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PROPERTY

NINTH EDITION

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CHAPTER 7
CONCURRENT OWNERSHIP

Introductory note: This chapter examines various ways in which two or more persons may own present possessory interests in the same property. The three varieties of co-tenancy are: (1) ***joint tenancy*** (which includes the right of survivorship; (2) ***tenancy in common*** (which does not have the right of survivorship); and (3) ***tenancy by the entirety***, which exists only between husband and wife, and which includes not only survivorship but indestructibility, in the sense that neither party can convey his interest or otherwise destroy the right of survivorship. After we discuss these three types of co-ownership, we treat various issues involving the relation between parties (e.g., the right to possession of the premises, the duty to account for rents received from third persons, etc.).

I. JOINT TENANCY

A. Each tenant owns whole interest: In a ***joint tenancy***, two or more people own a ***single, unified***, interest in real or personal property. Each joint tenant has exactly the same rights in the property; thus one cannot have a greater interest than the other.

1. **Right of survivorship:** The most significant feature of the joint tenancy is that each joint tenant has a ***right of survivorship***. That is, if there are two joint tenants, and one dies, the other becomes sole survivor of the interest that the two of them had previously held jointly. Survivorship is discussed more fully *infra*, p. 119.

2. **Right of possession:** In a sense, each of the joint tenants owns the "entire" interest, subject only to the rights of the other(s). While this may sound somewhat metaphysical, it has one clear consequence: each joint tenant is entitled to ***occupy*** the ***entire*** premises, subject only to the same right of occupancy by the other tenants. Thus the parties are not required to divide up the premises for occupancy, though they are free to do this if all agree. Relations between joint tenants (and between other types of co-tenants, including tenants in common and tenants by the

entirety) are discussed *infra*, p. 126.

B. Four unities: Under the traditional common-law view, a joint tenancy exists only where the so-called "***four unities***" exist: (1) the unity of "interest," (2) the unity of "title," (3) the unity of "time" and (4) the unity of "possession." See Moynihan, p. 217.

1. **Unity of interest:** Unity of ***interest*** means that the joint tenants must have ***identical interests***, both as to their share, and as to the ***duration*** of their interest. Thus one joint tenant ***cannot*** have a ***one-fourth*** interest and the other a ***three-fourths*** interest. Similarly, if one person has a one-half interest for life, and the other has a one-half interest in fee simple, the two are not joint tenants because the durations are not identical. See 2 A.L.P. 6.

2. **Unity of title:** Unity of ***title*** means that the joint tenants must each acquire title by the ***same deed or will***.

3. **Unity of time:** The unity of ***time*** means that each joint tenant's interest must ***vest at the same time***.

   Example: *O* owns Blackacre in fee simple. In 2005, she conveys "one-half of my interest in Blackacre" to "my son *S*, to hold jointly with me." In 2006, she conveys "my remaining interest in Blackacre" to "my daughter *D*." *S* and *D* own as tenants in common, *not* as joint tenants with right of survivorship, because *S*'s and *D*'s interests were not created by a single instrument at the same time, making a joint tenancy impossible. (That's true even if *S* and *O* were found to have held as joint tenants prior to *O*'s conveyance to *D*.)

4. **Unity of possession:** Unity of ***possession*** means that all the joint tenants have a right to possess and enjoy the entire property. (This unity, unlike the other three, also exists as to tenants in common.)

C. Creation of joint tenancies: At common law, there was a ***presumption*** that any co-tenancy was a joint tenancy, unless a clear intention to create a tenancy in common was shown. (The presumption did not apply where the co-tenants were husband and wife; here there was a presumption that a tenancy by the entirety was intended; see *infra*, p. 125.)

1. **Modern statutes reverse presumption:** Today, all states have ***reversed*** the commonlaw presumption, and now ***presume*** that a co-tenancy is a

tenancy in common unless there is a ***clear intent to establish a joint tenancy***. Most states have done this by statute; some have done it by case law.

2. **Standard language:** The usual (and clearest) phrasing used to create a joint tenancy is "***to A and B as joint tenants with right of survivorship, and not as tenants in common***."

3. **Conveyance by *A* to *A* and *B*:** Frequently the holder of a fee simple interest will wish to establish a joint tenancy between ***himself and another***. The most direct way to do this, of course, would be to convey to himself and that other person as joint tenants; thus *A* would convey his fee simple "to *A* and *B* as joint tenants."

   a. **Common-law view prohibits:** But this could not be done at common law. Recall that two of the "four unities" were those of ***time*** and ***title***. (*Supra*, p. 117.) Because of the common-law rule that no person could convey to himself, a conveyance that purported to be from *A* to "*A* and *B* as joint tenants" really conveyed only a one-half interest to *B*. Both the unity of time and the unity of title were therefore broken, and *A* and *B* took as tenants in common.

      i. **Conveyance to "straw man":** Therefore, if *A* wished to create a joint tenancy in himself and *B*, he had to convey to a "***straw man.***" He would thus convey to *C* and *C* would in turn convey to *A* and *B* as joint tenants.

   b. **Modern view allows direct creation:** But many states have enacted ***statutes*** explicitly authorizing the holder of a fee simple to create a joint tenancy in himself and another. Other states have reached this result by ***case law***.

4. **Personal property:** Joint tenancies may also be created in ***personal property***. But the statutes establishing a presumption in favor of tenancies in common apply to personal property as well as real property.

   a. **Bank accounts:** One common example of a possible joint tenancy in personal property is the ***joint bank account***, either checking, savings, or safe deposit.

      i. **Ambiguous "joint account":** Banks, to protect themselves, usually insist that if the account has two names on it (i.e., it's in some sense a "joint account"), the depositor(s) must sign paperwork that says that upon the death of one holder, the ***survivor gets the balance.*** Yet this paperwork may not reflect the ***intent of the depositor***; for instance, the depositor may merely intend to create a ***“convenience account,”*** so that the other named holder (e.g., the elderly depositor's child) can pay the depositor's bills. When the depositor dies, if the bank pays over the proceeds to the surviving joint account-holder, the decedent's heirs may claim that the estate, not the surviving joint holder, is entitled to the account balance, so as to further the decedent's intent in creating the account.

(1) Majority rule: In most states, the account paperwork described above (saying that the survivor gets the proceeds) is viewed as ***not controlling***, so that the ***intent of the depositor*** is what determines whether there is a right of survivorship or not. On the other hand, most states put the ***burden of proof*** on the person ***challenging*** the right of survivorship: “The surviving joint tenant takes the sum remaining on deposit … unless there is ***clear and convincing evidence*** that a convenience account was intended.” DKA&S, p. 290.

(2) During holders’ joint lifetimes: What about withdrawals from a “joint account” made while ***both account holders are alive***? Again, the bank will likely insist on paperwork saying that either account holder may withdraw all contents at any time. But as with the survivorship issue discussed above, regardless of what the bank's paperwork says, in most states “the ***presumption*** is that the joint account belongs to the parties ***in proportion to the net contribution of each party.***” DKA&S, p. 290. So if *A* deposits the entire sum into an account on which *A* and *B* are both listed, and *B* then withdraws sums without *A*’s permission (or later ratification), *B* can be required to repay the funds. *Id*. However, this presumption that the depositor does not intend to make a gift to the other holder can (as in the payment-on-death scenario described above) be ***rebutted*** by clear and convincing evidence to the contrary. *Id*. (For more about bank accounts, see *supra*, p. 15.)

D. Right of survivorship: As noted, the principal distinguishing feature of the joint tenancy is that the ***surviving*** tenant has the ***entire interest*** in the property. The deceased tenant does not have the ability to ***leave his interest by will***, nor is there anything to pass by intestacy to his heirs. Strictly speaking, what happens is that there are two joint tenants each of whom owns a complete interest, and when one of them dies, the other has an interest that is no longer subject to the former's rights. But, loosely speaking, the survivor is said to receive the other's interest under a "***right of survivorship.***"

1. Heirs and devisees take nothing: When a joint tenant dies, her ***heirs*** (if she dies intestate) or her ***devisees*** (if she leaves a will that purports to leave her joint tenancy interest) ***take nothing***— the interest is ***extinguished*** at the moment of the decedent / joint tenant's death, so there is nothing to pass by will or intestacy.

a. Signing a will is not a severance: Also, the mere ***execution of a will*** by a joint tenant purporting to leave the joint tenancy interest to a third person does ***not*** act as a severance — since the will provision has not yet taken effect (and never will take effect, since the interest will be extinguished at the moment the testator dies), courts do not treat the signing of the will as a conveyance.

2. Creditors: An unsecured or judgment-lien ***creditor*** of ***one*** joint tenant ***does not have rights*** against the interest of the ***other joint tenant.*** Therefore, if the debtor joint tenant dies first, the surviving joint tenant usually takes the property ***free and clear*** of the deceased tenant's creditor — the decedent's interest (and thus the creditor's "interest in that interest") simply ***ceases to exist*** at the moment of the debtor/joint-tenant's death. Moynihan, p. 220.

Example: *A* and *B* own Blackacre as joint tenants. Finance Co., which has lent money to *A* unsecured, gets a judgment against *A*, which under local law becomes a lien against all of *A*'s real property. *A* dies. In most states, Finance Co. has no rights against Blackacre — at *A*'s death, his joint tenancy interest was simply extinguished, resulting in an unencumbered fee simple in *B*.

a. Statutes: However, some states have statutes preserving an attachment, mortgage, or other lien on a joint tenant's interest after his death. Moynihan, p. 220, n. 2.

b. Mortgage creditors: As to ***mortgage*** creditors of a joint tenant, courts are split; see *infra*, p. 121.

E. Severance: There are a number of ways in which a joint tenancy may be ***severed***; severance will normally result in the creation of a ***tenancy in common***.

1. Conveyance by one joint tenant: A ***conveyance*** by one joint tenant to a ***third party*** will cause a severance, and thereby create a tenancy in common. That's because the third party does not have unity of time or title (*supra*, p. 118) with the remaining original joint tenant, so that the joint tenancy relationship has been destroyed.

Example: *A* and *B* hold Blackacre as joint tenants. *A* conveys his interest to *C*. This conveyance automatically severs the joint tenancy. Therefore, *B* and *C* are ***tenants in common***, not joint tenants.

a. Motive irrelevant: This principle that any conveyance by either joint tenant immediately severs the joint tenancy and replaces it with a tenancy in common applies even where a joint tenant is acting for the ***sole purpose*** of severing the tenancy, and even where the recipient of the conveyance ***immediately reconveys back*** to the severing joint tenant. In other words, the ***motive*** of the conveying joint tenant is irrelevant.

Example: *A* and *B* are joint tenants in Blackacre. *A* learns he is about to die. Therefore, and for the sole purpose of severing the joint tenancy, he conveys “all my interest” in Blackacre to his wife *W*. Title is now: *B* and *W* as tenants in common. *W* then immediately reconveys “all my interest” back to *A*. At that moment, *A* and *B* are tenants in common. Now, when *A* dies (leaving all his estate to *W*), title is: *B* and *W* as tenants in common. *A* has thereby avoided having *B* become the sole owner on *A*’s death.

b. Where three or more joint tenants: Suppose that there are ***three*** or more original joint tenants. A conveyance by one of them to a

stranger will produce a ***tenancy in common*** as between the ***stranger and the remaining original joint tenants***, but the ***joint tenancy will continue*** as between the ***original members***.

Example: *A*, *B*, and *C* hold Blackacre as joint tenants. *A* conveys his interest to X. The conveyance by *A* severs the joint tenancy as between *A* and the other two. Thus X holds an undivided one-third interest in the property as a tenant in common with *B* and *C*. *B* and *C* hold a two-thirds interest, but they hold this interest as joint tenants with each other, not as tenants in common. Thus if X dies, his interest goes to his heirs or devisees. But if *B* dies, his interest goes to *C*.

i. **Conveyance between joint tenants:** Essentially the same analysis applies if there are three joint tenants, and one conveys to ***another of the joint tenants***. As to the interest conveyed, the grantee becomes a tenant in common. But as to the interest not conveyed, the joint tenancy survives.

c. **Conveyance to one's self:** Suppose a joint tenant tries to terminate the joint tenant's fee by conveying his interest to ***himself***. Since the joint tenant could terminate the joint tenancy by conveying to third person, and that third person could then re-convey to the original joint tenant (thus leaving the original joint tenant with a tenancy in common), why shouldn't the joint tenant be able to accomplish the same objective without all the hocus-pocus of a "straw man"? At least one court has held that a conveyance by a joint tenant to himself, made for the purpose of terminating the joint tenancy, does indeed have that effect. See *Riddle v. Harmon*, 162 Cal. Rptr. 530 (Cal. Ct. App. 1980).

2. **Granting of mortgage:** Jurisdictions are not in agreement as to whether the ***granting of a mortgage*** by one joint tenant severs the joint tenancy. The answer in a particular state depends principally upon whether the state treats a mortgage as representing a transfer of title, or as merely being a lien to secure repayment.

a. **Title theory states:** In some states, the mortgagor, by granting the mortgage, is deemed to transfer title to the property to the mortgagee. In such a state, called a ***"title theory"*** state, the mortgage is, not surprisingly, a severance since it is a conveyance. Moynihan, p. 222. If the mortgage is defaulted upon, the mortgagee ***can foreclose on the undivided one-half interest of the mortgagor***, and have this auctioned at the foreclosure sale. The interest of the other party is not affected.

b. Lien theory state: Most states, however, follow the "***lien theory***" of mortgages, by which a mortgage is deemed to be merely a security for repayment, and not a transfer of title. In such states, the mortgage ***does not act as a severance***, at least in the sense that the right of survivorship is not destroyed. However, in lien theory states, the key issue becomes: Is the mortgage enforceable if the mortgagor ***dies*** before the other tenant? Courts in lien theory states are ***split*** on this issue.

i. Mortgage remains effective: Some states, either by case-law or statute, hold that the mortgage can be ***enforced*** against the decedent's interest. Under this approach, the case is treated basically as if the state were a title theory state — the foreclosing mortgagee auctions off the decedent's one-half interest, with the survivor given the right to pay off the mortgage if he chooses. C,S&W, pp. 201-02.

ii. Mortgage not effective: But other states take the view that the mortgage is ***not enforceable*** if the mortgagor dies before the other tenant.

Example: P and his brother, *B*, own property as joint tenants. Without P's knowledge, *B* and his friend D1 sign a note in favor of D2, and *B* gives a mortgage on the joint property to D2 to secure this note. *B* dies before the note is paid. *B* bequeaths all his property to D1. P brings suit to have the court declare that P takes the entire property by right of survivorship, and that D2's mortgage was extinguished on *B*'s death.

Held, for P. Illinois is a lien theory state, so P's execution of a mortgage did not sever the joint tenancy. Upon *B*'s death, P therefore became the sole owner of the property. Furthermore, the mortgage was merely a lien on *B*'s interest in the joint tenancy; since *B*'s interest ceased to exist the moment he died, so did the lien on his interest. Therefore, P holds sole title to the property, and D2's lien is extinguished. *Harms v. Sprague*, 473 N.E.2d 930 (Ill. 1984).

3. **Lease:** If one joint tenant executes a ***lease***, the courts are similarly split about whether the joint tenancy is severed. Most courts probably hold that such a lease (which applies only to the lessor's interest in the property) is ***not*** a severance. See, e.g., *Swartzbaugh v. Sampson*, 54 P.2d 73 (D.C. App. Cal. 1936), holding that where the lessee was in sole possession of the premises, the non-lessor joint tenant could not have the lease judicially rescinded.

4. **Partition:** The joint tenancy can be severed by ***partition***, i.e., the dividing up and distribution of the land (partition "in kind") or the sale of the land and distribution of the proceeds. This can be done either by agreement of the parties, or by court order at the request of one party. See *infra*, p. 129.

   a. **Contract to sever:** Similarly, the parties may make an ***agreement*** to sever the joint tenancy, even without partitioning the property.

   Note: Observe that the doctrine of severance, insofar as it results in a termination of the right of survivorship, applies only to joint tenancies, and not to joint ***life estates*** with a contingent ***remainder*** in fee to the survivor. In the latter case, the right of survivorship is more or less indestructible.

F. **Abolition in a few states:** In at least two states, Georgia and Oregon, joint tenancies have been completely ***abolished***. In a number of other states, joint tenancies continue to exist, but the ***right of survivorship*** has been either abolished or required to be expressly provided for in the creating instrument. Arizona, Illinois, Kentucky, North Carolina, Tennessee, Texas, and Washington are among the states that have done this. See 2 A.L.P. 14, n. 12, and A.L.P., 1976 Supp., p. 163, n. 12. Insofar as such a statute has the effect, in a particular case, of eliminating the right of survivorship, the joint tenancy is for practical purposes transformed into a tenancy in common, even though it may still be called a joint tenancy.

II. TENANCY IN COMMON

A. Nature of tenancy in common: The tenancy in common, like the joint tenancy, is an estate shared by two or more people in the same property at the same time. But whereas in a joint tenancy each party has an equal interest in the whole, each tenant in common has a ***separate*** "undivided" interest. The most important practical difference between the tenancy in common and the joint tenancy is that there is ***no right of survivorship*** between tenants in common.

1. **Only one unity required:** Recall that a joint tenancy must have four "unities"; see *supra*, p. 117. The tenancy in common, by contrast, requires only ***one unity***, the unity of ***possession***. That is, each tenant in common is entitled to possession of the ***whole property***, subject to the same rights in the other tenants. But since the unities of time, title, and interest are not required, the tenants may receive their interests at ***different times*** and by ***different conveyances***.
   a. **May have unequal shares:** Even more importantly, the tenants in common may have ***unequal shares***. Thus *A* and *B* may hold as tenants in common, with *A* holding an "undivided one-quarter interest" and *B* an "undivided three-quarters interest". Similarly, *A* may hold an undivided one-half life estate, and *B* an undivided one-half fee simple; the two could still be tenants in common with respect to each other. See Moynihan, p. 224.
      i. **Presumption as to size of interest:** If the conveyance does not state the size of the interest of each tenant in common, there is a ***presumption*** that the shares are ***equal***. But this presumption may be ***rebutted*** by evidence, drawn from surrounding circumstances, that unequal shares were intended. For instance, suppose that *A* and *B* (not husband and wife) take title to Blackacre as tenants in common, and that *A* puts up one-third of the money and *B* two-thirds; if *B* can show that there was no intent by him to make a gift to *A*, he will be held to have a two-thirds interest. See 2 A.L.P. 20.

B. No right of survivorship: Each tenant in common takes his share as an individual; this is in contrast to the joint tenancy, where the joint tenants take as a single "unit." As a consequence, each tenant in common has the right to make a ***testamentary transfer*** of his interest, and if he dies intestate, his interest will ***pass under the statutes of descent***. In other words, there is ***no right of survivorship***.

Example: *A* and *B* take title to Blackacre as tenants in common. They have equal shares. *A* dies, without a will, leaving only one relative, a son S. Title to Blackacre is now: a one-half undivided interest in S, and a one-half undivided interest in *B*.

1. **Right to convey or lease:** Similarly, the tenant in common may convey his undivided interest, or lease it to a third party. If he leases it, he may have the duty to share the rents with his co-tenants; see *infra*, p. 128.

C. Presumption favoring tenancy in common: As noted, most states now have either a statutory or case law ***presumption*** in favor of tenancies in common rather than joint tenancies, as long as the co-tenants are not husband and wife. See *supra*, p. 118.

D. Heirs: A tenancy in common can, of course, be created by action of the parties (e.g., O conveys "to *A* and *B* as tenants in common.") But such a tenancy can also result from ***operation of law***; one common way is through ***intestacy***. Where the intestacy statute specifies that two persons are to take an equal interest as co-heirs, they take as tenants in common.

Example: *A*, the fee simple owner of Blackacre, dies without a will. His sole surviving relatives are a son, S, and a daughter, D. Under the local intestacy statute, where a person is survived by two or more children and not by a spouse, the children share equally. S and D will therefore take title to Blackacre as tenants in common, each holding an undivided one-half interest.

E. Conveyance by one co-tenant: One tenant in common may ***convey*** his interest to a third person without the consent of the other tenant in common. After the conveyance, the grantee simply ***steps into the conveying co-tenant's shoes***, and holds as tenant in common with the nonconveying co-tenant.

Example: *A* and *B* hold Blackacre as tenants in common with equal shares. *A* conveys his interest to *C*. *C* and *B* are now tenants in common with equal shares.

1. **Can't bind absent co-tenant:** But a tenant in common may ***not*** make a

conveyance that in any way ***binds another tenant in common*** who does not participate in that conveyance.

> **Example:** *A* and *B* hold Blackacre as tenants in common with equal shares. *A* purports to convey the entire fee simple to Blackacre to *C*. This conveyance has no effect on *B*'s tenancy in common. And that's true even if *B* knew of the conveyance and did not object. Therefore, the conveyance is effective to pass *A*'s interest to *C*, but not to pass *B*'s interest to *C*. Consequently, *B* and *C* now hold as tenants in common.

2. **Grant of mortgage or judgment lien:** Similarly, if one tenant in common purports to grant a ***mortgage*** on the property, or allows a ***judgment*** to be entered against him that is a lien on his property, the mortgage or lien will be ***effective only against that tenant's own undivided interest***, not the interests of the other co-tenant. Then, if the property is eventually sold or partitioned (see *infra*, p. 129), the mortgage or lien will be effective only against the first co-tenant's proceeds.

> **Example:** *A* and *B* own Blackacre, a house and lot, as tenants in common. *A* grants to Bank a mortgage on "Blackacre." Since *B* has not joined in granting the mortgage, Bank's mortgage is good only against *A*'s undivided one-half interest in Blackacre. Therefore, if Blackacre is sold, Bank's mortgage entitles it to be satisfied only out of *A*'s one-half interest in the proceeds. The same is true if Blackacre is sold in a partition action.

3. **Creation of easement or settlement of boundary dispute:** The same rule is true of attempts by one tenant in common to grant an ***easement***, ***settle a boundary dispute*** with a neighbor, or do anything else that would affect title — the action does not affect the legal rights of any other tenant(s) in common who does not sign the grant or agreement. And that is true even where one tenant in common has ***sole occupancy*** of the premises, and the attempt to change title by grant of an easement, settlement of a boundary dispute, etc., is done by that occupying tenant in common.

III. TENANCY BY THE ENTIRETY

A. Common-law concept of entirety: At common law, the husband and wife were regarded as ***one person***. (See *supra*, p. 106.) As a consequence, there was a special form of co-ownership between husband and wife, the ***tenancy by the entirety***.

1. Four unities required: The same four unities required in the case of joint tenancy (*supra*, p. 117) must be met for a common-law tenancy by the entirety.

2. Right of survivorship: Similarly, the surviving spouse has a ***right of survivorship***.

3. No severance: The critical difference between the tenancy by the entirety and the joint tenancy is that as to the former, there is ***no doctrine of severance***, i.e., ***no way to terminate the tenancy*** while husband and wife are both still alive and still married. The indestructibility of the tenancy by the entirety is discussed further *infra*, p. 126.

B. Creation of estate: At common law, ***any conveyance*** to two persons who were in fact husband and wife ***necessarily*** resulted in a tenancy by the entirety. 2 A.L.P. 24.

1. Modern view: The modern view universally treats husband and wife as two individuals. Consequently, ***only twenty-two states*** retain the tenancy by the entirety at all. (The eight community-property states never had it in the first place, and twenty states have abolished it). See Moynihan, p. 231.

2. Presumption favoring entirety: In those states where the tenancy by the entirety survives, there is usually a ***presumption*** that a conveyance to persons who are actually husband and wife is intended to create a tenancy by the entirety. 2 A.L.P. 25. However, in most of these states the presumption is a ***rebuttable*** one, so that if there is outside evidence that a tenancy in common or a joint tenancy was intended, or if the deed itself contains the words “joint tenants” or “tenants in common,” the grantor's intention will be respected.

a. Exception in few states: But in a few states, the presumption in favor of the tenancy by the entirety remains so strong that even the use of the words “joint tenancy” or “tenancy in common” in the deed will ***not*** be sufficient to rebut it.

3. **Effect of same-sex marriage (*Obergefell*):** As we noted above (p. 114 *supra*), the Supreme Court has held that ***states may no longer refuse to permit same-sex couples to marry.*** See *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). *Obergefell* probably means that any state that recognizes tenancy by the entirety ***must apply that doctrine*** the same way to married ***same-sex*** couples as it does to married opposite-sex couples.

   a. **State might use “husband and wife” formulation:** Some states, in their statutes allowing for tenancy by the entirety, recite that this status is reserved for a ***“husband and wife”*** (rather than a “married couple”). In theory, a conservative state court might interpret such a statute as meaning that a married ***same-sex*** couple may not hold as tenants by the entirety. (Or, such a court, in a state that imposes a *presumption* in favor of tenancy by the entirety, might decide that the presumption applies only to oppositesex married couples.) But such an interpretation would likely be held to be inconsistent with *Obergefell*.

      i. **Rationale:** *Obergefell* recognizes marriage as a ***“fundamental right”*** for purposes of both due process and equal protection. The various state-law “incidents of marriage,” such as the right to hold property by tenancy by the entirety, are presumably part of the package of marriage-related rights that the *Obergefell* majority intended to guarantee to same-sex couples who marry.

4. **Personal property:** At common law, there could not be a tenancy by the entirety in ***personal property***. But most states that now allow such tenancies at all allow them in personal as well as real property.

C. **Indestructibility:** As noted, the key feature of the tenancy by the entirety is that it is ***not subject to severance***. So long as both parties are alive, and remain husband and wife, neither one can break the tenancy.

1. **Right of survivorship:** This means that if H and W take property as tenants by the entirety, they know that the survivor of them is assured of a complete interest in the property.

2. **No partition:** Thus neither party may obtain a ***judicial partition*** of the property.

a. **Termination by agreement:** However, if ***both spouses*** are so inclined, they may agree to terminate the tenancy by the entirety, replacing it by a tenancy in common or joint tenancy.

3. **Conveyance:** In some (but not all) states one spouse may ***convey*** his interest in the tenancy. But this conveyance cannot affect the other spouse's right to the entire estate if the latter survives. Thus even if a state permits, say, H to convey his interest to X, if H predeceases W, W will own the property outright and X will get nothing. (But conversely, if W dies before H, X will own the property outright). See Moynihan, p. 234. Thus a buyer in a state where tenancies by the entirety exist ***must be sure to have his deed signed by both H and W;*** otherwise, he may not even end up with a one-half interest.

4. **Rights of creditors:** Courts are in dispute about whether a ***creditor*** of one of the spouses may attach or levy on that spouse's interest in the tenancy by the entirety.

   a. **Majority view does not allow claim:** Most states do ***not allow*** a creditor to attach or force a sale of the debtor's interest in the entirety while the other spouse is still alive. See, e.g., *Sawada v. Endo*, 561 P.2d 1291 (Hawaii 1977), holding that this result follows from the indivisibility of tenancies by the entirety.

5. **Divorce:** If the parties are ***divorced***, the tenancy by the entirety ***ends***. In some states, the property is then deemed to be held in joint tenancy. But in most states, the property is held as tenants in common, so that if one tenant dies before there has been a sale of the property, there is no right of survivorship in the ex-spouse.

   a. **Equal shares:** Where the property is deemed to be held in joint tenancy following a divorce, the shares are by hypothesis equal, since that is the nature of a joint tenancy. (*Supra*, p. 117.) Where the property is held in a tenancy in common, most courts ***presume*** that the shares are also equal.

IV. RELATIONS BETWEEN CO-TENANTS

A. Few distinctions among tenancies: The rights and duties of each co-tenant during the cotenancy are more or less the same regardless of whether a joint tenancy, tenancy in common or tenancy by the entirety is involved. Therefore, the following discussion is applicable to all types unless otherwise noted.

B. Possession by one tenant: Each co-tenant has the ***right to occupy the entire premises***, subject only to a similar right in the other co-tenants. Moynihan, p. 225.

1. **Agreement regarding possession:** The parties are always free to change this equal right by ***agreement***. For instance, co-tenants might agree that each will exclusively occupy onehalf of the premises.

2. **Normally no duty to account:** Suppose property held in co-tenancy is solely occupied by ***one tenant***. With certain exceptions, that occupying tenant has ***no duty to account*** for the value of his exclusive possession. That is, he has no duty to calculate the reasonable rental value of his sole possession, and pay one-half of it to the other tenant. Nor is he normally liable for any profits he makes from his use of the land.

   a. **Rationale:** This rule follows from the notion that each tenant is entitled to occupy the entire premises subject to the same right in the other. If the sole occupant were required to account for the reasonable value of his occupancy, then the non-occupying co-owner would be able, merely by refusing to exercise ***his*** right to possession, to "convert the status of the occupying tenant from that of co-owner to rent-paying tenant." Moynihan, p. 226.

3. **Ouster:** But if the occupying tenant ***refuses to permit*** the other tenant equal occupancy, then he must account to his co-tenant for the latter's share of the fair rental value of the premises. In this situation, there is said to be an ***ouster*** of the tenant who has been refused occupancy.

   a. **What constitutes ouster:** What constitutes "ouster" for these purposes? Most courts holds that ouster occurs ***only*** when the out-of-possession tenant ***physically attempts*** to occupy the premises, and the occupying tenant refuses to allow this access. Most courts hold that ouster does ***not*** occur where the out-of-possession tenant merely demands that the occupying tenant either ***pay rent or vacate***. So in the common situation where one co-tenant has a use for the property and the other does not, the former ***can effectively occupy the premises without paying rent***, a situation that many commentators think is unfair.

Example: Spiller, Mackereth and others own a building as tenants in common. The lessee of the building vacates. Spiller then enters and begins using the building as a warehouse. Mackereth writes to Spiller demanding that Spiller either vacate half the building or pay rent. Spiller does neither. Mackereth brings suit for half the fair rental value of the premises.

Held, Spiller owes nothing. To start with, "in [the] absence of an agreement to pay rent or an ouster of a co-tenant, a co-tenant in possession is not liable to his co-tenants for his use and occupation of the property." Ouster will be deemed to occur only when the occupying co-tenant refuses a demand by the other co-tenants that the latter be allowed in to use and enjoy the land. Mackereth's demand letter, and Spiller's refusal to agree to pay rent or move out, was not enough to oust Mackereth, because Mackereth was not demanding equal use/enjoyment of the premises, merely rent. Nor did Spiller's placement of locks on the building act as an ouster of Mackereth, since the evidence was that Spiller was trying to protect goods he was storing in the building, not trying to keep Mackereth or the other co-tenants out. *Spiller v. Mackereth*, 334 So.2d 859 (Ala. 1976).

4. **Depletion:** A second situation in which the occupying tenant will have a duty to account is if he ***depletes the land***, or otherwise lessens its value. For instance, if he takes away and sells its mineral resources, such as oil, gas or coal, he will be liable to his co-tenants for their share of the profits he has made. Moynihan, p. 227.

C. **Premises rented to third party:** Although a co-tenant is normally entitled to occupy the premises himself without accounting for their reasonable rental value, the same is not true if he ***leases the premises*** to a third person. Once he does this, and collects rents, he is required to ***share*** these rents with his co-tenants.

1. **Statute of Anne:** This duty to account for rents received derives from an English statute, the Statute of 4 and 5 Anne. A majority of states have enacted similar statutes, and nearly all the remainder hold as a matter of case law that there is a duty to account for such rents. Moynihan, p. 226. But these statutes and decisions generally apply only to rent received from third persons, ***not to the rental value of occupancy*** by a co-tenant himself.

D. Payments made by one tenant: Sometimes, one co-tenant will make certain payments, and then wish to recover from the other co-tenants their share of the expenditures. Or, he may wish to deduct such expenditures before paying his co-tenants their share of rents he has collected from a third person. Finally, he may wish to have the expenditures credited to him before the proceeds are distributed in a partition proceeding (*infra*, p. 129).

1. **Taxes and mortgage payments:** One tenant may make ***property tax*** or ***mortgage*** payments on the property. Generally, such payments are viewed as being ***made for the benefit of all the co-tenants***, since their interest in the property is protected. Therefore, the tenant making the payment will be allowed to ***deduct*** the payment from the rents he has collected from third persons, and he will be reimbursed for the payments "off the top" before any proceeds from a partition sale are distributed. If the other co-tenants are personally liable for the indebtedness (e.g., if they have assumed the mortgage), in some states the tenant who has made the payment may bring a ***direct suit*** against them for contribution. 2 A.L.P. 73-75.
   a. **Mortgage completely paid off:** If a mortgage is completely paid off by one cotenant, he becomes "subrogated" to the mortgagee's interest, and thus holds an "equitable lien" against the property. He can therefore usually have the property sold and recover his overpayment from the proceeds.
2. **Repairs:** The cost of ***repairs*** is handled in a similar way. If one tenant pays these costs, and the others have not agreed to help him, most courts do not allow him to make a direct recovery against his co-tenants for their share. But he may deduct their portion of the repairs before turning over any rents received from third persons, and he may receive credit for his expenditures before any partition proceeds are distributed.
   a. **Right of contribution where possession shared:** Where ***possession is shared*** between the tenant who makes the payment for repairs and another tenant, a number of courts will allow a direct action for contribution. Moynihan, p. 228.
3. **Improvements:** If one tenant pays for ***improvements*** to the property, which the other tenants have not agreed to, the former is ***never*** permitted to recover contribution in a direct suit. And he is not normally permitted to deduct the cost of improvements from rents that he collects from a

third person. However, if the rents he collects are ***increased*** as a result of the improvements, he may collect just the increase, up to the cost of the improvement.

a. **Rationale:** The reason for these rules is that it would be unfair to allow the non-paying tenant to be “improved out of his estate”; for instance, if an automatic deduction from third-party rents were allowed, a tenant who counted on receiving his share of the rents would be deprived of them. 2 A.L.P. 81. Yet where a tenant, by paying for improvements, has increased the cash flow of the property, it is fair to allow him to recoup his payment from the increase.

b. **Partition:** The party who pays for an improvement is always free to seek ***partition*** from the court, and except in the case of a tenancy by the entirety, he will get it. (*Infra*, p. 129.) If the property can be divided “in kind” in such a way that the parcel containing the improvement can be given to the person who paid for it, the court will do so. Otherwise, it will order the property sold and the person who paid for the improvement will get, off the top, any increase in value from the improvement up to its cost.

4. **Acquisition of outstanding interest:** Co-tenants are required to act towards each other in ***good faith***. If they receive their interests at the same time (e.g., from the same will, or by the same conveyance), they will usually be held to be in a ***fiduciary relationship***. One important consequence is that if one of them ***buys an outstanding interest***, he ***holds that interest on behalf of all of them.***

a. **Buying at foreclosure or tax sale:** The same principle generally applies to a cotenant who buys the property at a ***foreclosure sale*** or ***tax sale***. The foreclosure or tax title is not automatically held for the benefit of the other tenants, but they have a ***right to elect to contribute*** within a reasonable time after the sale; if they do so, they maintain their ownership interest.

Example: *A* and *B* inherit from *O* Blackacre, a lot with a house on it; they take as equal tenants in common. At the time they inherit, the property is already subject to an outstanding mortgage of $100,000 held by Bank. Shortly after they inherit, the mortgage falls into default, and Bank starts foreclosure proceedings, notice of which

Bank gives to both *A* and *B*. *A* (but not *B*) bids at the foreclosure sale, and is the winner bidder at $100,000, all of which goes to Bank.

A court will almost certainly hold that in bidding, *A* owed a fiduciary duty to his co-tenant *B*. Therefore, post-foreclosure-sale, *B* will have the right to elect to participate equally in the purchase. Consequently, provided that *B* so elects within a reasonable time after the foreclosure, and pays *A* $50,000, *B* will be restored to his preforeclosure position as equal co-tenant.

E. Partition: Any tenant in common or joint tenant (but not a tenant by the entirety) may bring an equitable action for ***partition***. By this means, the court will either ***divide the property***, or ***order it sold*** and the ***proceeds distributed***. Normally, each tenant has an absolute right to partition.

1. Partition in kind: In some cases, there is a fair way to divide the property, so that each tenant can be given a parcel proportional to his interest. For instance, a large farm, all of whose acreage is roughly comparable, might be subdivided. This is known as partition "***in kind.***" Even if a precise apportionment is impossible, the court may order partition to another, to reflect the disparities in the physical division.

2. Partition by sale: Where partition in kind is not possible, or would be unfair to one party, the court will order the property sold, and the proceeds divided. This is a partition ***"by sale."***

3. Preference for partition in kind: Most courts state a preference for partitioning the property ***in kind*** rather than by sale, and say that they will approve a partition by sale if and only if the ***physical characteristics*** of the property prevent division of the property in kind, or if division in kind would be ***extremely unfair*** to one party.

Example: The property is in a residential zone, and requires 100 feet of street frontage for any house. The property is vacant now, and has 150 feet of frontage. *A* owns twothirds and *B* one-third, as tenants in common. *A* proposes to divide the property so that he gets two-thirds of the square footage, and so that he gets 100 feet of frontage. The court probably won't order partition in kind, because this would leave *B* with 50 feet of frontage, too little to build a house on. Therefore, the court will probably order the land sold.

a. Where opponent of partition lives or works on the property:

Where the party who is opposing partition by sale ***lives on the property*** or ***uses it for a business***, courts are especially ***reluctant*** to in effect evict that party by requiring that the entire parcel be sold.

Example: The Ps own 99/144ths of a 20-acre parcel, and D owns the remaining 45/ 144ths. D lives in a house at one edge of the property, and operates a rubbish and garbage removal business from part of the property. The remainder of the property is unused, and the Ps are not in possession of any part. The Ps want to convert the entire parcel into a residential development (and do not want the property partitioned in kind, since the residential parcel would be less valuable per acre with D's older house and garbage business adjacent to it than if the whole parcel became a development). D resists partition by sale, because she does not want to move her home or relocate her garbage business.

Held, D wins, and the property will be partitioned in kind, not by sale. Under Connecticut law, partition by sale will only be ordered if the physical attributes of the land are such that partition in kind would be impractical or inequitable, and the interests of the owners would be better promoted by partition by sale. The burden is on the party requesting partition by sale to demonstrate that these requirements are met. Here, the Ps have failed to meet either requirement. The property could certainly be partitioned in kind, with the Ps left to convert their roughly 2/3 portion to residential use. Furthermore, it is the interests of *all* the tenants in common, not merely the economic gain of one tenant or group of tenants, that the court must consider. Here, the lower court failed to give adequate weight to the fact that D would lose both her home and her livelihood if she were forced to participate in a sale of the entire property. *Delfino v. Vealencis*, 436 A.2d 27 (Conn. 1980).

Note: Courts continue to say that partition in kind is preferred over partition by sale. But in most cases where the parties disagree about which type of partition should be used, the court ends up decreeing partition by sale. DKA&S, pp. 296-97. One reason is that courts usually conclude that a sale is the fairest for all parties (though in a case in which only one party lives or works on the property, such as in *Delfino*, the fairness of a sale is harder to see). Probably ***economic***

efficiency will be better served in most instances by a ***sale***; for instance, the plaintiffs in *Delfino* were probably right in arguing that any gain to D in being able to continue to live and operate her business on the property would be outweighed by the loss of the ability to develop the whole parcel as residential real estate — in any event, if D's use of the property was really more valuable than the lost residential development use, D should in theory be able to be the highest bidder for the property at the partition sale.

b. Accounting for rents and profits: As noted above, before the proceeds from a partition sale are distributed, a tenant who has paid more than his share for repairs, mortgages, taxes, or improvements, will be repaid from the proceeds. Conversely, if one co-tenant has received more than his share of third-party rents, the other tenants will receive a matching share of the partition proceeds off the top. Thus an ***accounting*** for rents and profits is often part of a partition proceeding.

4. Agreement not to partition: The parties are always free to ***agree*** that they will ***not partition*** the property in the future. However, since partition is an equitable action, the court may ***disregard*** the agreement, and order partition, if the agreement is for an unreasonably long period of time, or if circumstances have changed.

