

Nos. A07-1512, A07-1513 and 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 Saint Paul

**BRIEF OF RESPONDENT
THE PORT AUTHORITY OF THE CITY OF SAINT PAUL**

LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
Kay Nord Hunt (#138289)
Phillip A. Cole (#17802)
Keith J. Broady (#120972)
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Appellants

BRIGGS AND MORGAN, P.A.
Scott G. Knudson (#141987)
Paul C. Thissen (#241416)
Diane B. Bratvold (#018696X)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

*Attorneys for Respondent Port Authority
of the City of Saint Paul*

TABLE OF CONTENTS

	Page
STATEMENT OF ISSUES.....	1
STATEMENT OF FACTS.....	3
A. The Port Authority’s Public Purpose Is Economic Development	3
B. Creation Of The 876 Fund In 1974.....	3
1. Pooled Concept	4
2. 876 Bonds Are Not A General Obligation.....	5
C. Excessive Borrower Defaults Made It Impossible To Pay 876 Bonds In Full	6
D. In 1992, The Port Authority Attempted To Restructure But Failed	8
E. Facing Impending Depletion Of Reserves, The Port Authority Conducted Tender Offers In 1996, 2002, And 2004, And Saved The 876 Fund Over \$23 Million	9
F. If Nothing Is Done, The 876 Shortfall Means Two-Thirds Of Bondholders Will Receive Little Or No Principal.....	11
G. The Port Authority Sought Court Approval Of A Plan To Liquidate And Distribute The 876 Fund Equally And Ratably In Order To Satisfy The Basic Resolution	11
H. The Economic Benefits Of The Port Authority’s Plan Are Undisputed	14
STATEMENT OF THE CASE	15
A. The District Court Proceedings.....	15
B. The Court Of Appeals Affirmed The District Court.....	17
ARGUMENT	20
I. The District Court Has Subject Matter Jurisdiction Under Minn. Stat. § 501B.25	21
A. Standard Of Review	21
B. Section 501B.25 Governs Proceedings Initiated After 1993	21
1. Chapter 474 Was Recodified As Chapter 469	23
2. In 1993, The Legislature Applied Sections 501B.16- .25 To Bonds Without A Trust Indenture	26

TABLE OF CONTENTS
(continued)

	Page
3. Application Of A Procedural Remedy To A Claim Initiated After The Procedure Became Effective Is Not Retroactive	27
4. The Port Authority Did Not Have To File A Notice Of Review	30
II. Judicial Approval Of The Port Authority's Plan Under Minn. Stat. § 501B.25 Is Not An Unconstitutional Impairment Of Contract.....	32
A. Standard Of Review And Standard For Decision	32
B. The Plan Does Not Substantially Impair Bondholders' Rights	33
1. Chapter 501B Rules Are Merely Procedural Provisions Available To The Issuer And Bondholder Alike	33
2. Judicial Approval Of The Port Authority's Plan Gives Effect To Contract Requirements For Equal And Proportionate Distribution Of The 876 Fund.....	34
3. Other Remedies Exist That Are Similar To Section 501B.25	38
C. The Plan Serves A Legitimate Public Purpose And Any Adjustment Of Bondholder Rights Is Reasonable And Appropriate	41
III. The District Court Properly Denied Appellants' Motion To Vacate District Court Orders From 2002 And 2004	43
A. Standard Of Review	43
B. Appellants' Motion Was Not Filed Within A Reasonable Time And Now Is Moot.....	43
IV. The District Court Properly Denied Appellants' Motion For Appointment Of A Receiver	47
A. Standard Of Review	47
B. Appellants Are Not Entitled To Appointment Of Receiver Under The Basic Resolution	47
C. The District Court Did Not Abuse Its Discretion In Denying Appellants' Motion For Appointment Of A Receiver	48
1. The Port Authority Properly Accounted For Non-Revenue Bond Facilities	49

TABLE OF CONTENTS
(continued)

	Page
2. Third-Party Costs	51
3. National Can Rental Income.....	52
4. Creation Of The River Maintenance Fund	53
5. Payments End In 2022	54
CONCLUSION	55

TABLE OF AUTHORITIES

CASES

<i>Allied Structural Steel Co. v. Spannaus</i> , 438 U.S. 234 (1978).....	42
<i>Arndt v. Am. Family Ins. Co.</i> , 394 N.W.2d 791 (Minn. 1986)	31
<i>Bliss v. Griswold</i> , 222 Minn. 494, 25 N.W.2d 302 (1946)	2, 49
<i>Bode v. Minn. Dep't of Natural Res.</i> , 612N.W.2d 862 (Minn. 2000)	2, 44
<i>Burgi v. Eckes</i> , 354 N.W.2d 514 (Minn. Ct. App. 1984).....	39
<i>Cady v. Bush</i> , 238 Minn. 105, 166 N.W.2d 358 (1969)	40
<i>Christensen v. Minneapolis Mun. Employees Ret. Bd.</i> , 331 N.W.2d 740 (Minn. 1983)	1, 32-33
<i>Energy Reserves Group, Inc. v. Kan. Power & Light Co.</i> , 459 U.S. 400 (1983).....	32
<i>First Trust Co. v. Union Depot Place Ltd. P'ship</i> , 476 N.W.2d 178 (Minn. Ct. App. 1991).....	40, 49
<i>Fish v. Chicago, St. P. & K. C. Ry. Co.</i> , 82 Minn. 9, 84 N.W. 458 (1900)	29, 34
<i>Gasper v. N. Star Co.</i> , 422 N.W.2d 727 (Minn. 1988)	23
<i>Griffin v. City of N. Chicago</i> , 112 Ill. App. 3d 901, 445 N.E.2d 827 (1983).....	30
<i>Gutierrez v. Red River Distrib. Inc.</i> , 523 N.W.2d 907 (Minn. 1994)	31
<i>Handicraft Block Ltd. P'ship v. City of Minneapolis</i> , 611 N.W.2d 16 (Minn. 2000)	21

<i>Healthspan Servs. Co. ex rel. Price v. Vestal</i> , No. C6-01-132, 2001 WL 1034565 (Minn. Ct. App. Sept. 11, 2001).....	44
<i>House v. Anderson</i> , 197 Minn. 283, 266 N.W. 739 (1936)	47
<i>Hunt v. Nevada State Bank</i> , 285 Minn. 77, 172 N.W.2d 292 (1969)	29
<i>In re Default Judgment of PHI Fin. Servs.</i> , No. C1-01-1978, 2002 WL 1050508 (Minn. Ct. App. May 28, 2002)	44
<i>In re Estate of O’Keefe</i> , 354 N.W.2d 531 (Minn. Ct. App. 1984).....	30
<i>In re Glendale Tp.</i> , 288 Minn. 340, 180 N.W.2d 925 (1970)	46
<i>In re Inspection of Minn. Auto. Specialties, Inc.</i> , 346 N.W.2d 657 (Minn. 1984)	2, 46
<i>In re Phar-Mor, Inc. Sec. Litig.</i> , 875 F. Supp. 277 (W.D. Pa. 1994).....	39
<i>In re Schmidt</i> , 443 N.W.2d 824 (Minn. 1989)	46
<i>In re Trust of Warner</i> , 275 Minn. 174, 145 N.W.2d 542 (1966)	41
<i>J.L. Manta, Inc. v. Braun</i> , 393 N.W.2d 490 (Minn. 1986)	23
<i>Jacobsen v. Anheuser-Busch, Inc.</i> , 392 N.W.2d 868 (Minn. 1986)	32
<i>Johnson v. Murray</i> , 648 N.W.2d 664 (Minn. 2002)	21
<i>Katz v. Katz</i> , 408 N.W.2d 835 (Minn. 1987)	31
<i>Lakeland Dev. Corp. v. Anderson</i> , 277 Minn. 432, 152 N.W.2d 758 (1967)	48

<i>Midwest Family Mut. Ins. Co. v. Bleick</i> , 486 N.W.2d 435 (Minn. Ct. App. 1992).....	30
<i>Minn. Bldg. & Loan Ass'n v. Murphy</i> , 176 Minn. 71, 222 N.W. 516 (1928)	48
<i>Minneapolis Gas Co. v. Zimmerman</i> , 253 Minn. 164, 91 N.W.2d 642 (1958)	32
<i>Muniz v. Hoffman</i> , 422 U.S. 454 (1975).....	23
<i>Mutual Ben. Life Ins. Co. v. Frantz Klodt & Son, Inc.</i> , 306 Minn. 244, 237 N.W.2d 350 (1975)	48
<i>Newman v. Fjelstad</i> , 271 Minn. 514, 137 N.W.2d 181 (1965)	44
<i>Ogren v. City of Duluth</i> , 219 Minn. 555, 18 N.W.2d 535 (1945)	1, 28
<i>Peterson v. City of Minneapolis</i> , 285 Minn. 282, 173 N.W.2d 353 (1969)	34
<i>Powers v. Siats</i> , 244 Minn. 515, 70 N.W.2d 344 (1955)	1, 38
<i>Shostak v. Shostak Constr. Corp.</i> , No. 99-138, 2000 WL 33675669 (Me. Super. Ct. Nov. 29, 2000).....	48
<i>Southern Minn. Beet Sugar Coop v. County of Renville</i> , 737 N.W.2d 545 (Minn. 2007)	36
<i>State ex rel. Goff v. O'Neil</i> , 205 Minn. 366, 286 N.W. 316 (1939)	47
<i>Stebbins v. Friend, Crosby & Co.</i> , 178 Minn. 549, 228 N.W. 150 (1929)	43
<i>Straus v. Straus</i> , 254 Minn. 234, 94 N.W.2d 679 (1959)	47
<i>Tompkins v. Forrestal</i> , 54 Minn. 119, 55 N.W. 813 (1893)	1, 29

<i>United Realty Trust v. Prop. Dev. & Research Co.</i> , 269 N.W.2d 737 (Minn. 1978)	29
<i>United States Trust Co. v. New Jersey</i> , 431 U.S. 1 (1977).....	37
<i>Village of Minneota v. Fairbanks, Morse & Co.</i> , 226 Minn. 1, 31 N.W.2d 920 (1948)	38
<i>Zwick v. Sec. State Bank of Red Wing</i> , 186 Minn. 308 243 N.W. 140 (1932)	48

STATUTES, RULES & REGULATIONS

1978 Minn. Laws, ch. 611, § 2.....	25
1986 Minn. Laws, ch. 474.....	Passim
1987 Minn. Laws, ch. 291, §§ 153-166	24
1989 Minn. Laws, ch. 340, art. 1, § 22	25
1993 Minn. Laws, ch. 271, § 8.....	25
1993 Minn. Laws, ch. 271, § 12.....	21
15 U.S.C. § 77ccc(7)	26
Minn. Const. art. I, § 11	1
Minn. R. Civ. P. 12.08(c)	43
Minn. R. Civ. P. 23.01 and 23.02.....	39
Minn. R. Civ. P. 52.01.....	49
Minn. R. Civ. P. 60.02.....	2, 43-44, 46
Minn. Stat. § 469.049	3
Minn. Stat. § 469.061	6
Minn. Stat. §§ 469.152-165.....	Passim
Minn. Stat. § 469.155	4, 26
Minn. Stat. § 469.161	26

Minn. Stat. § 469.162	3
Minn. Stat. § 501.37 (1979)	25, 41
Minn. Stat. § 501B.16	Passim
Minn. Stat. §§ 501B.16-.25	Passim
Minn. Stat. § 501B.18	15, 22
Minn. Stat. § 501B.25	Passim
Minn. Stat. § 555.02	38
Minn. Stat. § 576.01	2, 48, 52
Minn. Stat. § 645.21	1, 27
Minn. Stat. § 645.31	27
Minn. Stat. § 645.35	23
Minn. Stat. § 645.37	24

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF CONTRACTS, § 261 (1981)	39
---	----

STATEMENT OF ISSUES

1. **In 1993, the legislature amended Minn. Stat. § 501B.25 to give a district court jurisdiction over revenue bonds issues under chapter 469 even if the bonds were issued without a trust indenture. In 2002, 2004, and 2006, the Port Authority filed a petition for instructions under section 501B.25 for revenue bonds issued under Basic Resolution 876. In approving the petition to liquidate the 876 Fund, did the district court properly exercise jurisdiction over the Port Authority's revenue bonds?**

The district court and court of appeals held that the court had subject matter jurisdiction and approval of the Port Authority's petition was *not* retroactive application of the statute.

