

**DOLLARS AND SENSE:
UNDERSTANDING THE NEW JERSEY
SUPREME COURT'S ROLE IN EDUCATION
AND HOUSING**



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Dollars and Sense: Understanding the New Jersey Supreme Court's Role in Education and Housing

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The State of New Jersey has experienced increasing economic difficulties in recent years. Its state and local tax burden is the highest in the nation, totaling 11.8% of the average taxpayer's income,¹ and the Tax Foundation ranked New Jersey's business tax climate as the most inhospitable in the nation in 2009.² The state's economic growth in terms of real GDP has stagnated.³

Deteriorating economic conditions in the state may have caused New Jersey to begin losing two of its most important assets: its businesses and its residents.⁴ According to a Rutgers University study, between 2002 and 2006, the state lost 231,565 people.⁵ This decrease in population resulted in a cumulative income loss of \$7.9 billion between 2000 and 2005.⁶ According to other surveys, only ten percent of New Jerseyans were satisfied with the way their state and local governments operated in 2008,⁷ and forty-nine percent of residents expressed a desire to leave the state in 2007.⁸ Twenty-eight percent of residents wishing to move cited high property taxes as their most pressing concern.⁹

Some have faulted high taxes and fees and excessive regulation for making it burdensome for businesses in New Jersey to grow and create new jobs.¹⁰ While these are no doubt important factors, some say another may rest with various decisions of the New Jersey Supreme Court affecting housing and education in the state. The purpose of this white paper is to review these

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decisions and consider whether they have raised costs for individuals and businesses in New Jersey as some have argued. Some will say these decisions are consistent with the state's constitution and, therefore, are the cost of enforcing the law. Others will disagree and view the costs as a byproduct of judicial overreaching. Whatever the case, one thing is certain—courts play an enormous role in our lives and more debate about their role and greater transparency respecting judicial selection ought to be most welcome.

The New Jersey Supreme Court's Structure and Membership

The New Jersey Supreme Court is comprised of seven members—a chief justice and six associate justices.¹¹ Justices are nominated by the governor and must be approved by the senate.¹² Nominees must have been members of the New Jersey Bar for at least ten years prior to their appointment.¹³ Once confirmed to the court, a justice holds office for an initial term of seven years. At the end of this period, the governor may nominate the justice for reappointment, again with the advice and consent of the senate. If reappointed, the justice holds office “during good behavior” and enjoys tenure until turning seventy, at which time the justice is by law required to retire.¹⁴

By tradition, the New Jersey Supreme Court is comprised of at least three justices from each major political party.¹⁵ However, this arrangement is neither constitutionally nor legislatively mandated, and the governor is free to disregard it in nominating individuals to fill vacancies. The court currently consists of four Democrats, two Republicans, and one Independent.

The court's membership has changed significantly in recent years. Its longest serving member, Justice Virginia Long, has been on the court for just more than ten years.¹⁶ Two of the other members, Chief Justice Stuart Rabner and Justice Helen Hoens, were appointed within the last three years.¹⁷

More important, the court's composition will change significantly in the near future. During the next governor's term, at least one justice will reach mandatory retirement age, and three others will become eligible for reappointment – one of whom, even if reappointed, will reach mandatory retirement age during the same term. In particular, Justice Long will retire in 2012.¹⁸

Justice Wallace is eligible for reappointment and tenure in 2010, but even if reappointed, he too will have to retire in 2012.¹⁹ Hence, the next governor will, at a minimum, appoint two new members to the court. Furthermore, Justice Rivera-Soto and Justice Hoens will be eligible for reappointment and tenure (in 2011 and 2013 respectively) during the next governor's term.²⁰ Although governors usually renominate sitting justices eligible for reappointment, the governor is not required to do so. Hence, the next governor will certainly appoint at least two, and may appoint as many as four, of the seven justices of the New Jersey Supreme Court.

