reversal.

In order to address the Port's argument, it is important to point out what the Port does not and/or cannot contest and what is material to this appeal. The following material facts are undisputed:

- Basic Resolution 876 (Basic Resolution) is the contract between the Port and Bondholders for the borrowing of and repayment of money. (A. 44.) The relationship between the Port and Bondholders is that of debtor/creditor and is

contractual. The Port, in borrowing money from Bondholders and issuing bonds, promised repayment under the terms contained in the Basic Resolution. The Basic Resolution sets out how Bondholders' rights are protected as well as the operation of the bond program itself.

- The terms of the Basic Resolution do not grant the Port the right to go into court and seek a judicial modification/amendment of the Basic Resolution. They do not allow the court to modify the Resolution's terms or allow for court confirmation of Port actions. The Basic Resolution provides the method by which the terms of the Basic Resolution can be modified. The Port has chosen not to abide by the terms of its contract with the Bondholders. Section 9-2 of the Basic Resolution requires Bondholder consent to alter, amend or rescind the Basic Resolution. It states:

> The Holders of not less than fifty-one percent (51%) in aggregate principal amount . . . of the General Revenue Bonds which are at any time outstanding and not discharged shall have the right to consent to and approve the amendment of Basic Resolution No. 876 . . . by the [Port], for the purpose of authorizing any modification, alteration, amendment or rescission of or any addition to this Basic Resolution No. 876.

(A. 89.)

- The Basic Resolution does not provide for a trust indenture. (A. 44.) The Basic Resolution is not a trust instrument, nor is the Port a trustee. (*Id.*; T. 9/13/02, p. 21; T. 10/22/04, p. 14.)

- The Basic Resolution was not subject to any manner of trust oversight by the courts when it was adopted and when the bonds were issued.
- The Port last issued and sold 876 Bonds in September 1991. (T. 128-29, 284; Trial Ex. 108, Respondent's Brief, p. 6.)
- It was not until 1993 that the Legislature amended Minn. Stat. § 501B.25 to allow any application of Chapter 501B to Port bonds that had been issued without trust indentures. Pursuant to Minn. Stat. § 645.31, new provisions added to a statute "shall be construed as effective only from the date when the amendment became effective." This amendment became effective May 20, 1993, the day after enactment. *Cooper v Watson*, 290 Minn. 362, 187 N.W.2d 689, 693 n. 2 (1971).

1. The law on the date of bond issuance governs.

When reference is made to the sale of 876 Bonds, one is talking about the date of bond issuance and sale by the Port. As the Port well knows, but does not inform this Court, the law that exists at the date of a bond issuance controls, and it is the law that exists at that point in time that forms part of the bond contract. 15 McQuillin, *The Law of Municipal Corp.* § 43.122 (3d ed., 2008);[1] 64 Am. Jur. 2d Public Securities & Obligations, § 29 (2008); *Turkmani v. Republic of Bolivia*, 193 F. Supp. 2d 165, 171 (D.C. 2002) (bonds are governed by law in effect on date of issuance); *In re Cherokee*

[1] Amicus League of Minnesota Cities (League) simply ignores black letter law in this area.

County, Kansas Heath Care Facility Revenue Bonds, 946 P.2d 83, 89-90 (Kan. 1997). As this Court recognized in *Naftalin v. King*, 252 Minn. 381, 90 N.W.2d 185, 191 (1958), a contract is entered into when the governmental body issues either bonds or certificates of indebtedness. All 876 Bonds were issued and sold by the Port prior to 1993. (T. 128; 284.)[2]

On page 4 of its brief, the Port asserts that when it issued 876 Bonds, it was not issuing debt on its own behalf but as a "conduit issuer" for various development projects. But the developer did not in effect become the borrower obligated to repay the debt. To the contrary, the bonds as sold were investment grade rated, and in order to obtain the investment grade rating the Port pledged all revenues from non-revenue bond facilities, all other facilities owned by the Port, as a credit enhancement. (*See* Feders testimony, T. 386-406). The Port is obligated to repay the debt to the Bondholders, through all of the pledged revenues and covenants in the Basic Resolution, including revenues from revenue bond facilities and non-revenue bond facilities.

2. Chapter 474 bonds issued without trust indentures have never fallen within the provisions of Chapter 501B or its predecessor 501.

The Port's interpretation of Minn. Stat. § 501B.25 requires that the Court ignore the plain and ordinary meaning of its words. Simply put, Section 501B.25 does not apply to bonds without a trust indenture issued under Chapter 474.