Apposite Authorities:

Minn. Stat. §§ 501B.16-.25.

Minn. Stat. § 645.21.

Ogren v. City of Duluth,
219 Minn. 555, 18 N.W.2d 535 (1945).

Tompkins v. Forrestal,
54 Minn. 119, 55 N.W. 813 (1893).

2. **Are Minn. Stat. §§ 501B.16 and 501B.25, which authorize a district court to interpret or reform revenue bond pledges, an unconstitutional impairment of contract rights when applied to approve the liquidation of the 876 Fund?**

The district court and court of appeals held the statute was not an unconstitutional impairment of contract rights as applied in this case.

Apposite Authorities:

Minn. Const. art. I, § 11.

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

Powers v. Siats,
244 Minn. 515, 70 N.W.2d 344 (1955).

3. **A final order can only be vacated if a motion under Minn. R. Civ. P. 60.02 is brought within a reasonable time. Appellants waited two and four years to challenge district court orders. In that time, the Port Authority and bondholders acted in reliance upon those orders. Is appellants' challenge to the 2002 and 2004 orders untimely and/or moot?**

The district court denied the motion to vacate. The court of appeals effectively held appellants' challenge moot because relief was "futile."

Apposite Authorities:

Minn. R. Civ. P. 60.02.

Bode v. Minn. Dep't of Natural Res.,
612 N.W.2d 862 (Minn. 2000).

In re Inspection of Minn. Auto. Specialties, Inc.,
346 N.W.2d 657 (Minn. 1984)

4. **The district court found that the Port Authority did not commit waste in its handling of the 876 Fund. As such, the district court denied appellants' motion for appointment of a receiver. Are the district court findings on waste clearly erroneous and did the district court abuse its discretion in refusing to appoint a receiver?**

The district court denied appellants' request for a receiver. The court of appeals affirmed.

Apposite Authorities:

Minn. Stat. § 576.01.

Bliss v. Griswold,
222 Minn. 494, 25 N.W.2d 302 (1946).

STATEMENT OF FACTS

A. The Port Authority's Public Purpose Is Economic Development

The Port Authority of the City of Saint Paul ("Port Authority") is a public agency created under Minn. Stat. § 469.049 and its predecessor provisions. It is charged with promoting economic development in Saint Paul and the East Metro area. (T.280.)¹ The agency is managed by a professional staff experienced in economic development, property management and finance. (A.170.)

Created in 1932, the Port Authority initially focused its activities on the Mississippi River, where the Port Authority owns a number of properties that it leases to various third parties. In addition, the Port Authority collects tonnage charges based on the quantity of commodities shipped through some of these parcels. (T.229, 755.) The Port Authority also controls riparian rights in the Mississippi River, which it leases for barge fleeting. (T.229-30.)

B. Creation Of The 876 Fund In 1974

In the 1970s, the Port Authority broadened its focus to include economic development throughout Saint Paul. The Port Authority used revenue bonds to finance these expanded activities. (T.282-83.) State law defines a revenue bond as a municipal bond repaid solely from specifically defined revenues, *see* Minn. Stat. § 469.162; ordinarily, those revenues come from the facility the revenue bonds financed. (T.283.) Consequently, revenue bonds are not payable from the issuer's general revenues or taxing

¹ Appellants' Appendix is cited as "A. ___;" Respondent's Appendix is cited as "R.A. ___;" the district court transcript is cited as "T. ___."

powers. Minn. Stat. § 469.155, subd. 14. (A.170-71; T.289; A.63-85.) State law also mandates that the expenses associated with managing such projects be paid out of project revenues. *See* Minn. Stat. § 469.155, subd. 14.²

As part of its expanded program, in 1974 the Port Authority adopted Basic Resolution No. 876 (“Basic Resolution”), which created a common bond fund, established terms for financing development projects, and covenants for managing the fund. (A.44-93.) Through this common bond fund, the Port Authority issued individual series of 876 bonds to finance 139 development projects. (A.169.) When the Port Authority issued 876 bonds, it was not issuing debt on its own behalf, but as a “conduit issuer” for various development projects. The Port Authority did not receive any of the bond proceeds, which instead went to the developer of the project being financed. The developer in effect became the borrower obligated to repay the debt. When a borrower finished repaying the debt, it typically acquired the title to the project.

1. Pooled Concept

A central feature of the Basic Resolution was the Common Revenue Bond Fund (“876 Fund”), into which all borrower repayments went. Consequently, the holders of each series of revenue bonds issued under the Basic Resolution (“876 Bonds”) looked to one collective source for repayment. (A.49, 76-77, 171; T.320-21, 764-65.)

Because 876 Bond debt service came only out of the 876 Fund, repayment of any one series of 876 Bonds did not depend solely on the success of the specific project

² Under Minn. Stat. § 469.155, subd. 14(2), the issuer may advance the costs to enforce any remedies available under a revenue agreement and to be repaid from any recovery.

financed by that 876 Bond series, but on the collective performance of all projects financed by 876 Bonds. Section 5-8 of the Basic Resolution reinforced this pooled concept, providing that:

All General Revenue Bonds [876 Bonds] shall be equally and ratably secured by and payable from the [876 Fund], without priority of one such General Revenue Bond over any other,

(A.82.) In this context, the term “ratably” means “proportionately.” (T.761-62.)

Similarly, in section 4-7, the Basic Resolution provided “the Authority has made the covenants and agreements herein for the equal and proportionate benefit of all Holders of the General Revenue Bonds [876 Bonds].” (A.66.)

2. 876 Bonds Are Not A General Obligation

Consistent with state law, 876 Bonds are not a general obligation of the Port Authority or the City of Saint Paul. Section 4-7 of the Basic Resolution was explicit: “The General Revenue Bonds [876 Bonds] may not be payable from or be a charge upon any of the funds of the Authority other than the revenues pledged to the payment thereof” (A.66.)

Appellants claim that the Port Authority is obligated to sell properties that were not financed through the sale of 876 Bonds – which the parties have called “Non-Revenue Bond Facilities” – in order to raise cash to pay off the 876 Bonds. The lien created by the Basic Resolution, however, does not extend to sale proceeds derived from the Non-Revenue Bond Facilities. (A.28.) No provision in the Basic Resolution either imposes an obligation on the Port Authority to sell any of the Non-Revenue Bond

Facilities or requires the proceeds from the sale of Non-Revenue Bond Facilities to be used to repay principal and interest on 876 Bonds.³ *See also infra* at 49-51.

The 876 Fund also has a limited life. The purpose of the 876 Fund was to fund loans for development projects. Individual series of 876 Bonds were issued to generate capital for those loans. The revenue agreements between the Port Authority and borrowers are structured such that loan repayment amounts would pay the principal and interest due 876 bondholders within the term of the loan, which was limited by statute. Minn. Stat. § 469.061 (establishing 30-year maturity limit for non-housing revenue bonds). The main revenue stream for payments to 876 bondholders – payments by borrowers of 876 Bond proceeds – stop when the individual repayment obligations ends. (A.177; T.285-88.) The Port Authority sold the last 876 Bond in September 1991. (T.128-29, 284; Ex. 108.) That means the Basic Resolution functionally ends September 1, 2022, the last scheduled 876 Bond payment date. (T.285, 363, 793.)

C. Excessive Borrower Defaults Made It Impossible To Pay 876 Bonds In Full

The 876 Fund is currently unable to pay debt service in full and, looking ahead, will never again be able to do so. This circumstance results from economic events that occurred long ago. The district court found that this shortfall was not the fault of the Port Authority, but due to market forces, which the Port Authority could not foresee or control. (A.29.)

³ Appellants' witness, Perry Feders, a former CFO of the Port, testified that there is no language in the Basic Resolution pledging Non-Revenue Bond Facility sale proceeds to the 876 Fund. (T.413-14.)

In the late 1980s and early 1990s, there was a serious downturn in the real estate market, both nationally and especially in Saint Paul. (T.293-94, 746.) Ultimately, 37 of the 139 Bond-financed Facilities defaulted – over 25 percent of all 876 projects. (A.170.) Since these projects were mainly non-recourse financings, borrowers often found it more expedient simply to turn over the properties to the Port Authority. (T.293-94, 746.) While the Port Authority worked to market those properties, economic conditions prevented it from generating rental income or sales proceeds equal to the debt service or outstanding principal of the associated 876 Bonds. (A.174-75; T.294, 746.)

The Port Authority also could not raise lease payments on performing 876 Bond-financed Facilities because an individual borrower's payments had been fixed in an amount sufficient only to amortize repayment of the related series of 876 Bonds issued to finance that particular project. There was no provision in the financing leases that entitled the Port Authority to increase the charges on performing 876 Bond-financed Facilities. (A.174-75; T.291-92.) Similarly, the Port Authority was not entitled unilaterally to raise rents on existing leases of the Non-Revenue Bond Facilities. While these rents, which were pledged to repayment of the 876 Bonds, could be adjusted over time when the leases came up for renewal or rent resetting, there were significant economic limitations on what the Port Authority could charge tenants as rent. (T.291-92, 717-18.)

The annual shortfall between 876 Fund revenues and the debt service obligations on the pool of 876 Bonds grew to as much as \$15 million. (T.745-46.) As of May 31, 1990, there were over \$77.6 million in reserves pledged to the 876 fund. (R.A.209-10.)

Even that amount could not cover a shortfall in revenues of the magnitude experienced. (A.29.) By 2004, all reserves had been depleted. (A.117; T.745.) On-going revenues pledged to the 876 Fund became and remain insufficient to even pay interest, much less principal.⁴

The impact of the depletion of reserves is shown in this table:

876 FUND ACTUAL DEBT SERVICE PAYMENTS DECEMBER 2004 THROUGH JUNE 2007		
Date	Principal	Interest
December 1, 2004	55.38%	100%
June 1, 2005	0.00%	87%
December 1, 2005	0.00%	100%
June 1, 2006	50.65%	100%
December 1, 2006	0.00%	100%
June 1, 2007	0.00%	72.42%

(R.A.2.) Approximately \$51 million in principal currently remains outstanding. (A.170; T.749.)

