which was prepared at the request of the Commissioners. His opinion analyzed and reviewed the financial aspects and data relating to the proposed acquisition, rehabilitation and operation of the PATH system. He concluded that the section 7 certification required under the series consolidated bond resolutions could be made, since the anticipated net loss after debt service for the years 1969 through 1991 would level off at approximately $6,595,000[27] per year, an amount that would not impair the sound credit rating of the Port Authority. More specifically, Kubach concluded that

> a) There is always a comfortable margin between the anticipated net loss and 10% of the estimated General Reserve Fund;
>
> b) Net revenues available for Reserves will not be materially diluted by undertaking the acquisition, rehabilitation and operation of the Hudson Tubes:
>
> c) The coverage of both annual obligatory long term debt service and future maximum debt service is sufficiently within the limits necessary to preserve the Port Authority's credit and to continue the issuance of Consolidated Bonds.
>
> I therefore conclude that the application of all or any portion of unexpended proceeds of Consolidated Bonds, Nineteenth Series, Due 1991, will not during the years 1962 through 1991, in light of the estimated expenditures in connection with the Hudson Tubes, materially impair the sound credit standing of the Authority or the investment status of the Consolidated Bonds or the ability of the Port Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds.

Since the enactment of the 1962 covenant the Port Authority has referred to the covenant in all official statements furnished to the public in connection with each series of consolidated bonds issued by the Authority. The reference is set forth under the heading "Statutory Covenant With Prior Affected Bondholders Against Dilution of Pledged Revenues and Reserves by Additional Passenger Railroad Deficits," and the terms of the covenant are then summarized. The first two sentences of text read as follows:

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[27]In 1962 the general reserve fund was approximately $69 million.

In connection with the legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes system the Port Authority had advised the Legislatures of both States that the credit of the Port Authority would be impaired by such an undertaking of an anticipated perpetual deficit facility unless the States would enter into an enforceable contract with the Port Authority bondholders which would grant assurances against dilution of already pledged revenues and reserves by any additional passenger rail deficits beyond those of the basic Hudson Tubes System. The legislation as finally adopted includes such statutory covenants.

As of December 31, 1973 the Authority had invested $185,800,000 of its funds in the acquisition and improvement of PATH. The accumulated operating deficits of PATH (determined in accordance with ICC accounting practices) total $125,000,000,[28] of which approximately $17,000,000 constitutes depreciation. PATH has incurred an annual deficit after debt service for each of the last five years in excess of 10% of the general reserve fund. Accordingly, under the 1962 covenant the Port Authority would be precluded from pledging any of its revenues or reserves to any other deficit passenger railroad operation. In 1973, using the Authority's accounting procedures, the PATH deficit for the year, including debt service, was $24,913,000.

Following the enactment of the 1962 covenant legislation an action was instituted in the New York state courts challenging the validity of the statute by New York property owners. The principal issues presented in the action dealt with the legislative authorization to the Authority to construct the World Trade Center. The plaintiffs urged, among other things, that the legislation was unconstitutional because no congressional consent had been obtained. The New York Court of Appeals upheld the constitutionality of the covenant legislation, and the appeal therefrom was dismissed by the United States Supreme Court for want of a substantial fed-

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[28]Using the Authority's method of accounting, the accumulated PATH deficit as of December 31, 1973 was $153,073,000, inclusive of debt service.

eral question. *Courtesy Sandwich Shop v. Port of N. Y. Auth.*, 12 *N. Y.* 2d 379, 240 *N. Y. S.* 2d 1, 190 N. E. 2d 402, app. dism. 375 *U. S.* 78, 84 S. Ct. 194, 11 L. Ed. 2d 141, *reh. den.* 375 *U. S.* 960, 84 S. Ct. 440, 11 L. Ed. 2d 318 (1963). The Court of Appeals disposed of the consent argument in the following manner:

> This argument must fail because, assuming consent to be required for this sort of concurrent action, the congressional consent originally given in 1921 and 1922 to the bi-State compact creating the Port Authority expressly contemplated such further co-operative legislation in furtherance of port purposes as was here accomplished. * * * Among the Articles of Agreement consented to were articles III, VII and VI, which created the Port Authority with the powers enumerated plus "such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the other." Similarly, article XI, following the agreement for an initial comprehensive plan in article X, provides that the Port Authority should "from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two States, they shall be binding upon both States with the same force and effect as if incorporated in this agreement." Chapter 209 clearly falls within the congressional consent given to the articles contemplating the grant to the Port Authority of additional powers within the framework of the compact. [12 *N. Y.* 2d at 391, 240 *N. Y. S.* 2d at 7, 190 N. E. 2d at 406]

The lack of congressional consent to the covenant legislation was also raised by Port Authority bondholders in *Port Authority Bondholders Pro. Com. v. Port of N. Y. Auth.*, 387 *F.* 2d 259 (2 Cir. 1967). The Court of Appeals affirmed the dismissal of the bondholders complaint, having concluded that the United States Supreme Court's disposition in *Courtesy Sandwich Shop* had labeled the question "as unsubstantial." 387 *F.* 2d at 262.

In 1971 Theodore Kheel, Esq., and others instituted a class action in the United States District Court for the Southern District of New York challenging the constitutionality of the 1962 covenant on the grounds that it restricted the Authority's power to devote its revenues to nonself-supporting passenger rail facilities, in violation of the Compact and

Commerce Clauses of the United States Constitution, and impaired legislative sovereignty. The District Court dismissed the complaint, relying in part upon the disposition made in *Courtesy Sandwich Shop. Kheel v. Port of N. Y. Auth.*, 331 *F. Supp.* 118 (S. D. N. Y. 1971), aff'd on other grounds, 457 *F.* 2d 46 (2 Cir. 1972), *cert. den.* 409 *U. S.* 983, 93 S. Ct. 324, 34 L. Ed. 2d 248 (1973).

Legislative History of the Repeal of the 1962 Covenant.

Despite the enactment of the 1962 covenant, during the latter part of the 1960's and continuing to date there has been increasing public and governmental demand for the Port Authority to make a greater contribution toward a solution of the mass transit problems within the Port District. The critics of the Port Authority, as well as responsible executive and legislative officials, have focused primarily upon the utilization of the surplus earning capacity of the Authority's existing facilities to finance further Authority acquisition of or direct subsidies to mass transit facilities. It may be noted that between 1961 and 1970 the net revenues of the Authority had increased from $68,000,000 to $115,000,000, and over that period the Authority had available to it $454,000,000 in funds in excess of its debt service requirements.

In July 1964 Congress enacted the Urban Mass Transportation Act of 1964 (49 *U. S. C. A.* §§ 1601 *et seq.*), expressing for the first time a federal legislative interest in the support of urban mass transportation systems. In enacting the 1964 act Congress found (49 *U. S. C. A.* § 1601(a)):

> (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
>
> (2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate

provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) the Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

The purposes of the 1964 act were declared to be (49 *U. S. C. A.* § 1601(b)):

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economic and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

The scope of the 1964 act was expanded by the Urban Mass Transportation Assistance Act of 1970 on the basis of a finding by Congress (49 *U. S. C. A.* § 1601a) that "the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at reasonable cost an urgent national problem."[29]

In April 1970 Governors Cahill and Rockefeller announced a joint program to increase the Port Authority's role in mass transportation by building a rail link to John F. Kennedy International Airport and extending PATH to Newark International Airport and other parts of New Jer-

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[29]In November 1974, after the repeal of the 1962 covenant, Congress enacted the National Mass Transportation Assistance Act of 1974, which provided $11.8 billion over the next six years for mass transit capital expenditures and, for the first time, operating subsidies on a matching basis.

sey. Bills were introduced in the New Jersey and New York Legislatures authorizing the Port Authority to undertake mass transportation projects providing access to John F. Kennedy and Newark International Airports. In March 1971 joint hearings were held in New York and New Jersey by the New York State Assembly Committee on Corporations, Authorities and Commissions and by the Autonomous Authorities Study Commission of the New Jersey State Legislature with respect to the relationship of the Port Authority to mass transportation and the proposed passenger rail links to the airports. In June 1971 the Legislatures of New York and New Jersey enacted legislation authorizing the Port Authority to extend passenger rail transportation to Kennedy International Airport and to Newark International Airport and Cranford. *L.* 1971, *c.* 245; *N. J. S. A.* 32: 1–35.20 *et seq.* The sponsors of this legislation sought to avoid the limitations of the 1962 covenant by characterizing the proposed new railroad facilities "as constituting a part of each air terminal" rather than independent passenger railroads. *L.* 1971, *c.* 245, § 1. While this legislation was pending, the Port Authority obtained opinion letters from two New York law firms which concluded that the proposed rail extensions were subject to the provisions of the 1962 covenant and could not be financed out of Port Authority revenues or reserves unless "self-supporting" since PATH had used up all of the "permitted deficits" allowed by the covenant.

Following the enactment of the 1971 legislation the Commissioner of the New Jersey Department of Transportation commissioned a consulting firm to report on the Authority's ability to finance and operate the New Jersey PATH extension under the terms of existing covenants with bondholders, and to propose alternative financing programs if the Authority could not. The consultant's report was submitted in December 1971. At the outset it was noted that on the assumption the proposed additional facilities would operate

at a deficit, the 1962 covenant prohibited Authority financing and operation since the PATH deficit already exceeded the "permitted deficits" allowed by the covenant. The conclusion of the report was that the Port Authority was not, under the 1962 covenant, in a "favorable position" to provide the additional financing necessary for the proposed extensions of existing passenger rail facilities. The consultants recommended as an alternative solution the removal of PATH from the Authority's control so that the latter would no longer be responsible for its deficits.

In June 1972 the Port Authority and New Jersey Department of Transportation concluded on the basis of an engineering cost study that the proposed extension of PATH via Newark Airport to Cranford was not economically feasible under the terms of the 1962 covenant.

In the same month the State of New York passed a bill repealing the 1962 covenant. *Laws of* N. Y. 1972, *c.* 1003. Governor Rockefeller's message on the signing of that legislation stated:

> I am approving this bill in order to give incentive to the Port of New York Authority to proceed with urgently needed mass transportation facilities in the metropolitan region.
>
> Passed with overwhelming bipartisan support in both houses of the Legislature, the bill removes the absolute statutory prohibition against the use of the revenues of the Port of New York Authority for railroad purposes. That statutory covenant, together with the provision of the bi-state compact creating the Authority that neither State will construct competing facilities within the Port District, could forever preclude the two states from undertaking vitally needed mass transportation projects. In removing the present restriction, the bill would not jeopardize the security of Port Authority bondholders or their rights to maintain that security.
>
> * * * * * * * *
>
> New York, by the enactment of this measure, is taking an essential step in its long-range effort to realize the full potential of the Port Authority in meeting the total transportation needs of the New York-New Jersey port district. The Port Authority's active participation in helping to solve the problems of mass transportation in the New York City metropolitan area will inure to the benefit not only of millions of area residents generally, but also to the port facilities operated by the Authority and the workers and businesses that rely

on them. This bill is consistent with the original purpose of the Port Authority — to ensure the coordinated development of terminal, transportation and other facilities of commerce in and about the port district for the greater benefit of the people of New York and New Jersey.

The repeal of the 1962 covenant adopted by New York proved to be unacceptable at that time to the New Jersey Legislature and Governor Cahill, and on November 15, 1972, following a series of meetings among Governors Cahill and Rockefeller and the Commissioners of the Port Authority, the Governors announced agreement on a bi-state plan of passenger rail transportation development by the Port Authority. The plan provided for the extension of PATH via Newark Airport to Plainfield, direct rail service from Kennedy Airport to New York City, and direct rail service to Penn Station, New York, for riders of the Erie Lackawanna Railroad in six northern New Jersey counties and two counties in New York. The estimated total cost of the plan was $650,000,000 and it was estimated that the Port Authority would invest between $250,000,000 and $300,000,000, with the balance of the funds being furnished by grants from the Federal Urban Mass Transportation Administration and the states. The Governors also proposed to repeal the 1962 covenant with respect to bonds issued subsequent to the enactment of the legislation proposed by the Governors.

On December 11, 1972 the New Jersey Senate held an information session to consider pending Port Authority mass transit bills. During this session representatives of the Port Authority and of Governor Cahill's office stated that the State of New Jersey would have to commit substantially all of the funds then available to the State of New Jersey from the Federal Urban Mass Transportation Administration.

The legislation embodying the 1962 covenant was amended by the State of New Jersey on December 28, 1972, *L.* 1972, *c.* 208, so as to repeal the 1962 covenant with respect to

Authority bonds issued after the effective date of the legislation. The New York Legislature enacted concurrent legislation which became effective on May 10, 1973. *Laws of N. Y.* 1973, *c.* 318.

On April 22, 1974 the New Jersey Legislature enacted *chapter* 25 of the *Laws of* 1974 (the "repeal act"). Governor Byrne signed the bill on April 30, 1974. Section 1 of this act repealed section 3 of *chapter* 208 of the *Laws of* 1972, the effect of which is to repeal, retroactively, the 1962 covenant as to all issued and outstanding "affected bonds" issued by the Port Authority. The introducer's statement annexed to the Assembly Bill No. 1304 (which became *chapter* 25), sums up the intent and purpose of the action taken:

> **This bill is designed to preclude the application of the 1962 covenant restricting port authority participation in mass transit projects. Chapter 208, P. L. 1972, precluded such application to bonds newly issued after the effective date of that act, but maintained in status quo the position of holders of bonds issued between March 27, 1962 and December 28, 1972. Since affected bonds are outstanding until the year 2007, the restrictions imposed by the covenant effectively preclude sufficient port authority participation in the development of a public transportation system in the port district. In 1972 the State of New York passed legislation precluding the application of the 1962 covenant from outstanding bonds as well as newly issued bonds. It is the purpose of this act to accomplish effective repeal of the covenant.**

Concurring legislation was signed into law by Governor Wilson of New York on June 15, 1974. *Laws of N. Y., c.* 993. Governor Wilson issued a statement when he signed the bill, in which he said in part:

> **In response to my inquiry, the Chairman of the Port Authority has also advised me that because of the heavy long term capital commitments for the PATH facilities and the Kennedy rail link, the Authority has no significant capacity to contribute funds for operating subsidies for commuter railroads. Hence, the plain and simple fact of the matter appears to be that the Authority has virtually no excess funds that could be channeled into operating subsidies for mass transportation facilities in the New York metropolitan area.**

Even if such funds were available, existing bond indenture provisions which survive despite repeal of the statutory covenant would prohibit their use except in relation to facilities owned, leased or operated by the Port Authority.

The legislative history of the repeal of the covenant would not be complete without reference to other developments which were of immediate and continuing concern to the states and the nation at or about the time the repeal legislation was enacted. Commencing in the early 1950's and continuing to date the two states initiated studies of air pollution problems in their jurisdictions, and legislative action to control air pollution was undertaken by New Jersey as early as 1954, see *N. J. S. A.* 26:2C–1 *et seq.*, and by New York in 1957, see *Laws of N. Y., c.* 931. In 1955 the United States Congress enacted the Clean Air Act, 42 *U. S. C. A.* § 1857 *et seq.*, the preamble of which sets forth the following findings (among others):

(a) The Congress finds —

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration and property, and hazards to air and ground transportation.

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments * * *

The studies which were undertaken identified automobile exhaust emissions as a significant contributing factor in air pollution, and as the primary source of air pollution in the City of New York. In 1962 the State of New York adopted legislation requiring the installation of positive crankcase devices on new cars. *Laws of N. Y.* 1962, *c.* 994. While similar legislation was not enacted in New Jersey, the State did institute on February 1, 1974 an auto emission

testing program as part of the mandatory motor vehicle inspection system.

The efforts of the states to alleviate health hazards associated with air pollution were given a major impetus by the congressional enactment in 1970 of amendments to the federal Clean Air Act, 42 *U. S. C. A.* § 1857(*c–l*) *et seq.*, pursuant to which the Administrator of the federal Environmental Protection Agency was authorized to establish national air quality standards and to prescribe, upon the failure of a state to do so, the steps necessary to achieve compliance with those standards.

On November 13, 1973, after the State of New Jersey failed to present an acceptable plan for achieving compliance with the national air quality standards for hydrocarbons and carbon monoxide, the federal Administrator promulgated regulations designed to achieve a major reduction in hydrocarbon and carbon monoxide pollution in the northern part of New Jersey. 38 *Fed. Reg.* 31388 *et seq.* The federally-mandated plan for New Jersey included the mandatory use of retrofit devices on gasoline-powered vehicles and "the application of certain transportation control measures including a requirement for a significant reduction in vehicle miles traveled." 38 *Fed. Reg.* 31389. The Administrator also emphasized the importance of the development of mass transit to the effort to improve New Jersey's air quality:

> The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use. The planning, acquisition, and operation of a mass transit system is, and should remain, a regional or State responsibility. Many improvements are being planned in mass transit facilities in the State that will make it possible for more people to use mass transit instead of automobiles. * * * [38 *Fed. Reg.* 31389]

Finally, reference must be made to the energy crisis, the dimensions of which became a matter of national concern in the fall of 1973 with the imposition of an oil embargo by

Arabian suppliers of crude oil and the rapid escalation of the price of oil. On February 4, 1974, two months before the repeal legislation was enacted, the New Jersey Legislature passed the Emergency Energy Fair Practices Act of 1974 (*L.* 1974, *cc.* 2, 6).

Section 2 of that act stated:

> **The Legislature finds and determines that because of world conditions and the manner in which energy sources and fuels are allocated and distributed that an energy shortage now exists and may continue for the foreseeable future.**

Section 3 of the act authorized the Governor "to proclaim by Executive Order the existence of an energy emergency" and to establish a State Energy Office and appoint an Administrator with broad powers to control the use and distribution of all fuels. On February 5, 1974 Governor Byrne issued Executive Order No. 1 in which he proclaimed the existence of an energy emergency, created the State Energy Office and established the position of Administrator of that office.

In December 1973 the Regional Plan Association issued a report on the relationship of the energy crisis to transportation. Its findings noted the decline of public mass transit in the metropolitan region and the increased consumption of fuel caused by reliance upon private automobiles to satisfy the major passenger transportation demand of the region. The Association pointed out that

> **If we are serious about meeting a profligate demand for energy over the long pull, we will have to begin now to design a Region that is less energy consumptive in transportation and in its development pattern.**

While the immediate effects of the oil embargo have been dissipated, the nation is still confronted with the long-range effects of oil price increases, particularly as they bear upon the economic well-being of the country. On February

21, 1974 President Nixon described the problem in these terms in a special message to Congress on the energy crisis:

> We must also face the fact that when and if the oil embargo ends, the United States will be faced with a different but no less difficult problem. Foreign oil prices have risen dramatically in recent months. If we were to increase our purchase of foreign oil, there would be a chronic balance of payments outflow which, over time, would create a severe problem in international monetary relations. [*U. S. C. Cong. and Admin. News*, 93rd Cong., 2d Sess. at 36.]

