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FINANCING PUBLIC EDUCATIONAL FACILITIES IN NEW JERSEY AFTER THE *FREEHOLD* DECISION

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I. INTRODUCTION

In some New Jersey school districts the physical condition of the educational facilities is so deficient that the constitutional right to a thorough and efficient education[1] is threatened. Learning cannot occur in an atmosphere of physical decay; and the educational process will be severely impaired unless such deplorable conditions are rectified. In fact, in Upper Freehold Township Regional School District the physical facilities were so grossly inadequate that the Supreme Court of New Jersey upheld an order of the State Commissioner of Education directing the school district to issue bonds for the purpose of repairing the school.[2] The court thus protected what it felt was the students' right to a thorough and efficient education despite the fact that the voters had twice refused to authorize the needed repairs.

Upper Freehold is not alone. There is approximately a three billion dollar backlog of capital improvement projects for public education facilities in the state,[3] and ninety-one percent of all New Jersey school districts are unable to issue school bonds without voter approval.[4] Yet, there is increasing evidence of significant voter reluctance to approve educational expenditures.[5] As a result, the need for voter approval may impair the ability of school boards to comply with the constitutional mandate to provide a thorough and efficient education. Alternative methods of financing under existing New Jersey law should be considered. In particular, financing through a county improvement

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[1] N.J. CONST. art. VIII, § 4, para. 1.

[2] *In re* Upper Freehold Regional School Dist., 86 N.J. 265, 430 A.2d 905 (1981).

[3] NEW JERSEY STATE DEPARTMENT OF EDUCATION, ANNUAL REPORT 17 (1979-1980).

[4] Letter from Melvin L. Wyns, Assistant Director, Bureau of School Finance, to Jean LaMaita (Nov. 2, 1981).

[5] According to figures supplied by the New Jersey School Boards Association, the statewide school budget rejection rate has grown from an average of 18.6% in 1977 to 36.2% in 1981.

authority may have potential application in the school financing context.

II. The Constitutional Right to a Thorough and Efficient Education

The Constitution of the State of New Jersey mandates that students enrolled in state public schools receive a "thorough and efficient" education. Specifically, the constitution provides that:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.[6]

The Supreme Court of New Jersey strictly enforced this constitutional directive in *Robinson v. Cahill.*[7]

The plaintiffs in *Robinson* were local taxpayers, public school students, and educational administrators who objected to the ad valorem tax system used to fund public education in New Jersey.[8] The plaintiffs maintained that there was a direct correlation between the amount of money spent per pupil and the resulting educational benefits. Accordingly, the plaintiffs asserted that students in property-poor school districts were being deprived of a thorough and efficient education.[9] The supreme court concurred in this analysis and ordered the legislature to revise the funding process so that all students might obtain that level of education necessary for them to participate effectively in the political and economic system.[10] Thus, the supreme court established New Jersey as the first state to find that wealth-related disparities in educational funding are violative of state constitutional provisions.[11] A review of previous funding disputes is helpful in understanding the monumental significance of this decision.

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[6] N.J. Const. art. VIII, § 4, para. 1.

[7] 62 N.J. 473, 303 A.2d 273 (*Robinson I*), *cert. denied*, 414 U.S. 976, *aff'd on rehearing, jurisdiction retained*, 63 N.J. 196, 306 A.2d 65 (1973) (*Robinson II*), *order entered*, 67 N.J. 35, 335 A.2d 6 (*Robinson III*), *order entered*, 67 N.J. 333, 339 A.2d 193, *republished*, 69 N.J. 133, 351 A.2d 713 (1975) (*Robinson IV*), *order vacated*, 69 N.J. 449, 335 A.2d 129 (1976) (*Robinson V*), *injunction issued*, 70 N.J. 155, 358 A.2d 457 (*Robinson VI*), *injunction dissolved*, 70 N.J. 464, 360 A.2d 400 (1979) (*Robinson VII*).

[8] The students contended that the state had not fulfilled its constitutional obligations while the taxpayers and the educational administrators contested the disproportionate effect of the ad valorem property tax system and the inequitable amount of power wielded by local districts. Plaintiffs' Amended Complaint at 21-22, 37, 43, 53-54, 57-58, Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (Law Div. 1972).

[9] 62 N.J. at 481, 303 A.2d at 287.

[10] *Id.* at 515, 303 A.2d at 295.

[11] Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 Duke L.J. 1099.

In 1971 the Supreme Court of California held in *Serrano v. Priest*[12] that differences in educational opportunities which are a function of district wealth contravene the equal protection clause of the fourteenth amendment to the United States Constitution.[13] The court recommended that California adopt a system of educational financing in which the level of expenditure per pupil is not based on "the resources of his school district and ultimately upon the pocketbook of his parents."[14]

Following the *Serrano* decision, similar litigation was commenced in almost every state[15] and nine decisions were published.[16] This flurry of litigation was quickly halted when the United States Supreme Court in *Rodriguez v. San Antonio Independent School District*[17] decided that using property tax revenues to finance public schools does not discriminate against a suspect class because the alleged objects of discrimination are not poor persons but simply districts with low or "poor" property values.[18] The opinion distinguished previous wealth classification decisions by emphasizing that in those instances the discrimination had arisen because of disparities in personal wealth.[19] Additionally, the Court noted that wealth is a discriminatory criterion only when used to absolutely deprive the indigent of some "desired benefit" or "meaningful opportunity."[20]

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[12] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *later appealed*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977).

[13] 5 Cal. at 590, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

[14] *Id.* at 614, 487 P.2d at 1263, 96 Cal. Rptr. at 623.

[15] Levin, *supra* note 11, at 1101.

[16] *See* Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972); Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Hollins v. Shofstall, No. C-253652 (Ariz. Super. Ct. June 1, 1972), *rev'd*, 110 Ariz. 88, 515 P.2d 590 (1973); Caldwell v. Kansas, No. 50616 (Johnson County Dist. Ct., Kan. Aug. 30, 1972); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 390 Mich. 389, 212 N.W.2d 711 (1973); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972), *supplemented in* 119 N.J. Super. 40, 289 A.2d 569 (1972), *aff'd as modified*, 62 N.J. 473, 303 A.2d 273 (1973); Spano v. Board of Educ., 68 Misc. 2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972); Sweetwater County Planning Comm'n v. Hinkle, 491 P.2d 1234 (Wyo. 1971), *jurisdiction relinquished*, 493 P.2d 1050 (Wyo. 1972).

[17] 411 U.S. 1 (1973).

[18] *Id.* at 28. The Court was not persuaded that the "poorest people" were "concentrated" in all the "poorest districts." *Id.* at 22-23. The Court also emphasized that:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28.

[19] *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[20] 411 U.S. at 19-20.

The Court found that the discrimination complained of in *Rodriguez* caused no such deprivation but merely produced differences in the quality of education offered.[21] Further, the Court noted that education is not explicitly or implicitly guaranteed by the Constitution; consequently, it cannot be deemed a fundamental right.[22] Once the Court had decided that education is not a fundamental right and that property value is not a suspect classification, it could not apply the strict scrutiny test of the equal protection clause.[23] Accordingly, the majority examined the financing scheme using the rational basis standard[24] and concluded that the Texas system logically effectuated the legitimate state interest of encouraging "a large measure of participation in and control of each district's schools at the local level."[25]

After the *Rodriguez* decision foreclosed equal protection avenues for achieving reform of school financing practices, various suits commenced in state forums were based on state constitutional provisions governing free public education.[26] The *Robinson* decision, which

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[21] *Id.* at 23.

[22] *Id.* at 37.

[23] *Id.* at 40. The strict scrutiny test is applied to laws which discriminate on the basis of "suspect classifications" such as race, Brown v. Board of Educ., 347 U.S. 483 (1954), *supp. op.*, 349 U.S. 294 (1955); and, national origin, Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Court will only uphold such legislation if there is a compelling state interest for the classification. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 524 (1978).

[24] The rational basis standard examines allegedly discriminatory laws to see if the state has chosen reasonably neutral standards to accomplish its objectives. If there is a logical nexus between the means chosen and the desired end, then the law will be upheld. Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976) (zoning ordinance restricting location of adult theatres held constitutionally permissible); Washington v. Davis, 426 U.S. 229 (1976) (aptitude test which effectively measures skills of job candidates may be administered even though it may have racially discriminatory overtones).

[25] 411 U.S. at 49.

[26] The constitutional provisions of the fifty states are excellently summarized in Levin, *supra* note 11, at 1103 n.18. Ms. Levin reports that:

> Almost all state constitutions contain an express provision guaranteeing a free public education, although the language varies from state to state. Eight states mandate a thorough and efficient system of free public schools. MD. CONST. art. VIII, § 1; MINN. CONST. art. VIII, § 3; N.J. CONST. art. VIII, § 4, para. 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; S.D. CONST. art. VIII, § 15; W. VA. CONST. art. XII, § 1; WYO. CONST. art. VII, § 9; *see* OFFICE OF EDUCATION, U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, STATE CONSTITUTIONAL PROVISIONS AND SELECTED LEGAL MATERIALS RELATING TO PUBLIC SCHOOL FINANCE (DHEW Pub. No. (OE) 73-00002, 1973).
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> Another seven states use either 'thorough' or 'efficient.' ARK. CONST. art. XIV, § 1 (efficient); COLO. CONST. art. IX, § 2 (thorough); DEL. CONST. art. X, § 1 (efficient); IDAHO CONST. art. IX, § 1 (thorough); ILL. CONST. art. X, § 1 (efficient); KY. CONST. § 183 (efficient); TEX. CONST. art. VII, § 1 (efficient). . . .
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> Eight states mandate a 'general and uniform' public school system. ARIZ. CONST. art. XI, § 1; IDAHO CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; MINN.

was handed down only a few weeks after *Rodriguez*, became the seminal opinion in the area of school finance reform litigation.[27]

The *Robinson* court disposed of the federal equal protection issue by deferring to the Supreme Court opinion in *Rodriguez*; however, the court recognized that state equal protection standards could be more exacting than their federal counterparts. The court then carefully analyzed the state constitutional guarantee of a free public education.[28] The plaintiffs claimed that the constitutional mandate prohibits the state from delegating the fiscal responsibility for the schools to local municipalities.[29] After examining the history of the constitutional provision,[30] the court was unable to conclude that the drafters intended to guarantee absolute equality among the various taxpayers of the state.[31] Accordingly, the court did not hold that the constitutional provisions could only be fulfilled through the imposition of a statewide tax.[32] Nevertheless, Chief Justice Weintraub noted:

> Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the Constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it.[33]

CONST. art. VIII, § 1; N.C. CONST. art. IX, § 2(1); OR. CONST. art. VII, § 3; S.D. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2. . . .