D. In 1992, The Port Authority Attempted To Restructure But Failed

In 1991, a fiscal consultant to the Port Authority projected 876 Fund reserves to run out by December 2000. (A.172.) The Port Authority looked for alternatives and, in 1992, put forward a plan to form a trust and place the 876 Fund within it for restructuring

⁴ It was only with borrower prepayments and the sale of repossessed properties that any principal could be paid. (R.A.2.) After the Port Authority sold the Sheraton Midway Hotel in late 2005 for \$7.9 million, for example, the 876 Fund was able to pay approximately one-half of the then-matured principal on June 1, 2006. (T.749.)

purposes. Without a consensus of 876 bondholders supporting the 1992 proposal, that effort proved unavailing. (A.120.) Nevertheless, the Port Authority continued restructuring efforts in the 1990s, expending more than \$2 million of its own funds in unsuccessful efforts to develop a proposal that would command support of a sufficient number of bondholders. (A.173; T.297-98.)

E. Facing Impending Depletion Of Reserves, The Port Authority Conducted Tender Offers In 1996, 2002, And 2004, And Saved The 876 Fund Over \$23 Million

The Basic Resolution provides that Prepaid Net Revenues and Special Funds may be used to purchase 876 Bonds. (A.78-79.) Prepaid Net Revenues are the funds received from borrowers who pay off their 876 Bond-related debt early. (A.52.) Special Funds are the net proceeds from selling repossessed 876 Bond-financed Facilities. (A.53.) These prepayments and sale proceeds are deposited in the 876 Fund. (A.78-79.) Since 1996, the Port Authority has conducted three tender offers using Prepaid Net Revenues and Special Funds to repurchase 876 Bonds. (T.371.)

In 1996, the Port Authority used \$28,148,000 of Prepaid Net Revenue and Special Funds to purchase 876 Bonds with a face value of \$31,815,000, providing an immediate \$3,667,000 savings in principal to the 876 Fund, plus future savings from eliminating interest payments on the principal retired. (A.173; R.A.1.) Following the 1996 tender, many 876 Bond-financed Facility borrowers prepaid their financing leases. Other 876 Bond-financed Facilities in default were sold with proceeds placed in the 876 Fund as Special Funds. (A.173-74.)

In 2002, the Port Authority filed a petition for instructions under Minn. Stat. § 501B.25 for permission to conduct a tender offer using a “Dutch auction” methodology. (A.174; A. 121-23). In a Dutch auction tender, 876 bondholders would offer to sell their bonds to the Port Authority, who would then rank offers in order of the largest to smallest discount from par value. The district court authorized the Port Authority to proceed with the tender offer. (A.127.) The Port Authority purchased \$70,235,000 in outstanding 876 Bonds for \$54,044,000, for a principal savings to the 876 Fund of \$16,191,000, plus future interest savings on the principal retired. (A.174; R.A.1; *see also* A.121-22; T.641-42.)

In 2004, the Port Authority again petitioned the district court for instructions, using the procedures of chapter 501B. (A.166-67.) The district court authorized realignment of interest payments for all series of 876 Bonds to the same semiannual payment dates, payment by the fund of certain third-party administration costs. (*Id.*) The Port Authority also conducted another tender offer under the same terms as authorized in 2002. Following that 2004 tender, it retired \$21,715,000 in 876 Bonds for \$18,240,000, saving the 876 Fund \$3,475,000 in principal and again avoiding future interest payments on the amount retired. (A.174; R.A.1.)

In total, with these tender offers, the Port Authority retired \$123,765,000 in debt for \$100,432,000. The principal savings to the 876 Fund totaled \$23,330,000. The funds used in the tender offers have been disbursed, the 876 Bonds purchased have been retired, and the funds that would have been used to pay interest have been paid to other bondholders. These tender offers cannot be undone. (T.317.)

F. If Nothing Is Done, The 876 Shortfall Means Two-Thirds Of Bondholders Will Receive Little Or No Principal

If nothing is done, the Port Authority will continue to pay on-going revenues into the 876 Fund to make partial interest payments. (A.25.) Incoming revenues are not sufficient to pay interest in full or any principal on an on-going basis. (*Id.*) Due to borrower prepayments and sales of repossessed projects, however, the 876 Fund has at least \$15 million in Prepaid Net Revenues and Special Funds. (*Id.*; see also A.266 (REO Column); T.752-56.) If paid out as appellants contend, this \$15 million would *not* be paid equally and ratably to all 876 bondholders as required by sections 4-7 and 5-8 of the Basic Resolution. (A.66.) Instead, approximately one-third of bondholders would be paid in full, but the remaining bondholders – primarily small, retail holders – would not see their equal and ratable share of principal or interest. (T.765, 881.)

G. The Port Authority Sought Court Approval Of A Plan To Liquidate And Distribute The 876 Fund Equally And Ratably In Order To Satisfy The Basic Resolution

To avoid cutting off two-thirds of the bondholders, the Port Authority developed a plan that would equally and ratably distribute the \$15 million and all future revenue to all 876 Bondholders. The plan would take future revenue streams that are pledged to the 876 Fund, sell them and distribute the proceeds equally and ratably to bondholders in a one-time liquidating payment. (T.807, 872-73.)

To effect the plan, the Port Authority retained the investment banking firm Piper Jaffray, Inc. to market the 876 Fund revenues. (T.809; R.A.4-7.) Under the proposal, future revenues through September 1, 2022, from 876 Bond-financed Facilities, Non-

Revenue Bond Facilities and fleeting and tonnage charges, as well as loan repayments, would be assigned to a trust. (T.755-56; A.266; R.A.6-7.) The Port Authority would also add its rights to receive fiscal and administrative fees. (T.755, 758; R.A.3.) Investors would receive a proportionate share of those revenues through September 1, 2022, when the trust would terminate. (R.A.6-7.) In addition to distribution of the proceeds from the sale of these trust certificates, 876 bondholders would receive any Prepaid Net Revenues or Special Funds on hand in the 876 Fund. (T.756.) At the time of the hearing, those proceeds amounted to approximately \$15 million. (A.266.)

In Piper Jaffray's opinion, the Port Authority's proposal would confer significant advantages to 876 bondholders over maintaining the *status quo*. (T.821.) Monetization of revenue streams would avoid nearly \$4 million in future third-party administrative expenses. (T.756, 821-22.) The Port Authority has also offered to forgo collecting fiscal and administrative fees totaling several hundreds of thousands of dollars. (A.26.)

Piper Jaffray estimated that the proposal would realize between \$16-18 million for the 876 Fund, which, when added to prepaid Net Revenues and Special Funds of approximately \$15 million, would result in a total payment to bondholders of approximately 65% of the amount of outstanding principal. (T.815, 823.) Piper Jaffray believed that the proposal is consistent with the obligations in sections 4-7 and 5-8 of the Basic Resolution to treat all bondholders equally and ratably. (T.821.) Likewise, this proposal did not prefer a minority of early-maturing bondholders to the detriment of late-maturing bondholders. (T.823-24.) Another benefit was that the bondholders could

reinvest their pay-out in tax-free bonds, paying from 4 to 6 percent, with a return of principal after the new investment matures. (T.823-24.)

Additionally, because the Port Authority's proposal created a "liquidating event" for tax purposes, the proposal conferred another economic benefit on the 876 bondholders – an immediate tax loss which can be used to offset corresponding gains. (A.177-78; T.851-54; R.A.8-14.) While any bondholder could attempt to sell and realize a tax loss today, 876 Bonds trade in an illiquid market, and it would be financially disastrous if all 876 bondholders attempted to liquidate at one time. (T.868-69, 876-79.)

By creating a liquidating event without that market loss, 876 bondholders would realize a potential federal tax gain of up to 16 percent of the par value of their holdings. (T.857-60; R.A.15-16.) There may also be a state tax savings. (T.862.) Together then, the Port Authority's proposal offered a return of principal of approximately 65 percent of initial principal, plus tax benefits of up to 16 percent, for a total return potentially in excess of 80 percent of principal.

An expert in municipal finance, Dr. Gary Gibbons, testified the added benefits to 876 bondholders from the Port Authority's plan could be as much as \$5.8 million, with the most likely benefit being \$5 million. (T.872, 874.) Gibbons explained this added benefit was possible because the Port Authority plan overcomes the illiquidity and lack of marketability affecting 876 Bonds. (T. 876-79.) Because 876 bondholders are typically smaller, retail investors, the Port Authority plan also avoids market asymmetry in information available to the average 876 investor. (T. 879-80.) Gibbons further explained that the added benefit of the plan was independent of who pays administrative

costs, because the purchaser of the 876 revenues would not have to incur those expenses.

(T.881.)

H. The Economic Benefits Of The Port Authority's Plan Are Undisputed

Appellants provided no testimony disputing the economic benefit to 876 bondholders of the Port Authority's proposal, or the tax benefits that could be realized from a liquidating event. Appellants' single witness on the merits of the Port Authority's petition agreed that the Port Authority's plan would treat all bondholders, in regards to principal, equally and ratably, as required by sections 4-7 and 5-8 of the Basic Resolution. (T.924.)

STATEMENT OF THE CASE

A. The District Court Proceedings

In 2006, the Port Authority filed a verified Petition for Instructions with the Ramsey County District Court seeking an instruction allowing the Port Authority to implement its plan to liquidate the assets of its 876 Fund and distribute the proceeds on an equal and ratable basis to 876 Bondholders. (A.168-82.) The Port Authority also sought confirmation of its administration of the 876 Fund. (*Id.*) The petition followed the procedures set out in Minn. Stat. § 501B.18, which requires notice to affected parties by publication and first class mail.

The district court held a four-day evidentiary hearing and included certain bondholders that objected to the Port Authority's plan and sought the appointment of a receiver. (A.183-94, 201-11.) The objecting bondholders filed signed, unsworn statements indicating their ownership of 876 Bonds. These statements indicate that some bondholders purchased after 1993.⁵ A number of objecting bondholders, including two major investors, bought 876 Bonds after the Port Authority filed its June 30, 2006 petition. (R.A. 207-48.) Notably, the objecting bondholders with the largest ownership purchased all of their bonds after 1993. (*Id.*)

⁵ For example, the Jensen Family Trust, which reported owning \$1,612,000 of the 876 Bonds (R.A.234-38), acquired 876 Bonds on August 11, 14 and 21, 2006. Roland Jensen, who individually reported owning \$1,370,085 of 876 Bonds (R.A.239-44), purchased 876 Bonds on September 22, 2006. Thomas Hillin reported purchasing \$35,000 in face amount of 876 Bonds maturing in 2014 on October 13, 2006, at prices from 54 to 59 percent of face value. (R.A.220-23.)

Moreover, Appellants are incorrect that no bondholder supported the Port Authority's proposal. (App. Br. at 3 n.1.) Although no bondholders testified at the hearing, numerous bondholders submitted supporting statements, which were admitted as a trial exhibit. (R.A.249-51.)

On May 16, 2007, the district court granted the Port Authority's Petition for Instructions and denied the receivership motion. (A.9-39.) After carefully and thoroughly reviewing the applicable statutes and legislative history, the district court concluded subject matter jurisdiction existed. (A.17-20.) Because the provisions of §§ 501B.16-.25 were procedural and the petition was filed after enactment, the statute was not retroactively applied and did not impair any substantive rights of appellants. (A.19-20.)