The Court's Historical Decisions

The New Jersey Supreme Court is known nationally for its decisions. For example, in *Dale v. Boy Scouts of America*,²¹ the court unanimously held that the Boy Scouts could not lawfully exclude a homosexual assistant scoutmaster from the organization—a decision that the United States Supreme Court later reversed, holding that the New Jersey Supreme Court's decision violated the Boy Scouts' rights under the First Amendment.²² In *N.J. Democratic Party v. Samson*, although the state's election law provided that a party could place a new candidate on the ballot not later than 51 days from the election, the court allowed the Democratic Party to substitute Frank Lautenberg for Robert Torricelli for the 2002 United States Senate election just 39 days before election day.²³ More recently, in *Caballero v. Martinez*, the court unanimously held that an illegal alien can qualify as a resident of New Jersey for the purpose of collecting benefits under the Unsatisfied Claim and Judgment Fund,²⁴ which is a taxpayer-supported fund for "victims of motor-vehicle accidents involving uninsured and hit-and-run motorists."²⁵ In *Lewis v. Harris*, the court unanimously held that the equal protection clause of the New Jersey Constitution afforded same-sex couples the same rights and benefits enjoyed by opposite-sex married couples.²⁶

Although these decisions have been considered controversial by some, none could have had far-reaching economic effects. But two other series of cases have attracted attention for that reason: the *Mount Laurel* decisions on housing policy and the *Abbott* decisions on education policy.

The Mount Laurel Decisions

Mount Laurel I—

The Court and Control of Housing Policy

In 1975, the New Jersey Supreme Court decided *S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel*,²⁷ now known as *Mount Laurel I*. Mount Laurel had a local zoning ordinance that set minimum lot areas, minimum lot widths, minimum dwelling floor areas, and development densities for its residential zones.²⁸ The ordinance, in effect, "permit[ted] only single-family, detached dwellings, one house per lot," and generally prohibited attached townhouses, apartments, and mobile homes within the township.²⁹ The plaintiffs alleged that the ordinance unlawfully excluded low and moderate income individuals from obtaining housing in Mount Laurel.³⁰

The court issued a broad holding that "every... municipality [in the state] must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing."³¹ The court's holding meant not only that a municipality was prohibited from foreclosing opportunities for low and moderate income individuals to obtain housing through exclusionary zoning practices but that municipalities were required to "affirmatively afford that opportunity" consistent with the municipality's fair share of the regional need for affordable housing.³² The court's ruling specifically prohibited municipalities from using zoning ordinances to keep local property taxes low by excluding low-income, high-cost residents.³³ As for the remedy, the court allowed the township ninety days to comply with the specific requirements of its opinion by amending its zoning ordinances.³⁴

In so doing, the court stood ready to review the zoning laws of every municipality in the state to determine whether they complied with the court's analysis. Housing policy, in New Jersey, historically had been made on the local level for a number of reasons, including that local decision-makers can benefit from detailed knowledge of local circumstances and can facilitate trade-offs and compromises between the interests of various groups, each of whom has a chance to participate in local politics. After *Mount Laurel*, however, a number of the most important housing

decisions in New Jersey have been made by the supreme court.

*Oakwood at Madison—
The Builder’s Remedy*

Although the *Mount Laurel I* decision immediately concerned only Mount Laurel, its holding implicated the zoning policies of every “developing municipality” in New Jersey.³⁵ Fearful of being sued, some municipalities preemptively amended their zoning ordinances to conform to *Mount Laurel I*’s requirements.³⁶ Others faced lengthy and expensive litigation to determine the extent of their obligations under the decision.³⁷ The resulting litigation was made more arduous because the court’s decision in *Mount Laurel I* was perceived as highly ambiguous, and the court did not establish mechanisms by which municipalities could be sure they were complying with the specifics of its opinion. Even municipalities that tried in good faith to comply with *Mount Laurel I* could be—and often were—sued.

