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A07-1512  
A07-1513  
A07-1514

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**State of Minnesota  
In Supreme Court**

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

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**PETITION FOR REHEARING BY  
THE PORT AUTHORITY OF THE  
CITY OF SAINT PAUL**

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## INTRODUCTION

The Port Authority of the City of Saint Paul (Port Authority) respectfully petitions for rehearing pursuant to Minn. R. Civ. App. P. 140.01. As grounds for rehearing, the Port Authority believes the Court misconstrued the nature of the relief the Port Authority requested, incorrectly concluding that the Port Authority sought to change the terms of Basic Resolution 876. The Court thus misapplied existing rules of law. In addition, in *dictum* the Court unduly constrained future relief the Port Authority might seek under the Uniform Declaratory Judgments Act.

## ARGUMENT

With its petition, the Port Authority did not seek an amendment of Basic Resolution 876, but a harmonizing interpretation of the existing provisions of Basic Resolution 876 to address a situation that was not contemplated when the document was first adopted in 1974.

### **I. The Court Erred When It Concluded That The 1993 Changes To Minn. Stat. § 501B.25 Impermissibly Expanded The Port Authority's Procedural Rights.**

On page 11 of its opinion, the Court holds that the 1993 amendments to Chapter 501B gave the Port Authority "more procedural rights than it possesses under the Basic Resolution." Then, because the 1993 Amendments were not explicitly made retroactive (despite their intended purpose to permit the Port Authority to use them), Minn. Stat.

§ 501B.16 was held inapplicable to Basic Resolution 876. But this holding misapprehends what the Port Authority sought by its petition and calls into question what it means for a statute to be retroactive in application.

**A. The Port Authority invoked Chapter 501B to give effect to all provisions of Basic Resolution 876.**

The undisputed testimony and uncontested factual findings of the district court establish that the 876 Fund will never be able to pay 876 bondholders in full. (A. 25-26.) It is also uncontested that the reasons for this failure – poor real estate market conditions in Saint Paul – were not the fault of the Port Authority. (A. 29-30.) Basic Resolution 876 did not anticipate this circumstance. The absence of an acceleration provision in Basic Resolution 876 meant there were no contractual means to give effect to the express grant in sections 4-7 and 5-8 of Basic Resolution 876 to all 876 bondholders of an equitable and ratable interest in the assets of the 876 Fund. The Port Authority's plan to liquidate the 876 Fund was instead the only means to give effect to these key provisions of the Basic Resolution. (A. 30.) The opposing bondholders did not contest this finding by the district court, nor did they dispute that the liquidation plan would provide an added benefit to 876 bondholders of up to \$5.8 million. (T. 872, 874.)

Given that it was now economically impossible for bondholders to be paid in full, the Port Authority sought to apply the common law doctrine of impossibility of performance to ensure that all bondholders would be treated equitably and ratably. See *Powers v. Siats*, 244 Minn. 515, 520-21, 70 N.W.2d 344, 348-49 (1955) (“[P]erformance of a contractual duty may be excused when, due to the existence of a fact or circumstances of which the promisor at the time of the making of the contract neither knew nor had reason to know, performance becomes impossible ....”). Doing nothing would result in the large majority of 876 bondholders receiving none of their principal back, while a minority would have most, if not all, of their principal returned. What the Port Authority sought was not an amendment of Basic Resolution 876, but a harmonizing interpretation of the existing provisions of Basic Resolution 876 to address a situation that was not contemplated when that document was drafted. To be sure, the liquidation plan would have excused future performance by the Port Authority, not because that document had to be changed, but only because nothing was left for the Port Authority to perform under Basic Resolution 876.

The Port Authority used the procedures of Chapter 501B because they offered an efficient means to put the legal issues raised by the liquidation plan before the district court. Under this procedure,

bondholders would get adequate notice of what was sought and, as happened here, to appear to make their views known regarding the Port Authority's plan. Indeed, 876 Bondholders could have availed themselves of the right to petition the district court. The 1993 amendment to § 501B.25 did not give the Port Authority any rights it did not already have. The district court could have rejected the Port Authority's plan, holding that the doctrine of impossibility of performance did not apply.