The President further observed, "it is widely recognized now that the development of better mass transit systems may be one of the key solutions to both our energy and environmental problems." *Id.* at 42. Congress has repeatedly made similar findings. For example, the Regional Rail Reorganization Act of 1973, enacted on January 2, 1974, contains specific findings by Congress that "rail service and rail transportation offer economic and environmental advantages with respect to * * * energy efficiency and conservation * * * to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest," and that "railroads are one of the most energy-efficient modes of transportation for the movement of passengers and freight." 45 *U. S. C. A.* §§ 701, 761.

Bondholder Reliance on the 1962 Covenant and the Effects of Repeal.

Commencing with the issuance of the 20th series of 1962 the Authority advised potential investors of the existence of and protection afforded by the 1962 covenant by including detailed reference to the covenant in the official statements distributed to the public. U. S. Trust alleges in its complaint that purchasers of the Authority's consolidated bonds relied on the notice thus given to them in making their purchases. It is also alleged that the repeal of the covenant has diminished and will continue to adversely

affect the value of the bonds in the secondary market.[30] These issues were the subject of a trial at which U. S. Trust produced four witnesses in its behalf, together with numerous exhibits. Defendants relied upon cross-examination of plaintiff's witnesses plus their own exhibits.

Port Authority consolidated bonds are known in the market place as revenue bonds, *i. e.*, they are payable solely from the revenues and reserve funds derived from the facilities operated by the Authority. In the main these bonds are sold to relatively sophisticated institutional investors either for their own accounts or for the accounts of others whose investment funds they manage. Since the bonds carry a fixed rate of return and must compete against other similar types of securities available in the market place, the interest rate fixed when the bonds are initially marketed, as well as the price of the bonds in the secondary market, will normally reflect the investor's evaluation of the underlying security of his investment and the prevailing interest rates available on similar types of securities.

Prior to 1962 the Authority had successfully marketed several hundreds of millions of dollars of its consolidated bonds without the existence of the covenant. Presumably those issues were marketed on the strength of the Authority's overall revenues and reserves as well as in reliance on the previously enacted statutory covenants and the covenants contained in the CBR. The interest rates on these bond issues varied from a low of 2¾% (the 2nd and 4th series) to a high of 4¼% (16th series). The interest rate on the last bond issue offered prior to the enactment of the covenant was 3½% (19th series).

In the early 1960's, prior to the enactment of the 1962 covenant, the likelihood of legislation directing the Authority to take over the H & M became apparent. The record strongly suggests that the Authority itself took the

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[30]The secondary market in this context refers to the over-the-counter price at which the bonds are traded after the initial offering.

initiative in arousing the concern of the investment banking community to the implications of such legislation for the future financial well-being of the Authority. Whether this action was attributable to the Authority's fear of the "disease" of mass transit, see *Goldberg*, at 22, or a legitimate concern as to the Authority's ability to absorb substantial mass transit deficits is not the point; the fact of the matter is that the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority.

The fact of the covenant's existence and its terms were communicated to the public and were a matter of general knowledge among investment bankers, institutional investors and dealers in Authority bonds. It may fairly be said, however, that few, if any, members of the investment community ever analysed closely the actual effect of the 1962 covenant upon bondholder security. The principal witness offered by U. S. Trust in support of its contentions, John F. Thompson, whose credentials and qualifications are impeccable, when asked to compare the protections afforded bondholders by the 1962 covenant with the restrictions imposed by the CBR (*i. e.*, the 1.3 test and the section 7 certification required by the bond series' resolutions), testified:

> Well the 1962 covenant and its requirements, require more specific determinations by the commissioners, by the staff and the commissioners as to the earnings or prospects of deficits involved, and they are — well, in the case of the Section 7 requirements, the commissioners can simply rule or state their opinion that the requirement would not harm the holders of the outstanding debt. In the case of the 1.3 times, they are permitted estimates of future earnings to some degree as well as the historical earnings. This is a test which might be complied with on the initiation of a deficit rail facility, and later be found to have not avoided deficits by any means as given the propensity of these deficits to greatly increase.
>
> The determinations which must be made under the covenant, I believe, are much more susceptible to active testing, by those looking at the Port Authority from the outside, and those in the investment community a much more secure feeling about the future profitability of the Port Authority.

Based upon the testimony offered by plaintiff, the investment community's understanding of the covenant was that it in some manner furnished "security for the bondholders and it protected the diversion of the earnings of the Port Authority into deficit mass rail transit." If the covenant is to be understood in that sense, the record supports plaintiff's claim that investors relied on the covenant in purchasing Authority bonds. But while reliance existed, the covenant cannot be said to have been the "primary consideration" for the purchases having been made, for no witness testified that purchases would *not* have been made without the covenant, but only that they would not have purchased or recommended the purchase of the bonds "at the price which they were then offered."

The limited role of the covenant on the Authority's credit standing is also reflected in the ratings assigned to Port Authority bonds by the principal rating services, Moody's and Standard and Poor's. Both have rated Authority bonds as "A" bonds, meaning that they are of investment quality and no default in payment of principal or interest is anticipated. The bonds carried the same rating prior to the enactment of the covenant, after it was enacted, after it was prospectively repealed, and after the repeal act of 1974. As suggested in the reports of the rating services, the rating assigned to Port Authority bonds is an amalgam of many factors, including not only the covenant but "the Authority's strong operating, financial and management record".[31]

Following the 1962 covenant legislation the Port Authority issued 20 series of bonds prior to the enactment of the prospective repeal which became effective on May 10, 1973. The interest rates on these bonds ranged from a low of 3-1/4% (20th series) to a high of 6-5/8% (35th series). After the prospective repeal was enacted, the Authority marketed

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[31]As expressed by one of the witnesses, the Authority "has been well-run, well-organized, well-managed * * *. It's continually shown good revenues."

two additional bond issues, the 40th and 41st series, which carried interest rates of 6% and 5-1/2%, respectively. While it is claimed by plaintiff that the last two series of bonds are indirectly protected by the covenant until the "affected" bonds are retired in the year 2007, it is clear that the interest rates which the Authority has had to pay on non-affected bonds were not materially affected by the absence of direct covenant protection.

Plaintiff also attempted to show through its witnesses and exhibits that the repeal of the covenant adversely affected the secondary market for Authority bonds.[32] This conclusion was expressed by several witnesses who voiced the opinion that not only was the secondary market price of the bonds adversely affected, but that the nature of the market was altered in the sense that the market for the bonds became thin[33] and large institutional investors refused to purchase the bonds after repeal. There can be no question but that immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected. This was conclusively demonstrated by plaintiff's exhibits comparing the market price of selected Port Authority bonds, before and after repeal, with the prices of comparable bonds over the same period.

The problem presented by plaintiff's proofs, however, is that they do not show that the adverse effect attributable to the covenant repeal was permanent. Thus, immediately prior to repeal the price of Massachusetts Port Authority bonds was approximately two points higher than that quoted for New York - New Jersey Port Authority bonds having the same interest rate and a similar maturity.[34] The spread in

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[32]The repeal became effective when the concurrent New York legislation was signed by Governor Malcolm Wilson on June 15, 1974.

[33]A "thin" market is one characterized by a low volume of trading in which the price structure of the market is subject to sharp fluctuation by relatively small buy or sell orders.

[34]The bonds prices referred to in the text are derived from Exhibits P-90 and S-3 and the trial transcript.

favor of "Mass Ports" fluctuated immediately after repeal but showed a market tendency to increase until it reached a maximum of 6-1/2 points on August 2. The spread continued to fluctuate thereafter and reached a maximum of 12 points by December 13, 1974. By January 3, 1975 the spread had narrowed to three points, and never exceeded four points through January 23, 1975. By the date of the trial the spread was reduced to two points, which is the same differential that existed prior to the effective date of the repeal.

Furthermore, beginning in August 1974 there were other factors which unquestionably contributed to the adverse price differential prevailing between Port Authority bonds and those of comparable issues. On August 15, 1974 the *Wall Street Journal* carried a story detailing the Authority's problems in completing and renting space in the World Trade Center. Then, on November 10, 1974, the *New York Times* ran a multi-column feature story with the headline "Port Authority Has Fallen on Hard Times." This story, like the one carried by the *Wall Street Journal* in August, referred to the Authority's difficulties at the World Trade Center and its losses on that project, estimated in the article to be as high as $25,000,000 a year.[35] The article also suggested that other Authority facilities which formerly had been profitable were breaking even or losing money. It is to be noted that Port Authority bonds suffered their sharpest decline for the whole period under review during the one month period following the *New York Times* article. On November 8, 1974 the bonds were quoted at 78, and by December 13, 1974 the price had dropped to 65.

The bottom line of plaintiff's proofs on this issue is simply that the evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the

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[35]The latest available figures disclose that the World Trade Center incurred a deficit for the year 1973 of $16,460,000.

repeal of the covenant, except for a short-term fall-off in price, the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal

The Validity of the Repeal of the Covenant.

[2] Plaintiff's position here is premised on the proposition that the 1962 covenant legislation created a contract between the States of New Jersey and New York and the bondholders of the Port Authority which prohibited the use of Port Authority revenues and reserve funds for passenger railroad purposes except as expressly permitted by the terms of the act. The repeal act of 1974, it is said, impairs the obligation of that contract in violation of *U. S. Const.*, Art. I, § 10 of the United States ("No State shall * * * pass any * * * Law impairing the Obligation of Contract * * *") and *N. J. Const.* (1947), Art. IV, § VII, par. 3. ("The Legislature shall not pass any * * * law impairing the obligation of contracts * * *).[36]

[3] At the outset it is essential to define the terms of the contract and the nature of the impairment claimed by plaintiff. When the 1962 covenant was enacted there was in existence the CBR of 1952, pursuant to which the Authority had pledged its net revenues and the reserve funds as security

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[36]Plaintiff also urges that the repeal act contravenes the Fifth and Fourteenth Amendments of the United States Constitution and Article I, par. 20 of the New Jersey Constitution. The contention is that the repeal constituted a "taking" of property without due process of law, *i. e.*, just compensation. This issue will not be considered in this opinion for the following reasons: (1) to the extent that the claim is based upon an alleged reduction in the secondary market price of Authority bonds, it has been factually rejected *supra*, and (2) the test of constitutional validity as applied to repeal legislation is the same under the Contract and Due Process Clauses, *i. e.*, if an unlawful impairment has occurred there has been a "taking," and if not, then there is no taking. See *Veix v. Sixth Ward B. & L. Ass'n*, 310 *U. S.* 32, 41, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *Lynch v. United States*, 292 *U. S.* 571, 578–581, 54 S. Ct. 840, 78 L. Ed. 1434 (1934); Hale, "The Supreme Court and the Contract Clause: III," 57 *Harv. L. Rev.* 852, 890 (1944).

for the payment of debt service on all consolidated bonds. The CBR and the series' resolutions, pursuant to which all outstanding consolidated bonds were issued, constitute a contract between the bondholders and the Authority, and that contract was unaffected by the enactment of the 1962 covenant. The covenant superimposed upon the security provisions of the CBR and the series' resolutions the further agreement of the states that neither the Authority's revenues nor its reserve funds would be used for any additional passenger railroad facility whose estimated deficit would exceed 10% of the amount in the general reserve fund.[37] To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for such purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders.[38] *Bronson v. Kinzie,* 42 *U. S.* (1 *How.*) 311, 11 L. Ed. 143 (1843); *Planters' Bank of Miss. v. Sharp,* 47 *U. S.* (6 *How.*) 301, 327, 12 L. Ed. 447 (1848); *Hawthorne v. Calef,* 69 *U. S.* (2 *Wall.*) 10, 17 L. Ed. 776 (1864); *Von Hoffman v. City of Quincy,* 71 *U. S.* (4 *Wall.*) 535, 18 L. Ed. 403 (1867); *W. B. Worthen Co. v. Kavanaugh,* 295 *U. S.* 56, 55 S. Ct. 555, 79 L. Ed. 1298 (1935); *New Jersey Highway Authority v. Sills,* 109 *N. J. Super.* 424 (Ch. Div. 1970), supplemented 111 *N. J. Super.* 313 (Ch. Div.

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[37]The statutory formula for permitted deficits is set forth in more precise detail, *supra* at 162–163.

[38]It is not disputed by defendants that a legislative enactment, such as the 1962 covenant, may constitute a contract. Such has been the law since *Fletcher v. Peck,* 10 *U. S.* (6 Cranch.) 87, 3 L. Ed. 162 (1810). See also, *New Jersey v. Yard,* 95 *U. S.* 104, 114, 24 L. Ed. 352 (1877), where the court said: "It has become the established law of this Court that a legislative enactment * * * may contain provisions which * * * become contracts * * * within the protection of the [Contract Clause]." The legislative history associated with the enactment of the 1962 covenant as well as the statutory language used establish fairly conclusively that the Legislature intended the covenant to be a contract between the states and the bondholders of the Authority.

1970), aff'd 58 *N. J.* 432 (1971); *First Nat'l Bank of Boston v. Main Tpke. Auth.*, 153 *Me.* 131, 136 *A.* 2d 699 (Sup. Jud. Ct. 1957).

[4] The Contract Clause addresses itself not only to the obligation, but also to the remedy and the security furnished to enforce the obligation and assure its performance. The first expression of this view of the Contract Clause occurs in *Green v. Biddle*, 21 *U. S.* (8 *Wheat.*) 1, 5 L. Ed. 547 (1823), which arose out of a compact between Virginia and Kentucky creating the latter as a separate state. Under the terms of the compact Kentucky agreed that all private rights and land titles derived from the laws of Virginia would "remain valid and secure" under Kentucky law. Thereafter, Kentucky enacted a series of laws designed to diminish and impede the remedies available to Virginia claimants to recover possession and the rents and profits of lands occupied by Kentucky residents. In holding the legislation invalid under the Contract Clause, Justice Story said:

> It is no answer that acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." [21 *U. S.* (8 *Wheat.*) at 17].[39]

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[39]Upon rehearing in *Green v. Biddle*, Justice Washington delivered the opinion of the court containing perhaps the most extreme expression of the reach of the Contract Clause rendered by the court:

> The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. [21 *U. S.* (8 *Wheat.*) at 8488]

In contrast to the language of Justice Story quoted in the text above, Justice Washington states that *any* impairment, whether or not material to the obligation, violates the Contract Clause. It is

In *Von Hoffman v. City of Quincy, supra,* bonds were issued by a city under existing Illinois law which authorized a special property tax to be levied in an amount sufficient to pay the interest on the bonds. The taxes thus collected were to be held in a separate fund specially pledged for the payment of the interest and not to be used for any other purpose. Subsequently, the legislature enacted a statute which limited the rate of property tax that could be levied by municipalities, and repealed the prior law authorizing the levy of a special tax for the benefit of bondholders. The property taxes collected by the city under the new law were insufficient to pay the interest due on the bonds. A bondholder instituted suit against the city and judgment was entered in his favor for the amount of interest owed on the bonds. The city failed to pay the judgment and refused to levy a property tax for such purpose. The judgment creditor thereupon sought a writ of *mandamus* to compel the city to pay the judgment or to levy a special tax. In its defense the city relied upon the repeal legislation as constituting a valid exercise of the state's sovereign power with respect to future public revenues, as to which it urged no binding contract could exist.[40] The court held the repeal legislation to be an invalid impairment under the Contract Clause. The court reaffirmed the doctrine laid down by Justice Story in *Green v. Biddle, supra,* this time describing the prohibited area in terms of an impairment of "substantial" rights, rather than a "material" impairment.

> It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy,

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doubtful whether this view was ever embraced by the court at any time. But see *Planters' Bank of Miss. v. Sharp,* 47 *U. S.* (6 *How.*) 301, 327, 12 L. Ed. 447 (1848); *Ogden v. Saunders,* 25 *U. S.* (12 *Wheat.*) 213, 256, 6 L. Ed. 606 (1827).

[40]The Supreme Court had earlier rejected this argument in a different context. See *New Jersey v. Wilson,* 11 *U. S.* (7 *Cranch.*) 164, 3 L. Ed. 303 (1812).

> which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution, and to that extent void. [71 *U. S.* at 553].

In its analysis of the issue presented the court viewed the question as addressing itself to the impairment of a remedy. However, the "remedy" in this context is actually the security furnished for the payment of the obligation, *i. e.,* the authorization to levy a special property tax to pay the interest on the bonds.

This line of authority culminates in *W. B. Worthen Co. v. Kavanaugh, supra,* one of the last adjudications by the Supreme Court declaring repeal or amendatory legislation invalid under the Contract Clause. In *Kavanaugh* bonds had been issued by a municipal improvement district organized under the laws of Arkansas. At the time of issuance the statutory scheme to secure payment of the bonds provided for mortgage benefit assessments to be made against each parcel of property which "contained provisions well planned to make these benefit assessments an acceptable security." 295 *U. S.* at 57, 55 S. Ct. at 555. Thereafter, the legislature amended the statute so as to modify the procedures relative to defaulted obligations. The interest and penalties payable on default were substantially reduced, the time in which the property was to be sold for nonpayment was extended from 65 days to 2½ years, and the property owner was permitted to remain in possession with a right of redemption for a further period of four years without accounting for rents. The court struck down the subsequent legislation under the Contract Clause and in the course of doing so it gave a more precise definition of what constitutes a prohibited impairment. Speaking for the court Justice Cardozo said:

> In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. * * * The dividing line is at times obscure. There is no need for the

purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. * * * We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower. The case does not call for definition more precise. A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor.

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Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the others, there is no occasion to consider. A state is free to regulate the procedure in its courts even with reference to contracts already made * * * and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow. * * * What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security. [295 *U. S.* at 60, 62, 55 S. Ct. at 557].

[5, 6] As the language of the court in the cases cited above makes manifest, not every impairment of a contract obligation or security for its performance runs afoul of the Contract Clause; a state acting under its reserved police powers may alter its remedial processes and thereby diminish contractual security provided it does not destroy its quality as "an acceptable investment for a rational investor." This view of the Contract Clause has its origin in the concurring opinion of Justice Johnson in *Fletcher v. Peck,* 10 *U. S.* (6 *Cranch*) 87, 145, 3 *L. Ed.* 162 (1810). See *Hale, supra* at 873. Justice Johnson's conception of the states' reserved power under the Contract Clause was cogently expressed in his dissenting opinion in *Ogden v. Saunders,* 25 *U. S.* (12 *Wheat.*) 213, 6 L. Ed. 606 (1827), where he said:

Societies exercise a positive control as well over the inception, construction, and fulfillment of contracts, as over the form and measure of the remedy to enforce them.

* * * * * * * *

It is, therefore, far from being true, as a general proposition, "that a government necessarily violates the obligation of a contract which it puts an end to without performance." It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts. [25 *U. S.* (12 *Wheat.*) at 286, 291.]