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[2] The reference to sales after 1993 in the Port's brief is not to sales by the Port but the trading of bonds on the market. The Port admits it sold the last 876 Bonds in September, 1991. (Respondent's Brief, p. 6.)

The Port's theory that Chapters 474 and 469 are interchangeable relies entirely upon the notion that Chapter 469 is a "recodification" of Chapter 474. Chapter 469, however, is a substantial revision of a municipality's authorization to issue bonds. *Cf.* Minn. Stat. § 474.03(2) (1987) (A. 232) *with* § 469.061, subd. 5 (1989) (A. 243). Although portions of Chapters 469 and 474 are similar, the Legislature scrapped Chapter 474 and started anew with Chapter 469. It did not, as the Port contends, arbitrarily renumber the chapter leaving it completely intact.

The distinction between the chapters is important because Chapter 474 remains to this day the original authority for the issuance of 876 bonds. Minn. Stat. § 645.35 (repeal of a statute does not affect rights accrued or duties imposed before repeal). The repeal of a bond resolution's original authority has no effect upon the bonds' enforcement. *See Murphy v. Utter*, 186 U.S. 95, 110-11 (1902); *Am. Secs. Co. v. Forward*, 32 P.2d 343, 347 (Cal. 1934). The rights of the purchasers of 876 bonds authorized under Chapter 474 remain enforceable after the Chapter's repeal and cannot be altered by a Minnesota court under Chapter 501B.

The Port itself has correctly cited Chapter 474 as its authority for the issuance of 876 bonds for years after Chapter 474 had been repealed. (A. 48, 54.) In its brief, the Port argues that the Basic Resolution's inclusion of the words "as amended" after "Chapter 474" should be read to mean "Chapter 469."[3] Regardless, the Legislature did

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[3] If the instrument was meant to prospectively encompass any future amendment to Chapter 474, then it would not refer to such amendments in the past tense.

not merely amend Chapter 474. It repealed it. Nonetheless, in each subsequent issue of bonds after 1987, the Port continued to cite a repealed chapter as its authority for the issuance. It did not and could not reference Chapter 469, since the Basic Resolution itself was originally authorized under Chapter 474 and the Port could not treat all bondholders equally if the issuance of some bonds are governed by a different set of laws.

And there is no dispute that at the time of adoption, Chapters 474 and 501 did not authorize any court to alter the terms of a bond contract without a trust indenture. When the Legislature in 1993 amended Minn. Stat. § 501B.25 to include bonds issued without a trust indenture, it expressly removed any reference to bonds issued under Chapter 474. By the plain wording of § 501B.25, the court does not hold jurisdiction under Chapter 501B for these bonds issued under Chapter 474.

3. The Basic Resolution does not provide for a trust.

The Port's assertion on page 26 of its brief that "bond resolutions are the practical equivalent of trust indentures, which had been covered by § 501B.25 or its predecessors since 1978" is without support and is without merit. To create a trust, the language used in the bond resolution must show with reasonable certainty or beyond a reasonable doubt that a trust was intended to be created. *Bond v. Comm. of Revenue*, 691 N.W.2d 831, 837 (Minn. 2005); *Bingen v. First Trust Co. of St. Paul*, 103 F.2d 260, 263 (8th Cir. 1939). There is no such language or intent to create a trust in the Basic Resolution. *Bond*, 691 N.W.2d at 837 (setting out necessary elements for creation of a trust). That is why, in

accord with the terms of the Basic Resolution, the Port's President and CEO Kenneth Johnson testified as follows:

> Q. Is the Port Authority a guarantor, a trustee or fiduciary with respect to the 876 Fund?
>
> A. No, it is not.

(T. 9/13/02, p. 21; *see also* T. 10/22/04, p. 14.)

The Basic Resolution created a creditor/debtor relationship between the Port and Bondholders, not a trustee/beneficiary relationship. *Id.*

The Port's statement in page 40 of its brief that "chapter 501B protects both the trustee and beneficiary" is not true under the 1993 amendment. Under the 1993 amendment, the Port can simply declare itself to be a trustee but with no fiduciary responsibility or duty to Bondholders. In a true trust situation, the trustee has a fiduciary relationship with the beneficiary. *In re Watland*, 211 Minn. 84, 300 N.W. 195, 199 (1941). Such a trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. *Schug v. Michael*, 310 Minn. 22, 245 N.W.2d 587, 591 (Minn. 1976), *reh'g denied*. Since the Port and Bondholders' relationship here is debtor/creditor their interests are "necessarily different" and are adversarial. *In re Baltimore Emergency Servs. II, Corp.*, 432 F.3d 557, 562 (4th Cir. 2005).