The district court found that the 876 Fund would never be able "to pay principal and interest in full through the terms of the last maturing 876 bond." (A.25.) The district court also determined that if the *status quo* prevailed, certain bondholders would be paid in full, while remaining bondholders would only be paid "a partial and ever declining percentage of debt service." (A.25.) The court rejected appellants' claim that Non-Revenue Bond Facilities had to be sold to pay 876 Fund debt service, since those facilities were outside the limited lien of the 876 Fund. (A.28.) Finding the dire circumstances of the 876 Fund were not of the Port Authority's making, the court determined that contract doctrine of impracticability of performance also supported the Port Authority's plan. (A.29-30.)

The district court also rejected appellants' contention that they were entitled to a receiver. (A.32-33.) Appellants failed to satisfy the statutory standards for a receiver since "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." (A.33.) Moreover, any loss the 876 Fund has sustained "was not the result of mismanagement by the Port Authority." (A.33.) Accordingly, the district court refused to appoint a receiver.

Appellants also sought to vacate two orders of the Ramsey County District Court issued in 2002 and 2004 following Port Authority petitions for instructions involving Basic Resolution 876. (A.212-13, 94-109, 129-47.) In the 2002 petition, the Port Authority sought an instruction confirming the terms it proposed for a tender offer to purchase 876 bonds and its management of the 876 Fund. (A.103-09.) In the 2004 petition, the Port Authority sought permission to realign the dates on which interest and principal were paid on bonds still outstanding, permission to charge certain third-party administration expenses to the 876 Fund, and confirmation of its management. (A.139-46.) The district court determined proper notice of both petitions was provided to bondholders. (A.16.) The 2002 petition was contested; no one objected to the 2004 petition. No bondholder appealed either the 2002 or 2004 order. The district court denied the motion to vacate. (A.40-43.)

B. The Court Of Appeals Affirmed The District Court

The court of appeals likewise rejected the appellants' contentions. First, the court of appeals concluded the district court had subject matter jurisdiction to issue instructions

in response to each Port Authority petition. The court rejected appellants' retroactivity argument, holding the relevant date "is not when the last bonds were issued but, rather, when respondent petitioned the district court for instructions." (A.5.) The court also held that application of chapter 501B does not violate state and federal constitutional provisions that protect the right to contract. "[W]hile appellants show that the statute's application impairs their contractual rights, they cannot show that there is no demonstrated significant and legitimate public purpose behind the statute's application – the legitimate public purpose behind the district court's involvement is to prevent greater impairment of more contractual relationships and advance a greater good for a greater number." (A.6.)

The court of appeals also noted that appellants did not challenge the 2002 and 2004 petitions until 2006. (A.4.) Moreover, at oral argument, counsel for appellants "conceded that, as a practical matter, it would be impossible to undo the actions taken in reliance on the 2002 and 2004 orders, but argued that this court could vacate the orders without addressing the actions." (A.4.) Because the 2002 and 2004 orders were, "and remain, as a practical matter, exhausted, dormant, and beyond effective involvement in this litigation," the court of appeals decided the district court did not err in denying the motions to vacate. (*Id.*)

Finally, the court of appeals rejected appellants' arguments for the appointment of a receiver. The Basic Resolution provides that appellants may apply for appointment of a receiver, "but it does not provide that they are automatically entitled to the appointment

of a receiver upon application.” (A.7.) The district court properly denied a receiver because “appellants’ assertions of waste are unsupported by the evidence.” (A.7.)

This Court granted review.

ARGUMENT

Summary of Argument

This case involves the efforts of the Port Authority of the City of Saint Paul to bring a fair and equitable conclusion to the 876 Fund, created in 1974 by Basic Resolution No. 876. Unfortunately, if nothing is done, only one-third of bondholders will be repaid. This result is not only unfair, but offends a central tenet of the contract with bondholders, that the pool of revenues pledged to the 876 Fund be shared “equally and ratably” among bondholders. Consequently, the Port Authority filed a petition under the procedures the Minnesota Legislature enacted in 1993 and requested judicial approval to liquidate and distribute funds consistent with the contract. Indeed, the Port Authority’s plan is the *only* way to give force and effect to the contract.

Contrary to appellants’ assertion, the Port Authority did not invoke chapter 501B to amend the Basic Resolution. Instead, it sought instructions to address the current reality of the 876 Fund because it is not possible to pay all bondholders in full. Under the Port Authority’s plan, 876 bondholders would receive approximately 65 percent of the principal they would be entitled to, and by liquidating now, 876 bondholders would receive an added total benefit of up to \$5.8 million, plus potential and significant tax benefits.

Appellants’ claims must be rejected. Subject matter jurisdiction arose under Minn. Stat. § 501B.16-.25, which were applied prospectively here, not retroactively. The district court’s decision did not impair contract rights because the Port Authority’s plan gives full effect to the Basic Resolution and maximizes benefits to bondholders equally

and proportionately. The district court also properly denied the motion to vacate orders from 2002 and 2004, as well as appellants' efforts to appoint a receiver. This Court should affirm the lower courts' decisions.

I. THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION UNDER MINN. STAT. § 501B.25

A. Standard Of Review

This Court reviews subject matter jurisdiction *de novo*. *Handicraft Block Ltd. P'ship v. City of Minneapolis*, 611 N.W.2d 16, 19 (Minn. 2000). Statutory interpretation also receives *de novo* review. *See, e.g., Johnson v. Murray*, 648 N.W.2d 664, 671 (Minn. 2002).

B. Section 501B.25 Governs Proceedings Initiated After 1993

The district court properly exercised its power under Minn. Stat. § 501B.16. That section, in conjunction with Minn. Stat. § 501B.25, authorizes a court to “construe, interpret or reform” documents relating to revenue bonds issued by the Port Authority under chapter 469 and its statutory predecessor, chapter 474. Minn. Stat. § 501B.25 was last amended in 1993:

Sections 501B.16 to 501B.23 apply . . . at the sole election of the issuer of bonds issued under chapter 469, without a trust indenture, to the pledges and other bond covenants made by the issuer in one or more resolutions with respect to the bonds.

(A.261.) Before 1993, section 501B.25 stated that these procedures applied to “trusts established in connection with bonds issued under chapter 474.” (A.268.)

The 1993 amendments to section 501B.25 were effective upon adoption. 1993 Minn. Laws, ch. 271, § 12. The procedure applies to all petitions initiated after that date.

Not until 2002 did the Port Authority invoke the procedures of section 501B.18 to petition the district court under authority conferred in section 501B.25. (A.16.)

Appellants' argument that the 1993 amendment does not confer jurisdiction cannot withstand analysis. First, section 501B.25 refers to chapter 469 instead of chapter 474 because chapter 469 is the recodification of chapter 474. Like the district court, the court of appeals agreed the recodification did not preclude application of section 501B.25 to chapter 474 bonds. (A.6.) Second, as of 1993, section 501B.25 applied to bonds issued without a trust. Because the Port Authority's petitions were filed after that time, the statute authorizes the district court to decide the petitions.

Third, the application of section 501B.25 to the Port Authority bonds – the last issued in 1991 – is not a retroactive application of the law. Section 501B.25 provides a procedural remedy for bonds issued without a trust indenture. This Court has repeatedly held that the use of a procedural remedy to a claim filed after a statute's effective date is not a retroactive application of law. Retroactive application of a procedural remedy is determined by examining when the claim or petition was filed and when the procedural remedy became effective.

The court of appeals correctly decided that the "relevant date" is not when the last bonds were issued but, rather, "when respondent petitioned the district court for instructions." (A.5.) Because the first petition was filed in 2002, the Port Authority and the district court "were following statutory procedure that had been in effect for years." (*Id.*) For appellant's analysis to be correct, "it would be necessary to read into [the statute] additional language, i.e., that it applies with respect *only* to bonds *not yet sold* or

sold after 1993.” (*Id.*, emphasis original.) The court of appeals correctly declined to add words to the statute and rejected appellants’ challenge to subject matter jurisdiction. See *Gasper v. N. Star Co.*, 422 N.W.2d 727, 730 (Minn. 1988) (declining to read word “only” into statute).

1. Chapter 474 Was Recodified As Chapter 469

The legislature recodified chapters 474 and 469 and corrected references made in section 501B.25, but showed no intent to make a substantive distinction between bonds issued under chapters 474 and 469. See *J.L. Manta, Inc. v. Braun*, 393 N.W.2d 490, 494 (Minn. 1986) (recodification that merely moves powers from one chapter to another does not change substantive law); *Muniz v. Hoffman*, 422 U.S. 454, 470 (1975) (revising and consolidating laws does not effect a substantive change, absent a clear intent expressed otherwise).

Chapter 474: The Basic Resolution does not limit issuance of bonds to chapter 474, but anticipates that amendments may occur and authorizes issuance in accordance with those amendments. According to the Basic Resolution, the Port Authority was authorized to issue the 876 Bonds under “all relevant provisions of Minnesota Statutes 458, 474 and 475 and any amendment thereto” (A.48, emphasis added.) Therefore, the Port Authority is authorized to issue bonds pursuant to amendments to chapter 474, including its recodification into chapter 469.

Appellants rely on Minn. Stat. § 645.35, which provides that repeal of a statute does not affect any rights accrued or duties imposed before the repeal. (App. Br. at 28.) The statute is immaterial to chapter 474, however, because it was not repealed in any real

sense since its provisions continued as Minnesota law in chapter 469. Minn. Stat. § 645.37 (“When a law is repealed and its provisions are at the same time reenacted in the same or substantially the same terms by the repealing law, the earlier law shall be construed as continued in active operation.”).

In 1987, chapters 474 and 458 were recodified into a new chapter 469. The amending law specifically states that it is “an act related to economic development; recodifying provisions governing housing and redevelopment authorities, port authorities, economic development authorities” 1987 Minn. Laws, ch. 291 (Title). (A.241.) In fact, the language of chapter 474 was transferred nearly wholesale into the new chapter 469. *Compare* 1986 Minn. Laws, ch. 474 (R.A.138-151) *with* 1987 Minn. Laws, ch. 291, §§ 153-166, currently, Minn. Stat. §§ 469.152-165 (R.A.162-175).

Appellants also claim that the Port Authority continued to offer its bonds under chapter 474 after the 1987 recodification amendment, but cite only the front page of the Basic Resolution. (App. Br. at 9, 29.) The front page, however, states that the Basic Resolution was *amended* in 1987 and 1989. (A.44.) The Basic Resolution also states that authority to issue bonds arises from the Port Authority’s status as a “body corporate and politic” and as a redevelopment agency under chapter 474 “*as amended.*” (A.54, emphasis added.) The Port Authority, therefore, issued bonds under chapter 469 after chapter 474 was recodified in 1987.

Section 501B.25. All 876 Bonds that remain outstanding today were issued after 1978. (R.A.59-62.) In 1978, the Minnesota Legislature made clear that the power to construe, interpret, reform or deviate from the terms of a trust applied to “trusts

established in connection with bonds issued pursuant to Minnesota Statutes, Chapter 474.” 1978 Minn. Laws, ch. 611, § 2 (A.240); Minn. Stat. § 501.37. (R.A.177). At that time, revenue bonds (including the 876 Bonds) were issued pursuant to chapter 474. Unfortunately, when the legislature recodified chapter 474 into chapter 469 in 1987, it did not make a corresponding change to section 501.37. The statute continued to reference chapter 474 instead of chapter 469. (R.A.177.)