In short, nothing in the 1993 amendment changed the substantive law applicable to Basic Resolution 876. It was the preexisting common law doctrine of impossibility of performance the Port Authority relied on: a petition under Chapter 501B was merely the means to apply that doctrine to the circumstances confronting the 876 Fund and obtain a construction of Basic Resolution 876 that gave effect to all of its provisions.

**B. The Court's holding that the 1993 amendment to Chapter 501B was retroactive directly conflicts with settled precedent regarding application of procedural remedies.**

On page 11 of its opinion, the Court determined that the 1993 changes to § 501B.25 were retroactive merely because they applied to a contract in existence before the 1993 Amendments. But that conclusion effectively overturns settled precedent that the legislature can modify

procedural remedies without transgressing the presumption against retroactivity. For example, in *Ogren v. City of Duluth*, 219 Minn. 555, 18 N.W.2d 535 (1945), the Court held the legislature could repeal an evidentiary prescription otherwise applicable to existing claims; in *Hunt v. Nevada State Bank*, 285 Minn. 77, 172 N.W.2d 292 (1969), the Court applied a new long arm statute to an existing dispute; and in *United Realty Trust v. Prop. Dev. & Research Co.*, 269 N.W.2d 737 (Minn. 1978), this Court upheld the repeal of usury penalties to loans already in existence. A statute is not retroactive simply because existing facts affect how the statute is applied. There is no basis to distinguish the effect of the 1993 change on § 501B.25 from the legislative action upheld in these earlier cases. There is a tension between this case and those earlier decisions that this Court should address.

## **II. The Obiter Dictum Of Footnote 4 Should Be Dropped As Unnecessary To The Decision.**

Having concluded that the 1993 amendment to § 501B.25 gave the Port Authority impermissible, retroactive procedural rights, in footnote 4 the Court went out of its way to place the declaratory judgment process off limits too.<sup>1</sup> Thus, the Port Authority has no means to seek judicial

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<sup>1</sup> Before the district court, counsel for Appellants argued that while Chapter 501B was unavailable, the Port Authority could bring a declaratory judgment action on its interpretation of Basic Resolution

relief under the current circumstances, and similar parties in the future appear to be precluded from seeking judicial relief. This opportunity for relief was a material benefit to municipalities throughout this State, as noted by the League of Minnesota Cities in its amicus brief.

The Port Authority argued that it could have used the Uniform Declaratory Judgment Act to present its liquidation plan to the district court. And if those procedures, which predated Basic Resolution 876 by many years, were available, then it followed that 876 bondholders were not prejudiced by the 1993 amendment, which merely gave the Port Authority access to the more elegant procedures of the traditional trustee's petition for instructions.

As discussed above, the Port Authority proceeded on the theory that the doctrine of contract impossibility applied to the current circumstances confronting the 876 Fund, which would allow the Port Authority to proceed with its plan of liquidation. The district court agreed. (A. 29-30.) The use of a declaratory judgment action in this case is procedurally no different than a declaratory judgment action brought by an insurance carrier seeking a ruling that its policy does not provide coverage. See, e.g., *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762

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876. Trans. of November 17, 2006 Hearing, at 57, lines 2-5 (copy attached).

N.W.2d 572, 580 (Minn. 2009) (resolving insurer's action seeking declaratory judgment that policy definition of "advertising injury" did not include coverage for trademark and unfair competition claims for insured's use of word "hobbit"); *Minn. Higher Educ. Facilities Auth. v. Hawk*, 305 Minn. 97, 232 N.W.2d 106 (1975) (declaratory judgment action determining the power to issue a revenue bond for refinancing). The declaratory judgment procedure likewise should be available to the Port Authority to construe the provisions of sections 4-7 and 5-8 of Basic Resolution 876, and likewise to hold that, in current circumstances, the liquidation plan is the only way to give effect to the equitable and ratable language in those two provisions. The language of footnote 4 not only seems to preclude this, but that *dictum* presents an untoward and unnecessary gloss on Minn. Stat. § 555.01.