Ten states guarantee *either* a 'general' or a 'uniform' system. ARK. CONST. art. XIV, § 1 (general); COLO. CONST. art. IX, § 2 (uniform); DEL. CONST. art. X, § 1 (general); FLA. CONST. art. IX, § 1 (uniform); KAN. CONST. art. VI, § 2 (uniform); NEV. CONST. art. XI, § 2 (uniform); N.M. CONST. art. XII, § 1 (uniform); N.D. CONST. art. VIII, § 148 (uniform); UTAH CONST. art. X, § 1 (uniform); WYO. CONST. art. VII, § 1 (uniform). . . .

Many states use more than one of these descriptive phrases. *See, e.g.*, Idaho: "[I]t shall be the duty of the legislature of Idaho to establish and maintain a *general, uniform* and *thorough* system of public, free common schools." IDAHO CONST. art. IX, § 1 (emphasis added).

The remaining states have education clauses more limited in nature, such as those which mandate the provision of a "system of common schools" or "a public educational system." *See, e.g.*, CAL. CONST. art. IX, § 5; IOWA CONST. art. IX, 2d § 7; LA. CONST. Art. XII, § 1; N.Y. CONST. art. XI, § 1.

Id.

[27] Levin, *supra* note 11, at 1100.

[28] 62 N.J. at 501-08, 303 A.2d at 287-92.

[29] *Id.* at 502, 303 A.2d at 288.

[30] *Id.* at 501-08, 303 A.2d at 287-92.

[31] *Id.* at 513, 303 A.2d at 294.

[32] *Id.*

[33] *Id.*

The Chief Justice then held that the state is required to identify those municipalities that have not complied with the constitutional directives. If it is clear that assistance is needed, the state must step in and insure that adequate education is available.[34]

The court did not decide that the same quality of instruction must be provided to every child in the state but ruled that the state constitution guarantees every student "[t]hat educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[35] In so holding, the court recognized that the crucial factor for determining whether an educational system is thorough and efficient is not solely the money spent by the district but also the level of achievement attained by its pupils.[36] Applying this standard to the facts proferred by the plaintiffs, the court found that the present system did not fulfill the constitutional mandate and ordered the state to devise a more equitable scheme for the financing of public education.[37]

Five years after suit was first filed remedial legislation was put into effect. The Public School Education Act of 1975[38] codifies the legislature's commitment to establish uniform statewide achievement levels for basic educational skills and to provide sufficient funding so that the objectives will be reached in all communities.[39] The Act

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[34] *Id.* at 513, 303 A.2d at 294. The Chief Justice based this conclusion upon the fact that the tax imposed by the local districts is in reality a tax for state use since it is the state's obligation to provide a free public education. *Id.* at 503, 303 A.2d at 288-89. In effect, the local governments act as "an arm of the State" in performing this important function. *Id.* at 502, 303 A.2d at 288.

[35] *Id.* at 515, 303 A.2d at 295.

[36] *Id.* at 514, 303 A.2d at 294 (quoting Landis v. Ashworth School Dist. No.44, 57 N.J.L. 509, 512, 31 A. 1017, 1018 (1885)).

[37] *Id.* at 515, 303 A.2d at 295. After further argument, however, the supreme court decided that it would not invalidate the existing statutory system unless the legislature failed to enact new laws by December 31, 1974. Robinson v. Cahill, 63 N.J. 196, 198, 306 A.2d 65, 66 (1973) (*Robinson II*). When the legislature was still undecided as of January, 1975, the court decided that no changes would be implemented during the 1975-1976 school year. Robinson v. Cahill, 67 N.J. 35, 37, 335 A.2d 6, 7 (1975) (*Robinson III*). Subsequently, the court enacted provisional remedies under the appropriations clause of the state constitution, N.J. CONST. art. VIII, § 4, para. 2, so that compliance would be achieved in 1976-1977. Robinson v. Cahill, 67 N.J. 333, 348, 339 A.2d 193, 200 (1975) (*Robinson IV*). The controversy was finally resolved when the court upheld the validity of the Public School Education Act of 1975, N.J. STAT. ANN. § 18A:7A-1 to 33 (West Cum. Supp. 1981-1982), the corrective legislation ultimately adopted by the legislature, and issued an injunction restraining public school officials from expending any moneys for the support of public schools until the new act was fully funded. Robinson v. Cahill, 70 N.J. 155, 159-60, 358 A.2d 457 (1976) (*Robinson V*). The injunction was dissolved in July of 1976 when funding was finally assured by the legislature. Robinson v. Cahill, 70 N.J. 464, 458-59, 360 A.2d 400 (1976) (*Robinson VI*).

[38] N.J. STAT. ANN. § 18A:7A-1 to 33 (West Cum. Supp. 1981-1982).

[39] *Id.* § 18A:7A-2 (b)(3)(6). Recently, the Public School Education Act of 1975 was challenged for allegedly failing to comply with the constitutional mandate for a thorough and

includes a new equalization formula which is designed to insure that needy school districts receive an adequate amount of state aid to compensate for low tax bases.[40] This procedure is employed in order to reserve a sufficient amount of local control and encourage citizen involvement in education expenditures. The Act continues the practice of local taxation and decision-making.[41] Nonetheless, the statute requires that the state board monitor the progress of each district through the submission of annual reports[42] and the periodic review of state goals and standards.[43]

III. The Obligation to Maintain Adequate Educational Facilities

The most significant impact of the *Robinson* decision has been in the area of state aid to public education and concomitant attempts to alleviate the local property tax burden through the imposition of a state income tax.[44] Although not specifically addressed in *Robinson*, the court in *In re Upper Freehold Regional School District*[45] examined the relationship between the physical adequacy of educational facilities and the right to a thorough and efficient education. Essential to

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efficient education. In Abbott v. Burke, No. C-1893-80 (N.J. filed Feb. 5, 1981), the class action plaintiffs claimed that the current method for calculating state aid to school districts violates both the education clause of the New Jersey Constitution and the equal protection clause of the United States Constitution. Plaintiffs' Amended Complaint at 3, Abbott v. Burke, No. C-1893-80 (N.J. filed Feb. 5, 1981). The plaintiffs based this conclusion on their assertion that the "allocation of resources and educational opportunity under the New Jersey school finance system is based on criteria which are not substantially related to education, but rather is not based on such educationally irrelevant factors as local taxable wealth and arbitrarily determined funding limitations." *Id.* at 35.

In addition to citing deficiencies in special and bilingual instructions, staffing, and administration, the plaintiffs also alleged that the physical condition of the schools located in property poor districts was far from adequate. Quoting the Four Year Assessment of the Public School Education Act of 1975, Vol. I, at 89 [hereinafter cited as Four Year Assessment], the plaintiffs posited that the funds already provided to repair and renovate the urban schools are barely adequate. Further, the plaintiffs claimed that many schools in their districts (East Orange, Camden, Irvington and Jersey City) "are unfit for occupation." Plaintiff's Amended Complaint, *supra*, at 31. Moreover, the litigants reported that "[i]n 1978-79, county monitors cited 99 districts for failing to provide facilities that are clean, attractive, and in good repair, and 74 districts which were without acceptable institutional materials and equipment." *Id.* (relying on Four Year Assessment, *supra*, at 85). Plainly, the *Abbott* complaint indicated that there are many school districts in dire need of repair and renovation.

[40] N.J. Stat. Ann. § 18A:7A-18 (West Cum. Supp. 1981-1982).

[41] *Id.* § 18A:7A-2(a)(7).

[42] *Id.* § 18A:7A-11.

[43] *Id.* § 18A:7A-8.

[44] *Id.* § 54A:1-1, :10-12.

[45] 86 N.J. 265, 430 A.2d 905 (1981).

an understanding of this relationship is a review of current methods of funding public school capital improvements.

A. *Current Methods of Financing Public School Capital Improvements*

The current methods used to finance public school facilities are rather complex and variegated. The specific technique which a school district uses to issue bonds is determined by its status as either a Type I or Type II school district.[46] Type I school districts primarily include those districts which are established in cities or municipalities that

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[46] According to N.J. STAT. ANN. § 18A:21-1 (West 1968), a school board may undertake capital projects through levying taxes or issuing bonds. The capital improvements which may be financed in this manner include:

1. The acquisition by purchase or condemnation of lands;
2. The grading, draining and landscaping of lands owned or to be acquired by the board and the improvements thereof in any like manner;
3. The acquisition, construction, reconstruction, remodeling, alteration, enlargement or major repair of buildings; and
4. The purchase of the original furniture, equipment and apparatus, or of major renewals of furniture, equipment and apparatus, for any building used or to be used for such purposes.

Id.

Both Type I and Type II districts may employ the security mechanisms provided by the Qualified School Bond Act. *Id.* § 18A:24-85 to 97. Under the terms of that Act a school board may apply to the Commissioner of Education to have the bonds of the district qualified by the State Board of Education. *Id.* § 18A:24-88(c). Once the Commissioner is satisfied that the school district needs the proceeds of the bonds to finance improvements guaranteeing a thorough and efficient education, he will recommend that the state board issue a resolution approving the issuance of the bonds. *Id.* § 18A:24-88(b) & (c). The State Treasurer then withholds a sufficient amount of the municipality's state school aid to cover the debt service on the bonds. *Id.* § 18A:24-93(a). The State Treasurer forwards the requisite funds to the paying agent. *Id.*

As security for the bondholders, the State of New Jersey covenants with the purchasers not to take any action which would create a lien on or deduction from the municipality's state aid; however, the state does not promise that it will never repeal or limit the statutes authorizing state aid for schools. *Id.* § 18A:24-93(b).

Finally, the Act does not relieve school districts or municipalities of the obligation to continue to budget sums sufficient to pay principal and interest on the bonds. To the extent that these sums are not needed because of the contribution of state aid the school district must use the moneys to cover other operating expenses. *Id.* § 18A:24-94.