[7] Justice Johnson's formulation of the police power doctrine as applied to the Contract Clause was quoted with approval and forms the rationale for the court's decision in *Home B. & L. Ass'n v. Blaisdell,* 290 *U. S.* 398, 428–429, 54 S. Ct. 231, 78 L. Ed. 413 (1933). During the span of more than a century between *Ogden v. Saunders* and *Blaisdell* the court had held on numerous occasions that the states retained the power to impair contractual obligations — including those to which the state was a party — in the exercise of their always reserved police powers to act in the interest of the public health, safety and general welfare.[41] First in dictum, *Boyd v. Alabama,* 94 *U. S.* 645, 650, 24 L. Ed. 302 (1877), and then by direct application of the doctrine, the court held that a lottery franchise granted for a definite term of years could be repealed. *Stone v. Mississippi,* 101 *U. S.* 814, 25 L. Ed. 1079 (1880); *Douglas v. Kentucky,* 168 *U. S.* 488, 18 S. Ct. 199, 42 L. Ed. 553 (1897). In *Northwestern Fertilizing Co. v. Hyde Park,* 97 *U. S.* 659, 24 L. Ed. 1036 (1878), it was held that a franchise to operate a fertilizer factory at a given location could be negated by the exercise of the police power to abate a nuisance. Similarly, the power to control the use of the public streets may not be bargained away, *Atlantic Coast Line R. Co. v. Goldsboro,* 232 *U. S.* 548, 34

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[41]For a more detailed discussion of the development of the doctrine, see *Wright, The Contract Clause and the Constitution,* 196–213 (1938).

S. Ct. 364, 58 L. Ed. 721 (1914); *Denver & Rio Grande R. Co. v. Denver*, 250 *U. S.* 241, 39 S. Ct. 450, 63 L. Ed. 958 (1919), nor can the state contractually bind itself not to exercise its power of eminent domain, *West River Bridge Co. v. Dix*, 47 *U. S.* (6 How.) 507, 12 L. Ed. 535 (1848); *Pennsylvania Hospital v. Philadelphia*, 245 *U. S.* 20, 38 S. Ct. 35, 62 L. Ed. 124 (1917), or to change the location of its governmental subdivisions, *Newton v. Mahoning County*, 100 *U. S.* 548, 25 L. Ed. 710 (1880). The broadest expression of this view of the police power during this period is to be found in *Chicago & Alton R. R. v. Tranbarger*, 238 *U. S.* 67, 35 S. Ct. 678, 59 L. Ed. 1204 (1915), where Justice Pitney said:

> It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [the Contract and Due Process Clauses] has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise * * *. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety. [238 *U. S.* at 76–77, 35 S. Ct. at 682]

The issue before the court in *Blaisdell* was the validity of the Minnesota Mortgage Moratorium Law. Once again the question was whether the state could exercise its sovereign power to impair the security provisions for the payment of a debt by a significant alteration of the remedies available for its enforcement. The act provided that during the economic emergency declared to exist, the state courts could upon application and notice extend the period of redemption from foreclosure sales and fix the rental value to be paid by the mortgagor in possession. The act also barred any action for a deficiency judgment until after the expiration of the redemption period. The court upheld the con-

stitutionality of the act, and Chief Justice Charles Evans Hughes described the reach of the Contract Clause:

> To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.
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> * * * * * * * *
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> Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson v. Binford,* 287 *U. S.* 251, 276, 53 *S. Ct.* 181, 189, 77 *L. Ed.* 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, — a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. [290 *U. S.* at 428, 434–5, 54 S. Ct. at 236]

[8–10] The line of demarcation between *Blaisdell* and *Kavanaugh* may be expressed as one of degree: The states' inherent power to protect the public welfare may be validly exercised under the Contract Clause even if it impairs a contractual obligation so long as it does not destroy it. While Blaisdell placed great emphasis upon the emergency character of the Minnesota law to validate the action taken, decisions of the court since then have sanctioned nonemergent legislation impairing contractual rights and remedies where necessary to protect the economic well being of the state. See *Veix v. Sixth Ward B. & L. Ass'n of Newark,* 310 *U. S.* 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *Gelfert v. National City Bank,* 313 *U. S.* 221, 61 S. Ct. 898, 85 L. Ed. 1299 (1941). Furthermore, in keeping with the principles set forth in *Kavanaugh,* we must deal with realities and not abstractions, for "[t]he Constitution is 'in-

tended to preserve practical and substantial rights, not to maintain theories.'" *Faitoute Iron & Steel Co. v. City of Asbury Park,* 316 *U. S.* 502, 514, 62 S. Ct. 1129, 1133, 86 L. Ed. 1629 (1942).

The most recent case dealing with the issue, and that upon which defendants place greatest reliance, is *City of El Paso v. Simmons,* 379 *U. S.* 497, 85 S. Ct. 577, 13 L. Ed. 2d 446, reh. den. 380 *U. S.* 926, 85 S. Ct. 879, 13 L. Ed. 2d 813 (1965). The facts of the case may be briefly summarized. Texas law had provided for the sale of public lands on easy credit terms to raise money for school funds and to encourage land settlement. The credit terms set forth in the law governing such sales included a provision permitting the contract owner, were the land forfeited back to the State for nonpayment of interest, an unlimited time in which to reinstate the contract by payment of back interest, subject only to the rights of intervening third persons. In 1941, after a history of land title disputes and rampant speculation in such lands, Texas limited the right of reinstatement to five years. Upon expiration of this five-year period the State would have clear title. Simmons, owner of a quitclaim deed to land contracted for in 1910, had not made timely payment of the interest arrearages. His contract title was forfeited by the state which subsequently transferred the land to the City of El Paso. He instituted suit against the city to determine title to the land, urging that the 1941 law was a violation of the Contract Clause since it not only impaired his contractual right of reinstatement but destroyed it completely.

The 1941 legislation was held by the court to constitute a valid exercise of the state's power to modify or affect the obligation of its contracts. The essential question, in the court's view, was not whether the statute impaired the "obligation" or the "remedy", for not "every modification of a contractual promise * * * [or] every alteration of existing remedies * * * violates the Contract Clause." 379

U. S. at 506–507, 85 S. Ct. at 582. Rather, the question was whether the modification of the contractual obligation to reinstate the purchaser's title was reasonable on the facts disclosed. Citing the legislative history, the court noted that Texas had a vital interest in "the integrity of land titles" and in the administration "of its property in a businesslike manner" (379 *U. S.* at 511–12, 85 S. Ct. at 585) and

> * * * [t]he Contract Clause of the Constitution does not render Texas powerless to take effective and necessary measures to deal with [these matters]. * * * [T]he promise of reinstatement, whether deemed remedial or substantive, was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking. * * * We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible [*sic*] right to reinstatement in case of his failure to perform * * *. We, like the Court in *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 *U. S.* 502, 514, 62 *S. Ct.* 1129, 1135, 86 *L. Ed.* 1629, believe that "[t]he Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' * * *." 379 *U. S.* at 513–515, 85 S. Ct. at 586.
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> The measure taken to induce defaulting purchasers to comply with their contracts * * * was a mild one, indeed, hardly burdensome to the purchaser who wanted to adhere to his contract of purchase, but nonetheless an important one to the State's interest. The Contract Clause does not forbid such a measure. [379 *U. S.* at 516–517, 85 S. Ct. at 588]

The view of the Contract Clause and its subservience to the police power as expressed in *Blaisdell* and *El Paso* coincides with the interpretation placed upon the Contract Clause of the New Jersey Constitution as interpreted by our highest courts. Thus, in *Hourigan v. North Bergen Tp.*, 113 *N. J. L.* 143 (E. & A. 1934), Justice Heher cited *Blaisdell* with approval for the proposition that "the reservation of essential attributes of sovereign power" is to be read into the contracts of the State. He there defined the police power as

*** * * an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people and [it] is paramount to any rights under contracts between individuals. While this power is subject to limitations in certain cases, there is a wide discretion on the part of the legislature in determining what is and what is not necessary — a discretion which courts ordinarily will not interfere with. [at 149]**

[11] Neither *New Jersey Highway Auth. v. Sills, supra,* nor *New Jersey Sports & Expos. Auth. v. McCrane,* 61 *N. J.* 1 (1972), app. dism. 409 *U. S.* 943, 93 S. Ct. 270, 34 L. Ed. 2d 215 (1972), suggests that our present Supreme Court has adopted a narrower interpretation of the Contract Clause of either the State or the Federal Constitutions. In *Sills* the court viewed a statute exempting National Guardsmen from the payment of tolls on the Parkway as "ordinary and relatively unimportant legislation" not intended to deal with "any problem of state-wide importance" as was the case in *El Paso* (111 *N. J. Super.* at 320). And in *McCrane* the Supreme Court expressly affirmed that while a contract between the State and the bondholders of an independent governmental authority is entitled to protection under the State and Federal Constitutions, such contracts are nevertheless subject to "a proper exercise of the State's never abdicated police powers." 61 *N. J.* at 26.[42]

[12] The history of the creation and evolution of the Port Authority establishes beyond peradventure that it was intended by the states and by the Congress to perform govern-

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[42]In their brief and at oral argument defendants ask the court to pass upon the validity of the New York repeal act under the New York Constitution. While it would unquestionably be desirable to do so in the interest of resolving all issues within the context of this litigation, that question should be left to the New York courts for decision. *Cf. Interstate Wrecking Co. v. Palisades Interstate Park Comm'n,* 57 *N. J.* 342, 352 (1971). It may be noted that U. S. Trust has filed a declaratory judgment action in the New York Supreme Court which is presently pending.

mental functions necessary and vital to the public safety, health and welfare of the citizens of the two states and the nation as well. *Cf. Comm'r of Int. Rev. v. Ten Eyck,* 76 *F.* 2d 515, 518 (2 Cir. 1935). The states have a continuing interest in and can never abdicate their sovereign powers to control and direct the activities of the Authority to meet the everchanging needs of a complex society. See *Blaisdell, supra,* 290 U. S. at 442, 54 S. Ct. 231. Senator Farley summed it up when he advised Commissioner Kellogg in 1961:

> * * * I appreciate that if the Legislature directs you to enter into a contract involving the issuance of bonds, there will be no impairment of obligations of contract, but I must call to your attention and the members of your Commission that one Legislature cannot bind a subsequent Legislature involving policy. If, perchance, may I illustrate — ten, fifteen, twenty years from now the respective legislatures of New York and New Jersey importune your Port Authority Commission to do something in addition involving public service, one legislature cannot bind another involving policy. [*Supra* at 157]

The interest of the states in the development of a coordinated system of public and private transportation within the Port District has been spread on the public record for more than 50 years, and legislative action to accomplish that objective clearly involves an exercise by the states of their fundamental sovereign powers. The enactment of the 1962 covenant was indeed an attempt to satisfy an immediate public need to preserve the H&M as a viable public transportation system. The passage of time and events between 1962 and 1974 satisfied the Legislatures of the two states that the public interest which the Port Authority was intended to serve could not be met within the terms of the covenant.

[13, 14] The events which occurred between the passage of the covenant and its repeal are described elsewhere in this opinion (*supra* at 167–176) and need not be detailed again. Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from

whatever source and without any significant impairment of bondholder security, was correspondingly increased.[43] During the same interval mass transit facilities within the District continued to deteriorate while the public need for such facilities became unprecedented as the result of the promulgation of stringent federal air pollution regulations designed to reduce automobile usage and the emergence of an energy crisis which threatened the entire system of private automobile transportation in the two States.[44]

"The motive, the policy [and] the object" of the repeal legislation, read against its background, was to further a vital interest of the states which their Legislatures deemed to be essential to the public good. The question is whether the exercise of such power falls within the prohibited scope fo the Contract Clause, or does it, in the language of Chief Justice Hughes in *Blaisdell,* represent "a rational compromise between the individual rights and the public welfare." 290 *U. S.* at 442, 54 S. Ct. at 241.

Conceding the existence of some impairment of bondholder security as a result of the repeal, has the action of

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[43]Between 1961 and 1973 the net revenues of the Authority increased from $68,000,000 to $137,000,000, and over that period the Authority had available to it $582,732,000 in excess of its debt service requirements, after taking into account the deficits of the H&M. Through 1974, the corresponding figures are $161,283,000 and $649,750,000, respectively.

[44]Plaintiff urges that none of the legislative history (detailed at 167–176, *supra*) which preceded the repeal of the covenant should be considered relevant to the question of whether the repeal constituted a reasonable exercise of the states' police powers inasmuch as the repeal legislation was unnecessary and the Legislature made no findings or declarations with respect to such matters. A judgment as to the necessity of the legislation is for the Legislature and not the courts. See *Hourigan v. North Bergen Tp., supra* 113 *N. J. L.* at 149. Nor is the Legislature required to make explicit findings and declarations within the context of the legislation to support an exercise of the police power. See *Gelfert v. Nat'l. City Bank of N. Y., supra* 313 *U. S.* at 235, 61 S. Ct. 898; *Bucsi v. Longworth B. & L. Ass'n,* 119 *N. J. L.* 120, 122 (E. & A. 1937), app. dism. 305 *U. S.* 665, 59 S. Ct. 154, 83 L. Ed. 431 (1938).

the states destroyed the quality of their security as an "acceptable investment for a rational investor"? The repeal, of course, leaves intact the provisions of the CBR and the series resolutions which now constitute, together with the General Reserve Fund Act, the same measure of the bondholders' contractual security rights as existed prior to the enactment of the covenant in 1962. Presumably, rational investors—including plaintiff—purchased hundreds of millions of dollars of consolidated bonds prior to 1962, without the additional security afforded by the covenant and with full knowledge of the power of the states to direct the Authority into mass transit operations. The two principal bond rating services, upon whose judgment the financial community places great reliance, rated the consolidated bonds—minus the covenant —as securities as to which no default was anticipated.

The claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record. The pledge of the Authority's net revenues and reserves remains intact; the Authority will still be barred from the issuance of any new consolidated bonds unless the 1.3 test required by the CBR is met, and the Authority will continue to be prohibited from the issuance of any consolidated bonds or other bonds secured by a pledge of the general reserve fund without the certification required by section 7 of the series resolutions, to wit, that in the opinion of the Authority the estimated expenditures in connection with any additional facility for which such bonds are to be issued would not, for the ensuing ten years, impair the sound credit standing of the Authority, the investment status of its consolidated bonds, or the Authority's obligations to its consolidated bondholders.

[15] Plaintiff's claim of an unconstitutional impairment is predicated upon such slender reeds as the assertion that the "quality" of the certification required under the CBR and section 7 need not be as "objective" as that required under the covenant; the speculation that the good judgment of the Authority's commissioners in making the necessary

certifications will be overborn by the "political pressures" exerted by the Governors of the States,[45] and the self-flagellating prospect that the states will conspire to "give" the New York City subway system to the Authority and thereby destroy not only the bondholders' security but the Port Authority as well. But as the court stressed in *Faitoute, supra,* constitutional questions must be decided in the world of reality and not by resort to abstract speculations of the kind offered by plaintiff.

[16, 17] The thrust of plaintiff's argument is that any impairment of the security provisions of a contract violates the Contract Clause. It seeks to recreate a theory of the Contract Clause which, if ever imbedded in our constitutional law, no longer exists. As reflected in the course of more than 150 years of its judicial interpretation, the Contract Clause must be construed in harmony with the power of the states to alter or modify their contractual obligations where an important public interest requires. Those who enter into contractual relations with the sovereign, including the bondholders of the Port Authority, are chargeable with the knowledge that it is a sovereign entity with which they are dealing and that "the reservation of [the] essential attributes of sovereign power" is as much a part of their contract as that which is expressly stated.

[18] It is the judgment of this court that the repeal legislation was a reasonable and hence valid exercise of the states' police power which is not prohibited by the Contract Clause of either the Federal or the State Constitution. An order will therefore be entered dismissing the complaint of plaintiff and in favor of defendants on so much of their counterclaim as seeks a declaratory judgment with respect to the constitutional validity of *chapter* 25 of the *Laws of* 1974.

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[45]At the same time plaintiff argues that the covenant's requirement of a certification by the Governors is an "added" protection afforded them by the covenant.

In view of the court's holding in the U. S. Trust action, defendant's third separate defense (asserting the invalidity of the 1962 covenant) and the complaint in the *Gaby* action will be dismissed. See *Wagner v. Ligham,* 37 *N. J. Super.* 430 (App. Div. 1955).

Judgment

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION — BERGEN COUNTY

UNITED STATES TRUST COMPANY OF NEW YORK, etc.,
Plaintiff,

v.

THE STATE OF NEW JERSEY, et als.,
Defendants.

DANIEL M. GABY,
Plaintiff,

v.

THE PORT OF NEW YORK AUTHORITY, et al.,
Defendants.

THE COURT having rendered its written opinion on May 14, 1975, it is, for the reasons stated therein,

ORDERED, ADJUDGED and DECREED:

1. The complaint in *United States Trust Company of New York, etc.* v. *The State of New Jersey, et als.*, Docket No. L-26861-73 ("the U.S. Trust action"), is hereby dismissed;

2. Judgment is hereby entered in favor of the defendants in the U.S. Trust action on so much of their counterclaim as seeks a declaratory judgment with respect to the constitutional validity of chapter 25 of the Laws of New Jersey 1974;

3. Chapter 25 of the Laws of New Jersey 1974 is hereby declared valid and constitutional in all respects;

4. In view of the Court's holding in the U.S. Trust action, the defendants' third separate defense in that action and the complaint in *Daniel M. Gaby* v. *The Port of New York Authority,* Docket No. L-26462-71, are hereby dismissed.

Dated: May 29, 1975.

GEORGE B. GELMAN,
J.S.C.

[Consents to form omitted in printing.]

Decision of the Supreme Court of New Jersey

UNITED STATES TRUST COMPANY OF NEW YORK, AS TRUSTEE FOR THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY CONSOLIDATED BONDS, FORTIETH AND FORTY-FIRST SERIES; ON ITS OWN BEHALF AND ON BEHALF OF ALL HOLDERS OF CONSOLIDATED BONDS OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT-CROSS-RESPONDENT, v. THE STATE OF NEW JERSEY; BRENDAN T. BYRNE, GOVERNOR OF THE STATE OF NEW JERSEY; AND WILLIAM F. HYLAND, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

DANIEL M. GABY, PLAINTIFF-CROSS-APPELLANT, v. THE PORT OF NEW YORK AUTHORITY, JAMES C. KELLOGG, III, HOYT AMMIDON, GUSTAVE L. LEVY, JAMES G. HELLMUTH, ANDREW C. AXTELL, WILLIAM J. RONAN, W. PAUL STILLMAN, WALTER H. JONES, BERNARD J. LASKER, PHILIP B. HOFFMAN, AND JERRY FINKELSTEIN, COMMISSIONERS OF THE PORT OF NEW YORK AUTHORITY, AUSTIN J. TOBIN, EXECUTIVE DIRECTOR OF THE PORT OF NEW YORK AUTHORITY, AND WILLIAM T. CAHILL, GOVERNOR OF THE STATE OF NEW JERSEY, DEFENDANTS-CROSS-RESPONDENTS, AND UNITED STATES TRUST COMPANY OF NEW YORK, ETC., INTERVENOR.