Quiz Yourself on
CONCURRENT OWNERSHIP

33. O conveyed Blackacre “to A and B as co-tenants.” A then died, bequeathing all of his real and personal property to his son, S. B is still alive. What is the state of title to Blackacre? ___________________

34. O conveyed Blackacre “to A and B as joint tenants.” B then conveyed to C, by a quitclaim deed (conveying whatever interest B had in the property). Subsequently, A died, bequeathing all of his real and personal property to his son, S. What is the state of title? ___________________

35. O, the fee simple owner of Whiteacre, died, leaving the property by will to his three children, A, B, and C, “as tenants in common.” A purchased C's interest. The property is a single-family home. A moved in, and used the property as his principal residence. B, a bachelor, has now demanded to live in the home as well. If A refuses, will a judge order A to share the house with B? __________________

36. Henry and Wanda were husband and wife. Using funds supplied entirely by Henry, the two purchased Blackacre from Oscar. (The deed from Oscar to Henry and Wanda read, "To Henry and Wanda in fee simple," without further elaboration.) Shortly thereafter, Henry became infatuated with a younger woman, Georgia. To celebrate the six-month anniversary of their affair, Henry conveyed to Georgia his interest in Blackacre. (Assume that the land is located in a state that permits such a conveyance.) For the next five years, Henry continued to be married to Wanda, but carried on his affair with Georgia. Then, Wanda died, leaving all of her real and personal property to her and Henry's daughter, Denise. Shortly thereafter, Henry died. What is the state of title? (Assume that the common-law approach to all relevant matters is in force, unmodified by statute or case law.) __________________

37. Herb and Wendy, husband and wife, were the owners of Blackacre, which they held by tenancy of the entirety. In 2011, Herb and Wendy were divorced. They intended to sell the property, but before they could do so, Herb died suddenly in 2012. Herb's will leaves all his real and personal property to his son by a prior marriage, Stan. What is the state of the title to Blackacre? __________________

38. Arthur and Bertha, after inheriting Blackacre from their father, held it as tenants in common. Originally, Arthur lived in the premises, and Bertha had no interest in doing so. After a few years, Arthur moved out, and sent Bertha the following letter: "I am moving out of Blackacre. You have the right to live on the property. If you do not do so, I will rent it out." Bertha made no response. Arthur, after advertising for a tenant, rented the property to Xavier, who responded to the ad. Xavier paid $20,000 of rent during the first year. (Xavier paid all operating costs, such as utilities.) At the end of the first year of this rental, Bertha learned of the arrangement and sent Arthur a letter stating, "You owe me one-half of the rents paid by Xavier." Is Bertha correct? __________________

39. Omar, the owner of Whiteacre, left the property to his daughter Carol and his son Dan, in equal parts. The will said nothing about who should occupy the property. The property was a single-family home. Dan already had a home of his own, suitable for his family. Carol did not. Therefore, Carol moved into the house, and has since occupied it. The estimated fair market rental value of the house is $18,000 per year. Dan has demanded that Carol pay him one-half of this amount, to compensate for her use of the premises. Carol has responded, "You are free to live here with me, but I'm not paying you any money for my use of the premises." If Dan sues for one-half of the fair market rent represented by Carol's occupancy of the premises, will Dan prevail? ___________________

40. Edward and Felicia, brother and sister, received Whiteacre as a bequest in their mother's will. Edward, who had been living on the property while his mother was still alive, continued to do so after her death. Felicia has never had any interest in living on the property. The property is presently worth approximately $800,000, and has a rental value of $50,000 per year. However, Edward has rejected all suggestions by Felicia that the property be sold or rented out to third parties (though Edward has always indicated that Felicia is welcome to live on the property with him). What sort of action, if any, may Felicia bring to accomplish her goals?

____

Answers

33. B and S hold as tenants in common. Today, all states establish a presumption that an ambiguous conveyance creates a tenancy in common rather than a joint tenancy. Therefore, O's ambiguous conveyance made A and B hold as tenants in common. Consequently, when A died, there was no right of survivorship on the part of B. Instead, A's undivided one-half interest in Blackacre passed to S. S and B now hold as tenants in common.

34. S and C as tenants in common. When B conveyed to C, this had the effect of ***severing*** the joint tenancy between A and B. Therefore, A and C held as tenants in common, not joint tenants, immediately after the conveyance by B to C. Therefore, when A died, C had no right of survivorship. S inherited A's share of the tenancy in common.

35. Yes. Each tenant in common is entitled to ***possession of the whole property***, subject to the same rights in the other tenants. It does not make any difference that one of the tenants in common has a larger undivided interest than the other — the relative size of the interests matters only when the property is sold and the proceeds are allocated.

36. **Fee simple absolute in Georgia.** Oscar's original conveyance to Henry and Wanda created a tenancy by the entirety in them, since at common law any conveyance to two persons who are in fact husband and wife necessarily results in such a tenancy. (In fact, in the 22 states that retain tenancy by the entirety, there remains a presumption that a husband and wife who take property take it by the entirety.) When Henry conveyed his interest to Georgia, this did not have the effect of destroying the tenancy by the entirety, since such a tenancy is ***indestructible*** while both parties are alive and remain husband and wife. But the conveyance did have the effect of passing to Georgia whatever Henry's rights were. When Wanda died before Henry, her interest was extinguished, and there was nothing for her to pass to Denise. Since Henry would have taken the entire property had he kept his interest, Georgia steps into his shoes, and takes the entire property.
37. **Wendy and Stan each have an undivided one-half interest as tenants in common.** Where husband and wife are divorced, the tenancy by the entirety automatically ends. In most states, the property is then deemed to be held as tenants in common (i.e., without right of survivorship). Thus when Herb died, his undivided one-half interest as tenant in common passed to Stan.
38. **Yes.** Although a co-tenant is normally entitled to occupy the premises himself without accounting for their reasonable rental value, the same is not true if he leases the premises to a third person. Once he does this, and collects rents, he is required to share these rents with his co-tenant.
39. **No.** Each co-tenant is entitled to occupy the entire premises, subject only to the same right on the part of the other tenant. But the occupying tenant has, in general, no duty to account for the value of his exclusive possession. If Carol refused to let Dan live in the property, then Carol would be liable to pay Dan one-half of the rental value of the premises. But as long as Carol holds the premises open to Dan, she does not have to pay Dan any part of the imputed value of her own occupancy.
40. **She should bring an action for partition.** Any tenant in common or joint tenant (but not a tenant by the entirety) may bring an equitable action for partition. By this means, the court will either divide the

property, or order it sold and the proceeds distributed. Normally, each tenant has an absolute right to partition, even over the objection of the other. Here, since the property probably cannot be readily divided, the court will order it sold. Felicia will get half of the sale proceeds.

Exam Tips on *CONCURRENT OWNERSHIP*

Joint Tenancy

- **Joint tenancy vs. tenancy in common:** Generally, a tenancy in common, ***not*** a joint tenancy, is presumed unless there is a ***clear intent*** to establish a joint tenancy.
  - **Identify interest:** First look at the grantor's language. A joint tenancy is clearly indicated by a grant which provides: "To A and B as joint tenants with right of survivorship."
    - **Ambiguity:** Watch for language that does ***not*** clearly indicate a joint tenancy; when this happens, lean in favor of a tenancy in common.
      Example: O grants realty "to A and B, to be held by them jointly." Most courts would find a tenancy in common because of the ambiguous language. However, in your answer, analyze the surrounding circumstances which may influence a court to decide differently. For instance, if A and B are related to each other and to O, and the property is a single-family residence, you can argue that O intended to keep the property in the family and that he would not have created a situation where one cotenant might possibly be forced to share a home with a stranger (which could happen with a tenancy in common).

  - **Survivorship:** Remember that the unique characteristic of a joint tenancy is that upon a cotenant's death, her share ***passes to the surviving cotenants in equal shares***; the remaining cotenants are then in joint tenancy with each other.

Example: A, B and C are in joint tenancy with each other. Each holds an undivided one-third interest in the property. If A dies, her interest passes to the other two. Therefore, B and C will each hold an undivided one-half interest in the property, as joint tenants.

- ☞ **Severance:** The most frequently-tested issue regarding a joint tenancy is the issue of ***severance***. Often fact patterns will be complicated, with several transfers having occurred, and you will be asked to determine the rights of the various parties to the property; to do this, you'll have to recognize where severance of the joint tenancy has occurred.
  - ☞ **Sale or other conveyance:** Look for a ***conveyance*** by one cotenant to another party. This ***effects a severance*** as to that interest but ***not*** as to the interests of the other joint tenants.
    Example: A, B, and C are joint tenants in a parcel of land. B sells her share to Z. The result is that A and C hold equal shares of a two-thirds interest in the land as joint tenants with each other, and Z holds a one-third interest in the land as a tenant in common vis a vis the other two.
  - ☞ **Devise:** Don't be fooled when a cotenant devises her share of a joint tenancy in her ***will***. This does ***not*** effect a severance, nor does it pass the share on to the devisee. The decedent's share automatically passes to the other cotenant(s).
    Example 1: O conveys realty "to my brothers A and B, their heirs and assigns as joint tenants with right of survivorship." A dies, devising his interest to his only child, "C for life, and then to C's son, S, for life, and then to S's children, their heirs and assigns." B dies and devises his interest "to my friend, F, his heirs and assigns." F later conveys by quitclaim deed "to P, his heirs and assigns."

P owns the realty in fee simple because: (1) A's interest went to B when A died (despite the fact that A tried to devise it by will), leaving the whole parcel in B; (2) B devised the whole parcel to F; and (3) F conveyed the whole parcel to P.

Example 2: A, B, and C are joint tenants of a parcel. A conveys her interest to D, her daughter. Later, B dies, with a will leaving all B's real estate to S, his son.

When A conveyed her interest to D, D became a tenant in common with a onethird interest, while B and C continued to be joint tenants as to the remaining twothirds. B's attempted devise to S was ineffective and C received B's interest, leaving C with an undivided two-thirds interest and D with an undivided one-third interest as tenants in common.

- **Mortgage:** If a joint tenant mortgages his interest in a state that treats a mortgage as a transfer of ***title***, then the joint tenancy is ***severed***. However, in a state where a mortgage is treated as merely a ***lien*** to secure repayment, the tenancy is usually ***not*** deemed ***severed.***
- **Partition:** Another method of severance that appears in fact patterns is ***partition***: the dividing up and distributing of the land or the sale of the land and distribution of the proceeds, which can be done either by agreement of the parties, or by court order at the request of one party. Partition effects a severance — each cotenant is given a share equal in value. If the estate can't be divided equally, the cotenant who receives the land of greater value may be required to make a cash payment to the other cotenant.

Tenancy in common

- **T/C generally:** A conveyance to two or more people is presumed to be a tenancy in common unless a contrary intention is shown.
  - **No ability to affect other co-tenant's rights:** Keep in mind that a tenant in common may not make a conveyance (including a mortgage) that in any way ***binds another tenant***

in common who does not join in the conveyance.

> *Example:* Blackacre is owned by *A* and *B* as tenants in common. *A* borrows money from Bank and signs (but *B* doesn't) a mortgage to Bank on "Blackacre." If *A* doesn't pay the money back, Bank can foreclose on only *A*'s tenancy in common interest, not *B*'s. And that's true even if *B* knew about and approved *A*'s signing of the mortgage (as long as *B* didn't sign the mortgage or explicitly give *A* the right to sign on *B*'s behalf).

Tenancy by the entirety

☛ **Tenancy by the entirety generally:** In jurisdictions which recognize tenancy by the entirety, a conveyance ***to a husband and wife*** is ***presumed*** to create a tenancy by the entirety. But the presumption operates only if there's no indication that the parties had a contrary intention.

> *Example:* Bride and Groom receive a wedding gift of a parcel of realty. The deed states: "to Bride and Groom, husband and wife, as joint tenants." Several years later Bride and Groom separate and Bride moves in with another man, Mon. At Mon's request, Bride executes a quitclaim deed conveying her interest in the realty to Mon.
>
> The "as joint tenants" language rebutted the presumption of a tenancy by an entirety, and instead created in Bride and Groom a joint tenancy with right of survivorship. When Bride conveyed to Mon, the joint tenancy was severed, and Groom and Mon became tenants in common.

☞ **Same-sex married couples:** Be on the lookout for a question that involves tenancy by the entirety in the context of ***same-sex marriage.*** Since all states must now recognize same-sex marriage (*Obergefell v. Hodges*), if your fact pattern says that tenancy by the entirety is available by statute where property is held by a "husband and wife," you should say that *Obergefell* probably means that the courts must interpret this form of ownership as being ***available to married same-sex couples too.*** So if state law establishes a "presumption" that where H and W co-own property, they intend to do so as tenants by the entirety, say that the presumption should apply to property owned by members of a same-sex married couple too.

Ouster

- **Ouster generally:** Look for a fact pattern which indicates that a tenant not in possession of the land has attempted to physically occupy the land and the occupying tenant has refused to allow access. When this occurs, point out that the cotenant who has ousted the other cotenant or prevented her from occupying the premises may be required to ***account to the other cotenant for rent.*** (Each co-tenant normally has a right of ***equal access*** to the property.)

Partition

- **Sale vs. in kind:** If you have a partition problem, you'll need to say whether the court will order partition ***"in kind"*** (physical division) or instead a partition by ***sale***. Point out that courts have a general ***preference for partition in kind***, but not where this would be ***unfair*** to one side.

    Example: The property is in a residential zone, and has 1-acre minimum lot sizes for houses. The property is vacant now, and is 1.5 acres. *A* owns two-thirds and *B* one-third, as tenants in common. The court probably won't order partition in kind, because this would leave *B* with .5 acres, too small to meet the 1-acre minimum to build a house on. Therefore, the court will probably order the land sold, and the proceeds divided two-thirds / one-third.

EXAMPLES & EXPLANATIONS

Property

Sixth Edition

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CHAPTER 13

Concurrent Ownership

As we have seen, property ownership can be divided up in several ways. A landowner of 100 acres, for example, may give 50 acres to one person and 50 acres to another; the landowner may give one person the whole 100 acres as a life estate and another the remainder; the landowner may sever the surface from the subsurface by granting away the mineral rights; or the landowner may transfer legal title to a trustee with rights to manage and sell the property for the economic benefit of beneficiaries who have the right to income and value appreciation.

Finally, two or more persons may concurrently own the same interest in the same land. There are three major concurrent interests developed in England and recognized in the United States: tenancy in common, joint tenancy with right of survivorship, and tenancy by the entirety. Each may be found in any present or future interest, and may be held in any estate—for life, in fee simple determinable or subject to a condition subsequent, in fee simple absolute, etc.

TENANCY IN COMMON

The most common form of concurrent ownership is the tenancy in common. Each tenant in common owns a share of the same piece of property. The default rule is that each co-tenant has an equal right to possess the whole property and to share equally in rents and appreciation in value. Thus, it is said that their interests are "undivided"—that is, each has *seisin* and the right to possess the whole. In practice, they frequently own varying proportional interests in the land. Tenants in common (or co-tenants) are presumed to own a property in proportion to the amount each contributed to purchase the property, but this presumption is rebuttable and subject to an agreement to the contrary.

Tenants in common normally share in rents and sales proceeds according to their respective interests. Even if co-tenants own varying interests in property, each co-tenant enjoys the right to possess the entire property. Thus, if *A* owns a 50 percent interest and *B* and *C* each own a 25 percent interest in Blackacre, as tenants in common, *A* would receive 50 percent of any net rents from the property, but all three would have equal rights of possession.

Concurrent ownership sometimes breeds conflict and disagreement. Common law default rules have evolved to resolve possession, use, profit-sharing, and expense-sharing issues that may arise when concurrent owners cannot agree.

A tenancy-in-common interest is assignable (transferable), devisable, and inheritable. Transferees become tenants in common with the remaining tenants in common. A co-tenant can mortgage his interest to secure a loan or can sell his interest, but cannot sell his co-tenants' interests in the property.

Example 1: *O* conveys Blackacre, a 100-acre farm, to *A* and *B* as tenants in common. No more being said in the deed of transfer, *A* and *B* each own a 50 percent undivided interest in the entire 100 acres. Three years later *A* dies, devising his interest in Blackacre to *M*. *M* now owns a 50 percent interest in Blackacre. *B* and *M* own the 100-acre farm as tenants in common.

Example 2: *O* conveys Whiteacre to *A* and *B* as tenants in common. *A* then dies without a will, survived by two children, *C* and *D*. Without a will, *C* and *D* take *A*'s interest under the canons of descent or intestacy, again in equal proportions, so that *B* owns a 50 percent interest and *C* and *D* each owns a 25 percent interest in Whiteacre.

Example 3: *O* conveys Greenacre, along with its farm equipment, to *A* and *B* as tenants in common. In a majority of states, it is possible to have a tenancy in common in personalty as well as real property.

JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

The joint tenancy with right of survivorship is a form of concurrent ownership with a survivorship element. When a joint tenant dies, her interest ends. The last surviving joint tenant owns the property outright, and may sell or devise the property. The joint tenancy with right of survivorship is often used as a will substitute: It avoids the cost and time of probate administration since a decedent's interest in the property ends on her death and the title remains in the remaining joint tenants. Often the property involved is the family residence.

Example: Ann and Brady are joint tenants with right of survivorship in Whiteacre. Ann dies, her will devising all her real property to Donna. Donna gets no interest in Whiteacre. Brady is the sole owner. A year later Brady dies, his will devising all his real property to Emmylou. Emmylou owns Whiteacre.

The preferred language to create a joint tenancy with right of survivorship is "to *A* and *B* as joint tenants with right of survivorship and not as tenants in common." The most significant difference between a joint tenancy with right of survivorship and a tenancy in common is the right of survivorship.

At one time—and still today in many jurisdictions—a joint tenancy could be created and maintained only if all the tenants shared the four unities:

(1) Unity of Time—The joint tenants' interests must vest at the same time.

(2) Unity of Title—The joint tenants must acquire title in the same deed or will.

(3) Unity of Interest—Each joint tenant must own equal shares of the same estate.

(4) Unity of Possession—Each joint tenant has a right to possession of the whole property.

Historically, a joint tenant could change his interest from a joint tenancy with right of survivorship to a tenancy in common by destroying any one of the four unities. That absolute rule is no longer the law either for creating or destroying joint tenancies in many jurisdictions. An agreement between joint tenants that one tenant have sole possession, for example, does not destroy the unity of possession. Likewise, a court in equity may look to the respective contributions each joint tenant made to acquire the property and divide any sales proceeds in proportion to each joint tenant's respective contribution.

Unity of title is still required in some jurisdictions, but in most it has been abolished by statute or judicial opinion after decades of being circumvented by use of a straw man or straw. A ***straw man*** is a person who briefly takes legal title for the sole purpose of reconveying the property back to his grantor. Usually the straw is someone in the lawyer's office, a secretary or a paralegal—someone who can be trusted to reconvey the property.

The process worked this way: A person holding land solely in his own name wanted to own the property as a joint tenant with right of survivorship. He may have wanted to pass the property to his spouse or child outside of probate.

Let's assume the landowner wanted to transfer the family residence to himself and his wife as joint tenants with right of survivorship. At early common law, the landowner could not create a joint tenancy with right of survivorship by making a direct transfer to his spouse or a transfer to himself and his spouse since the deed attempted to create an interest in the spouse at a different time and under a different title (deed). A tenancy in common and not a joint tenancy with right of survivorship resulted. The solution to this dilemma was for the landowner to transfer the property to a straw man, who immediately deeded the land to the original landowner and his wife as joint tenants with right of survivorship.

Many jurisdictions have concluded there is no reason to require a straw. These jurisdictions allow a direct transfer from one person to himself and another as joint tenants with right of survivorship, particularly when the other is the spouse. Be cautious here, as many states still require resort to a straw man for one spouse to transfer property to himself and spouse as joint tenants with right of survivorship.

A joint tenancy is created by a deed or a will. A joint tenancy cannot arise by intestate succession: Two or more persons inheriting the same property become tenants in common. On the other hand, it is possible under proper facts—usually taking the land under a faulty deed naming the co-tenants as joint tenants with right of survivorship—that joint adverse possession could yield a joint tenancy held by two or more adverse possessors.

When two joint tenants die simultaneously, most courts treat half the property as if one tenant survived and the other half as if the other tenant survived—effectively treating the property as a tenancy in common, giving the heirs of each tenant an equal share.

Sometimes, rarely we hope, one joint tenant murders the other joint tenant. When one of two co-tenants murders the other one, the murderer forfeits the right of survivorship, but not his interest. In effect, murder turns the joint tenancy into a tenancy in common.

Since her interest in the joint tenancy ends on her death, a joint tenant cannot devise her interest in a joint tenancy with right of survivorship; nor is her interest inheritable. A joint tenant may transfer or assign her interest during her life, however. The assignment ends the joint tenancy at least as to the transferee, who thereafter holds his interest as a tenant in common with the other tenants, who continue to hold their fractional share in a joint tenancy with right of survivorship. Ending a joint tenancy with right of survivorship interest in property and transforming it into a tenancy in common interest is called a "severance."

SEVERANCE

In some jurisdictions, when one or more of the four unities of a joint tenancy with right of survivorship no longer exists, the joint tenancy interest is said to be ***severed*** from the joint tenancy relationship and becomes a tenancy in common ownership interest. A severance, in short, turns a joint tenancy into a tenancy in common between the severed interest and the remaining joint tenants. The remaining joint tenants continue holding their interests in the property as a joint tenancy with right of survivorship. Thus, when the joint tenancy is created in three or more persons, a unilateral act of one of them leaves the joint tenancy intact as between the remaining tenants, who together then would hold a tenancy in common with the severing tenant. Courts in these jurisdictions look for some action or relationship that destroys one of the four unities to find a severance.

Courts in other jurisdictions do not focus on the four unities, but look instead for an act or instrument that indicates an intent by one of the joint tenants to terminate the survivorship element.

Joint tenancy interests can be severed voluntarily or involuntarily. The most common voluntary severance occurs when one joint tenant unilaterally transfers her interest to another person, as when *A*, a joint tenant, deeds her interest to a third party. The most common involuntary severance is a foreclosure sale or a sale in bankruptcy proceedings.

Example 1: *O*, the holder of a fee simple absolute in Blackacre, conveys "to *A*, *B*, and *C*, as joint tenants with right of survivorship." Five years later *C* conveys her interest to *D*. The deed to *D* is a severance of *D*'s interest in the joint tenancy. *A* and *B* continue in joint tenancy with each other, but are in a tenancy in common with *D*, each of the three having a one-third interest in Blackacre. If *A* dies, leaving a will devising her interest in Blackacre to *M*, *M* gets nothing. *A*'s interest ends on her death and *B* owns a two-thirds interest in Blackacre as a tenant in common with *D*, who owns a one-third interest.

Example 2: Same facts as in Example 1, except *A* and *B* survive while *D* dies, leaving a will devising his interest to *N*. *D* held an interest as a tenant in common at his death. A tenancy in common is devisable, so *N* owns a one-third interest in Blackacre. *A* and *B* continue to own the remaining two-thirds interest in Blackacre as joint tenants with right of survivorship as between themselves, but as tenants in common with *N*.

Example 3: Same facts as in Example 1, except *A*, *B*, and *D* all survive. *A* sells her interest to *L*. This severs *A*'s interest from the joint tenancy. Since a joint tenancy requires more than one person (and *B* cannot be in a joint tenancy by herself), the joint tenancy is now a tenancy in common, with *B*, *D*, and *L* as tenants in common.

(a) Leases

A short-term lease by one joint tenant does not sever a joint tenancy. The lease ends on the death of the leasing joint tenant. The lessee's possessory rights derive from the lessor joint tenant; when the lessor joint tenant no longer has an interest due to his or her death, the lessee also loses his right of possession. The lease terminates with the death of the leasing co-tenant even though the lease term has not run its course and the lessee has no notice in the lease or elsewhere of the extent of the lessor's rights: The surviving, nonleasing joint tenants do not take subject to the lease.

Some older cases held that a lease with a long term might work a severance, at least for the term of the lease. More recent cases have concluded that even a long-term lease by one joint tenant will not sever the joint tenancy.

The modern trend rests on a couple of rationales. One is that the lease is not a freehold estate and hence there is no severance of title and the tenant enjoys the rights of possession through the leasing co-tenant, not in his own right. The second is that in a state no longer holding the four unities as essential to the joint tenancy, under a principle of "equal dignity," the parties who intended to hold as joint tenancy with right of survivorship should manifest their intent to terminate the survivorship element more definitely. Likewise, an option to purchase the leasing joint tenant's interest, when contained in the lease, does not sever the joint tenancy, either, until the option is exercised and the property is sold.

Word to the wise: Because a lessee's right to continue occupying the premises through the term of the lease might end on the death of his lessor, a lessee should require all joint tenants to execute the lease.

(b) Mortgages

The issue in many cases is whether one joint tenant unilaterally granting a mortgage to secure a debt severs a joint tenancy with right of survivorship. As background, a mortgage is a document by which the owner of real property pledges the property to secure the payment of a debt (a promissory note) owed by the owner of the property or by someone else. If the debtor fails to pay the debt, the creditor may "foreclose" on the mortgaged property, selling it to raise money to pay off the debt.

The vast majority of jurisdictions are ***lien theory jurisdictions***, meaning a mortgage provides security for a loan. Title remains with the debtor. Since legal title remains with the debtor joint tenant, the giving of a mortgage by one joint tenant to secure his personal debt does not sever the joint tenancy. Only when the interest is sold following foreclosure proceedings does a severance occur.[1]

Jurisdictions differ on what happens to the mortgage if the debtor joint tenant dies while the mortgage is outstanding. Conceptually, the mortgage should be worthless since the deceased debtor no longer owns an interest in the property, and the creditor's rights depend on the debtor's interest. The deceased joint tenant's interest, moreover, does not pass to the other joint tenants; rather, the interest just ends, similar to a life estate. Some states, by statute or judicial opinion, however, conclude that the property continues to be subject to the mortgage. Hence lenders should have all joint tenants sign the mortgage, even if they are not personally liable for the debt.

About a dozen jurisdictions are known as ***title theory jurisdictions***, where a mortgage conveys legal title to the creditor. The creditor owns the debtor's interest in fee simple determinable, to revert to the debtor when the debt is retired. Some courts, especially a few decades back, viewed the transfer of legal title as destroying at least one of the four unities, and thus severed the debtor's interest from the joint tenancy. While that is still the law in some title theory jurisdictions, see, e.g., Stewart v. AmSouth Mortgage Co., 679 So. 2d 247 (Ala. Ct. Civ. App. 1995), most recognize that the mortgage is a security device, and the debtor remains the true owner. In these title theory jurisdictions, the mortgage, as under a lien theory, does not sever the joint tenancy.

(c) Judgment Liens

Just as a completed foreclosure of a mortgage will sever a joint tenancy, so also will a levy and sale of a joint tenant's interest sever it. The docketing of the lien, however, does not sever it because the service of a sheriff's writ of execution does not disturb the possessory rights of the joint tenants. Severance requires a completed sale.

(d) Unilateral and Secret Severances

A joint tenant unilaterally can sever a joint tenancy by transferring her interest to a third party. Sometimes a joint tenant wants to sever her interest from the joint tenancy but continue to maintain her interest in the property as a tenant in common rather than as a joint tenant. In some jurisdictions, the joint tenant must resort to the use of a straw man to sever her interest. A few jurisdictions (among those that allow the direct creation of a joint tenancy with right of survivorship without the use of a straw man) see no reason to prevent the direct severance without using a straw.

The possibility exists, however, that the severance is done secretly and does not come to light until one or the other joint tenant dies. The secret severance opens up the possibility of fraud: A joint tenant may execute a severance deed to himself or to another as a tenant in common without telling anyone else or even recording the deed in the public deed records. If he dies first, a severance will be found to have occurred, with the joint tenant's assignee, devisee, or heir taking the joint tenant's interest as a tenant in common. If he is the survivor, he might destroy the severance document and take the whole of the property. The law does not countenance this ruse. Thus, where courts approve direct severances that do away with the use of straw men, they more closely scrutinize the completely secret severance. To prevent this fraud on the other joint tenants, some jurisdictions require either public recording or notification to the other joint tenants. See, e.g., Cal. Civ. Code §638.2 (1986) (statute enacted to counter the holding in Riddle v. Harmon, 162 Cal. Rptr. 530 (1980)).

DISTINGUISHING JOINT TENANCIES FROM TENANCIES IN COMMON

Centuries ago in England, the joint tenancy was the default concurrent interest. A transfer from *O* "to *A* and *B*" created a joint tenancy with right of survivorship. English courts were anxious to avoid splitting ownership. Creating a joint tenancy with right of survivorship was presumed to be the parties' intent when there was any ambiguity as to whether a document created a tenancy in common or a joint tenancy. The purpose of the presumption was to maintain family estates intact.

Today this presumption is reversed. The tenancy in common is preferred. Statutes in many jurisdictions provide that a grant to concurrent owners is presumed to be a tenancy in common unless the deed clearly establishes that the grantor intended to create a joint tenancy with right of survivorship. State legislatures have long been anxious to encourage widespread ownership of land.

A major caveat with regard to married couples is in order here. In many states that recognize the tenancy by the entirety (an estate exclusively reserved for married couples—to be developed in the next section), a grant to a husband and wife is presumed to create a tenancy by the entirety unless the deed expresses a clear intent to create another interest. In some states that do not recognize the tenancy by the entirety, a grant to a husband and wife is presumed to create a joint tenancy with right of survivorship unless the deed or will clearly manifests intent to create a tenancy in common. In some jurisdictions that do not recognize the tenancy by the entirety, only married couples can hold property as joint tenants with right of survivorship, but the presumption is that the grant creates a tenancy in common unless the grant evidences a clear intent to create a joint tenancy with a right of survivorship. In the remaining jurisdictions, a grant to a husband and wife is treated like any other grant to multiple persons, and is presumed to be a tenancy in common unless a clear intent to create another concurrent interest is expressed.

The usual words to create a joint tenancy with right of survivorship are "to *A* and *B* as joint tenants with a right of survivorship and not as tenants in common." Some courts will find the requisite intent to create a joint tenancy with right of survivorship in a grant "to *A* and *B* as joint tenants," but many courts refuse to find a joint tenancy with right of survivorship unless the deed or will contains words of survivorship. "To *A* and *B* jointly" creates a tenancy in common, for example, not a joint tenancy with right of survivorship. A specific indication of an intention to establish the right of survivorship, along with a negation of a tenancy in common, is the best course.

A grant to "*A* and *B* as joint tenants, remainder to the survivor of them" creates joint life estates, with a contingent remainder in the survivor. It is not the same as a joint tenancy with right of survivorship, however, and dramatically different legal consequences may follow. A joint tenant can unilaterally “sever” her interest from the joint tenancy and become a tenant in common with the other co-tenants. Severance destroys the survivorship character as to her interest. When she dies, her heir or devisee takes her interest. In contrast, persons holding joint life estates with a contingent remainder cannot unilaterally terminate the survivorship requirement.

TENANCY BY THE ENTIRETY

A third form of concurrent ownership is the tenancy by the entirety. The tenancy by the entirety is limited to husbands and wives, who own the property as a unit, not by equal shares. The same four unities necessary to form a joint tenancy with right of survivorship are essential to form a tenancy by the entirety, and in addition, the couple must be married at the time they acquire the property. Thus marriage is the fifth unity required for this type of tenancy. Engagement to be married is insufficient. Hence, a couple buying a home to live in after their marriage will not hold the home in a tenancy by the entirety. Divorce terminates the tenancy by the entirety and a tenancy in common results in most states (a joint tenancy with right of survivorship results in a minority of states).

Like the joint tenancy with right of survivorship, the tenancy by the entirety is characterized by a right of survivorship in the surviving spouse. Unlike in the joint tenancy, one spouse cannot unilaterally sever the tenancy by the entirety. Moreover, neither spouse can seek judicial partition.[2]

About half our jurisdictions recognize the tenancy by the entirety. In the majority of those, a grant to a husband and wife is presumed to create a tenancy by the entirety unless a different form is indicated in the deed. In others, a grant to a husband and wife creates a presumption that a tenancy in common is created unless the deed indicates a tenancy by the entirety or joint tenancy with right of survivorship is intended. To avoid confusion, parties intending to create a tenancy by the entirety should convey to “*H* and *W*, husband and wife, as tenants by the entirety.”

At one time, a husband and wife owning property as tenancy by the entirety were deemed one—and that one was the husband. He had management rights, rights to the income, and the power to sell. The wife had survivorship rights—even if the husband sold the property, the wife’s survivorship rights continued in force. A wife relinquished her survivorship rights if she signed the deed. As a practical matter, therefore, husbands and wives both signed deeds conveying the property to third parties.

Since the husband could sell the property, he also could pledge it as security. His creditors, secured and unsecured, could foreclose on the property. A purchaser at foreclosure was entitled to possession of the property, and to all rents and income from the property. If the husband outlived the wife, the purchaser kept the property in fee simple absolute. If the wife survived her husband, she got the property back.

In the mid-nineteenth century, jurisdictions began enacting Married Women's Property Acts (MWPA) giving married women rights to control property. Courts and legislatures applied MWPA to fashion three theories of a modern tenancy by the entirety in all states recognizing this tenancy. Today, in the majority of tenancy-by-the-entirety jurisdictions, a creditor can foreclose on the tenancy by the entirety property only if both spouses are liable for the underlying debt or both have executed a mortgage. The husband and wife, moreover, both must execute the deed on the sale of the property. In a second group of states, a creditor of one spouse's separate debts may foreclose on the debtor spouse's half interest (the half interest being a fiction, since the couple holds the property as whole) subject to the other spouse's survivorship rights. Thus the creditor can get rents from the property if any are collected, but will lose all rights in the property if the nondebtor spouse outlives the debtor spouse.

Finally, in two jurisdictions—Kentucky and Tennessee—creditors can reach a spouse's survivorship interest, but not the right to current possession and rents. Hence creditors have no interest while both spouses are alive, and will have an interest only if the debtor spouse survives the nondebtor spouse.

RIGHTS AND OBLIGATIONS BETWEEN CO-TENANTS

(a) Possession, Ouster, and Payment of Rent

Each co-tenant (tenant in common, joint tenant, or tenant by the entirety) has the right to possess the entire property. As such, the majority rule is that a co-tenant using the whole property, absent ouster, does not owe rent to the other co-tenants. In a small minority of states, a co-tenant using the property owes a fair rental to the remaining co-tenants.

In the majority of jurisdictions where a co-tenant owes no rent to his co-tenants for using the property, the rule changes if the occupying tenant ousts the other co-tenants. ***Ouster*** occurs when the occupying tenant acts to prevent the other co-tenants from using the property. Ouster may occur if the occupying tenant changes the locks or if the occupying tenant makes use of the property in a way that no other use can be made of any part of the property and refuses to make room for another's use. Generally, before the ousted co-tenant can bring an action for ouster, the co-tenant must make a demand for access to the property and be denied access.

Example: *H* and *W*, husband and wife, own Blackacre as tenants in common. *H* abandons *W* and Blackacre. *C*, a judgment creditor of *H*, levies on Blackacre to satisfy the judgment, and purchases *H*'s interest in Blackacre at the judgment sale and then demands half of the fair rental value of Blackacre from *W*, who is using Blackacre. *W* refuses. *C* is not automatically entitled to rent from *W*. *C* must first demand possession and be refused it by *W* (the common term for this is "ouster"). Only then is *C* entitled to half Blackacre's rental value.

(b) Contribution

A co-tenant who expends money for some matter related to the commonly owned property sometimes may seek reimbursement from his co-tenants for his expenditures. There are three distinct judicial causes of action with which a co-tenant may seek reimbursement from his co-tenants: contribution, an accounting, and a final settlement on sale or partition. A co-tenant seeks ***contribution*** when he demands his co-tenants pay for their pro rata share of expenses. If a co-tenant refuses to contribute voluntarily, the paying co-tenant may bring a judicial action for contribution.

(1) Taxes, Interest, and Insurance

Assuming no one is using the property, a co-tenant who pays the annual property taxes, government assessments, or interest on mortgages may seek contribution from the other co-tenants.[3] Taxes and interest are usually known as ***carrying charges***. All co-tenants have a duty to contribute their share of taxes and interest on mortgages. In a minority of states, property insurance is a carrying charge. Where insurance is a carrying charge, a co-tenant paying insurance premiums can seek contribution. Otherwise, no contribution is allowed for insurance premiums.

Co-tenants must contribute to pay carrying charges since, in the case of property taxes and mortgage interest, nonpayment may result in the property being foreclosed on and sold. In addition, the amount owed and the obligation to pay are established by outside parties and not by an individual co-tenant.

If the paying co-tenant is the only co-tenant using the property, no contribution is permitted for carrying charges up to the fair rental value of the property. Because the occupying co-tenant is not obligated to pay rent to her co-tenants, she is responsible for the taxes and interest on the mortgage since she is the principal beneficiary of the payment (plus, it serves as a substitute for the payment of rent). If the occupying co-tenant does pay rent to her co-tenants, she may offset the others' share of the carrying charges against the rent due.

Unless the other co-tenants agree, a co-tenant has no right to compensation for services performed by the co-tenant. If a co-tenant mows the lawn or repairs a broken window, for example, he has no right to be compensated for his time or labor.

(2) Mortgage Principal

A co-tenant who makes a mortgage principal payment when due or past due may seek contribution from his co-tenants. A co-tenant who prepays the principal of a mortgage, on the other hand, cannot seek contribution, but must wait until the principal payment comes due and payable under the original mortgage before seeking contribution.

(3) Repairs and Maintenance

A co-tenant cannot get contribution for repairs, even necessary repairs. While on first blush it would seem best if the paying co-tenant received contribution for necessary repair and maintenance—say, to fix a broken window, replace a roof, or mow the lawn—courts have been reluctant to decide on a case-by-case basis which repairs were necessary, what type of repair (quality and extent) was needed, and how much should have been spent for the repair. Hence courts have concluded that no co-tenant has a duty to make repairs.

In many jurisdictions, there is an exception for expenses paid pursuant to a government citation or assessment. If a co-tenant in possession in these states pays to repair property after city officials order him to do so pursuant to a city ordinance, a paying co-tenant may seek contribution for the repair costs. The repair costs are considered government assessments and hence are treated the same as carrying charges.

(4) Improvements

A co-tenant who improves property cannot compel contribution from his co-tenants. The rationale is that no one has a duty to improve property, and no one who chooses to improve the land should force his co-tenants to contribute. Were it otherwise, rich co-tenants might "improve" poorer co-tenants out of their interest.

(c) An Accounting

Even though a co-tenant cannot seek contribution for repairs and improvements, he may get some reimbursement indirectly in an accounting. An accounting occurs when a co-tenant maintains records (and furnishes a copy to her co-tenants) as to income and expenses from renting the property to a third party. Even though a co-tenant can solely possess co-owned property and keep any profits generated from that sole possession, once he leases or rents the property to others he must account for any profits and share the net proceeds with his co-tenants. See Statute of Anne, ch. 16, §27 (1705) (adopted by all American states either as part of the common law or by statute).

In an accounting, the co-tenant collecting rent payments may offset the costs associated with generating and collecting the rent. The co-tenant may offset rent revenues by the amount he expended on taxes, interest, mortgage principal, and insurance. In addition, he can offset other expenses, such as advertising, management fees, *actual* amounts spent on repairs or maintenance, and utilities. The co-tenant can offset his monetary outlays only to the extent of any rental income received. The accounting in effect reduces how much of the rental proceeds the co-tenant must distribute to his co-tenants.

Absent an agreement to the contrary, an accounting does not allow him to demand contribution from his co-tenants if expenditures exceed revenues. Notwithstanding this limitation on the accounting, the paying co-tenant can still demand contribution if rent revenues are insufficient to pay the property taxes, government assessments, interest, and currently payable principal payment on a mortgage. Unless the tenants agree, a co-tenant receives no compensation for time spent managing the property.

Example: *A*, *B*, and *C* own raw land as tenants in common. *A* pays the annual taxes of $3,000 and the interest of $5,000 on the outstanding mortgage. *A* rents the land to a local farmer who will cut the grass on the land to use as hay to feed his livestock. The farmer pays *A* $2,000 rental. *A* can demand *B* and *C* each contribute $2,000 ($8,000 total carrying costs less $2,000 rents equals $6,000, divided by 3 equals $2,000 per co-tenant).

The co-tenant cannot offset the total cost of improvements in an accounting. He can offset only so much of the cost of the improvements as is traceable to an increase in rents received because of the improvements, but no more.

(d) Final Settlement on Sale

If the co-tenants sell the property, either voluntarily or by a judicially ordered partition sale (discussed on page 232), a final settlement takes place. A co-tenant who expended money and has not been reimbursed for taxes, interest, mortgage principal, repairs, maintenance, insurance, and other common expenses associated with owning the property will be reimbursed out of the sales proceeds.

Improvements are a special case. A co-tenant who paid for improvements will receive the sales proceeds attributable to the value added by the improvements. The amount paid for the improvement is irrelevant.

As was the case under contribution and an accounting, a co-tenant who spends time managing and selling the property is not entitled to any compensation for her labors unless the other co-tenants specifically agree.

Example 1: Adam, who owns a one-third interest in Blackacre as a tenant in common, builds a house on Blackacre for $100,000. Five years later the three co-tenants sell Blackacre for $250,000. The land is worth $75,000; the building is worth $175,000. Adam receives the $175,000 attributable to the building and one-third of $75,000 ($25,000) as his share of the sales proceeds attributable to the land.