There is one other security mechanism which school districts may employ when issuing debt. A school district may apply to the Division of Local Finance in the Department of Community Affairs for a certificate approving the issuance of the bonds and ascertaining that they are valid and binding obligations of the school board or guaranteeing municipality. *Id.* § 18A:24-67. The aggregate amount of bonds financed in this manner may not exceed 1.5 times the amount of debt which the issuer is already authorized to borrow for school purposes. *Id.* § 18A:24-70(a). The municipality then issues a blanket bond payable to the paying agent which does not state a dollar amount but which is "a binding obligation to pay the amount of the

become cities,[47] whereas Type II districts exist in all municipalities other than cities.[48]

School bonds may be issued by a municipality or a school district after they have been authorized by the appropriate authorities.[49] In Type II districts there are different procedures for districts that have a board of school estimate[50] and those that do not. In a Type II district that has a board of school estimate, bonds are authorized for issuance as soon as the board of education in the district adopts a final resolution which has been approved by "a recorded roll call majority vote of the full membership."[51] In addition, the board must finalize the amount of money required for a given capital project[52] and submit documentation of the plan to the attorney general for his approval.[53]

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principal and accrued interest on all bonds issued and outstanding at any time." *Id.* § 18A:24-70(b). The bonds are then issued in registered form only. *Id.* § 18A:24-70(d). The principal amount of the bonds issued under this optional method may not exceed $250,000.00 or an average of not more than $25.00 per person based on the population of the district. *Id.* § 18A:24-77.

[47] *Id.* § 18A:9-2.

[48] *Id.* § 18A:9-3. The provisions governing Type II school districts also apply to those districts which are considered regional districts under N.J. STAT. ANN. § 18A:13-1 (West 1968). Should the legal voters of either type of district desire to alter their selection they may do so in a public election after a petition signed by at least 15% of their number has been filed with the municipal clerk. *Id.* § 18A:9-4.

[49] In Type I school districts the board of education is to consist of either five or seven members in accordance with municipal ordinances; however, districts located in "cities of the first class" are to have a nine member board. *Id.* § 18A:12-6 (West Cum. Supp. 1981-1982). In Type I districts the boards of education are appointed by the mayor or other chief executive officer of the city. *Id.* § 18A:12-7 (West 1968). Similarly, Type II districts located in towns with a population of 10,000 or more which had appointed boards in 1968 may continue to appoint its members pursuant to N.J. STAT. ANN. § 18A:12-16 (West 1968), or hold an election at which all legal voters in the municipality may be asked if they prefer to have an elected board. *Id.* § 18A:12-18. All other Type II school board members are elected to their positions pursuant to N.J. STAT. ANN. § 18A:12-10 (West 1968), and both species of Type II districts may have three, five, seven, or nine members. *See id.* § 18A:12-10, -11, -11.1.

[50] Type II districts are required to have a board of school estimate only if the district had a board of school estimate in 1949 when the statute was enacted and if the territorial limits of the district incorporate more than one municipality with a combined population over 10,000. *Id.* § 18A:22-3. In a Type II district the board of school estimate consists of all chief executive officers of governments within the district, the president of each board of education and two members of each governing body. *Id.* § 18A:22-4. The board is empowered to take action only if a majority of the members from each municipality is present. *Id.* § 18A:22-5. All Type I school districts are required to have a board of school estimate as provided in N.J. STAT. ANN. § 18A:22-1 (West Cum. Supp. 1981-1982). The members of the board of school estimate include two representatives from the board of education, two members of the municipal governing body, and the chief executive officer of the city. *Id.*

[51] *Id.* § 18A:24-10(b).

[52] *Id.* § 18A:24-12 (West 1968).

[53] *Id.* § 18A:24-30.

The bonds can then only be sold at a public sale after at least seven days notice in a municipal bond publication.[54]

In contrast, a Type II school district without a board of school estimate may authorize the issuance of bonds only after holding both a recorded roll call of the full board of education and an election for all legal voters.[55] The voting may be conducted through a general, special, or municipal election which must be held no sooner than forty-one days after the governing body has passed an ordinance authorizing the issuance of the bonds.[56]

In a Type I school district, once the board of estimate has received notice of the planned project[57] and certified the amount of money it deems necessary to accomplish the stated objectives,[58] the governing body of the municipality adopts an ordinance approving the bonds.[59] The principal amount of the bonds is limited according to the number of grade levels of instruction which the district provides or will provide;[60] however, there is no requirement that the issuance

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[54] *Id.* § 18A:24-36.

[55] *Id.* § 18A:24-10(c) (West Cum. Supp. 1981-1982). The voter approval requirement also applies to regional Type II school districts. *Id.* In addition, the statute provides that school bonds may not be issued without voter approval by any district, Type I or Type II, whose by-laws, ordinances, or other governing rules require voter approval for the issuance of bonds. *Id.*

[56] *Id.* § 18A:24-29 (West 1968). Furthermore, the clerk of the municipality must post at least seven notices providing details of the referendum as well as publish notice in a newspaper with municipal or county-wide circulation no less than seven days before the election. *Id.*

[57] *Id.* § 18A:22-18.

[58] *Id.* § 18A:22-19.

[59] *Id.* § 18A:24-11.

[60] *Id.* § 18A:24-19 (West Cum. Supp. 1981-1982). School bonds may be issued for a principal amount which exceeds the limits set forth in N.J. STAT. ANN. § 18A:24-19 (West Cum. Supp. 1981-1982), if the issue receives the approval of the Commissioner of Education and the local finance board as well as affirmative support from all legal voters in the district. *Id.* § 18A:24-23. According to N.J. STAT. ANN. § 18A:24-26 (West 1968), the Commissioner is empowered to consent to the offering if he is convinced that "existing educational facilities in the district are, or within five years will be, less than 80% adequate" and that the proposed additions or improvements will be fully utilized within ten years. *Id.* Similarly, under N.J. STAT. ANN. § 18A:24-27 (West 1968), the local finance board is authorized to grant approval to the bonds if it is convinced that the district is planning to spend a reasonable sum which will not impair its credit or its ability to meet principal and interest payments on all its debts. *Id.* In addition, the finance board must ascertain that the school district will be able to bring its debt limit within statutory limits at some point during the ensuing twenty years. *Id.* Finally, in issuing school bonds the Type I school district must comply with the provisions contained in N.J. STAT. ANN. § 40A:49-1 to 27 (West 1967 & Cum. Supp. 1981-1982) (governing form of ordinances and resolutions) and N.J. STAT. ANN. § 52:27-1 to 66 (West 1975) (governing procedures and function of Municipal Finance Commission). *Id.* § 18A:24-11 (West 1968). As part of the process of issuing the bonds the school district must also prepare a supplemental debt statement which identifies all of the district's bonds and notes that are issued and outstanding or authorized but not yet issued. *Id.* § 18A:24-16 (West Cum. Supp. 1981-1982). The supplemental debt statement also reveals the effect of the proposed issue on the district's other obligations. *Id.*

of school bonds be approved by the voters. After the Type I district bonds have received all of the necessary approvals they must be sold in compliance with the local bond law.[61] In effect, Type I school bonds are no different than all other municipal obligations[62] because any private sale which is effectuated must be confirmed by a two-thirds majority of the entire municipal governing body.[63]

B. In Re Upper Freehold Regional School District: *The Power of the State to Order Capital Improvements*

1. *The* Freehold *Decision*

In *In re Upper Freehold Regional School District*,[64] the Supreme Court of New Jersey conclusively ruled that the Commissioner and the State Board of Education are empowered to order a Type II school district without a board of school estimate to issue bonds to fund necessary capital improvements even when the voters have explicitly rejected such a course of action.[65]

The *Freehold* controversy centered on the extreme state of disrepair at Allentown High School, a school maintained by the Upper Freehold Regional School District.[66] The high school, which was built in 1963, is attended by about 1,000 students. In 1975, school

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[61] *Id.* § 40A:2-1 to 64 (West 1980).

[62] School bonds are "full faith and credit" obligations entitled to the benefit of the ad valorem taxing power of the constituent municipalities. *See id.* § 18A:24-27 (West 1968). Like other general obligations, school bonds may be refunded at or prior to maturity. *Id.* § 18A:24-61.1 (West Cum. Supp. 1981-1982). In a Type I district, refunding bonds may be issued in any amount which the governing body deems necessary. *Id.* In a Type II district, the Board of Education certifies the size of the issue and the Local Finance Board grants the final approval for the refunding. *Id.* Should the Finance Board disapprove the issue it must provide the Board of Education with its reason for doing so. *Id.* § 18A:24-61.7.

The refunding process is extremely beneficial to municipalities and school districts that wish to retire debt which had been issued at an unusually high rate of interest or before the enactment of the Qualified School Bond Act. *Id.* § 18A:24-85 to 97. Moreover, the refunding process is attractive to issuers because the legislature has provided that refunding bonds "shall be excluded in calculating the net school debt of a municipality or district." *Id.* § 18A:24-61.2. Naturally, refunding bonds must be issued in compliance with the provisions of local bond law. *Id.* § 18A:24-61.3 (citing *id.* § 40A:2-52 to 60). In addition, there are no marketing restrictions on refunding issues and thus the bonds may be sold at public or private sale. *Id.* § 18A:24-61.

[63] *Id.* § 40A:2-27 (West 1980). The bonds must be sold at public sale unless the principal amount of the issue is less than $20,000 or no legally acceptable bid is received at an advertised public offering. *Id.*

[64] 86 N.J. 265, 430 A.2d 905 (1981).

[65] *Id.* at 279, 430 A.2d at 913.