In fact the Port has acknowledged that it is in the Port's best interest to be acquitted of its obligations under the Basic Resolution. (T. 369.) Port employees such as William Morin, who was the Port's director of real estate, admits he evaluates the measures that need to be taken solely from the perspective of his obligation to the Port.

(T. 539.) He understands that he holds no fiduciary obligation to Bondholders. (*Id.*) And if the Bond Resolution is the "practical equivalent" of a trust indenture as the Port now cynically suggests, then its use of the 1993 amendment would not have been necessary and the Port is in gross violation of its duties owed to Bondholders.

4. The 1993 Amendment is not a clarifying amendment.

Under the law as it existed prior to 1993, a trust is not to be created where none in fact was contemplated. The 1993 Amendment adding bonds without trust indentures to § 501B is not a clarifying amendment as the Port asserts; it is a wholesale change in the law. The 1993 Amendment altered the substance of Minn. Stat. § 501B.25 and added a new category of Port bonds – those without trust indentures – to its reach. Prior to this amendment, Minnesota's trust statute did not apply to bonds issued without trust indentures. The 1993 Amendment accordingly does not interpret § 501B.25; it substantially changes the language and reach of §§ 501B.16-501B.25.

The 1993 Amendment grants for the first time to the Port the authority to "elect" to apply §§ 501B.16, et al. to Port bonds issued without trust indentures. It creates for the first time the legal fiction that the bond resolution is "the trust instrument" and that the Port becomes the "trustee," although the statute also declares this "trustee" has no "fiduciary responsibility to the Bondholders." Minn. Stat. § 501B.25.

Nowhere does the Legislature declare the 1993 Amendment to be one of clarification. Moreover, the Port provides no legislative history manifesting any intent that this amendment was one of clarification. *State v. Niska*, 514 N.W.2d 260, 264-65

(Minn. 1994), *reh'g denied.* And even if the Legislature had inserted the word "clarify," which it did not, that fact alone is not sufficient to justify retroactive application. *Id.*

B. The Lower Courts Applied the 1993 Amendment Retroactively in Contravention of Minnesota Law.

As previously stated and contrary to the Port's argument to this Court, there can be no dispute that "the payment of bonds is governed by the law in effect at the date of their issuance. Such law forms a part of the bond contract." That contract cannot be impaired by subsequent legislation. 15 *McQuillin, the Law of Municipal Corp.* at § 43:122. As this Court has unequivocally held, the legislature cannot by subsequent enactment change or enlarge the rights of the parties under a contract. *Seastrand v. D. A. Foley & Co.*, 144 Minn. 239, 175 N.W.117, 118 (1919).

Here, the rights of the parties were vested and fixed, at the latest, by September 1991. *Naftalin*, 90 N.W.2d at 191; *Comstock v. Bd. of Comm'rs of LeSueur County*, 92 Minn. 88, 100 N.W. 652 (1904). Thus, under this Court's definitions of retroactivity as enunciated in *Cooper*, 187 N.W.2d at 693, retroactivity must be defined in terms of the effect the 1993 Amendment would have on the vested contractual rights, not in terms of the time when the Port happens to assert § 501B.25 and petition the court, as the Port asserts and the Court of Appeals has ruled.

Contrary to the Court of Appeals analysis, a statute is retrospective if in its operation it alters pre-existing legal interests or rights. While this Court has observed the statute only becomes effective as of its passage, it nonetheless is retrospective because of its effect on previously established property and contract rights. *Cooper*, 187 N.W.2d at

693. The question is whether the 1993 amendment is to be construed as retroactive in its application to Port bonds issued prior to its enactment. Clearly, by its terms, the 1993 amendment is to have no retroactive application. *Chapman v. Davis*, 233 Minn. 62, 45, N.W.2d 822, 824 (1951).

The 1993 Amendment provides that § 501B.25 does not apply if the bond resolution provides otherwise. Such language is clear indication that the Legislature intended that such legislation would not apply to bond contracts issued before 1993 because prior to the statutory enactment there had been no reason for a bond contract to have such an opt-out provision. There was no statute that applied to bonds without a trust indenture. The Port and the lower courts have wholly ignored this language contained in § 501B.25 in addressing the statute's application to Bondholders.