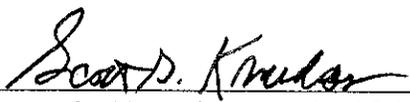
### **CONCLUSION**

The Court noted that doing nothing would result in the large majority of 876 Bondholders receiving none of their principal back, while a minority would have most, if not all, of their principal returned. Accordingly, the Court should grant the petition for rehearing to address the legal theory on which the Port Authority presented its plan of liquidation. If the common law doctrine of impossibility of performance applied, as determined by the district court, then the 1993 amendment

to Chapter 501B did not afford the Port Authority more procedural rights. The decision as it stands indicates mere reliance on antecedent facts makes a statute retroactive. Hence, the Court needs to focus on what it means for a statute to be retroactive in application. Finally, the unnecessary and incorrect footnote 4 should be dropped.

Dated: September 21, 2009.

**BRIGGS AND MORGAN, P.A.**

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**ATTORNEYS FOR RESPONDENT  
PORT AUTHORITY OF THE CITY  
OF SAINT PAUL**

**Attachment – November 17, 2006 Hearing Transcript**

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STATE OF MINNESOTA  
COUNTY OF RAMSEY

COPY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT

Court File No. C2-02-200043

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

VOLUME I

The above-entitled matter came on for Hearing on the  
17th day of November, 2006, before the Honorable  
Teresa R. Warner, Judge of District Court, 1070 Ramsey  
County Courthouse, 15 West Kellogg Boulevard, St. Paul,  
Minnesota.

APPEARANCES:

Appearing for Basic Resolution 876

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1 Marrinan to resolve.

2           If they wanted to use moneys in dispute  
3 under the contract, they had to seek an amendment of the  
4 contract or perhaps a declaratory judgment with regard  
5 to their purported interpretation of it. But Judge  
6 Marrinan had no authority under 501B.25 to sit in a  
7 virtually ex parte situation and proceed. No one  
8 appeared, to my knowledge, in opposition in either of  
9 those years.

10           THE COURT: My question is did anybody  
11 appear on behalf of the bondholders?

12           MR. COLE: No, I don't believe so.

13           THE COURT: Whether they were in opposition  
14 or not, was there any representation?

15           MR. COLE: To my knowledge, there wasn't.

16           MR. BROADY: Franklin Funds had an attorney.

17           MR. COLE: I'm sorry. Franklin Funds in  
18 2002, they wanted to do the Dutch auction. They were  
19 the inspiration for it so that is true.

20           THE COURT: That's in 2002. What about  
21 2004?

22           MR. COLE: To my knowledge, no one appeared.  
23 I presume that notice was sent out under 501B to the  
24 bondholders. The scope of the issues were not revealed.  
25 The contract argument is not set forth in their notices.

AFFIDAVIT OF SERVICE VIA U.S. MAIL

STATE OF MINNESOTA                    )  
  ) ss App. Nos. A07-1512, A07-1513, A07-1514  
COUNTY OF HENNEPIN                )

Bethany C. Suhreptz, being first duly sworn, deposes and states that on the 21st day of September, 2009, she served the attached document:

1.     Petition for Rehearing by the Port Authority of the City of Saint Paul

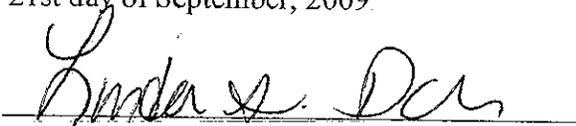
upon:

Kay Nord Hunt, Esq.  
Keith Broady, Esq.  
Lommen, Abdo, Cole, King & Stageberg, P.A.  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402

Which is the last known mailing address of said attorneys, by depositing in the mail, postage pre-paid, a true and correct copy thereof.

  
Bethany Suhreptz

Subscribed and sworn to before me this  
21st day of September, 2009.

  
Notary Public