Example 2: Maurice, who owns a one-third interest in Whiteacre as a tenant in common, spends $20,000 to install a swimming pool. Two years later the co-tenants sell Whiteacre for $215,000. The land and building are valued at $210,000. The swimming pool added $5,000 to the property's value. Maurice receives $5,000 for the swimming pool and one-third of the $210,000 ($70,000) for the land and building as his share of the sales proceeds.

(e) Tax Sales and Foreclosure Sales

If the co-tenants fail to pay taxes or mortgage payments, the state or the mortgagee (the creditor) may seek a judicial sale of the property to pay the taxes or the mortgage. The co-tenants share excess proceeds from these sales as explained above.

Co-tenants may have a statutory right to redeem the property from the purchaser at the foreclosure sale for a short time after the foreclosure sale (usually from three months to two years). If a co-tenant purchases the property at the tax sale or foreclosure sale (or after the foreclosure sale by exercising the statutory right of redemption), the majority rule is that the purchasing co-tenant is deemed to be acting in her fiduciary capacity as a co-tenant. The remaining co-tenants have the option of remaining co-tenants by contributing their share of the taxes or mortgage. If the other co-tenants choose not to contribute, after a reasonable time the purchasing co-tenant will own the property outright.

In a minority of jurisdictions, if the other co-tenants have an opportunity to bid at the tax sale or foreclosure sale, the purchasing tenant represents himself and not the co-tenancy. There are exceptions—if the other co-tenants are not adults, if the purchasing co-tenant deceived the other co-tenants into believing he was representing the co-tenancy, or if the purchasing co-tenant intentionally did not pay the taxes or the mortgage because he was in a superior financial position to successfully purchase the property at the forced sale.

(f) Adverse Possession

Since each co-tenant has the right to possess the co-owned property, it is difficult for a co-tenant to adversely possess the property. It can be done, however. To begin running the statute of limitations the co-tenant claiming by adverse possession must give clear notice to the other co-tenants that she is claiming adversely. Notice in writing certainly gives the requisite notice, but it is not the sole method to give notice. Ouster alone may not suffice, but ouster combined with acts so inconsistent with a concurrent ownership that co-tenants must be deemed to be on notice of the adverse possession might suffice.

PARTITION

Tenants in common or joint tenants with right of survivorship are not obligated to continue a concurrent ownership and they are not required to sell just their interests to separate themselves from the co-tenancy. Instead, the tenant in common or the joint tenant has an absolute right to petition a court to partition the property. (Neither spouse can seek partition of property held in a tenancy by the entirety.) A partition action today is statutory in nature, although it began as a common law cause of action. There are two distinct categories of partition: partition in kind and partition by sale.

(a) Partition in Kind

Courts favor ***partition in kind***, or physical partition. A partition in kind offers the least upset to the original co-tenancy, and it does not force a person to sell who does not wish to do so. In some states, the presumption favoring a partition in kind is statutory. In a partition in kind, the court divides the property into parcels of equal value, each co-tenant receiving a separate parcel. When fewer than all co-tenants seek partition, they receive separate parcels and the others continue to own the rest of the property as co-owners. If a court cannot partition the property into parcels of equal value, the court may order a money payment from one party to another to equalize the division. This payment is known as ***owelty***. Because a partition is seldom likely to involve equally valuable parcels distributed to each tenant, owelty is a common feature in a partition in kind.

Example: Anne and Bruce own Blackacre as tenants in common. Blackacre is a 40-acre farm with a farmhouse. Anne seeks a partition in kind. A court awards Anne 5 acres and the farmhouse with a total value of $200,000, and awards the remaining 35 acres valued at $210,000 to Bruce. Bruce must pay an owelty of $5,000 to Anne to even out the value each party receives.

(b) Partition by Sale

Partition in kind is not always practicable or advisable. In these cases, a court may order a ***partition by sale*** wherein the property is sold and the proceeds split among the concurrent owners. A single-family residence, for example, is not suited to partition in kind. Other factors, including a large number of co-tenants, the terrain, and the size of the tract, may convince a judge that a partition in kind is inadvisable. Similarly, when the appraisals necessary to justify a partition in kind are costly, or the appraisals are unreliable, a court may order a partition by sale. Judicial discretion in administering the partition by sale is generally recognized as a matter of equity, subject to the rules governing accounting and contribution (discussed earlier in this chapter).

A judicially ordered partition by sale may be appropriate even if all competent parties agree to a sale because a minor or unascertained (unborn) person owns an interest. The court approves the sale if it is in the best interest of the minor or unborn persons.

Some jurisdictions permit a co-tenant to purchase at the sale—others do not. Where permitted, a purchasing co-tenant must pay a fair value and that amount is subject to judicial scrutiny. The proceeds of the sale are distributed as in a final accounting and settlement discussed above. Any co-tenant who has not accounted for any rents must do so. Sales proceeds from improvements will be allocated to the improver equal to the *value* of the improvements added to the overall value of the property, and not the *cost* of the improvements.

An agreement between the co-tenants prohibiting judicial partition normally is invalid as a restraint on alienation, but such restrictions will be sustained when limited to a reasonable time. For example, limitations on sale of a residence embodied in a divorce settlement and prohibiting a co-tenant's filing a partition action have been found reasonable.

Whether a restriction is reasonable may depend on whether the co-tenant wanting partition acquired his or her interest with knowledge of the restriction, the expertise of the co-tenant in possession, or the terms of an agreement on the subject between the parties. Nonetheless, an agreement to limit access to the judicial process is not to be inferred lightly. Partition is favored by the law and agreements to limit the remedy will be strictly construed.

Examples

Drafting Exercise

1. Now that you know the basic characteristics of all three of the major concurrent interests, please draft the granting clauses in a deed to create a tenancy in common, a joint tenancy with right of survivorship, and a tenancy by the entirety.

Dying to Know What Happened

2. (a) *O*, the holder of a fee simple absolute in Blackacre, conveyed Blackacre "to *A*, *B*, and *C* as joint tenants with right of survivorship." A year later *C* conveyed all his interest in Blackacre to *D*. Who has

what interest in Blackacre?

(b) *A* died five years later, devising his interest in Blackacre to *E*. Who owns what interest in Blackacre?

(c) Three years later *B* died, devising his interest in Blackacre to *F*. Who owns what interest in Blackacre?

Surviving Joint Tenancies

3. *O* conveys Blackacre "to *A* and *B* and the survivor of them." What interest or estate is created for *A* and *B*?

Creating a Tenancy by the Entirety

4. Toby purchased his home when he was single. Now he is married to Veronica and wants to own the home as a tenant by the entirety with her. How would you advise Toby to create the tenancy by the entirety?

On Second Thought

5. Kent and Richard own their law office building as joint tenants with right of survivorship. Kent was recently diagnosed with cancer. He wants to sever the joint tenancy and drafts a deed conveying his interest in the office building to himself as a tenant in common. What is the result of such a conveyance?

Mortgage Business

6. In a jurisdiction that does not clearly adhere to either a lien or a title theory, how would you recommend that a mortgage lender proceed in a loan for the purchase price of a residence whose title is to be held in the name of a husband and wife as joint tenants?

Our Land, His Debt

7. *H* and *W*, husband and wife, held title to Blackacre as joint tenants with right of survivorship. They separated. Later that year *H* borrowed $100,000 and executed a mortgage on Blackacre to secure payment of the debt. *H* died the next year. The state condemned Blackacre to build a new sports arena. The state agreed to pay $500,000 for Blackacre. The debt

secured by the mortgage ($100,000) was unpaid, but was not the subject of a foreclosure action. *H*'s executor claimed a portion of the condemnation award for *H*'s estate. Is this claim valid?

He Did *What*?

8. (a) Anthony and Ben held title to Blackacre as joint tenants with right of survivorship. Ben executed a mortgage in a lien theory state. Ben defaulted on the mortgage loan and the creditor brought a foreclosure action. The court hearing the foreclosure ordered that Blackacre be sold through a judicial sale, conducted at an auction. Ben showed up at the sale, was the highest bidder for the property, and obtained a deed confirming the title to the property to him in fee simple absolute. Anthony came forward to claim his interest in Blackacre. Ben sued Anthony to quiet title in fee. What result?
   (b) Same facts as in the previous problem, but a third party, not Ben, obtained title through the foreclosure sale. Would this affect the result?
   (c) What result in (a) if Anthony and Ben had both signed the mortgage, and Ben was the highest bidder at the foreclosure auction?

Future Interests Intrude

9. (a) *O* conveyed Whiteacre "to *A* for life, remainder to *B* and her heirs." *A* and *B* cannot agree on the management of Whiteacre and *A* sues *B* for partition. What result?
   (b) *O* conveyed Blackacre "to *A* and *B* as tenants in common for life, remainder to *C* and her heirs." *A* and *B* disagree about the management of Blackacre and *A* sues *B* for its partition. May *A* bring this action?

Contribution and Accounting

10. (a) Shane, a widower, died intestate, survived by his three children: Homer, who lives one mile from Shane's residence; Louise, in Louisiana; and Ken, in Kentucky. Shane's residence passed to his three children under the state's intestacy statute. In what concurrent interest do the three children own the home?

(b) The house sat vacant for four months after Shane's death. Homer looked after the house but did not reside in it. He paid the monthly water and electricity bills totaling $120 for four months, paid a junior high school student $240 over four months to mow the lawn, and paid $90 for the annual termite inspection. Homer sent a $1,000 check monthly to Mortgage Company ($4,000 total in four months). Of the $4,000, $1,200 was interest, $1,800 went against principal of the note, $600 went to property taxes, and $400 went to insurance on the house. Homer asked Louise and Ken to reimburse him. Assuming Ken and Louise do not want to pay anything, but will pay the minimum the law requires, how much will Homer collect from Ken and Louise?

(c) After four months of the house sitting empty, Homer hired a painter to paint both the exterior and the interior of the house for $4,500. He could have hired a painter for $3,600, but felt more comfortable with the one he hired. After the house was painted, Homer paid $90 to advertise the house for rent.

Homer leased the home for $1,500 a month. Homes in the neighborhood similar to the house rented for $1,800, but Homer was happy to get $1,500. Homer continued paying the $1,000 each month to Mortgage Company. The tenant paid for the utilities and lawn maintenance.

What are the financial ramifications to Homer, Louise, and Ken after the first month's rental?

(d) After two years, Homer collected enough rental revenues to reimburse himself for expenditures out of his personal funds. In the first month after that, he collects $1,500 rent and pays Mortgage Company $1,000, $120 for the annual termite inspection, and $80 to repair a clogged toilet. What are the financial consequences to the co-tenants?

(e) A year later the tenant moved out. In the first month there was no rent income from the house, but Homer paid the $1,000 due that month to the Mortgage Company ($900 carrying charges and $100 insurance premium). Instead of sending Louise and Ken the $100 a month they had come to expect, Homer sends a letter demanding each contribute $300. Louise does not want to pay and demands to know why she did not receive her $100. Homer, frustrated, filed a suit seeking judicial partition. Should the judge order a partition in kind or a partition by sale?

(f) Homer engaged a real estate broker, who located a buyer to purchase the house for $180,000. The broker's commission was $10,800. Other expenses of sale were $4,200. To retire the note and mortgage, $15,000 of the sales proceeds were paid directly to Mortgage Company. Homer tells the closing agent that he spent 45 hours on the sale of the house and dedicated 450 hours to managing the property for the benefit of the three co-tenants since their father's death. He figures conservatively his time was worth $20 an hour, for which he has never been compensated, and for which he wanted to be compensated out of the sales proceeds ($900 for time on the sale of the house; $9,000 for his labors all those years). How much does each co-tenant get from the sale of the house?

Explanations

Drafting Exercise

1. To create a tenancy in common, you might say that *O* conveys to "*A* and *B*, in equal shares, as tenants in common." For a joint tenancy, say *O* conveys to "*A* and *B* as joint tenants with right of survivorship and not as tenants in common." For a tenancy by the entirety *O* conveys to "*A* and *B*, husband and wife, and to the survivor of them as tenants by the entirety, and not as tenants in common or joint tenants." Some of these suggestions are the product of caution or some make use of a default rule, but the intent in each case is made clear.

Dying to Know What Happened

2. (a) *C*'s deed to *D* severed the joint tenancy. *A* and *B* continue in joint tenancy with each other, but together reform as a tenancy in common with *D*, each of the three having a one-third interest in Blackacre.

   (b) *A*'s interest in Blackacre ended on his death. He had nothing to devise to *E*. *B*, as a joint tenant, gets *A*'s interest. *D* is a tenant in common and will not increase her ownership. *A* now owns a two-thirds interest and *D* owns a one-third interest in Blackacre as tenants in common.

(c) *B* died owning her interest as a tenant in common. A tenant in common can devise her interest. Therefore, *F* owns a two-thirds interest and *D* owns a one-third interest in Blackacre as tenants in common.

Surviving Joint Tenancies

3. Because a survivorship right is indicated (though not as clearly as it might be), many state courts say that this conveyance creates a joint tenancy with a right of survivorship in *A* and *B*. However, some state courts—a minority—hold that *A* and *B* have a concurrently held life estate, lasting as long as they both live, followed by a contingent remainder held by the survivor in fee simple absolute. States using the minority rule sometimes do so in order to prevent a partition action that would otherwise defeat the survivorship right. See William Stoebuck & Dale Whitman, *The Law of Property* §5.2, at 181 n.39 (3d ed. 2000).

Creating a Tenancy by the Entirety

4. When one party to a proposed joint tenancy already owns the property to be held in the tenancy, the parties should proceed in a two-step transaction. First, Toby should transfer the title to the property to a straw (a/k/a straw man) (an intermediary to temporarily hold legal title). Second, the straw should retransfer the title to Toby and Veronica as husband and wife in a tenancy by the entirety. They then would receive the title with the four unities present at the moment of the tenancy's creation. A straw is used when a jurisdiction does not clearly permit the unilateral creation of a joint tenancy by one of the tenants. The straw serves some function. The formalities of the process bring home to the sole owner the legal significance of what he or she is doing. They also prevent a layperson from accidentally creating a tenancy by the entirety when a tenancy in common was intended.

On Second Thought

5. It depends on the jurisdiction. If the jurisdiction allows a joint tenant unilaterally to sever a joint tenancy, Kent's deed severs the tenancy. This

assumes Kent abides by any other requirement the state may impose, such as recording in the public deed records or notifying Richard.

If, on the other hand, a jurisdiction requires a straw for a sole owner to create a joint tenancy in himself and another, then it is also likely to require the use of a straw to end the joint tenancy (unless a joint tenant transfers his interest to a third party). Some jurisdictions allowing a person to create a joint tenancy directly without the use of a straw may require a straw for a joint tenancy to sever his interest. In either of these jurisdictions, Kent's deed to himself is ineffective to sever the joint tenancy; and the joint tenancy continues.

Mortgage Business

6. The simplest and safest method is for both husband and wife to sign both the note and the mortgage.

Our Land, His Debt

7. In most states, the executor's claim is not valid. The mortgage, even given without *W*'s consent, does not sever the joint tenancy in lien theory states and in many title theory states so long as *H* has the financial ability to repay the loan and eliminate the mortgage. In most jurisdictions, the mortgage is extinguished with *H*'s death (*H*'s estate still is liable on the loan, however; only Blackacre does not serve as security for nonpayment). The survivorship right is still effective on *H*'s death and on *H*'s death *W* owns Blackacre. As owner of Blackacre she is entitled to the entire condemnation award. The separation does not affect how the title is held. See People v. Nogarr, 330 P.2d 858, 861 (Cal. Dist. Ct. App. 1958).

   In some title theory jurisdictions, however, *H*'s mortgage severs the joint tenancy with right of survivorship. In these jurisdictions, *H*'s estate owns a one-half interest in Blackacre as tenant in common and will receive half the condemnation proceeds. The executor can use $100,000 to retire the outstanding note. *W* keeps her half of the condemnation proceeds.

He Did *What?*

8. (a) Anthony prevails. Ben will neither win nor quiet the title. The

mortgage did not work a severance of the joint tenancy when executed, but when the property was put into foreclosure and beyond Ben’s power to recall, a severance occurred. Thus, when the court ordered that the results of the sale were binding on Ben, a severance of the joint tenancy had destroyed the survivorship right and Anthony and Barlow became tenants in common. Only Ben’s interest in Blackacre was auctioned. The title obtained in foreclosure was subject to Anthony’s rights and, by decree, the court in Ben’s suit will find that Anthony and Ben hold Blackacre as tenants in common. A deed claiming to give Ben sole ownership in fee simple absolute may have been color of title for an adverse possession action, but Anthony acted well within any limitations period.

(b) No. Only Ben’s interest could be sold at auction. The sale severed the joint tenancy with right of survivorship. Anthony and Ben would still be tenants in common at the point when the court ordered the sale. After the sale, the third party becomes a tenant in common with Anthony.

(c) First, since both parties executed the mortgage, a third party purchasing at a foreclosure sale would own the whole property, not just a one-half interest. The issue is whether Ben will receive the same favorable treatment allowed a third-party purchaser. In a majority of jurisdictions Ben would be deemed to purchase the property on behalf of the joint tenancy. If he had the money to buy at the foreclosure sale he had the money to make the mortgage payments and so he had a duty to make the mortgage payments. Anthony would be allowed to continue as a joint tenant with right of survivorship. In most jurisdictions Anthony would be required to contribute funds for his share of the mortgage.

    If, however, Anthony and Ben lived in a jurisdiction where a joint tenant is treated the same as a third party as long as the other joint tenants have an equal opportunity to bid and there was no indication Ben engaged in fraudulent conduct or was in a fiduciary relationship with Anthony, Ben would own Blackacre outright. Any excess sales proceeds over the amount of the mortgage would be divided between the two in a final settlement.

Future Interests Intrude

9. (a) Judgment for *B*: no partition. *A* has a present interest held in a life estate; *B* has a vested remainder held in fee simple absolute. *A* and *B* do not have concurrent possessory rights and so neither has a right to bring a partition action against the other.

   (b) Yes. *A* and *B* have a concurrent right to possess the life tenancy, so each has a right to bring partition against the other, but only as to the life estate they both hold, and not as to *C*'s remainder. *C* does not have any concurrent rights to possession with them. Concurrent life tenants may partition their life estates, and *C*, of course, could voluntarily join in any partition by sale. An analogous result: If *T1* and *T2* both hold a joint leasehold, they have a right to partition the lease inter se, but have no such right against their landlord.

Contribution and Accounting

10. (a) A tenancy in common is presumed unless the deed or will stipulates another form. Here there was no deed or will, only a statute. Homer, Louise, and Ken own the residence as tenants in common.

    (b) Ken and Louise are obligated to pay carrying charges, which are the interest of $1,200, the property taxes of $600, and the mortgage principal reduction payments of $1,800. In some states, the $400 for insurance is also a carrying charge; in others it is not. The law of the state where the property is located controls the definition of a carrying charge, not the state where the various co-tenants live. Assuming insurance is not a carrying charge, the total of the carrying charges is $3,600. The three siblings own equal shares and are equally liable for the carrying charges. Thus Ken and Louise should both contribute $1,200 to Homer.

    While it seems in fairness the co-tenants should all contribute to pay the reasonable costs of societally acceptable (and even mandated) expenses, a court will not force Louise and Ken to contribute for the yard maintenance, the utilities, the termite inspection, and, in most states, the insurance premiums. An annual termite inspection in some states is mandated by statute, so this may not be an elective expense everywhere. A good argument could be that this should be a carrying charge when it is state mandated and outside the control of any co-tenant. On the other hand, a co-tenant must select the inspector and that may result in a range of costs within the discretion of one co-tenant.

(c) Homer keeps the entire first month's rental of $1,500. Under the Statute of Anne, Homer must share net rental proceeds with his co-tenants, Louise and Ken. In an accounting, Homer can reduce the amount to be split with Louise and Ken by the interest ($300), the mortgage principal reduction ($450), and the taxes ($150) (total of $900). In addition, he can offset the other $4,690 of expenses related to the rental—insurance ($100), advertising ($90), and painting (repairs and maintenance are not an improvement) ($4,500).

In the accounting the revenues are the actual amount collected, not what *could* have been collected, so rent revenues are $1,500, not $1,800. Likewise, deductions are actual amounts paid, not what *could* have been negotiated, so the painting expense is the full $4,500. Homer cannot be reimbursed in the current month by more than the rent collected: The rent is applied first against the carrying costs, and any excess rent collections go to Homer. Thus Homer can receive only the $1,500 this month. Homer could have demanded contribution if the rent revenues did not cover the carrying charges, but here they did. Nothing prohibits Homer from requesting Ken and Louise pay their share if Louise and Ken are willing to pay, but he cannot force them to contribute. Expenditures not offsetting revenues are carried forward to offset any excess revenues in the next month, months, or years.

(d) Homer can offset the carrying charges, the insurance premium, and the termite inspection costs (total of $1,200). Homer keeps the $1,200. He then splits the remaining $300 equally among himself, Louise, and Ken; or $100 to each.

(e) Partition by sale. It's hard to imagine any of the three co-tenants even arguing for a partition in kind. Assuming one does, the judge begins with the presumption that a partition in kind is preferred. But here, where the property is a single-family rental house, the impracticalities of a partition in kind are so great that a partition by sale is an easy decision.

(f) First, no co-tenant is entitled to compensation for representing the co-tenancy unless the co-tenants agree. Therefore, Homer gets no money for his efforts in the sale or for the many years he managed the property. After that, the math is simple. Sales proceeds of $180,000 less the commissions ($10,800), the other fees ($4,200), and the mortgage payment ($15,000) leaves $150,000 to be divided among the three co-tenants, or $50,000 each.

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1. In many jurisdictions, even the foreclosure sale does not sever the joint tenancy until the time to exercise a statutory right of redemption passes. Under the right of redemption, the owner of the foreclosed property can "redeem" or buy the property from the purchaser at the foreclosure sale by paying the purchaser his purchase price (plus costs and interest) within a statutory period of time after the foreclosure sale (the period ranging from three months to two years).

2. Judicial partition is explained later in this chapter.

3. Co-tenants are responsible only for interest on mortgages existing when the concurrent ownership began, or the mortgage secures a debt for which all co-tenants are personally liable. If one co-tenant mortgages the property or her interest in the property, she is solely liable for the interest payment and cannot get contribution.

CHAPTER 9

Common Law Estates and Present Interests

Real property ownership can be divided several ways. *O*, owning 100 acres of real property, might transfer 50 acres to *A* and the other 50 acres to *B*. Alternatively, *O* might sell the surface rights to *A* and the mineral rights to *B*. If he wanted, *O* could transfer the management rights to *A* (a trustee of a trust, for example) and the income and profits interest to *B* (the beneficiary of the trust). The next few chapters develop a fourth method of dividing up ownership: over time. *O*, for example, might transfer acreage to *A* for a period of time (say, ten years) and then give it to *B* for the rest of the time, or might give it to *A* "for life" (this is known as a life estate, meaning it lasts as long as *A* lives, and no longer) and then give it to *B* for the rest of the time, meaning that *B* will wind up, after *A* dies, owning the property in perpetuity. In other words, property can be divided physically, but may also be divided along a timeline.

The study of who owns what interests in property over time is known as the study of estates and of present and future interests. Studying estates and present and future interests requires more than reading for and attending class. You should work problems outside of class. In addition to the Examples in this book, you can find more practice problems in John Makdisi & Daniel Bogart, *Estates in Land and Future Interests* (6th ed. 2013), and

Linda H. Edwards, *Estates in Land and Future Interests: A Step-By-Step Guide* (4th ed. 2013).

SOME HISTORY

We start with a very brief history of the origin of estates and future interests. In 1066, at the battle of Hastings, a Norman archer shot the Anglo-Saxon king, Harold, in the eye socket, killing him and leading to the conquest of England by William I, the Conqueror. After the battle, William parceled out the countryside to his knights; what he gave them was a use right, or ***tenure*** —the right to hold.

William initially parceled out lands for limited periods of time, usually for the life of a particular knight, the estate which today we call a "life estate." William, as king, prized personal loyalty above all, and rewarded it with land. But that loyalty had to be tested and affirmed anew with each generation, and so the land reverted to the king at death. The knights, once in possession of their holdings, quickly became interested in their families and children holding the land after their deaths. Over time, the knights and other landed persons were allowed to pass property along to male heirs.

The landed persons, however, became increasingly interested in two additional rights: the right to transfer or dispose of their property by will after death (***testamentary power***, or ***devisability***) and the right to dispose of their land during their lifetimes (a ***power to alienate***, or ***alienability***). The right to alienate land was recognized by the Statute *Quia Emptores* (Latin for "concerning purchasers") in 1290.[1] The Statute of Wills in 1540 authorized all Englishmen to transfer or devise property by will at their death.

As society evolved, the meaning of the granting language evolved. Initially, for example, a grant "to *A*" meant *A* owned a life estate—i.e., owned the property for his life—and the property at his death reverted to the grantor (often the king). Later a grant to "*A* and his heirs" meant *A* owned the property for his life and at his death the property passed to his heirs—usually his eldest son. After 1290, a grant to "*A* and his heirs" meant *A* owned the property outright, and his heirs owned nothing unless and until the parent died still owning the property. After 1540, a person owning land could devise the property to anyone by will. Heirs had only an expectancy but no absolute right to succession. Finally, the presumption that a grant "to *A*" conveyed a life estate was reversed so that today a grant "to *A*" is presumed to convey a fee simple absolute unless language in the conveyance limits the grant.

The landowners were also interested in transferring land not only to one person, but to a line of successors who could hold tenure, accounting for spouses, children, and grandchildren. From that desire evolved the system of estates in land. It was and is still possible today to create interests in property that are split along a timeline running successively from the present into the future. Such a split in ownership is the major feature of our common law interests and estates, created first for England's nobility but available to all of us today.

Split ownership—fragmented over time—enabled a transferor or testator to control the ownership of property after the transfer or, in the case of a will, after the testator's death (a ***testator*** is a person dying and leaving a will, a/k/a a ***decedent***; and whatever property is transferred by will is often referred to as a ***decedent's estate***, administered by an ***executor***). Most rules for transfers and wills discussed in this chapter were either formulated for testators interested in such control or by their children, heirs, and transferees resisting that control. The history of common law estates may be seen as a series of intergenerational conflicts, as well as a series of devices designed to achieve that age-old aim of the propertied classes, tax avoidance.

ESTATES AND INTERESTS

The study of estates and interests is, for the beginner, one of concepts and vocabulary. We'll begin by defining and distinguishing "estates" and "interests." A person may have an ownership interest in property. That interest may refer to an estate (ownership along a time continuum). Elsewhere in the course you will encounter other interests a person may have in land, such as easements, restrictive covenants, equitable servitudes, liens, mortgages, and leases. A later chapter, for example, explores concurrent interests—when more than one person share the same possessory rights to specific property.

Estates categorize ownership over a timeline. Estates are divided into present possessory interests (commonly called ***present interests***) and future possessory interests (commonly called ***future interests***). A person owns a present interest in property if he or she can take possession and use the property currently—in the present time. In contrast, a person who owns a future interest must wait until some future time to take possession of the property. Although the owner of a future interest in property, being without the right to immediate possession, in effect gets no present enjoyment or economic benefit (other than appreciation in value) from owning the land, the person owning the future interest is an owner of an interest in the property nonetheless.

Estates also refer to when and how ownership ends. Some estates last forever or into infinity, some for a person's life, some until something happens. Thus, in classifying estates and interests, it is said that "Owen has a present interest (or future interest, as the case may be), held in an estate known as a. . . ." You will spend the best part of the next several chapters learning to fill in that last blank. This task will require constant study—cramming the subject won't suffice.

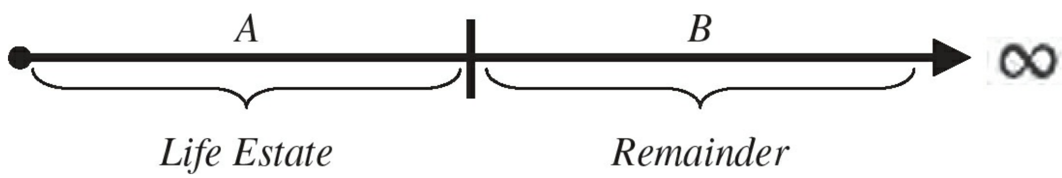
ESTATES: FUNDAMENTAL FRAGMENTS OF TIME

Fragmentation of ownership interests over time is the basic concept underlying present and future interests. Judges in early England wanted to visualize ownership of property for all time. Moreover, land was considered to last forever. An oft-used diagram shows a dot representing today and a line extending to infinity to identify all estates in property from today to infinity:

A ***fee simple absolute*** is what we think of as complete ownership, lasting until the end of time. Its owner can enjoy the property, transfer it away by sale or gift during his life, or devise it (by will) at his death. If he dies without a will and still owning the property, the property passes to his descendants, usually family members, designated in a state statute known generally as the Canons of Descent or the Intestacy Statute. The above diagram illustrates the fee simple absolute.

The diagram indicates that beginning at the present, the dot, on the facts known today, all persons who can use or possess the property from now to infinity must get their rights from or through the fee simple absolute owner. Obviously the owner cannot personally use the property until infinity. Human mortality precludes that. The owner, however, controls who gets the property from now until infinity. The owner during his life or at his death will pass the right to control use and possession to others.

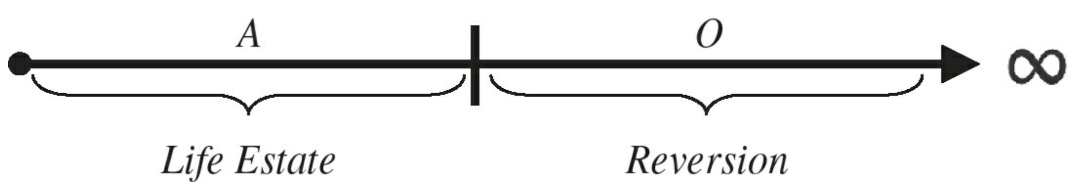
A common transfer is from the property owner (*O*) to *A* for life, remainder to *B*. This grant would be diagrammed:



A has a present interest, held in a life estate. *A* can use the property during his lifetime (or transfer the rights to others to use the property during *A*'s lifetime).

B has a future interest, a (vested) remainder, held in a fee simple absolute. *B* must wait until *A*'s life ends before *B* can possess and use the property. *B* has the right to possess the property or designate who will control the use of the property until infinity after *A*'s death.

If *O* had granted *A* a life estate and not stipulated what happens after *A* dies, the law stipulates the property will revert back to *O* (or *O*'s later designee) at *A*'s death. The timeline would look like this:



A has a present interest, held in a life estate.

O has a future interest, a reversion, held in a fee simple absolute. That is, once *A* dies, the property reverts to *O*, and *O* again has a fee simple absolute, and once more is free to possess the property or designate who will.

There are four core estates, categorized based on the potential longevity or duration of the possessory interests.

Estate	**Duration**
Fee Simple	Forever (Infinity)
Fee Tail (fee simple conditional)	Until original grantee's lineage dies out
Life Estate, or Term for Life	For the life of the grantee
Term of Years	Fixed period measured in years, months, or days

The first three estates for historical reasons are known as ***freehold estates***. As you can see, this category of estates, or types of tenure, has nothing to do with how they begin; the key is that they have different ways of ending. Possession of a freehold estate is denoted by a special word: ***seisin***—pronounced "seez-in." So lawyers say, "Land must always be seised of some person" or "*O* has seisin."

The fourth estate listed here, the term of years, along with the periodic tenancy, the tenancy at will, and their documentary cousin, the leasehold, are all known as ***nonfreehold estates***. A nonfreehold estate is a less complete form of ownership than a freehold estate. An apartment rental, for example, is a nonfreehold estate.

A person may hold each of the estates as present interest or as a future interest. Hence a person may own a present interest in a life estate, or a future interest in a life estate. The same is true for the other estates.

Example: Olivia deeded Blackacre to Adam for his life, then to Barbara for her life, then to Carla and her heirs. Adam owns a *present interest* in Blackacre, held in a life estate. Barbara owns a *future interest* in Blackacre, held in a life estate. She must wait for Adam to die before she takes possession. Carla owns a future interest, a vested remainder held in fee simple absolute.

THE IMPORTANCE OF TERMS—AND SOME MORE TERMS

Much of the study of estates is the study of nomenclature, or labels.

Therefore it is important to master precise labels. There are different categories of fees simple, for example: fee simple absolute, fee simple determinable, fee simple subject to a condition subsequent, and fee simple subject to an executory limitation. Master the differences between them and use precise labels in referring to them. Do not label a reversion a reversionary interest, for example, because you will only confuse yourself and other people. Some aspects of each estate require careful scrutiny as you study each estate.

First, master the wording used to create each estate. There may be seemingly subtle differences in wording to distinguish different estates. There is a big difference, for example, between a grant to "Jill and her heirs" (fee simple absolute) and one to "Jill and the heirs of her body" (fee tail or fee simple conditional).

Next, know the characteristics of each estate. One on which you need to concentrate refers to its ***termination***—how or when the estate's duration ends. A fee simple absolute may not end; it potentially lasts into infinity. A life estate, on the other hand, lasts only for the life of some person and ends on that person's death. An estate can end either naturally or by a condition subsequent. A ***condition subsequent*** is the occurrence or nonoccurrence of an event that can cut short an estate. An estate may end naturally, for example, on the death of a person or at the end of a given time period, say ten years. An estate may be terminated by a condition subsequent, for example, if the grant conditions the continued ownership on the property not being used for some purpose, or the grant conditions the continued ownership on the property being used for some purpose and the property ceases to be used for that purpose. A grant to "Local School Board, but if the land ceases to be used for school purposes, then to the Lion's Club" creates a fee simple in Local School Board that might last forever, but School Board's fee simple estate could be terminated unnaturally if the condition subsequent (land ceases to be used for school purposes) happens.

Finally, know whether and in what ways the estate or interest holder can transfer the interest. Property is ***devisable*** if the owner can transfer ownership by a will—a testamentary transfer. Property is ***descendible*** or ***inheritable*** if the property can pass by the state's intestacy statute to heirs if the owner dies without a will. Property is ***alienable***, ***assignable***, or ***transferable*** if the owner can sell or give it away during his lifetime—an *inter vivos* transfer. Most estates and interests are devisable, inheritable, and alienable to some extent today, but there are exceptions.

(a) Fee Simple Absolute

A ***fee simple absolute*** is an estate with an infinite or perpetual duration. A person owning a fee simple interest theoretically can possess the property forever. There is no inherent end to the ownership. The owner may sell or give the property away, devise it by will, or die without a will and have the property go by operation of law under the canons of descent to his heirs. Hence a fee simple absolute is alienable (transferable or assignable), devisable, and descendible (inheritable). Most land sales are for a fee simple absolute.

The language traditionally used to create a fee simple absolute is "***to* A *and his heirs***." Today the phrase "***to* A**" also transfers a fee simple absolute, as do phrases such has "***to* A, *his heirs and assigns***."

Diagramming the grant:

$$\underbrace{\textbf{to } \boldsymbol{A}}_{\textbf{Words of Purchase}} \qquad \underbrace{\textbf{and his heirs}}_{\textbf{Words of Limitation}}$$

The critical language to determine who owns the estate are the ***words of purchase***. Property transferred "to *A*" belongs to *A*. They denote who takes the estate. Property transferred "to *A* and his heirs" still belongs solely to *A*. The remaining language, "and his heirs," are ***words of limitation***. They tell experienced lawyers what was granted, that the grantor intended the estate to be one greater than a life estate, and that the estate lasts in perpetuity—i.e., that the grantor transferred a fee simple absolute. Despite the language of the grant, *A*'s heirs get absolutely nothing from this transfer. Only *A* gets the property.

(b) Life Estate

(1) Attributes of a Life Estate

The life estate—as the name implies—means the owner owns the property for life. The life estate is the oldest type of freehold estate. As long as the life estate lasts, its holder may use the property, collecting all the rents and profits generated from it. The life estate's duration is measured by the life tenant's life. The life estate is neither devisable nor descendible (by the life tenant) because the life estate ends on the death of the life tenant. The life estate, however, is alienable *inter vivos* (transferable during the life tenant's life) by the life tenant for a term lasting so long as the original life tenant lives. The third party's right to continue using the property ends with the original life tenant's life.

Because the life estate was the dominant estate for more than 100 years, courts for centuries interpreted transfers "to *A*" as life estates. That is, when in doubt whether the grantor meant to transfer a life estate or a fee simple absolute, English courts 900 years ago would find the grant "to *A*" to be a life estate. The reverse is true today. Either by statute or judicial decision, a person transferring property today is deemed to transfer his or her entire interest in the property unless the words of grant or other evidence indicate that the grantor intended to transfer a lesser interest. Today a grant from *O* to *A* would transfer a fee simple absolute to *A*.

There are no mandatory words required to create a life estate. "To *A* for life" may be the most common, but "to *A* for her natural life," "to *A* during her lifetime," "to *A* for the term of her life," and "to *A* as long as he lives" all create a life estate. The language to create a life estate may be diagrammed:

$$\underbrace{\textbf{To } \boldsymbol{A}}_{\textbf{Words of Purchase}} \qquad \underbrace{\textbf{for life}}_{\textbf{Words of Limitation}}$$

The words "To *A*" are ***words of purchase*** indicating who gets the property. The words "for life" are ***words of limitation*** indicating the grantee *A*'s ownership of the property ends on her death.

Example 1: Owen transfers Blackacre "to *A* for life." *A* has a present interest, held in a life estate. When *A* dies her interest in Blackacre ends. She cannot devise it to anyone, nor will Blackacre pass by inheritance to her heirs.

Because a life estate has limited duration, some other person also must own an interest in the property. If the grant to the life tenant does not stipulate who takes the property upon the life tenant's death, the original grantor (or his estate if he is deceased) takes possession. When a grantor is to receive possession back when the life estate ends, the grantor's future interest is labeled a ***reversion***.

Example 2: Owen transfers Blackacre "to *A* for life." *A* has a present interest in a life estate. Owen owns a future interest, a ***reversion***. *A* owns the present possessory interest. Owen cannot use Blackacre while *A* is alive, but Owen (or someone taking through Owen) will take possession of Blackacre in the future when *A* dies.

A transferor or grantor may provide that some third party will take the property after the life estate ends. The future interest following a life estate owned by a third party (not the grantor) is called a ***remainder***. A remainder is a future interest in a third party that "remains" after the interests and estates prior to it end *naturally*. In practice, the remainder follows the life estate, fee tail, and the term of years. Remainders may be vested remainders, contingent remainders, vested remainders subject to divestment, or vested remainders subject to open. The distinction between the various remainders, and between a remainder and a reversion can lead to have critically different consequences. For now, master the difference between a remainder and a reversion.

Example 3: Owen transfers Blackacre "to *A* for life, then to *B* and her heirs." As in Example 2, *A* owns a present interest in a life estate. A future interest follows *A*'s life estate. The future interest, being in a person other than the grantor, is called a ***remainder***. In a few pages we learn *B*'s remainder is a vested remainder in fee simple absolute. *B*'s heirs own nothing under the grant.

While a life estate is frequently measured by the life tenant's life, it can be measured by the grantor's life or by the life of a third party. Thus *O*'s conveyance "to *A* for *O*'s life" gives *A* possessory rights until *O* dies. The words of purchase "to *A*" give the property to *A*. The words of limitation "for *O*'s life" limit the duration of *A*'s ownership to *O*'s life. The "*O* to *A* for *O*'s life" conveyance might be a means to confer benefits on *A* when *O* wants the property to go to someone else after *O* dies.

When a person's interest in a life estate is measured by the life of a third person, say *X*, the life estate is called a ***life estate pur autre vie*** *X*—that is, a life estate measured by the life of *X*. A person owning a life estate pur autre vie may transfer or assign the life estate to another party during his life; and because the life estate continues as long as the other person lives, the life estate pur autre vie may be devisable (by will) and descendible (inheritable) (if no will). The life estate *pur autre vie* ends on the death of the person who is the measuring life.

Example 4: Owen in Year 1 transferred Whiteacre "to *A* for life." In Year 5 *A* transferred her interest in Whiteacre to *B*. *B* died in Year 10 while *A* was still alive. *B* by will devised all his real property to *C*. Question: Who owns what interests in Whiteacre? In Year 1, *A* owned a present interest, held in a life estate. Owen owned the reversion, a future interest, to become possessory when *A* died. In Year 5, *B* acquired a life estate pur autre vie *A*. Owen maintained his reversion. When *B* died, he devised the life estate pur autre vie to *C*. *C* can use Whiteacre until *A* dies. Owen retained his reversion. If *A* died in Year 20, *C*'s life estate pur autre vie *A* ends and Owen owns Whiteacre in fee simple absolute.