C. As Applied Here, Minn. Stat. § 501B.25 Is a Substantive Statute.

The Port asserts that Minn. Stat. § 501B.25 adopted "a procedural remedy through which a trustee can petition a district court for an order." (Port Brief, p. 27.) The League makes the same assertion. What they describe as procedural is not procedural at all. As applied here, Minn. Stat. § 501B.25 is a substantive statute.[4]

Substantive statutes create, define and regulate rights. *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989). One who buys bonds issued with a trust knows that Chapter 501B applies and that under § 501B the court can authorize a deviation from the terms of

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[4] Also and as will be addressed, it makes no difference if the amendment only provided a procedural remedy. The result under Minnesota law is the same – no application to Bondholders.

a trust. Minn. Stat. § 501B.16. But one who purchased bonds issued prior to 1993 with no trust indenture also knew that § 501B had no application and that Minnesota's general contract principles would govern the parties' rights and relationship in the case of a dispute. General contract principles do not allow the court to rewrite the parties' contract.

Parties to a contract are not forever locked into its terms. The very terms of the Basic Resolution – Section 9-2 – provide a mechanism for contract modification, which the Port simply has refused to follow. (A. 89.) Parties may, by mutual assent, modify a contract or waive their rights under it and engraft new terms on it. *Minn. Valley Gun Club v. Northline Corp.*, 207 Minn. 126, 290 N.W. 222, 225 (1940). But the courts do not have the authority to so modify Bondholders' rights at the bequest of the Port and the Port cannot do so unilaterally.

The only reason that the Port decided to declare itself a trustee under § 501B.25 was to invoke Minn. Stat. § 501B.16, subd. 4, so as to assert that the court may issue orders deviating from the terms of the Basic Resolution and to confirm the Port's deviations. In 2002, for example, the Port asked the trial court to authorize "the [Port] to recover the expenses of the proposed tender offer or those incurred with future offers, including the expenses of pursuing this Petition and responding to the Franklin Fund's request, from funds on deposit under the Basic Resolution and to recover up to 0.75% of the principal of bonds tendered as a cost of tender." (A. 108-109.) No provision of the Basic Resolution so allows. The trial court's allowance of such costs is an amendment to

the Basic Resolution without Bondholder consent and is contrary to Section 9-2 of the Basic Resolution. (A. 89.)

Following the Port's success in 2002, in 2004, the Port brought another petition, this time seeking to change the timing of the principal and interest payments. (A. 139.) The Port acknowledged to the trial court that under the terms of the Basic Resolution such a change required Bondholder consent; the Port did not seek such consent. It instead asserted that the court had the power under Minn. Stat. § 501B.16 "to construe the Basic Resolution to authorize this adjustment." (A. 142-143.)

This time the Port sought to recover the costs of the petition "as well as other ongoing costs necessarily incurred by the [Port] in connection with the administration of the 876 Funds and the 876 Bonds, from Prepaid Net Revenues, Special Funds and, after depletion of those funds, from Net Revenues." (A. 144.) No language in the Basic Resolution authorized the Port's request. (T. 242-43.) Using these revenues pledged to the Bond Fund is a breach of Section 5-2(3) that requires the use of funds in the Bond Fund to be withdrawn "solely" to pay principal and interest owed on the bonds. (A. 76.)

Finally, in 2006, the Port brought another petition. In that petition, it reminded the court that in 2004 the court had exercised "its authority to construe, interpret and reform the Basic Resolution" by its 2004 Order adjusting the payment terms. (A. 175.) Now the Port came before the court requesting a court order "allowing the [Port] to liquidate the 876 Bonds and terminate the Basic Resolution." (A. 178-180.)

Mr. Johnson, the Port President, has admitted that the 2006 Petition requested a liquidating event. (T. 258.) He testified:

> Q. The one effect of [the 2006 Petition] will be to relieve the Port Authority of its obligations and covenants under Section 4 of the bond resolution, correct?
>
> A. I think so.

(T. 257.)

In paragraph 42 of its 2006 Petition, the Port proposed to solicit proposals from third parties to purchase revenue streams that are pledged to payments on 876 Bonds through 2022 "when the 876 Fund would ordinarily have ended." (A. 179.) In fact, 2002 is merely the due date on the last 876 Bond, not the end of the 876 Fund or the end of the Port's obligation. Again, this proposal is directly contrary to Basic Resolution § 4-9. (A. 68.) And the Port has specifically admitted there is nothing in the Basic Resolution that so supports its request, and no statute says that the Port is acquitted of its covenants after 30 years. (T. 364-365.)[5]

In paragraph 12 of its 2006 Petition, the Port asserted it has pledged revenues unrelated to 876 Bonds that it receives from lease revenues on the Mississippi River. (A. 171-72.) It asserts: "These lease revenues are funds that could be used for other public purposes if not pledged to the 876 funds." (A. 172.) The Port has admitted that lease revenues are pledged to the 876 Fund and in its Petition sought to have the court

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[5] Nonetheless, the Port continues to assert that 2022 is the end date of the 876 Fund. (See Port's Brief, pp. 6, 54.)

relieve the Port from its pledge, to the detriment of Bondholders and contrary to Section 4-9 of the Basic Resolution, drafted by the Port. (A. 68.)