In 1989, the legislature recodified chapter 501, repealing that statute and creating a new chapter 501B. Minn. Stat. § 501.37 was recodified using identical language in Minn. Stat. § 501B.25, its current statutory home. 1989 Minn. Laws, ch. 340, art. 1, § 22. (A.249.) As part of that process, the outdated reference to chapter 474 was carried along. The discrepancy was fixed in a clarifying 1993 amendment which swapped “469” for “474.” 1993 Minn. Laws, ch. 271, § 8 (A.256-57.); *see* Minn. Stat. Ann. § 501B.25 (West 2002) (Editor’s Comment) (amendment clarifies previous law). This housekeeping change did not alter the substance of the law.

The legislature clearly did not intend to extend section 501B.16 provisions to chapter 474 bonds starting in 1978, then abruptly withdraw those provisions in 1993, while at the same time extending those provisions for the first time to chapter 469 bonds. As the district court stated, “[i]t appears far more likely that this was due to an oversight rather than the result of any intentional decision.” (A.18.)

The district court’s power to “construe, interpret or reform” the provisions of bonds issued under chapter 474 has existed since 1978. The 1993 amendment to section 501B.25 does not mean that this authority was revoked in 1993 when chapter 469 was

inserted. Instead, the 1993 amendment recognized that the statutory source of a Port Authority's power to issue bonds like the 876 Bonds is found in chapter 469 rather than chapter 474, which no longer existed. In short, appellants' argument misconstrues legislative intent.

2. In 1993, The Legislature Applied Sections 501B.16-.25 To Bonds Without A Trust Indenture

Appellants claim that section 501B.16 "has never applied to Chapter 474 bonds without a trust indenture." (App. Br. at 27.) Several pages later, appellants clarify that "[i]t was not *until 1993* that any iteration of the court's jurisdictional scope on trust administration oversight [i.e., section 501B.25] was defined to include Port bonds that pertained to a bond resolution that did not have a trust." (App. Br. at 30, emphasis added.) With this qualification that, in fact, section 501B.25 has applied to Port Authority bonds issued without a trust since 1993, appellants demonstrate their claim is a red herring. The three Port Authority petitions were filed years after the 1993 amendment.

Yet even if pre-1993 law applies, the district court properly exercised jurisdiction under section 501B.25. Bond resolutions are the practical equivalent of trust indentures, which have been covered by section 501B.25, or its predecessor, since 1978. Minn. Stat. § 469.155, subd. 6 (powers include pledge of revenues to bondholders); *see generally* 15 U.S.C. § 77ccc(7) (Trust Indenture Act of 1939) (defining indenture). Each bond resolution is a document designed to govern the relationship between bondholders and issuer, a function a trust indenture also provides. *See, e.g.*, Minn. Stat. § 469.161 (bond

resolution may limit powers). The 1993 amendment merely clarified that bond resolutions are included within the scope of revenue bond governing documents covered by section 501B.25, over which the district court has held supervisory power since 1978.

3. Application Of A Procedural Remedy To A Claim Initiated After The Procedure Became Effective Is Not Retroactive

There is a presumption against retroactive effect in application of a statute. "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21. But statutes that include procedural remedies applying to claims initiated after the effective date of the statute is a prospective, not retrospective, application. As such, the 1993 amendment to section 501B.25 applies to claims and proceedings initiated *after* the amendment became effective. Minn. Stat. § 645.31, subd. 1 ("[T]he portions of the law which were not altered by the amendment shall be construed as effective from the time of their first enactment, and the new provisions shall be construed as effective only from the date when the amendment became effective. . . .").

Minn. Stat. § 501B.25 adopted a procedural remedy through which a trustee can petition a district court for an order that will confirm a trustee's action, settle an account, determine persons who have an interest, construe, interpret or reform the terms of a trust, and instruct the trustee in any matter relating to the administration of the trust and the discharge of the trustee's duties, among other things. Minn. Stat. § 501B.16 (1)-(23). The statute permits the trustee to file the petition and grants the district court's authority;

the statute does not dictate a result, nor does it modify substantive rights of either the trustee or the beneficiaries.

This Court has consistently recognized in a number of different procedural contexts that procedural remedies are prospective, not unlawful retroactive applications.

There is nothing in the 1943 statute showing that it should not operate prospectively as to matters of procedure and evidence. Such matters do not affect rights accrued. Therefore, as to such matters *the statute operates prospectively*. The result is that matters of procedure and evidence are governed by the law in force when the right to compensation is asserted. [citations omitted] As applied here, the result of such construction is that the substantive rights of the parties are controlled by the 1941 statute. . . . The procedural and evidentiary provisions governing the assertion of that right are those contained in the 1943 statute.

Ogren v. City of Duluth, 219 Minn. 555, 562-63, 18 N.W.2d 535, 539 (1945) (emphasis added). *Ogren* was a workers' compensation case arising out of a 1941 injury. *Id.* at 555-57, 18 N.W.2d at 536-37. A 1941 workers' compensation statute created a presumption that certain identified diseases contracted by workers in certain occupations were work-related. *Id.* at 558, 18 N.W.2d at 537. In 1943, the legislature repealed the presumption. *Id.* The claim was filed in October 1943. *Id.* at 556, 18 N.W.2d at 536.

This Court concluded that "a right to compensation . . . for a death caused by occupational disease accruing while [the 1941] statute was in force is governed by that statute; but the procedure and evidence to establish the right are governed by the 1943 statute as the law in force at the time the right is asserted." *Id.* at 555, 18 N.W.2d at 536 (syllabus by the court). As such, the injured worker was not entitled to the 1941 presumption that his disease was work-related. "There is no such thing as a vested right in a rule of evidence." *Id.* at 563, 18 N.W.2d at 539.

This Court has addressed in a similar fashion other statutes that change procedural remedies. Changes in procedure apply *prospectively* to claims initiated after the statute's effective date. *See, e.g., Hunt v. Nevada State Bank*, 285 Minn. 77, 96, 172 N.W.2d 292, 304 (1969) (holding long-arm statute, which post-dated accrual of cause of action, applied to claims against alleged conspirators because statute was "simply a procedural permission to sue" that did not "alter any substantive right"); *see also Fish v. Chicago, St. P. & K. C. Ry. Co.*, 82 Minn. 9, 11, 84 N.W. 458, 459 (1900) (holding statute prescribing rule of evidence, enacted after the action was filed, did not abridge presumption against retrospective application because "right to have one's controversies determined by existing rules of procedure and evidence is not a vested right").

Appellants wrongly assert that this case is different because it involves contracts that arose before the 1993 amendment. Indeed, this Court, more than 100 years ago, recognized that a procedural statute is prospectively applied to claims arising from pre-existing contracts, such as a performance bond. *See Tompkins v. Forrestal*, 54 Minn. 119, 125, 55 N.W. 813, 814 (1893) (holding statute giving right to sue on performance bond in laborer's name, which was enacted after bond was issued, did not abridge presumption against retrospective application because "amendment related solely to the method of procedure for the enforcement of an existing obligation and liability"). The Court reiterated this conclusion with respect to loan transactions that originated before usury was eliminated as a defense. *United Realty Trust v. Prop. Dev. & Research Co.*, 269 N.W.2d 737, 744 (Minn. 1978) (amendment repealing penalties in usury statutes as

to loan transactions; repeal was effective as to all transactions sought to be enforced after effective date of amendment).

Simply put, “[a] statute is not retroactive merely because it relates to antecedent facts for its operation.” *In re Estate of O’Keefe*, 354 N.W.2d 531, 535 (Minn. Ct. App. 1984) (citing *Griffin v. City of N. Chicago*, 112 Ill. App. 3d 901, 445 N.E.2d 827 (1983)). *See also Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435, 438 (Minn. Ct. App. 1992) (holding application of statutory amendment to underinsured motorist law to pre-existing insurance contract was not retroactive application because claim arose after statute became effective.).

Here, the Port Authority initiated proceedings under the 1993 amendment long after it became effective. The presumption against retroactivity does not apply.

4. The Port Authority Did Not Have To File A Notice Of Review

Appellants are incorrect that the Port Authority is somehow hampered because it failed to file a notice of review. (App. Br. at 32.) First, the district court’s analysis is not inconsistent with the Port Authority’s analysis. The district court concluded that the 1993 amendment “set forth a procedure to be used from that time forward.” (A.19.) And, the court noted, “[u]se of this procedure does not impair any vested rights pertaining to bonds issued prior to 1993.” (*Id.*) The court of appeals criticized this analysis as “distinguishing between substantive and procedural amendments, based in part on outdated law.” (A.5 n.5.) But, in fact, the court of appeals’ analysis focused on when the petition was filed and the effective date of the 1993 amendment. (*Id.*) In short, the

district court and court of appeals applied the same principles, using different words, to arrive at the same conclusion. Both courts decided that the 1993 amendment's application to this case was *not* a prohibited retroactive enforcement of a statute.

Even assuming that the district court's analysis differs from the Port Authority's position, a notice of review was not necessary because the district court decided retroactivity favorably to the Port Authority. A notice of review is only required when an issue is decided adversely to a respondent. Minn. R. Civ. App. P. 106 (respondent may seek review of judgment or order "which may adversely affect respondent"); *Arndt v. Am. Family Ins. Co.*, 394 N.W.2d 791 (Minn. 1986) (respondent must file notice of review to obtain appellate review of issues decided adversely to respondent, even if ultimate judgment is in respondent's favor).

Finally, an appellate court may affirm on grounds different from those adopted by the lower court. As the court of appeals noted, any differences between its decision and the district court's decision does not mandate reversal because it may affirm for different reasons. (A.5 n.5) (citing *Gutierrez v. Red River Distrib. Inc.*, 523 N.W.2d 907, 908 (Minn. 1994)). *See also Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (appellate court "will not reverse a correct decision simply because it is based on incorrect reasons").

II. JUDICIAL APPROVAL OF THE PORT AUTHORITY'S PLAN UNDER MINN. STAT. § 501B.25 IS NOT AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT

A. Standard Of Review And Standard For Decision

All legislation is presumed to be constitutional; therefore, the burden rests on the challenger to “demonstrate beyond a reasonable doubt that the challenged Act violates a constitutional provision.” *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872 (Minn. 1986). The constitutional application of a statute receives *de novo* review. *Id.*

All contracts “made by the state are entered into subject to the implied condition that they are ever subordinate to a reasonable and proper exercise of the state’s inalienable police power.” *Minneapolis Gas Co. v. Zimmerman*, 253 Minn. 164, 184, 91 N.W.2d 642, 656 (1958). Both the federal and state constitutions contain language that absolutely protects contract rights; however, “courts have indicated the prohibitions of such contract clauses must be accommodated to the inherent police power of the state ‘to safeguard the vital interests of its people.’” *Jacobsen*, 392 N.W.2d at 872 (quoting *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983)).