Example 5: Same facts as in Example 4 except *A* died in Year 8 while *B* is still alive. Since *B* owned a life estate pur autre vie *A*, *B*'s interest in Whiteacre ended on *A*'s death. Owen's future interest, his reversion, becomes a present possessory interest, a fee simple absolute.

(2) Marketability Problems

In practice, legal life estates are difficult to market. Lenders may be reluctant to take property held as a life estate for security for a loan for fear the life tenant may die before the loan is repaid. Purchasers who wish to improve the property likely will not purchase a life estate and invest millions of dollars in constructing improvements since they would lose the improvements and land as soon as the life tenant dies. There are other problems with life estates, so much so that England no longer recognizes the *legal* life estate (the *equitable* life estate—one held in trust—is recognized). The legal life estate continues to be recognized in the United States, although most life estates are equitable life estates held in trusts (trusts are discussed more fully in Chapter 12—see "The Rule and Trust Law").

A transferor may choose the legal life estate to impose obligations on the life tenant, to avoid the fees and costs involved in administering a trust for property, or to preserve the property in its present use. There may be reasons driven by the federal and state estate tax codes as well since by definition the legal life estate expires on the life tenant's death, and will not go into the life tenant's decedent's taxable estate. Income taxes might figure in the transferor's calculations too: The transferor can carve out a future interest for a charity and obtain a charitable deduction for the value of that interest, with the transferor or his family enjoying the property in the mean time in a life estate.

(3) Conflicts Between the Life Tenant and the Remainderman

Besides the lender and sales problems discussed above, legal life estates create problems between the holder of the legal life estate and the person who owns the property once the life estate ends (the original grantor who has a *reversion*, or a third party who has a *remainder*). Often a life tenant will want to use the property in a manner contrary to what the future interest holder would. Some rules have evolved to resolve these conflicts.

First, logically enough, the holder of the life estate can exclude others from the property, including any holder of a future interest (either a reversion or a remainder). Thus, the life tenant can treat the future interest holder as trespasser should the future interest holder attempt to use the property or remove anything from it.

Second, the life tenant keeps all the income, rents, and profits from the use of the land during the life estate. The life tenant who farms the land, for example, may keep the crops or the proceeds from the sale. Likewise, a life tenant who rents the property to another keeps the rent and is not obligated to share the net rents with the future interest holders.[2] Special rules under the rubrics of "waste" and "open mines doctrine" balance the rights of the life tenant to extract minerals and change the use of the land with the life tenant's obligation to preserve the property in its current condition for the future interest holder. Those rules are developed more fully later in this chapter.

Third, a life tenant has duties and obligations. The life tenant must keep the premises in ordinary repair, must pay taxes, must pay the interest on any mortgage for all the property, and in some jurisdictions must pay insurance premiums. A life tenant is not entitled to contribution or reimbursement from the future interest holder for these expenses. The repairs required to be made are ordinary repairs only. The life tenant, on the other hand, is not obligated to improve the property; to repair extraordinary damages caused by storms, earthquakes, fires, etc. (but it may be his duty to repair damages from ordinary wear and tear). Likewise, a tenant who constructs improvements on the land cannot seek partial payment from future interest holders. We take this up in detail later in this chapter in the discussion of the cause of action for “waste.”

Sometimes the life tenant acquires land subject to a mortgage and/or notes secured by the property. The life tenant is responsible for the interest payments. Some states say he is not liable for the principal of any loan secured by the property; others say the life tenant is liable for the principal included in any installment payment due during the life estate.

Although some jurisdictions require the life tenant to insure buildings on the land, most do not. In these jurisdictions, a life tenant who insures the building anyway cannot seek reimbursement from the future interest holder. Some jurisdictions hold a life tenant may keep any insurance proceeds received on any claim made against the policy, while others hold the life tenant and the remaindermen must split any insurance proceeds according to the relative values of each person’s interest (which can be calculated using actuarial tables).

Further, a life tenant has a duty to pay real property taxes. This duty includes an obligation to buy the property at a tax sale. If the life tenant has the duty to pay taxes, then he has the duty to remedy the situation when the taxes fall into default and the municipal government seeks to sell the property to satisfy that default. Moreover, if the government makes a special assessment against the property for permanent improvements, such as streets, sidewalks, sewers, and so on, most jurisdictions hold the life tenant and the remainderman liable for each person’s proportionate share (based on relative values of each person’s interest).

(4) Life Estate or Fee Simple

Some drafters of wills (testator) and deeds (grantor), often nonlawyers, do not use “to *A* and his heirs” or “to *A* for life” to identify what estate the recipient is to take; or a testator or grantor might include a purpose or an unclear explanation of his intent. A classic example occurs when a testator favors one or more parties by guaranteeing the party the right to continue living on the property. Usually the favored party is someone who shared a home with the decedent for many years. The grant or will may be worded, "I want my home to go to *A* to live in." The issue in these cases is whether the transferor or grantor intended to give the transferee a fee simple absolute, a life estate, or some nonfreehold estate.

A judge trying this issue will first read the plain language of the document, attempting to ascertain the ***grantor's*** or ***testator's intent***. If that does not resolve the issue, the judge will resort to rules of construction. ***Rules of construction*** are not laws, but are accepted suppositions that can be rebutted by evidence. One rule of construction is that a testator (deceased person with a will) intended to give away all his property through his will. An interpretation that disposes of all the testator's property in the will rather than resorting to the state's intestacy statute is favored. A corollary of the first rule is that a partial intestacy (i.e., a will that does not dispose of all the testator's property) is disfavored. Another rule of construction is that a grantor or testator conveys her full interest in the property unless the intent to pass a lesser estate is clearly expressed or necessarily implied by the terms of the deed or will.

(c) Fee Tail and Fee Simple Conditional

Desiring to maintain large estates as a unit for generations so as to preserve a family's wealth and social standing, a grantor might have created a fee simple conditional or fee tail. The ***fee simple conditional*** and ***fee tail*** in effect were a series of life estates. *A* enjoyed a life estate; on *A*'s death the property automatically passed to *A*'s eldest son for his life; on his death the property passed to that son's eldest; and so on until the family line ended (died "***without issue***" is the traditional phrase for this event), at which point the property reverted back to the grantor (or more likely to one of the grantor's heirs). The ending of the grantee's bloodline is called ***failure of issue***. The fee tail thus thinks in dynastic, not individual, terms.

The fee tail and fee simple conditional are related estates—in fact, one replaced the other and both are created by the same language: "***to* A *and the heirs of his body***." In the transfer "to *A* and the heirs of his body," the words "to *A*" are ***words of purchase***, and the phrase "and the heirs of his body" are

words of limitation—sometimes called in this instance "***words of procreation***." Each generation of *A*'s heirs has a life estate.[3]

At one time, "heir" meant a male heir, the system of inheritance then in use being ***primogeniture***, or inheritance limited to the eldest son. Before the birth of a son, the holder of the fee simple conditional had a fee simple conditioned on the birth of an heir. If its holder died without an heir, the property reverted back to the grantor. By the Statute *De Donis Conditionalibus* (1285), the fee simple conditional was changed into a fee tail, and thereafter, when *O* conveyed "to *A* and the heirs of his body," a fee tail, inheritable to the last member of the grantee's family line, was established. And a younger son inherited and became the heir if his elder brother died before inheriting. South Carolina is the only jurisdiction recognizing the fee simple conditional today. Today heirs are determined by state intestacy statutes and do not favor males or first-borns.

Fee tails, like life estates, are not devisable or generally inheritable because the property passes from one generation to the next under the terms of the fee tail grant. The fee tail, when used in conjunction with a principle of primogeniture, served to preserve the largest English estates intact rather than to split them up among the children of the nobility. It was also early used to return land transferred to a child to the family's estate should the line of that child die out. This second use of the estate was particularly useful in transfers of land to a second or third son, who normally would not inherit the family's main estate under the system of primogeniture. (During the time the estate was first created, mortality rates due to war, disease, and the limited ability of farmers to produce enough food were such that it took on average a minimum of four children in a family to ensure the continuation of a family dynasty.)

Today all but four jurisdictions have abolished the fee tail by statute. Many did so in the early nineteenth century. Those still recognizing the estate are three New England states (Maine, Massachusetts, and Rhode Island) and Delaware. In these four jurisdictions, the holder of the fee tail can break the entail or ***disentail*** the property simply by conveying his interest in fee simple absolute to a third party, who takes it in fee simple absolute. Often the beneficiaries of disentailing are creditors of the estate holder, and often the third party is the entailed owner's attorney, who serves as straw man, or someone bound to convey it right back in fee simple absolute. In all other states, the fee tail is abolished by statute.[4]

The statutes abolishing the fee tail interpret the traditional fee tail grant as creating one of several estates: Most jurisdictions give the first grantee a fee simple absolute; others give the first taker a life estate after which the heirs of his body take a fee simple absolute. Only about seven jurisdictions use the second configuration. A few preserve the fee tail for one generation.

Fee tails, even where authorized, are seldom used. More than that, the use of the fee tail was unusual even at common law, because grantors and testators did not want to chance a failure of issue after their children and grandchildren died. Better to have used the conveyance "to *A* and his heirs" or some variation or to split the fee into more acceptable present and future interests.

(d) Term of Years

The term of years, a nonfreehold estate, resembles a leasehold and is treated under that topic. See infra Part III, "The Law of Landlord and Tenant." In general, a term of years lasts for some fixed period. The fixed period may be for centuries, decades, years, months, or days. Because the term of years ends naturally and is not divested (unless some condition is attached in the grant), the future interest following a term of years is a reversion if the grantor owns the property again after the term of years ends or a remainder if a third party takes possession. A term of years is alienable, inheritable, and devisable.

WASTE

(a) Voluntary, Permissive, and Ameliorating Waste

A life tenant is obligated to deliver the property in essentially the same condition or use as when the life tenant took possession. Waste occurs when the possessory life tenant permanently impairs the property's condition or value to the future interest holder's detriment. In general, it involves the abuse, alteration, or destruction of realty by a person not a trespasser and not holding a fee simple.[5] A future interest holder may bring an action for waste for substantial injury to these future interests caused by the life tenant. The future interest holder may collect damages and an injunction to prevent waste.

A grant or transfer can be made “to *A* for life, without impeachment for waste.” Under this grant, the holder of the life estate is immune from suit by the future interest holder.

Waste falls into several categories. ***Affirmative*** or ***voluntary waste*** occurs when the life tenant actively changes the property’s use or condition, usually in a way that substantially decreases the property’s value. A court will enjoin affirmative waste. A second category of waste, ***permissive waste***, is akin to nonfeasance—the life tenant fails to prevent some harm to the property. For example, one court found that not making normal repairs to a water pump that resulted in dead lawn, shrubs, and trees was permissive waste. See Kimbrough v. Reed, 130 Idaho 512, 943 P.2d 1232 (1997). The life tenant was required to pay damages to the remainderman. The law of permissive waste evolved to become the duties discussed earlier: to make ordinary repairs, to pay interest on debt, to pay taxes and assessments, and in some jurisdictions to pay insurance premiums.

A variation of affirmative waste is ***meliorating*** or ***ameliorating waste***, or waste that benefits the remainderman’s interest. In England, the law of waste was strict: A life tenant could not stop growing crops and begin grazing cattle, for example, even if it made the property more productive or valuable. Even changing crops may have been waste. Courts in the United States have allowed reasonable changes in use and condition. For example, in Melms v. Pabst Brewing Company, 79 N.W. 738 (Wis. 1899), a life tenant owned a stately mansion in the midst of a brewery complex. Over time other commercial activities encroached on the mansion to the point at which it was no longer suitable for use as a residence, and not efficiently convertible to commercial purposes. The court held under the circumstances that demolishing the mansion and replacing it with a commercial building would not be waste. In evaluating whether it will be permitted, courts look at the life tenant’s expected remaining life, the need for change, and the good faith of the life tenant and future interest holder in proposing or opposing the change.

(b) Open Mines Doctrine

The open mines doctrine sets out rules applicable to natural resources, particularly minerals. Under the ***open mines doctrine***, a life tenant may mine and remove minerals (and keep the profits) if the grantor had opened the mines or began the mining and removal before he granted the life estate. The presumption is the grantor intended the life tenant to continue using the property as the grantor had been using it. That same presumption swayed courts to conclude, unless the future interest holder consented, that the life tenant could not begin or conduct mining operations if no mining took place before the life estate began. While England applied the same rule to timber cutting, American courts in some cases allow timber cutting as ameliorative waste.

(c) Economic Waste

A variation on waste is economic waste. ***Economic waste*** occurs when the income from property is insufficient to pay the expenses the life tenant has a duty to pay: ordinary maintenance, real estate taxes, interest on mortgages, and in some jurisdictions, insurance. Economic waste does not mean the property is not being used for its highest and best use, only that it does not pay for its own upkeep. The life tenant—and in some cases the remainderman—can bring an action to sell the property if economic waste occurs.

In an illustrative case, Baker v. Weedon, 262 So. 2d 641 (Miss. 1972), the life tenant, Anna Weedon, experienced personal economic distress and wished to sell land (her life estate interest and the remaindermen's interest) and put the money in a trust so she could use the income from the trust to pay for her personal living expenses. The court held that economic waste does not mean the life tenant personally would be better off financially, or that a court can act when a life tenant needs to sell (not just her interest but the remaindermen's as well) for economic reasons. Only if the income from the property is insufficient to "pay taxes and maintain the property" could a court order a sale. The property in that case generated just enough money each year to pay the taxes and maintenance. Hence the court found no economic waste.[6]

DEFEASIBLE FEE SIMPLE ESTATES

The three freehold estates developed to this point—fee simple absolute, life estate, and fee tail (and the fee simple conditional)—are subject to several variations, particularly of the fee simple absolute, that may end prematurely because of a condition subsequent. A ***condition subsequent*** is an event whose occurrence or nonoccurrence will terminate the estate. Once the condition subsequent occurs, the estate holder's interest ends and the property either reverts to the original grantor or passes to a third party.

Example: Armas transferred Blackacre "to Britney and her heirs, but if Britney sells alcohol on Blackacre, then to Carrie." Armas has transferred a fee simple to Britney but it is not a fee simple absolute since Britney may lose all her interest in Blackacre if she sells alcohol on Blackacre.

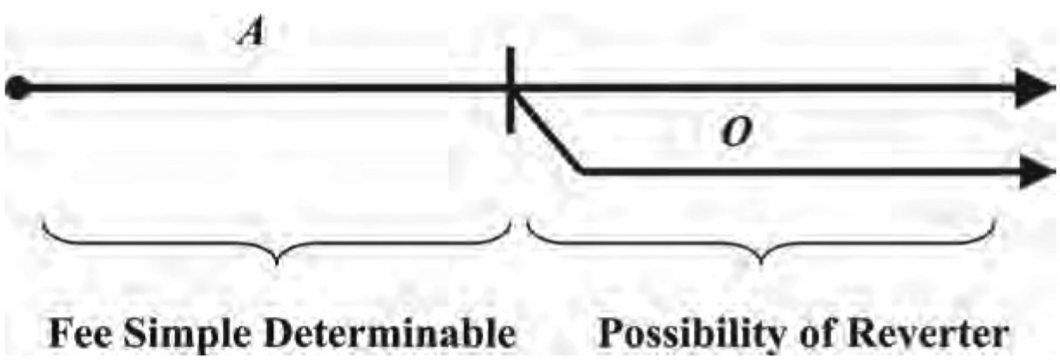
The Example illustrates the concept of a defeasible estate. A life estate may also be defeasible, but most defeasible estates are defeasible fee simples. Three distinct defeasible fees have evolved, each with its own label and characteristics. Britney's estate in the above Example is called a fee simple subject to an executory limitation. If the property were to return to Armas, the grantor, Britney's interest would be called a fee simple subject to a condition subsequent. The grant could have been worded differently to create the third defeasible fee simple, the fee simple determinable. It is important to learn the words to create each defeasible fee simple and the attributes of each estate.

(a) Fee Simple Determinable

A ***fee simple determinable*** is an estate that would be a fee simple absolute but for a provision in the transfer document that states that the estate shall *automatically* end on the happening of an event or nonevent. An example is "to *A* and her heirs so long as the property is used for church purposes," or "to *A* and his heirs unless liquor is sold on the property." Although it is sometimes said that no words of art are necessary to create such estates and that the transferor's intent controls, the words typically employed to create a fee simple determinable are "***so long as***," "***during***," "***while***," "***unless***," and "***until***." All these words, with the phrases that follow, are words of limitation, indicating a fee simple determinable.

The significant difference between a fee simple absolute and a fee simple determinable is that while both potentially have an infinite or perpetual duration, the fee simple determinable might terminate automatically if the condition subsequent occurs. Historically a grantor could not provide that the property would pass to a third party if the condition subsequent eventuated and the fee simple determinable ended. The only option was to have the property return to the original grantor (or his heirs if the original grantor was dead). The chance that the property might return to the grantor if the condition subsequent happened is called the ***possibility of reverter***. In sum, absent words to the contrary, a fee simple determinable is a present possessory estate followed by a possibility of reverter in the grantor. Sometimes the possibility of reverter is expressed in the deed or will creating the fee simple determinable; if not expressed it will be implied as part of the nature of a fee simple determinable.

The timeline for a fee simple determinable would look like this:



Example: Armas deeded Blackacre to Britney "so long as Britney does not sell alcohol on Blackacre." Britney owns a fee simple determinable estate in Blackacre that could last forever. However, if Britney sells alcohol on Blackacre, the property automatically returns to the grantor, Armas, who owns a possibility of reverter.

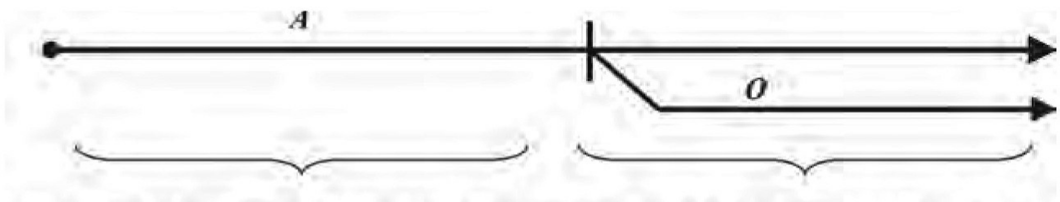
(b) Fee Simple Subject to a Condition Subsequent

Closely related to the fee simple determinable is the ***fee simple subject to a condition subsequent***. Like the holder of a fee simple determinable, the holder of a fee simple subject to a condition subsequent may hold the property forever, but could lose it entirely if the condition subsequent occurs.

The difference between a fee simple determinable and a fee simple subject to a condition subsequent is that the fee simple determinable ends automatically upon the happening of the condition subsequent, whereas the grantor of a fee simple subject to a condition subsequent must assert his ***right of entry*** (also called "right of reentry" or "power of termination"). Until the grantor exercises his right of entry, the holder of the fee simple subject to a condition subsequent continues to own the property. As is the case with the fee simple determinable, the only person who can retake the property on the event of the condition subsequent is the grantor or his heirs.

The fee simple subject to a condition subsequent usually can be identified by some of the following language in the granting instrument: "***provided that***," "***but if***," "***on the condition that***," or "***provided, however***." Compare these phrases with the one used to create a fee simple determinable.

The timeline for a fee simple subject to a condition subsequent would look like this:



Fee Simple Subject to a Condition Subsequent **Right of Entry (in the Grantor)**

Example: Armas transferred Blackacre "to Britney; provided, however, if Britney sells alcohol on Blackacre, then Armas may reenter and retake the land." Britney owns a fee simple subject to a condition subsequent in Blackacre. Her interest may last forever. If she sells alcohol on Blackacre, however, Armas can elect to take back the property. Armas owns a right of entry (right of reentry; power of termination).

There are some different legal consequences between a fee simple determinable and a fee simple subject to a condition subsequent. First, when the conditioning event occurs under a fee simple determinable, the owner of the fee simple determinable loses all interest in the property immediately and the title automatically reverts to the holder of the possibility of reverter. Once title reverts, it is too late for a waiver. A new deed is required to undo the effect of the broken condition. On the other hand, the holder of a fee simple subject to a condition subsequent owns the land until the holder of the right of reentry elects to retake the property. The holder of a right of entry does not automatically gain possession upon a broken condition. The holder may waive any breach of the covenant. Until the owner of the right of entry retakes the property, the owner of the fee simple subject to a condition subsequent continues owning the land.

Second, unless modified by statute (which many jurisdictions have done), the running of the statute of limitations for adverse possession starts at different times. The adverse possession statute starts running against the holder of a possibility of reverter (as to a fee simple determinable) on the day the condition subsequent happens. In contrast, since the owner of a fee simple subject to a condition subsequent continues owning the property even if the designated event occurs, the adverse possession limitations period does not begin to run until the holder of the right of entry exercises that right. A few jurisdictions by judicial decision or by statute equate the two estates for adverse possession purposes and begin the running of the statute of limitations as soon as the condition occurs.

Third, while most jurisdictions have adopted a uniform rule on the power of the holder of the possibility of reverter and right of entry to transfer or devise the future interest—either both are assignable or neither is— in a few jurisdictions the possibility of reverter is transferable, while the right of reentry is not.

Commentators have long urged that the two estates be consolidated by statute since the remaining differences are too small to warrant continuing both. These critics contend that despite the fact that the fee simple determinable has an automatic termination feature and the fee simple subject to a condition subsequent does not, a reentry is never automatic. To them the view that *O* turns up and *A* gives up possession is simply unrealistic. Further, as a matter of policy, any exercise of *O*'s rights ought to be judicially supervised in any event, no matter what words the grantor uses. Many states have merged the two.

Some legislatures have responded to the problems that possibilities of reverter and rights of entry create for conveyancing attorneys by enacting statutes that limit their duration to a period of 20 or 30 years. These interests must be asserted within the statutory time period or else be forever barred. A few courts have done the same thing without waiting for their legislatures by limiting the life of a possibility of reverter or right of reentry to a reasonable length of time. See, e.g., Mildram v. Town of Wells, 611 A.2d 84 (Me. 1992) (holding that not asserting a right of reentry for 82 years vested the holder of the present interest with a fee simple absolute). Other courts have found, based on the language used by the drafter, that the future interest was personal to the grantor or transferor and not intended to be alienable, devisable, or descendible for the benefit of his or her heirs.

(c) Distinguishing a Fee Simple Determinable from a Fee Simple Subject to a Condition Subsequent from a Covenant

At times it may be critical to determine whether a given grant is a fee simple determinable or a fee simple subject to a condition subsequent. If properly drafted, the determination is easy. A grant using the words “as long as,” “so long as,” “during,” “while,” “unless,” or “until” creates a fee simple determinable. A grant using the words “provided that,” “provided, however,” “but if,” or “on condition that” creates a fee simple subject to a condition subsequent. Problems arise when the grant uses words from both categories or the grant is otherwise ambiguous.

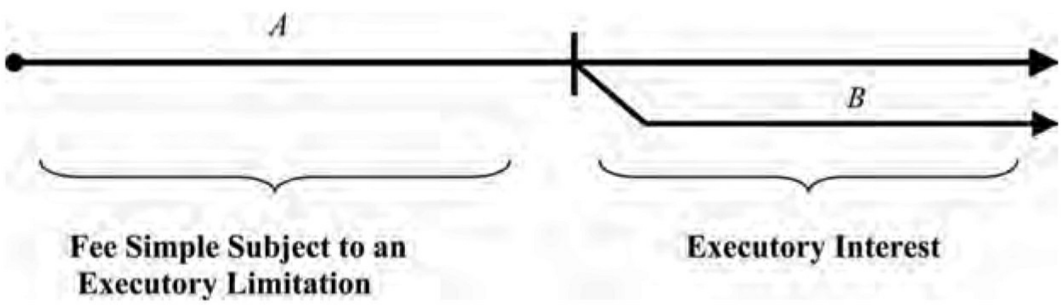
A judge will try to ascertain the grantor’s intent as expressed in the document as a whole. Because courts disfavor forfeitures, when in doubt, as a matter of construction, a judge will construe a grant as a fee simple subject to a condition subsequent rather than as a fee simple determinable because the fee simple subject to a condition subsequent allows the possessor to continue ownership until the holder of the right of entry (power of termination) acts to retake the property.

In some cases a court may interpret the qualification to the title as not being a divesting condition at all, but instead a covenant. A ***covenant*** is a promise to do or not do some act. A grantor may seek injunctive relief or damages for a breach of a covenant, but the owner of the fee simple will not forfeit ownership. In some cases a court may even interpret limiting language as ***precatory language*** instead of as a condition or a covenant. Precatory language expresses a desire, suggestion, hope, or expectation, but does not rise to the level of a covenant or condition.

(d) Fee Simple Subject to an Executory Limitation

One shared characteristic of the fee simple determinable and the fee simple subject to a condition subsequent is that only the original grantor or his heirs can hold the future interest (the possibility of reverter or the right of entry). For more than 200 years in England, a grant could not divest a defeasible fee in favor of a third party. The grantor had to retain a future interest for himself. Finally, by the Statute of Uses enacted in 1536, grantors could pass future interests following a defeasible fee simple to a third party. After more than 200 years of judges and lawyers repeating the mantra "only the grantor can have a future interest following a defeasible fee," the English legal community settled on a new label for the expanded rights.

The same granting language that would create either a fee simple determinable or a fee simple subject to a condition subsequent creates a ***fee simple subject to an executory limitation*** (also known as a fee simple on executory limitation) if the future interest goes to a third party. Only one label for the possessory interest was coined, not two. The new label given to the future interest to a third party following a fee simple subject to an executory limitation is the ***executory interest***.

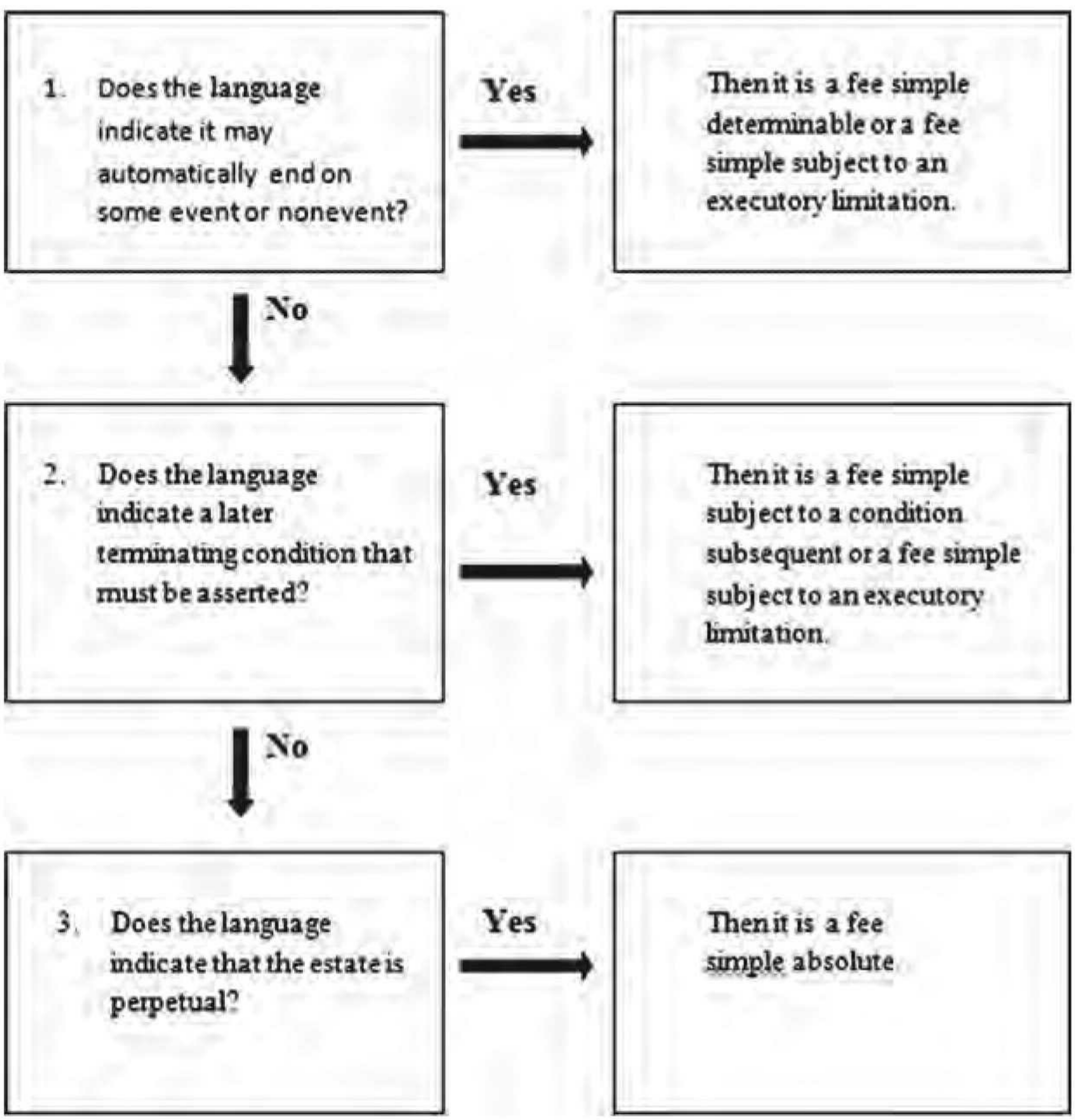


Example: Armas transferred Blackacre "to Britney as long as Britney does not sell alcohol on Blackacre, then to Carl and his heirs." Britney's estate is a fee simple subject to an executory limitation. Carl's future interest is an executory interest (technically a *shifting* executory interest, as will be discussed in Chapter 10).

CLASSIFYING ESTATES IN FEE SIMPLE—A

FLOWCHART

In classifying estates held in fee simple, ask yourself the following questions, in the order presented in this flowchart:



Examples

A Present and a Future Estate

1. (a) *O*, having full ownership, conveys Blackacre "to *A* for ten years."

What is *A*'s estate?

(b) What is *O*'s interest?

(c) What estate will *A* and *O* have in ten years?

Words of Purchase and Words of Limitation

2. In the following conveyances, does *A* hold an estate in fee simple absolute?
   (a) *O* conveys "to *A*."
   (b) *O* conveys "to *A* and his heirs."
   (c) *O* conveys "to *A* and his heirs, but if *A* dies, to *B* and his heirs."

No Issue

3. *O* conveys "to *A* and his bodily heirs, but if *A* dies without issue, to *B* and his heirs." *A* has a daughter, *C*, who predeceases *A*. This may occur, for example, if a farmer, Orville, dies, leaving his farm to his eldest son, "Arnold, and his bodily heirs, but if Arnold dies without issue, to Bart and his heirs." What estates are created?

An Estate for Joint Lives

4. *O* conveys "to *A* and *B* for the lives of *A* and *B*." When does the estate end?

Insurance Proceeds

5. *O* conveys Blackacre "to Larry for life, remainder to Freda and her heirs." Larry the life tenant insures Blackacre against fire for $100,000. Improvements on Blackacre are worth $75,000. They burn to the ground. Larry claims the proceeds of the policy. Freda appears and claims the bulk of the proceeds. Can she do so successfully?

She Meant Well

6. *O* writes, "I give my house and lot to you for your residence. Don't sell it. Let your sister have the rest of my property." What estate is transferred?

A Slew of Estates

7. What estates are created in the following transfers?
   - (a) *O* conveys "to *A* and his heirs so long as the property is used as a residence."
   - (b) *O* conveys "to *A* and her heirs, on the express condition that Blackacre be used only for residential purposes, but if it ceases to be used for such purposes, then *O* and her heirs shall have the right to reenter."
   - (c) *O* conveys "to *A*, provided that the estate granted shall cease and determine if liquor is sold, used, or stored on the premises."
   - (d) *O* conveys "to *A* and his heirs, it being my wish and purpose in making this conveyance that the property be used for residential purposes."
   - (e) *O* conveys "to *A* and his heirs, provided further that *O* and *A* agree and promise that the property shall only be used for residential purposes."
   - (f) *O* conveys Blackacre "to *A* so long as he wishes to live on the property."
   - (g) *O* conveys Blackacre "to *A*, provided that he lives on the property, but if he does not live there, then to *O*."
   - (h) *O* conveys "to *A* for life, then if *B* graduates from law school, to *B* and her heirs so long as the land is used for a law office." What interests do the parties have before *B* graduates from law school?
   - (i) What interest do the parties have when *B* graduates from law school?
   - (j) *O* conveys "to *A* so long as the property is used as a residence solely, provided, however, that if it is not so used, the estate shall cease and revert to *B* and his heirs, who have the right to repossess the property." What estate does *A* have?

Explanations

A Present and a Future Estate

1.
   - (a) *A* has a term of years or a leasehold, a nonfreehold estate. It is a present possessory estate.
   - (b) Just after the conveyance, *O* has a reversion in fee simple absolute. It is a future interest (currently nonpossessory). See infra Chapter 10.
   - (c) After a term of years ends, *A* no longer has any interest in Blackacre.

O will possess the grandest of them all—a fee simple absolute, which is what we think of when we say that a person has “ownership” of real property.

Words of Purchase and Words of Limitation

2. (a) Yes. Today *A* holds an estate in fee simple absolute. The words of purchase are “to *A*” and the words of limitations are supplied by the canon of construction that a fee simple absolute is preferred unless the language of the deed or will indicates the grantor or testator meant to transfer a lesser estate.
   (b) Yes. Although other words might be used, “to *A* and his heirs” are the recommended words to create a fee simple absolute.
   (c) No. *A*’s estate is something less. The words of purchase are the same, but the words of limitation are “and his heirs, but if *A* dies to *B* and his heirs,” and indicate that the grantor intends that descendibility and devisability not be part of *A*’s estate; thus no fee simple absolute was intended. Since *A* must die, *A*’s death is considered the natural termination of his interest and not a condition subsequent. *A* holds a life estate. See Mark Reutlinger, *Wills, Trusts, and Estates: Essential Terms and Concepts* 92 (1993).

No Issue

3. “*A* and his bodily heirs” is interpreted to mean the same as “*A* and the heirs of his body.” Hence *A* has a fee tail (or fee simple conditional), where it is recognized.

   Since *A* has a child, *C*, who predeceased him, it matters how the jurisdiction handles the failure of issue. If the jurisdiction is one of the few that retains the fee tail, the land would belong to *A* as long as he lived, then to *A*’s eldest child as long as he lived, then to his eldest child as long as he lived, until *A*’s bloodline ended, at which point the land would go to *B* (or his heirs). In the Example, *A*’s line died with him and his daughter, *C*; so on *A*’s death *B* would get a fee simple absolute estate in the farm.

   Jurisdictions that have abolished the fee simple conditional and the fee tail have interpreted language that historically created one of the two estates in two different ways. The majority of jurisdictions treat the “and the heirs of his body” and “and his bodily heirs” language as words of limitation indicating a fee simple absolute—i.e., just like "and his heirs." In those jurisdictions, *A* received a fee simple absolute, and *B* got nothing.

In other jurisdictions *A* has a life estate and if he dies with children living at his death (or grandchildren if no surviving child) the child (or grandchild) takes the land in fee simple absolute. If *A* dies without issue, the property passes to *B* in fee simple absolute.

Which interpretation applies makes a big difference in the Example since *A* died without a surviving child (*C* predeceased *A*). In the first instance *A* owns the farm in fee simple absolute and can devise it in his will or it passes to his heirs (siblings, cousins, etc.). In the second instance, *A*'s interest in the farm ends on *A*'s death and *B* owns the farm in fee simple absolute.

An Estate for Joint Lives

4. The estate ends either (1) when the first of *A* and *B* dies, or (2) when the last of the two dies. The intent of the transferor or grantor, *O*, controls the choice. That choice involves either construing the greatest estate granted by the transferor or freeing the title of this life estate at the earliest possible time and vesting the transferor's reversion. Thus, policies of either presuming the words of conveyance against the grantor or freeing up the alienability of the title conflict here. The transferor's intent should control. If there were added to this conveyance a "remainder to the survivor of them in fee simple absolute," the length of the life estate would be clear. (This remainder would, as we will see, be a contingent remainder, lacking as it does ascertainability of the identity of the survivor until the death of either *A* or *B*.) See 1 *American Law of Property* §2.15, at 128 (James Casner, ed., 1952).

Insurance Proceeds

5. Some courts hold that a life tenant has no duty to insure the property. If Larry has no duty under a state's law to insure the improvements, then the proceeds should be wholly his, and some courts have so held. There may be insurance law questions as to what Larry can insure, but Freda as the holder of the remainder has no standing to raise those questions. (The moral here is for the present and future interest holders to get together and purchase insurance, making sure that everyone's interest is adequately

covered—or for the person creating the tenancy to impose the duty to insure on the tenant.) See 1 *American Law of Property* §2.23, at 159 (James Casner, ed., 1952).

She Meant Well

6. Several aspects of this language are relevant. The "for your residence" language may indicate a life estate; dead people don't need a residence. Similarly, the "don't sell it" language perhaps negates the alienability aspect of a fee simple absolute. On the other hand, perhaps the drafter intended merely to reenforce and define the purpose of the writing—to provide a residence for the transferee—i.e., precatory language. The restraints on use and alienability on the holder of the estate may be consistent with either a fee simple absolute or a life estate. If the court finds it to be a fee simple, the court will independently review the "don't sell it" language to decide whether the restraint is an unreasonable restraint on the alienability of land. Still, perhaps the "rest of my property" language indicates a future interest to follow a life tenancy in the house and lot. If this is a lay drafter, however, one cannot put too much store in such a person's knowledge of future interests. Also relevant to a determination of the issue of how to define the estate are the other provisions of the transfer. Is the sister otherwise well provided for by the "rest of my property" language? As things stand, the jurisdiction's statutes preferring the larger estate, such as a fee simple, most likely will control. See White v. Brown, 559 S.W.2d 938 (Tenn. 1977), discussed and distinguished in Williams v. Estate of Williams, 865 S.W.2d 3 (Tenn. 1993).

A Slew of Estates

7. (a) *A* has a present interest in fee simple determinable, followed by *O*'s future interest, a possibility of reverter, held in fee simple absolute. See Thomas Bergin & Paul Haskell, *Preface to Estates in Land* 48 (2d ed. 1984).
   (b) *A* has a present interest in fee simple subject to a condition subsequent. *O*'s future interest is a right of entry or a power of termination. If, after the terminating event is described, the last clause were to read instead "*B* and his heirs shall have the right to

reenter," *A* would hold a fee simple subject to an executory limitation, and *B* would hold an executory interest in fee simple absolute.

(c) This is a conveyance with words indicating a fee simple determinable (the "cease and determine" phrase, indicating an automatic shift of the fee simple back to grantor *O*) and with words indicating a fee simple subject to a condition subsequent (the "provided that" language). In this ambiguous grant, the modern canon of construction disfavoring forfeiture and preferring finding the larger estate in the grantee leads to this conveyance being a present interest in *A*, held in fee simple subject to a condition subsequent, *O*'s retaining a right of entry at the moment of the conveyance.

(d) *A* has a fee simple absolute. The additional language is precatory language, indicating *O*'s desire, but is neither a condition nor a covenant, and therefore is unenforceable.

(e) *A* has a fee simple absolute. The language neither makes the interest into a fee simple determinable nor subjects it to a condition subsequent. Rather, the promise is a covenant to use the property as a residence; when he does not, the breach of this promise subjects *A* to contract remedies (e.g., damages or an injunction). The difference between a condition and a covenant is that breach of a condition results in a forfeiture of the property while the owner retains ownership when a covenant is breached, but may be subject to monetary damages or, more likely, an injunction.

(f) This conveyance creates either a determinable life estate or a fee simple determinable in *A*. A court will try to ascertain the grantor's intent based on the surrounding facts and circumstances. Today a court would tend to find that *O* transferred the fee simple determinable, the larger estate, to *A*, the grantee. If the grant is a fee simple determinable, *O* retains a possibility of reverter. If, on the other hand, the grant is a determinable life estate, *O* has a reversion, getting Blackacre back when *A* ceases living on Blackacre and no later than *A*'s death. If *A*'s interest is a fee simple determinable and *A* continued to live on the property up to his death, *A* has satisfied the condition and, as a result, at the moment of death he holds the property in fee simple absolute. Some good it will do him! This result will, however, benefit his heirs or devisees.

(g) *A* has a fee simple subject to a condition subsequent. The terms "provided" and "but if" are words denoting a fee simple subject to a condition subsequent. *A* does not own a fee simple subject to an executory limitation since Blackacre returns to *O* and does not vest in a third party. The drafting, however, is sloppy: Instead of "then to *O*," better to have said that "*O* has the power to terminate *A*'s interest and the right to reenter the property." This makes plain that the termination is not automatic and that *O* must do something, through either self-help or at law, to reenter. See 1 *American Law of Property* §4.6, at 417 (James Casner, ed., 1952).