[66] *Id.* at 268, 430 A.2d at 907. The district is comprised of the towns of Freehold and Allentown. Three additional municipalities send their students to the high school but do not belong to the district. *Id.*

district officials began to notice that the building exhibited severe structural defects, including cracked floors, an improperly angled roof, and warped, irregular windows.[67] Over the next three years the building's deficiencies became increasingly apparent. A 1978 inspection by the Monmouth County Superintendent of Schools and the chief safety consultant of the New Jersey Department of Education revealed considerable water damage and predicted that the defective windows would shatter during a storm. In accordance with statutory mandates for a Type II district,[68] the Board of Education arranged for a special referendum to be submitted to the voters. The Board sought approval for funds to both repair the facility and build an addition to it or, in the alternative, an amount sufficient only to accomplish the necessary repair work. Both proposals were defeated by the voters.[69]

During the following school year conditions at the high school substantially worsened. Large industrial drums were installed to catch rain leaking through the roof. On very stormy days classes were held in the auditorium and the cafeteria. The water caused rotting of the columns and framing in the library as well as severe damage to the floor tiles in other rooms.[70] The danger of shattering glass from warped window frames caused many teachers to keep the shades drawn all year. In addition, the students, teachers, and staff were potentially threatened by short-circuiting in the electrical system, activation of the fire alarms, slippery floors, and falling ceiling tiles.[71] Nevertheless, in April of 1979, the voters again refused to authorize the issuance of bonds to repair the facility and to provide for an alternate location to conduct classes until the construction was complete.[72]

In desperation, the school board petitioned the Commissioner of Education for an order to issue the bonds and, following a hearing by an administrative law judge, the Commissioner granted the district's request.[73] The municipalities of Allentown and Freehold appealed to the State Board of Education, which refused to overturn the findings of the Commissioner.[74]

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[67] *Id.* at 269, 403 A.2d at 907. A civil action instituted against those who designed and constructed the school is still pending. *Id.*

[68] *See* notes 48-50 *supra* and accompanying text.

[69] 86 N.J. at 269, 430 A.2d at 907.

[70] *Id.* at 270, 430 A.2d at 908.

[71] *Id.*

[72] *Id.*

[73] Pursuant to N.J. STAT. ANN. § 18A:7A-15 (West Cum. Supp. 1981-1982), the Commissioner is empowered to "order necessary budgetary changes within the school district." *Id.*

[74] 86 N.J. at 271, 430 A.2d at 908.

Despite the Commissioner's authorization and the sanction of the State Board, bond counsel refused to issue a favorable opinion on the validity of the bonds because of the lack of voter approval.[75] Consequently, the school board petitioned the appellate division for relief. The appellate division found that the school district could not legally appeal from the decision of the State Board since it was not disadvantaged by the Board's ruling; however, it granted a motion by the State Board and ordered that the bonds be issued.[76] Bond counsel was still not convinced, however, that the Commissioner and State Board could legally circumvent the voter approval statute and the supreme court granted certification to resolve the issue.[77]

Citing the state constitutional guarantee of a thorough and efficient education,[78] Justice Pollock analyzed the Commissioner's statutory duty to insure that the constitutional mandates are fulfilled.[79] The court found that the legislature had provided the Commissioner with a broad spectrum of powers so that he might effectively carry out his constitutional responsibilities. The opinion noted that the Commissioner retained the ultimate responsibility for the conduct and operation of the schools even though the county superintendents and local boards of education are directed to monitor the structural condition of the physical plant[80] and to equip and maintain the facilities.[81] More importantly, the court held that the Commissioner is free to ascertain "the amount he deems necessary to fulfill the educational requirements of the district."[82] The court found that this statutory power even allows the Commissioner "to appropriate additional funds for a school budget after the budget has been rejected by the voters and reduced by the governing body."[83]

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[75] *Id.*

[76] *Id.* at 272, 430 A.2d at 909.

[77] *Id.*

[78] *Id.*; *see* note 6 *supra*.

[79] 86 N.J. at 273, 430 A.2d at 909.

[80] *Id.*; *see* N.J. STAT. ANN. § 18A:7-8(b) (West 1968).

[81] 86 N.J. at 278, 430 A.2d at 912; *see* N.J. STAT. ANN. § 18A:11-1(d) (West 1968).

[82] 86 N.J. at 274, 430 A.2d at 910; *see* N.J. STAT. ANN. § 18A:22-38 (West Cum. Supp. 1981-1982).

[83] 86 N.J. at 275, 430 A.2d at 910 (citing Board of Educ. v. City Council, 55 N.J. 501, 506, 262 A.2d 881, 884 (1970) and Board of Educ. v. Township Council, 48 N.J. 94, 107, 223 A.2d 481, 487 (1966)). In *Board of Education v. City Council*, the supreme court decided that the Commissioner of Education could lawfully order a Type I school district to appropriate additional sums to pay for salary increases and to compensate substitute teachers. 55 N.J. at 504, 262 A.2d at 882. The court reached this conclusion even though the local authorities had excluded these items from the school budget. The court found that, "it is the duty of the Commissioner to see to it that every district provides a thorough and efficient school system. This necessarily includes adequate physical facilities and educational materials, proper curriculum and staff and

Justice Pollock then emphasized that the state's duty to provide a thorough and efficient education includes not only the duty to allocate sufficient current operating funds, but also the obligation to make necessary capital expenditures.[84] After noting that the legislature had not identified voter approval as the only acceptable method for the issuance of bonds, the court concluded that the Commissioner was fully empowered to authorize the required funding to ameliorate the "inadequate and inefficient" conditions at Allentown High School.[85] Justice Pollock declared: "The students and teachers of Allentown High School have been held hostage long enough. It is now time to proceed with the repairs to the school."[86]

The court qualified its order, however, by noting that in future cases the Commissioner must "exercise restraint" in overriding the voter approval requirements.[87] Further, the court stated that the public has a right to participate in any hearings before the Commissioner and reiterated that the Commissioner's decision is reviewable by the courts.[88] Finally, Justice Pollock emphasized that the municipalities in the Upper Freehold Regional School District would not exceed their debt limits if they issued the contemplated bonds. The court expressed no opinion as to whether the Commissioner could authorize the issuance of bonds which would either cause a school

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sufficient funds." *Id.* at 506, 262 A.2d at 883. In *Board of Education v. Township Council*, the voters in a Type II school district had twice rejected the school budget proposed by the board of education. Instead of certifying the amount it deemed necessary for the operation of the school system, the township council certified to the tax board an amount significantly less than the original budget. 48 N.J. at 98, 223 A.2d at 483. The supreme court found that the Commissioner is empowered to "direct appropriate corrective action by the governing body or fix the budget on his own" if he finds that the budget prepared is insufficient to enable compliance with mandatory legislative and administrative educational requirements." *Id.* at 107, 223 A.2d at 488. Thus, the Commissioner of Education can order both Type I and Type II school districts to budget additional monies for the thorough and efficient operation of the school system.

[84] 86 N.J. at 275-76, 430 A.2d at 911 (citing Robinson v. Cahill, 62 N.J. at 520, 303 A.2d at 297).

[85] *Id.* at 279, 430 A.2d at 912-13. It is important to note that the Attorney General fully concurs in this result as evidenced by Op. Att'y Gen. 26 (1977). In the opinion, the Attorney General stated:

> [I]t is our opinion that under the Education Clause of the State Constitution and the Public School Education Act of 1975, the Commissioner and the State Board are authorized to direct a local district to undertake a capital project where such a project is deemed essential to a constitutionally mandated thorough and efficient educational system even though the issuance of bonds for such expenditures may have been disapproved by the voters.

Id.

[86] 86 N.J. at 280, 430 A.2d at 813.

[87] *Id.*

[88] *Id.* at 279, 430 A.2d at 913.

district to exceed its borrowing capacity or impair its plans to meet other capital needs.[89]

2. *The Power of the State Commissioner of Education to Overrule the Public*

It is clear that the Commissioner of Education has been afforded broad statutory powers to effectuate constitutional and legislative mandates.[90] In fact, a careful examination of judicial precedent reveals that the courts have always permitted the Commissioner a wide range of discretion in the enforcement of educational mandates.[91] For example, in *Booker v. Plainfield Board of Education*,[92] the court decided that the Commissioner can either order a local school district to submit a formal plan to correct de facto segregation or prescribe a plan of his own.[93] The court reached this result despite the Commissioner's contention that it was beyond his authority "to interfere with local boards in the management of their schools unless they violate the law, act in bad faith . . . or abuse their discretion in a shocking manner."[94] Similarly, in *Jenkins v. Township of Morris School District*,[95] the Commissioner was allowed to compel two municipalities to continue their reciprocal services arrangement and order them to proceed with regionalization even though his mandates were not supported by a specific statute.[96]

As previously noted, the courts have also established the Commissioner's right to reinstate cuts made in a school budget by a governing body.[97] Plainly, this is a powerful and pervasive grant of authority. However, according to a 1977 opinion of the Attorney General, this power is a necessary right without which "the State would be [unable] to compel a local district to meet its constitutional obligation."[98]

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[89] *Id.* at 281, 430 A.2d at 913.

[90] N.J. STAT. ANN. §§ 18A:4-21 to 4-40, :7A-9, 10, 14, 15, 22 & 29 (West 1968 & Cum. Supp. 1981-1982).

[91] *See, e.g., In re* Masiello, 25 N.J. 590, 138 A.2d 393 (1958), where the supreme court held that the Commissioner has the power to decide all disputes and controversies arising under state law regarding education, including the power to exercise his "independent judgment" in determining proper corrective action. *Id.* at 607, 138 A.2d at 401-02. *See also* Morean v. Board of Ed., 42 N.J. 237, 200 A.2d 97 (1964) and Schults v. Board of Ed., 86 N.J. Super. 29, 205 A.2d 762 (1964), *aff'd.*, 45 N.J. 2, 210 A.2d 762 (1965).

[92] 45 N.J. 161, 212 A.2d 1 (1965).

[93] *Id.* at 178, 212 A.2d at 10.

[94] *Id.* at 177, 212 A.2d at 9-10.

[95] 58 N.J. 483, 279 A.2d 619 (1971).

[96] *Id.* at 508, 279 A.2d at 633.

[97] *See* note 84 *supra* and accompanying text.

[98] Op. Att'y Gen. 26 (1977).

In short, the Commissioner of Education is entitled to utilize forceful measures in order to compel compliance with constitutional and statutory guidelines. The right to order municipalities to issue bonds to finance needed capital projects is thus a logical and justifiable extension of the Commissioner's power over budgetary affairs of school districts.

3. *The Significance of* Upper Freehold.

At first impression the *Freehold* decision might be considered a radical break from tradition; however, a careful examination of prior law reveals that the courts had already sanctioned several other unusual solutions to the voter approval dilemma.