This Court applies a three-part test to determine whether a contractual impairment is unconstitutional. *Christensen v. Minneapolis Mun. Employees Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn. 1983) (citing and quoting *Energy Reserves*, 459 U.S. at 400)). First, does the law operate as a substantial impairment of a contractual obligation? *Id.* Constitutional scrutiny increases with the severity of the impairment. *Id.* Second, if a substantial impairment exists, those defending the statute must demonstrate the legislation has “a significant and legitimate public purpose.” *Id.* at 751. Third, the

statute is examined to determine whether “the adjustment of the rights and responsibilities of the contracting parties” is of a “character appropriate to the public purpose” that justifies the statute. *Id.*

B. The Plan Does Not Substantially Impair Bondholders’ Rights

Appellants incorrectly contend that proceeding under section 501B.16 impairs their substantive contract rights. First, use of a judicial procedure does not ordain such a result. Second, appellants fail to consider that the Basic Resolution requires equal and ratable distribution of the 876 Fund. Finally, section 501B.25 did not “impair” contractual rights because other similar remedies have always been options under common and statutory law.

1. Chapter 501B Rules Are Merely Procedural Provisions Available To The Issuer And Bondholder Alike

Invoking a procedure does not compel a certain result. Sections 501B.16-.25 are bilateral procedural provisions that authorize the district court to consider a petition for instructions and hear arguments on whether a particular course of conduct is appropriate under the law and bond documents. The district court got it right:

Applying Sections 501B.16 to 501B.25 to the 876 bonds and the Basic Resolution does not impair the contractual relationship or deprive the 876 bondholders of any contract rights, it merely allows the Port Authority, or persons interested in the 876 bonds, to petition the Court to consider whether a particular course of conduct is proper under the law and the Basic Resolution. The 876 Bondholders retain all rights granted to them under the Basic Resolution and have the ability to assert those rights before the district court.

(A.19-20.) As the district court noted, 876 bondholders likewise could invoke these provisions. While appellants may have a right to a hearing, they do not have a vested right to any particular process, venue, or remedy. See *Peterson v. City of Minneapolis*, 285 Minn. 282, 288, 173 N.W.2d 353, 357 (1969) (applying comparative fault statute retroactively because “legislation dealing only with remedies and procedures are not beyond the reach of retrospective legislation”); *Fish*, 82 Minn. at 11, 84 N.W. at 458 (no vested right in existing rules of procedure).

This rule makes perfect sense here. Appellants’ own submissions show that at least some of them were steadily acquiring 876 Bonds in 2004, 2005 and 2006, and even after notice of the 2006 petition had been sent to bondholders. They were not acting in the belief that chapter 501B procedures did not apply to the Basic Resolution. Hence, chapter 501B did not substantially impair contract rights because it simply provided a procedure available to both bondholders and the Port Authority, without dictating any particular result.

2. Judicial Approval Of The Port Authority’s Plan Gives Effect To Contract Requirements For Equal And Proportionate Distribution Of The 876 Fund

Appellants focus on the bond as a contract, but they fail to discuss the specific terms of the Basic Resolution. The district court’s order gives effect to all terms in the Basic Resolution; therefore, the appellants are not deprived of any substantive rights. The Port Authority’s proposal honors the Basic Resolution’s central commitment to equal and ratable distribution of 876 Fund. While there is no provision in the Basic Resolution

to accelerate the maturity date of all 876 Bonds when there are insufficient funds to pay all principal and interest, the Basic Resolution does provide guidance in that situation.

Section 5-8 provides that all 876 bondholders should be treated equally and ratably.

Priority of Payment.

All General Revenue Bonds shall be *equally and ratably secured by and payable from the Bond Fund, without priority of one such General Revenue Bond over any other*, provided that nothing herein shall preclude the AUTHORITY from using any available sums to purchase, prepay or discharge any General Revenue Bonds it deems appropriate. In the event that the balance in the Bond Fund is at any time insufficient to pay all principal and interest then due on General Revenue Bonds, the AUTHORITY shall apply the balance first to pay pro rata the interest then due on all such General Revenue Bonds, and the AUTHORITY shall apply pro rata any remaining balance toward the payment of principal of the then matured General Revenue Bonds.

(A.82, italics added, other emphasis original.) Section 4-7 similarly provides that “the AUTHORITY has made the covenants and agreements herein for the equal and proportionate benefit of all Holders of the [876 Bonds].” (A.66, emphasis original.) While the second sentence directs pro rata payment during a temporary shortfall, as the court of appeals noted, “it does not contemplate the situation in which the balance will never be sufficient to pay interest and principal as they become due in the future.” (A.2.) That provision in section 5-8 can be harmonized with the principle that bondholders are equally and ratably secured without priority of one over the other.

Importantly, the fact question whether there are sufficient funds to pay 876 bondholders was submitted to the district court. The devastating factual finding, which must be accepted unless clearly erroneous, is that maintaining the *status quo* will result in

a majority of bondholders receiving “very little, if any principal.” As the district court found:

The current state of the 876 bond fund is such that it will never be able to pay principal and interest in full through the term of the last maturing 876 bond. The Port will soon consummate the sale of the last of the repossessed 876 properties. . . . If the Port Authority proceeds under the status quo, the (funds) will be used to pay principal in full for those bondholders whose 876 bonds have matured. Thereafter, the 876 revenues will only be able to pay a partial and ever declining percentage of debt service. If the Port Authority maintains the status quo, a minority of bondholders will receive 100% of their principal, while a majority will receive very little, if any, principal.

(A.25-26.) Appellants offered no contrary evidence; therefore, the factual finding must be accepted by this Court. *See, e.g., Southern Minn. Beet Sugar Coop v. County of Renville*, 737 N.W.2d 545, 552, 554, 555 and n.7 (Minn. 2007) (upholding several factual findings as “not clearly erroneous”).

The district court also concluded that this result cannot be sustained under the Basic Resolution.

The Basic Resolution is clear that the 876 fund is a pooled concept and that 876 bondholders are to be treated equally and ratably. In considering the Port Authority’s Petition, this Court must take into account the best interests of the bondholders as a whole. . . . This Court finds that the Port Authority’s Petition providing for a liquidation of the 876 bonds maximized the return that the 876 bondholders will receive while remaining consistent with the provisions of the Basic Resolution.

(A.30.) Appellants adduced no evidence to counter the district court’s factual finding that the Port Authority’s proposal is much better for all 876 bondholders. If the Port Authority’s proposal is not implemented, Sections 4-7 and 5-8 will be violated because the benefits obtained will not be equal and proportionate for all bondholders. A minority

of 876 bondholders will receive a return of 100 percent of their principal, while the majority of 876 bondholders will never see a return of any of their principal. Under those circumstances, any argument about substantial impairment falls away.

The U.S. Supreme Court's decision in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), does not suggest otherwise. There, New Jersey and New York repealed a statutory covenant made in 1962 that had limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves. *Id.* at 3. The 1962 law "limited the Port Authority's deficits and thus protected the general reserve fund from depletion;" the repeal "totally eliminated an important security provision and thus impaired the obligation of the State's contract." *Id.* at 19. Because the State "has made no effort to compensate the bondholders for any loss sustained in the repeal," the court held that the repeal substantially impaired the bond contracts. *Id.* at 20.

U.S. Trust offers no guidance here. The Port authority's plan delivers to 876 Bondholders all the revenues the Basic Resolution pledged to them, plus additional monetary and tax benefits not achievable otherwise. In *U.S. Trust*, the state – the borrower – acted solely for its own benefit and offered no benefit to affected bondholders. Here, in contrast, the Port Authority is not the borrower, only a conduit, and is presenting a proposal that actually maximizes benefits to all bondholders. The district court's decision thus does not substantially impair contracts.

3. Other Remedies Exist That Are Similar To Section 501B.25

Section 501B.25 cannot work a substantial impairment unless it somehow changes the remedies available to the Port Authority. However, similar remedies exist and the Port Authority could have accomplished the same result through other procedural steps. First, courts have the authority to declare contractual rights. *See, e.g.*, Minn. Stat. § 555.02 (“Any person interested under a deed, will, written contract, or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . . contract, . . . and obtain a declaration of rights, status, or other legal relations thereunder.”).

Additionally, the Port Authority was entitled to seek relief under basic principles of contract law. Minnesota courts have long applied the doctrine that contract performance can be excused when unanticipated events have so changed the contractual relationship that its purpose is no longer served. For instance, the performance of a contractual duty may be excused for impossibility or impracticability when:

- (a) Performance is impractical in the sense that it would cause an excessive or unreasonable burden upon the promisor, such as when a great increase in expense or difficulty is caused by a circumstance.
- (b) The impracticality is due to the existence of a fact or circumstance that the promisor neither knew nor had reason to know at the time of the contract. The fact or circumstance must be inconsistent with the facts which the parties assumed as likely to continue.
- (c) Impracticability of performance is not wholly attributable to the promisor.

Powers v. Siats, 244 Minn. 515, 519, 70 N.W.2d 344, 349 (1955) (applying factors); *see also Vill. of Minneota v. Fairbanks, Morse & Co.*, 226 Minn. 1, 13, 31 N.W.2d 920, 926

(1948) (holding contract excused by impossibility of performance); *Burgi v. Eckes*, 354 N.W.2d 514, 518 (Minn. Ct. App. 1984) (relieving landowner of duty to repair when, through no fault of his own, unanticipated building repairs became economically impossible); RESTATEMENT (SECOND) OF CONTRACTS, § 261 (1981).

As the district court's undisputed factual findings make clear, the current challenge facing the 876 Fund warrants relief under the doctrine of impracticability. The district court determined not only that performance is impractical, but also that the impracticability is due to the existence of circumstances that the Port Authority had no reason to know at the time of the contract, and the impracticability is not attributable to the Port Authority.

[T]he Port Authority did not cause the conditions that lead to the numerous defaults which are responsible for the shortage in the 876 fund. At the time the Basic Resolution was drafted, the Port Authority was obviously aware that defaults could occur because provisions were made for just such occurrences. What the Port Authority could not foresee at that time was the large number of defaults that were to occur due to circumstances beyond their control.

(A.28-29.) Based on the district court's findings of fact, the Port Authority plan could proceed even if chapter 501B did not exist – through the long-established doctrine of impracticability.

Finally, the Port Authority could have proceeded by initiating a defendant class action under Minn. R. Civ. P. 23.01 and 23.02 to accomplish the same end it is pursuing under Minn. Stat. § 501B.25. *Cf. In re Phar-Mor, Inc. Sec. Litig.*, 875 F. Supp. 277 (W.D. Pa. 1994) (certifying defendant class under analogous federal class action rule). Specifically, Rule 23.02, subd. 2, would allow a bond issuer to seek an injunction or other

declaratory relief against a class of bondholders where it can demonstrate the bondholders have “acted or refused to act on grounds generally applicable to the class.” Here, the Port Authority could have sought a declaration that the equal and ratable provisions require that all bondholders share in the revenues available on that basis. If necessary, the doctrine of impossibility or impracticality would sustain that interpretation.