In *Oakwood at Madison, Inc. v. Twp. of Madison*, the court attempted to clarify *Mount Laurel I*, discussing what would constitute a municipality’s fair share of low-income housing within a region, what kinds of affirmative devices a municipality should employ when attempting to meet its obligation, and—perhaps most importantly in the long run—what remedies should be available to developers who want to build low cost housing.³⁸ This “builder’s remedy” established by *Oakwood* allowed a real estate developer to sue a municipality not in compliance with *Mount Laurel* and obtain a court order allowing it to build housing at a greater density than the municipality’s ordinances allowed if the builder included low-income housing—generally a certain number of both low-cost housing units and, to make the deal worthwhile for the builder, an additional number of market-rate units.³⁹ The theory behind the builder’s remedy was that the intended beneficiaries of the *Mount Laurel* decisions—lower-income people who would live in more modest housing—would often lack the ability or the incentive to sue municipalities to enforce *Mount Laurel*. Real estate developers, however, could profit by building new housing units in the affected municipalities, and so by giving them an incentive to sue, they would act almost as private attorneys general to enforce *Mount Laurel*.

According to some observers, the builder’s remedy virtually ensured that too much real estate would be developed too quickly. One result has been the rapid, unplanned development and corresponding increases in property taxes.⁴⁰ This is compounded by the fact that sometimes developers threaten to sue a municipality if it will not approve the developers’ plans for housing projects including both market-rate units and low-cost housing, and then in fact build the former (on which the developer can make a large profit) but not the latter.⁴¹ When this happens, the municipality is left with more market-rate housing than it started with—which means that the proportion of its affordable housing has decreased, which puts it even further out of compliance with *Mount Laurel*. According to the New Jersey League of Municipalities, “[t]he builder’s remedy is no longer a reward; it has become a weapon.”⁴²

*Mount Laurel II—
Spiraling Litigation*

Despite the court’s attempt in *Oakwood at Madison* to clarify the meaning of *Mount Laurel I*, substantial uncertainty—and thus much litigation and litigation risk—remained, and so in 1983, eight years after it decided *Mount Laurel I*, the court heard a consolidated appeal of six of the most important lower court decisions regarding the application of the *Mount Laurel I* decision in *S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel*,⁴³ which is now referred to as *Mount Laurel II*. Complaining of the “widespread non-compliance with the constitutional mandate” established in *Mount Laurel I*,⁴⁴ the court said it was trying “to encourage voluntary compliance with the constitutional obligation by defining it more clearly,” “to simplify litigation in this area,” and “to increase substantially the effectiveness of the judicial remedy.”⁴⁵

In a unanimous decision, the court held that “each municipality must provide a realistic opportunity for decent housing for its indigenous poor except where they represent a disproportionately large segment of the population as compared with the rest of the region.”⁴⁶ As in *Mount Laurel I*, this obligation extends beyond merely removing exclusionary provisions in zoning ordinances and instead requires municipalities to use “[a]ffirmative governmental devices,” such as

bonuses for developers, mandatory set asides, and assistance to developers in obtaining federal subsidies for affordable housing.⁴⁷ Furthermore, the court held that a municipality's *Mount Laurel* obligation would not be satisfied by a "good faith attempt" to comply with constitutional requirements; only a municipality's actually achieving "the substantial equivalent of the fair share" of low-income housing opportunity within its region would discharge the obligation.⁴⁸

Under *Mount Laurel II*, therefore, municipalities must sometimes in effect subsidize low-cost housing. The result of subsidizing an activity, however, is to produce too much of it relative to the social optimum. Hence, if municipalities have to subsidize low-cost housing, then real estate developers will overbuild low-cost housing. Since low-cost housing accounts for a disproportionately small share of the municipality's tax base and a disproportionately high share of its costs, the municipality will have to either cut services, increase taxes, or both. All these alternatives are unpalatable, but since the political difficulty of cutting services often exceeds that of raising taxes, municipalities have generally opted to raise taxes.