First and foremost, the courts have rarely sustained taxpayer challenges to the voting process itself, irrespective of the apparent validity of the claims. For example, in *Board of Education v. Bosco*,[99] the court found that the plaintiff-taxpayers had no constitutional or statutory right to compel the Board of Education to hold a second election so that voters would have an opportunity to rescind their approval of a school bond issue.[100] The court reached this result despite the fact that the plaintiffs presented a petition allegedly signed by forty-percent of the total voters qualified to vote in school district elections.[101]

Similarly, in *Citizens to Protect Public Funds v. Board of Education*,[102] the court refused to invalidate a school bond election on the grounds that the Board of Education had illegally allocated funds to distribute booklets and air radio broadcasts urging voters to approve the issuance of the bonds.[103] Noting that "[e]very school district is obligated to provide suitable school facilities and accommodations for all children who reside in the district," the court decided that the school board has the implicit power to make any reasonable expenditure necessary to inform voters of the need for improved facilities.[104] The court stated, "[w]hen the program represents the [board's] judgment of what is required in the effective discharge of its responsibility,

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[99] 138 N.J. Super. 368, 351 A.2d 36 (Law Div. 1975).

[100] *Id.* at 378, 351 A.2d at 41. The court noted that it could find no statutory provision which would "return to the people the right, by referendum or otherwise, to compel the board to even reconsider the proposal heretofore approved by the district electors at the special election of December 10, 1974." *Id.*

[101] *Id.* at 371, 351 A.2d at 37.

[102] 13 N.J. 172, 98 A.2d 673 (1953).

[103] *Id.* at 178, 98 A.2d at 676.

[104] *Id.* at 179, 98 A.2d at 676.

it is not only the right but perhaps the duty of the body to endeavor to secure the assent of the voters."[105]

In an attempt to insure voter approval of school bond issues, several boards of education have employed rather creative polling practices. Suprisingly, the courts have often endorsed these atypical election procedures.

For instance, in *Kimsey v. Board of Education School Dist. No. 273*,[106] the Board of Education conducted the elections on the bond issue on a Saturday. The court noted that such elections are usually held on a Tuesday, but in the absence of any statutory or judicial authority proscribing Saturday elections the court refused to invalidate the election results.[107] In *Flanagan v. Nyguist*,[108] the court affirmed the Commissioner of Education's ruling that a school district need not provide for absentee voting in order to comply with constitutional due process mandates.[109]

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[105] *Id.* at 181, 98 A.2d at 677. *See also* Welsh v. Board of Educ., 7 N.J. Super. 141, 72 A.2d 350 (App. Div. 1950). In *Welsh*, the court dismissed an appeal brought by taxpayers demanding a recount of votes. The court found, *inter alia*, that the Board of Education had given the voters sufficient notice of the election even though the record did not indicate whether standard or daylight saving time would be in effect. *Id.* at 145, 72 A.2d at 352.

[106] 211 Kan. 618, 507 P.2d 180 (1973).

[107] *Id.* at 627, 507 P.2d at 187. The court also refused to enjoin the issuance of the bonds on the basis that unfair campaign tactics had been used in the election. The court noted that "unscrupulous campaign methods must be met in some other way than by an action to enjoin issuance and sale of bonds." *Id.* at 630, 507 P.2d at 189 (quoting Humphrey v. City of Pratt, 93 Kan. 413, 416, 144 P. 197, 198 (1914)).

[108] 38 A.D.2d 645, 327 N.Y.S.2d 119 (1971), *cert. denied*, 406 U.S. 907 (1972).

[109] *Id.* at 646, 327 N.Y.S.2d at 120. Holding Saturday elections and failing to poll absent voters are just two of the innovative strategies employed by boards of education in an attempt to mitigate the effects of voter rejection. For other noteworthy methods for eliciting positive voter response, see Stelzer v. Huddleston, 526 S.W.2d 710 (Tex. Civ. App. 1975) (voters provided with only 72 hours notice of election); Wright v. Board of Trustees, 520 S.W.2d 787 (Tex. Civ. App. 1975) (informal canvassing techniques utilized). In *Wright*, the court refused to invalidate the election despite charges that some of the voters were not qualified to vote, that the election returns were not delivered to the proper party, that the poll lists were not certified in accordance with Texas law, that the pollsters had not been adequately trained, and that some of the voting machines had not been set at zero. 520 S.W.2d at 792-93. The court found that none of these alleged irregularities affected the outcome of the election. *Id.* at 793. In Town of Groton v. Union School Dist. No. 21, 127 Vt. 142, 241 A.2d 332 (1968), the school district had provided three polling places when the original bond issue was presented to the voters; however, on a subsequent election held to consider rescinding approval of the issue, votes could be cast at only one location. *Id.* at 146-47, 241 A.2d at 335. The court found that the polling arrangements were sufficient. *Id.* Finally, in Byron v. Timberland Regional School Dist., 113 N.H. 449, 309 A.2d 218 (1973), the bond issue in question twice failed to receive the requisite approval from two-thirds of all voters present and voting. Nevertheless, the court found that the resolution authorizing the issuance of bonds was validly adopted at the third election and declared that

Clearly, then, the courts have recognized the frustration felt by school officials who want to provide adequate facilities and equipment for their pupils but are constrained by the lack of voter approval. The *Freehold* decision may therefore be characterized as simply a clear and definite expression of judicial intolerance for students "held hostage"[110] by unsympathetic voters. Accordingly, the significance of the *Freehold* opinion lies in its minimization of the importance of voter approval. This new trend toward school district independence should thus encourage educational bodies to consider alternative forms of capital funding which do not depend upon a favorable response from the voters.

IV. The Need for an Alternative Financing Method

Remedial action was only taken in Upper Freehold after the school facilities reached such a state of disrepair that the constitutional right to a thorough and efficient education was severely impaired. Given a method of financing which requires voter approval, should the only avenue of redress be an extensive and costly appeal to the Commissioner of Education and to the courts? The cumbersome nature of such a process makes it appropriate to consider its inherent problems and to examine alternative methods of financing public school capital improvements.

A. *Practical Problems Resulting from the Need for Voter Approval*

Generally, municipal and county debt is governed by the provisions of the local bond law,[111] which imposes a restriction upon the amount of indebtedness that may be incurred.[112] This restriction is a function of a percentage of assessed property valuations within the municipality or county.[113] These limitations may be exceeded under

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"any bonds issued pursuant thereto would be legal obligations of the district." *Id.* at 457, 309 A.2d at 223. Indeed, the only practice which is routinely condemned by the courts is failing to provide notice of changes in voting district boundaries at least twenty-one days prior to the election. *See* Lambert v. Unified School Dist. No. 237, 204 Kan. 381, 461 P.2d 744 (1969) (for notice of bond election to be effective after change in boundary lines, publication must occur at least twenty-one days prior to election).

[110] *Freehold*, 86 N.J. at 280, 430 A.2d at 913.

[111] N.J. Stat. Ann. § 40A:2-1 to 64 (West 1980 & Cum. Supp. 1981-1982).

[112] *Id.* § 40A:2-6 (West 1980).

[113] *Id.*

certain circumstances with the consent of the local finance board;[114] however, up to the limit there are no requirements for voter approval.[115] It is left to the governing body to determine when, how much, and for what purpose indebtedness is incurred.[116] If their judgment is poor, or if prudence is not observed, the governing body will pay at the polls. Thus, the requirement of voter approval for Type II school debt is the exception, not the rule, for the issuance of obligations in New Jersey.

Within limits, this type of flexibility is desirable. The planning and financing of substantial capital projects is an involved process. From the initial design stage, scores of professionals such as architects, engineers, and attorneys are involved. Once a project is reviewed and approved, financing may take place in a variety of ways. It may be determined that interim financing should be followed until the project is complete, at which time it will be permanently funded through the issuance of long-term debt.[117] Under existing legal schemes, the municipality through its governing body will make these determinations.[118]

The requirement of voter approval injects significant uncertainty into the process. Before a particular project can be placed before the voters for their consideration, much of the initial planning and preparation must be accomplished. The size and scope of the project must be established and relative costs must be determined.[119] At the precise juncture in the process when the normal practice would be to obtain financing, finalize plans and specifications, advertise for bids, and let contracts, the project is instead halted and placed before the voters. If the project is approved, then the normal pace of events may resume: financing can be secured, construction begun, and a finished project presented to the ultimate users. If the project is rejected by the voters, then the process is abruptly halted. If there has not been a proper determination as to the relative need of the project, that is, if

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[114] *Id.* § 40A:2-7(d). The local finance board may consent if it determines that the amount sought is in the public interest and will not "materially impair" the municipality's or county's credit or ability to repay its debts. *Id.* (The term "local government board" as used in the statute is synonomous with "local finance board." *Id.* § 52:27BB-2 (West Cum. Supp. 1981-1982)). N.J. STAT. ANN. § 40A:2-7 (West 1980) sets forth additional exceptions to debt limitations, particularly in the event of emergencies.

[115] *See id.* § 40A:2-1 to 64 (West 1980 & Cum. Supp. 1981-1982).

[116] *See id.* § 40A:2-3 (West 1980).

[117] *Id.* § 40A:2-8.

[118] *Id.*

[119] *See id.* § 18A:24-24 (West Cum. Supp. 1981-1982) for the required form of a proposal to issue school bonds.

the voters are "correct," then an end to the process may be appropriate. Conversely, if a valid need exists, then the government officials are left with a dilemma: should they redesign the project and alter its scope in order to bring its cost down, thereby increasing the likelihood of voter approval; or should they embark upon a public relations campaign in the hope that the voters will approve the issue after learning more about the project? In the meantime, of course, several factors crucial to the completion of the project will have changed. Because of the inevitable inflation in the cost of construction projects the total cost of the finished project may be substantially higher than originally planned.[120] In addition, conditions in the credit markets may have become so adverse that the interest cost on the debt is significantly higher. There are many instances of projects which are designed, planned, placed before the voters, and in some cases approved, but which must be abandoned because the amount of time necessary to go through this process has rendered the price estimate obsolete. Whatever arguments one may make in favor of the policy of voter approval, one cannot help but question whether it is conducive to a flexible and efficient method of financing capital improvements.

B. *Utilization of County Improvement Authorities to Finance Public School Facilities*

Under existing New Jersey law, municipalities, counties, and other political subdivisions are not limited to their ability to finance under the local bond law with respect to the acquisition of capital assets. Under the County Improvement Authorities Law,[121] counties may create authorities[122] for the purpose of providing public facilities within the county.[123] The Law empowers such authorities to construct and lease various types of "public facilities" to either the county or municipalities and other governmental units within the county.[124] This method of financing has been used to provide a variety of capital improvements for use by municipalities, counties, and the state.[125] An analysis of the County Improvement Authorities Law should be

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[120] For example, in *Upper Freehold Township* the cost of the repairs to the school escalated to an amount nearly two-thirds greater than the original estimate. 86 N.J. at 280, 430 A.2d at 913.