(h) *A* has a life estate, *B* has remainder (a contingent remainder since *B* must satisfy a contingency—graduating from law school—to take after *A* dies). Because it is possible *A* may die before *B* graduates, *O*, the grantor, retains a reversion. *O* also has a possibility of reverter if the land is not used for a law office, but as a matter of tradition, lawyers only mention the first interest *O* holds, the reversion.

(i) *B*'s remainder interest is no longer contingent. It is a vested remainder in fee simple determinable. Contingent and vested remainders are developed more fully in the next chapter. Since *B*'s remainder is vested, *O*'s reversion has ended, but *O*'s future interest, the possibility of reverter, remains. Thus *A* has a life estate, *B* has a vested remainder in fee simple determinable, and *O* has a possibility of reverter. See 1 *American Law of Property* §4.12, at 427 (James Casner, ed., 1952).

(j) *A* has a fee simple subject to an executory limitation. The language is ambiguous, indicating either a fee or a life estate. The preference for the larger estate permits this language to be construed as a fee simple subject to an executory limitation. *B* has an executory interest (in the next chapter we learn that *B* has a *shifting* executory interest).

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1. Throughout this book, you'll notice common law forms of action and procedures based initially on late-thirteenth-century statutes. Many are the result of the work of Edward I, known as a law reformer in his day and to this day. These are not statutes in the modern sense—they are the product of "the King sitting in Parliament" with his nobles, and so are more like executive orders issued with the consent of the nobles.

2. The renter or lessee loses rights to continued possession of the leased premises on the death of the life tenant unless he has or makes an agreement with the future interest holder.

3. At common law, a fee tail could be a "***fee tail special***"—e.g., "to ***A*** and the heirs of her body by her husband Ben"—or "***fee tail male***" or "***fee tail female***"—e.g., "to ***A*** and the male (or female) heirs of his body."

4. Often these statutes simply said something like “the estate in fee tail is abolished.” Thus, to know whether the statute applies, one must know the words necessary to create the estate in the first place.
5. Waste is used to regulate two other relationships in the law of real property—the landlord-tenant and the mortgagor-mortgagee relationship.
6. Ultimately, the remaindermen in the case had a change of heart, agreed to sell all but five acres of the 150-acre farm, set up a trust, and allow Anna Weedon to take the income from the trust.

Senate Research Service

ISSUES IN FOCUS

THE TOP 40 REAL PROPERTY TAX TERMS

Real property tax terms are often confusing and misunderstood. This SRS *Issues in Focus* is designed to act as a quick reference. The ease of having these selected and common definitions available should save the reader time by not having to wade through New York State Law and the New York Codes, Rules and Regulations in order to find them. These definitions are presented in alphabetic order, with the term identified in italics.

SRS ANALYST: Jason Scott

July 19, 2000

#I00-52

New York State Senate
Albany, New York 12247
(518) 455-2166

BACKGROUND

According to the State Comptroller's *Special Report on Municipal Affairs*, for the fiscal year ending in 1996 (latest year for which data are available), real property taxes accounted for 29% of the $81.5 billion in total revenues for all local taxing jurisdictions. These taxes represented an especially significant share of total revenue for villages (47%), school districts (42%), and towns (54%). The money funds schools, pays for police and fire protection, goes to maintain roads, and funds other municipal services enjoyed by residents. Property taxes are also important to those who have to pay them, so familiarity with the various terms related to their administration is a necessity. Although by no means complete, the selected definitions provided here should help the reader better understand the terminology used in discussing real property taxation.

REAL PROPERTY TAX TERMS

Unless otherwise noted, the following definitions are derived from Title 9, Volume A-2, of the New York State Codes, Rules and Regulations and Articles 1 through 20 of the New York State Real Property Tax Law.

Adirondack Park parcels — parcels of wild or forest lands, owned by the State and located within the boundaries of the Adirondack Park, that are subject to taxation, in whole or in part, pursuant to Section 532(a) and (b) of the Real Property Tax Law, and for which assessments were approved by the State Board for the 1960 assessment roll.

Adjudicatory proceeding — any activity that is not a rule-making proceeding, a hearing to afford a party an opportunity to be heard in relation to the determination of rates, ratios, or assessments, an employee disciplinary action in which the rights, duties, or privileges of named parties are to be determined on a record after a hearing, or a review of a local disciplinary action by an appointing authority against an assessor.

Adjusted prior assessment — a prior assessment increased by reason of the addition of new property or decreased by reason of fire, demolition, or destruction, adjusted in accordance with the provision of subdivisions (4) and (5) of Section 1904 of the Real Property Tax Law.

Arm's-length transfer — a sale of a fee or all undivided interests in real property in the open market, between an informed and willing buyer and seller where neither is under any compulsion to participate in the transaction, unaffected by any unusual conditions indicating a reasonable possibility that the full sales price is not equal to the fair market value of the property assuming fee ownership.

Assessed value — the monetary amount at which a property is put on the assessment roll.

Assessing unit — a city, town, or county with the power to assess real property, unless the city, town, or county is part of a consolidated assessing unit, or a village as provided in Real Property Tax Law Section 1402.

Assessment information file — a collection of records for every parcel shown on the assessment roll, where related information for assessment administrative purposes, including the initial recording of all transfers, is maintained.

Base year assessment roll — the roll from which the State Board of Real Property Services selects its samples for the purpose of a market value survey.

Common law easement — an easement created pursuant to common law (i.e., the body of law developed primarily from judicial decisions based on custom and precedent, unwritten in statute or code) for conservation purposes acquired on or before January 1, 1990, on land within the Adirondack or Catskill parks.

Complaint review panel — a group of staff members of the Office of Real Property Services (ORPS) that provides for compliance with statutes, rules, and procedures in the review of the State equalization rate, class equalization, and class ratio complaints.

Conveyance — every instrument in writing, by which any estate or interest in real property is created, transferred, assigned, or surrendered, excluding a will, easement, right-of-way, lease, license agreement, or mortgage.

Current roll — the assessment roll for which a State equalization rate, special equalization rate, class equalization rate, or class ratio is determined, and the assessment roll for which an assessor's report is being completed.

Easement — a right to use another person's real estate for a specific purpose. The most common type of easement is the right to travel over another person's land, known as a right of way. In addition, property owners commonly grant easements for the placement of utility poles, utility trenches, water lines, or sewer lines. The owner of property that is subject to an easement is said to be "burdened" with the easement, because he/she is not allowed to interfere with its use. (Source: Nolo.com.)

Equalization Rate — a measure, based on sampling by the State Board of Real Property Services, of the average level of assessment in an assessing unit. Simply put, it is a statement of the average percentage of full value at which assessments have been set by the assessor, based on the State Board's valuation date. For example, suppose a town has a total assessed value of $10 million, and it was determined that the full value is $50 million. Dividing the assessed valuation ($10,000,000) by the full valuation ($50,000,000) produces an equalization rate of .20, or 20%. The reader should note that there is a lag between the valuation date on which an equalization rate is based and the year the rate is used. As a result, a community's equalization rate, in most cases, is not the **current** ratio between its assessed value and its full market value.

Exempt assessed value — the part of the assessed value of a parcel exempt from taxation.

First levy date — the last statutory day for the levy of any tax for any purpose upon the final assessment roll or a portion thereof.

Full sales price — the price actually paid or required to be paid for real property or an interest therein, whether paid or required to be paid by money, property, or any other thing of value, including the cancellation or discharge of an indebtedness or obligation, and the amount of any lien or encumbrance on the real property, or interest therein, that existed before the delivery of the deed and that remains thereon after the delivery of the deed, but excluding the fair market value of any property received by the buyer.

Full value standard — for the purposes of a State equalization rate, the manner in which the full value of taxable real property is determined when computing a State equalization rate. Where only one market value survey is used in the computation of an equalization rate, the full value of the taxable real property is the value as of the valuation date. Where two surveys are used, the full value of the taxable real property is a weighted average of the values as of each of the valuation dates.

Grievance day — the date on which local officials hear complaints in relation to assessments. This is generally the fourth Tuesday in May, but many localities change this date for one reason or another, so it best to check with your local assessor.

Homestead class — (1) all one-, two-, or three-family-dwelling residential real property, including such dwellings used in part for nonresidential purposes but primarily for residential purposes, and farm dwellings; (2) all other residential real property consisting of more than three dwelling units held in condominium form of ownership, provided certain special conditions are met; (3) all vacant land parcels located in an assessing unit that has a zoning law or ordinance in effect, provided that such parcel does not exceed 10 acres and is located in a zone that does not allow a residential use other than that described above; and (4) land that is used in agricultural production and is eligible for an agricultural assessment as defined in Section 305 or 306 of the Agriculture and Markets Law, where the owner of such land has filed an annual application for an agricultural assessment, and farm buildings and structures thereon. A mobile home or trailer does not constitute a homestead unless it is owner-occupied and separately assessed.

Land parcel — used interchangeably with *lot* in tax mapping. All real property parcels separately assessed apart from the land are to be identified to the land parcel.

Lending institution — any bank, trust company, national bank, savings bank, savings and loan association, federal savings bank, federal savings and loan association, private banker, credit union, investment company, pension fund, licensed mortgage banker, or any other entity that maintains a real property tax escrow account for real property located in New York State.

Levy roll — the final assessment roll upon which taxes are to be levied.

Market value ratio — the ratio of assessed value to full value of the taxable real property on a final assessment roll.

Measured roll — an assessment roll from which observations, either sample parcels for appraisal or sales, are chosen in conducting a market value survey or from which aggregate full values are estimated based upon local reassessment activity. The procedures for market value surveys are to provide which assessment rolls are to be measured.

Municipality — a city, town, or village, other than a village that is not an assessing unit.

Nonhomestead class — all real property not included in the homestead class.

Nonresidential property — locally assessed properties that are not residential property.

ORPS — Office of Real Property Services.

Physical or quantity change — either an increase in assessed value from the prior roll to the current roll resulting from new construction, property annexed from another assessing unit, property omitted from the prior roll, property discovered during tax mapping, and property that has become a locally assessed property or taxable State land, or a decrease in assessed value from the prior roll to the current roll resulting from fire, demolition, loss of parcels from the roll due to tax mapping, removal of mobile homes, removal of duplicate parcels from the roll and property which is no longer a locally assessed property or taxable State land. It is not the result of the splitting or merging of parcels. Increases in assessments of oil and gas rights assessed pursuant to Real Property Tax Law Article 5, Title 5, that are a result of increased production are to be treated as increases resulting from new construction. Decreases in assessments of oil and gas rights assessed pursuant to the same section of law that are the result of decreased production are to be treated as decreases resulting from demolitions. Where new property has replaced existing property, the installation of new property will be treated as new construction and the removal of the previously existing property will be treated as a demolition, notwithstanding that the new property may be similar or identical, in function or otherwise, to the previously existing property. In special assessing units or homestead assessing units, physical or quantity changes also include a change in class designation and the annexation or removal of a parcel from a portion.

Residential Assessment Ratio — established by the State Board of Real Property Services according to law, the residential assessment ratio, or RAR, is the midpoint of a list, ranked from highest to lowest, of ratios of assessed value to sales price for each usable residential sale. The RAR is an indication of the level of assessment of residential property in a community. Residential property owners can use the RAR in an attempt to prove that their homes are assessed at a higher level than other homes on the assessment roll.

Residential property and residential real property — these terms are defined differently for different purposes, but generally mean one- two-, and three-family residential property, including such dwellings used in part for nonresidential purposes but primarily for residential purposes, but excluding parcels with an assessment limitation and parcels held in a cooperative or condominium form of ownership.

Revaluation, reassessment, or *update* — a systematic review of the assessments of all locally assessed properties, valued as of the valuation date of the assessment roll containing those assessments.

Special ad valorem levy — a charge imposed upon benefited real property, in the same manner and at the same time as taxes for municipal purposes, to defray the cost, including operation and maintenance, of a special district improvement or service, but not including any charge imposed by or on behalf of a city or village.

Special district — a town or county improvement district, district corporation, or other district established for the purpose of carrying on, performing, or financing one or more improvements or services intended to benefit the health, welfare, safety, or convenience of the inhabitants of such district or to benefit the real property within such district, and in which real property is subject to special ad valorem levies or special assessments for the purposes for which such district was established.

State equalization rate — the percentage of full value at which taxable real property in a county, city, town, or village is assessed as determined by the State Board.

Tax billing address — the address designated by the buyer of the property to which tax bills are to be sent. A tax billing address may be expressed in the form of a code.

Tax lien — an unpaid tax, special ad valorem levy, special assessment, or other charge, imposed upon real property by or on behalf of a municipal corporation or special district, that is an encumbrance on real property, whether or not evidenced by a written instrument.

Taxable status date — the date as of which the taxable status of the property is determined according to its condition and ownership, and by which many municipalities require property tax exemptions to be filed (generally March 1st, but may vary depending on the locality).

Valuation date — the date when the full market value of the property is determined (generally January 1st, but may vary depending on the locality).

LEGISLATIVE ACTIVITY — 2000

The following bills proposing changes to real property tax definitions have been introduced to date in the 2000 Session:

- S. 963 — allows the governing body of any approved assessing unit except New York City, by referendum, to include owner-occupied four-family residential dwellings within the definition of *homestead class* (No Action);

- S. 2088 — includes, within the definition of *homestead class*, for purposes of class share tax treatment, residential real property consisting of more than three dwelling units held in cooperative form of ownership (Passed Senate); and

- S. 6462 — includes, within the homestead classification, residential real property held in cooperative form of ownership (No Action).

ADDITIONAL SOURCES OF INFORMATION

New York Codes, Rules and Regulations. Title 9, Volume A-2, Section 185.

New York State. Office of the State Comptroller. *Special Report on Municipal Affairs*. 1996.

Senate Research Service

ISSUES IN FOCUS

NEW YORK PROPERTY TAXES — A REVIEW OF TWO REPORTS

Property owners in New York State recently had an opportunity to see somewhat different perspectives on real property taxes in New York. In early 2006, the Senate Finance Committee released a study on the cost of local government it had commissioned from Global Insight, Inc. (GI). In April of 2006, the Office of the State Comptroller published a research brief that summarized the issues associated with property taxes.

Prior reports on property taxation in New York have found that State residents pay substantially higher local taxes per capita than does the average American, whereas the State tax rates are much nearer to national averages. These reports agree about the high rates, but as with any group of reports that examine the same subject matter, there are also instances where the reports disagree. Generally speaking, the GI and OSC reports complemented each other.

Despite recent clamoring for increased State education aid as a mechanism to lower local property taxes, the OSC study found that having a single major identifiable local revenue source for municipalities and schools offers direct accountability and keeps the pressure on these local governments to carry out their operations in a cost-effective manner. OSC further notes that State aid, such as the STAR (school tax relief) program, lowers the effective tax rate on homeowners — the largest group of people who vote on and otherwise influence local school budgets. For many seniors, STAR has effectively eliminated their school tax burden.

GI found that the high local tax burden is due primarily to high growth rates in local government spending. New York State has a multiplicity of local governmental units, which results in the duplication of resources, inefficient service delivery, and ultimately higher costs and higher local taxes. Localities also have high levels of government employment and large payrolls because of duplication and overstaffing.

This SRS *Issues in Focus* summarizes and contrasts the Global Insight and State Comptroller studies.

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INTRODUCTION

Two significant reports that examine real property taxes in New York State were recently published, giving property owners an opportunity to see somewhat different perspectives on this politically charged topic. In early 2006, the State Senate Finance Committee released a study on the cost of local government it had commissioned with Global Insight, Inc. In April of 2006, the Office of the State Comptroller (OSC), through its Division of Local Government Services and Economic Development, published a research brief that summarized the issues associated with property taxes.

While the OSC brief is largely descriptive, both publications offer at least limited proscriptive counsel for the lowering of property taxes in the State. What follows is a summary of the main points of each report (neither of the reports are of such brevity as to allow them to be fully explained here) and some conclusions that can be drawn from a comparison of the two. Sources for copies of the individual reports can be found in "Additional Sources of Information," below.

BACKGROUND

The cost of local government is influenced by many factors, including the mix and quality of local services provided; the shares of local services paid for by the State; population size, age distribution, and density; land development patterns; income and property value levels; and attitudes towards taxation. However, the sources of funding for local government activities are more easily discernible (see table below).

Percentage of Total Local Government Revenues Derived From Property and Sales Taxes, 2002

Units	*Number*	*Percentage of revenues from:*	
		Real property tax	*Sales tax*
Cities	61	22.5%	17.3%
Counties	57 (1)	21.4%	23.8%
Towns	932	50.1%	9.4%
Villages	554	43.0%	5.6%
School Districts	703 (2)	51.7%	(3)
Fire Districts	862	92.1%	N/A

N/A = Not applicable
(1) Excluding the 5 boroughs of New York City.
(2) Includes both independent and dependent districts.
(3) A relatively small number of districts receive sales tax distributions or impose a consumer utility tax. Most of the remainder of school district funding (38%) is State aid.

Prior reports on property taxation in New York have found that State residents pay substantially higher local taxes per capita than do average Americans, whereas the State tax rates are much nearer to national averages. Unlike sales taxes and State aid, the property tax is a relatively stable, locally controlled revenue source. Earlier studies have also suggested that the State's multiple local governmental units duplicate resources and services, provide inefficient service delivery, and generally have an inability to capture efficiencies and economies of scale in service delivery. Due to such duplication and, according to some, overstaffing, local governments experience high employment costs.[1]

In 2002, there were 3,704 units of local government units in State, excluding units located in New York City. In addition to the units presented in the table above, there were 200 joint activities agencies, 116 industrial development agencies, and 219 special purpose units.

REPORT FINDINGS IN COMMON

As with any group of reports that examine the same subject matter, there are numerous instances where the reports express agreement. Such findings include the following:

- In 2002, New York State ranked first in the continental United States in the amount of all local taxes levied, at $6,377 per household; local property tax revenues per household in New York State totaled $3,750 as compared with the median for all states of $2,254 (third highest in the nation, exceeded only by Connecticut and New Jersey).

- Local government spending in 2002 was $4 billion higher in New York than the average of 10 states delivering similar services.

- In 2002, New York State provided approximately 38% of the revenues for local elementary and secondary education spending.

- Property taxes are the largest tax imposed by local governments in the State, representing 79% of all local taxes, not including New York City. (New York City's property taxes are relatively low compared with other localities because the City collects revenue from a number of other local taxes, including a personal income tax.)

- Local property tax levies grew by an unadjusted 60% from 1995 to 2005; most of this growth occurred between 1997 and 2002, when local government expenditures increased approximately 13% in real terms (i.e., after adjusting for inflation), while real property and sales taxes rose 19.6% in real terms over the same period. This resulted in rising tax burdens locally and relative to comparable states.

- In 2005, the revenue generated through local property taxes exceeded the amount levied via the State's personal income tax by roughly $10 billion for the same year.

- Excluding New York City, the downstate area (in this instance defined as Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, Sullivan, Ulster, and Westchester Counties) has far higher tax bills, but far lower tax rates than the upstate area.

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[1] Cabalquinto, Casey, and Matthew Gardner. *Achieving Adequacy: Tax Options for New York in the Wake of the CFE Case.* Washington, DC: Institute on Taxation and Economic Policy, April 2005. Also, Public Policy Institute of New York State. *How High Is the Upstate Tax Burden — and Why?* August 16, 2004.

What follows is a closer look at each of the 2 reports and some conclusions that can be drawn from their findings.

REPORT 1: *ASSESSING THE COMPARATIVE COST OF LOCAL GOVERNMENT SERVICES IN NEW YORK STATE*

Commissioned by the Senate Finance Committee, Global Insight, Inc. (GI), a recognized international economic analysis service, analyzed aggregate local government revenues and expenditures. The resulting report, *Assessing the Comparative Cost of Local Government Services in New York State*, was released in December 2005.

GI examined the differences between upstate and downstate in those variables, as well as nationally and against a smaller cohort of similar states. Specifically, New York was compared to 10 other large states with major urban centers and local governments that provide a range and level of services similar to those provided in New York, namely, California, Connecticut, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Pennsylvania, and Texas.

The analysis distinguished among general governmental and education spending, transportation and employment costs, and Medicaid expenditures and revenues. Not all of the results were statistically significant; only the major findings, conclusions, and recommendations are presented here.

Employment

GI found that the rate of local government employment in New York State was almost 26% higher than the national average. For the continental United States, the average size of a unit of government (city, town, village, etc.) in 2002 was 1,926 households; in New York State it was 1,493, excluding New York City. In 2002, the number of households per education unit (i.e., school district) was 5,733, excluding New York City, which was well below the 48-state median of 7,406.

As stated in the GI report, "These below-average figures suggest the possibility of both overlapping governmental units and the existence of too many small local government units, each serving a low number of households. Though these differences may be due to other factors, such as demands for higher-quality local services (e.g., smaller class sizes in schools; more police and fire personnel per household, etc.) and the broader range of services provided by local governments, they may also be due in part to the large number of local governments in the state."

Local government employment in New York State has risen in both absolute and unit terms. According to the report, in 2002, New York State had the second-highest level of local education full-time employees in the 11 states (0.076 per household) even before New York City was excluded, trailing only Texas at 0.079.

The federal Bureau of Labor Statistics states that total local government employment in the State rose from 1.007 million in 1997 to 1.092 million in 2004. Wages and salaries plus benefits comprised about 50% of total expenditures of local governments, including education employment, in the State in 2002. GI found that higher local government employment levels meant higher growth rates in local costs, as total compensation has been rising faster than has the rate of inflation.

Since local government services are labor-intensive, total compensation often comprises the majority of annual expenditures, so that the rate of government employment in workers per household has a significant effect on local government spending. The local government employment levels per household are only slightly lower upstate than downstate, but given the greater financial resources available downstate, GI expected to see larger percentage differences in the levels of compensation than it did, suggesting that there are too many local government workers upstate given the local resources available to pay for them.

What GI found was that higher local government spending and local tax levels in New York State may be due more to the number of workers and less to the average salaries paid. Noting that inefficiencies result when providing local government services in the sparsely populated, rural counties, GI stated that government services in such counties may require more workers per household. Structural factors prevent economies of scale from being realized in such areas.

According to GI, merely reducing the local government employment levels to those of the comparable states will not solve the problem of the cost of local government services. In addition to lowered employment levels, localities would also have to adjust the quality of services provided, alter employee wage and benefit levels, and revise local tax systems.

GI predicted that the size of the potential savings that could be obtained by improving the efficiency of delivering local government services in New York State is quite large, and presented an upper-bound estimate of $2.465 billion upstate and $0.99 billion downstate. Stated another way, "[T]he $2.465 billion are local revenues that would not have been required if the local expenditures and taxes in the upstate counties had been based on the lower employment rates in the comparable states."

Expenditures

There was a marked increase in the level of local government expenditures in recent years. From 1997 to 2002, local government expenditures increased nearly 30% in nominal terms and 13% in real terms (i.e., after adjusting for inflation). The sharp increase in local government spending in recent years has produced a similarly high growth rate in locally generated revenue, primarily that of real property and sales taxes. By way of example, real property tax collections, which represent around 41% of all local government revenues, increased 19.6% during the period 1997-2002, according to the Comptroller's 2004 Annual Report, resulting in rising local tax rates.

The growth in local property tax that exceeded the rate of inflation from 1995 to 2005 raised the actual tax burden not only in real terms, but relative to comparable states as well. The GI analysis "compared local government expenditure, employment, and tax revenue levels in New York State to those in the 48 other states (Alaska, the District of Columbia, and Hawaii were excluded because they were not comparable), and then to a smaller set of 10 comparable states."

Among the findings presented in the GI report:

- Total local government expenditures per household in New York State were $15,172, well above the 48-state average of $8,802. When New York City was excluded, the New York State figure was still approximately $12,300 per household.

- The expenditure difference per household between New York and the other states is wider for local, general government services than for education services. Local, general government expenditures in New York State (including New York City) were $9,747 per household in 2002, 94% higher than the 48-state average of $5,030.

- Local education expenditures per household were $5,425 in New York State, 44% above the 48-state average of $3,772. According to *Education Week*, per-pupil spending in New York State in the 2001-02 school year was $10,002, third-highest in the United States and 29% above the U.S. average of $7,734.

- Local government employment expenditures per household was higher in New York State than in the other states, again with the difference greater for local, general government than for education.

- Because of high expenditure levels, local tax revenues per household in New York in 2002 for both local, general government and education services were 60% and 83% higher, respectively, than in other states.

In addition to measuring New York against the nation, GI also compared the State to 10 other large, comparable states with major urban centers, specifically, California, Connecticut, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Pennsylvania, and Texas. The levels of both local, general government and education expenditures in New York State were higher than comparable state averages, and the differences were statistically significant to a high degree.

All tax revenues per household in New York were higher than the 11-state average. The comparison of revenue, expenditure, and local tax levels in New York with those in the 10 other states shows that the levels are consistently higher in New York, even when the distorting effects of New York City are excluded. These differences exist for both local, general government and education services, and the expenditure differences are slightly higher than the revenue differences. Finally, the differences between New York and the comparable states are somewhat greater for local, general government services than for education.

Units of Local Government

GI notes that, along with rising expenditures, there is a link between the structure of local government in New York State and the above-average tax burdens borne by its residents, as suggested by a series of recent studies. In particular, much attention has been focused on the fact that multiple government bodies within each county have the power to raise revenues through direct taxation, yet often provide overlapping services. Most municipal corporations, specifically including counties, cities, fire districts, school districts, towns, and villages, are authorized to levy taxes.

GI cites the following examples of the multitude of local government units: Seneca County, which has a population density of 108 persons per square mile, is served by 28 governments, and Chautauqua County, which has a population density of 130 persons per square mile, is served by 88 governments.

The report did not rely solely on anecdote, however. The number of households per unit of local government in New York State, for both education and general government, was found to be below the U.S. averages, especially in the upstate counties. There, the number of households per local noneducation unit of government is 52.6% less than in the downstate counties. This implies that New York, compared to the average state in the nation, supports significantly more units of local government to provide necessary services.

GI goes so far as to state, "[W]e conclude that local government services, notably local, general government, are not being delivered as efficiently as they could be in New York State, especially in the upstate counties." It further finds that significant local tax revenues and State funding can be saved by promulgating policies designed to streamline government and share services. The report concludes, "It is difficult to state precisely what share of the additional local expenditures and taxes presented above are directly attributable to inefficiencies in providing local government services in New York State, but if we assume the share is half, then the additional local government expenditures were $2.24 billion upstate and $1.82 billion downstate, with additional local taxes paid of $1.00 billion in the upstate counties and $1.32 billion downstate."

Other Factors

The report produced by GI mentions several other factors that have contributed to the State's high property taxes. These include the higher cost of living generally in the Northeast, especially in the downstate region, and higher service standards, such as smaller classroom sizes or more days per week of trash collection.

In addition to streamlined government and consolidated services, the report finds that local property taxes could be lowered by altering how services are provided (i.e., what level of government of provides the services) and/or how the services are funded. For example, in some states, highway maintenance is primarily the responsibility of county highway departments, while in others, local road maintenance is handled at the state level. Similarly, in many states, the state government pays the majority of local education costs, whereas in 2002, New York State provided approximately 38% of the revenues for local elementary and secondary school spending.

REPORT 2: *PROPERTY TAXES IN NEW YORK STATE*

The OSC, as part of its Local Government Issues in Focus series, published a 22-page "research brief" that summarized the issues associated with real property taxes and provided an analysis of recent trends. It should be noted that the OSC report, *Property Taxes in New York State*, was not as detailed or comprehensive as that done by GI. The OSC report concurred with the GI report in that tax burdens in New York State are generally higher than in the rest of the nation.

Regional Differences

The OSC report had mixed things to say about regional differences in property tax levels, growth rates, and relative burden. It found a great deal of variation across the State. Although taxpayers in suburban downstate counties pay the highest property tax bills per household, they have some of the lowest tax rates in the State, since their property values are much higher as well. These low rates are partly due to the growth in property values between 1995 and 2005, which was much stronger downstate than upstate, according to the OSC.

The fact that total taxes per household are higher in downstate counties, however, may not indicate by itself that property taxes are more burdensome there. Downstate residents are generally wealthier, and therefore may be able to afford higher taxes. As stated in the report, "[B]y this measure, downstate property taxes look much more affordable than average, especially in property-wealthy Suffolk and Westchester counties."

Property Tax Growth

Generally speaking, property taxes are used to balance municipal budgets after accounting for all other sources of revenue, which means that property taxes tend to increase more quickly if other revenues stagnate or decline. During the late 1990s, the economic expansion allowed most local governments to keep property tax increases below inflation. According to the OSC report, school districts were the only local government units to have property tax growth that outpaced inflation between 1995 and 2000.

As the expansion cooled, however, the trend reversed. Economic slowdowns and resulting contractions in other revenues have placed additional pressure on local property tax levies. The OSC report said that, as a result, the property tax is currently the fastest growing local revenue in the State. It further declared, "Most [property tax] growth occurred in the last 5 years — when property tax levies increased by 42%, compared to inflation of 13%."

In its discussion of the trends associated with property taxes, the OSC report specifies that local governments as a whole had average annual increases in the property tax levy of only 2.3% during the 1990s, and counties, cities, towns, and villages all kept annual levy increases below the inflation rate of 2.5%.

Slow property tax growth during that period was also related to increased growth in other sources of revenue (especially sales tax revenue growth due to the healthy economy) and moderating costs, including low interest rates for capital projects and lower-than-usual pension contributions. The low pension contributions were driven by 2 factors: then-Comptroller Carl McCall's decision to reduce, and in some instances even eliminate, local pension contributions; and extraordinary returns on pension fund investments during that period.

The OSC found that from 2000 to 2005, the economic impact of the recession and the attacks of September 11, 2001, reduced State aid at the same time other local revenues declined. These changes, coupled with growth in local costs for health care and employee benefits, produced more rapid property tax growth. All classes of government shared in this acceleration, with levies growing faster than inflation during the period.

School district levies grew at an average annual rate of 7.3%, significantly outpacing inflation even after accounting for STAR. According to the Comptroller, the primary reason for this is that schools consume more public resources than other types of local government, accounting for 48% of total local government expenditures in 2004, and demands upon public education have been escalating. State revenue sharing and school aid increases also may have had an impact.

Preliminary school district and village levy data show growth slowing for those classes of government as well, although less dramatically (from 7.8% in 2005 to 6.8% in 2006 for school districts, and from 6.3% to about 5.5% for villages). However, growth rates for most classes of local government continue to be substantially above inflation.

And yet, not all of the news reported by the OSC was bad. Levy increases have moderated somewhat in 2006, particularly for counties, which benefited from last year's Medicaid cap (Chapter 58, L. 2005). However, Medicaid constitutes only a small portion of total local government expenditures; in 2002, local government spending attributable to Medicaid averaged only 2.6% of total spending. Nevertheless, as described in a recent OSC update separate from the aforementioned report, county tax levy increases slowed from an annual average increase of 7.0% statewide from 2000 to 2005 to 3.3% in 2006, a sizable portion of which can be attributed to the recent Medicaid cap.

Assessment Reform

One area examined in the OSC report, but not in the GI report, was property assessments. The Comptroller's Office found that assessment quality varies throughout the State, and in many areas properties with similar market values may have very different assessments and tax bills. Such discrepancies can lead to dissatisfaction and assessment challenges, which in turn may have a significant impact on the property tax base.

Although national standards call for property revaluation every few years, State law does not require jurisdictions to assess real property at full market value. Recent statistics from the Office of Real Property Services show that only two-thirds of assessing jurisdictions are achieving satisfactory uniformity in residential assessments. A 1996 interagency task force on real property valuation recommended that assessment requirements be strengthened in New York State. Specifically, State law should be amended to require that all assessing jurisdictions assess real property at market value, in accordance with standards promulgated by national standard-setting agencies — including updated assessments on a regular cycle, not to exceed 4 years. As indicated in the report, the Comptroller's Office would like to see the task force's recommendations acted upon.

CONCLUSION

The reports in question agreed on several points. There were also some variables that were considered by one report, but not the other. And then there were instances where the reports diverged in opinion as well. Generally speaking, the GI and OSC reports complemented each other.

Based on their multistate analysis, GI found that 2002 local government spending was up to $4 billion higher in New York than the average of 10 states that deliver similar services. Education spending accounted for 49.8% of all local spending, and local government spending on all other services, e.g., highways, water, public protection, and sanitation, represented 47.6% (the report did not detail how the remaining 2.6% was spent).

The OSC found that economic vagaries largely contributed to the jump in property taxes in the late 1990s and early 2000s, and that more favorable current economic conditions appear to have reduced the rate of property tax rate increases. For its part, GI attributed rising property taxes to New York's multijurisdictional approach to delivering local government services as well as a higher cost of delivering these services, requiring $2.3 billion in additional local taxes and $1.7 billion in additional State support.

Education Spending

New York employs more education workers than average, and total spending per pupil for K-12 education in the State far exceeds the U.S. average. Specifically, GI found that per-household, local education expenditures in 2002 were $5,425 in New York State, 44% greater than the 48-state median of $3,721. It also found that local educational employment in the State also exceeded that seen elsewhere. In 2002, the New York State level of 0.074 education employees per household was, respectively, 13.9% and 7.2% greater than the 48-state average and median figures of 0.065 and 0.069.

GI also noted that *Education Week*'s "Quality Counts 2005: No Small Change," an annual report evaluating state school financing systems, indicated that annual, per-pupil spending in New York State in the 2001-02 school year was the third-highest in the nation and the State financing of education was 29% higher than the national average. According to GI, the State also enjoys smaller class sizes on average than the rest of the nation.

Increased State Aid to Lower Local Taxes

Recently, several groups have sought increased State education aid as a mechanism to lower local property taxes. As the STAR reimbursements made by the State come from the General Fund and are paid directly to local school districts, it can be considered a form of State education aid; households receive a portion of their State tax payments back in the form of lower school property tax levels.

According to the OSC, however, such programs may encourage growth in spending, particularly in higher-wealth, higher-spending areas. As stated in the Comptroller's report, "Having a single major identifiable local revenue source for municipalities and schools offers direct accountability and keeps the pressure on these local governments to carry out their operations in a cost-effective manner." It further cautions that STAR lowers the effective tax rate on homeowners, the largest group of people who vote on and otherwise influence local school budgets. For many seniors, STAR has effectively eliminated their school tax burden.

The OSC says that by reducing the local tax share paid for greater school spending, State education aid may actually provide an incentive to increase school spending, an impact the OSC notes has been described in several studies. OSC cautions that while short-term property tax relief may be the perceived effect of increased State education aid, the long-term outcome of such tax shifts may well be an overall increase in both State and local taxes.

LEGISLATIVE ACTIVITY — 2006

Each year, the Legislature considers a multitude of bills that would effect changes in the real property tax system. The following bills have seen action in the Senate in 2006:

- S. 101 — authorizes granting of a school tax exemption to veterans with at least 40% disability (Passed Senate);
- S. 734-A — provides State assistance for revaluation of school district assessments at full value (Passed Senate);
- S. 884 — permits tax jurisdictions to apply for and receive from the courts incidents of ownership of land subject to foreclosure to permit an environmental investigation (Passed Senate);
- S. 1975 — exempts from real property taxation property leased by a municipality for a public library for a period of 20 years or more (Passed Senate);
- S. 2224 — defines the War on Terrorism as a "period of war" for purposes of the veterans' alternative property tax exemption (Passed Senate);
- S. 2353 — authorizes certain cities and villages to expedite foreclosure on substantially physically distressed and unoccupied residential, commercial, or industrial properties (Passed Senate);
- S. 2847-B — creates an exemption for increased value of property in certain areas of the Adirondack Park (Passed Senate);
- S. 3309 — grants the 80% real property tax exemption to forest lands subject to a recognized forest certification program (Passed Senate);
- S. 3691 — removes the distinction between owner-occupied and nonowner-occupied family properties in terms of eligibility for the small claims assessment review program (Passed Senate);
- S. 4018 — grants a 50% exemption for certain cold storage facilities used to hold fruit (Passed Senate);
- S. 4939 — provides for a third party designation by eligible senior real property owners for notices regarding annual recertification (Passed Senate);
- S. 5607 — provides third-party notice option for property owners eligible for the tax exemption for persons with disabilities (Passed Senate);
- S. 5966-A — extends, until January 1, 2011, the expiration of the law relating to the tax exemptions for solar, wind, or farm waste energy systems (Passed Senate); and
- S. 6830 — provides for adjusted homestead and non-homestead adjusted base proportions in assessing real estate taxes in Nassau County (Chapter 24, L. 2006).

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Senate Research Service

ISSUES IN FOCUS

ROAD MAP OF THE STATE BOARD OF REAL PROPERTY SERVICES

The State Board of Real Property Services is a five-member body, appointed by the Governor, whose function is to oversee the administration of real property assessments in New York. The Board is required to establish State equalization rates, assess special franchises, investigate the methods of assessment throughout the State, and support real property tax equity. The body that carries out the Board's policies and programs is the Office of Real Property Services (ORPS). Through its six regional offices located throughout the State, ORPS provides several types of assistance to localities.

This SRS *Issues in Focus* describes the State Board of Real Property Services, including its membership and their powers and duties, and the role of ORPS.

SRS ANALYST: Jason Scott
June 6, 2000
#I00-43

New York State Senate
Albany, New York 12247
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WHAT IS THE STATE BOARD OF REAL PROPERTY SERVICES?

In 1960, the Legislature created the State Board of Equalization and Assessment (Chapter 335, L. 1960). While it was renamed in 1994 to the State Board of Real Property Services, the Board's mission and function has not changed since its inception. As outlined in Article 2 of the Real Property Tax Law, the Board is a five-member body appointed by the Governor, with the advice and consent of the Senate, whose function is to oversee the administration of real property assessments in New York. The members of the Board are appointed for eight-year terms. They receive no monetary compensation for their membership, but are reimbursed for expenses incurred while on State business. Other than the statutory requirement that one of the members be "an individual actively engaged in the commercial production for sale of agricultural crops, livestock and livestock products of an average gross sales value of ten thousand dollars or more," it is the task of the Governor and Senate to appoint and approve qualified members to the Board.

WHO IS ON THE BOARD?

The current members of the Board are Chairwoman Ifigenia T. Brown of Ballston Spa (Saratoga County), John M. Bacheller of Latham (Albany County), Frank B. Cernese of Montrose (Westchester County), Ruth L. Henahan of Delmar (Albany County), and Leon E. Wright, Jr. of Franklinville (Cattaraugus County). Thomas G. Griffen of Kinderhook (Columbia County), Executive Director of the Office of Real Property Services (ORPS), also serves as the executive officer for, and secretary of, the Board. (The executive officer of ORPS is not appointed by the Governor but rather is appointed by the Board itself.)

The Board convenes several times a year for public meetings, which are usually held at ORPS's Sheridan Avenue office in Albany.