Mount Laurel II also expanded the class of municipalities obligated to comply with the *Mount Laurel* requirements. Whereas previously only "developing municipalities" were required to comply, *Mount Laurel II* held that any municipality that is designated by the state's State Development Guide Plan (SDGP) as a "growth area" is bound to fulfill these obligations.⁴⁹ Because the court's decision in *Mount Laurel I* had not defined the term "developing municipality," its decision to extend the *Mount Laurel* requirements to all "growth areas" under the SDGP had the practical effect of clarifying which municipalities were affected,⁵⁰ therefore in theory decreasing the need for costly litigation to determine whether or not a municipality was "developing."⁵¹ Additionally, however, it meant that "the conclusion [in *Mount Laurel I*] that fully developed municipalities have no *Mount Laurel* obligation is no longer valid."⁵² This had the effect of increasing the number of municipalities subject to the *Mount Laurel* obligations. This brought to new areas of the state the upward pressure on local taxes *Mount Laurel I* had already generated elsewhere.

The court also affirmed that a builder's remedy should be available to plaintiff developers on a case-by-case basis.⁵³ This means that, "[w]here the plaintiff has acted in good faith, attempted to obtain relief without litigation, and thereafter vindicates the constitutional obligation in *Mount Laurel*-type litigation, ordinarily a builder's remedy will be granted, provided that the proposed project includes an appropriate portion of low and moderate income housing, and provided further that it is located and designed in accordance with sound zoning and planning concepts, including its environmental impact."⁵⁴

The court acknowledged that its role in determining housing policy should be limited but it nevertheless demonstrated a willingness to intervene: "while we have always preferred legislative to judicial action in this field we shall continue—until the legislature acts—to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine... We may not build houses, but we do enforce the Constitution."⁵⁵ When confronted with charges that the court's decision was an example of judicial activism, then-Chief Justice Wilentz, who had authored the *Mount Laurel II* opinion, explained:

Our reasons for our "activism," if that is what it was, are fully set forth in *Mount Laurel II*... We note only that for the many years from the day of *Mount Laurel I* to the day of *Mount Laurel II* there was no activism, and there was no legislation, no ordinances and no lower-income housing.⁵⁶

Hills Dev. Co. v. Bernards Twp. in Somerset County
—*The Legislature Responds*

In response to *Mount Laurel II*, the legislature passed the Fair Housing Act of 1985 (FHA) to ensure compliance with the court's holdings.⁵⁷ The FHA created the Council on Affordable Housing (COAH), a twelve-member body within the Department of Community Affairs.⁵⁸ The COAH would designate housing regions within the state, estimate the need for low-income housing within the regions, and establish guidelines by which the regions could meet their fair share obligation under *Mount Laurel II*.⁵⁹ The New Jersey Supreme Court upheld the constitutionality of the FHA in *Hills Dev. Co. v. Bernards Twp. in Somerset County*.⁶⁰ The COAH also is charged with reviewing

each municipality's zoning and affordable housing regulations. If the COAH determines that a municipal fair share plan presents a realistic opportunity for the production of affordable housing, it may grant "substantive certification" to the municipality's plan, which affords the municipality with protection from builder's remedy lawsuits.⁶¹

Effects of the Decisions

For more than thirty years, the *Mount Laurel* decisions have affirmatively required New Jersey municipalities to subsidize low-income housing. The decisions have also involved municipalities and state agencies in protracted, often repetitive, litigation.

1. Increased Tax Burdens

New Jersey's state-local tax burden, which totals 11.8% of the average taxpayer's income, is the highest in the nation.⁶² So too are its property taxes, which total \$2,372.43 per capita annually.⁶³ There are many causes for this, but one of them is the additional tax burden generated by the *Mount Laurel* decisions.