[121] N.J. STAT. ANN. § 40:37A-1 to 135 (West 1967 & Cum. Supp. 1981-1982).

[122] *Id.* § 40:37A-46 (West 1967).

[123] *Id.* § 40:37A-54 (West Cum. Supp. 1981-1982). County improvement authorities were authorized so that each county could, *inter alia*, construct public buildings, improve public transportation, develop aviation facilities, update sewage and waste disposal systems, provide loans for redevelopment, and increase the middle and low income housing stock. *Id.*

[124] *Id.* § 40:37A-54(d).

[125] *Id.*

made to determine whether this long-accepted method of financing could be utilized to provide public school facilities.

The ability of school districts to enter into lease financing arrangements with a county improvement authority depends upon two determinations. First, it must be established that school districts are in fact governmental entities with which county improvement authorities may enter into lease arrangements. Second, it is essential to determine whether the restrictive provisions relating to school district lease powers would permit a viable lease financing arrangement.

County improvement authorities were created in order to insure the "provision within the county of public buildings for use by the state, county, or any municipality in the county, or any two or more or any subdivisions, departments, agencies, or instrumentalities of any of the foregoing."[126] To achieve this goal, authorities are empowered "to lease such public facilities to any county, municipality, governmental unit or person."[127] "Governmental unit" is defined to include "the state, or any county or municipality or any subdivision, department, agency or instrumentality heretofore or hereafter created, designated or established by or for . . . the state or any county or municipality."[128]

In *Botkin v. Westwood*,[129] the Borough of Westwood sought to poll the voters on the issue of school district deconsolidation. In holding that the borough was not entitled to take this course of action, the court declared:

> In New Jersey, school districts of whatever classification, though co-terminus with municipal boundaries, . . . are, and have been for more than half a century, local governmental units, governed by a board of education. They are separate, distinct and free from the control of the municipal governing body except to the extent our education law provides.[130]

In numerous other decisions and attorney general opinions it has been clearly determined that school districts are created pursuant to, and derive their powers from, state law and that they are separate and distinct political subdivisions of the state.[131] It is equally clear from

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[126] *Id.* § 40A:37A-54(a).

[127] *Id.* § 40:37A-78 (West 1967).

[128] *Id.* § 40:37A-45(k) (West Cum. Supp. 1981-1982).

[129] 52 N.J. Super. 416, 145 A.2d 618 (App. Div.), *app. dismissed*, 28 N.J. 218, 146 A.2d 121 (1958).

[130] *Id.* at 425, 145 A.2d at 623 (citations omitted).

[131] Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 79 N.J. 574, 579, 401 A.2d 681, 683 (1979) ("Local boards of education are creations of the State and, as such, may exercise only those powers granted to them by the legislature—either expressly or by necessary or fair implica-

an analysis of the County Improvement Authorities Law that school districts are "subdivisions" of the state within the meaning of that Law and as such are authorized to enter into lease financing arrangements with county improvement authorities in order to effectuate the purposes of the Law.[132] In view of the broad definitional provisions of the County Improvement Authorities Law, it would indeed be a narrow and restrictive reading of that Law to conclude that school districts did not fall within the class of entities for which county improvement authorities may construct public facilities and with which such authorities may enter into lease agreements.

Having determined that school districts may enter into lease arrangements with county improvement authorities, it is necessary to ascertain that the terms of such leases would not be subject to the restrictions under which school districts normally operate.

The state has invested school districts with a limited range of leasing powers. Type II districts may rent buildings for school purposes without voter approval on a year-to-year basis, or, in an emergency, for a term not to exceed five years.[133] In all other situations, any school district may "lease for a term not exceeding 50 years" land or buildings needed for school purposes.[134] In the case of Type II school districts without a board of estimate, the law indicates that any such long term leases require voter approval.[135]

The County Improvement Authorities Law, on the other hand, purports to give an authority, and any entity entering into a lease with such authority, broad powers with respect to the terms and provisions that such lease may contain. For example, the lease may be entered into for any term or an unlimited term, it may be with or without

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tion."); Board of Educ. v. Bosco, 138 N.J. Super. 368, 374, 351 A.2d 36, 39 (Law Div. 1975) (legislature established educational system through creation of political subdivisions such as local boards of education). *See also* Op. Att'y Gen. 28 (1976), which states that "[l]ocal boards of education are political subdivisions created by the legislature and empowered by it to provide, maintain and supervise local school districts."

[132] N.J. STAT. ANN. § 40:37A-78 (West 1967).

[133] *Id.* § 18A:20-4.1(a) (West Cum. Supp. 1981-1982).

[134] *Id.* § 18A:20-4.2(c) (emphasis added). The law provides that the terms of any lease which is to exceed one year must be approved by the Commissioner of Education and the local finance board in the Department of Community Affairs. *Id.* § 18A:20-4.2(d).

[135] *Id.* However, the Attorney General has indicated that an election is not necessary when the acquisition is to be entirely financed by federal funds. In Op. Att'y Gen. 28 (1976), he stated that "where school construction is entirely financed by grant moneys, voter approval would not be a necessary element in the authorization of such project. These projects would be properly authorized by appropriate board action following the receipt of the requisite approvals for school construction." *Id.* at 3. The Attorney General also noted that "[T]his conclusion does not concern Type I school districts, or type II districts with boards of school estimate since such districts are not required by statute to obtain voter approval for construction projects under any circumstances." *Id.* at 4.

consideration, and it is a valid and binding obligation on the parties whether or not the governmental units in question have made the necessary appropriations to pay the lease payments prior to its authorization.[136] Furthermore, an entity entering into such a lease with a county improvement authority is directed to do any and all things necessary to provide for the "payment or discharge of any obligation thereunder in the same manner as other obligations" of such governmental entity.[137] Although there are no cases construing this particular provision, virtually identical language in the County and Municipal Utilities Authorities Law[138] has been subject to review by the courts.

In *Graziano v. Mayor & Township Committee*,[139] taxpayer plaintiffs challenged the legality of a sewer service contract entered into between the Township of Montville and the Montville Township Municipal Utilities Authority (MUA). Under the terms of the contract the municipality agreed to pay any deficit that might result if the MUA failed to charge users for the full debt service and operating costs incurred in connection with the MUA's sewer system.[140] Judge Botter took notice of the "sweeping terms" of the County and Municipal Utilities Authorities Law which provided that service contracts between an MUA and a municipality could be made on any terms and conditions approved by the municipality, for a specified or unlimited time, and that they would be valid whether or not an appropriation with respect thereto were made by the governmental unit prior to authorization of the contract.[141] The court was faced with the dilemma of reconciling these "sweeping terms" with more general stat-

[136] N.J. STAT. ANN. § 40:37A-78 (West 1967).

[137] *Id.*

[138] *Id.* § 40:14B-1 to 69 (West 1967 & Cum. Supp. 1981-1982).

[139] 162 N.J. Super. 552, 394 A.2d 103 (App. Div.), *certif. denied*, 79 N.J. 462, 401 A.2d (1978).

[140] 162 N.J. Super. at 556-57, 394 A.2d at 105. The court found support for its position by analogizing the municipal utilities authority system to that of the State Building Authority. *Id.* at 562, 394 A.2d at 107-08. In McCutcheon v. State Bldg. Auth., 13 N.J. 46, 97 A.2d 663 (1953), the court found that the building authority could not constitutionally issue bonds and construct buildings which were then to be leased back to pay the debt service. *Id.* at 63, 97 A.2d at 671. Justices Jacobs and Brennan dissented because they felt that rent due in the future could not be considered a present liability of the State. *Id.* at 71, 97 A.2d at 676 (Jacobs, J. & Brennan, J., dissenting). In fact, the dissenting view is now the controlling position as evidenced by several recent opinions. *See* City of Camden v. Byrne, 82 N.J. 133, 153, 411 A.2d 462, 473 (1980) (court refused to compel legislature to allocate funds to municipalities and counties on permanent basis as this would convert applicable statutes into "'debts' binding upon future legislatures"); Holster v. Board of Trustees, 59 N.J. 60, 71, 279 A.2d 798, 804 (1971) ("projected or anticipated future legislature appropriation not a present debt or liability"); Clayton v. Kervick, 52 N.J. 138, 155, 244 A.2d 281, 290 (1968) (Educational Facilities Authority plan to issue bonds for construction and lease of buildings for higher education not violative of constitutional debt limitations).

[141] 162 N.J. Super. at 561, 394 A.2d at 107.

utes which regulate the fiscal affairs of municipalities. For example, the court noted "normally, municipal contracts cannot be made for more than one year because provisions of the local budget law . . . forbid expending funds and incurring obligations for which no appropriations had been made."[142] The court took further notice of provisions of the local public contracts law which limit the duration of contracts,[143] and provisions of the local bond law which limit the amount of indebtedness that a municipality may incur.[144]

In upholding the validity of the service contract in question, the court stated that the specific provisions of the Municipal and County Utilities Authorities Law controlled the subject matter of the contract in question to the exclusion of general provisions of other laws governing debt limitations and contract requirements.[145] The court concluded that the County and Municipal Utilities Authorities Law "validly authorized the Township to take on obligations to the MUA that are limited only by the good sense and fiduciary responsibility of the Township's officers."[146]

Judge Botter's reasoning in the *Graziano* decision is equally applicable to lease arrangements entered into pursuant to the County Improvement Authorities Law. The purpose of the Law is specific and the provisions relating to lease powers are broad. It is reasonable to conclude, therefore, that a court would adopt the reasoning set forth in *Graziano* and hold that the provisions of the County Improvement Authorities Law would permit an authority and a school district to enter into a long-term, unconditional lease financing arrangement, notwithstanding the restrictions governing school district lease powers generally.[147]

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[142] *Id.* at 563-64, 394 A.2d at 108-09 (citing N.J. STAT. ANN. § 40A:4-57 (West 1980)).

[143] N.J. STAT. ANN. § 40A:11-15 (West 1980).

[144] *Id.* § 40A:2-6.

[145] 162 N.J. Super. at 564, 394 A.2d at 109.