The Port admits that the Port could be relieved of its covenants by negotiating an amendment to the resolution with 51% of Bondholders, as the Basic Resolution provides. (T. 257.) No such negotiation occurred. (*Id.*)

What the Port petitioned for and was granted by the 2002, 2004 and 2006 Orders are material and significant alterations of the Basic Resolution.

D. The 2002/2004 Petitions Are Void.

Contrary to the Port's statement, Bondholders' claim as to that which the Port has wrongly deprived Bondholders and continues to deprive Bondholders based on the trial court's 2002 and 2004 orders is not "newly minted." As established before the trial court and based on just part of Judge Marrinan's 2004 order alone, the Port will continue to take funds Bondholders claim belongs to them which are estimated to total $3,858,336 by the year 2022. And the sole basis for Port's claim of entitlement to these funds is Judge Marrinan's 2004 order. (T. 127.)

The Port's assertion as to "mootness" simply makes no sense in the context of this case contesting the court's subject matter jurisdiction. Mootness involves the question whether there is a justiciable controversy. As this Court explained in *Kahn v. Griffin*, 701 N.W.2d 815, 822 (Minn. 2005), citing the United States Supreme Court's explanation in *Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 189 (2000), mootness can be described as the doctrine of standing set in a time frame: the

requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness).

The Port's assertion that what has been done cannot be undone has no record basis before this Court. Obviously if the Port has removed money that belongs to the Bond Fund it needs to pay it back. This is the result that follows any case where a party fails to follow the terms of its contract. As Bondholders explained to the Court of Appeals, to the extent that the Port's actions are in conformity with the terms of the Basic Resolution, there is no breach of contract and its actions can stand.[6] To the extent Port's actions are not ultimately found to be in conformity with the terms of the Basic Resolution, the Port needs to answer for that breach. But such a determination is not an issue before the court which is addressing only the jurisdictional issue.

E. Port Cannot Now Change Jurisdictional Basis on Which It Presented Its Petitions.

The Port also cannot now argue or change the jurisdictional basis on which the 2002, 2004 and 2006 petitions came before the court and the orders were issued. In 2002, 2004 and 2006, the Port specifically petitioned the court "pursuant to Minn. Stat. §§ 501B.16 and 501B.25" and it was on that basis that the trial court held the petitions were before the court. (A. 9; 16.)

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[6] It is the Port that cannot support the Court of Appeals "newly minted" futility doctrine. (A. 4.) The Bondholders have been informed that the tape of the Court of Appeals argument is for internal court purposes only. If any purported concessions at oral argument are at issue, Bondholders request that this Court listen to that tape. There are no such concessions.

It is true that under Chapter 555 a court may declare the rights and obligation of the parties under a contract. However, the court has no authority under Chapter 555 to modify the terms of a contract and the Port would have had to initiate such an action by a summons and complaint personally served on Bondholders in accord with the Minnesota Rules of Civil Procedure. Minn. Stat. § 555.011.

The Port's assertion that it could proceed with a class action against Bondholders simply makes no sense. It is the Port which has not honored its contractual obligations to Bondholders. Moreover, in such a proceeding the court also has no authority to modify the parties' contract or instruct the Port.

The Port's assertion that its contractual obligations can somehow be excused under the doctrine of impossibility or impracticability is not before this court. A basic principle of the law of contracts is a promissor is bound to perform the agreement according to its terms or respond in damages for breach of contract. Impractability and impossibility are affirmative defenses to a breach of contract action, an action which is not before this court. *Minnesota Practice Civ. JIGS,* § 1620.30; 30 *Williston on Contracts*, § 77:6 (4th ed. 2007).

And contrary to the Port's argument, asserted economic loss or hardship is not enough to excuse performance of a contract. The doctrines of impracticality of performance or frustration of purpose have "at their core requirement that some event must occur, the non-occurrence of which was a basic assumption of the contract at the

time it was made." *J J. Brooksbank Co. v. Budget Rent-A-Car Corp.*, 337 N.W.2d 372, 376 (Minn. 1983).

The Port cites the *Restatement (Second) of Contracts* § 261 (Respondent's Brief, p. 39). Comment b to Restatement § 261 explains that "mere market shifts or financial inability do not usually affect discharge" under the doctrine of impracticability. Comment b provides a helpful example. In illustration 2, its comments is as follows: "A contracts to produce a movie for B. As B knows, A's only source of funds is a $100,000 deposit in C Bank. C Bank fails, and A does not produce the movie. A's duty to produce the movie is not discharged, and A is liable to B for breach of contract." *Id.*

Impossibility or impracticability is not an issue in this case and the trial court's own statement shows that the Port would have no such defense. (A. 29.)