As explained above, *Mount Laurel* requires municipalities to provide a realistic opportunity for building new affordable housing units. In municipalities without substantive certification, builders encouraged to construct low-income housing units can build them with even more market rate homes, leading to increased demands for services and higher taxes. Furthermore, since affordable housing generates tax revenue per capita *less than* the average across the municipality's tax base as well as added demand for services *greater than* the average across the municipality's population, adding affordable housing units to the municipality's mix of housing increases the municipality's expenses more than it increases the municipality's tax revenue. Hence, the municipality must either cut services or raise taxes.

Greenwich Township provides a good example. In 1988, in response to a lawsuit brought by a developer, a court ordered Greenwich Township to nearly triple its size by constructing 810 new housing units, including just 70 affordable units, in a town which contained only 520 units total. This influx of new residents naturally required a vast increase in public education and other services, and so a dramatic increase in property taxes.⁶⁴

The tax burden on residents in affected municipalities has been exacerbated by other decisions of the supreme court that have decreased the obligation of low-income housing occupants to pay property taxes. Thus, in 1991, the New Jersey Supreme Court unanimously upheld a lower court's decision⁶⁵ that the property taxes of residents in affordable housing units should be assessed by taking into account deed restrictions that limit their resale value to their initial purchase price plus inflation, not their market value.⁶⁶ In other words, affordable housing units are taxed at considerably less than their full market value. Such rulings could lower property taxes for owners of affordable housing units by as much as seventy-five percent, costing municipalities hundreds of thousands of dollars in property tax revenues each year.⁶⁷

Additionally, in the process of fulfilling their affordable housing obligations, growing municipalities sometimes force neighboring towns that have already met their *Mount Laurel* obligations to raise taxes to cope with the nearby influx of people. In Clinton, for example, the growth of surrounding municipalities imposed an additional financial burden on the local government to provide police, fire, and other services because these services extended beyond Clinton's borders. As a result, taxes in Clinton doubled.⁶⁸

2. Disincentives for Development

Although the subsidies for affordable housing mandated by the *Mount Laurel* decisions have resulted in overbuilding of such units (and market-rate units builders are permitted to construct under the builders remedy), nevertheless the *Mount Laurel* decisions have discouraged other kinds of development. For example, Raritan Township wished to attract a large store, such as a Lowe's or a Home Depot, in part because Raritan believed the property taxes from the store would help reduce taxes on residential real estate in the township. The COAH's 2008 regulations, however, made attracting such a business nearly impossible, not only because the business would have to pay a three percent fee on its costs of construction to subsidize affordable housing, but also because, if it attracted the store, the township itself would be required to pay an additional \$2 million in subsidies for affordable housing. That \$2 million, along with the costs of providing services to new

residents in the affordable units, would outweigh the tax revenue that the business would have generated.⁶⁹ Raritan accordingly abandoned its plan to attract such a business.

3. Inefficient Development and Sprawl

Other critics of the *Mount Laurel* decisions argue that they have caused suburban sprawl and environmental degradation in New Jersey. This happens mostly through the builder's remedy, which can allow developers to build many more units and at a higher density than the municipalities' development plans would otherwise permit. Sometimes just the threat of a builder's remedy lawsuit forces a municipality to allow the construction of housing at higher-than-planned density.⁷⁰

Furthermore, the COAH has sometimes estimated the future economic growth of a municipality and the number of housing units that its infrastructure and public services are capable of supporting at levels higher than local officials think warranted.⁷¹ This too allows more development than would have been permitted under local regulations. For example, in December 2008, the mayor of the Township of Marlboro objected to the number of affordable housing units the township was required to build pursuant to the COAH's estimates, calling them "unreasonable and outrageous."⁷² According to the mayor, the obligation imposed by the COAH greatly exceeded the level of housing necessary to accommodate expected job growth and would put enormous stress on the infrastructure, schools, amenities, and open space of the township.⁷³ Disagreeing with the COAH, however, can be costly. For example, when the COAH estimated that the Borough of Leonia needed to increase its affordable housing by 103 units based on the 1980 census, the borough's planning consultant concluded that "it would be difficult and costly for borough officials to take their own survey to determine if the number overestimates the need for affordable units."⁷⁴ The borough could thus choose between the costs of expensive, protracted, and unpredictable litigation or the costs of building the affordable units the COAH had mandated.