Argued October 7, 1975—Decided February 25, 1976.

SYNOPSIS

Class action on behalf of citizens, residents and taxpayers whose occupations were dependent upon the existence of mass transportation was brought against Port Authority of New York and New Jersey challenging constitutionality of covenant between the States of New Jersey and New York on one hand and the holders of bonds issued by the Port Authority on the other hand with respect to the use to which certain revenues were to be put. After the covenant was repealed by New Jersey Legislature, trustee for the bonds brought action challenging the constitutionality of the repealing statute. The Superior Court, Law Division, 134 *N. J. Super.* 124, upheld the constitutionality of the repealer and dismissed the class action and the parties appealed. The Supreme Court held that compact which created the Port Authority empowered, but did not mandate, the Authority to develop a plan for a particular kind of method of transportation; and that, since the Authority had exercised its discretion by rejecting a policy favoring mass transportation, mandamus did not lie to compel the Authority to develop a plan for mass transit even though, by virtue of repeal of the covenant, it had the funds to do so.

Affirmed.

Pashman, J., concurred in part and dissented in part and filed an opinion.

Mr. Robert B. Meyner and *Mr. Devereux Milburn,* of the New York bar, argued the cause for appellant-cross-respondent-intervenor United States Trust Company (*Messrs. Meyner, Landis and Verdon,* and *Messrs. Carter, Ledyard and Milburn* and *Hawkins, Delafield and Wood,* of the New York bar, attorneys; *Mr. Meyner, Mr. Milburn,* and *Mr. Donald J. Robinson,* of the New York bar. on the brief and of counsel).

Mr. Murray J. Laulicht and *Mr. Michael I. Sovern,* of the New York bar, Special Counsel to the Attorney General. argued the cause for respondents-cross-appellants State of New Jersey, Brendan T. Byrne and William F. Hyland (*Mr. William F. Hyland,* Attorney General of New Jersey. attorney; *Mr. Laulicht, Mr. Sovern* and *Mr. Harold Edgar,* of the New York bar, Special Counsel to the Attorney General, on the brief).

Mr. Howard Stern argued the cause for plaintiff-cross-appellant Daniel M. Gaby (*Messrs. Shavick, Stern, Schotz, Steiger and Croland,* attorneys; *Mr. Stern* on the brief. *Mr. Stern* and *Mr. Theodore W. Kheel* of the New York bar and *Messrs. Battle, Fowler, Stokes and Kheel* of the New York bar, of counsel).

Mr. Francis A. Mulhern argued the cause for cross-respondent The Port Authority of New York and New Jersey, et al. (*Mr. Mulhern,* attorney and on the brief; *Mr. Patrick J. Falvey* of the New York bar, *Mr. Joseph Lesser* of the New York bar, *Ms. Isobel E. Muirhead, Mr. Arthur P. Berg* of the New York bar, and *Mr. Vigdor D. Bernstein,* of counsel).

PER CURIAM. The judgment is affirmed, substantially for the reasons set forth in the opinion of Judge Gelman, 134 *N. J. Super.* 124 (Law Div. 1975). The observations which follow are occasioned by Justice Pashman's suggested remedy in the Gaby suit.[1]

Whatever persuasive force might be accorded the argument that as a matter of policy the Port Authority should devote more of its energies and resources to the mass transit field, the fact remains that the remedy fashioned by our Brother is neither pressed for by Gaby on this appeal nor within the powers of this Court to direct and enforce.

Gaby's class action complaint for a declaratory judgment that the 1962 Covenant was unconstitutional asked for "multifarious relief," including a request that the Port Authority be directed "to formulate and submit to the court a plan for the development of mass transit facilities within the Port District," 134 *N. J. Super.* at 131. However, the trial judge, having concluded in the *United States Trust Co.* suit that "the repeal legislation was a reasonable and hence valid exercise of the states' police power which is not prohibited by the Contract Clause of either the Federal or the State Constitution," *id.* at 197, found it unnecessary to reach the issue of the 1962 Covenant's asserted invalidity. He therefore dis-

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[1]Justice Pashman would order the Port Authority to complete pending projects and to "formulate and present plans and suggestions for a regional mass transportation scheme to the Legislatures of New York and New Jersey * * * in an expeditious fashion and within a fixed period of time." *Post* at 288.

missed Gaby's complaint, *id.* at 198, without discussing the requested relief of a direction for development of a mass transit plan, on which issue there was neither testimony nor argument at the trial level.

In his brief filed in the Court after direct certification of his appeal, 68 *N. J.* 175 (1975), Gaby conceded his limited purpose in pursuing the appeal as being "to preserve the issue of the constitutionality of the 1962 Covenant." The point of this in turn was, as he put it, to furnish "an alternative ground for affirming the decision below."[2] Whatever issues may have been preserved by his appeal and whatever desire there may have been to present "all the issues," the fact remains that Gaby's brief raises and discusses only the validity of the Covenant in constitutional terms. No argument is made there for any special relief; and, understandably, the Port Authority has likewise not briefed the question at all in this Court. At oral argument the subject was adverted to only in a limited fashion.

Ordinarily, we would have no occasion to decide an issue which, while portentous in itself, has become so remote and peripheral to the central thrust of this litigation. However, inasmuch as the minority opinion raises and discusses *in extenso* this question of considerable public significance, namely, the involvement of the Port Authority in mass transit and particularly the propriety of this Court ordering as a specific remedy the submission of a plan for development of mass transit facilities, we overlook whatever infirmities may exist in the record before us, compounded by the practical disadvantage of not having the views of the parties, and proceed to address the point.

[1] The 1921 Compact between the States of New York and New Jersey, whereby the Port Authority was created, *N. J. S. A.* 32:1–4, envisioned the adoption of a Comprehensive Plan for the development of the port. *N. J. S. A.*

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[2]**Cross Motion for Certification of Plaintiff-Respondent, Daniel M. Gaby.**

32:1–11. Direction was given to the Port Authority in the Plan itself "to proceed with the development of the port of New York in accordance with said comprehensive plan * * *." *N. J. S. A.* 32:1–33. That the Authority's involvement in transportation matters was contemplated is obvious from a reading of this and other portions of the Comprehensive Plan as well as of the Compact; but it requires a quantum leap to derive therefrom a mandate (as distinguished from the power) to develop a plan for a particular kind or method of transportation, to wit, mass transit. It is not without significance, for instance, that the legislature has provided that the Authority *may* make recommendations for the increase and improvement of transportation facilities, *N. J. S. A.* 32:1–13, which by definition includes railroads and any facility for the "transportation or carriage of persons or property," *N. J. S. A.* 32:1–23; but nowhere is it mandated that such recommendations be made. A mandate such as that contemplated by the minority opinion is not something to be inferred by the courts but rather is a singularly appropriate subject for specific legislative directive, conspicuously absent here. *Cf. Del. Riv. & Bay Auth. v. N. J. Pub. Emp. Rel. Comm'n.*, 112 *N. J. Super.* 160, 165 (App. Div. 1970), aff'd o. b., 58 *N. J.* 388 (1971).

If, then, the Authority is in the position of being empowered (as we acknowledge) rather than mandated to act in the area of mass transit, its exercise of that power becomes a matter of discretion and judgment. As is made abundantly clear by the voluminous record in this case, the trial court's opinion, and the concurring and partially dissenting opinion here, the Authority has more than once in recent years broached the question of whether it should pursue a policy of encouraging mass transit and has determined that it shall not. The remedy suggested in the minority opinion is designed to overrule that decision. As such it is in the nature of the former prerogative writ of *mandamus,* now invocable under proceedings for relief in lieu of prerogative writs, *Rule* 4:69.

[2, 3] However, *mandamus* will not lie if the duty to act is a discretionary one and the discretion has been exercised. As Justice Heher explained, in *Switz v. Middletown Twp.*, 23 *N. J.* 580 (1957), *mandamus* is "a coercive process that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result." 23 *N. J.* at 587. As we have sought to demonstrate, the circumstances before us do not at all invite or accommodate the remedy proposed. This is so because the Authority (whose function is clearly not ministerial) has in fact exercised its discretion, even though that exercise has resulted in the rejection of a policy favoring mass transportation. Being a judgment decision its wisdom may be open to dispute; but as to the propriety of this Court's refusal to intrude on the underlying policy determination. there can be no question in the circumstances before us. And this not as a response to some procedural deficiency but because of our respect for the fundamental substantive principle embodied in *mandamus*.

Finally, we observe that in this particular area of bi-state operations, there is close and continuing supervision of the Port Authority by the other branches of government. Hence, the proposed remedy would not only tend to usurp the influence over the Authority vested in the Governors of the States of New York and New Jersey, but would also intrude upon the functions of the legislatures of the respective States, whose task it is in the final analysis to enact appropriate legislation and take such other action as may be required to remedy whatever deficiencies may exist with respect to mass transit.

Affirmed.

PASHMAN, J. (concurring in part and dissenting in part).

I

INTRODUCTION TO GABY COMPLAINT

My Brothers today affirm a lower court decision which was the product of two separate and distinct actions consolidated for trial. *United States Trust Co. v. State,* 134 *N. J. Super.* 124 (Law Div. 1975). In the first action, brought by plaintiff United States Trust Company, the trial court sustained the State's repeal of the 1962 statutory covenant (*N. J. S. A.* 32:1–35.55) between the States of New Jersey and New York and the holders of bonds issued by the Port Authority of New York and New Jersey (Port Authority). That covenant was concurrently enacted by the legislatures of New York and New Jersey at the time of the Port Authority's acquisition of the Hudson & Manhattan Railroad Company (H & M), since renamed the Port Authority Trans-Hudson System (PATH). Intended as a means of protecting the bondholders' investments, the covenant prohibited the states and the Port Authority from applying "any of the rentals, tolls, fares, fees, charges, revenues or reserves, . . . for any railroad purposes whatsoever other than permitted purposes." *N. J. S. A.* 32:1–35.55. As subsequently defined in the covenant, "permitted purposes" precluded the establishment, acquisition or construction of any railroad facility until the Port Authority could determine that the facility would be self-supporting or would not produce deficits except within narrowly defined limits.

In dismissing plaintiff's cause of action, the trial court found that the 1974 "repealer," *N. J. S. A.* 32:1–35.55a, was immune from constitutional challenge as an impairment of contractual obligation, a right which is protected by *U. S. Const.,* Art. I, § X and *N. J. Const.* (1947), Art. IV, § VII, ¶ 3. As a collateral finding, the court determined that the attractiveness of Port Authority bonds was not contingent upon the continued protection of the 1962 covenant, but rather upon the viability of the Port Authority itself.

The majority affirms the trial court on these bases and to this extent, I concur fully and completely with the conclusions reached by Judge Gelman in his very enlightened and comprehensive opinion. My agreement is premised on the unduly restrictive influence which the covenant exerted on Port Authority operations in contravention of the statutory mandates upon which that agency was created in 1921. The paralytic effect of the covenant could be seen in the Authority's practical inability and attitudinal reluctance to respond to the mounting needs for rapid transit in the New York metropolitan area. In light of the limited utility which it continued to serve, the 1962 covenant represented an artificial obstacle to the affirmative public action which was necessitated as an alternative to continued and wasteful reliance solely on the private automobile as the primary mode of transportation.

The second action, *Gaby v. Port of New York Authority, et al.*, was likewise concerned with the repeal of the 1962 covenant. Expanded into a class action on behalf of citizens, residents and taxpayers whose occupations are dependent upon the existence of mass transportation, plaintiff cites the 1962 covenant as an impediment to the improvement and expansion of these facilities. While the State of New Jersey sought the repeal of the covenant as an ultimate end in the *United States Trust Co.* action, plaintiff Gaby visualizes a repeal as merely a means to a larger end. This is because the vindication of Gaby's interests is only partially dependent on freeing the financial resources from the restrictions of the 1962 covenant and placing them at the Port Authority's disposal. More problematical and essential to the relief which he desires is the necessity to overcome the administrative inertia which has characterized the agency's efforts in the area of mass transportation. Consequently, Gaby requested in his complaint that the trial court:

> [D]irect and order the Port Authority, its Commissioners, and its Executive Director to formulate and submit to this Court, or a Special Master to be appointed by this Court, a plan for the

development of mass transportation facilities in the Port District. [Plaintiff Gaby's complaint at 17]

This action was pretried on February 22, 1973 and oral arguments were heard on September 26, 1973 on the parties' respective motions for summary judgment. Judgment was deferred and arguments were later rescheduled to permit the submission of briefs on additional issues and the intervention of United States Trust Company as a party defendant representing the interests of Port Authority bondholders. Prior to these arguments, the pendency of legislation repealing the covenant recommended that the trial court withhold further review. Accordingly, the proceedings were stayed to permit consideration of the anticipated legislation.

The statutory repealer which was signed into law by Governor Brendan T. Byrne on April 30, 1974 precipitated the *United States Trust Co.* action, which was instituted on the same day. On the basis of common subject matter, this later action was consolidated on December 10, 1974 with the previously filed *Gaby* case by order of the trial court. These matters then proceeded to trial in February 1975.

The trial was largely confined to the factual issues of bondholder reliance on the 1962 covenant and resultant damage to the secondary bond market caused by the repeal of the covenant. The information which was thus elicited formed the basis for the trial court's reported opinion, 134 *N. J. Super.* 124, in which the constitutionality of the 1974 repealer was sustained. Although reasons upon which the court's decision was grounded were clearly distinguishable from the constitutional arguments advanced by Gaby, the court's ultimate decision — the rejection of the 1962 covenant — coincided with Gaby's interests. Regardless of whether that result was achieved by sustaining the 1974 repealer as the trial court did, or whether it was achieved by finding the 1962 covenant itself unconstitutional as suggested by Gaby, the result indicated the possibility of granting the further relief sought by Gaby. A more activist role

for the Port Authority appeared to be a reality. Nonetheless, the court concurrently ordered the dismissal of Gaby's complaint, thus frustrating the additional relief which he sought. 134 *N. J. Super.* at 198. From this disposition, Gaby filed a cross-motion for direct certification which was granted on May 28, 1975. 68 *N. J.* 175 (1975).

Similar to his presentation before the trial court, Gaby's arguments are again directed towards a declaration of the unconstitutionality of the 1962 covenant. This is more the result of strategic considerations, however, than devotion to substantive principle. Recognizing the limited nature of the trial court's factual findings and disposition, Gaby has taken what appears to be a most advisable legal course. By preserving the issue of the constitutionality of the 1962 covenant on appeal, he has simultaneously preserved one of his major contentions should this or any other court reverse the trial court on the constitutionality of the 1974 repealer.

Furthermore, in his Supreme Court brief, Gaby explained that his contentions with regard to the 1962 Covenant are inextricably tied to his request for greater involvement of the Port Authority in mass transit projects:

> **The Appellant's Brief of Gaby is concerned with the validity of the 1962 Covenant (*N. J. S. A.* 32:1-35.50 *et seq.*). Central to the issue of the validity of the Covenant is the question whether the mass transportation of people within the Port District was one of the principal activities authorized by the Compact (*N. J. S. A.* 32:1-35.50 et seq.); whether the insulation of the Port Authority from that activity was in such derogation of the Compact as to frustrate its meaning and intent and so material as to require Congressional approval. [Plaintiff-Cross Appellant's brief at 3].**

The majority today chooses to overlook this relationship in its reluctance to transcend the judgmental confines of the trial court and in its affirmation of that court's dismissal of Gaby's complaint. This disposition, undertaken in an unusually cavalier fashion, is not a product of some misunderstanding as to the essential relief which Gaby requests. On the contrary, the majority recognizes the strategic con-

siderations implicit in Gaby's desire to preserve the issue of the constitutionality of the 1962 Covenant. *Ante* (at 261). Nonetheless, in characterizing the constitutional arguments raised by Gaby as exemplifying a "limited purpose in pursuing the appeal," the majority misconstrues and frustrates the true interests of Gaby, and has done so in a manner which I find most distressing.

The majority justifies its truncated consideration of Gaby's plea by referring to an isolated phrase, taken out of context from a sentence which Gaby adopted as representative of his position in his cross-motion for certification. When more appropriately considered within the sentence in which it originally appeared, the phrase — "an alternative ground for affirming the decision below" — assumes an entirely different meaning from that which the majority attaches to it:

> The purposes of this cross motion are identical with those stated by the State of New Jersey in its cross motion for certification: ". . . bring before the Supreme Court *all of the issues submitted to Judge Gelman* and to avoid the possibility that some of the issues submitted to Judge Gelman might have to be determined in the first instance by the Appellate Division. Because of the urgency and public importance of this case, it would be most unwise to require a piecemeal, appellate process, particularly since the [first] issue presented by this cross motion could be an alternative ground for affirming the decision below. . . ." [Plaintiff-cross appellant's appendix at 47a–48a; emphasis supplied].

While the "first issue" refers to the constitutionality of the 1962 covenant, I believe it would be wrong to confuse Gaby's real interest in stimulating improvement of urban mass transportation with his more temporal interest in having the 1962 covenant declared unconstitutional. The majority not only fails to make this distinction, but fails to do so despite Gaby's expressed desire to present "all of the issues" to this Court.

This failure is only compounded by the majority's persistent willingness to ignore the Gaby complaint and the relief which it warrants. In spite of plaintiff's overindulgent concern for the constitutionality issue, the statement of his case reflects

more than a limited and perfunctory reference to the subject. During the course of oral argument, counsel for Gaby specifically stated:

> **Yes, as we read the compact between the states, the affirmative obligation of the Port Authority in this area is to plan. The immediate affirmative obligation . . . and indeed in these briefs and elsewhere, there is a suggestion that if the Covenant is invalid or the repealer upheld, either way, that it would be appropriate for the Court to direct the Port Authority to study mass transit needs in the Port Authority area and make proper proposals. Then when it comes to implementation, then you're talking about legislation of the two states, but the affirmative obligation of the Port Authority is to study the problem as it affects the Port area.**

It should be noted in passing, that this statement not only affirms the relief desired by plaintiff, but also embodies a request for a remedy which parallels that which I suggest below, *infra* at 287–288.

Therefore, although my Brothers remove the constricting fiscal shackles of the 1962 covenant, they fail to take the additional steps which flow as natural concomitants to the action which they affirm. This failure, as I see it, stems, in part, from a reluctance to go farther and faster in an area plagued by administrative inaction and intransigence. It also constitutes an indulgence in the meaningless gesture of sustaining the 1974 repealer without concurrently authorizing the relief needed to implement the initiative which the Legislature sought to instill in the Port Authority by that repeal.

As I fear, the administrative foot-dragging which was implicit in the 1962 covenant, may be only symptomatic of the inertia which has characterized the Port Authority in the field of mass transit operations. The majority's decision can only serve to perpetuate this sad state of affairs.