POWERS AND DUTIES OF THE STATE BOARD

Overseeing the administration of real property assessments in New York is no easy task. As part of that responsibility, the Board is required by law to:

- establish State equalization rates for each county, city, town, and village;
- hear and determine reviews relating to determinations made by county equalization agencies;
- assess special franchises;
- approve assessments of State lands subject to taxation;
- have general supervision of the function of assessing throughout the State;
- investigate the methods of assessment throughout the State and confer with, advise, and assist assessors and other officials whose duties relate to assessments;

- furnish assessors with information and instructions that may aid them in making assessments;

- prescribe forms relating to assessments, including applications for exemption from real property tax;

- inquire into the provisions of the laws of other states and confer with the appropriate officials thereof regarding the most effectual and equitable methods of assessing and taxing real property;

- prepare an annual report to the Legislature that will include recommendations concerning amendments to existing law and other information that may be advisable;

- establish railroad ceilings for railroad real property;

- monitor the quality of local assessment practices by individual assessing units;

- impose, collect, and receive fees or charges that may be authorized by statute;

- adopt rules and regulations to implement the computerized statewide school district address match and income verification system as detailed in Section 171 of the Tax Law;

- administer oaths, take affidavits, and certify acknowledgments in relation to any matter or proceeding in the exercise of the powers or duties of the Board;

- meet with local officers concerning assessment and real property taxation matters if such a meeting is seen as necessary by the Board;

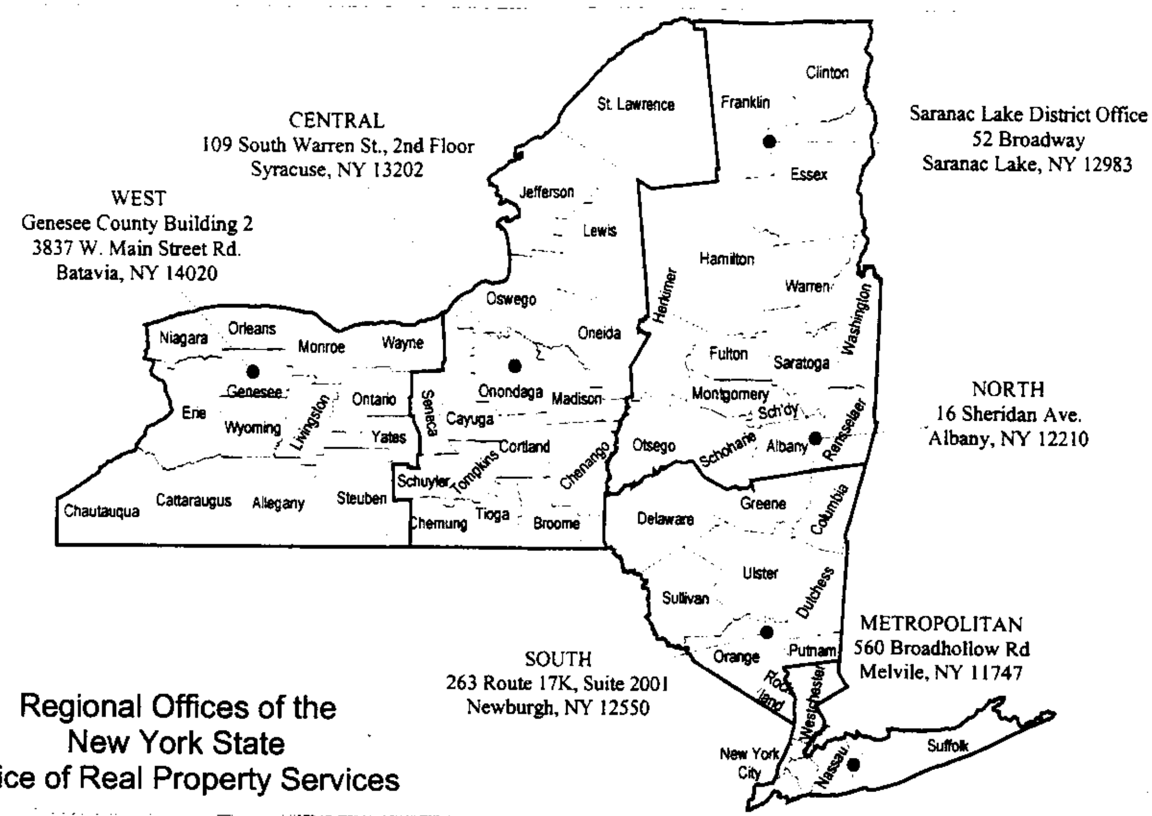
- make official visits to counties not more than once every two years to discuss matters relating to assessment and real property taxation; and

- direct disciplinary actions against officials who neglect or refuse to perform official duties.

THE ROLE OF THE OFFICE OF REAL PROPERTY SERVICES

The New York State Office of Real Property Services (ORPS), formerly the State Division of Equalization and Assessment, carries out the policies and programs of the Board. Its mission, "To lead the State's efforts to support local governments in their pursuit of real property tax equity," is brought to the Board by Executive Director Thomas G. Griffen.

ORPS maintains its principal office in Albany and extends its operations through regional offices in Batavia, Melville, Newburgh, Syracuse, and Albany. ORPS also maintains a full-service office in Saranac Lake. The map on the following page shows the counties served by each of the regional offices.



Regional Offices of the
New York State
Office of Real Property Services

Using data processing equipment, these regional offices generally provide direct technical assistance to localities in the installation of the Real Property System (a computer program) and related real property administrative services, such as the municipal full-value measurement survey. In addition, the regional offices supply the following types of assistance:

- Project Planning — The regional staff assist localities in analyzing their needs and putting together work plans and timetables of project plans.

- Initial Revaluation Projects and Valuation Updates — The regional staff monitor the work of private valuation contractors and provide assistance, i.e., training, if needed. If a private contractor is not involved, then the regional staff run the initial revaluation project or valuation update by working with the local assessor(s).

- Real Property System (RPS) Conversion — RPS is a computer program that helps localities and assessors with the assessment process. The regional staff help the locality convert its existing files to the RPS.

- Assessor Training — This is part of the comprehensive services offered to local government.

- Market Survey — The regional staff assist ORPS with the responsibilities associated with doing market value surveys that produce municipal full-value estimates for the creation of equalization rates.

LEGISLATIVE ACTIVITY — 2000

A number of bills affecting the New York State Board of Real Property Services have been introduced in the current session. One measure provides that the Board may not cause a school district to be part of more than one regional service area when establishing regional offices to serve different areas of the state (A. 6147, No Action). Another authorizes the Board to study the fiscal impact of granting local school districts the authority to implement an income tax surcharge (S. 3130, No Action).

ADDITIONAL SOURCES OF INFORMATION

New York Codes, Rules and Regulations. Volume 9, Subtitle F.

New York State Consolidated Laws. Real Property Tax Law, Article 2.

World Wide Web site:

New York State Office of Real Property Services (www.orps.state.ny.us)

Real Property Tax Cap Information – Frequently Asked Questions

Notice: The answers listed below supplement the guidance issued by the New York State Department of Taxation and Finance and the New York State Department of State: "Property Tax Cap: Guidelines for Implementation". These answers are intended to assist in implementing the law. As new questions arise or answers need to be clarified, we will provide additional information. Some of the responses are derived from "Property Tax Cap: Guidelines for Implementation" [pdf].

Applicability

Does the 2 percent cap on property taxes apply to tax levies, rates or real property assessments?

The legislation establishes a limit on the annual growth of real property taxes levied by local governments and school districts. The cap is not directly applicable to property tax rates, or to the assessed value of real property.

Fire districts are already subject to spending limits under section 176 (18) of the Town Law. How does this limitation differ from the tax levy limit?

The tax levy limit is a separate limitation on the amount of the tax levy, and is a restriction on fire districts that is in addition to the spending limitation. Fire districts must meet the requirements of both.

Counties, cities and villages are already subject to a constitutional tax limit under article VIII of the State Constitution. How does this limitation differ from the tax levy limit?

The tax cap is a restriction on the year-to-year increase in the tax levy, while the constitutional tax limit is a restriction on the total amount of the levy in any single year. Therefore, the tax levy limit is a separate restriction imposed upon counties, cities and villages that is in addition to the threshold constraint of the constitutional tax limit. Counties, cities and villages must meet both requirements.

Do special districts governed by separately elected commissioners but that include their budgets within the town budget have to report to OSC by November 20 when the town adopts its budget or when the commissioners approve the special district's budget?

Special districts that have separate, independent elected boards and which have the authority to levy a tax, or can require a municipality to levy a tax on its behalf are subject to the tax levy limit and are not part of the municipality's tax levy limit. Therefore, these special districts must submit the report form to OSC before the board of commissioners adopts the special district's budget, regardless of when the town adopts it budget.

Are BIDS (business improvement districts) separately subject to the levy limit?

No. BIDs do not have separate, independent elected or appointed boards which have the authority to either levy a tax or require a tax to be levied on their behalf. The BID itself should be distinguished from the District Management Association (DMA), which is a not-for-profit entity that carries out BID activities, usually under a contractual arrangement. This arrangement is generally prescribed in the BID plan. The DMA can make **recommendations**, but it is the board that makes the decisions as to the amount of the levy. Therefore, in accordance with DOB guidance, BIDs would not be considered an independent district, so the levies for BIDs must be incorporated into the municipality's levy limit.

Are fire protection districts in towns separately subject to the levy limit?

No. Fire **protection** districts (as opposed to **fire districts**) are not governed by separately elected or appointed governing boards that can levy or require the levy of taxes on behalf of the district. Therefore, levies for fire **protection** districts are part of the town's tax levy limit.

Do libraries have their own tax levy limit? If so, how is the limit overridden?

In accordance with guidance provided by the New York State Division of the Budget, a library (such as a special legislative district public library, school district public library, a municipal public library, or an association library) has its own tax levy limit if it (i) has a separate, independent elected or appointed governing board, and (ii) can require a municipality or school district to levy a tax on its behalf (which includes, where applicable, a tax levy approved by voters). To the extent the budget of a library is comprised of revenues generated by a tax levy of a municipality or school district that the municipality or school district is required to impose on behalf of the library, those tax revenues fall within the tax levy limit of the library. To the extent the budget of that library is comprised of revenues generated by the taxing authority of a municipality (such as a town or village), and that municipality is not required to impose that tax levy on behalf of the library, those tax revenues fall within the tax levy limit of the municipality. The library's tax levy limit may be overridden by a resolution approved by a 60% vote of the total voting power of the library's governing board. If the library governing board overrides the tax cap and the library budget or taxes to support the library is subject to voter approval, the proposition must be approved by only a simple majority of the voters (i.e. more than 50%), unless, in the case of a special act library district, it is otherwise provided in the special act creating the district.

Calculating the Tax Levy Limit

Our local government levied less than was allowable according to our prior year tax levy limit. How do we calculate the amount of "available carryover" we can include in determining our tax levy limit for the coming fiscal year?

"Available carryover" generally refers to the amount, if any, by which the tax levy for the prior fiscal year was below the allowable tax levy limit for that year (before any exclusions for pension contributions and/or court orders/judgments arising out of tort actions), up to one and one-half percent (1.5%). In cases where a local government levied less than the amount of its allowable tax levy limit for the prior fiscal year, the amount of available carryover that the local government can include in calculating its tax levy limit for the coming fiscal year is the lesser of:

A) The difference between the prior year tax levy limit (before exclusions) and the actual levy for the prior fiscal year

Or

B) 1.5 percent of the prior year tax levy limit (before exclusions).

If a local government's actual levy was equal to or more than the prior year's calculated tax levy limit (before exclusions), there would be no amount available to be carried over.

Before performing the "available carryover" calculation, you should confirm with the tax levying body the amount actually levied for the prior fiscal year.

Please note: OSC has developed an easy-to-use available carryover calculator to help you perform this calculation within the online reporting system.

We set up a reserve after having identified an error in our property tax cap calculation from last year. How should we account for this reserve amount in our tax cap calculation for the coming year?

When an excess tax levy has been identified and set aside in reserve, the law requires that the excess levy plus any interest earned must be used to offset the tax levy in the coming fiscal year. There are two steps involved in order to accomplish this:

(1) **The Form:** OSC's online report form includes a dedicated field that captures the total amount the unit had to place in reserve. That figure will automatically be subtracted from the amount in the "Prior Fiscal Year Tax Levy" field—before the tax base growth factor is applied. In the example below, the unit had to put $10,000 in reserve in FYE 2012. Therefore, for the FYE 2013 calculation, the user would enter $10,010 (which includes interest earned) in the appropriate field. The resultant levy limit in this example is $105,444.

(2) **Offsetting Tax Levy**: Once the total level of property taxes needed to support the budget for the coming year is set, the amount in reserve ($10,010) must then be used to offset the property taxes that will be levied for the coming fiscal year. This means that the entity would only have to levy the remaining $95,434.

Base Formula Tax Levy Limit Calculation			
Formula Element	**FYE 2012** (year of the error)	**FYE 2013** (year of correction)	**FYE 2014** (year after correction)
Prior Fiscal Year Tax Levy	100,000	112,700	**105,444**
- Deferred Levy from Reserve + Interest	NA	**10,010**	0
Prior Fiscal Year Tax LevyAdjusted for Deferred Levy	NA	***102,690***	*105,444*
x Tax Base Growth Factor	1.0000	1.0000	1.0000
+ PILOTs Receivable in Prior Fiscal Year	10,000	10,000	10,000
- Prior Year Tort Exclusion	NA	0	0
x Allowable Levy Growth Factor	1.02	1.02	1.02
- PILOTs Receivable in Coming Fiscal Year	10,000	10,000	10,000
+ Net adjustments and exclusions (in this example, just pension exclusion)	500	500	500
Total Levy Limit With Adjustments, Exclusions (including any deferred levy from prior year excess)	**102,700**	**105,444**	**108,253**
+Amount of Excess Levy OR -Deferred Levy from Prior Year	10,000	**(10,010)**	0
Actual Amount Levied in Coming Fiscal Year	**112,700**	**95,434**	**108,253**
Actual Amount Levied PLUS Deferred Levy	**NA**	**105,444**	108,253

In the following year's calculation (FYE 2014 in this example) the starting point for the 2014 calculation ("prior year levy" field) will equal the prior year tax levy, irrespective of the $10,010 reserve amount. However, a local government may choose to use the lower prior year levy number, which is net of the reserve offset.

Note: for detailed instructions as to the actual accounting treatment and required journal entries associated with the placing of excess levy into reserve, please consult OSC's accounting bulletin on the topic.

My local government overrode the property tax levy limit last year but levied less than the limit before any adjustments or exclusions. Can we still utilize the carryover amount?

Yes. If the total property taxes levied was less than the tax levy limit in the prior year, a local government or school district is permitted to carryover up to 1.5 percent of the prior year levy limit. In accordance with guidelines issued by the Department of Taxation and Finance, there is no carryover permitted for unused exclusions associated with growth in pension costs or tort judgments.

Are relevies of delinquent taxes and levies of delinquent user fees subject to the tax levy limit of the local government which relevies or levies the charges?

No. Relevies of delinquent taxes and levies of delinquent user fees are not subject to the tax levy limit of the local government which relevies or levies the charges. Delinquent school taxes were already subject to a school district's levy limit. User fees are not taxes subject to the levy limit. In each case, the relevy or levy process is simply a mechanism to collect delinquencies, but does not change the character of the charge for purposes of the levy limit.

Is the prior year levy to be adjusted for tax refunds that are granted after taxes are levied?

No. Your prior year levy should consist of the amount of taxes levied in support of your local government or school district's budgeted expenditures for that fiscal year. There is no authority to adjust the levy for tax refunds made during the prior year.

How do I know my "allowable levy growth factor"?

OSC will pre-populate the prescribed report form with the appropriate allowable levy growth factor. The allowable levy growth factor is 1.02, or the sum of one plus the "inflation factor," whichever is less. The inflation factor is based on a calculation that uses the consumer price index for all urban consumers – unadjusted (CPI-U) published each month by the Bureau of Labor Statistics.

How do I get my "tax base growth factor"?

The tax base growth factor is derived using a "quantity change factor," which is calculated by the Department of Taxation and Finance. The Department of Taxation and Finance will provide each local government with the applicable tax base growth factor, if any. This information is also available on their website. In addition, OSC has pre-populated most local government's tax base growth factor into their electronic form.

Please contact the Department's Solutions Center at (518) 591-5233 if you have questions on how this figure is calculated or if your form does not have a pre-populated value.

Is the town tax levy limit calculated separately for the town-wide and town outside of village funds?

No. The tax levy limit is calculated based on the combined total levy for all funds for which the town board determines the amount of the levy, including the highway fund and funds for special districts that are governed by the town board.

We will not know how much our PILOT payments will be for the coming fiscal year until our tax rates are set. How should I go about filling out this part of the form?

The figure should be based on a good faith estimate of the amount you expect to receive. You should use the same process that you use to estimate your PILOTs receivable during budget development. Most local governments that receive PILOTs estimate the amount receivable pursuant to their respective PILOT agreements.

My municipality receives a payment made in lieu of real property taxes, but the formula by which the payment is derived is not based on the assessed value of the property or the tax rates. Are these types of PILOTs also included in the calculation of the tax levy limit?

Yes. The tax cap is based on all payments in lieu of taxes, and does not distinguish between PILOT amounts that are based on assessed value, or some other methodology.

Is the tax levy limit calculated based on the aggregate levy necessary for each fund or is the levy limit calculated separately for each fund? What if some of the funds have different tax bases and/or are not coterminous with the municipality's boundaries (such as a town outside village fund, part town highway fund, or a water fund that covers only a portion of the town)? What if some of the districts have a different type of levy (such as a per unit special assessment or an ad valorem tax) from the town or county's base property tax levy?

The tax levy limit should be calculated on the combined total levy for all funds and special districts that fall under the municipal levy. For additional guidance on which special districts are incorporated in the municipal levy, please see "Property Tax Cap: Guidelines for Implementation" [pdf] issued by the New York State Department of Taxation and Finance.

My local government has benefitted from a transfer of function. Do I need to report this to OSC?

Yes, all transfer of functions must be reported to OSC. The effects of any transfer of function beginning in 2013 must be included in your calculation of your tax levy limit. Please call the Comptroller's office to have an examiner calculate the effect of the transfer. You may contact us through your regional office [pdf]. Once the Comptroller's office has calculated the costs/savings, a letter will be issued and the amounts will then be pre-populated into your online form.

If you do not report this transfer and are later audited and discovered to have levied in excess of your levy limit because of this omission, your government could be required to put the excess levy into reserve.

If a local government's total levy in the coming fiscal year is higher than the tax levy limit based on the allowable growth and tax base growth factors, either due to the additional levy for excludable expenses or an override, what is its base levy when calculating the tax cap in the next fiscal year?

Pursuant to the guidance issued by the Department of Taxation and Finance ("The Property Tax Cap: Guidelines for Implementation" [pdf]), the total levy, including the levy for excludable expenses or the higher levy resulting from a successful override, becomes the base for the following year's tax levy limit calculation.

How will the exclusion for certain expenses related to court orders or judgments work (tort actions only) if the cost has been financed?

If the annual debt service associated with the bonds or notes issued for this expense exceeds 5 percent of the prior year's levy, you may utilize this exclusion.

Is an administrative consent order, such as one entered into with the Department of Environmental Conservation, for violations of the Environmental Conservation Law or regulations (e.g. to remediate air or water pollution), covered by the court order/judgment language in the law?

No. The exclusion relates to court orders or judgments arising out of tort actions. An administrative consent order would not fall into this category.

Do we need a separate local law and/or resolution to override the levy limit for each fund or special district included within the overall municipal levy?

No. A county, city, town or village must enact a local law to override the tax levy limit that is based on the combined total levy for every fund and special district that falls within the municipal levy limit. If the levy for one special district included within the municipal levy limit increases by more than the allowable growth, but does not cause the total municipal levy to exceed the levy limit, then no local law overriding the limit is needed.

The statute provides that the tax levy limit generally does not apply to the first fiscal year after a "local government" is newly established. When a town establishes a new special district, governed by the town board, is the first year's levy for the new district included in the town's tax levy limit calculation?

Yes. In accordance with the guidance issued by the Department of Taxation and Finance and the Department of State, the tax levy that supports the operations of a special district that is "established, administered and governed by the governing board of another municipality," is part of that municipality's tax levy and is subject to the municipality's overall property tax cap calculation. Therefore, under this guidance, the exception for a newly established local government does not apply and the levy for the special district is not exempt from the tax cap in the first year.

Is a unit based charge imposed to fund a town or county special district (e.g. sewer or water district) subject to the tax levy limit?

A unit based benefit assessment is subject to the limit. Special assessments (benefit assessments) and special ad valorem levies imposed within a town or county district are both included in the definition of "tax" in Chapter 97 of the Laws of 2011. Therefore, a benefit assessment, whether based on units or some other formula, constitutes a tax for purposes of the tax levy limit calculation. As noted earlier, however, user fees are not taxes subject to the levy limit. In limited circumstances, a user fee also may be properly based on units. It can sometimes be difficult to differentiate between a unit based benefit assessment and a unit based user fee. As a general guide, a special assessment is imposed on an assessment roll, against benefited properties within the district, in proportion to the benefit received by the property. A user fee is a contractual charge to district users and must bear a rational relationship to the amount of use. If you are uncertain whether a certain charge is a special assessment or a user fee, you should consult your attorney. Our legal staff is also available to speak to your attorney at (518) 474-5586 for assistance.

What are omitted taxes?

“Omitted Taxes” is a broadly used term for several types of real property tax adjustments that are billed in a subsequent year, such as a change in property ownership that also changes the status of the property from exempt to non-exempt. In that instance, the new owner is responsible for the pro-rated portion of the taxes on the property for the rest of the tax year, but that pro-rated amount is not billed to the new owner until the next tax billing cycle.

Taxes imposed for the prior fiscal year pursuant to Real Property Tax Law §520 (assessment and taxation of exempt property upon transfer of title) or pursuant to Real Property Tax Law §551 (entry by assessor of omitted real property on current assessment roll) should be included in the total levy for the upcoming fiscal year as there is no exclusion in the tax cap legislation for the taxes attributable to the prior fiscal year.

How are omitted taxes accounted for in the calculation of the levy limit?

The total amount of taxes levied on the tax rolls, including omitted taxes, should equal the levy adopted in the budget. In other words, the property taxes to be levied for the upcoming fiscal year plus omitted taxes (even though levied at prior year tax rate) should be the value used in the calculation of the tax levy limit. Omitted taxes levied should be included in the “prior year levy” field as well as in the “proposed levy” fields in the tax cap form.

For example: a municipality passes a budget requiring a total tax levy of $1,000,000, which includes $900,000 in property tax for the upcoming year, and $100,000 of omitted taxes. The tax roll should show $900,000 in tax levy for the upcoming year, and $100,000 in omitted taxes. Municipalities should ensure that the total of $1,000,000 is within the calculated tax levy limit and report this as the tax levy for the upcoming fiscal year.

How do charge-back arrangements affect the calculation of the levy limit for the county and/or municipality?

When counties provide certain services to municipalities, they can recover costs in one of two ways: the county can either elect to bill a municipality directly or add the amount to the county levy specific to a municipality. For purposes of calculating the levy limit, the charge-back amount should be reflected in the tax levy limit of whichever government levies the tax. Therefore:

- When the county **bills** the municipality, the charge becomes part of the *municipality's tax levy limit* because that municipality will raise taxes to pay the bill.
- When the county **levies** the charge under the county's own taxing authority, the charge becomes part of the *county's tax levy limit*

A county can switch between billing and using its own levy to recover its charge back costs. It is the responsibility of the county and the municipalities involved to properly report charge-back amounts with respect to their levy limit calculations. Failure to properly report charge back amounts in levy limit calculations may lead to an entity exceeding its levy limit and having to place the excess in a Reserve for Excess Tax Levy.

In cases where a county adjusts the municipal tax levy by adding the charge-back to the municipal levy, the amount of the charge back should be included in the *county tax levy* for purposes of calculating the county's levy limit. Once the county places a tax, under its own taxing authority, on the tax bill it is considered a county tax.

The county pays for tax certiorari refunds and then bills the town for the town's share. The town then includes an amount in its budget for the following fiscal year to cover the amount charged back by the county. Is the amount charged back to the town subject to the town's tax levy limit?

Yes. RPTL 726(1) (a) generally requires a county to pay the entire amount of a certiorari refund and to charge back to towns, etc. their shares of the refund. Under RPTL 726(4), unless a town bonds its share of a tax certiorari refund, the town is required to raise the money to reimburse the county in its next annual budget. Therefore, the amount charged back to the town is subject to the town's levy limit for the following year.

My library serves a school district and a portion of a municipality. We obtain voter approval for the school district portion but have a contract with the municipality for the portion of the library that serves the area outside the school district. What is my levy and do I need to report separately for the municipal portion?

Your levy is only the amount that was approved by voters within the school district. To the extent that the municipality levies taxes to support the expenditure made pursuant to its contract with your library, it is part of the municipality's levy limit.

We are a library that holds a vote when we want to raise the levy. In years when there is no vote, the town is only required to levy the amount needed for the funding passed by voters on the most recent ballot. Sometimes the town chooses to contribute more, at our request. Do we report a levy limit calculation every year, regardless of whether we hold a vote on the levy, and if so, what constitutes our "levy" in the intervening years?

Since the library board is, in effect, requiring a levy through the ballot process, you are, indeed, subject to the levy limit every year. However, only the amount approved by the voters is subject to the library's levy limit. Any amount that the municipality provides above that amount voluntarily is part of the municipality's levy limit.

My library had a levy vote through the process in Education Law § 259(1)(b) (a so-called "414" proposition) for the first time for the fiscal year beginning in 2012. I understand that I must calculate my own levy limit and report separately, but what do I use as my "prior year levy". Also, what if the levy driven by the voters exceeds the calculated limit?

In this case, you would enter a "0" as your prior year levy. As a result, it is likely that the voter approved levy will exceed the calculated limit. Therefore, the library governing board must enact a resolution to override the tax levy limit.

Some of the towns in my county have elected to use their sales tax allocation to offset the county tax levy. When calculating the levy limit for my county, how should I account for this?

When a town decides to use their sales tax allocation to offset the county portion of real property taxes levied to taxpayers in that town, for tax cap purposes, where all or a portion of a town's sales tax allocation is applied to reduce county taxes, <u>such an amount must be subtracted from the county's tax levy</u>.

When a local government dissolves, how does the successor government that will be assuming the debts, liabilities and obligations of the dissolved entity go about adjusting its allowable levy limit under the tax cap?

Under such circumstances, the allowable levy limit will be determined by the Office of the State Comptroller. The successor government is not expected to complete the online tax cap form.

Limited Exclusions

How can a local government account for the cost of unfunded mandates (e.g., costs associated with health and safety or environmental compliance) in the tax cap calculation?

The legislation does not provide for a general exclusion of "mandated costs". The tax cap allows for only a limited number of exclusions to the tax levy limit for local governments, which are (i) costs resulting from court orders or judgments against the local government arising out of tort actions that exceed five percent of the total prior year's tax levy, and (ii) pension costs associated with the annual growth in the "system average actuarial contribution rate" (for ERS and PFRS) and the "normal contribution rate" (for TRS) above two percentage points (view "Property Tax Cap: Guidelines for Implementation" [pdf] pages 6-8, for a more detailed explanation).

The voters in my Fire District approved a bond referendum. Is this additional voter approved expense exempt from the tax levy limit?

No. There is no statutory exclusion from the tax levy limit applicable to local governments for debt service on bonds or notes, even if the issuance of debt is voter approved. If the additional debt service expense, together with the district's other non-excludable expenses, would cause the tax levy to exceed the levy limit, the governing board of the Fire District must pass a resolution by at least a 60% vote to override the limit.

Will there be additional exclusions for emergency expenditures such as those resulting from Hurricane Irene? Are exclusions available for extraordinary expenditures related to the payment of tax certioraris, capital projects, debt service (including on bond issuances approved by the voters), payouts on large liabilities such as accumulated unused sick and vacation time to retirees; and projects required by DEC or another State agency?

No. The law (Chapter 97 of the Laws of 2011 [pdf]) only provides for limited exclusions as follows:

- Pension contributions due to increases in the statewide system average actuarial contribution rate (ERS or PFRS) or normal contribution rate (TRS) over 2 percentage points for major retirement systems.
- Expenditures resulting from court orders or judgments arising out of tort actions that exceed 5 percent of the total tax levied in the prior fiscal year.
- **For School Districts Only:** The tax levy to support capital local expenditures.

Any other expenses must be accommodated within the allowable levy limit, unless the governing body successfully overrides the levy limit.

Do I need to do a separate calculation to determine the additional levy for the excludable portion of each retirement system?

Yes. The law allows you to perform separate calculations for each of the major retirement systems (ERS, PFRS and TRS). Please refer to the Tax Cap User Guide for instructions on how these exclusions should be calculated. In addition, we have integrated a pension exclusion calculator into our online tax cap form to help with this calculation.

My municipality amortized our pension contribution in a prior year. How does this affect our ability to qualify for the pension contribution exclusion when calculating our levy limit for the coming fiscal year? Is it only applicable on the non-amortized portion of our bill?

Those local governments utilizing amortization may not levy for the pension exclusion pursuant to The Property Tax Cap: Guidelines for Implementation [pdf]. You may utilize the pension exclusion for any pension system for which you DO NOT amortize or plan to amortize any portion of the bill for that year. However, if you take the pension exclusion, you are not allowed to later amortize any portion of your pension bill for that fiscal year. If you levy an additional amount for the pension exclusion and you amortize a portion of your contribution related to that retirement system, you will have to place the levy raised due to the pension exclusion calculation into a reserve to reduce your next year's tax levy.

If we amortized our pension contributions payable to one retirement system (ERS) and not another (PFRS), are we barred from utilizing the pension exclusion for both systems?

The calculation is separate for each pension system, so if you choose to amortize the payments for one pension system, you may still utilize the pension exclusion for the system for which the payments are not amortized.

I did not receive a User ID or PIN to access the Retirement System's salary base projections. Who do I contact for that?

Please email the Retirement System at RTEmpSer@osc.state.ny.us, or call Beth Wicks at 518-474-9236 or Patricia Engel at 518-486-3921.

Where do I get my salary base number? Which one do I use?

For the ERS and PFRS exclusions, you must use the projected salary base provided by the Retirement System online. Your form has been pre-populated with the salary base provided by the Retirement System. It will display once you select whether you are paying in December or February. If this salary base needs to be allocated to another local government, you may override the pre-populated salary base by entering in a different number. For example, you may change the salary base amounts to account for differences in salaries due to shared services if two local governments share police. Although the salary base amount will automatically appear in one municipality's base, this amount may be decreased and adjusted so that the other municipality can increase their base. This is the only instance in which a change should be made.

You also have access to the online system (Employer Rates and Projections) in order to determine your projected salary base for the ERS and PFRS system. The appropriate column to use is marked "Projected Salaries mm/dd/yyyy –mm/dd/yyyy". The only time this is not the case is for calendar year entities that are NOT planning to prepay their bill in December, but will instead be paying their current bill in February. These would use the "Salary Estimates mm/dd/yyyy – mm/dd/yyyy".

For the TRS system, you will have to estimate the salary base for your budget year. However, since the TRS system bills based on actual final salary figures for the school year just ended, this is less complex than for the ERS/PFRS system.

What if I don't have / don't agree with the projected salary base provided by the Employee or Police and Fire Retirement Systems? Can I use my own projection? With whom can I discuss the discrepancy?

For the ERS and PFRS exclusion, you must use the projected salary base provided by the Retirement System online (see above). If you have any questions about these numbers, please email the Retirement System at RTEmpSer@osc.state.ny.us, or call Beth Wicks at 518-474-9236 or Patricia Engel at 518-486-3921.

What does the ERS/PFRS salary base include? Does it include LOSAP, overtime, “increases for a settled CBA”, FICA, longevity, or early retirement costs?

For ERS and PFRS, you must use the projected salary base provided by Retirement (see above). If you have questions about what this includes, please email the Retirement System at RTEmpSer@osc.state.ny.us, or call Beth Wicks at 518-474-9236 or Patricia Engel at 518-486-3921.

What if my salary base projection changes between the time I use it for calculating the pension exclusion and the time it is used to calculate my bill one year later? Can those affect my cap retroactively?

No. Your cap will not be affected retroactively.

My town has a number of special districts that are separately subject to the cap, but which are included within our pension bill. We allocate a portion of the pension costs to the districts. Would we include the whole salary base within our own pension exclusion, or will we have to calculate the share that pertains to us only? If so, on what basis would we do that?

The pension exclusion is meant to offset the tax levy necessary to pay for an extraordinary increase in pension costs. If that increase is passed along to an “independent” special district, the portion of the exclusion should be passed along as well. This is accomplished by allocating the salary base or total exclusion according to the method used to allocate the bill.

Our special district library must, by State law, enact its budget before our pension exclusion information is available, but after the inflation factor is calculated. The guidance issued by the Department of Taxation and Finance and the Department of State indicates that we may not estimate our pension exclusion. However, it may take some time until we can change our fiscal year, since our special act must be amended to do so. If we calculate our limit and file our limit information without the exclusion and either stay within that or pass a resolution to override, as necessary, are we in compliance with the law?

Yes. The pension exclusion is not a required part of the levy limit calculation; it can increase the amount that can be raised by taxes without an override. However, we would encourage you to work toward changing your fiscal year or budget process in order to be able to have as much flexibility as possible under the levy limit in future years.

Our county's retirement salary base includes county, community college and dependent special districts. In order to utilize the salary base for purposes of the retirement exclusion, are we expected to subtract out these salaries before we compute our county's pension exclusion?

No. To the extent that your county's salary base includes bases of special districts that are not subject to their own levy limits and a community college, they would be part of a single exclusion calculation.

It appears that the Comptroller's Office is calculating the pension exclusion on a cash basis only and not the actual expenses, even though local governments need to budget for it and record it according to GAAP rules. Can you please explain?

There seems to be some confusion regarding the standards for financial reporting and budgeting. Financial reporting standards state the financial statements of a local government should be presented in accordance with GAAP. Budgetary practices, however, are outside the scope of financial reporting standards, and as such, budgets are often prepared on a non-GAAP basis. The budget is simply the financial plan that contains estimates of expected inflows and outflows of spendable cash resources for the coming fiscal year. The amount actually paid to each retirement system (ERS, PFRS and TRS) each year represents the amount due on the annual bill. Each local government should budget for an appropriation of this total during the fiscal year in which their retirement system bill will be paid and include in its tax levy the budgeted total of appropriations. Thus, the tax levy exclusion is based upon the fiscal year in which the tax would have to be levied in order to pay the full amount of the anticipated pension bill.

Filing the Levy Limit Calculation

The local government budget process often results in many changes to the budget initially proposed. If the amendments made prior to final adoption of the budget change the estimated tax, which tax levy is to be reported to OSC or are multiple submissions required?

The law requires each local government, prior to adopting a budget, to submit to OSC the information necessary for calculating the tax levy limit, not the actual tax levy, for the coming fiscal year. The calculation of the tax levy limit does not change based on discretionary budgetary decisions. The tax levy limit is calculated based on factors that are generally known, including the prior year's tax levy, the tax base growth factor, PILOTS receivable in the prior fiscal year and the coming fiscal year, the exclusion pertaining to excess expenditures related to tort actions for the prior fiscal year, the allowable levy growth factor and available carryover, if any. These factors would not change during the budget process. Only one submission of this information is required but amended submissions will be accepted.

The report form that we have developed, in addition to requiring information necessary for calculating the levy limit, also provides for submission of information relating to the local governments proposed tax levy and whether the governing body plans to override the levy limit. This information should be based on the proposed budget at the time the submission is made to OSC. The later in the budget process the information is submitted to us, as long as it is submitted prior to budget adoption, the more useful it will be.

Does a local government have to complete and submit the form even if it plans to override the tax levy limit?

Yes. Every local government, regardless of whether it intends to override, must submit to OSC on the required form the information necessary for calculating their tax levy limit.

If a local government has not levied a property tax in the prior fiscal year (e.g., 2012), does it need to calculate (and report) a tax levy limit for the coming fiscal year?

Yes. The law requires that all local governments (unless it is a newly created local government) subject to the tax cap calculate their tax levy limit for the coming fiscal year and, prior to adoption of their budgets, file the information necessary for that calculation with the Office of the State Comptroller.

Will OSC confirm my tax cap (i.e., tax levy limit) calculation?

No. Local governments are responsible for calculating their own levy limit. For informational purposes, the form that we have developed will run the mathematical computation for you after you have input all of the required data elements as outlined in the law. After you have submitted your form, our system will also generate a confirmation of your submission. However, this *confirmation does not attest to the accuracy of the data elements input by each reporting entity*.

If, upon entering the required elements, you do not agree with the tax levy limit that results from the application of the mathematical formula, you may contact OSC's Division of Local Government and School Accountability at (866) 321-8503 option 3.

How do coterminous town/villages report to OSC?

In this case, the town and village are separate local governmental entities and must report their tax levy limits to OSC separately, even if one of the governments does not levy a tax.

Who in my local government should have access to the reporting system? How do they gain access to the forms?

The Chief Fiscal Officer (CFO) of each local government should be enrolled with a primary authorizer account which allows the CFO to create and modify user accounts for their local government. An enrollment guide with instructions is emailed to new CFOs. Changes in CFO or changes in contact information can be sent to our mailbox: LGSAMonitoring@osc.state.ny.us

How can I find out about other training on this topic? Can we arrange a training session?

Please visit our Property Tax Cap website at Local Government Training Unit website [Real Property Tax Information] or call (866) 321-8503 option 5.

Does a local government or independent special district need to file with OSC if it does not plan to levy taxes in the coming fiscal year?

Yes. Any local government that is subject to the levy limit must file, even if it does not levy a tax in that year.

Our budget was approved by our governing body on August 31st. The NYS OSC form wasn't available to input the information. Will we be penalized for filing late?

No. Local governments who passed their budgets before the online form became available this year will not be penalized for reporting late. Please make sure you submit your form as soon as practicable.

Our association library has a calendar year fiscal year, but its service area coincides with the school district. So, when we need voter approval for a levy increase, we do so on the school district's ballot. However, in order to continue this in the future, we would have to adopt our budget before we will have information on the inflation factor. Can we continue to do this if we plan to pass an override resolution each year?

According to the new law, you must file your levy limit information with the Comptroller's Office before you adopt your budget. Since you cannot calculate that limit without the inflation factor, you cannot file the information until five months prior to the start of your fiscal year. Therefore, you will either have to change your fiscal year to coincide with the school year or, if feasible, hold your vote at a different time of the year.

Reserve for Erroneous Levies

If I have to set up a reserve because of an error in the implementation of the property tax cap, what kind of reserve should I be setting up?

When an excess tax levy has been identified, a series of accounting entries will be required. These entries assume that the local government or school district has already recorded the real property taxes levied for the current fiscal year's budget. The local government or school district will need to defer the recognition of revenues associated with the excess tax levy until the following fiscal year as required by the tax cap legislation. This deferral of revenue serves as the accounting mechanism for placing excess tax levy in reserve as required by the legislation. The amount of revenue deferred for excess tax levies should be placed in a separate interest-bearing bank account. The accounting entries can be found in our [accounting bulletin "Reserve for Excess Tax Levy" [pdf]]

Overrides of the Tax Levy Limit

If a local government or a special district (not newly formed) governed by a separate independently elected board did not levy or cause the levy of any "taxes" in 2012 (including special assessments and special ad valorem levies), but will do so in 2013, will the local government need to override the tax levy limit in order to levy taxes in 2013?

Yes. The law provides that all local governments subject to the cap must calculate the tax levy limit for the coming fiscal year in accordance with the statutory formula. If the amount of taxes to be levied in the coming fiscal year exceeds the applicable tax levy limit and the allowable exclusions, then the local government must override the tax levy limit.

What special wording is required on the budget resolution for voters to vote upon? Must it specify the actual monetary amount of the override and/or the specific districts for which the override is being passed? Will OSC provide suggested language?

For local governments, the law does not specify particular language for the budget resolution, although it should be clear that it is for the purpose of overriding the tax levy limit for the coming fiscal year only. Specific language is required for school districts seeking voter approval on a budget that relies on a tax levy that exceeds the levy limit (Chapter 97 of the Laws of 2011 [pdf]). Please consult your attorney or speak with your local government association for more guidance on model local laws/language.

A governing board of a local government has adopted a budget, or has a default budget (i.e. a budget by operation of law because the final budget was not adopted prior to statutory deadline), which includes a tax levy in excess of the allowable tax levy limit, without complying with the override requirements. What happens now?

As per guidance issued by the Department of Taxation and Finance, a local government may not impose or cause the imposition of taxes in excess of their levy limit without first complying with the statutory override requirement. In an instance where a local government has an adopted or default budget that provides for a levy in excess of the allowable levy limit, and there is no proper override in place, the local government must take steps to reduce the amount of the tax levy to be within the allowable limit.