The *Abbott v. Burke* Decisions

In another series of decisions that, like the *Mount Laurel* decisions, span several decades and have spawned

countless other lawsuits, the New Jersey Supreme Court largely assumed control of school funding in the state.

The Thorough and Efficient Education Clause of the New Jersey Constitution provides, "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."⁷⁵ In the *Abbott v. Burke* line of cases, the New Jersey Supreme Court has effectively interpreted this clause to say that the supreme court itself has final authority to decide whether the state's schools are thorough and efficient and to order changes as it saw fit if it concludes that they were not. In particular, in the *Abbott II* decision, the court ruled that the education the state was providing in certain poor, urban school districts was not thorough and efficient and thus that the state must provide these districts with additional funding so that their operating budgets would approximately equal those of more affluent school districts that raised more money through local property taxes.⁷⁶

Although the court's primary mandate in *Abbott* was only that spending across school districts be equalized, the effect was almost entirely to increase funding in poorer districts to match that in wealthier districts. This was entirely predictable: public officials generally find it easier to increase taxes than to cut existing services. As two scholars recently noted, "'Equitable' funding had... become synonymous with the highest funding in the state."⁷⁷ Complying with the *Abbott* decisions has thus been extremely costly. "Abbott parity aid," which is state funding adjusted annually to equalize spending between the Abbott districts and the wealthier districts, equaled about \$1 billion during the 2006 fiscal year.⁷⁸ During that period, the state spent an additional \$500 million to provide "supplemental aid" that funds educational needs in Abbott districts not met by parity aid.⁷⁹ Furthermore, Abbott pre-schools, which the court mandated in 1998, cost the state an additional \$500 million each year.⁸⁰ The state is also obligated to build and maintain adequate school facilities.⁸¹ According to some estimates, New Jersey spent \$37.7 billion on the Abbott districts between 1998 and 2008 alone.⁸²

It would seem that this massively increased investment in education in the *Abbott* districts would

improve education in such districts and thus have a generally beneficial effect on the state, and it is likely that education in *Abbott* districts has improved in some ways. Nevertheless, the benefits may well be much smaller than the supreme court supposed.⁸³ A 1999 Rutgers University study, for example, found “no evidence of a positive effect of expenditures in New Jersey public high schools in” the *Abbott* districts.⁸⁴ The reason for this, of course, is not hard to ascertain: good results in the education system depend on many factors besides funding, and so increased funding is no guarantee of improved results. In the case of the incremental funding resulting from the *Abbott* decisions, studies such as the Rutgers one suggest that the benefits of such funding may well be outweighed by its costs.

The Early Holdings: *Abbott I* and *Abbott II*

The earliest *Abbott* decisions considered the constitutionality of the funding provisions of the Public School Education Act of 1975 (“PSEA”), which set out a scheme of state aid to local school districts. Finding the act unconstitutional under the Thorough and Efficient Education Clause, the court held that “the Act must be amended to assure funding of education in poorer urban districts at the level of property-rich districts.”⁸⁵ Further, the court held that “such funding cannot be allowed to depend on the ability of local school districts to tax”⁸⁶ but “must be guaranteed and mandated by the state.”⁸⁷ In addition to this obligation of the state to equalize school funding across districts, the state had an obligation to go even further and raise funding in poorer urban districts—the districts now known as *Abbott* districts—because “the level of funding must also be adequate to provide for the special educational needs of these poorer urban districts in order to redress their extreme disadvantages.”⁸⁸ In other words, spending in *Abbott* districts sometimes had to be even higher than in affluent ones.