In light of the rapidly deteriorating condition of mass transit operations in the metropolitan area, this disposition is most unfortunate. Faced with the ever-increasing deficits which are inherent in this mode of public transportation, mass transit operations have been repeatedly shunned by the Port

Authority in spite of its statutory mandate to the contrary. As cutbacks in service have been experienced throughout the Port District, the commuters' resort to the private automobile has produced a dysfunctional volume of traffic congestion and pollution. The toll which this congestion has exacted has been obvious in the tunnels and on the bridges, whose operations the Port Authority apparently prefers to maintain.

Unlike today's majority, I am unwilling to assign plaintiff Gaby's case to death or to a peaceful somnambulism. This is particularly so where within the historical and evidential materials presented to the trial court reside the seeds for a more sweeping and effective disposition. I cannot sanction the mere repeal of the 1962 covenant without a concurrent assurance that the Port Authority will assume those responsibilities for which it was created and, which to this point, it has effectively avoided. The recalcitrance of the Port Authority has not been altered by the trial court's disposition and will not be altered by merely affirming that decision. A more effective disposition is needed.

II

HISTORY OF THE OBLIGATION OF THE PORT AUTHORITY TO PROVIDE MASS TRANSIT FACILITIES

In its opinion, the majority grudgingly acknowledges the Port Authority's obligation to become involved in mass transportation. After a perfunctory reading of the statutory framework of the Port Authority, the majority concludes that the existence of such a mandate is "a singularly appropriate subject for specific legislative directive, conspicuously absent here." (At 258).

While specific statutory directives have served as vehicles for recent Port Authority projects, *N. J. S. A.* 32:1–35.20 (authorization for the Port Authority to undertake mass transportation projects to link the various airports in the Port District), *N. J. S. A.* 32:1–35.21 (authorization to

build railroad lines to and facilities at the various airports in the Port District), its employment is in its infancy and affords no insight as to the previously reluctant forays which the Port Authority has made into the field of mass transportation. A full consideration of the statutory basis of the Port Authority and the history of its implementation reveals that the majority's interpretation of the Authority's powers and obligations is both short-sighted and erroneous. For instance, the statutory creation of the Port Authority evinces a clear legislative intent to have the Authority become involved in development of mass transportation. The majority position misconceives the role of the Authority to be a drone-like entity ultimately dependent upon enabling legislation, rather than a separate bi-state agency. Similarly, the majority fails to recognize the inherent limitations on the knowledge, information and expertise which are at the disposal of the New Jersey and New York Legislatures on the subject of mass transit operations. In light of this fact, the wisdom of relying upon legislative directives to address the panoply of needs within the field of mass transportation becomes problematical. The failure of the majority to account for these factors casts a large shadow upon the validity of its construction of the Port Authority's powers. These inadequacies within the majority position become apparent upon thorough consideration of the statutory origins of the Port Authority and the mandate which was encompassed in its original Compact and Comprehensive Plan.

A. Origins and Early Development; Compact and Comprehensive Plan

The Port Authority is a statutory product of a compact which was entered into by the States of New Jersey and New York in 1921.[1] Modeled after the recommendations of a joint

[1]New Jersey approved the compact by *L.* 1921, *c.* 151, now contained in *N. J. S. A.* 32:1-1 *et seq.* The comparable New York

commission,[2] the Port Authority represented a response to the dysfunctional competition and commercial disputes which historically had plagued the two states.[3] As such, it was intended to meet the needs and interests which the two states shared with respect to the Port of New York. This was expressly recognized in the preamble to the 1921 Compact, which stated:

> The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums

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legislation was adopted in *Laws of New York* 1921, *c.* 154, now contained in *N. Y. Unconsol. Laws*, § 6401 *et seq.* (McKinney 1961). Congressional consent to the compact was granted by *Pub. Res. No.* 17, *S. J. Res.* 88, *c.* 77, 42 Stat. 174.

At the time of creation, the agency was designated "The Port of New York Authority." *N. J. S. A.* 32:1–4. This was amended by *L.* 1972, *c.* 69, §§ 1, 2, contained in *N. J. S. A.* 32:1–4 and 32:1–4.1, to the more ecumenical "The Port Authority of New York and New Jersey." For the purposes of this opinion, the agency shall be referred to as the Port Authority or just Authority.

[2]The New York, New Jersey Port and Harbor Development Commission was a body whose representative membership were created by independent, though concurrently enacted bills which were passed by the Legislatures of New Jersey and New York in 1917. Composed of three commissioners from each state, the commission issued a preliminary report in 1918, New York, New Jersey Port and Harbor Development Comm'n, *Preliminary Joint Report, Transmitted to the Legislature*, February 18, 1918 (1918). This was followed by a progress report in 1919, and a comprehensive report in 1920, in which the commission proposed the establishment of a permanent body with interstate jurisdiction. *Joint Report with Comprehensive Plan and Recommendations* (1920). It subsequently submitted the tentative draft of the proposed compact. See *Bard, The Port of New York Authority*, 24–34 (1942).

[3]The enmity between the two states traces its roots as far back as the seminal case, *Gibbons v. Ogden*, 22 *U. S.* (9 Wheat.) 1, 6 *L. Ed.* 23 (1824). Although it has from time to time received exhaustive consideration in the case law, *New Jersey v. New York*, 28 *U. S.* (3 Pet.) 461, 7 *L. Ed.* 741 (1830); 30 *U. S.* (5 Pet.) 284, 8 *L. Ed.* 127 (1831); 31 *U. S.* (6 Pet.) 323, 8 *L. Ed.* 414 (1832); *In the Matter of Devoe Mfg. Co.*, 108 *U. S.* 401, 406–10, 2 *S. Ct.* 894, 27 *L. Ed.* 764 (1883); *State v. Babcock*, 30 *N. J. L.* 29 (Sup. Ct. 1862); *Central RR. of N. J. v. Jersey City*, 70 *N. J. L.* 81 (1903), a concise presentation of its history may be found in *Bard, supra*, footnote 2, at 5–24.

of money, and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans. . . . [*N. J. S. A.* 32:1–1]

While the Compact delineated the framework for the Port Authority and its operations, the necessity for a more specific implementation was recognized in Article X, which directed the state legislatures to adopt "a plan or plans for the comprehensive development of the port of New York" "as soon as may be practicable." *N. J. S. A.* 32:1–11. The formulation of this plan was undertaken by the Authority's initial board of commissioners, whose *Report with Plan for the Comprehensive Development of the Port of New York, December 21, 1921* (1921) was eventually enacted as the Comprehensive Plan mandated by the Compact.[4]

This plan envisioned an active and affirmative role for the Port Authority in the development of the Port District.[5] Section 8 of the Comprehensive Plan provided:

The Port of New York Authority is hereby *authorized and directed to proceed with the development of the port of New York* in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. [*N. J. S. A.* 32:1–33; emphasis supplied]

That fulfillment of this statutory mandate contemplated the involvement of the Port Authority in transportation matters of the Port District is undeniable. This responsibility, for

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[4]The Comprehensive Plan was enacted in *L.* 1922, *c.* 9, now contained in *N. J. S. A.* 32:1–25 *et seq.* New York approved the Comprehensive Plan in *Laws of New York* 1922, *c.* 43, now found in *N. Y. Unconsol. Laws* § 6451–68 (McKinney (1961)). Congressional consent was secured in *S. J. Res.* of July 1, 1922, *c.* 277, 42 Stat. 822.

[5]The metes and bounds of the Port District are defined in *N. J. S. A.* 32:1–3.

example, was explicitly mentioned in that portion of the preamble of the Compact cited above. Article XXII of the Compact further clarifies this responsibility by defining "transportation facility" as including:

> . . . ***railroads***, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, carfloats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, aircraft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the ***transportation or carriage of persons or property***. [*N. J. S. A.* 32:1–23; emphasis supplied]

The centrality of the railroads to the organizational and coordination schemes of the Port Authority was highlighted by the separate definition of "railroads."[6] This was a reflection of the final report by the New York, New Jersey Port and Harbor Development Commission, which in 1920 had recommended the establishment of a bi-state agency with appropriate jurisdiction. See footnote 2, *supra*. The report, whose factual findings served as the basis for the Compact and the Comprehensive Plan, found the commercial inadequacies of the metropolitan area to be "primarily a railroad problem." The absence of railroad coordination and accessibility at many places within the district consequently required "essentially a railroad plan." The Commission summarized its suggestions in a proposal which entailed the establishment of railroad beltline systems between New Jersey and New York, and concluded:

> This remodeled terminal railroad system, bringing every railroad of the Port to every part of the Port, and thus giving every part of the Port opportunity to develop and to have the economical trans-

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[6] *N. J. S. A.* 32:1–23 provides:

"Railroads" shall include railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, powerhouses, substations, lines for the transmission of power, car barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment.

portation service needed for its commercial and industrial growth and expansion, constitutes the comprehensive plan of the Commission — the plan which the Commission recommends for formal adoption by the two states. [New York, New Jersey Port and Harbor Development Commission, *Joint Report, supra* footnote 2, at 3]

This statutory responsibility to develop the transportation facilities of the Port District, and particularly facilities relating to railroad operations, contained an implicit obligation to foster passenger transportation service. Although the Port and Development Commission report concentrated on the freight shipment needs of the area, it did not preclude a comparable role for the Port Authority in passenger service. With one notable exception, the Port Authority's role in passenger service is confirmed by the early history of the agency. In this regard, however, even that exception, the 1928 veto message of Governor Alfred E. Smith of New York which rejected a New Jersey proposal for the development of a rapid transit system between the states, may be no more than a personal predilection. [7] See 134 *N. J. Super.* at 149. Noting that the Port Authority should "stick to this program . . .[for] the solution of the great freight distribution problem," Governor Smith at no time denied the agency's power to deal with passenger service, and only suggested a reordering of its priorities. More importantly, the position which he advocated was expressly repudiated by the Port Authority that same year. In a June 11, 1928 resolution supporting the continuation of a Suburban Transit Engi-

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[7]Governor Smith, in what remains the only major statement questioning a Port Authority role in passenger traffic, remarked:

> I am satisfied that the Port Authority should stick to this program, and I am entirely unwilling to give my approval to any measure which at the expense of the solution of the great freight distribution problem will set the Port Authority off on an entirely new line of problem connected with the solution of the suburban passenger problem.

Veto Message, *Public Papers of Governor Alfred E. Smith of 1928*, 187–88 (1938).

neering Board,[8] the Port Authority recognized that it had a responsibility to the metropolitan commuter, based on its broader duty to develop transportation in the Port District:

> The Commissioners of the Port Authority have found in their studies that no adequate or effective interstate transportation development can take place without taking full account of *transportation of passengers* as well as of freight throughout the Port District.[9] [Emphasis supplied]

B. *Port Authority Involvement in the Area of Mass Transit; Reports, Studies and Legislation Concerning Mass Transit*

The continuance of its role in mass transportation has been reaffirmed by the Port Authority from time to time. The obligation to provide for passenger service within the

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[8]The Suburban Transit Engineering Board had been created in response to a Port Authority suggestion in its 1927 Annual Report. As that report stated:

> It is our opinion that, in the long run, the greatest progress will be attained by having this Engineering Board undertake the responsibility for the preparation of the engineering section of a comprehensive suburban transit plan for the entire port district. The Port of New York Authority, *Annual Report for 1927*, 56 (Jan. 20, 1928).

Parenthetically, it should be noted that this body was the intended recipient of the funds which Governor Smith vetoed. The Port of New York Authority, *Annual Report for 1928*, 63 (Dec. 31, 1928).

[9]*Annual Report for 1928*, *supra* footnote 8, at 64–66. The Port Authority answered more directly the fears expressed by Governor Smith in a subsequent part of its June 11, 1928 resolution:

> The Commissioners of the Port Authority are satisfied from the reports of their staff that continuance of the work of the Suburban Transit Engineering Board and the participation therein by members of the staff of The Port of New York Authority will not at this time divert any of their efforts away from the effectuation of the statutory Comprehensive Plan nor from their duties in the field of protecting the Port nor from any other pending work of the Port Authority, but on the contrary, the continuance of such Suburban Transit Engineering Board's work will facilitate the other work of the Port Authority. [*Id.* at 65]

Compact's injunction to the Post Authority has not only been acknowledged by those whose occupations and interests are related to the transportation field,[10] but by ranking members of the Port Authority staff as well. For example, the following colloquy between Assemblyman J. Edward Crabiel and the Port Authority's then Executive Director Austin J. Tobin occurred at a 1958 legislative hearing:

> ASSEMBLYMAN CRABIEL: Mr. Tobin, just to clear my mind on certain key points — I have been reading your report and listening to your talk — there is no question that, as far as the compact between the two states is concerned, ***the Legislatures could direct the Port Authority to do rapid transit and that that would be within their compact.***
>
> MR. TOBIN: ***Yes sir. There's no question about it.*** [***Hearings on Assembly Bills No. 16 and 115 and Senate Bill No. 50, supra*** footnote 10, Nov. 24, 1958, at 44] (emphasis supplied).

The manifestations of this responsibility have been insignificant such as the separate sections which the Authority devoted to "Suburban Transit" in its earlier Annual Reports (a practice by the way, which has been resumed since the Port Authority's acquisition of the H & M railroad in 1962). See T. W. Kheel & R. J. Kheel, "The Port Authority 1962 Covenant — Bar to Mass Transportation," 27 *Rutgers L. Rev.* 1, 5(1973) ; The Port of New York Authority, *Annual Report for 1923,* "Commuter Passenger Traffic," 35–36 (Jan. 19, 1924) ; *Annual Report for 1924,* "Congestion of Passenger-Traffic," 23–24 (Jan. 24, 1925) ; *Annual Report for 1929,* "Suburban Transit," 27–28 (Dec. 31, 1930). More indicative, however, of the Port Authority's

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[10]See ***Hearings on Assembly Bills No. 16 and 115 and Senate Bill No. 50 before N. J. Assembly Comm. on Fed. & Interst. Rels. and Assembly Comm. on Highways, Transp. and Pub. Utilities,*** Nov. 24, 1958, at 18A (Statement of Augustus S. Dreier, Counsel, Inter-Municipal Group for Better Rail Service) ; Dec. 3, 1958, at 22-A (Statement of Herman T. Stichman, Trustee, Hudson & Manhattan Railroad) (hereinafter referred to as Assembly Hearings) ; ***Caro, The Power Broker Robert Moses and The Fall of New York,*** 922–23 (1974).

role in rapid transit operations have been the infrequent reports which it has issued on this subject.[11] The representativeness of at least 14 of these reports cannot be premised on any successful projects which they have stimulated or realized. As frankly admitted by Edward J. O'Mara, a chairman of the Metropolitan Rapid Transit Commission (a Port Authority-funded investigative agency which itself produced an unsuccessful series of legislative proposals):

> For at least 35 years, there has been a growing public awareness of the importance of mass transportation in the metropolitan region in the State of New Jersey. At least 14 more or less extensive studies have been made of the problem by various committees and commissions. Nothing has ever come of them, and in the meantime the problem has been becoming progressively more acute. [*Assembly Hearings*, Nov. 24, 1958, at 70A]

See also *2d Hearing before N. J. Sen. Comm'n (Created un-*

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[11]These reports have been conducted on a variety of topics and in conjunction with various other interested organizations. Some, though by no means all, of these studies have included a continuing study begun in 1927 of the suburban transit facilities to relieve traffic congestion in conjunction with a variety of other groups (pursuant to New Jersey legislative authorization, *L.* 1927, *c.* 277); a 1937 study entitled "Suburban Transit for Northern New Jersey (Mar. 1, 1937) concerning interstate and suburban passenger problems within the Port District and New Jersey in particular (undertaken pursuant to *L.* 1936, *c. J. Res.* No. 6); a continuation of studies begun in 1937 and the presentation of legislative proposals for implementing a new transit system (pursuant to *L.* 1938, *c. J. Res.* No. 1); a 1948 study concerning the development of a rapid transit system in Northern New Jersey which would link Newark Airport and New York City (undertaken pursuant to a request by New Jersey Governor Alfred E. Driscoll); 1948 study concerning the development of a north-south transit line in Hudson County (initiated at the request of the City of Bayonne); and the creation in 1952 of the Metropolitan Rapid Transit Commission to undertake a comprehensive study of the transit problems of the Port District (*L.* 1952, *c.* 194). By agreement reached in 1955, the Port Authority provided $800,000 when this last study was inaugurated. The Commission's report was released in 1958. In addition, the Port Authority in the early 1960's conducted a series of studies concerning the feasibility of its acquiring the operations of the H & M railroad, and later, the conditions under which the authority would do so.

der Sen. Res. No. 7 (1960) and Reconstituted under Sen. Res. No. 7 (1961)) to Study the Financial Structure and Operations of The Port of New York Authority, Jan. 27, 1961 (2d day), at 64–66 (Statement of Austin J. Tobin, Executive Director, Port of New York Authority). In this respect, these studies provide a broad overview of the historic approach of the Port Authority to the problems of urban mass transit. This background is particularly important because what the Court is truly asked to consider is the manner in which the Port Authority has dealt with the problems of mass transit in the Port District, and the attitudinal reluctance which has characterized its efforts in this area of transportation.

These studies, in conjunction with the annual reports which are issued by the Port Authority, possess several characteristics worth noting. First, virtually none of the studies resulted from the Port Authority's own initiative. Most of the studies were the product of either legislative or other governmental requests for pertinent information and proposals. See footnote 11, *supra.* While the failure to take affirmative administrative or investigatory action may not necessarily be indicative of an agency's abdication of responsibility in the case of the Port Authority, the failing is particularly suspect. This is because the duties expressly imposed on the Port Authority by the 1921 Compact were those to "make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted;"[12] and to suggest to the state legislatures recommended means to improve Port commerce.[13]

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[12] *N. J. S. A.* 32:1–12, which was contained in the original Compact as Article XI and which is indicative of a statutory mandate, provides:

> The port authority *shall* from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement. [Emphasis supplied]

[13] *N. J. S. A.* 32:1–13 provides:

> The port authority may from time to time make recommendations to the legislatures of the two states or to the congress of the

Second, none of these studies contains an expressed commitment (much less a recommendation of such a commitment) by the Port Authority to undertake the construction or implementation of a mass transit system. Instead, most of them recommend the assumption of these obligations by other governmental or quasi-governmental bodies and agencies. See The Port of New York Authority, *Suburban Transit for Northern New Jersey,* 10 (1937); The Port of New York Authority, *Annual Report for 1958,* 38–42. In conjunction with this, it should be noted that the Authority was one of the staunchest supporters of two New Jersey legislative proposals, S–50 and A–115, which were introduced and discussed in 1958. See *Assembly Hearings, supra,* Nov. 24, 1958, at 44, 49 (Statements of Austin J. Tobin, Executive Director, Port of New York Authority). Not surprisingly both of these measures presented plans for the establishment of an independent agency to handle matters relating to mass transportation. Conversely, the Port Authority was strongly opposed to a companion proposal, A–16, which would have authorized the agency itself to develop, improve and coordinate the rapid transit facilities in the Port District. *Assembly Hearings, supra,* Nov. 24, 1958, at 18–19 (Statements of Austin J. Tobin, Executive Director, Port of New York Authority).[14]

United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious handling of such commerce.