The Port asserts that Bondholders "have no support for the blanket statement that equitable relief cannot be granted where a party's rights are governed by contract." (Port Brief, p. 40.) But this Court has declared exactly that. In *U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 496 (Minn. 1981), this Court stated: "Equitable relief cannot be granted where the rights of the parties are governed by a valid contract," citing *Cady v. Bush*, 283 Minn. 105, 166 N.W.2d 358 (1969).

F. It Is Immaterial Whether a Law Alters Procedural or Substantive Rights; the Legislature Must Still Express Its Intention to Make the Statute Retroactive.

This Court has unequivocally held that "it is immaterial in this state whether a law alters procedural or substantive rights; the Legislature still must express its intention to

make it retroactive." *In re Murphy*, 293 Minn. 298, 198 N.W.2d 570, 576 (1972). In *In re Murphy*, this Court rejected the argument made by the Department of Public Welfare that the 1967 statute "merely procedurally amend[ed] and extend[ed] remedial rights which previously existed under § 526.01, thus avoiding application of the rule against retroactivity." *Id.* As this Court held, Minn. Stat. § 645.21 draws no distinction between laws affecting procedural and substantive rights.

The Port cites the 1893 case of *Tompkins v. Forrestal*, 54 Minn. 119, 55 N.W. 813, 814 (1893). But as this Court stated in *Chapman*, 45 N.W.2d at 824 n. 1, at the time of this court's decision in *Tompkins v. Forrestal*, "Minn. Stat. § 645.21 was not then enacted."

In *Chapman*, this Court applied language, which is identical to the current version of § 645.21, to a situation in which after the defendant's accident had occurred but before plaintiff brought her action against the defendant the Minnesota statute governing how service of process may be effected had been amended. Plaintiff asserted that the amended statute applied. This Court disagreed and held to so hold would be to apply the statute retroactively which is contrary to Minn. Stat. § 645.21.

The Port also relies on *Ogren v. City of Duluth*, 219 Minn. 555, 18 N.W.2d 535 (1945), *reh'g denied*. This Court also addressed *Ogren* in *Chapman* holding that the "[in *Ogren* the] court gave retroactive effect to the statute only where such necessary legislative intent was manifest." *Chapman*, 45 N.W.2d at 824 n. 1.

This Court's decision in *United Realty Trust v. Prop. Dev. and Research Co.*, 269 N.W.2d 737, 744 (Minn. 1978), also does not support the Port. The Port ignores this Court's own explanation of its decision in *United Realty Trust* in its subsequent decision in *Haugen v. Peterson*, 400 N.W.2d 723, 725 (Minn. 1987). In *Haugen*, this Court explained that the Court has made an exception to the presumption against retroactivity when the statute concerns a repeal of a penal law. *Id.* This Court cited *United Realty Trust* as the leading case for this proposition.

In *United Realty Trust*, this Court held that a borrower was obligated to obey the terms of a loan whose interest rates were illegally high when made in 1973, but acceptable under a partial repeal of the usury laws in 1974. In *United Realty Trust*, this Court acknowledged the general rule that "repeal of a penal law releases the penalty imposed as to all actions initiated after repeal . . . ." 269 N.W.2d at 742. This Court specifically held that the legislature had the power to validate retroactively a contract previously invalid so long as it did not interfere with a vested right. *Id.*

In *Haugen*, the issue presented was whether the repeal of Minn. Stat. § 500.20, subd. 2 in 1982 revived a restrictive covenant which, under the statute, terminated in 1979. 400 N.W.2d at 725. This court held that *United Realty Trust* "only supports reviving the restrictive covenant if the 30 year limit on the life of property restrictions is a penal law." 400 N.W.2d at 725. This Court concluded it was not. The termination of the restrictive covenant in 1979 left appellant with a vested right to develop her property as

she saw fit. Accordingly, the repeal of Minn. Stat. § 500.20 did not revive the effect of a terminated restrictive covenant.