Appellants do more than exaggerate when they claim that chapter 501B “works a wholesale change” with “the court’s authority,” creating a “transfer of power” from the bondholders to the Port Authority and the court. (App. Br. at 36.) First and foremost, chapter 501B protects *both* the trustee and the beneficiaries. *First Trust Co. v. Union Depot Place Ltd. P’ship*, 476 N.W.2d 178, 183-84 (Minn. Ct. App. 1991). Second, it is not “only by invoking” chapter 501B that the courts have authority to interpret contracts and excuse performance but also, as discussed above, via declaratory judgment and the doctrine of impracticability. Finally, appellants have no support for the blanket statement that equitable relief cannot be granted where a party’s rights are governed by contract. (App. Br. at 38.) *Cady v. Bush*, 238 Minn. 105, 110, 166 N.W.2d 358, 362 (1969), merely rejects a claim for unjust enrichment where a written contract establishes the parties’ rights and expresses their agreement.

In short, because the Port Authority could have sought similar relief through other remedies available at the time the Basic Resolution was issued, a parallel remedy under section 501B.25 is not a substantial impairment.

C. The Plan Serves A Legitimate Public Purpose And Any Adjustment Of Bondholder Rights Is Reasonable And Appropriate

Even assuming that appellants' rights are substantially impaired, the application of section 501B.25 is constitutional because the Port Authority's plan advances a legitimate public purpose. Any adjustment of bondholder rights is reasonable and appropriate to that purpose. First and foremost, there is a legitimate public purpose to empowering a court to supervise instruments adopted in connection with revenue bonds. The granting of supervisory jurisdiction creates a venue for resolving the meaning of the instrument when it is in doubt or the proper application of the law is uncertain. *In re Trust of Warner*, 275 Minn. 174, 179-80, 145 N.W.2d 542, 546 (1966) (construing Minn. Stat. § 501.37).

Bond issuers do not have a relationship with a single party (as in a typical contract). Instead, the instruments adopted in connection with a bond issue apply to numerous holders in varying circumstances and with varying interests, as here. Interpreting and applying the bond instruments acquires added complexity since an interpretation that benefits one bondholder may injure another – just as is the case with trust beneficiaries. That is a particularly relevant concern under the provisions of this Basic Resolution, which were instituted for the “equal and proportionate benefit of all Holders.” (A.66, 82.) As summarized by the court of appeals:

[T]he legitimate public purpose behind the district court's involvement is to prevent greater impairment of more contractual relationships and advance a greater good for a greater number. Appellants also cannot show that there is no legitimate public purpose in the adjustment of the parties' rights and responsibilities so as to partially compensate all parties to Basic Resolution

876; section 4-7 of the Resolution itself targets “an equal and proportionate benefit” to all bondholders.

(A.6.) Given the district court’s factual finding that the Port Authority’s plan maximizes benefits to all bondholders, appellants have no basis for claiming that the Port Authority is “shirking” responsibilities and its purpose is “naked self-interest.” (App. Br. at 46-47.)

Moreover, appellants misstate the law in claiming that the Port Authority must show “unprecedented emergencies” such as mass foreclosures and the Great Depression. (App. Br. at 46.) Indeed, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 n.24 (1978), specifically states “[t]his is not to suggest that only an emergency of great magnitude can constitutionally justify a state law impairing the obligations of contracts.” Appellants also overlook that the present condition of the 876 Fund is the result of a very serious downturn in the St. Paul real estate market. That decline was so massive that even reserve funds in excess of \$77.6 million could not prevent the current revenue shortfall.

The Port Authority’s proposal pursues a legitimate and significant public purpose by preventing the substantial impairment of the contract rights of a majority of bondholders. Further, any adjustment of appellants’ rights that necessarily follows from this is reasonable and appropriate because the plan partially compensates all bondholders and fulfills the Basic Resolution’s mandate that revenues are equally and proportionately distributed.

III. THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTION TO VACATE DISTRICT COURT ORDERS FROM 2002 AND 2004

A. Standard Of Review

A district court's decision to deny a motion to vacate an order or judgment will be upheld absent an abuse of discretion. *Stebbins v. Friend, Crosby & Co.*, 178 Minn. 549, 550, 228 N.W. 150, 150 (1929).

B. Appellants' Motion Was Not Filed Within A Reasonable Time And Now Is Moot

Although subject matter jurisdiction may be challenged at any time during a proceeding, Minn. R. Civ. P. 12.08(c), a motion to vacate a final order for any reason under Rule 60 must be made "within a reasonable time." Minn. R. Civ. P. 60.02. Consequently, even if this Court concludes that the district court overreached its jurisdiction in 2006, it should not overturn the 2002 and 2004 Orders because appellants' motion was untimely and now is moot.

Appellants' assertion that the district court "did not find any procedural flaw" in their Rule 60 motion is wrong. (App. Br. at 41.) The district court decided the petitions were "properly before this Court in 2002 and 2004" pursuant to chapter 501B and denied the motion to vacate. (A.10, 40-43.) The district court did not comment on the timeliness of appellants' motion. (See A.20, 40, 42.) The court of appeals held that appellants' Rule 60 challenge to the 2002 and 2004 orders "is futile." (A.4.) The court of appeals added in a footnote that it would not decide a matter "only to set precedent." (A.4 n.4.) Where "an event occurs that makes an award of effective relief impossible, the

matter will be dismissed as moot.” (*Id.*) This Court may affirm either because the motion was untimely or because the issue is moot.

First, a party seeking to challenge an order under Rule 60.02(d) must bring the motion “within a reasonable time.” Minn. R. Civ. P. 60.02. “By including this limitation, the rule demonstrates an intent to limit the length of time within which a party may receive relief from a final judgment.” *Bode v. Minn. Dep’t of Natural Res.*, 612 N.W.2d 862, 869 (Minn. 2000). Courts enforce this limitation in recognition of the general desirability that judgments be final. *Id.*

Determining what is a reasonable time requires consideration of all circumstances including “intervening rights, loss of proof by or prejudice to the adverse party, the commanding equities of the case, the general desirability that judgments be final and other relevant factors” *Id.* at 870 (quoting *Newman v. Fjelstad*, 271 Minn. 514, 522, 137 N.W.2d 181, 186 (1965)). The party moving to vacate a judgment as void must explain satisfactorily the reason for delay. *Bode*, 612 N.W.2d at 870. Actions taken in reliance on a final judgment also weigh against reopening the order. *Id.* See also *In re Default Judgment of PHI Fin. Servs.*, No. C1-01-1978, 2002 WL 1050508, at *2 (Minn. Ct. App. May 28, 2002) (holding appellant failed to file motion to vacate in reasonable time because party relied on judgment and assigned rights to another).

Appellants waited too long to challenge the 2002 and 2004 Orders and offer no reason why they waited two and four years. See, e.g., *Healthspan Servs. Co. ex rel. Price v. Vestal*, No. C6-01-132, 2001 WL 1034565, at *2 (Minn. Ct. App. Sept. 11, 2001) (noting no reason given why not brought earlier; 2-½ year delay in seeking Rule 60 relief

was unreasonable). Significantly, the district court found the Port Authority provided proper notice both in 2002 and 2004. (A.16; *see also* A.127, 166.)

Moreover, the Port Authority and bondholders acted in reliance on the 2002 and 2004 Orders in several ways. The tender offers made in 2002 and 2004 resulted in the purchase and retirement of over \$90 million of 876 Bonds. (A.159-60; R.A.1.) The bondholders who sold bonds in the two tender offers have a strong interest in finality and have vested rights premised on the sale. Those who tendered would have to pay back their principal to the 876 Fund – a hopeless task to administer. And the interest savings to the 876 Fund would have to be reversed, an even more impossible task, leaving the 876 Fund in an even worse financial situation.

Before 2004, each 876 Bond issued had its own provisions regarding the date on which the semi-annual and annual principal payments were due. (A.161.) In order to provide equal and ratable distribution under the Basic Resolution, the 2004 Order adjusted the interest payment dates for all outstanding 876 Bonds to June 1 and December 1 of each year. (A.164, 166-67.) It would be an accounting impossibility to recalibrate interest payment dates and amounts and collect overages/underages. The 2004 Order also directed the Port Authority to pay all costs of administering the 876 Fund from revenues of the 876 Fund. (A.165, 167.) Since then, the Port Authority has crafted its budgets based on the 2004 Order. (A.176.)

None of these actions taken by the Port Authority and bondholders in reliance on the 2002 and 2004 Court Orders can be undone without great prejudice and difficulty, if

they can be undone at all. Very simply, appellants' Rule 60.02 motion is unreasonably late.

Likewise, appellants' effort to invalidate the earlier orders should also be denied on mootness grounds. *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (court must address mootness even if parties do not raise issue); *In re Inspection of Minn. Auto. Specialities, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984) (issue moot if no effective relief possible).

Appellants present a chart of on-going expenses that they claim depend on the 2004 order. But this newly-minted argument ignores the indisputable fact that the 2002 and 2004 tender offers simply cannot be revoked, nor can the interest payment dates be recalculated back to 2004. There is no logical way to parse appellants' challenge to apply only to part of the 2002 and 2004 orders. The challenge must be rejected in its entirety.

Both orders are "beyond effective involvement in this litigation." (A.4.) In describing appellants' request as futile, that court was in effect holding the issue was moot. (A.4.) Indeed, this Court has previously applied the mootness doctrine when it determined an order would be "futile." *In re Glendale Twp.*, 288 Minn. 340, 343, 180 N.W.2d 925, 927 (1970) ("[T]his court does not pass judgment which can have no practical effect."). This Court should affirm the decision to deny appellants' motion to vacate the 2002 and 2004 Orders.

IV. THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTION FOR APPOINTMENT OF A RECEIVER

A. Standard Of Review

A district court's decision to deny an application for a receiver will be upheld on appeal, absent an abuse of discretion. *State ex rel. Goff v. O'Neil*, 205 Minn. 366, 286 N.W. 316 (1939). Appointment of a receiver should be "cautiously and sparingly exercised." *House v. Anderson*, 197 Minn. 283, 285, 266 N.W. 739, 740 (1936); *see also Straus v. Straus*, 254 Minn. 234, 240, 94 N.W.2d 679, 683-84 (1959) (holding "great caution" must be taken in appointing receiver; showing must be "clear, strong, and convincing;" court must be satisfied "imminent danger of loss" exists).

B. Appellants Are Not Entitled To Appointment Of Receiver Under The Basic Resolution

Appellants claim that they are entitled to appointment of a receiver under the Basic Resolution. Section 4-12 provides for the "*application* for appointment of a receiver or other proceeding" to "protect and enforce the rights of all Holders of such General Revenue Bonds(.)" (A.71, emphasis added.) But section 4-12 does not *require* the appointment of a receiver merely upon application. It identifies no triggering event (like a default) and creates no express "right" to a receiver, but only provides that bondholders may "apply" to the court for a receiver. (A.71.) Section 4-12 is more accurately read as placing limitations upon bondholders by requiring that no court proceeding can be initiated without twenty percent of the bondholders first approving of such lawsuit in writing. (*Id.*) The provision, therefore, protects bondholders from the costs and other harms of litigation commenced by a small minority of disgruntled

bondholders. Both the district court and court of appeals correctly held that bondholders must satisfy the conditions set forth in Minn. Stat. § 576.01 in order for a court to appoint a receiver. (A.32-33, 7.)