[14]On this point, a noted transportation expert, Michael N. Danielson, observed:

> A good many people in the New York area, particularly in New Jersey, could see no point in creating another agency, whether bi-state or tri-state, as long as the Port of New York Authority apparently possessed both the jurisdiction and financial capacity to tackle the regional rail problem. Time and again, the Port Authority fended off these forays, emphasizing that there was an "absolute incompatibility between railroad deficits and the PNYS'S contractual limitations with its bondholders . . . and to confine itself to self-supporting projects." [*Danielson, Federal-Metropolitan Politics and the Commuter Crisis,* 23 (1965)].

Finally, as previously noted, there has been a startling absence of tangible progress resulting from, or attributable to these investigatory efforts. This is true even though the Port Authority has recognized the commuter problems which beset the New York metropolitan area. As early as 1925, in its Annual Report, the Authority observed:

> **While hundreds of millions of dollars have been spent in urban rapid transit during the past decade, no commensurate amounts have been expended on suburban rapid transit, and the commuter has reached the limit of his endurance where the trunk lines leading into New York City are incapable of handling both suburban and through traffic. The passenger service of every railroad in the Port District is taxed to its limit by the requirements of this service. There is barely room during the rush hours for the trains carrying freight because of the commuter service, while passengers and freight must both necessarily move during these hours. [The Port of New York Authority, *Annual Report for 1924*, 23 (Jan. 24, 1925)]**

See also The Port of New York Authority, *Annual Report for 1927*, 10, 53 (Jan. 20, 1928). Over the years, this recognition has increased with its realization of the expanding dimensions of commuter congestion and the inability of private transit facilities to cope with the problem. The Port of New York and New Jersey, 1972 *Annual Report*, 10–15 (1972); 1973 *Annual Report*, 10–15 (1973); 1974 *Annual Report*, 4–6 (1974).

The Port Authority's ineffectual investigative efforts cannot be justified due to a theoretical lack of jurisdiction in mass transit operations. Such jurisdiction was given to the agency in the Compact of 1921. Nor is the lack of success due to the financial inability of the Port Authority to assume additional obligations. As the trial court found, the Authority is not only financially sound, but has suffered no detrimental effects from the repeal of the protective 1962 Covenant:

> **Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from whatever source and without any**

significant impairment of bondholder security, was correspondingly increased. [134 *N. J. Super.* at 194–95]

Rather, the limited effectiveness of these studies is merely symptomatic of an underlying limitation which the Port Authority has imposed on its own involvement in mass transportation. This limitation, which is derived from a narrow construction of its statutory powers, precludes an undertaking by the Authority unless the relevant project will be financially self-supporting, or will only generate deficits within conservatively defined limits. While the definition of the limitation is presented in purely financial terms, its effect has been to severely restrict the scope of activities in which the agency may engage. Because the majority of mass transportation facilities are closely associated with high deficits, the practical operation of the Port Authority's self-imposed restriction has prevented the Authority from fulfilling its rapid transit obligations.

C. *History of the Self-Supporting Concept*

While the provisions of the Compact and Comprehensive Plan sketched a broad authorization in terms of the activities which were within jurisdiction of the Port Authority, the powers accorded to it were not commensurate with its tasks. Without the necessary power, the Authority could not unilaterally support its statutory mandates, much less initiate action in their behalf:

An impressive body of activities was thus laid out wherein the Port Authority could formulate the needs of the port as a whole and be vigilant to protect its interests. It would serve as a focus and agent of the forces of unity within the port. The primary requirement in this field would not be legal power but adequate funds and continuous application. The Port Authority never lacked support with respect to the former, and was well conceived to function with respect to the latter. But success along this line of endeavor would depend upon cooperation from public agencies and private interests. Where conflicts developed it could make progress very slowly, if at all. [*Bard, supra*, footnote 2, at 58–59]

As a result of setbacks incurred in early legal skirmishes with the powerful railroads in the 1920's, the Port Authority appeared to assume a less assertive role in the port's development than that anticipated by its proponents. Reluctant to promote otherwise desirable activities within the Port District, the Authority restricted its goals to the dubious task of maintaining a balanced budget. The difficulty of this objective was compounded by the fact that under both the Compact and the Comprehensive Plan, the Port Authority had been denied the power to either levy assessments or pledge the credit of either state. *Annual Report for 1954,* vi (1954). Consequently, to offset the costs and losses which it incurred, the agency was dependent upon the revenues which it realized from its various projects and facilities.

While this new objective in the early years of the Port Authority was tempered by a "rule of economic practicability," The Port of New York Authority, *Annual Report for 1926,* 5 (Jan. 20, 1927), its importance was later elevated by the increased emphasis placed on self-sufficiency. In other words, because the fiscal stability of the Port Authority was dependent upon the revenues of its facilities, it was necessary for all projects to demonstrate their self-supporting capacity before the Authority would undertake their implementation. Thus, James C. Kellogg, III, the then Vice-Chairman of the Port Authority, read from a prepared statement before a Senate Commission in 1960, as follows:

> In order that the Port Authority might carry out the tremendous and continuing task of developing the public terminal and transportation facilities of this metropolitan area, the two Legislatures clothed it with all necessary and appropriate powers of port and terminal development, with the important exception of the power to tax or to levy assessments. This reservation is the key to the whole concept of the Port Authority, which is that of a self-supporting agency, whose public projects are carried on through the development of their own revenues and charges, and which imposes no burdens on the general taxpayer. [*Hearings before N. J. Sen. Comm'n Created under Sen. Res. No. 7 (1960) to Study the Financial Structure and Operations of the Port of New York Authority,* September 27, 1960, 7–8 (Statement of James C. Kellogg, III, Vice-Chairman of the Port Authority)].

The objective of a self-supporting authority, while salutary in principle, was inconsistent with the Port Authority's original objectives and early history. In its annual report for 1924, the Authority explicitly rejected the self-supporting concept as a basis for its operations:

> Preferably, and in the main, therefore, the Port Authority regards itself rather as the guardian and guide of the Port District, protecting it against attacks both from within and without, and directing its activities and developments with a view to procuring the greatest cooperation of existing agencies, the utmost efficiency and the minimum of cost. *If such is to be its primary function it should not be expected to be self-supporting.* [The Port of New York Authority, *Annual Report for 1924*, 9–10 (Jan. 24, 1925); emphasis supplied]

Moreover, the self-supporting concept as a fundamental precept of the Port Authority's financial scheme is belied both by the projects which it embarked upon after its creation and by subsequent developments in its financial structure. As the trial court observed, because of the heavy investment required by these early projects, the Port Authority was confronted with large deficits from the outset. 134 *N. J. Super.* at 140. However, rather than restricting the Authority's activities, New Jersey and New York encouraged such projects by advancing funds, transferring control of lucrative facilities (such as the Holland Tunnel) to the Authority, and permitting the Authority to issue "open-ended" bonds. This latter device, in particular, helped free the Port Authority from absolute reliance on self-supporting projects. By placing all revenues derived from the sale of open-ended bonds into a common fund, the Port Authority was able to free deficit operations from the inadequate sales of their particular bonds. *Goldberg, A History of the Port of New York Authority Financial Structures,* 5 (1964). The pooling of resources not only permitted the Port Authority to finance debt-ridden facilities through those which were profitable, but simultaneously afforded bondholders a certain degree of security regardless of the success or failure of any given project. The open-ended financing of the Port

Authority, which was originally introduced in the form of the General Reserve Fund (*N. J. S. A.* 32:1–142), literally, the pool into which all funds were paid, was later expanded by the Authority's adoption of the Consolidated Bond Resolution in 1952. This resolution, which abandoned the practice of earmarking funds for specific projects, authorized the issuance of bonds whose revenues would be designated by the Authority for a given project according to its needs. As the trial court found, the resolution obviated any further concern for maintaining the self-supporting concept as a prerequisite to Port Authority involvement in a project:

> **With the adoption of the CBR the "self-supporting" facility concept which had governed earlier authority financing ceased to have the significance previously attached to it; for under the CBR the Authority's financial structure is based on a unitary enterprise concept and all revenues from all facilities are pooled. Individual facilities are not financed independently of the rest of the Authority. The facilities contribute their revenues for debt service on all Authority bonds according to their earning power and without regard to the amount of bonds issued for the construction of any particular facility. [134 *N. J. Super.* at 143]**

Enactments such as the General Reserve Fund and the Consolidated Bond Resolution created the possibility for the involvement of the Port Authority in traditionally deficit operations such as mass transportation. Nonetheless, the translation of this new financial freedom into practical action was not forthcoming from the Port Authority:

> **That cashbox, so long empty, was full now, thanks to the postwar traffic boom, . . . the Port Authority's was worth $700,000,000. Long on cash, moreover, the Port Authority was short on dreams. The visionaries who had created it were long gone from its councils; Julius Henry Cohen had been replaced by money men like Cullman and Colt and Pope whose eyes were brightened by the balances in the Authority's ledgers, not by the potentialities for improving the common weal that those balances represented. The purpose for which the Authority had been created — the development of an *overall* transportation system to knit together a great port — had been lost sight of for years. Plans the Authority had aplenty, of course, but unrelated plans, plans for individual projects, joined by no link other than the fact that their construction would return the agency profit. [*Caro, supra,* footnote 10, at 922–23]**

The resultant program which the Port Authority pursued represented less of an integrated effort to organize and coordinate the commerce of the port of New York, and more of an administrative mish-mash with little cohesiveness or relation to the agency's statutory mandate. Thus, construction of a World Trade Center, with little or no relation to the activities for which the Port Authority was created, was suddenly elevated to an importance which transcended that of a more traditionally-regarded responsibility of the Authority such as mass transportation.

The underlying rationale for these actions was unmistakably attributable to retention of the self-supporting limitation to which the Port Authority had previously adhered. This was made clear by Executive Director Tobin of the Port Authority when questioned at a 1958 hearing about the manner in which future revenues and reserves would be committed:

> **Well, it is closed unless those future bond issues have to do with projects that can be made self-supporting and in which the Commissioners of the Port Authority will not only certify as *a matter of conscience* and a matter of record that they believe that they can be made self-supporting and will add to the general credit of the Port Authority; but also if they can demonstrate arithmetically on sound projections of its existing net revenues and its maximum future debt service that those projects will not hurt this bondholder. That's all he has. If that bondholder has an open end bond without those restrictions, he has a piece of paper. [*Assembly Hearings, supra*, November 24, 1958, at 38 (Statement of Austin J. Tobin, Executive Director, Port of New York Authority); emphasis supplied]**

This self-limitation has exacerbated the Port Authority's demonstrated lack of initiative. For example, although the Port Authority in 1955 agreed to provide the Metropolitan Rapid Transit Commission with $800,000 for that body's study of a metropolitan scheme of mass transit, the price which the Authority extracted for its financial support was a "Memorandum of Understanding" which precluded its own role in any deficit operations which the Commission

might recommend. *Danielson, supra* at 23; *Assembly Hearings, supra,* December 3, 1958, at 91–A to 92–A (Statement of Frank H. Simon, Executive Director, Metropolitan Rapid Transit Commission). More importantly, perhaps, the Port Authority's inertia has interjected itself in the relationship between the agency and the Legislatures which it allegedly serves. This has been done in an often contradictory fashion as illustrated by the following discussion between Assemblyman Crabiel and Executive Director Tobin:

> ASSEMBLYMAN CRABIEL: What I'm getting at here is, you're saying categorically that you cannot take a deficit. Now, I'm raising the point that as far as the Legislatures of the two states, when they established the compact there was nothing in the compact and nothing in the instructions from the Legislatures to the Port Authority that they could not undertake a deficit operation.
>
> MR. TOBIN: Well, excuse me, sir. I'd say that there was. I would say that the way the statutes are phrased, it could undertake nothing except a self-supporting operation. We have no way of financing anything but a self-supporting operation.
>
> ASSEMBLYMAN CRABIEL: Well how do you account for the fact, then, that you have operated deficit operations?
>
> MR. TOBIN: Because the pooled revenues have been sufficient. Because we believed also, when we went into those, that they could be self-supporting and we were wrong.
>
> ASSEMBLYMAN CRABIEL: That's what I was pointing up. [*Assembly Hearings, supra,* November 24, 1958, at 45]

III

THE ROLE OF THE PORT AUTHORITY

Ultimately, those who are most hurt by the Port Authority's failure to enter the field of mass transportation are, of course, the commuters. Absence of Port Authority initiative in this area is a direct reflection of the deficits which are inherent in the provision of this public service:

> Until the late 1950's, transit operations in the United States were generally profitable and, consequently, attractive to investment. Decline in patronage and increasing labor and equipment costs have completely reversed this trend to a point where today, public transit in its everyday operations in most cities is a losing proposition. The losses are not as great as sometimes presumed but, in most

cases, average between 20 and 25 percent annually. Therefore, public transit — like many other sectors of the transportation industry, including private automobile transportation — now requires substantial public support in the form of direct financial subsidies to be capable of rendering necessary services. [Roeseler and Levi, "State Subsidies for Public Transit: An Overview of Current Legislation," 4 *Urban Lawyer* 59, 60 (1972)]

See also Kneafsey and Edelman, "A Market-Oriented Solution to the Northeast Railroad Dilemma," 41 *I. C. C. Pract. J.* 174 (1973–74). This problem concerning the financial weaknesses of mass transit facilities has been realized within the New York metropolitan area. This, no doubt, has resulted from both the unusually heavy demands which have been placed on these systems in the Port District, and the lack of a perceived common interest among the District's geographic and political components. *Danielson, supra*, at 21–22.

The Port Authority's failure to assume an active role in solving this problem has had a concurrent effect on the traveling habits of the average commuter. Faced with increasing service cutbacks and escalating fares, the commuter is left with fewer alternatives to the private automobile. Grubb, "Urban Transportation Alternatives to the Automobile," 39 *I. C. C. Pract. J.* 19 (1971–72); Cooper, "Prospects for a Mass Movement to Public Transit," 5 *Urban Lawyer* 679 (1973). His increasing resort to this mode of transportation in turn has caused a drastic increase in traffic congestion and air pollution which are commonly associated with the metropolitan area.

These problems have stimulated legislative responses on both the federal and state levels. The federal response consists primarily of the Urban Mass Transportation Act of 1964, 49 *U. S. C. A.*, § 1601 *et seq.*, which purports to encourage "the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private." 49 *U. S. C. A.*, § 1601. See Haley and Watkins, "The Urban Mass Transporta-

tion Assistance Act of 1970 — A Federal Program Comes of Age," 16 *N. Y. Law For.* 741 (1970). As a corollary to the urban mass transit crisis, the federal government has enacted the Clean Air Act, 42 *U. S. C. A.*, § 1857 *et seq.* Similar considerations produced comparable legislation in New Jersey, Emergency Energy Fair Practices Act of 1974, *L.* 1974, *cc.* 2, 6; Executive Order No. 1 (Feb. 5, 1974).

These legislative enactments were most recently recognized in a report issued by the Joint Transportation and Communications Committee of the New Jersey Legislature. *Report of the Senate and General Assembly Joint Transportation and Communications Committee (Pursuant to Assembly Concurrent Res. No. 211 of 1974)*. October 6, 1975. As the report noted:

> The legislation passed by New Jersey during the last four years clearly reflects the determination on the part of its officials to direct the Port Authority towards making a greater financial commitment to mass transit. In order to determine whether New Jersey has been treated by the Port Authority in a fair and impartial manner the Committee has investigated the degree of Port Authority responsiveness to meeting the mass transportation needs of the State. [*Id.* at 13]

The Committee's conclusion was succinct as it was unfortunate:

> The Committee recognizes that the Port Authority has acquired a reputation for its engineering, planning and management skills. It is the conclusion of the Committee, however, that in the area of mass transportation the Port Authority's performance has not been satisfactory. [*Id.* at 17]

The Committee's conclusions were premised upon the same type of factors which I have considered above. While the Committee was hopeful that the Port Authority would take its mass transportation responsibilities "more seriously" in the future, it nonetheless pledged "its vigilance to see that the

Port Authority completes the mass transportation projects it has promised to complete." *Id.* at 18, 19.[15]

The sensitivity of the state government to the urgent need for more modern means of public transportation has not been confined to the legislative branch. In his recent "State of the State" address, Governor Byrne not only recognized this problem, but concurrently cited the Port Authority's responsibility for its solution. Perhaps even more important, the Governor indicated his willingness to impose an affirmative sanction on the Port Authority should the desired action in the area of mass transit not be forthcoming:

> How do we keep the railroads running at a time when the state subsidy program costs over $100 million a year and has been growing by more than 35 per cent a year? Should there be an overall operating agency for these lines? What about the communities and industries served by lines soon to be abandoned? Where can we find the $255 million required to match federal funding for the

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[15]While the history of the Port Authority's involvement in mass transportation has been discouraging, the prospects for renewed efforts by the agency in this area of endeavor are hopeful. In the above cited report by the Legislature's Joint Transportation and Communications Committee, the development of a mass transportation plan by the Port Authority was noted. *Report of the Senate and General Assembly Joint Transportation and Communications Committee (Pursuant to Assembly Concurrent Res. No. 211 of 1974*, 16–17 (October 4, 1975)). This plan committed the Port Authority to the provision of additional direct rail service to Penn Station in New York City for New Jersey commuters, the expansion of the Midtown Bus Terminal, the construction of a rail link to Kennedy Airport and the extension of the PATH system from Newark to Plainfield. Although the Urban Mass Transportation Administration on December 19, 1975 rejected New Jersey's request for $278-million to construct the PATH extension, the State's expressed intention to reapply for such funds will create the possibility of a continued role for the Port Authority in mass transportation. *The Sunday Star-Ledger*, December 21, 1975, at 1, 8; *The New York Times*, December 22, 1975, at —; *The New York Times*, January 4, 1976, at 34. This persistence has apparently been successful as federal approval of a $400-million block grant for the PATH extension to Plainfield and other mass transit projects is anticipated. *The Star-Ledger*, February 10, 1976, at 1.

modernization of two major commuter lines and the extension of PATH to Plainfield?

The Port Authority of New York and New Jersey must increase its commitment to these efforts. If it is unwilling to do so, we will insist that it rescind the toll increases instituted last year for the specific purpose of funding improvements in the public transportation system. [Annual Message of Governor Brendan T. Byrne, Jan. 13, 1976, at 19]

I, too, would similarly take this opportunity to demonstrate the vigilance which has motivated the Joint Committee and the Governor. The Port Authority has too long neglected the responsibility with which it was statutorily charged in 1921. In *So. Burlington Cty. NAACP v. Tp. of Mt. Laurel,* 67 *N. J.* 151, 189 (1975), we recognized the significance of transportation to the overall development of an urban area. I would today reaffirm this significance.