In only one case has this Court made an exception to Minn. Stat. § 645.21. In *Hunt v. Nev. State Bank*, 285 Minn. 77, 172 N.W.2d 292 (1969), *cert. denied sub nom Burke v. Hunt*, 397 U.S. 1010 (1970), this Court ruled that Minnesota's "nonconsensual" long-arm jurisdiction statute, Minn. Stat. § 543.19, should be applied retroactively even though the Legislature gave no clear intention that it should be so applied. *Hunt* has not been applied to any other statute. *Hanson v. Liberty Homes, Inc* , 510 F. Supp. 273, 275 (D. Minn. 1981) (recognizing lone exception of *Hunt*). Since *Hunt*, this Court has consistently and unequivocally held that § 645.21 applies to all laws without making any distinctions between laws relating to procedure and those relating to substantive rights. *Cooper*, 187 N.W.2d at 369; *In re Murphy*, 198 N.W.2d at 576 (same); *Brugger v. Brugger*, 303 Minn. 488, 229 N.W.2d 131, 135 (1975), *reh'g denied* (same); *Kahn v State*, 327 N.W.2d 21, 27 (Minn. 1982) (same).

Finally, the Port cites to this Court two Court of Appeals decisions – *In re Estate of O'Keefe*, 354 N.W.2d 531 (Minn. Ct. App. 1984), *rev. denied*, and *Midwest Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435 (Minn. Ct. App. 1992). *Midwest Mut. Ins. Co.* involved a no-fault insurer who asserted its coverage should be construed as difference in limits rather than as add-on coverage. *Id.* at 437-38. The legislature there had specified that the no-fault amendment was effective "for all injuries occurring on or after August 1, 1989, or for deaths occurring as a result of injuries sustained on or after August 1, 1989." *Id.* at

438. The Court of Appeals concluded that the August 1989 no-fault amendment was not being applied retroactively based on the fact that the insured's accident (August 19, 1989) and the claimant's death (September 8, 1989) all occurred after the amendment went into effect.

In re Estate of O'Keefe, the statutory amendment subjected a decedent's homestead to claims for medical assistance benefits. 354 N.W.2d at 531. Because there was no provision for a claim for medical assistance paid prior to the recipient's death, the Court of Appeals held the statute was not being applied retroactively when the decedent's death did not occur until after the statute had been amended. *Id.* at 534. The Court of Appeals further stated that even if the statute is retroactive, it complied with Minn. Stat. § 645.21.

The Minnesota Court of Appeals itself, in *In re Wage and Hour Violations of Holly Inn, Inc.*, 386 N.W.2d at 311, acknowledged, ". . . the distinction between statutes that create a new right or wrong and statutes that create a new remedy has not been followed." Accordingly, in *Holly Inn*, the Court of Appeals held that "although the statute in the present situation changed only the procedure for recovery against the employer, the above cases from our Supreme Court indicate that, in the absence of clear legislative intent, the 1985 language cannot be applied retroactively." *Id.* at 313.

Contrary to the League's assertion and as this Court is well aware, if this Court permits application of the 1993 Amendment here, such a ruling will not apply in very limited circumstances. Such a ruling would provide legal authority for use of legislation

passed without retroactive intent to be given retrospective effect in a wide variety of situations. Such a ruling implicates application of the U.S. and Minnesota Constitutions' prohibition against impairment of contracts. Such a ruling would create uncertainty and instability in the marketplace if future changes in the law could be used to authorize amendment, alteration and deviation from the terms of any contract, including municipal bonds.

II. THE 1993 AMENDMENT CANNOT BE CONSTITUTIONALLY APPLIED TO 876 BONDHOLDERS AND A RECEIVER SHOULD BE APPOINTED.

If the Port were truly confident that its actions are in the best interests of Bondholders, there would be no reason for its opposition to the appointment of a receiver. The Port's lack of confidence that its actions are in the best interest of Bondholders is exposed by its absolute refusal to acknowledge the benefit of having a receiver appointed. This receiver will have a fiduciary responsibility to Bondholders, and can speak for all Bondholders. If the Port's assertions as to what is in the best interests of Bondholders is correct, presumably the receiver for Bondholders will agree. But it should not be for the Port to decree what is in the best interests of Bondholders when it is in an adversary debtor/creditor relationship with Bondholders.

Running throughout the Port's brief is its assertion that the Port's proposal for liquidation honors the Basic Resolution's central commitment to equal and ratable distribution of the 876 Fund. This argument is nothing more than a smoke screen to cover the Port's true purpose: to be discharged from its contractual covenants and pledges and to not be held accountable to Bondholders for the Port's past breaches of the

covenants and duties owed Bondholders under the Basic Resolution. As set forth in Bondholders' initial brief, these breaches include such actions as the diversion of one-half of the pledged tonnage fees from the Bond Fund, sale proceeds from non-revenue bond facilities not going into the Bond Fund, wrongful payment of paying agency fee and wrongful payment of third party costs from the Bond Fund.