C. The District Court Did Not Abuse Its Discretion In Denying Appellants' Motion For Appointment Of A Receiver

Appointing a receiver is an extraordinary remedy granted only in limited circumstances. "Receiverships are notoriously expensive and rightly considered a last resort." *Zwick v. Sec. State Bank of Red Wing*, 186 Minn. 308, 311-12, 243 N.W. 140, 141 (1932). Indeed, "[i]t is highly inequitable to appoint a receiver where it appears that the ultimate result will be a sacrifice of the assets of the corporation wholly to the profits of counsel and receiver and to costs and expenses of such receivership." *Lakeland Dev. Corp. v. Anderson*, 277 Minn. 432, 442-43, 152 N.W.2d 758, 765-66 (1967).

Minn. Stat. § 576.01 requires proof that property of the applicant is in danger of loss or material impairment. The evidentiary burdens for proving such danger are high. "[T]he one requesting the appointment of a receiver has the burden of proving by clear and convincing evidence the insolvency of the debtor, inadequacy of the security, and waste." *Mut. Ben. Life Ins. Co. v. Frantz Klodt & Son, Inc.*, 306 Minn. 244, 246, 237 N.W.2d 350, 352 (1975) (quoting *Minn. Bldg. & Loan Ass'n v. Murphy*, 176 Minn. 71, 75, 222 N.W. 516, 518 (1928)). A court should be reluctant to appoint a receiver when the applicants have demonstrated no more than a disagreement over the management of assets. *Shostak v. Shostak Constr. Corp.*, No. 99-138, 2000 WL 33675669, at *1 (Me. Super. Ct. Nov. 29, 2000) (R.A.178-180.).

Appellants' allegations of waste were considered by the district court and properly rejected. (A.31-34.) "This Court finds that the Port Authority has provided sound management of the 876 fund." (A.29.) On appeal, the evidence concerning waste must be viewed in the light most favorable to the Port Authority and the facts forming the basis for the district court's conclusion may only be reversed if they are clearly erroneous. *Bliss v. Griswold*, 222 Minn. 494, 502-03, 25 N.W.2d 302, 307-08 (1946); Minn. R. Civ. P. 52.01; *First Trust Co. v. Union Depot Place Ltd. P'ship*, 476 N.W.2d 178, 181 (Minn. Ct. App. 1991).

1. The Port Authority Properly Accounted For Non-Revenue Bond Facilities

Appellants contend that the sale proceeds of Non-Revenue Bond Facilities should be used to repay the 876 bondholders. Presumably, they want the receiver to sell those facilities and use the sale proceeds to pay 876 Bond debt service. That contention misreads the Basic Resolution.

The district court properly found that the lien created by the Basic Resolution "is limited to a defined universe of revenues . . . [and] does not include sale proceeds of non-revenue bond facilities." (A.28.) Under the Basic Resolution, the pledge of revenues includes "Net Revenues," consisting of (a) payments made by 876 Fund borrowers for 876 Bond-financed projects, and (b) the net revenue from certain non-876 Bond-financed assets. (A.64-65.)

The Basic Resolution provides that *operating* proceeds from “Facilities” financed by 876 Bonds must be deposited into the 876 Fund.⁶ “Facilities” are “all revenue-producing properties, from time-to-time owned, leased or otherwise financed by the Authority and operated, used or leased for one or more of the purposes authorized by the Act.” (A.50.) There are exceptions. (A.51; *see also* A.58, 64-65.) Therefore, *only* operating revenues from 876 Bond-financed facilities and Non-Revenue Bond Facilities are revenues pledged to the 876 Fund.

Although net *sale* proceeds from 876 Bond-financed Facilities are “Special Funds” and are deposited into the 876 Fund, nothing in the Basic Resolution imposes a lien on the *sale* proceeds derived from Non-Revenue Bond Facilities. (A.53, 79.) The limited level of security associated with Non-Revenue Bond Facilities was disclosed repeatedly to potential purchasers of 876 Bonds during that period of time when the Port Authority was issuing 876 Bonds.⁷ (T.301-02; R.A.28, 85-86; T.300, 326-27.)

Sections 4-9 and 4-13 of the Basic Resolution certainly do not create a lien on Non-Revenue Bond Facility sale proceeds. Those provisions impose an obligation to maximize bondholder returns. (A.68, 72.) They do not create new, independent liens on properties not otherwise pledged to the 876 Fund. Hence, the district court properly

⁶ Facilities financed by other, non-876 revenue bonds, defined as “Other Secured Bonds” in the Basic Resolution, are outside the pledge created by the Basic Resolution. (A.51, 58, 64-65.)

⁷ Official Statements issued by the Port Authority disclosed that Non-Revenue Bond Facilities were not subject to a pledge to the 876 Fund. (T.301-02; R.A.28.) For instance, a 1987 Official Statement disclosed that the Port Authority had revenues “not pledged to the Common Revenue Bond Fund,” including sales of certain land and easements. (*Id.*)

rejected appellants' claim that Non-Revenue Bond Facilities had to be sold for the benefit of 876 bondholders.

2. Third-Party Costs

Appellants also argue that the Port Authority wasted assets by improperly paying third-party administrative costs of the 876 Fund from its revenues. The argument fails because the Port Authority was acting in accordance with the district court's 2004 Order. (A.167.) Since inception in 1974, revenues generated by 876 Bond-financed Facilities were intended to cover third-party costs associated with the 876 Fund. (T.234-35.) These include paying agent fees, audit and annual report costs, mailing charges, legal fees and special property assessments; 876 bondholders are the beneficiaries of these out-of-pocket expenses. (T.306-07.) Internal administrative expenses of the Port Authority are not included among the third-party out-of-pocket costs. (T.236.)

Indeed, from 1974 to 1991, when the Accumulated Net Revenue Fund had a surplus, third-party out-of-pocket costs were paid from that fund or by assessment on borrowers. (T.234, 289, 332-33.) After 1991, many projects matured, defaulted or prepaid, and the Port Authority increasingly absorbed third-party costs. (T.242, 373, T.10/22/04 at 41-42.)

The 2004 petition sought clarification that the Port Authority could recover ongoing third-party administrative expenses necessarily incurred in connection with the administration of the 876 Fund from its revenues. (A.143-44.) After taking testimony, the district court authorized the Port Authority to recover "ongoing administrative expenses necessarily incurred in connection with the administration of the 876 Fund and

the 876 Bonds.” (A.167.) The district court also determined that all 876 bondholders had notice of the petition. (A.166.) Yet no 876 bondholder objected at the hearing or challenged the 2004 Order on appeal. (T.300.)

The Port Authority has been paying third-party out-of-pocket costs with 876 Fund revenues since September 2004. Because a receivership is an equitable remedy granted by a court, it follows that acting in accordance with an existing court order cannot be waste under Minn. Stat. § 576.01.

3. National Can Rental Income

Another claimed item of waste concerns the National Can Facility, also known as the Rexam Facility. (T.258-63.) The Port Authority leased the National Can Facility under a contract executed May 1, 1970. (R.A.103-129.) The Port Authority issued 876 Bonds to finance the construction of the facility. (T.259.) Under the lease, National Can had an option to purchase the land and facility at the end of the original term, but did not do so. (R.A.104, 126; T.261-62.) The lease provided National Can with lease renewal options that could extend the leasehold at the same, fixed rent until July 31, 2029. (R.A.104, 93.) Rental income from National Can/Rexam property went into the 876 Fund.

Appellants urged that the facility be sold and proceeds dedicated to the 876 Fund. (App. Br. at 22.) The district court heard extensive evidence on the issue and found no waste, denying the receivership motion on the grounds that the Port Authority plan will maximize revenues pledged to the 876 Bondholders notwithstanding that the National

Can Facility was not to be sold. (A.33.) The finding is not clearly erroneous and finds ample support in the record.⁸

4. Creation Of The River Maintenance Fund

Appellants claim the Port Authority improperly used rental income from riverfront properties for harbor maintenance instead of paying that income into the 876 Fund. (App. Br. at 21.) The district court found otherwise. (A.33.) In 1992, the Port Authority determined that its shipping facilities were in need of maintenance. With the depletion of the Accumulated Net Revenue Fund in 1991, another funding source was needed. Section 4-2 of the Basic Resolution allows for the payment of maintenance and repairs from lease revenues. (A.55.) The Port Authority relied on this provision to create the River Maintenance Fund, which is funded from an allocation of rents and fleeting and tonnage charges. (T.721-22.)

The River Maintenance Fund facilitates maintenance work that benefits 876 Bondholders. (T.726-727.) The revenues from the harbor properties are higher if the tenants on the river properties derive greater benefit. Failure to maintain port infrastructure would reduce rents. Additionally, the maintenance and improvements have minimized the vacancy rate of the river properties and encouraged expansion. (T.722-723.) The increased rental income resulting from maintenance has exceeded the expenditures from the River Maintenance Fund. (T.723.) The River Maintenance Fund

⁸ This Court can take judicial notice of the fact that the National Can building has been sold, which removes this issue from the case. (R.A.245-48). The Port Authority has deposited the net sale proceeds into the 876 Fund as Special Funds. (See T.263).

is a proper use of Non-Revenue Bond Facility lease revenues and cannot be deemed waste.

5. Payments End In 2022

As explained *supra* at p. 5, the 876 Fund has a limited life. September 1, 2022, is the date the 876 Fund was designed and intended to terminate. (T.363, 793.) Debt service and administration costs will consume the 876 Fund. The amount of revenues the 876 Fund will receive going forward will decline because the number of performing 876 Bond-financed Facilities will eventually decrease to zero. (T.742-43; A.266.) The debt service that these projects will be able to pay will decline, decreasing to less than two percent of 876 Fund debt service by 2022. (T.750-51.) The costs of administering the 876 Fund will also continue without declining, even if 876 Fund revenues decline. (T.751.) By 2022, those costs are expected to be approximately 25 percent of the available revenues for 876 Fund debt service. (T.751.) If nothing is done, two-thirds of 876 bondholders will receive nothing. (T.765, 881.) Because the Port Authority's plan gives bondholders the benefits of revenues through the anticipated end date of the program, the district court correctly found no waste.

CONCLUSION

The Port Authority has steadfastly discharged its contractual obligations to 876 Bondholders. Its proposal to terminate the 876 Fund now is the only way to ensure that all of the revenues pledged to 876 Bondholders are distributed consistently with the provisions of Basic Resolution that give *all* 876 Bondholders an equal and ratable interest in those revenues. Moreover, the Port Authority's plan adds up to \$5.8 million in additional value, which will be lost if the plan cannot go forward.

Dated: October 20, 2008.

BRIGGS AND MORGAN, P.A.

By: 

Scott G. Knudson (#141987)

Paul C. Thissen (#241416)

Diane B. Bratvold (#018696X)

2200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402-2157

(612) 977-8400

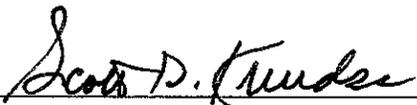
**ATTORNEYS FOR RESPONDENT
PORT AUTHORITY OF THE CITY
OF SAINT PAUL**

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Port Authority of the City of Saint Paul, certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word Word 2003 and contains 13,964 words, including headings, footnotes and quotations.

Dated: October 20, 2008.

BRIGGS AND MORGAN, P.A.

By:  _____

Scott G. Knudson (#141987)

Paul C. Thissen (#241416)

Diane B. Bratvold (#018696X)

2200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402-2157

(612) 977-8400

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