IV

CONCLUSION

The relief which I recommend today is intended as an answer to a problem which has assumed crisis proportions. The Port Authority is the producer, the director and the main character of the play known as "The Disease of Mass Transportation." This malady has suffered too long from the benign neglect of public agencies such as the Port Authority, and such neglect has permitted the disease to spread unattended. The resulting state of affairs may most accurately be described as one of emergency. While the appellation "emergency" was at one time reserved for calamitous and natural occurrences, the inadequate and deteriorating quality of mass transit in the metropolitan area has had an eroding effect on the urban environment in which it operates. This effect has been measurable not only in terms of the unending lines of commuters who have been inconvenienced by inefficient service, but also in terms of traffic congestion with its attendant pollution as well. The courts of this country have long recognized that such emergent circumstances may

serve as a mandate to administrative action. "While emergency does not create power, emergency may furnish the occasion for the exercise of power." *Home Building & Loan Ass'n v. Blaisdell,* 290 *U. S.* 398, 425–26, 54 S. Ct. 231, 235, 78 *L. Ed.* 413, 422 (1934); *Hourigan v. North Bergen Tp.,* 113 *N. J. L.* 143, 148 (E. & A. 1934).

For an Authority that is long on cash and short on dreams,[16] it is time to respond for those who have long suffered the inconvenience and expense which have resulted from the Port Authority's inaction.

I would order the Port Authority, its Commissioners and its Executive Director to not only complete those projects to which it is already committed, but to formulate and present plans and suggestions for a regional mass transportation scheme to the Legislatures of New York and New Jersey. Implicit in this would be the requirement that such efforts be completed in an expeditious fashion and within a fixed period of time. This injunction is necessary to bring home the importance of Authority action in the face of the current transportation crisis.

In proposing this relief, I should not be understood as advocating usurpation of the functions of either the executive or legislative branches of government. The majority's characterization of my position is in error. (At 259). My disposition does not contemplate ordering either the Governors or the Legislatures of the States of New Jersey and New York to undertake any particular course or courses of action. I would be loathe to intrude upon the relationships which have developed between these other branches of state government and the Port Authority. Nonetheless, I am all too aware of the fact that expertise in the field of mass transit operations resides in the body which was originally vested with both power and jurisdiction in that area, namely the Port Authority. By according the Authority a statutory mandate to

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[16] *Caro, supra, footnote* 10 at 922.

undertake mass transportation projects, it was anticipated by both States that the Port Authority would actively research, promote and recommend projects to be authorized and implemented by the State Legislatures. It is precisely the Port Authority's reluctance to utilize its expertise that has frustrated this basic first step towards the development of a much-needed integrated mass transportation system in the metropolitan area. Therefore, I would order the Port Authority to proceed with this initial planning stage, while, at the same time, acknowledging that ultimate adoption and implementation of the resultant plans remain a legislative and executive prerogative. The declared willingness of those branches of government to adopt appropriate measures leaves me confident that only timely suggestions by the Port Authority are needed to point the direction towards improved mass transit operations.

Although I am unsure whether it is the perception of my suggested order as a usurpation of executive and legislative function which underlies the majority's disagreement with such relief, I am, nonetheless, clear in my opposition to the lesson in civil procedure which the majority would impose on this case. I find that the majority's exercise of power under a writ of *mandamus* would ill-befit a remedy with such a Marshallian association. *Marbury v. Madison,* 5 *U. S.* (1 Cranch) 137, 2 *L. Ed.* 60 (1803). This is a direct result of not only the restrictive but the erroneous construction which the majority gives to the powers implicit in a *mandamus.* The writ of *mandamus* is a remedial process whose essential function is to compel the performance of a ministerial action *or the exercise of a discretionary function. Roberts v. Holsworth,* 10 *N. J. L.* 57 (Sup. Ct. 1828); *Switz v. Middletown Twp.,* 23 *N. J.* 580 (1957). This mode of relief is particularly appropriate with regard to recalcitrance by public officials or authorities. *Bd. of Taxation v. Belleville,* 92 *N. J. Super.* 338, 340–41 (Law Div. 1966). While the court has the power under a *mandamus* to compel action, it does not similarly have the power to control discretion in the performance of

the designated action. Such discretion properly resides in the functioning authority.

By its construction of the *mandamus,* the majority would not only accord the authority discretion in the manner of performing the compelled action, but would permit the authority discretion as to whether the ordered action should be performed at all. Although the majority has recognized that the Port Authority has resisted efforts to promote its involvement in mass transportation, it would consider this to be an exercise of discretion which would preclude a *mandamus* or an order similar to the one which I have suggested:

> **As we have sought to demonstrate, the circumstances before us do not at all invite or accommodate the remedy proposed. This is so because the Authority (whose function is clearly not ministerial) has in fact exercised its discretion, even though that exercise has resulted in the rejection of a policy favoring mass transportation. Being a judgment decision its wisdom may be open to dispute; but as to the propriety of this Court's refusal to intrude on the underlying policy determination, there can be no question in the circumstances before us [At 259].**

I cannot subscribe to such reasoning, whose circular nature would undercut the relief which the majority otherwise feels warranted under the circumstances and which would effectively emasculate the *mandamus,* or any similar relief, as a remedy.

I reject the majority's approach to the problem of this case within a procedural context. We have been taught that there are no rights without remedies. By stripping us of our remedies, the majority is most assuredly divesting us of our rights. *Marbury v. Madison, supra,* 5 *U. S.* (1 Cranch) at 163, 2 *L. Ed.* at 69. Furthermore, we have long passed the days wherein cases were decided on the niceties of procedural technicalities. *Hodgson v. Applegate,* 31 *N. J.* 29, 43 (1959); *Edelstein v. Asbury Park,* 51 *N. J. Super.* 368, 385 (App. Div. 1958). There is no need to resurrect in this case another of these manifestations of by-gone days.

Even if I were to acknowledge the necessity of specifically resorting to a *mandamus* or its equivalent, I could not justify withholding such relief in this case; nor can I presently understand the distinction which the majority draws between the *mandamus* which they recommend and the order which I propose. Granting that mandamus is an "extraordinary remedial process," *Beronio v. Pension Comm'n of Hoboken,* 130 *N. J. L.* 620, 623 (E. & A. 1943), aff'g 129 *N. J. L.* 557 (Sup. Ct. 1943), I cannot see the unfortunate plight of the more than 30 million commuters who are dependent upon the Port Authority's transportation services annually, nor the Authority's benign neglect of their plight, as being anything less than extraordinary. This is particularly so where to adopt the majority's approach would permit the Port Authority to ignore the statutory responsibilities with which it was charged in 1921.

The majority in *Gaby v. Port of New York Authority* has been unwilling to take the action which I regard as imperative. From its disposition I must, therefore, respectfully dissent.

For affirmance—Justices MOUNTAIN, SULLIVAN and CLIFFORD and Judges CONFORD, CARTON and HALPERN—6.

Concurring in part and dissenting in part—Justice PASHMAN—1.

Excerpt from Exhibit P-1

DUN & BRADSTREET, INC.

MUNICIPAL CREDIT REPORT

December 28, 1961 Bond Sale 1-4-62 Revenue Service

THE PORT OF NEW YORK AUTHORITY

Prospects: SUPERIOR. The Port of New York Authority is a financially strong, multi-purpose, bi-state agency with a substantial history of accomplishments. It has competent management and continues to draw heavily on its ample earnings and borrowed funds to finance large programs of capital improvements. Among the programs now under way are construction of a second deck to the George Washington Bridge and related improvements, redevelopment of LaGuardia Airport, development of New York International Airport, improvements at Newark Airport, development and improvement of Port Newark and the Brooklyn-Port Authority Piers, and enlargement of the Port Authority Bus Terminal and the Lincoln Tunnel approaches connecting with it. Numerous efforts have been made to have the Authority assist in solving the commuter railroad problem in the area, and one program appears to be about ready to proceed. Under it the Authority will purchase commuter railroad cars for commuter railroads operating between New York State municipalities, and as a financial safeguard the financing of this program is insulated from the remaining financial structure of the Authority. The proposal to have the Authority take over the bankrupt Hudson & Manhattan Railroad has not yet secured the necessary legislation from both states, but efforts to tie this program in with the proposed World Trade Center, which the Authority has in planning, appear to be meet-

ing with more enthusiasm than the initial proposal. No recent developments have been reported concerning additional airport facilities.

Bond Sale: The Port of New York Authority is offering for public sale on January 4, 1962, $25,000,000 Consolidated Bonds, Nineteenth Series (First Installment), dated November 1, 1961, and due November 1, 1991. The bonds will be retired periodically, however, and for this purpose a mandatory periodic retirement schedule is specified, in amounts that will allow retirement annually by November 1 ranging upward from $250,000 in 1964 to $2,000,000 in 1991. The bonds are callable at the Authority's option on any November 1 beginning 1964 at 103% to meet the retirement schedule or on any interest payment date beginning November 1, 1968 at 103% other than to meet the retirement schedule; both call provisions specify a declining scale of premiums. Interest will be payable May 1 and November 1 at the rate named by the purchaser. The bonds will be coupon in form, registerable as to principal alone, or as to both principal and interest and, if so registered, convertible into coupon bonds at the expense of the holder. The bonds will be payable on a par with the Authority's other Consolidated Bonds, as described below. All legal proceedings pertaining to these bonds are subject to approval by Sidney Goldstein, General Counsel of the Authority, and by Hawkins, Delafield & Wood, Bond Counsel for the Authority.

Bonded Debt: The Authority's gross bonded debt as of November 30, 1961, adjusted to include the bonds now offered, amounts to $657,745,000. This total includes $50,692,000 General and Refunding Bonds, Series 8 through 12 and 15; $64,512,000 Air Terminal Bonds, Series 1 through 3; $7,630,000 Marine Terminal Bonds Series 1 and 2; and $534,911,000 Consolidated Bonds, Series 1 through 19. The

Excerpt from Exhibit P-1

Authority also had outstanding at November 30, 1961, $35,000,000 Series K Consolidated Notes due December 28, 1961, which will be refunded in part by proceeds of the current bond offering. The bonds now offered, like the outstanding Consolidated Bonds, are issued under and secured by the Consolidated Bond Resolution of 1952. Briefly, they are direct and general obligations of the Authority for the payment of principal and interest of which the full faith and credit of the Authority is pledged. They are secured equally and ratably with all the other Consolidated Bonds by a pledge of (1) the net revenues of the Authority from the Hoboken-Port Authority Piers, the Brooklyn-Port Authority Piers, the Port Authority-West 30th Street Heliport, the Erie Basin-Port Authority Piers, The Elizabeth-Port Authority Pier (under construction), the Port Authority-Downtown Manhattan Heliport, and any additional facilities which may hereafter be financed or refinanced in whole or in part through the medium of Consolidated Bonds, (2) the Port Authority's existing six bridges and tunnels, two union motor truck terminals, bus terminal, grain terminal, and Inland Terminal No. 1, subject only to the pledge heretofore made of such revenues in favor of General and Refunding Bonds, (3) the Port Authority's existing four air terminals, subject to the pledge heretofore made of such revenues in favor of Air Terminal Bonds, (4) Port Newark, subject to the pledge heretofore made of such revenues in favor of Marine Terminal Bonds, (5) the General Reserve Fund of the Authority equally with other obligations of the Authority, and (6) the Consolidated Bond Reserve Fund established in connection with Consolidated Bonds.

Debt Service Requirements: The Authority's bonds are partly serial and partly callable term bonds redeemable

according to their terms from mandatory sinking fund payments. Serial maturities and sinking fund payments extend to 1991. After peak total debt service of $42,161,000 in 1962, including requirements on the bonds now offered, debt service trends downward gradually over the life of the bonds with only minor exceptions. Debt service requirements over the next 10 years, including amortization and interest, are shown in Table 1.

Coverage for Debt Service: The Authority's earnings provide ample coverage for debt service on all bonds, including those now offered. Net revenues in 1960 totaled $73,970,000, including income on investments and after security valuation adjustments, and covered interest payable in 1960 5.57 times and principal and interest 2.40 times. Net operating revenues, before income on investments and security valuation adjustments, totaled $62,682,000 and covered interest payable in 1960 4.72 times and principal and interest 2.04 times. Net operating revenues in 1960 would provide coverage on maximum interest payable in 1962, including the new issue, 3.01 times and on maximum total debt service payable in 1962, 1.49 times. Net operating revenues for the 12 months to September 30, 1961, would provide coverage on maximum interest 3.06 times and maximum total debt service 1.52 times.

Facility Usage: Traffic using various of the Authority's facilities is shown in Table 2, in each case for the last three twelve month periods ending September 30. For the 12 months ending September 30, 1961, vehicular traffic on the bridges and tunnels was down 2.0%, air passenger traffic was down 2.6%, plane movements down 5.2%, number of marine vessels up 5.0%, and waterborne tonnage down 1.9%. A number of factors account for these trends, but probably the most important single cause of the declines

was the economic recession that dominated much of the 12 month period to September 30, 1961. Bad weather early in 1961 also depressed traffic at many of the facilities. In the case of some individual facilities, such as LaGuardia Airport, declines also reflect shifting traffic patterns within the area, in this case because of rehabilitation of the facility. Declines in the number of plane movements additionally are accounted for by airline utilization of larger planes. In any case the declines during the period were overall moderate in extent and temporary in duration. With the general upturn in business conditions, facility usage can be expected to resume an upward trend.

Financial Operations: Financial operations of the Authority over the last three calendar years, 1958 through 1960, were discussed in our report on the Authority dated April 20, 1961. Financial operations for the last three 12 month periods ending September 30, 1959 through 1961, are shown in Table 3.

Financial Position: The Authority's fund position remains strong. At the end of 1960 the Authority showed over $1.0 billion invested in facilities, against which it had funded debt totaling $610,827,000. Reserve funds totaled $79,065,000, distributed by fund as follows: General Reserve Fund, $61,082,000; Special Reserve Fund, $12,512,000; Air Terminal Reserve Fund, $4,468,000; and Marine Terminal Reserve Fund, $1,001,000. At December 31, 1960 the Authority showed total assets of $1,214,095,000, up from $1,112,476,000 at the end of 1959. The financial position of the Authority at September 30, 1961, as reported in its quarterly statements, is briefly summarized in Table 4.

Additional Facilities: The Authority is currently engaged in studies for improvements and other new construction

Excerpt from Exhibit P-1

in addition to programs now in progress. Among these are the following: (1) The Authority made a definitive report to the Governors and Legislatures of the two states in May 1961 indicating a need for an additional major airport to serve the future needs of the metropolitan area. No positive action has been taken. The Authority has no present power to construct or acquire such a facility, if it is to be located outside the Port of New York District nor to acquire any real property for a new airport at any location. (2) The Authority submitted a report dated March 10, 1961, to the Governors of New Jersey and New York and the Mayor of New York City "for their consideration and determination of any further action they may wish to direct toward the establishment of a World Trade Center in the Port of New York." The study found a proposed World Trade Center economically feasible and proposed redevelopment of a 16 acre site in lower Manhattan to house public and private agencies involved in international commerce. New York enacted legislation in 1961 to permit effectuation of this program and acquisition by the Authority of the Hudson & Manhattan Railroad, provided New Jersey enacted identical legislation. New Jersey enacted legislation permitting acquisition of the H&M but failed to include legislation pertaining to the World Trade Center. Recent press reports indicate that New Jersey is regarding much more favorably the proposal to tie the two projects together as a single undertaking but with the change that the World Trade Center be moved from the Lower East Side of Manhattan to the Lower West Side. The site under consideration includes and is adjacent to the present H&M terminal and buildings. (3) The Authority is studying the possibility of acquiring and improving the Hudson & Manhattan Railroad Company. As noted, the Authority has no power to proceed with this project,

Excerpt from Exhibit P-1

or with the World Trade Center, without authorizing legislation from both states. The Authority has stated that upon due statutory authorization it might be able to sell bonds for such acquisition if investors could be given contractual assurance with statutory protection that its General Reserve Fund could not be applied to commuter rail transit deficits beyond those of the present and existing Hudson & Manhattan Railroad. It has specified additional protections necessary to insure financial soundness of the undertaking. (4) New York State has appropriated $20,000,000 to the Authority to be used in purchasing commuter railroad cars for the purpose of renting them to commuter railroads operating between municipalities in New York State. The legislation was effective September 21, 1959, and the program has approval of both states. The Port Authority could not borrow money for the purchase of such cars, however, until New York State guaranteed payment of principal and interest on the bonds. Even after authorization, the Port Authority may pledge to the payment of the bonds only the railroad cars purchased, the rentals on them, and the State liability on its guarantee. The New York Constitution was amended in 1961 to permit the New York guarantee. The Authority expects to requisition the money appropriated by New York as it is needed and hopes further to encourage a concurrent program, financed from private investment sources, to maximize the number of cars that can be purchased. The Authority expects to issue the bonds described to repay the State's appropriation and/or refund the private financing. The Authority has entered an agreement with New York Central Railroad to initiate this program, which will commence with the purchase of 53 commuter cars at a cost of over $8.1 million.

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Excerpt from Exhibit P-2

DUN & BRADSTREET, INC.

MUNICIPAL CREDIT REPORT

December 14, 1962 Revenue Service

New Issue Report: Sale 12-19-62
THE PORT OF NEW YORK AUTHORITY

Prospects: SUPERIOR. The Port of New York Authority is a financially strong, multi-purpose, bi-state agency with a long list of accomplishments. As the Authority has consolidated its financial strength and expanded its activities, it has increasingly been faced with conflicts with opposition groups in the Port District; and its public relations has become a matter of increased importance. But the Authority has highly competent management, which works within the objectives of the bi-state Compact and within the scope of authorizing legislation of the States of New York and New Jersey. The Authority continues to draw heavily on its ample earnings and on borrowed funds to finance extensive programs of capital improvements. The second deck of the George Washington Bridge was opened August 29, 1962, although additional construction work on the approaches remains to be completed. Other programs now under way include construction of a bus station in the Washington Heights section of Manhattan as a part of the George Washington Bridge improvement, redevelopment of LaGuardia Airport, continued development of New York International Airport, improvements of Newark Airport, development and improvement of the Brooklyn-Port Authority Piers, Port Newark, and the Elizabeth-Port Authority Piers, and enlargement of the Port Authority Bus Terminal and its

approaches to the Lincoln Tunnel. Also the Authority is authorized to proceed with and is working toward construction of a World Trade Center in lower Manhattan estimated to cost about $270 million, and in conjunction with this project it has acquired the Hudson Tubes, an interstate electric railroad, having taken over this operation September 1, 1962, under a wholly-owned subsidiary corporation, Port Authority Trans Hudson Corporation (PATH). This is expected to continue as a deficit operation, but safeguards have been established to prevent dilution of security of the Authority's bonds. The Authority has also launched its program of purchasing commuter railroad cars for commuter railroads operating between New York State municipalities; these bonds, however, are guaranteed by the State of New York and the entire program is insulated from the rest of the Authority's financial structure.