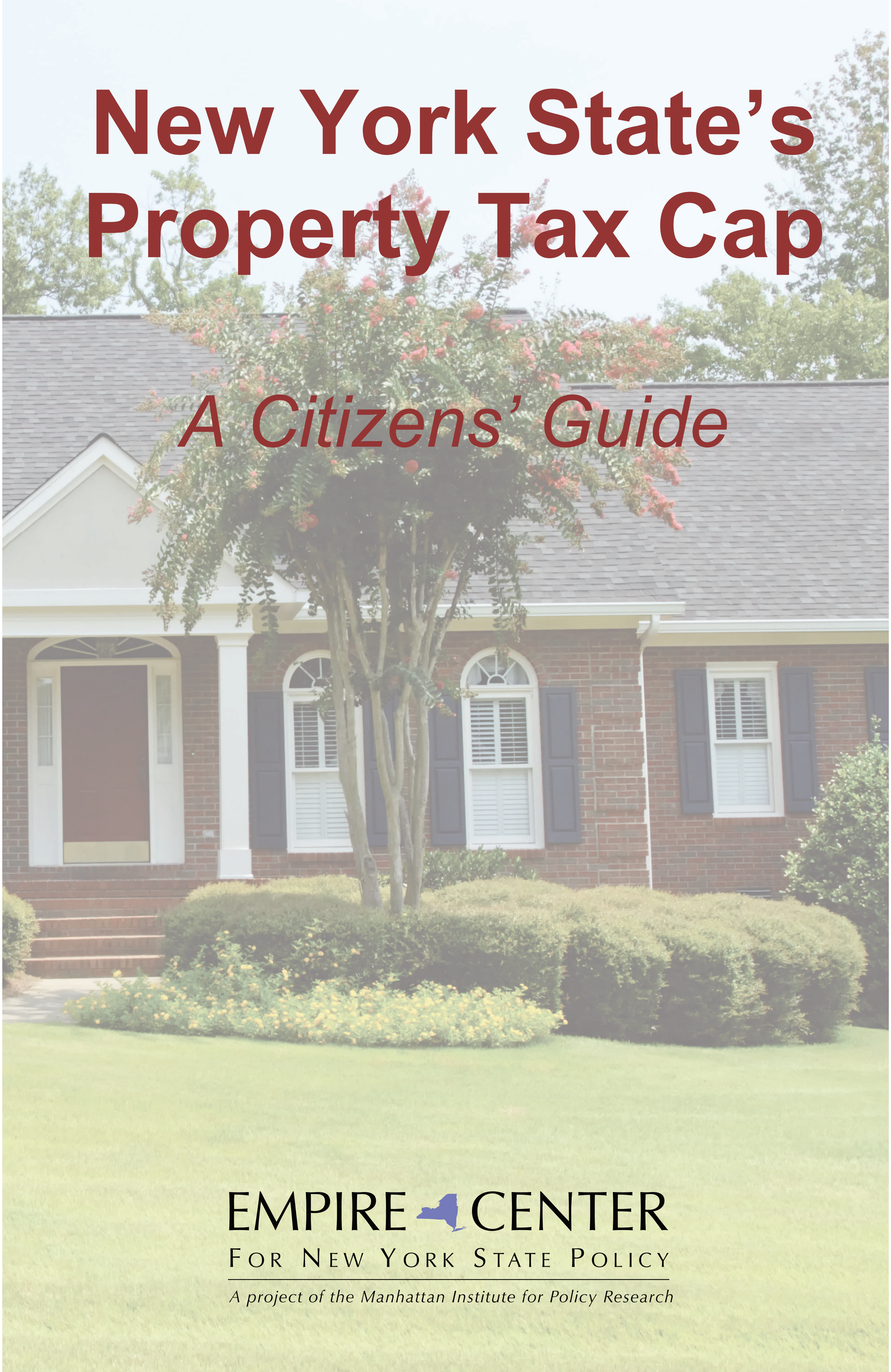
In general, the governing board should pass a resolution that reduces the amount of the tax levy to an amount that complies with the allowable levy limit. Since a local government generally cannot change its budget after the budget deadline has passed, it is recommended that a deficit reduction plan be adopted and the budget revisited after the beginning of their fiscal year.

My local government adopted legislation to override the tax levy limit, but the adopted budget contains a tax levy within the allowable tax levy limit. How can we repeal the override legislation so that taxpayers are eligible for tax freeze credits?

Where the governing board of a local government has enacted a local law or resolution to override the tax levy limit for the coming fiscal year, and the adopted budget for the coming fiscal year contains a tax levy within the allowable tax levy limit, the local government must repeal the override local law or resolution in order qualify its residents for tax freeze credits. The override legislation can only be repealed by legislation of "equal dignity". In other words, if the local government (counties, cities, towns and villages) had to adopt a local law to override the tax levy limit, then it must adopt a local law in order to repeal the override. The repeal local law is subject to the same requirements as all other local laws (e.g., public hearing, filing with the Secretary of State). Fire districts and others override the tax levy limit by adopting a resolution and, therefore, may adopt a resolution to repeal the override

What are the time constraints, if any, for adopting the repeal local law?

Consistent with guidance issued by the Department of Taxation and Finance relating to the adoption of a local law to override the tax levy limit, the local law to repeal the override of the tax levy limit must be adopted before the local government certifies as tax freeze compliant. The certification must be made no later than the 21^{st} day of the fiscal year to which it applies.



New York State's Property Tax Cap

A Citizens' Guide

EMPIRE CENTER
FOR NEW YORK STATE POLICY

A project of the Manhattan Institute for Policy Research

NEW YORK STATE'S PROPERTY TAX CAP
A Citizens Guide

New York State has a new law capping annual increases in local government and school district property taxes. Effective in local fiscal years starting on or after Jan. 1, 2012, the law limits the annual growth of property taxes levied by local governments and school districts to **2 percent** or the rate of inflation, whichever is less.

The cap applies to all counties, cities, towns and villages outside New York City, and to all fiscally independent school districts. It also applies to the property tax levies of special districts established to finance fire departments, libraries, sewer and water systems and other purposes.

This booklet lays out the basics of the tax cap and answers some common questions about how the cap will work. It concludes with a full text of the tax cap provisions passed by the Legislature and signed into law by Governor Andrew Cuomo in June 2011.

Several important aspects of the new tax cap law may need to be clarified for many New Yorkers. For example:

- **The cap is not absolute.** School budgets can exceed the cap if approved by at least 60 percent of school district voters. Tax caps for counties, cities, towns, villages and special districts can be overridden by a vote of at least 60 percent of the local governing bodies.

- **The annual cap in your community will seldom be exactly two percent.** It could be *lower* if the rate of inflation has been below two percent, which was the case in several recent years. However, as explained in the following pages, the law also includes several exceptions and allowances that can make the cap *higher*. These factors will vary from year to year and will differ in each taxing jurisdiction.

- **A simple majority of voters will now have the power to block *any* tax increase in independent school districts.** Districts that fail to win voter approval for their proposed budgets after two tries must freeze their property tax levies.

CALCULATING THE CAP

Annual growth in property tax levies will be capped at 2 percent or inflation, whichever is less. Inflation is defined as the average monthly Consumer Price Index for all urban consumers (CPI-U) for the 12-month period ending six months prior to the start of the next fiscal year, minus the average for the same period preceding the current fiscal year. For example, if a town fiscal year begins Jan. 1, the percentage change in the inflation rate is the average CPI-U for July 1, 2010, through June 30, 2011. For school district fiscal years, which commonly start on July 1, the inflation rate is the change in average monthly CPI-U for the 12 months ending the previous Dec. 31. The cap cannot be less than zero.

The basic cap of up to 2 percent is subject to the following exclusions or modifications:

- **A growth factor reflecting the "quantity change" in taxable property values in the base year.** This factor is based on actual physical changes to taxable property—such as new construction of homes, stores and offices—and not mere changes in the assessed value of existing, unchanged taxable properties. These taxes can be added to the allowable (capped) levy in the first year after the value of the change is reflected on the local tax roll.

- **Tort settlements or awards whose costs exceed 5 percent of the tax levy in the base year.** A tort is a type of lawsuit seeking damages for personal injuries caused by negligence. Tort settlements exceeding 5 percent of a jurisdiction's tax levy are rare.

- **Capital costs (including debt service) for school districts**, which cannot borrow money for capital purposes without voter approval.

- **Pension contribution increases that exceed two percentage points of covered payroll**. (See page 4 for details on how this amount is computed.)

- **A carryover of up to 1.5 percent of unused tax levy growth to the following year.** For example, if a city raises taxes by 2 percent in a year when its cap is 3 percent, 1 percent can be added to the subsequent year's levy cap.

A proposed tax levy that does not exceed the cap will continue to require approval by more than 50 percent of the members of the governing body of a county, city, town, village or special district, or by a simple majority of voters participating in a school district or special district budget referendum.

The amount of property taxes that can be levied by a local government or school district without exceeding the cap can be calculated in this manner:

1. Determine the total amount of taxes levied, not collected, in the prior fiscal year.

2. Multiply the total amount of taxes levied for the prior year by the "tax base growth factor," reflecting physical additions to the tax base, as reported to the local government by the state Department of Taxation and Finance.

3. Add any payments in lieu of taxes (PILOTs) that were receivable from property owners in the base year. The total amount of PILOTs receivable is to be included in the calculation of the tax levy limit. No adjustment is permitted.

4. Starting in fiscal year 2013, subtract the tax levy necessary to support expenditures for tort actions for any amount that exceeds five percent of the local government's tax levy in the prior fiscal year. There is no subtraction for these expenditures in the calculation for the 2012 fiscal year.

5. Multiply the result by the allowable levy growth factor—either 2 percent or inflation, whichever is less.

6. Subtract any PILOTs receivable in the coming year. The total amount of PILOTs receivable is to be included in the calculation of the tax levy limit. No adjustment is permitted.

7. Add pension costs exceeding two percentage points of payroll, as explained on page 4.

8. Beginning with fiscal year 2013 budgets, add any available cap carryover from the prior fiscal year. There is no available carryover for the 2012 fiscal year.

Provisions for overriding the cap are summarized on page 5.

The Pension Exclusion

Pensions for employees of local governments covered by the tax cap are financed by annual tax-funded contributions to statewide public pension systems. Pension contribution rates are calculated as a percentage of total salaries paid to employees in each of the three pension plans—the New York State Employee Retirement System (ERS), the Police and Fire Retirement System (PFRS) and the New York State Teachers Retirement System (TRS). Taxpayer-funded pension contribution rates have been rising in recent years and will continue to rise in the next several years, mainly as a result of increases in pension benefits and market losses sustained by the pension funds since the late 1990s.

Pension costs attributable to pension contribution rate increases of more than two percentage points in a given year are *not* subject to the new property tax cap.

During fiscal years starting in 2011, the system-wide average contribution rates were 16.3 percent for ERS, 21.6 percent for PFRS and 11.1 percent for TRS. For budgets covering fiscal years that start in 2012—the first group subject to the tax cap—those rates rise by 2.6 percentage points for ERS employees and 4.2 percentage points for PFRS employees. (The TRS rate accrued by school districts in 2012-13 is expected to rise by no more than 1.4 percent, according to a preliminary projection, and so will fall under the cap.) Subtracting two percentage points from the ERS and PFRS figures, a jurisdiction can increase its tax levy by an amount equal to 0.6 percentage points of its ERS salaries and 2.2 percentage points of its PFRS salaries—in addition to the “capped” portion of the tax levy.

For a hypothetical employer with a $1 million ERS salary base and a separate $1 million PFRS salary base, the ERS exemption is calculated by multiplying 0.6 percent by the $1 million salary base ($6,000), and the PFRS exemption is calculated by multiplying 2.2 percent by the separate $1 million salary base ($22,000), for a total pension exemption of $28,000. All other pension costs fall under the basic cap.

The impact of the pension exclusion on a given jurisdiction’s net tax cap depends on the relative size of its payroll in comparison with its property tax levy. The addition to the basic 2 percent cap will be *greatest* in jurisdictions where payrolls equal or exceed the tax levy, and *least* in jurisdictions where the payroll is smaller than the levy. In the example above, if the employer’s tax levy is the same as its total payroll of $2 million, a pension exclusion of $28,000 adds 1.4 percentage points to the basic cap, yielding a net tax cap of 3.4 percent before other exclusions. A budget holding taxes within the cap will still require approval by a simple majority of the governing board or school district voters.

OVERRIDE PROVISIONS

A **county, city, town, village or special district** can exceed the tax levy limit if at least 60 percent of the members of its governing body vote in favor of a local law overriding the cap. Local laws, in turn, are subject to statutory requirements including advance public notice and public hearings.

As explained by the state Department of Taxation and Finance:

> *A budget officer, or chief executive, may prepare a tentative budget that requires a tax levy in excess of the levy limit. However, the governing body cannot, without first complying with override requirements, (i) adopt a budget that requires a levy in excess of the tax levy limit, or (ii) impose or cause the imposition of a tax levy to the extent that a budget requires a levy in excess of the levy limit.*

In other words, the override vote in a county, city, town, village or special district must come **before** the budget vote.

In **school district**s, voters will continue to have a direct say on proposed school budgets—and a greater say than ever on taxes. Under the new law, a school budget that requires a tax levy above the cap must be approved by a supermajority of at least 60 percent of the district residents participating in the annual budget vote, held on the second Tuesday in May. A budgeted tax hike within the limit will continue to require approval by at least a simple majority of voters.

If a budget is defeated, the school board can resubmit it to district voters in original or revised form. However, if the budget is defeated a second time, or if the board chooses not to resubmit, the district *must* revert to a contingency budget.

Under a contingency budget, the school tax will be frozen—with *no* exceptions or allowances. The tax cap law is clear:

> *Notwithstanding any other provision of law to the contrary, if the qualified voters fail to approve the proposed school district budget upon resubmission or upon a determination not to resubmit for a second vote … the sole trustee, trustees or board of education shall levy a tax no greater than the tax that was levied for the prior school year.*

QUESTIONS AND ANSWERS

Q: Does the property tax cap affect property tax rates?

A: Tax rates cannot be changed in any way that would raise the total amount of property taxes —the tax levy — above the cap. Localities cannot get around the cap by manipulating rates.

Q: Can I expect my own tax bill change at the same rate as the levy?

A: The cap will limit growth in your tax bill, but the specific level depends on assessments. To understand why, consider how the property tax rate is calculated:

$$(\text{Tax Levy} \div \text{Assessed Value}) \times 1{,}000 = \text{Tax Rate}$$

So, for example, in a community with a tax levy of $1 million and a tax base with assessed value of $100,000,000, the tax rate is $10 per $1,000. Assuming no change in assessed values, a 2 percent increase in the tax levy will also drive up the tax bill by 2 percent, or 20 cents per $1,000 in the example used here. Your property tax bill could rise faster than the tax levy if, for example, there is a *decrease* in assessed property values during the same year. Possible causes of a decrease in property values include a flood or other natural disaster; the purchase of taxable property by a tax-exempt organization; eminent domain proceedings in which government acquires ownership of a private parcel; a general drop in market values; and successful challenges to assessed values.

If assessments change at a uniform rate, then the tax cap will have a uniform impact on individual tax bills. But if some assessments change more than others—rising faster, for example, in a section of town closest to a new school or highway—than taxes will increase more for some property owners than for others. **A locality cannot circumvent the tax cap simply by manipulating assessments.**

Q: In a given year, will the tax cap be the same for my county, town and school district?

A: The starting point in all cases will be a tax levy limit of 2 percent or the rate of inflation, whichever is less. But the net cap for each taxing jurisdiction may be slightly different, based on factors such as inflation rates in the prior year, pension contributions, growth factors and, on the school level, voter-approved capital construction expenses.

Q: A new strip mall was added to my town's tax base. Would the increased property tax revenue offset a property tax increase?

A: Under the new tax cap, as under previous law, the addition of new taxable properties to the tax base through new construction or expansion of existing structures or facilities will make it possible to reduce taxes on other taxable property. But to avoid discouraging development, new taxes generated by new construction during a given year (also known as "quantity change" in the tax base) will not initially be subject to the levy limit, although it will be part of the capped tax levy in subsequent years.

Q: How does the "carryover" provision work? Can it be used by a property tax jurisdiction to exceed the tax cap?

A: When a local governments or school district holds its annual tax levy within the cap, it has the option of adding the difference to the cap limit in the following year (but **only** in the immediately following year). For example, if a locality increased its tax levy by 1.2 percent in a year in which the 2 percent tax cap applied, then up to 0.8 percent of the tax levy is therefore "unused" and can then be raised in the next year before hitting the cap. Up to 1.5 percentage points can be carried over in this way, hypothetically raising the basic tax cap to as high as 3.5 percent above the prior year. Of course, there is no requirement to carryover unused taxing authority, and all local budgets will continue to require approval from the governing body or school district voters.

Q: A big utility in our town just won a big court-ordered reduction in its assessment, and a court-ordered refund of some past taxes. Will this be excluded from the tax cap?

A: The exclusion for court awards applies only to tort cases, which involve personal injuries due to negligence. Localities that are found liable for having over-assessed some property cannot use that as an excuse for exceeding the tax cap.

Q: In the past, defeated school budgets could be replaced by contingency budgets that raised taxes even higher. Does the new tax cap change this?

A: Yes. Under the new tax cap law, a contingency budget cannot result in a tax levy increase. That means spending increases up to the limit are allowable only if financed by revenues other than the property tax; for example, state or federal aid, district fees or other sources.

Q: Can a school district circumvent the cap by having the public vote on separate referenda for expenditures, such as sports or music programs?

A: No. If separate referenda on budget items are put before the voters that necessitate a tax levy that exceeds the tax cap, then a 60 percent supermajority would be required for each individual referendum to be approved and go into effect. Bond issues for capital purposes will require a simple majority, however.

Q: I live in a city that does not have a separate school property tax. How does the tax cap apply, if at all, to my school district?

A: The school districts in Buffalo, Yonkers, Rochester and Syracuse are "dependent" on their city governments, which levy a single property tax to cover both municipal purposes and schools. Since residents of these cities do not vote directly on school budgets, they will not have the ability to directly control the share of the tax levy going to schools. But the total city tax levy, including the portion intended for the school district, **is** subject to the cap. Excluding these cities and New York City, which is completely excluded from the cap, all other school districts in New York State are independent property tax jurisdictions and are subject to the tax cap.

Q: In my town, the public directly votes on the budget for our fire and library districts. Do these budgets need 60 percent voter approval of their budgets to raise their tax levies above the cap?

A: Special district budgets will continue to require only simple majority approval from voters. A cap override in a special district will require approval from 60 percent of the members of the district's governing body.

Q: My town tax bill lists a separate property tax for the highway department, which is headed by an independently elected superintendent. Would this be a special district subject to the tax cap?

A: No, not if the highway department is part of the town budget rather than an independent special district. It is not uncommon for individual municipal departments, particularly those headed by an elected official, to have their tax levies shown separately on a property tax bill, yet are legally part of the overall tax levy of the town or municipality. Accordingly, it would be possible for a town department to have a large increase in the tax rate above the tax cap, though in actuality it represents merely a portion of the larger town tax levy that remains within tax cap.

Property taxes levied by a town to fund the town budget under its taxing authority fall within the town's tax levy limit. Property taxes levied by a town on behalf of another entity, such as a special district, fall within that other local entity's tax levy limit.

Q: My sewer district imposes a bi-annual fee on my property. Is this subject to the tax cap?

A: Fees that are imposed by a special district are **not** subject to the property tax cap since they are not taxes.

A key distinction between a fee and a property tax is that a tax is imposed based on the assessed value of the property, whereas a fee is typically imposed uniformly on each property in the district, or according to service usage by each property (as measured by water meters, for example), or has a rate differential based on the type of property.

Q: My town is going through a reassessment to full value, which may result in higher taxes on my house and in my neighborhood. Does the tax cap restrict that potential tax increase?

A: Assessment changes may redistribute the tax burden within a given taxing jurisdiction, but localities cannot use reassessments to raise that tax burden to a level exceeding the cap. As was the case prior to the tax cap, a reassessment to full value within a taxing jurisdiction will vary in its impact upon individual properties. Some homes will face a higher tax, while others may face a lower tax due to changes in individual property values. The sum of these individual tax liabilities constitutes the tax levy, which is subject to the tax cap.

Q: What happens if a taxing jurisdiction exceeds the allowable tax levy by mistake?

A: Each property tax jurisdiction is responsible for determining its tax levy amount prior to formally approving the tax levy based on several calculations, including the rate of inflation, and any allowable exceptions such as a tort judgment or excess employee pension costs. If the tax levy exceeds the allowable amount due to "clerical or technical error," the excess tax levy must be placed into an interest-earning reserve account to be applied to offset the next year's tax levy. The state comptroller's office will prescribe specific requirements for property tax jurisdictions that accidentally exceed their levy limits.

Q: What happens when two local governments or school districts merge? Does the tax cap still apply?

A: Yes. A new tax levy within the tax cap is calculated by the new taxing jurisdiction as a result of any change in the previous governmental arrangement. For example, the new school district that emerges from a consolidation of two or more districts would calculate the new tax levy based on the prior year's levy amounts from the separate school districts, which would be overseen and determined by the state Education Department. Furthermore, if a local government dissolves and another assumes its debts, obligations and tax base, the new levy limit would be calculated by the remaining government.

RESOURCES

Links to additional information on the tax cap, including additional "frequently asked questions," can be found at the following state government websites:

Governor Andrew M. Cuomo
http://governor.ny.gov/citizenconnects/?q=reforminggovernment/1

Office of the State Comptroller*
http://www.osc.state.ny.us/localgov/realprop/index.htm

Department of Taxation and Finance*
http://www.tax.ny.gov/research/property/cap.htm

To compare property taxes and expenditures in different New York communities covered by the tax cap, use "BenchmarkingNY" at www.SeeThroughNY.net

* In some cases, portions of authoritative tax cap guidance reports developed by these agencies for the use of local government officials are paraphrased or reproduced verbatim in the preceding pages of this booklet. The official reports can be downloaded at the websites listed above.

APPENDIX

Property TaxCap Provisions
Excerpted from Chapter 97 of the Laws of 2011

Underlined text is new law; old law is crossed-out

PART A

Section 1. The general municipal law is amended by adding a new section 3-c to read as follows:

§ 3-c. Limit upon real property tax levies by local governments.

1. Unless otherwise provided by law, the amount of real property taxes that may be levied by or on behalf of any local government, other than the city of New York and the counties contained therein, shall not exceed the tax levy limit established pursuant to this section.

2. When used in this section:

(a) "Allowable levy growth factor" shall be the lesser of: (i) one and two one-hundredths; or (ii) the sum of one plus the inflation factor; provided, however, that in no case shall the levy growth factor be less than one.

(b) "Available carryover" means the amount by which the tax levy for the prior fiscal year was below the tax levy limit for such fiscal year, if any, but no more than an amount that equals one and one-half percent of the tax levy limit for such fiscal year.

(c) "Coming fiscal year" means the fiscal year of the local government for which a tax levy limit shall be determined pursuant to this section.

(d) "Inflation factor" means the quotient of: (i) the average of the national consumer price indexes determined by the United States department of labor for the twelve-month period ending six months prior to the start of the coming fiscal year minus the average of the national consumer price indexes determined by the United States department of labor for the twelve-month period ending six months prior to the start of the prior fiscal year, divided by: (ii) the average of the national consumer price indexes determined by the United States department of labor for the twelve-month period ending six months prior to the start of the prior fiscal year, with the result expressed as a decimal to four places.

(e) "Local government" means a county, city, town, village, fire district, or special district including but not limited to a district created pursuant to article twelve or twelve-A, or governed by article thirteen of the town law, or created pursuant to article five-A, five-B or five-D of the county law, chapter five hundred sixteen of the laws of nineteen hundred twenty-eight, or chapter two hundred seventy-three of the laws of nineteen hundred thirty-nine, and shall include town improvements provided pursuant to articles three-A and twelve-C of the town law but shall not include the city of New York or the counties contained therein.

(f) "Prior fiscal year" means the fiscal year of the local government immediately preceding the coming fiscal year.

(g) "Tax levy limit" means the amount of taxes authorized to be levied by or on behalf of a local government pursuant to this section, provided, however, that the tax levy limit shall not include the following:

(i) a tax levy necessary for expenditures resulting from court orders or judgments against the local government arising out of tort actions for any amount that exceeds five percent of the total tax levied in the prior fiscal year;

(ii) in years in which the system average actuarial contribution rate of the New York state and local employees' retirement system, as defined by paragraph ten of subdivision a of section nineteen-a of the retirement and social security law, increases by more than two percentage points from the previous year, a tax levy necessary for expenditures for the coming fiscal year for local government employer contributions to the New York state and local employees' retirement system caused by growth in the system average actuarial contribution rate minus two percentage points;

(iii) in years in which the system average actuarial contribution rate of the New York state and local police and fire retirement system, as defined by paragraph eleven of subdivision a of section three hundred nineteen-a of the retirement and social security law, increases by more than two percentage points from the previous year, a tax levy necessary for expenditures for the coming fiscal year for local government employer contributions to the New York state and local police and fire retirement system caused by growth in the system average actuarial contribution rate minus two percentage points;

(iv) in years in which the normal contribution rate of the New York state teachers' retirement system, as defined by paragraph a of subdivision two of section five hundred seventeen of the education law, increases by more than two percentage points from the previous year, a tax levy necessary for expenditures for the coming fiscal year for local government employer contributions to the New York state teachers' retirement system caused by growth in the normal contribution rate minus two percentage points.

(h) "Tax" or "taxes" shall include (i) a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, and (ii) special ad valorem levies and special assessments as defined in subdivisions fourteen and fifteen of section one hundred two of the real property tax law.

3. (a) Subject to the provisions of subdivision five of this section, beginning with the fiscal year that begins in two thousand twelve, no local government shall adopt a budget that requires a tax levy that is greater than the tax levy limit for the coming fiscal year. Provided however the tax levy limit shall not prohibit a levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph (g) of subdivision two of this section.

(b)(i) The commissioner of taxation and finance shall calculate a quantity change factor for each local government for the coming fiscal year based upon the physical or quantity change, as defined by section twelve hundred twenty of the real property tax law, reported to the commissioner of taxation and finance by the assessor or assessors pursuant to section five hundred seventy-five of the real property tax law.

The quantity change factor shall show the percentage by which the full value of the taxable real property in the local government has changed due to physical or quantity change between the second final assessment roll or rolls preceding the final assessment roll or rolls upon which taxes are to be levied, and the final assessment roll or rolls immediately preceding the final assessment roll or rolls upon which taxes are to be levied.

(ii) After determining the quantity change factor for the local government, the commissioner of taxation and finance shall proceed as follows:

(A) If the quantity change factor is negative, the commissioner of taxation and finance shall not determine a tax base growth factor for the local government.

(B) If the quantity change factor is positive, the commissioner of taxation and finance shall determine a tax base growth factor for the local government which is equal to one plus the quantity change factor.

(iii) The commissioner of taxation and finance shall notify the state comptroller and each local government of the applicable tax base growth factors, if any, as soon thereafter as such factors are determined.

(c) Each local government shall calculate the tax levy limit applicable to the coming fiscal year which shall be determined as follows:

(i) Ascertain the total amount of taxes levied for the prior fiscal year.

(ii) Multiply the result by the tax base growth factor, calculated pursuant to paragraph (b) of this subdivision, if any.

(iii) Add any payments in lieu of taxes that were receivable in the prior fiscal year.

(iv) Subtract the tax levy necessary to support expenditures pursuant to subparagraph (i) of paragraph (g) of subdivision two of this section for the prior fiscal year, if any.

(v) Multiply the result by the allowable levy growth factor.

(vi) Subtract any payments in lieu of taxes receivable in the coming fiscal year.

(vii) Add the available carryover, if any.

(d) Whenever the responsibility and associated cost of a local government function is transferred to another local government, the state comptroller shall determine the costs and savings on the affected local governments attributable to such transfer for the first fiscal year following the transfer, and notify such local governments of such determination and that they shall adjust their tax levy limits accordingly.

4. (a) When two or more local governments consolidate, the state comptroller shall determine the tax levy limit for the

consolidated local government for the first fiscal year following the consolidation based on the respective tax levy limits of the component local governments that formed such consolidated local government from the last fiscal year prior to the consolidation.
(b) When a local government dissolves, the state comptroller shall determine the tax levy limit for the local government that assumes the debts, liabilities, and obligations of such dissolved local government for the first fiscal year following the dissolution based on the respective tax levy limits of such dissolved local government and such local government that assumes the debts, liabilities, and obligations of such dissolved local government from the last fiscal year prior to the dissolution.
(c) The tax levy limit established by this section shall not apply to the first fiscal year after a local government is newly established or constituted through a process other than consolidation or dissolution.
5. A local government may adopt a budget that requires a tax levy that is greater than the tax levy limit for the coming fiscal year, not including any levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph g of subdivision two of this section, only if the governing body of such local government first enacts, by a vote of sixty percent of the total voting power of such body, a local law to override such limit for such coming fiscal year only, or in the case of a district or fire district, a resolution, approved by a vote of sixty percent of the total voting power of such body, to override such limit for such coming fiscal year only.
6. In the event a local government's actual tax levy for a given fiscal year exceeds the tax levy limit as established pursuant to this section due to clerical or technical errors, the local government shall place the excess amount of the levy in reserve in accordance with such requirements as the state comptroller may prescribe, and shall use such funds and any interest earned thereon to offset the tax levy for the ensuing fiscal year. If, upon examination pursuant to sections thirty-three and thirty-four of this chapter, the state comptroller finds that a local government levied taxes in excess of the applicable tax levy limit, the local government, as soon as practicable, shall place an amount equal to the excess amount of the levy in such reserve in accordance with this subdivision.
7. All local governments subject to the provisions of this section shall, prior to adopting a budget for the coming fiscal year, submit to the state comptroller, in a form and manner as he or she may prescribe, any information necessary for calculating the tax levy limit for the coming fiscal year.
§ 2. The education law is amended by adding a new section 2023-a to read as follows:
§ 2023-a. Limitations upon school district tax levies.
1.Generally, unless otherwise provided by law, the amount of taxes that may be levied by or on behalf of any school district, other than a city school district of a city with one hundred twenty-five thousand inhabitants or more, shall not exceed the tax levy limit established pursuant to this section, not including any tax levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph i of subdivision two of this section.
2. Definitions. As used in this section:
a. "Allowable levy growth factor" shall be the lesser of: (i) one and two one-hundredths; or (ii) the sum of one plus the inflation factor; provided, however, that in no case shall the levy growth factor be less than one.
b. "Available carryover" means the amount by which the tax levy for the prior school year was below the applicable tax levy limit for such school year, if any, but no more than an amount that equals one and one-half percent of the tax levy limit for such school year.
c. "Capital local expenditures" means the taxes associated with budgeted expenditures resulting from the financing, refinancing, acquisition, design, construction, reconstruction, rehabilitation, improvement, furnishing and equipping of, or otherwise providing for school district capital facilities or school district capital equipment, including debt service and lease expenditures, and transportation capital debt service, subject to the approval of the qualified voters where required by law.
d. "Capital tax levy" means the tax levy necessary to support capital local expenditures, if any.
e. "Coming school year" means the school year for which tax levy limits are being determined pursuant to this section.

f. "Inflation factor" means the quotient of: (i) the average of the national consumer price indexes determined by the United States department of labor for the twelve-month period preceding January first of the current year minus the average of the national consumer price indexes determined by the United States department of labor for the twelve-month period preceding January first of the prior year, divided by: (ii) the average of the national consumer price indexes determined by the United States department of labor for the twelve-month period preceding January first of the prior year, with the result expressed as a decimal to four places.

g. "Prior school year" means the school year immediately preceding the coming school year.

h. "School district" means a common school district, union free school district, central school district, central high school district or a city school district in a city with less than one hundred twenty-five thousand inhabitants.

i. "Tax levy limit" means the amount of taxes a school district is authorized to levy pursuant to this section, provided, however, that the tax levy limit shall not include the following:

(i) a tax levy necessary for expenditures resulting from court orders or judgments against the school district arising out of tort actions for any amount that exceeds five percent of the total tax levied in the prior school year;

(ii) in years in which the system average actuarial contribution rate of the New York state and local employees' retirement system, as defined by paragraph ten of subdivision a of section nineteen-a of the retirement and social security law, increases by more than two percentage points from the previous year, a tax levy necessary for expenditures for the coming fiscal year for school district employer contributions to the New York state and local employees' retirement system caused by growth in the system average actuarial contribution rate minus two percentage points;

(iii) in years in which the normal contribution rate of the New York state teachers' retirement system, as defined by paragraph a of subdivision two of section five hundred seventeen of this chapter, increases by more than two percentage points from the previous year, a tax levy necessary for expenditures for the coming fiscal year for school district employer contributions to the New York state teachers' retirement system caused by growth in the normal contribution rate minus two percentage points; and

(iv) a capital tax levy.

2-a. Tax base growth factor.

a. No later than February fifteenth of each year, the commissioner of taxation and finance shall identify those school districts for which tax base growth factors must be determined for the coming school year, and shall notify the commissioner of the tax base growth factors so determined, if any.

b. The commissioner of taxation and finance shall calculate a quantity change factor for the coming school year for each school district based upon the physical or quantity change, as defined by section twelve hundred twenty of the real property tax law, reported to the commissioner of taxation and finance by the assessor or assessors pursuant to section five hundred seventy-five of the real property tax law. The quantity change factor shall show the percentage by which the full value of the taxable real property in the school district has changed due to physical or quantity change between the second final assessment roll or rolls preceding the final assessment roll or rolls upon which taxes are to be levied, and the final assessment roll or rolls immediately preceding the final assessment roll or rolls upon which taxes are to be levied.

c. After determining the quantity change factor for a school district, the commissioner of taxation and finance shall proceed as follows:

(i) If the quantity change factor is negative, the commissioner of taxation and finance shall not determine a tax base growth factor for the school district.

(ii) If the quantity change factor is positive, the commissioner of taxation and finance shall determine a tax base growth factor for the school district which is equal to one plus the quantity change factor.

3. Computation of tax levy limits. a. Each school district shall calculate the tax levy limit for each school year which shall be determined as follows:

(1) Ascertain the total amount of taxes levied for the prior school year.

(2) Multiply the result by the tax base growth factor, if any.

(3) Add any payments in lieu of taxes that

were receivable in the prior school year.
(4) Subtract the tax levy necessary to support the expenditures pursuant to subparagraphs (i) and (iv) of paragraph i of subdivision two of this section for the prior school year, if any.
(5) Multiply the result by the allowable levy growth factor.
(6) Subtract any payments in lieu of taxes receivable in the coming fiscal year.
(7) Add the available carryover, if any.
b. On or before March first of each year, any school district subject to the provisions of this section shall submit to the state comptroller, the commissioner, and the commissioner of taxation and finance, in a form and manner prescribed by the state comptroller, any information necessary for the calculation of the tax levy limit; and the school district's determination of the tax levy limit pursuant to this section shall be subject to review by the commissioner and the commissioner of taxation and finance.
4. Reorganized school districts. When two or more school districts reorganize, the commissioner shall determine the tax levy limit for the reorganized school district for the first school year following the reorganization based on the respective tax levy limits of the school districts that formed the reorganized district from the last school year in which they were separate districts, provided that in the event of formation of a new central high school district, the tax levy limits for the new central high school district and its component school districts shall be determined in accordance with a methodology prescribed by the commissioner.
5. Erroneous levies. In the event a school district's actual tax levy for a given school year exceeds the maximum allowable levy as established pursuant to this section due to clerical or technical errors, the school district shall place the excess amount of the levy in reserve in accordance with such requirements as the state comptroller may prescribe, and shall use such funds and any interest earned thereon to offset the tax levy for the ensuing school year.
6. (a) Notwithstanding any other provision of law to the contrary, in the event the trustee, trustees or board of education of a school district that is subject to the provisions of this section proposes a budget that will require a tax levy that exceeds the tax levy limit for the corresponding school year, not including any levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph i of subdivision two of this section, then such budget shall be approved if sixty percent of the votes cast thereon are in the affirmative.
(b) Where the trustee, trustees or board of education proposes a budget subject to the requirements of paragraph (a) of this subdivision, the ballot for such budget shall include the following statement in substantially the same form: "Adoption of this budget requires a tax levy increase of which exceeds the statutory tax levy increase limit of for this school fiscal year and therefore exceeds the state tax cap and must be approved by sixty percent of the qualified voters present and voting."
7. In the event that the original proposed budget is not approved by the voters, the sole trustee, trustees or board of education may adopt a final budget pursuant to subdivision eight of this section or resubmit to the voters the original or a revised budget at a special district meeting in accordance with subdivision three of section two thousand seven of this part. Upon one defeat of such resubmitted budget, the sole trustee, trustees or board of education shall adopt a final budget pursuant to subdivision eight of this section.
8. Notwithstanding any other provision of law to the contrary, if the qualified voters fail to approve the proposed school district budget upon resubmission or upon a determination not to resubmit for a second vote pursuant to subdivision seven of this section, the sole trustee, trustees or board of education shall levy a tax no greater than the tax that was levied for the prior school year.
9. Nothing in this section shall preclude the trustee, trustees, or board of education of a school district, in their discretion, from submitting additional items of expenditures to the voters for approval as separate propositions or the voters from submitting propositions pursuant to sections two thousand eight and two thousand thirty-five of this part; provided however, except in the case of a proposition submitted for any expenditure contained within subparagraphs (i) through (iv) of paragraph i of subdivision two of this section, if any proposition, or propositions collectively that are subject to a vote on the same date, would require an expenditure of money that would require

a tax levy and would result in the tax levy limit being exceeded for the corresponding school year then such proposition shall be approved if sixty percent of the votes cast thereon are in the affirmative.

§ 3. Section 2023 of the education law, as amended by section 24 of part A of chapter 436 of the laws of 1997, subdivision 1 as amended by chapter 682 of the laws of 2002, subparagraphs (v) and (vi) of paragraph b of subdivision 4 as separately amended by section 1 of part D-2 of chapter 57 of the laws of 2007 and chapter 422 of the laws of 2007, subparagraph (vii) of paragraph b of subdivision 4 as added by section 1 of part D-2 of chapter 57 of the laws of 2007, subparagraph (vii) of paragraph b of subdivision 4 as added by chapter 422 of the laws of 2007 and paragraph b-1 of subdivision 4 as amended by section 5 of part B of chapter 57 of the laws of 2008, is amended to read as follows:

§ 2023. Levy of tax for certain purposes without vote; contingency budget.

1. If the qualified voters shall neglect or refuse to vote the sum estimated necessary for teachers' salaries, after applying thereto the public school moneys, and other moneys received or to be received for that purpose, or if they shall neglect or refuse to vote the sum estimated necessary for ordinary contingent expenses, including the purchase of library books and other instructional materials associated with a library and expenses incurred for interschool athletics, field trips and other extracurricular activities and the expenses for cafeteria or restaurant services, the sole trustee, board of trustees, or board of education shall adopt a contingency budget including such expenses and shall levy a tax, subject to the restrictions as set forth in subdivision four of this section and subdivision eight of section two thousand twenty-three-a of this part, for the same, in like manner as if the same had been voted by the qualified voters, subject to the limitations contained in subdivisions three and four of this section.

2. Notwithstanding the defeat of a school budget, school districts shall continue to transport students to and from the regular school program in accordance with the mileage limitations previously adopted by the qualified voters of the school district. Such mileage limits shall change only when amended by a special proposition passed by a majority of the qualified voters of the school district. In cases where the school budget is defeated by such qualified voters of the school district, appropriations for transportation costs for purposes other than for transportation to and from the regular school program, and transportation that would constitute an ordinary contingent expense pursuant to subdivision one of this section, shall be authorized in the budget only after approval by the qualified voters of the district.

3. The administrative component of a contingency budget shall not comprise a greater percentage of the contingency budget exclusive of the capital component than the lesser of (1) the percentage the administrative component had comprised in the prior year budget exclusive of the capital component; or (2) the percentage the administrative component had comprised in the last proposed defeated budget exclusive of the capital component.

4. a. The contingency budget shall not result in a ~~[percentage increase in total spending over the district's total spending under the school district budget for the prior school year that exceeds the lesser of: (i) the result obtained when one hundred twenty percent is multiplied by the percentage increase in the consumer price index, with the result rounded to two decimal places; or (ii) four percent.~~

~~b. The following types of expenditures shall be disregarded in determining total spending:~~

~~(i) expenditures resulting from a tax certiorari proceeding;~~

~~(ii) expenditures resulting from a court order or judgment against the school district;~~

~~(iii) emergency expenditures that are certified by the commissioner as necessary as a result of damage to, or destruction of, a school building or school equipment;~~

~~(iv) capital expenditures resulting from the construction, acquisition, reconstruction, rehabilitation or improvement of school facilities, including debt service and lease expenditures, subject to the approval of the qualified voters where required by law;~~

~~(v) expenditures in the contingency budget attributable to projected increases in public school enrollment, which, for the purpose of this subdivision, may include increases attributable to the enrollment of students attending a pre-kindergarten program~~

~~established in accordance with section thirty-six hundred two-e of this chapter, to be computed based upon an increase in enrollment from the year prior to the base year for which the budget is being adopted to the base year for which the budget is being adopted, provided that where the trustees or board of education have documented evidence that a further increase in enrollment will occur during the school year for which the contingency budget is prepared because of new construction, inception of a pre-kindergarten program, growth or similar factors, the expenditures attributable to such additional enrollment may also be disregarded;~~

~~(vi) non-recurring expenditures in the prior year's school district budget; and~~

~~(vii) expenditures for payments to charter schools pursuant to section twenty-eight hundred fifty-six of this chapter.~~

~~(viii) expenditures for self-supporting programs. For purposes of this subparagraph, "self-supporting programs" shall mean any programs that are entirely funded by private funds that cover all the costs of the program.~~

~~b-1. Notwithstanding any other provision of this subdivision to the contrary, in the event a state grant in aid provided to the district in the prior year is eliminated and incorporated into a non-categorical general state aid in the current school year, the amount of such grant may be included in the computation of total spending for the prior school year, provided that the commissioner has verified that the grant in aid has been incorporated into such non-categorical general state aid]~~ tax levy greater than the tax levied for the prior school year.

~~[c.]~~ b. The resolution of the trustee, board of trustees, or board of education adopting a contingency budget shall incorporate by reference a statement specifying the projected percentage increase or decrease in total spending for the school year, and explaining the reasons for disregarding any portion of an increase in spending in formulating the contingency budget.