[146] *Id.*

[147] The budgetary planning and approval process for Type II school districts without a board of estimate is rather complicated. Annually, the Board of Education must prepare a budget. N.J. STAT. ANN. § 18A:22-7 (West Cum. Supp. 1981-1982). The items of expenditure and revenue which must be set forth in the budget are set out by law in great detail. *Id.* § 18A:22-8. Upon preparation of the budget the Board of Education must hold a public hearing. *Id.* § 18A:22-10 to 13 (West 1968 & Cum. Supp. 1981-1982). At or after the public hearing on the budget, but not later than 12 days prior to the election, the Board must fix the amount of money to be voted upon at the annual election, and this sum must be designated in the election notice. *Id.* § 18A:22-32 (West Cum. Supp. 1981-1982). The budget is then submitted to the voters at the annual school election. *Id.* § 18A:22-33.

It should be noted, however, that the amount necessary to pay interest and debt redemption charges on outstanding debt of the school district is not voted upon, but is certified to the county board of taxation, together with the amounts approved at the budget election. The total

Although the County Improvement Authorities Law has not yet been employed to provide financing for public school facilities, it is a viable alternative to the present financing system.[148] It is helpful to illustrate the exact means by which this potential method of financing would be utilized.

Assume that a particular county has created a county improvement authority. Within that county is a school district which desires to replace an obsolete building with a new and expanded public education facility which will both meet the needs of existing students and provide room for expected growth in the population. The school

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amounts so certified must be included in the taxes assessed, levied, and collected in the municipality or municipalities comprising the school district. *Id.* Assuming the budget is approved, then the amounts in the budget are certified to the county and must be assessed, levied, and raised in the municipality or municipalities composing the district. *Id.* § 18A:22-34. If the budget is rejected by the voters or if any part of the budget is rejected, then the Board of Education must deliver the proposed budget to the governing body of the municipality or municipalities included within the district. The governing body of each municipality in the district must, after consultation with the Board of Education, determine the amount which, in its judgment, is necessary to be appropriated for each item appearing in the budget "to provide a thorough and efficient system of schools in the district" and must certify to the County Board of Taxation the totals of the amount so determined to be necessary. *Id.* § 18A:22-37. If the Board of Education disagrees with the amount certified by such governing body or bodies, it may appeal the municipality's determination to the Commissioner of Education. *Id.* If the governing body of any municipality within the district fails to certify the amount determined by them to be necessary for any item rejected at the annual school election, then the Commissioner shall determine the amount or amounts which in his judgment are necessary to be appropriated. The amount so certified must be included in the taxes to be assessed, levied, and collected in any such municipality. *Id.* § 18A:22-38.

[148] It is interesting to note that the State of Pennsylvania already employs the concept of lease financing in the construction of public school facilities. Under the terms of the State Public School Building Authority Act, PA. STAT. ANN. tit. 24, § 791.1-17 (Purdon 1962 & Cum. Supp. 1981-1982), the state created an authority "for the purpose of constructing, improving, maintaining and operating, buildings for public school and educational broadcasting facilities and furnishing and equipping the same for use as part of the public school system." *Id.* § 791.4 (Purdon Cum. Supp. 1981-1982).

The authority issues bonds, constructs the facilities, and then leases them back to the individual districts. *See id.* § 791.4(h) & (i) (Purdon 1962). The authority cannot pledge the credit or taxing power of the state as security for the bonds but instead secures the debt by pledging rental revenues received from the leasing districts. *Id.* § 791.4(n) & (i).

The Pennsylvania courts have fully endorsed this lease financing scheme. In Greenhalgh v. Woolworth, 361 Pa. 543, 64 A.2d 659 (1949), the state supreme court found that the school district's 30 year lease of a building constructed by the state building authority did not violate the debt limitation clause of the state constitution even though title to the building would be surrendered to the school district at the end of the lease. *Id.* at 556-57, 64 A.2d at 666. Similarly, in Bentley v. Conneaut Twp. School Dist., 35 Erie 67, 82 Pa. D. & C. 267 (1953), the court found that construction of a building by the authority could continue where the lease rentals had to be slightly increased due to higher construction costs.

Clearly, then, the State of Pennsylvania has found lease financing to be an effective way to comply with its constitutional mandate for a thorough and efficient education. *See* PA. CONST. art. II, § 14.

district has approached the authority with a plan for constructing a new facility. The authority issues its bonds[149] and uses the proceeds to construct a new facility for the school district. The facility is leased to the school district for a term which is coterminus with the maturity date of the bond issue. The lease payments payable to the county improvement authority are equivalent to the principal and interest payments on the bond issue and are in fact applied to meet such payments.[150] At the end of the lease term and upon payment of the bonds, title to the facility passes to the school district. The terms of the lease are absolute. The school district promises to pay without setoff or counterclaim an amount equal to the debt service requirements of the authority's bond issue. The school district promises in the lease to make all budgetary and other provisions in order to provide sufficient funds to meet its obligations under the lease. This means that the school district will include an amount at least sufficient to make such payments as its proportionate share of the municipal tax levy.[151] In the event that the school district fails to make the required payments, the improvement authority's option will be to evict the school district from the building and to utilize whatever other landlord-tenant remedies are available to it.[152]

The advantages of this financing method are apparent. First, the school district itself is not burdened with the obligation to enter the public credit markets in order to obtain sufficient funds. The improvement authority, which in many cases will have ready access to the market, undertakes this obligation. It may even be agreed that the improvement authority will assume the responsibility for actually constructing the facility, thereby eliminating the need for the school district to become involved in this phase of the project. In effect, the method of financing can be fashioned as a "turnkey" endeavor.[153] Another advantage is that the county improvement authority will be permitted to sell its bonds on a negotiated basis as opposed to a public sale. This means that the authority will be working with an experienced investment banker throughout the course of the financing,

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[149] *See* N.J. STAT. ANN. § 40:37A-118 (West Cum. Supp. 1981-1982).

[150] *See, e.g.*, Clayton v. Kervick, 52 N.J. 138, 141-42, 244 A.2d 281, 282-83 (1968).

[151] N.J. STAT. ANN. § 18A:22-34 (West Cum. Supp. 1981-1982).

[152] Other remedies available to the authority are codified in the County Improvement Authority Law. *See id.* § 40:37A-68.1 (county improvement authority may enter into contract or agreement to meet deficiencies in revenues provided that it obtains approval of director of division of loan government services); *id.* § 40:37A-129 (authority can obtain insurance for payment of interest or principal, or both, from any department or agency of United States).

[153] A turnkey project is one in which a developer completes construction without governmental assistance and turns the keys over to the authority upon completion. Lehigh Constr. Co. v. Housing Auth., 56 N.J. 447, 480, 267 A.2d 41, 46 (1970).

which in many cases will result in a more advantageous financial structure for the project than could be obtained in the rather limited public bid procedures which a Type II school district would have to follow in the sale of its bonds.[154] Of course, the county improvement authority could also employ a public sale method if this were deemed to be more desirable. The flexibility which the authority could provide should not be underestimated. In fact, the only disadvantage of the lease financing method is that there might be slightly higher transaction costs with respect to the actual financing itself.

There are a number of creative ideas which could be utilized when financing public school facilities through a county improvement authority. Perhaps the most useful techniques are made possible by the natural economies of scale which authority financing produces.

A county improvement authority active in the area of public school financing could arrange such financing for a number of different school districts within its geographical boundaries under a "pooling" method of financing. This means that the authority would finance facilities for a variety of municipalities and school districts, perhaps with a single bond issue. The lease payments from the various school districts and municipalities would be "pooled" to provide one unified flow of revenue for the payment of debt service. This could make the bond issue more attractive to investors since the security for the issue would not be a single governmental entity. Rather, the "risk" would be spread over a number of different lessees. Less prosperous school districts might benefit from this risk-spreading effect because one "bad" credit would have less impact than if the financing were done on an individual basis. Consequently, the ability of poorer school districts to comply with the constitutional mandate of a thorough and efficient education could be enhanced. While investors and bond rating agencies might evaluate a pooled financing on the basis of the worst risk, such a result could be mitigated by employing alternate security mechanisms permitted under the County Improvement Authorities Law.

In addition to authorizing lease agreements between an authority and the county or municipality, the County Improvement Authorities Law permits counties and municipalities to agree to "appropriate moneys for the purposes of the authority, and to loan or donate such money to the authority in such installments and upon such terms as may be agreed upon with the authority."[155] This method could be employed to provide a backup security to the obligation of the school

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[154] N.J. STAT. ANN. § 18A:24-36 (West 1968).

[155] *Id.* § 40:37A-79 (West 1967).

district to make lease payments to the county improvement authority. This transfer of credit from the municipality or county would certainly enhance the security of the bond issue. This security could be arranged either on an individual basis with the municipality in which the school district was contained or possibly through a county-wide arrangement under which the county agreed to make up any deficiencies in debt service requirements caused by the default of one or more participating school districts.

An additional security mechanism is the use of commercial insurance for the purpose of providing a guarantee of debt incurred to finance public school improvements.[156] The Municipal Bond Insurance Association (MBIA) and the American Municipal Bond Assurance Corporation (AMBAC) are well-known entities which provide insurance for municipal bond issues.[157] These organizations are widely used in connection with the marketing of bond issues which might not otherwise be marketable at an acceptable rate of interest.[158] Of course, premium expenses are a significant cost and the relative advantage of such an insurance program would have to be evaluated on a case-by-case basis with competent financial advisory assistance.

In summary, the County Improvement Authorities Law could be utilized to provide financing for public school facilities. Issuing bonds through the authority would afford school districts access to creative marketing techniques and sophisticated security mechanisms. In addition, the flexible nature of the lease financing transaction would allow the school districts to enter the credit market more readily than they are able to under the present system.

C. *Policy Considerations*

The financing of public school facilities by county improvement authorities through the issuance of revenue bonds is no doubt a more liberal method of financing and significant public policy questions are apparent. Any alternative financing method which obviates the need for voter approval arguably constitutes an evasion of a "right" of the

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[156] *See, e.g., id.* § 40:37A-129 (West Cum. Supp. 1981-1982). This statute empowers the county improvement authorities to obtain insurance or guarantees from any department or agency of the federal government. *Id.*

[157] Standard & Poor's grants AMBAC and MBIA insured bonds an AAA rating. R. LAMB & S. RAPPAPORT, MUNICIPAL BONDS 318 (1980). *See also* PUBLIC SECURITIES ASSOCIATION, FUNDAMENTALS OF MUNICIPAL BONDS 64 (1st ed. 1981).