Bond Sale: The Authority is offering for public sale a total of $25,000,000 Consolidated Bonds, Twenty-Second Series (First Installment) on December 19, 1962. Details of the bond sale are shown in Table 1.

Bonded Debt: As of November 30, 1962, the Authority had outstanding funded debt in the amount of $732,837,000 (excluding the State-guaranteed Commuter Car Bonds), and total debt including the current offering will amount to $757,837,000. The outstanding debt at November 30, 1962 included $44,987,000 General and Refunding Bonds, Series 8 through 11 and Series 15; $62,829,000 Air Terminal Bonds, Series 1 through 3; $7,276,000 Marine Terminal Bonds, Series 1 and 2; and $617,745,000 Consolidated Bonds, Series 1 through 21. By the Consolidated Bond Resolution of 1952 the Authority covenanted that no additional General and Refunding, Air Terminal or Marine

Excerpt from Exhibit P-2

Terminal Bonds would be issued, and since that time the Authority has made substantial progress toward converting the form of its debt into the Consolidated Bonds, 84% of the total bonded debt being in this category at November 30. Security for the Consolidated Bonds is described in Table 1.

Debt Service Requirements: The Authority's bonds are partly serial, and partly callable term bonds redeemable according to their terms from mandatory sinking fund payments. Serial and sinking fund payments extend out to 1993. Including requirements on the bonds now offered, total debt service is at a high of $44 million to over $45 million 1963 through 1975, the estimated peak falling in 1969 in the amount of $45,736,000. Requirements decline gradually out to the mid-1980s and thereafter decline sharply, an arrangement well designed to permit scheduling of additional bond issues.

Coverage for Debt Service: The Authority's earnings provide wide coverage on its debt service requirements. Net revenues for the 12 months ended September 30, 1962, totaled $75,874,000, which covered interest for that period by 4.83 times. Net revenues for this 12-month period would cover estimated maximum future interest due in 1963 3.18 times and estimated maximum total debt service due in 1969 by 1.66 times. This computation does not take into account growth of revenues through increased usage of the Authority's facilities or growth to be expected from opening of new or expanded facilities.

Facility Usage: For the 12 months ended September 30, 1962, vehicular traffic on the Authority's bridges and tunnels increased 6.1% over the comparable 12-month period in 1960-61. Air passenger traffic at the three commercial

airports increased 10.4%, and the total of plane movements at the four airports (including Teterboro) rose 8.1%. Marine terminal traffic declined 4.7%, although waterborne tonnage registered a slight gain of 1.9% (See Table 5). Factors accounting for the changes in the Authority's traffic and usage were the economic recession that dominated the first half of 1961, bad weather early in that year, and shifting traffic patterns in the area necessitated by the expansion and improvement programs.

Financial Operations: The Authority's gross operating revenues have shown upward trends into 1962; for the 12 months ended September 30, 1962, gross operating revenues amounted to slightly less than $132.0 million. After deduction of operating expenses, net operating revenues amounted to $71,158,000, and with the inclusion of interest earned on investments, total net revenues were $75,874,000. Net operating revenues for this period equalled 53.9% of gross operating revenues (See Table 4).

Financial Position: The Authority maintains a strong fund position. At the end of 1961, the Authority had over $1.1 billion invested in facilities, while funded debt totaled $626,093,000. Debt retired through the end of 1961 amounted to $538,630,000. Reserve funds at December 31, 1961, totaled $82,412,000, made up of $62,609,000 in the General Reserve Fund, $13,305,000 in the Special Reserve Fund, $5,376,000 in the Air Terminal Reserve Fund, and $1,121,000, in the Marine Terminal Reserve Fund. Total reserves were held $81,588,000 invested in securities and $824,000 in cash.

Additional Programs: The Authority is proceeding with certain additional programs which it is authorized to undertake by legislation enacted by the two states. Most

prominent of these are the proposed World Trade Center and the Hudson Tubes operations.

World Trade Center: The Authority has the power to proceed with this program under identical authorizing legislation passed by New York and New Jersey. This center would be an integrated facility of commerce in the lower west side of Manhattan on a site encompassing the present site of the Hudson Terminal buildings generally in an area bounded by Church Street, Liberty Street, Vesey and Barclay Streets and the Hudson River. It would bring together the government and other agencies concerned with the movement of World Trade cargo through the Port of New York. The present estimated capital cost of the program is $270 million. The Commissioners of the Port Authority have indicated that they will proceed with this facility only after establishing that it would produce revenues sufficient with adequate margin to cover annual operating and debt service costs beginning after a reasonable development period. It is expected the facility would be financed by Consolidated Bonds.

Hudson Tubes Facility: On August 28, 1962 the Interstate Commerce Commission issued a certificate authorizing acquisition and operation of the Hudson Tubes by PATH. On September 1, 1962 pursuant to order of the New York County Supreme Court, in a condemnation proceeding, title was vested in PATH to the Terminal Buildings at 30 and 50 Church Street in New York City and the balance of the railroad system formerly operated by the Hudson & Manhattan Railroad; excluded from the acquisition were property interests of other railroads, such as the Journal Square Station in Jersey City and the

trackage between Jersey City and Newark. PATH and the Pennsylvania Railroad Corporation, however, entered into an agreement for continued operation of joint-train service on the same terms as the former agreement between H&M and PRR. The agreement runs to February 28, 1963. PATH commenced operations September 1, 1962.

It is expected that the program for acquiring the properties, modernizing the power and signal systems, and acquiring new cars will cost in excess of $100 million. The operation is expected to involve a continuing annual deficit for operations and debt service of about $5 million. Plans for extension of the facilities expect to enlarge the deficit. The General Reserve Fund or other available revenues or reserves are applicable to these deficits under limitations described below.

The Authority's present plans call for demolition of the Hudson Terminal buildings, replacement of the terminal, and modernization of the trackage. Preliminary plans are being made for possible developing of a new Hudson Tubes station in Jersey City.

Covenant Against Security Dilution: Recognizing the deficit nature of the Hudson Tubes operation, the Authority urged the legislatures of the two states to incorporate protective features to prevent impairment of the Authority's credit. In general the protection contained in the legislation prohibits the application of any revenues or reserves pledged to the Consolidated Bonds for additional commuter railroad purposes beyond the original Hudson Tubes, unless the Port Authority shall have first certified the eligibility. To be eligible the Authority must determine either that the proposed facility is self-supporting, or if not, that at the end of the preceding calendar year the General Reserve Fund contained the full

statutory amount and that for the ensuing 10 years the estimated average annual deficits of the proposed additional commuter facility and any then existing Port Authority commuter facility would not exceed an amount equal to 1/10 of the amount in the General Reserve. Certain adjustments in this figure are provided by statute to prevent the enlargement of deficit capacity, and the limiting figure may be enlarged to the extent of state subsidies for commuter railroad purposes.

Litigation: On June 26, 1962, a suit was commenced against the Authority to declare the Hudson Tubes-World Trade Center legislation unconstitutional and to enjoin the Authority from proceeding. The latter motion was denied July 17, 1962; condemnation proceedings were authorized on July 26, 1962. Further argument is being heard in the present term of the Appellate Division. Bonds now offered are stated to be not affected by these matters.

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Exhibit P-3

Memo To: William H. Morton
Robert R. Krumm

From: John F. Thompson

PORT AUTHORITY OF NEW YORK
AND NEW JERSEY

Extended Comment

The much discussed 1962 Covenant was embodied in concurrent statutes adopted by the New Jersey and New York legislatures which authorized and provided for construction by the Authority of the World Trade Center and which provided for the takeover of PATH. Section 6 in each of the statutes reads as follows:

> "The two states covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority . . . (b) neither the states nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad puposes whatsoever other than permitted purposes hereinafter set forth."

Permitted purposes include the Hudson Tubes, certain freight transportation and terminal facilities, self-supporting facilities, or facilites with permitted deficits. The

permitted deficits are based on estimates by the Port Authority of revenues and expenditures for the ensuing ten years. The deficit of PATH is to be included. The aggregate annual deficit from passenger railroad facilities as so estimated shall not exceed 1/10 of the amount in the General Reserve Fund. There is an alternative limiting figure, namely, 1% of the total amount of bonds retired from revenues by the Authority plus the General Reserve Fund, but this is still the smaller of the two alternatives. At the end of 1973 the General Reserve Fund totaled $173.5 million plus, so the permitted estimated annual deficit would be $17 million. The deficit of PATH alone in 1973 was "more than" $20 million, so there is obviously no room here.

The provisions of Section 6 quoted above are part of the contract with holders of bonds issued between March 27, 1962 and May 10, 1973. It is generally believed by municipal bond attorneys and others familiar with this matter that the outright repeal of this section would constitute a forbidden impairment of the obligation of contracts under the federal constitution. This was one of the reasons that Governor Cahill opposed the outright repeal. If repeal were nevertheless attempted there is little doubt that litigation would be instituted on behalf of bondholders. Such litigation might well continue over a period of years, holding up Port Authority financing and projects as a result.

A second unfortunate result of attempted repeal would be the indirect effect on the credit of the two states. Through its various agencies New York State has outstanding some $4.5 billion of bonds issued by its agencies which are dependent to an unusual degree on the good faith of the state. A similar additional amount is anticipated during the years immediately ahead for state sponsored projects. Investors would consider the repeal of this covenant as evidence of bad faith on the part of the state;

this could increase the difficulty and cost of financing these additional projects.

In New Jersey a large project has recently been financed only after addition of a reserve makeup provision commonly spoken of in the marketplace as a moral obligation. The bonds in question are not yet fully distributed. A recent article in the Commercial and Financial Chronicle suggests that holders of these bonds may, because of Governor Byrne's proposal to repeal the Port covenant of 1962, question the value of the state's moral pledge on the sports complex bonds.

Along with the pressure to repeal the covenant there are exaggerated statements about the reserves and earnings of the Port Authority which, without the covenant, could be available for mass transit purposes. If we examine the operations of the Port Authority for the last several years the annual net revenues after paying debt service on the consolidated bonds have been $70 to $75 million. This is before interest and repayments on the bank loans, which have required a major portion of net income for several years, and would continue to require most of it through 1979. This net income is a significant and impressive amount when it is considered within the framework of the current operation and debt service requirements of the Port Authority. Together with the reserve funds it provides strength and stability to the Port Authority's financial position, and its credit standing.

But if it is to be considered in the framework of the mass transit problem in the metropolitan area it becomes a very small amount. Officials recently stated that $100 million would carry the deficit of the New York City transit system only from January 1 to May 1. During the past year final legislative authorization was given to plans for rail mass

transportation improvement previously announced by Governors Rockefeller and Cahill and the Port Commissioners. Included are rail connections with Kennedy and Newark Airports (and thence to Plainfield, New Jersey), and connections facilitating direct rail access from New Jersey to Penn Station. The plans anticipate substantial federal and state capital grants, and assignment of operating deficit risks to other agencies, so that the projects can be certified as in compliance with the 1962 covenant. If the Port Authority's financial strength and credit position are to be maintained, the realities of its financial position limit incursion into the mass transit field as much as does the 1962 covenant, and the announced program presses that limit. The burden of proof is on those who push for more.

Recent assertions that mass transit development was the purpose for which the Port Authority was created are an attempt to revise history. The basic original purpose did involve transportation, that of commerce in and out of the Port of New York from other areas both foreign and domestic. The concept was for the two states to work jointly in Port developments. It was a number of years later that the Port Authority, being the most convenient bi-state body, was given the authority and responsibility for the various bridge and tunnel crossings between the states. In fact the first tunnel, the Holland Tunnel, was built by another authority and eventually refinanced and turned over to the Port Authority. On the other hand the marine terminal development has been quite in line with the Port's basic original purpose and would have been much more extensive had it not been for the obdurate attitude of the New York City government in the immediate post-war years when these developments were getting underway. Given the shift to air transportation the airport development is certainly in line with the Port Authority's original purposes. Despite all the criticism of the World Trade Center, the courts

have held that this project is a valid Port Authority purpose.

The Port Authority has been authorized and directed by the two states in each and every project undertaken, and except for PATH, the projects were expected eventually to support themselves with their own revenues. Overall the Port Authority has been expected to operate as a public business agency with revenues from the services it provides being its only source of funds. It has neither taxing power nor any kind of so-called moral obligation or reserve makeup provision providing indirect state support for its debt.

There is a wide body of opinion that in present circumstances, especially because of energy and environmental problems, government should step in to discourage auto traffic into major urban centers in favor of the greater use of mass transit. Because of its bi-state character, its efficiency in building and operating the projects it has undertaken, together with an unreal view of the relation of its earnings and resources to the needs of mass transit in the area, the Port Authority has become a focal point of demands on this score. It is submitted here that this is inappropriate. The Port Authority has functioned for the two states to finance and operate public facilities which on the whole could be supported by their own revenues. In carrying out this assignment it has to some degree used the automobile tolls from the Hudson crossings as a back-up in getting other projects underway. But if there is to be a significant shift of funds from charges imposed on automobile traffic to the support of mass transit this should be done by the two states themselves; to do this is an exercise of the state police power and taxing power. As such it should apply to all automobile traffic into Manhattan whether using the free City bridges or the Hudson crossings.

Excerpt from Exhibit P-4

(DRAFT MEMO DATED 4/27/72 BY JOHN F. THOMPSON)

PORT OF NEW YORK AUTHORITY

MASS TRANSPORTATION VS. BONDHOLDERS SECURITY.

In 1962 concurrent statutes were adopted by the New Jersey and New York legislatures providing for the World Trade Center, for the take-over of PATH, and also providing restrictions on future activity of the Port Authority in the railroad field. These restrictions are found in sections six in each of the statutes. Here the two States covenant; (1) not to diminish or impair the power of the Port Authority to establish, levy and collect rentals, tolls, fares, fees or other charges for facilities of which the revenues have been pledged to the bonds; and (2) that the Port Authority will not apply any such revenues for "any railroad purposes whatsoever other than permitted purposes hereinafter set forth." Permitted purposes include the Hudson Tubes, certain freight transportation and terminal facilities, self-supporting facilities, or facilities with permitted deficits. The permitted deficits are based on estimates by the Port Authority of revenues and expenditures for the ensuing ten years. The deficit of PATH is to be included. The aggregate annual deficit from passenger railroad facilities as so estimated shall not exceed 1/10 of the amount in the General Reserve Fund. There is an alternative limiting figure, namely, 1% of the total amount of bonds retired from revenues by the Authority plus the General Reserve Fund, but this is still the smaller of the two alternatives. At the end of 1971 the General Reserve Fund totaled $144 million plus, so the permitted estimated annual deficit would be something over $14 million. The deficit of PATH alone in 1970 was $13 million and in 1971 was reported to be $16 million, so there is obviously no room here at all.

Excerpt from Exhibit P-4

The text of the discussion of the covenant against additional passenger railroad deficits from the most recent official statement is attached hereto, as is the text of section six of the 1962 concurrent acts of the two legislatures.

The present covenant to charge adequate tolls and other charges is found in section 12 subdivision F of the Consolidated Bond Resolution and reads as follows: "To establish and collect flight fees, wharfage, dockage, rents, tolls and other charges in connection with facilities the net revenues of which are pledged as security for Consolidated Bonds, to the end that at least sufficient net revenues may be produced therefrom at all times to provide for the debt service upon all Consolidated Bonds."

Turning to the possibility that the bondholders be approached for a modification of the Resolution, the procedure to obtain such modification is found in section 16 of the Consolidated Bond Resolution adopted October 9, 1952. The text of this procedure for modifications is also attached hereto. This procedure requires that a *meeting of the holders* of consolidated bonds be called for the purpose of considering any such proposed amendment, repeal or modification. Broad publication of the notice of such a meeting is required,—once a week for four weeks in papers not only in New York but also in Boston, Philadelphia, Chicago and San Francisco. Notices are also to be mailed to the holders of registered bonds. To qualify to vote at such a meeting the holder of a consolidated bond or his proxy must present at the meeting his bond or bonds, or a certificate of ownership from a Registrar or such Bank or Trust Company satisfactory to the Authority as has accepted such bonds against receipt and certificate of ownership, which shall entitle the holder to vote at the meeting. 60% of the aggregate principal amount of outstanding consolidated bonds, exclusive of Authority-

owned bonds, is necessary to constitute a quorum at the meeting. Approval of the proposed modification also requires the consent of 60% of the aggregate principal amount of the bonds. The modification is in the form of a proposed resolution presented at the meeting. Voting at the meeting shall be by ballot. There are provisions that the meeting may be adjourned from time to time in order to obtain a quorum, but at some point it appears that holders of at least 60% of the outstanding bonds either in person or by proxy must be present at the meeting and vote favorably for the modification.

The percentage approval required is lower than that for the Triborough, but the meeting procedure adds further complexity and difficulty to the process of obtaining approval. In my opinion an approach to the bondholders for a modification of the 1962 restrictions accompanied by a moderate increase in interest rate on their bonds would fail, partly because it would be unacceptable and partly because of the procedural difficulties.

It is suggested that in the alternative consideration be given to measures assisting mass transportation which can be developed within the present framework and covenants with the bondholders. One such proposal would be concurrent action by the States to place an override toll of 50% or more on the tolls now collected for the tunnels and bridges. This additional toll revenue could be turned over to the States in such proportion and on such terms as agreed to for use in assisting mass transit facilities. It could be said of course, that the added toll would reduce the traffic on these facilities somewhat and therefore reduce the revenue from the present tolls which is pledged to payment of the bonds. As an answer to this it could be provided that some part of the override toll proceeds be

Excerpt from Exhibit P-4

pledged to insure that gross pledged revenues from tolls not decline. The base could be total tolls collected in the most recent year, or an average of several years. Such an arrangement could protect the bondholders' rights on a realistic and fair basis, and at the same time provide for assistance to mass transit.

* * *

Exhibit P-5

[LETTERHEAD OF]
W. H. MORTON & CO.

June 10, 1974

Mr. Norman T. Hurd
New York State Executive Office
1350 Avenue of the Americas
New York, New York 10019

Dear Mr. Hurd:

All in the group who met in your office on Friday to discuss the adverse effect of repealing the 1962 Port Authority covenant join me in thanking you for your courtesy and consideration. As in any such discussion a few after thoughts occur which were not expressed at the time, and we would like to share these with you.

We are less than impressed by the "unanimous vote" in the legislature. Some of us fully understand the short roll call on the first run through of a day's calendar and feel that the "vote" indicates no more than a passive acquiescence in a leadership decision to "leave it to the Governor."

It is true that the impact on the "moral obligation" financing after Governor Rockefeller signed the 1972 repeal bill was minimal. However the conciliatory message and the fact that Governor Cahill was not persuaded to support retroactive repeal provided a setting far different from that today when Governor Wilson's action will be final and decisive.

Concerning the New Jersey Sports Complex financing, we fully agree about the impact of its questionable public purpose. It should also be said, however, that no one we know in the investment community believes the issue could