The Legislature’s Responses and the Court’s Reproaches: *Abbott III* and *Abbott IV*

While the court did not specify how the legislature should remedy the deficiencies of the PSEA, the court made it clear that the legislature could not simply require the *Abbott* districts to increase local taxes to

increase spending on education.⁸⁹ With increased taxation in *Abbott* districts not an option, residents of non-*Abbott* districts naturally feared that the quality of education in their districts would suffer, their taxes would be increased, or both.⁹⁰ Shortly after the court’s ruling, the New Jersey legislature passed the largest tax increase in the state’s history, a \$2.8 billion package⁹¹ that doubled the top rate under the state’s income tax from 3.5 percent (of income greater than \$50,000 per year) to 7 percent (of income greater than \$150,000 per year),⁹² and increased the state sales tax from 6 percent to 7 percent, as well as extended it to new items.⁹³

With the added revenue from this tax increase, the legislature passed the Quality Education Act (QEA) in an effort to increase and redistribute education funding.⁹⁴ The QEA greatly increased funding for 30 special needs districts, and slightly increased funding for 330 others. It reduced the remaining school districts’ aid, however, sometimes to zero.⁹⁵ For the districts whose aid was cut, the shortfall would have to be made up by increasing property taxes or cutting education budgets.⁹⁶ Faced with a backlash, the legislature amended the QEA in 1991, reducing aid to poorer districts⁹⁷ and increasing funding for property tax relief in other districts.⁹⁸

In *Abbott III* the court held that, despite the large increases in education funding effected by the QEA,⁹⁹ the act was nevertheless unconstitutional because it failed “to assure parity of regular education expenditures between the special needs districts and the more affluent districts.”¹⁰⁰ This was now the second funding plan the court had struck down. The court did not provide the legislature with any specific funding instructions and ordered the legislature to implement an adequate funding formula by the 1997-1998 school year.¹⁰¹

In December of 1996, the legislature passed the Comprehensive Education Improvement and Financing Act (“CEIFA”).¹⁰² CEIFA sought to ensure adequate educational funding by defining core curriculum standards that each district should meet and then calculating how much compliance with these standards would cost using a Department of Education spending model.¹⁰³ In *Abbott IV*, however, the supreme court held that CEIFA too was unconstitutional.¹⁰⁴ The court struck down the act because its funding scheme “fail[ed] to assure expenditures sufficient to enable students in the special needs [i.e., *Abbott*] districts

to meet those standards.”¹⁰⁵ The legislature finally approved \$246 million in additional funding for the Abbott districts.¹⁰⁶

Increasing Districts’ Abbott Obligations: *Abbott V*

From the beginning the *Abbott* decisions required not only substantial equality in funding between Abbott districts and wealthier ones but also that the level of funding in Abbott districts “be adequate to provide for the special educational needs of [the] poorer urban districts” and to “redress their extreme disadvantages.”¹⁰⁷ In *Abbott V*,¹⁰⁸ the supreme court turned to this latter aspect of its previous decisions and ordered the creation of an array of new programs¹⁰⁹ that, in its judgment, would improve the quality of education in the affected districts. These included, first and foremost, a system of “whole-school reform,”¹¹⁰ which “integrat[ed] reform throughout the school as a total institution” by affecting “the culture of the entire school, including instruction, curriculum, and assessment” and “cover[ed] education from the earliest levels, including pre-school.”¹¹¹ In addition, the court ordered the Commissioner of Education to implement “full-day kindergarten and a half-day pre-school program[s] for three- and four-year olds,”¹¹² and “technology, alternative school, accountability and school-to-work and college-transition programs,”¹¹³ as well as to “secure funds”¹¹⁴ to remediate “infrastructure deficiencies in Abbott school buildings”¹¹⁵ and to “provid[e] the space necessary to house Abbott students adequately.”¹¹⁶ The most sweeping new obligation of the state under *Abbott V* was surely the mandate that the state provide free pre-school for three- and four-year olds. This would prove to be extremely expensive, probably costing the state about \$500 million per year.¹¹⁷