[158] *See* R. LAMB & S. RAPPAPORT, *supra* note 157, at 317. "These issues do not need insurance in order to gain their rating or be sold; however, the intent is to enable good and solid issuers . . . to find a wider, more national market and to help reduce their interest cost." *Id.*

voting public to approve or reject such projects.[159] Similar arguments have been attempted in the past, but have been rejected by the New Jersey courts.[160] These disputes involved attempts by the state to acquire capital facilities through a lease financing mechanism. It was argued that the state could not enter into a long-term obligation to finance capital improvements because such an obligation would constitute an indebtedness of the state. Since indebtedness of the state can only be incurred after approval by the voters, such a lease financing scheme was alleged to constitute an unconstitutional evasion of this requirement.[161] This argument was rejected by the New Jersey courts and the validity of the lease financing mechanism was upheld. In these cases, however, the lease obligation was not unconditional, but

[159] When the framers wrote the United States Constitution there were clearly defined areas which were considered to be appropriate for the voters. *See, e.g.*, U.S. CONST. art. 1, & 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); Mahan v. Howell, 410 U.S. 315, *modified on other grounds*, 411 U.S. 922 (1973) (Constitution commands that representatives be chosen by people); Kirkpatrick v. Priesler, 394 U.S. 526 (1969) (in congressional election one man's vote must be worth as much as another's). Certain matters, however, were deemed too important to be subject to the desires of the majority and were written into the Constitution for the express purpose of preventing their later repeal by the populace. *See, e.g.*, U.S. CONST. amend. I; Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (purpose of first amendment is to protect free discussion of governmental affairs); Buckley v. Valeo, 424 U.S. 1 (1976) (government may not aid religions even if it attempts to aid all religions equally). In New Jersey there is a recognized right to a thorough and efficient education. *See* notes 6-43 *supra* and accompanying text. Although it is apparent that the legislature and the framers of the state constitution intended that this constitutional mandate be effectuated through the local school boards, it would indeed be anomolous to conclude that their intent was to provide a "thorough and efficient education" *only if the voters so approve*. Accordingly, the right of the voting public to approve or reject school bond issues must be afforded a degree of importance which does not impair the students' right to receive an adequate education.

[160] *See* note 161 *infra*.

[161] *See, e.g.*, Holster v. Board of Trustees, 59 N.J. 60, 279 A.2d 798 (1971), which held that the County College Bond Act, N.J. STAT. ANN. § 18A:64-1 to 29 (Cum. Supp. 1981-1982), did not violate the debt limitation clause of the New Jersey Constitution, N.J. CONST. art. VIII, § II, para. 3, because no legislature can bind a future body to approve specific appropriations. Consequently, since future legislatures are not bound to appropriate funds, the expected or anticipated debt cannot be deemed to be a present liability of the State. 59 N.J. at 71, 279 A.2d at 804. *But see* McCutcheon v. State Bldg. Auth., 13 N.J. 46, 97 A.2d 663 (1953), which found that future payments do violate the constitutional debt limitation. The *Holster* court noted that the *McCutcheon* opinion "retains little vitality today." 59 N.J. at 73, 97 A.2d at 805. Further, in Clayton v. Kervick, 52 N.J. 138, 244 A.2d 281 (1968), the court reached an analogous result in upholding the Educational Facilities Authority Law. The *Clayton* court also noted that lease financing has been approved by courts in many other jurisdictions. 52 N.J. at 154, 244 A.2d at 289 (citing McArthur v. Smallwood, 225 Ark. 328, 281 S.W.2d 428 (1955) (state office building); Berger v. Howlett, 25 Ill.2d 128, 182 N.E.2d 673 (1962) (state hospital and penitentiary complex); State v. Board of Regents, 167 Kan. 587, 207 P.2d 373 (1949) (state armories); *In re* Board of Pub. Bldgs., 363 S.W.2d 598 (Mo. 1963) (state office buildings); *In re* Okla. Capitol Improvement Auth., 410 P.2d 46 (Okla. 1966) (financing buildings for public safety department); *In re* Okla. Capital Improvement Auth., 355 P.2d 1028 (Okla. 1960) (state office building); State v. Giessel, 271 Wis. 15, 72 N.W.2d 377 (1955) (state office building, gymnasium, university, dormitories)).

was subject to annual appropriations by the state legislature,[162] and was, in effect, a year-to-year obligation. The courts did not reach the question of whether a long term lease which was not conditional upon future appropriations would be in conflict with the voter approval requirement. Thus, it is unclear whether a New Jersey court would permit the independent lease power grant in the County Improvement Authorities Law to override the general requirement that Type II school districts obtain voter approval prior to entering into long term leases.[163]

Moreover, while it is arguable under *Graziano* that the County Improvement Authorities Law would take precedence over the statutes defining school districts' lease powers, it is questionable whether there is sufficient authority for bond counsel to issue an opinion

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[162] *See* Holster v. Board of Trustees, 59 N.J. 60, 279 A.2d 798 (1971) and Clayton v. Kervick, 52 N.J. 138, 244 A.2d 281 (1968), which held that the legislature must annually appropriate the funds to make the annual lease payments. In other words, the legislature is not legally bound to automatically provide the required funds. Unlike the state legislature, however, local boards of education do have the power to take actions which will bind future acting bodies. Rall v. Board of Educ., 104 N.J. Super. 236, 249 A.2d 616 (App. Div. 1968), *rev'd on other grounds*, 54 N.J. 273 (1969). In *Rall*, the court found that since the legislature had empowered school boards to set tenure requirements shorter than the statutory minimum, it impliedly intended the decisions of one board to continue beyond the life of that board. *Id.* at 244, 249 A.2d at 620. The court cited other statutes which specifically indicate that a school board may enter into contracts or agreements that will bind future acting bodies. *See, e.g.*, N.J. STAT. ANN. § 18A:29-4.1 (West 1968) (salary schedule binds adopting and future boards for two years after date of adoption); *id.* § 18A:27-3 (West 1968) (teacher employment contracts binding until June 30); *id.* § 18A:39-2 (West Cum. Supp. 1981-1982) (school transportation contract to run for four years). Consequently, it is quite apparent that the lease financing arrangement between one school board and a county improvement authority would be binding upon future acting boards. Furthermore, should a future school board fail to include the requisite lease payments in its budget the Commissioner of Education could order a budgetary increase sufficient to cover the payments. *See* notes 78-83 *supra* and accompanying text.

[163] There is one other way which the lease financing transaction could be structured. As previously noted, municipalities are clearly empowered to enter into leases within county improvement authorities. N.J. STAT. ANN. § 40:37A-78 (West 1967). Furthermore, municipalities may acquire real or personal property "in trust for, on behalf of, or as agent for, any other political subdivision or body corporate and politic" of the state. *Id.* § 40A:12-20 (West 1980). Significantly, a municipality may convey land or buildings to any county, local, regional or consolidated board of education that plans to use the property for educational purposes. *Id.* § 40A:12-19. The law also indicates that only a nominal consideration need be paid for the property and does not specify a particular manner in which the conveyance must be executed. *Id.*

Accordingly, a municipality could enter into a lease financing transaction with a county improvement authority for the benefit of a local school district. The municipality could obligate itself under the lease on an unconditional basis and sublease the facility to the school district on a year-to-year basis. This arrangement would avoid any possible conflict with the voter approval requirements and would result in a secure, and therefore marketable, lease financing structure.

Ordinarily, municipalities may not make expenditures which exceed the limitations set forth in N.J. STAT. ANN. § 40A:4-45.1 to 45.5 (West 1980). Significantly, however, the County Improvement Authorities Law was recently amended to provide that lease payments allocable to debt service on County Improvement Authority bonds issued to finance a facility in the county or municipality are exempted from the limitations in increasing appropriations. *See* N.J. STAT.

approving the use of lease financing. Nevertheless, the dire need for alternative sources of capital and the extreme utility of this financing method create the perfect conditions for a test case.

Furthermore, it is quite clear that school districts must comply with the constitutional mandate set forth in *Robinson*. The school boards are faced with a true Hobson's choice: should they accept voter rejection of bond issues and risk being sued for failing to provide a thorough and efficient education or should they seek alternative methods of financing which are not dependant upon voter approval? Plainly, this is a serious dilemma which many New Jersey school boards must soon resolve.[164]

CONCLUSION

The right to a thorough and efficient education is clearly being jeopardized by the inadequacies of many public school facilities; however, without voter approval school boards are unable to issue bonds to finance the needed repairs. The Supreme Court of New Jersey has indicated that the voter approval requirement may be relaxed when the need for capital improvements is great. In effect, the court has decided that students must be provided with a thorough and efficient education even when the voters refuse to authorize the funding needed to achieve that objective.

Accordingly, given the supreme court's commitment to adequate educational facilities it is appropriate to examine alternative, more efficient methods of financing. Issuing bonds through a county improvement authority is one method which could be employed. This type of lease financing is a cost effective, reasonable alternative which would provide school districts with a flexible approach to the school financing dilemma. More importantly, it would help school districts to fulfill their constitutional responsibility to provide a thorough and efficient education.

ANN. § 40:37A-56.1 (West Cum. Supp. 1982-1983). Thus, the financing of facilities through a county improvement authority would not result in a financial or budgetary disadvantage to a municipality.

[164] In fact, in Galloway Township, New Jersey, the school board is faced with precisely this problem. In September of 1981 a referendum asking voters to approve the construction of a $7 million middle school was narrowly defeated despite months of campaigning by school board officials. The Press, Sept. 29, 1981, at 19, col. 1. The referendum was the eighth or ninth time since 1967 that the school board had asked residents to approve construction of a new school. *Id.*, Sept. 21, 1981, at 17, col. 3. During this time the cost of the proposed facility more than tripled. *Id.* The superintendent of schools indicated that the board would either seek approval at a second election or petition the Commissioner of Education for an order to issue the bonds as was done in Upper Freehold Township. *Id.*, Sept. 29, 1981, at 19, col. 1. The school superintendent opined that the Commissioner would "have no choice but to order the district to build the school" since the state has rated local facilities as "inadequate" because of overcrowding. *Id.* The school official expressed concern over possible lawsuits by parents who feel that Galloway Township is not providing their children with a proper education. *Id.*