In addressing the constitutionality of its actions, the Port ignores its own statement that the termination of the pledges in favor of the Bond Fund will allow the Port to recapture all of the revenue from non-revenue bond facilities so that it can use these revenues for other public purposes. (See Amended Petition of the Port, ¶ 12; A. 171-72.) The Port, by its own admission, is attempting to terminate the pledges for a reason prohibited under the U.S. and Minnesota Constitutions. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S.1, 29 (1977).

What the Port has done here illustrates why a receiver must be appointed. With regard to the present shortfall, while some of it may have been caused in part by past economic events, the Port has greatly increased the shortfall by not depositing all pledged revenues into the Bond Fund and by taking unauthorized expenses from the Bond Fund. Section 4-12 of the Basic Resolution provides for the appointment of receiver to enforce the rights of all Bondholders. Upon appointment, the Receiver can discuss with the Port the equal and ratable treatment of all Bondholders after all monies wrongfully taken by the Port are returned to the Bond Fund. The petitioning Bondholders are not seeking

preferential treatment for any group of bondholders but are merely seeking to have a receiver appointed to enforce the rights of all bondholders.

The Port's other arguments with regard to the liquidation are likewise untenable. The Port's assertion there will be a tax benefit to Bondholders is also a smokescreen. If any Bondholder wants to take a tax loss they can do so by selling their bonds in the public market. Bondholders do not want or need the Port to do tax planning for them. It should be an individual decision of each Bondholder if they want to sell a bond for a tax loss. Further, any lender, including Bondholders, would prefer payment over a loss. Any request the Court should consider potential tax losses as payment of a debt is unprecedented and is frankly absurd.

The record does support that the Port has committed waste. The Port's unilateral diversion, starting in 1996 and continuing through the present, of one-half of the tonnage fees pledged to the Bond Fund into a river maintenance fund is a breach of Section 4-3 of the Basic Resolution. Section 4-3 provides in part: "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. 63-64.) To permit the debtor, the Port, to divert revenues pledged to a lender, Bondholders, to pay for renewal, replacement or improvements that the Port agreed was its responsibility in the loan agreement, the Basic Resolution, cannot be sanctioned. By diverting those pledged revenues, the Port commits waste to the detriment of Bondholders. But perhaps more significant than the waste carried on in the past is forestalling what is planned for the future. The Port

proposes, and the trial court has allowed, that the entitlement to the pledge revenue stops in 2022. (A. 20.) Under the contract, the pledge remains in place until the bonds are paid in full – Basic Resolution Section 4-9. (A. 68.) Under the contract, the revenues of "non-revenue bond facilities" are pledged to the Bond 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. *Id.*

The Port argued before the trial court that it could sell a non-revenue bond facility any time at its discretion and withhold the proceeds from the Bond Fund. (T. 350.) This seems a particularly contentious and contrary construction of its covenant to lease the property to pay the bonds and to get the best price on sale. The Port contends it can stem the flow of revenue at will to Bondholders by selling and keeping the proceeds to itself.

The Port makes the argument that "presumably [the bondholders] want a receiver to sell those facilities and use the proceeds to pay 876 Bond debt service." Bondholders have made no such argument. Bondholders seek a receiver to protect and enforce the right of all Bondholders, and to enforce all covenant duties of the Port as specifically provided for in Section 4-12. (A. 71.) Basic Resolution Section 5-2(3) governs the use of funds in the Bond Fund and requires funds withdrawn by the Port be used "solely to pay" the interest and principal due on the bonds. (A. 76-77.) The Port, however, developed

the strategy of engaging the trial court to license its use of the Bond Fund for unauthorized purposes. (*See* Appellant's initial brief, pp. 15-22.) The Port has taken revenues pledged to the Bond Fund, and taken expenses from the Bond Fund that are not permitted. The receiver should enforce those covenants for the benefit of all Bondholders.

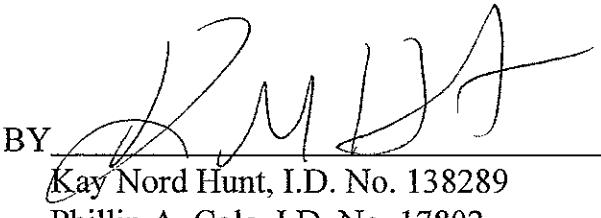
The Bondholders need a receiver to engage the Port on these issues and others.

CONCLUSION

For the reasons stated, Appellant respectfully requests the lower court to be reversed and the relief be granted as set out on page 54 of Appellant's initial brief to this Court.

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

Dated: October 30, 2008

BY 

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,943 words. This brief was prepared using Word Perfect 10.

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

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