Effects of the Decisions— Higher Taxes and More Debt

Just as with the *Mount Laurel* decisions, a primary effect of the Abbott decisions has been higher property taxes for New Jerseyans. In particular, Abbott mandates have produced a system of educational funding in which non-Abbott local governments receive little state aid and must pay a larger share of their education costs themselves—costs that can usually be met only

through higher property taxes.¹¹⁸ For example, in 2002 Haddonfield, received only 7 percent of its total school funding from the state, the balance coming from local property taxes, while Abbott districts received almost all of their funding from the state.¹¹⁹ Districts not receiving much state aid, therefore, have often raised property taxes dramatically.¹²⁰ In Dumont, for example, some residents’ property taxes nearly doubled following the court’s decision in *Abbott V*,¹²¹ and in Randolph property taxes increased by nearly \$1,000 for many residents.¹²² Conversely, the system creates strong incentives for Abbott districts to cut their property taxes, for the less they fund themselves, the more the state has to fund for them. Thus, since the early Abbott decisions, Abbott districts have cut property tax rates almost in half.¹²³

Abbott requirements have also resulted in increases in state debt. For example, when the supreme court in *Abbott V* required the state to build new schools and renovate others, the legislature funded the new mandates by authorizing the issuance of \$8.6 billion in bonds under the Educational Facilities Construction and Financing Act (EFCFA).¹²⁴ Advocacy groups concerned about the state’s debt load then challenged the issuance of the bonds under the Debt Limitation Clause of the state constitution, but the supreme court rebuffed their challenge.¹²⁵

The School Funding Reform Act of 2008 and *Abbott XX*

Earlier this year, the New Jersey Supreme Court effectively relinquished control of school funding in the state. In *Abbott XX*, the court held constitutional the School Funding Reform Act (SFRA), a law passed in 2008 that allocates school funding based on where low-income children live without regard to whether that location is an Abbott district.¹²⁶ Although the court’s decision released the state from its earlier *Abbott* orders, the court reserved the right to review the SFRA as implemented. In particular, the court held that the constitutionality of the act depends on whether (a) “the State will continue to provide school funding aid during this and the next two years at the levels required by SFRA’s formula,” and (b) a state “review of the formula’s weights and other operative parts after three years of implementation” yields satisfactory results.¹²⁷

Given these qualifications, further litigation is certainly possible.

The SFRA still imposes significant costs on local governments. Thus, the Commissioner of the Department of Education stated that “wealthy municipalities will still be expected to pick up a larger share of the cost of public education in their districts than poorer communities.”¹²⁸ Even under the new funding formula, for example, Monmouth Beach School District received only 6 percent of its \$11,575 per pupil funding from the state during the 2008-2009 school; local taxpayers funded most of the difference, that is, 86 percent or about \$9,955 per pupil.¹²⁹ Additionally, Monmouth Beach residents of course pay state income taxes, which in part fund education in other districts, benefits that residents of Monmouth Beach never see.¹³⁰

CONCLUSION

Determining how communities should be arranged and developed, including determining what kinds of houses and other buildings will be permitted and where, just like determining what school curriculums should be and how schools should be funded, involve countless tradeoffs between competing interests, value decisions, and judgment calls. These determinations also require huge amounts of fact-finding. They are paradigmatically the kinds of things about which reasonable people can and will disagree, sometimes radically. In the *Mount Laurel* and *Abbott* decisions, the New Jersey Supreme Court’s construction of the state constitution caused it to play a central role in shaping housing and education policy. These decisions have had profound economic effects on the New Jerseyans’ tax burden, as well as the state’s economy more generally and, for these and other reasons, it is most appropriate to have a vigorous debate about the proper role of our courts in a democratic society.

Endnotes

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