~~[d.]~~ c**.** Notwithstanding any other provision of law to the contrary,

the trustees or board of education shall not be authorized to amend or revise a final contingency budget where such amendment or revision would result in total spending in excess of the spending limitation in paragraph (a) of this subdivision; provided that the trustees or board of education shall be authorized to add appropriations for~~[:~~

~~(i) the categories of expenditures excluded from the spending limitations set forth in paragraph (b) of this subdivision, subject to approval of the qualified voters where required by law;~~

~~(ii) expenditures resulting from an actual increase in enrollment over the projected enrollment used to develop the contingency budget, provided that where such actual enrollment is less than such projected enrollment, it shall be the duty of the trustees or board of education to use such excess funds to reduce taxes; and~~

~~(iii)]~~ the expenditure of gifts, grants in aid for specific purposes or for general use or insurance proceeds authorized pursuant to subdivision two of [~~**subdivision**~~] **section** seventeen hundred eighteen of this chapter in addition to that which has been previously budgeted.

~~[e. For the purposes of this subdivision:~~

~~(i) "Base school year" shall mean the school year immediately preceding the school year for which the contingency budget is prepared.~~

~~(ii) "Consumer price index" shall mean the percentage that represents the average of the national consumer price indexes determined by the~~

~~United States department of labor, for the twelve month period preceding~~

~~January first of the current year.~~

~~(iii) "Current year" shall mean the calendar year in which the school district budget is submitted for a vote of the qualified voters.~~

~~(iv) "Resident public school district enrollment shall mean the resident public school enrollment of the school district as defined in paragraph n of subdivision one of section thirty-six hundred two of this chapter.~~

~~(v) "Total spending" shall mean the total amount appropriated under the school district budget for the school year.]~~

§ 4. Paragraph a of subdivision 7 of section 1608 of the education law, as amended by chapter 238 of the laws of 2007, is amended to read as follows:

a. Each year, commencing with the proposed budget for the two thousand--two thousand one school year, the trustee or board of trustees shall prepare a property tax report card, pursuant to regulations of the commissioner, and shall make it publicly available by transmitting it to local newspapers of general circulation, appending it to copies of the proposed budget made publicly available as required by law, making it available for distribution at the annual meeting, and otherwise disseminating it as required by the commissioner. Such report card shall include:

(i) the amount of total spending and total estimated school tax levy that would result from adoption of the proposed budget and the percentage increase or decrease in total spending and total school tax levy from the school district budget for the preceding school year; and

(ii) the district's tax levy limit determined pursuant to section two thousand twenty-three-a of this title, and the estimated school tax levy, excluding any levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph i of subdivision two of section two thousand twenty-three-a of this title, that would result from adoption of the proposed budget; and (iii) the projected enrollment growth for the school year for which the budget is prepared, and the percentage change in enrollment from the previous year; and [(iii)] (iv) the percentage increase in the consumer price index, as defined in paragraph c of this subdivision; and [(iv)] (v) the projected amount of the unappropriated unreserved fund balance that will be retained if the proposed budget is adopted, the projected amount of the reserved fund balance, the projected amount of the appropriated fund balance, the percentage of the proposed budget that the unappropriated unreserved fund balance represents, the actual unappropriated unreserved fund balance retained in the school district budget for the preceding school year, and the percentage of the school district budget for the preceding school year that the actual unappropriated unreserved fund balance represents.

§ 5. Paragraph a of subdivision 7 of section 1716 of the education law, as amended by chapter 238 of the laws of 2007, is amended to read as follows:

a. Each year, commencing with the proposed budget for the two thousand--two thousand one school year, the board of education shall prepare a property tax report card, pursuant to regulations of the commissioner, and shall make it publicly available by transmitting it to local newspapers of general circulation, appending it to copies of the proposed budget made publicly available as required by law, making it available for distribution at the annual meeting, and otherwise disseminating it as required by the commissioner. Such report card shall include: (i) the amount of total spending and total estimated school tax levy that would result from adoption of the proposed budget and the percentage increase or decrease in total spending and total school tax levy from the school district budget for the preceding school year; and (ii) the district's tax levy limit determined pursuant to section two thousand twenty-three-a of this title, and the estimated school tax levy, excluding any levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph i of subdivision two of section two thousand twenty-three-a of this title, that would result from adoption of the proposed budget; and (iii) the projected enrollment growth for the school year for which the budget is prepared, and the percentage change in enrollment from the previous year; and [(iii)] (iv) the percentage increase in the consumer price index, as defined in paragraph c of this subdivision; and [(iv)] (v) the projected amount of the unappropriated unreserved fund balance that will be retained if the proposed budget is adopted, the projected amount of the reserved fund balance, the projected amount of the appropriated fund balance, the percentage of the proposed budget that the unappropriated unreserved fund balance represents, the actual unappropriated unreserved fund balance retained in the school district budget for the preceding school year, and the percentage of the school district budget for the preceding school year that the actual unappropriated unreserved fund balance represents.

§ 6. Section 2008 of the education law is amended by adding a new subdivision 3 to read as follows:

3. Notwithstanding any other provision of law to the contrary, any proposition submitted by the voters that requires the expenditure of money shall be subject to the requirements set forth in subdivision nine of section two thousand twenty-three-a of this part.

§ 7. Section 2022 of the education law, as amended by section 23 of part A of chapter 436 of the laws of 1997, subdivisions 1 and 3 as amended by section 8 of part C of chapter 58 of the laws of 1998, subdivision

2-a as amended by section 3 of part A of chapter 60 of the laws of 2000, paragraph b of subdivision 2-a as amended by section 5 of part W of chapter 57 of the laws of 2008, subdivision 4 as amended by section 7 of part M of chapter 57 of the laws of 2005 and subdivision 6 as added by chapter 61 of the laws of 2003, is amended to read as follows:

§ 2022. Vote on school district budgets and on the election of school district trustees and board of education members.

1. Notwithstanding any law, rule or regulation to the contrary, the election of trustees or members of the board of education, and the vote upon the appropriation of the necessary funds to meet the estimated expenditures, in any common school district, union free school district, central school district or central high school district shall be held at the annual meeting and election on the third Tuesday in May, provided, however, that such election shall be held on the second Tuesday in May if the commissioner at the request of a local school board certifies no later than March first that such election would conflict with religious observances.

~~[When such election or vote is taken by recording the ayes and noes of the qualified voters attending, a majority of the qualified voters present and voting, by a hand or voice vote, may determine to take up the question of voting the necessary funds to meet the estimated expenditures for a specific item separately, and the qualified voters present and voting may increase the amount of any estimated expenditures or reduce the same, except for teachers' salaries, and the ordinary contingent expenses of the schools.]~~

The sole trustee, board of trustees or board of education of every common, union free, central or central high school district and every city school district to which this article applies shall hold a budget hearing not less than seven nor more than fourteen days prior to the annual meeting and election or special district meeting at which a school budget vote will occur, and shall prepare and present to the voters at such budget hearing a proposed school district budget for the ensuing school year.

2. Except as provided in subdivision four of this section, nothing in this section shall preclude the trustees or board of education, in their discretion, from submitting additional items of expenditure to the voters for approval as separate propositions or the voters from submitting propositions pursuant to ~~[section]~~ sections two thousand eight and two thousand thirty-five of this ~~[article]~~ part; provided however that such propositions shall be subject to the requirements set forth in subdivision nine of section two thousand twenty-three-a of this part.

2-a. Every common, union free, central, central high school district and city school district to which this article applies shall mail a school budget notice to all qualified voters of the school district after the date of the budget hearing, but no later than six days prior to the annual meeting and election or special district meeting at which a school budget vote will occur. The school budget notice shall compare the percentage increase or decrease in total spending under the proposed budget over total spending under the school district budget adopted for the current school year, with the percentage increase or decrease in the consumer price index, from January first of the prior school year to January first of the current school year, and shall also include the information required by paragraphs a and b of this subdivision. The notice shall also set forth the date, time and place of the school budget vote, in the same manner as in the notice of annual meeting, and shall also include the district's tax levy limit pursuant to section two thousand twenty-three-a of this part, and the estimated school tax levy, excluding any levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph i of subdivision two of section two thousand twenty-three-a of this part, that would result from adoption of the proposed budget. Such notice shall be in a form prescribed by the commissioner.

a. Commencing with the proposed budget for the two thousand one--two thousand two school year, such notice shall also include a description of how total spending and the tax levy resulting from the proposed budget would compare with a projected contingency budget adopted pursuant to section two thousand twenty-three of this article, assuming that such contingency budget is adopted on the same day as the vote on the proposed budget. Such comparison shall be in total and by component (program, capital and administrative), and shall include a statement of the assumptions made in estimating the projected contingency budget.

b. Commencing with the proposed budget for the two thousand eight--two thousand nine school year, such notice shall also include, in a format prescribed by the commissioner, an estimate of the tax savings that would be available to an eligible homeowner under the basic school tax relief (STAR) exemption authorized by section four hundred twenty-five of the real property tax law if the proposed budget were adopted. Such estimate shall be made in the manner prescribed by the commissioner, in consultation with the office of real property services.

3. In all elections for trustees or members of boards of education or votes involving the expenditure of money, or authorizing the levy of taxes, the vote thereon shall be by ballot, or, in school districts that prior to nineteen hundred ninety-eight conducted their vote at the annual meeting, may be ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such district meetings.

4. The budget adoption process shall conform to the requirements set forth in section two thousand twenty-three-a of this part. In the event that the original proposed budget is not approved by the voters, the sole trustee, trustees or board of education may adopt a final budget pursuant to subdivision five of this section or resubmit to the voters the original or a revised budget pursuant to subdivision three of section two thousand seven of this part. Upon one defeat of such resubmitted budget, the sole trustee, trustees or board of education shall adopt a final budget pursuant to subdivision five of this section.

Notwithstanding any other provision of law to the contrary, the school district budget for any school year, or any part of such budget or any propositions involving the expenditure of money for such school year shall not be submitted for a vote of the qualified voters more than twice.

5. If the qualified voters fail to approve the proposed school district budget upon resubmission or upon a determination not to resubmit for a second vote pursuant to subdivision four of this section, the sole trustee, trustees or board of education, after applying thereto the public school moneys and other moneys received or to be received for that purpose, shall levy a tax for the sum necessary for teachers' salaries and other ordinary contingent expenses in accordance with the provisions of this subdivision and ~~[section]~~ sections two thousand twenty-three and two thousand twenty-three-a of this article.

6. Notwithstanding the provisions of subdivision four of section eighteen hundred four and subdivision five of section nineteen hundred six of this title, subdivision one of section two thousand two of this article, subdivision one of this section, subdivision two of section twenty-six hundred one-a of this title and any other provision of law to the contrary, the annual district meeting and election of every common, union free, central and central high school district and the annual meeting of every city school district in a city having a population of less than one hundred twenty-five thousand inhabitants that is scheduled to be held on the third Tuesday of May, two thousand three is hereby adjourned until the first Tuesday in June, two thousand three. The trustees or board of education of each such school district shall provide notice of such adjourned meeting to the qualified voters in the manner prescribed for notice of the annual meeting, and such notice shall provide for an adjourned budget hearing. The adjourned district meeting or district meeting and election shall be deemed the annual meeting or annual meeting and election of the district for all purposes under this title and the date of the adjourned meeting shall be deemed the state-wide uniform voting day for all purposes under this title. Notwithstanding the provisions of subdivision seven of section sixteen hundred eight or subdivision seven of section seventeen hundred sixteen of this title or any other provision of law, rule or regulation to the contrary, in two thousand three the property tax report card shall be submitted to the department no later than twenty days prior to the date of the adjourned meeting and the department shall make its compilation available electronically at least seven days prior to such date.

§ 8. Section 2035 of the education law is amended by adding a new subdivision 3 to read as follows:

3. Any proposition submitted pursuant to this section shall be subject to the requirements set forth in subdivision nine of section two thousand twenty-three-a of this part.

§ 9. Section 2601-a of the education law, as added by chapter 171 of the laws of 1996, subdivision 2 as amended by section 6 and subdivision 4 as amended by section 8 of part M of chapter 57 of the laws of 2005, subdivision 3 as amended by chapter 640 of the laws of 2008, subdivision 5 as amended by section 29 of part A of chapter 436 of the laws of 1997, subdivision 6 as amended and subdivision 7 as added by chapter 474 of the laws of 1996, is amended to read as follows:

§ 2601-a. Procedures for adoption of school budgets in small city school districts. 1. The board of education of each city school district subject to this article shall provide for the submission of a budget for approval of the voters pursuant to the provisions of this section <u>and in accordance with the requirements set forth in section two thousand twenty-three-a of this title.</u>

2. The board of education shall conduct all annual and special school district meetings for the purpose of adopting a school district budget in the same manner as a union free school district in accordance with the provisions of article forty-one of this title, except as otherwise provided by this section. The annual meeting and election of each such city school district shall be held on the third Tuesday of May in each year, provided, however that such annual meeting and election shall be held on the second Tuesday in May if the commissioner at the request of a local school board certifies no later than March first that such election would conflict with religious observances, and any school budget revote shall be held on the date and in the same manner specified in subdivision three of section two thousand seven of this title. The provisions of this article, and where applicable subdivisions nine and nine-a of section twenty-five hundred two of this title, governing the qualification and registration of voters, and procedures for the nomination and election of members of the board of education shall continue to apply, and shall govern the qualification and registration of voters and voting procedures with respect to the adoption of a school district budget.

3. The board of education shall prepare a proposed school district budget for the ensuing year in accordance with the provisions of section seventeen hundred sixteen of this chapter, including all provisions relating to required notices and appendices to the statement of expenditures. No board of education shall incur a school district liability except as authorized by the provisions of section seventeen hundred eighteen of this chapter. Such proposed budget shall be presented in three components: a program component, a capital component and an administrative component which shall be separately delineated in accordance with regulations of the commissioner after consultation with local school district officials. The administrative component shall include, but need not be limited to, office and central administrative expenses, traveling expenses and all compensation, salaries and benefits of all school administrators and supervisors, including business administrators, superintendents of schools and deputy, assistant, associate or other superintendents under all existing employment contracts or collective bargaining agreements, any and all expenditures associated with the operation of the board of education, the office of the superintendent of schools, general administration, the school business office, consulting costs not directly related to direct student services and programs, planning and all other administrative activities. The program component shall include, but need not be limited to, all program expenditures of the school district, including the salaries and benefits of teachers and any school administrators or supervisors who spend a majority of their time performing teaching duties, and all transportation operating expenses. The capital component shall include, but need not be limited to, all transportation capital, debt service, and lease expenditures; costs resulting from judgments in tax certiorari proceedings or the payment of awards from court judgments, administrative orders or settled or compromised claims; and all facilities costs of the school district, including facilities lease expenditures, the annual debt service and total debt for all facilities financed by bonds and notes of the school district, and the costs of construction, acquisition, reconstruction, rehabilitation or improvement of school buildings, provided that such budget shall include a rental, operations and maintenance section that includes base rent costs, total rent costs, operation and maintenance charges, cost per square foot for each facility leased by the school district, and any and all expenditures associated with custodial salaries and benefits, service contracts, supplies, utilities, and maintenance and repairs of

school facilities. For the purposes of the development of a budget for the nineteen hundred ninety-seven--ninety-eight school year, the board of education shall separate its program, capital and administrative costs for the nineteen hundred ninety-six--ninety-seven school year in the manner as if the budget for such year had been presented in three components. Except as provided in subdivision four of this section, nothing in this section shall preclude the board, in its discretion, from submitting additional items of expenditure to the voters for approval as separate propositions or the voters from submitting propositions pursuant to sections two thousand eight and two thousand thirty-five of this chapter subject to the requirements set forth in subdivision nine of section two thousand twenty-three-a of this part.

4. The budget adoption process shall conform to the requirements set forth in section two thousand twenty-three-a of this title. In the event the qualified voters of the district reject the budget proposed pursuant to subdivision three of this section, the board may propose to the voters a revised budget pursuant to subdivision three of section two thousand seven of this title or may adopt a contingency budget pursuant to subdivision five of this section and subdivision five of section two thousand twenty-two of this title. The school district budget for any school year, or any part of such budget or any propositions involving the expenditure of money for such school year shall not be submitted for a vote of the qualified voters more than twice. In the event the qualified voters reject the resubmitted budget, the board shall adopt a contingency budget in accordance with subdivision five of this section and subdivision five of such section two thousand twenty-two of this title.

5. If the qualified voters fail or refuse to vote the sum estimated to be necessary for teachers' salaries and other ordinary contingent expenses, the board shall adopt a contingency budget in accordance with this subdivision and shall levy a tax for that portion of such sum remaining after applying thereto the moneys received or to be received from state, federal or other sources, in the same manner as if the budget had been approved by the qualified voters; subject to the limitations imposed in subdivision four of section two thousand twenty-three of this chapter, subdivision eight of section two thousand twenty-three-a of this title and this subdivision. The administrative component shall not comprise a greater percentage of the contingency budget exclusive of the capital component than the lesser of (1) the percentage the administrative component had comprised in the prior year budget exclusive of the capital component; or (2) the percentage the administrative component had comprised in the last proposed defeated budget exclusive of the capital component. Such contingency budget shall include the sum determined by the board to be necessary for:

(a) teachers' salaries, including the salaries of all members of the teaching and supervising staff;

(b) items of expense specifically authorized by statute to be incurred by the board of education, including, but not limited to, expenditures for transportation to and from regular school programs included as ordinary contingent expenses in subdivision twelve of section twenty-five hundred three of this chapter, expenditures for textbooks, required services for non-public school students, school health services, special education services, kindergarten and nursery school programs, and the district's share of the administrative costs and costs of services provided by a board of cooperative educational services;

(c) items of expense for legal obligations of the district, including, but not limited to, contractual obligations, debt service, court orders or judgments, orders of administrative bodies or officers, and standards and requirements of the board of regents and the commissioner that have the force and effect of law;

(d) the purchase of library books and other instructional materials associated with a library;

(e) items of expense necessary to maintain the educational programs of the district, preserve the property of the district or protect the health and safety of students and staff, including, but not limited to, support services, pupil personnel services, the necessary salaries for the necessary number of non-teaching employees, necessary legal expenses, water and utility charges, instructional supplies for teachers' use, emergency repairs, temporary rental of essential classroom facilities, and expenditures necessary to advise school district voters concerning school matters; and

(f) expenses incurred for interschool athletics, field trips and other extracurricular activities; and

(g) any other item of expense determined by the commissioner to be an ordinary contingent expense in any school district.

6. The commissioner shall determine appeals raising questions as to what items of expenditure are ordinary contingent expenses pursuant to subdivision five of this section in accordance with section two thousand twenty-four and three hundred ten of this chapter.

7. Each year, the board of education shall prepare a school district report card, pursuant to regulations of the commissioner, and shall make it publicly available by transmitting it to local newspapers of general circulation, appending it to copies of the proposed budget made publicly available as required by law, making it available for distribution at the annual meeting, and otherwise disseminating it as required by the commissioner. Such report card shall include measures of the academic performance of the school district, on a school by school basis, and measures of the fiscal performance of the district, as prescribed by the commissioner. Pursuant to regulations of the commissioner, the report card shall also compare these measures to statewide averages for all public schools, and statewide averages for public schools of comparable wealth and need, developed by the commissioner. Such report card shall include, at a minimum, any information on the school district regarding pupil performance and expenditure per pupil required to be included in the annual report by the regents to the governor and the legislature pursuant to section two hundred fifteen-a of this chapter; and any other information required by the commissioner. School districts (i) identified as having fifteen percent or more of their students in special education, or (ii) which have fifty percent or more of their students with disabilities in special education programs or services sixty percent or more of the school day in a general education building, or

(iii) which have eight percent or more of their students with disabilities in special education programs in public or private separate educational settings shall indicate on their school district report card their respective percentages as defined in this paragraph and paragraphs (i) and (ii) of this subdivision as compared to the statewide average.

§ 10. Paragraph b-1 of subdivision 4 of section 3602 of the education law, as amended by section 26 of part A of chapter 58 of the laws of 2011, is amended to read as follows:

b-1. Notwithstanding any other provision of law to the contrary, for the two thousand seven--two thousand eight ~~[through]~~ school year and thereafter, the additional amount payable to each school district pursuant to this subdivision in the current year as total foundation aid, after deducting the total foundation aid base, shall be deemed a state grant in aid identified by the commissioner for general use for purposes of ~~[sections]~~ section seventeen hundred eighteen ~~[and two thousand twenty-three]~~ of this chapter.

§ 11. Paragraph a of subdivision 1 of section 3635 of the education law, as amended by chapter 69 of the laws of 1992, is amended to read as follows:

a. Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children. Such transportation shall be provided for all children attending grades kindergarten through eight who live more than two miles from the school which they legally attend and for all children attending grades nine through twelve who live more than three miles from the school which they legally attend and shall be provided for each such child up to a distance of fifteen miles, the distances in each case being measured by the nearest available route from home to school. The cost of providing such transportation between two or three miles, as the case may be, and fifteen miles shall be considered for the purposes of this chapter to be a charge upon the district and an ordinary contingent expense of the district. Transportation for a lesser distance than two miles in the case of children attending grades kindergarten through eight or three miles in the case of children attending grades nine through twelve and for a greater distance than fifteen miles may be provided by the district with the approval of the qualified voters, and, if provided, shall be offered equally to all children in like circumstances residing in the district; provided, however, that this requirement shall not apply to transportation offered pursuant to section thirty-six hundred thirty-five-b of this article.

§ 12. Nothing contained in this act shall impair or invalidate the powers or duties, as authorized by law, of a control board, interim finance authority or fiscal stability authority including such powers or duties that may require the tax levy limit, as that term is defined in section one or section two of this act, to be exceeded.

§ 13. This act shall take effect immediately; provided, however, that sections two through eleven of this act shall take effect July 1, 2011 and shall first apply to school district budgets and the budget adoption process for the 2012-13 school year; and shall continue to apply to school district budgets and the budget adoption process for any school year beginning in any calendar year during which this act is in effect; provided further, that if section 26 of part A of chapter 58 of the laws of 2011 shall not have taken effect on or before such date then section ten of this act shall take effect on the same date and in the same manner as such chapter of the laws of 2011, takes effect; provided further, that section one of this act shall first apply to the levy of taxes by local governments for the fiscal year that begins in 2012 and shall continue to apply to the levy of taxes by local governments for any fiscal year beginning in any calendar year during which this act is in effect; provided, further, that this act shall remain in full force and effect at a minimum until and including June 15, 2016 and shall remain in effect thereafter only so long as the public emergency requiring the regulation and control of residential rents and evictions and all such laws providing for such regulation and control continue as provided in subdivision 3 of section 1 of the local emergency rent control act, sections 26-501, 26-502 and 26-520 of the administrative code of the city of New York, section 17 of chapter 576 of the laws of 1974 and subdivision 2 of section 1 of chapter 274 of the laws of 1946 constituting the emergency housing rent control law, and section 10 of chapter 555 of of the laws of 1982,amending the general business law and the administrative code of the city of new york relating to conversions of residential property to cooperative or condominium ownership in the city of New York as such laws are continued by chapter 93 of the laws of 2011 and as such sections are amended from time to time.

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The Property Tax in New York State

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Condition Report

Prepared for the Education Finance Research Consortium

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Figures

Executive Summary

The property tax burden in New York State increased from 1993 through 2006, whether measured in inflation-adjusted dollars or in taxes paid as a proportion of property values. Total levies for school districts, including New York City, rose from $12.1 billion to $22.4 billion during the period. After accounting for inflation as measured by the Consumer Price Index, property tax collections by school districts rose 31.8 percent, while student enrollment increased by 4.8 percent for the period.[1] After adjusting for both enrollment and inflation, property taxes rose by one-quarter, or 25.7 percent. At the same time, state aid to school districts increased by 35.7 percent; and total school expenditures by 39.3 percent, both adjusted for inflation and enrollment increases. The overall average effective property tax rate for schools rose by roughly 13.7 percent from 1993 to 2005, from $13.98 per $1,000 of value to $15.89.

These broad changes in the distribution of overall property tax burdens occurred during the study period:

- Among property classes, the proportion of taxes paid by residential property owners rose from 51.1 percent to 58.5 percent, while the proportion paid by commercial and industrial property owners declined.
- Effective tax rates (tax levies as a proportion of property values) rose in 77 percent of school districts, while declining in 23 percent. The average effective property tax rate rose sharply in Upstate school districts, while effective rates dropped significantly on Long Island and in the Westchester-Rockland region. The difference among regions was driven primarily by property values, which more than doubled in the Long Island and Westchester-Rockland regions while rising by smaller proportions in Upstate districts. Expenditures and tax levies rose by well over the rate of inflation in all regions.
- Statewide, average effective tax rates rose for both residential and commercial properties, the two largest property classes. The statewide increase in overall average property tax rates, and the statewide increase in average tax rates for residential property, were driven by especially large increases in New York City, where taxable values rose but were outpaced by increases in spending and tax levies. The effective school property tax rate on residential property in New York City rose by two-thirds, although the city's average residential effective rate in 2005 was still lower than rates outside the city.
- Outside New York City, overall average tax rates and tax rates on residential property rose during the mid- and late 1990s but then declined to around their 1993 level by 2005. Average effective

[1] Enrollment figures are based on NYS Education Department's Duplicated Combined Adjusted Average Daily Membership or DCAADM, which is based on the number of students receiving their educational program at district expense. For more information, please see http://www.oms.nysed.gov/faru/Profiles/18th/revisedAppendix.html.

tax rates on commercial property rose modestly outside New York City over the period, and rose sharply within the city, contributing to a significant average increase in commercial property tax rates statewide.

- Overall, the school property tax in New York became more regressive from 1993 to 2005, as indicated by effective property tax rates. Effective tax rates in poorer school districts rose relative to income over the period, while those in higher-income districts generally declined in relation to income. Conversely, overall tax collections in the highest-income districts increased by more than twice the rate of increase in the lowest-income school districts, in part because property values in higher-income districts rose rapidly.
- Property taxes generated, on average, only 18 percent of total revenue among the Big Four urban school districts, and 23 percent in high-need rural districts, in 2006-07. The Big Four districts saw large declines in combined wealth ratio compared to most other districts statewide. Property values for the school districts in Buffalo and Rochester declined by nearly 15 percent from 1993 to 2005, while the effective tax rates increased by over 30 percent.
- In 2006, according to the Census Bureau's American Community Survey (ACS) data, median property taxes as a proportion of household income were highest on Long Island, at 7.2 percent compared to a statewide average of 4.6 percent. The ACS data confirm the picture of a somewhat regressive property tax distribution, with lower-income households paying a relatively higher level of income in property taxes than higher-income households.

Property taxes in New York are imposed not only by school districts, but by counties, cities, towns, villages and fire districts as well. School districts represent the largest share of overall property tax collections, and raised total tax levies by 92 percent over the study period, more than twice the average increase for other taxing jurisdictions. Outside of New York City, school districts were responsible for 71 percent of the total increase in property tax collections from 1993 to 2005. Because of the Education Finance Research Consortium's particular interest in school finance, this report focuses primarily on property taxes collected by school districts.

Among the six Need Resource Categories of school districts established by the state Education Department, effective school property tax rates rose most noticeably during the study period in New York City and among high-need rural districts. As of 2005, average effective tax rates among the six NRC categories were clustered in two groups. The Big Four city school districts, and Low-Need districts, both had overall effective tax rates around 1.3 percent of value. New York City, and districts in the NRC categories of High Need Rural, High Need Urban/Suburban, and Average Need all had effective property tax rates around 1.7 to 1.8 percent. Such ratios can add up to substantial differences in tax bills – an effective tax rate of 1.8 percent on a $100,000 home would represent $500 more in annual taxes than a 1.3 percent effective rate.

While effective tax rates on property owners rose during the period, the property tax's share of overall school funding declined slightly (to characterize this observation another way, overall expenditures and revenues rose more rapidly than effective property tax rates). Such comparisons are complicated because the state's School Tax Relief (STAR) program was created in the middle of the study period, and STAR revenues to districts are difficult to classify purely as either state aid or property-tax equivalents. Throughout this report, unless otherwise noted, references to property tax revenues do not include STAR payments to school districts and homeowners. Setting STAR revenue aside, property taxes declined from 51.9 percent of total school revenues in 1993-94 to 45.4 percent in 2006-07.

I. Overview

Locally imposed property taxes represent a key funding source for local governments and school districts in New York State. (Unlike some states such as California and Washington, New York does not have a state-level real property tax.) Across the state, property taxes provided 29.9 percent of total revenues for schools, counties, cities (including New York City), towns, villages and fire districts in 2005. At $37.2 billion, property tax revenues collected by school districts and other local governments were nearly equal to combined revenues from federal and state grants, and far surpassed other individual revenue sources, according to data from the Office of the State Comptroller (OSC).[2] School districts collect the largest share of property taxes, $15.5 billion outside New York City in 2005, according to OSC data. (Appendix A shows property tax collections by major classes of local governments.) Including property tax revenues for the New York City School District brings the school total to $23.1 billion, or 62 percent of all property taxes in the state that year.[3]

This paper reports on research and analysis of trends in the property tax in New York State conducted on behalf of the Education Finance Research Consortium by the Nelson A. Rockefeller Institute of Government, the public-policy research arm of the State University of New York. The study examines both statewide trends and variations in trends among local school districts, as well as the role of the School Tax Relief (STAR) program.

Data Sources

The primary study period is 1993 to 2005, with some additional data from more recent years. The research and analysis of school districts are based primarily on two sources of data – the New York State Education Department's (NYSED's) ST-3 reports on school district revenues, and the New York State Office of Real Property Services (ORPS) data on property values and tax levies. The Education Department's ST-3 data are publicly available through the 2005-06 school year, and department staff provided the Rockefeller Institute with preliminary ST-3 data for the 2006-07 school year. ORPS' data extend as recently as 2005. For analysis of statewide property tax collections by all classes of local governments, and of school district revenues in relation to other local entities, we rely on data from the Office of the State Comptroller; we have placed this analysis in Appendix A to minimize potential confusion among the NYSED, ORPS and OSC data. In addition, the Institute supplemented its analysis with the Census Bureau's 2006 American Community Survey data, for certain analysis of property tax burdens at the individual household level. The Rockefeller Institute expresses its appreciation to staff at the Education Department, Office of Real Property Services, and

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2 See "2007 Annual Report on Local Governments" and "Financial Report on School Districts, Fiscal Years Ended 2005" both published by the Office of the State Comptroller and available at: http://www.osc.state.ny.us/localgov/datanstat/index.htm.

3 The $23.1 billion figure is from the Office of the State Comptroller, while most references in this report rely on data from the New York State Education Department or the Office of Real Property Services.

Department of Taxation and Finance for their assistance. We are grateful to the Education Finance Research Consortium for sponsoring the study.

II. Major developments in property taxes statewide

In New York and elsewhere, the property tax is frequently criticized as excessively burdensome and often inequitable. Currently, Governor Paterson and a gubernatorially appointed Commission on Property Tax Relief are urging enactment of a statutory limit on annual growth in school property tax levies.[4] Some legislators have called for going further by abolishing the property tax outright and replacing such revenue with unspecified new revenues provided by the state.[5]

Supporters of the property tax note that it generates the largest proportion of funding for public schools, and that revenue from the property tax is less volatile than either the second-largest source of education funding – state assistance – or the other two major sources of state and local tax revenue, income and sales taxes. During the period the Rockefeller Institute examined for this report, those two characteristics of the property tax – its role as the most important source of education funding, and the stability of revenue – were clearly in evidence.

From $12.1 billion in the 1993-94 school year, property tax revenues collected by all school districts statewide (including New York City) rose 84 percent in nominal terms, to $22.4 billion, as of 2006-07, according to New York State Education Department data. After accounting for a slight increase in enrollment and for inflation, school property tax levies rose an adjusted 31.8 percent during the period.[6]

Property taxes as a share of overall school revenues

School districts in New York rely primarily on two major sources of revenue – property tax levies and state aid. Federal aid, and local revenue other than property taxes (chiefly sales tax and utility tax revenue), contribute a combined total of roughly 10 percent of overall revenue for school districts. The proportion of total school revenue from state aid tends to fluctuate with the state's fiscal position. From 1993-94 to 2001-02, state assistance rose from 38.7 percent to 41.6 percent of all revenues, according to the Education Department's ST-3 data. In the wake of the September 11, 2001, terrorist attacks and the resulting damage to state revenues, state aid declined sharply as a share of total revenues. The state has provided major increases in aid to schools over the past two years. While available data do not allow calculation of the impact on

[4] The principal investigator for this project, Robert Ward, is a non-voting special adviser to the Commission.
[5] See, for instance. A.4746 by Assemblyman Cahill et al., introduced February 6, 2007.
[6] Inflation adjustments are based on the Consumer Price Index.

overall school revenues for all districts, it appears that districts outside New York City and the Big Four city districts used some of the new state aid to reduce their reliance on property taxes.[7]

The role of STAR

Assessing the contribution that property taxes make to overall school revenues has become more complicated since creation of the state's STAR (School Tax Relief) program for homeowners in 1998. From the 2001-02 school year through 2006-07, STAR represented a consistent 7 percent or so of total revenues to all school districts.

Conceptually, STAR might best be considered as additional state aid to schools, given that the dollars come from the state's broad-based general revenues and are used to offset the costs that local taxpayers bear for public education. Treating STAR this way portrays an important change in the relationship between state assistance and locally generated revenue. Throughout most of the 1990s, property taxes and other local revenue provided more than 50 percent of school funding, while state aid was around 40 percent. In the first year of our study period, 1993-94, property taxes were just below 52 percent of the total, and state aid 38.7 percent – a gap of more than 13 percentage points. In 2006-07, the final year for which we have complete data, Education Department data show property taxes at 45.4 percent and state aid 36.6 percent of total revenue. Assigning STAR dollars to the state-aid portion of revenue in that year shrinks the gap between property taxes and state aid to less than 2 percent. The role of property taxes still exceeds that of state assistance, but not by much. If STAR is considered state aid, then, creation and expansion of the program have significantly increased the state share of overall education costs.

Alternatively, STAR may be considered as property-tax revenue to school districts, rather than state aid. When he initiated the program, Governor Pataki portrayed STAR dollars as direct substitutes or reimbursement for homeowners' property tax payments, a characterization echoed by supporters in the Legislature. Homeowners receive the benefit as a reduction in the tax payments they would otherwise make to their local school districts. As a technical matter, school districts continue to set their overall tax levies just as they have for decades – and they do not subtract STAR dollars from those levies in their official reports, or treat such revenue as state aid. If STAR is viewed as part of the property-tax total, school districts' reliance on property taxes has become even more predominant. Property taxes plus STAR totaled 52.6 percent in 2006-07, fully 16 percentage points more than aid from Albany.

Yet a third method of accounting for STAR – considering it partly state aid, and partly property tax revenue –is also be worth considering, and may be the most useful way to analyze the program. Several

[7] In 2008, some 630 school districts that submit proposed budgets to voters reported to the state Education Department that property tax levies would make up an average 58.5 percent of those districts' total expenditures for 2008-09. That was the lowest proportion among these districts since 2001. These figures are from the Property Tax Report Cards school districts submit to the department before school budget votes each year. Such submittals do not include New York City or the Big Four districts (because residents in those districts do not vote on school budgets), but represent more than 90 percent of tax levies outside the largest five districts.

researchers have concluded that STAR leads to higher school spending and higher property tax rates.[8] If such is the case, STAR should not be regarded as entirely equivalent to state aid for analytical purposes. While increased state assistance may lead to higher spending, it tends to reduce local tax rates rather than increase them. From the perspective of local school officials, the main practical impact of STAR is that it reduces the cost of education for local homeowners, and thus likely increases voter support for any given increase in school spending. Given these characteristics, it may be worthwhile to "label" as state aid that proportion of STAR funding that reduces local costs, and to classify as property taxes the proportion of STAR that is consumed by otherwise unexpected increases in local tax levies and spending. Eom, Duncombe and Yinger find that "extra" tax increases stimulated by STAR offset some 40 percent of savings the program is intended to provide local taxpayers. If we consider 40 percent of STAR dollars as increases in local property taxes, that would add roughly $1.4 billion to the Education Department's count of total property tax collections in 2006-07—and raise the property tax proportion of overall school revenues to 48.3 percent. With the remaining 60 percent of STAR considered as state aid, the state assistance share of overall school revenues would total 40.9 percent.

Thinking about STAR's role in school finance in different ways may influence the way it is treated in public policy discussions. Concerns over both rising property taxes and inequity of resources among school districts have prompted many advocates to call for increasing the state's share of overall education funding, or to move away from reliance on the property tax toward the more progressive income tax, or both. In that context, the three alternative approaches to analyzing STAR that are outlined above lead to significantly different estimates of Albany's contribution to school budgets. That share in 2006-07 was 36.6 percent if STAR is treated as the equivalent of property tax revenue; 40.9 percent if 60 percent of STAR is treated as state aid and the remainder as property tax; or 43.8 percent if STAR is regarded entirely as state aid. In some recent years, the combination of state aid and STAR dollars has approached half of total school funding.

Table 1: Major Revenue Sources:
Varying Ways To Measure Proportions of Overall School Revenues

	1993-94	**2006-07**
State Aid	38.7%	36.6%
…including all STAR revenue	38.7%	43.8%
Property Taxes	51.9%	45.4%
…including all STAR revenue	51.9%	52.6%
STAR	NA	7.2%
State Aid with 60% of STAR revenue	38.7%	40.9%
Property Taxes with 40% of STAR revenue	51.9%	48.3%
Source: ST-3 data; Rockefeller Institute calculations.		

[8] See, for example, "The Unintended Consequences of Property Tax Relief: New York's STAR Program," Tae Ho Eom, William Duncombe and John Yinger, Center for Policy Research, Syracuse University, January 2007. The researchers also found that STAR resulted in small decreases in student performance and efficiency of educational services, while "magnifying existing inequities" in New York's education finance system.

The following figures show two different groupings of revenue, where revenues from the STAR program are treated as state revenue (Figure 1) and as local revenue (Figure 2). If STAR revenues are treated as state revenue, the trends show convergence between state and local revenue until the early 2000's, and a divergent trend after 2002. If the revenues from the STAR program are treated as local revenue, then the convergence and divergence trends between state and local revenue are less pronounced but still observable. In either case, property taxes and other local resources remain the most important source of revenue for school districts.

Figure 1: Revenue Distribution, New York State (STAR treated as State Revenue)

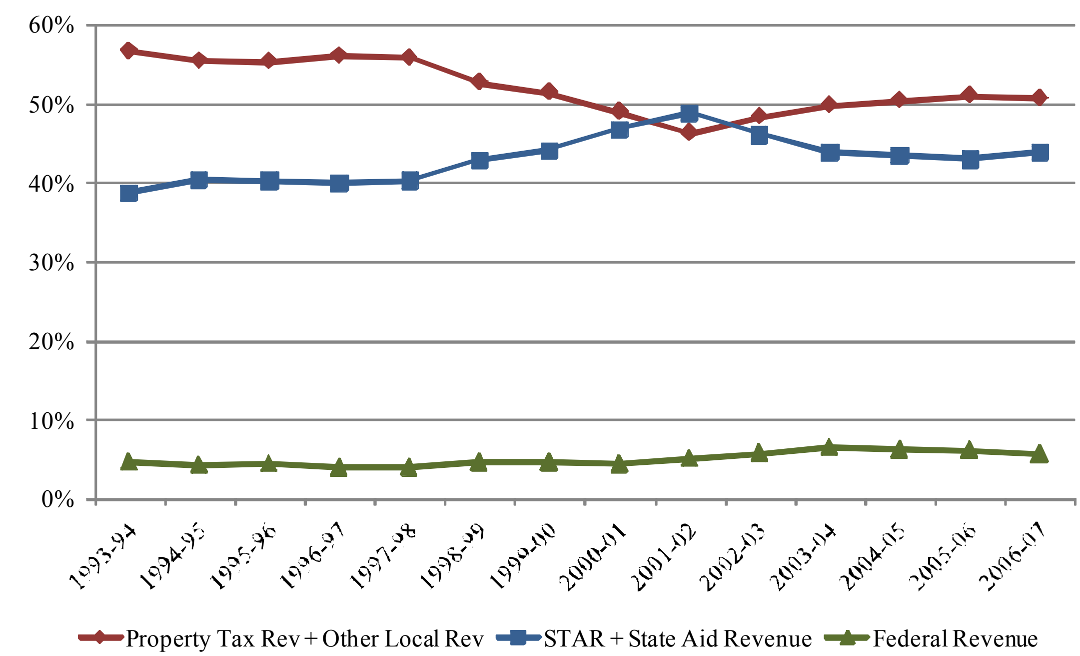
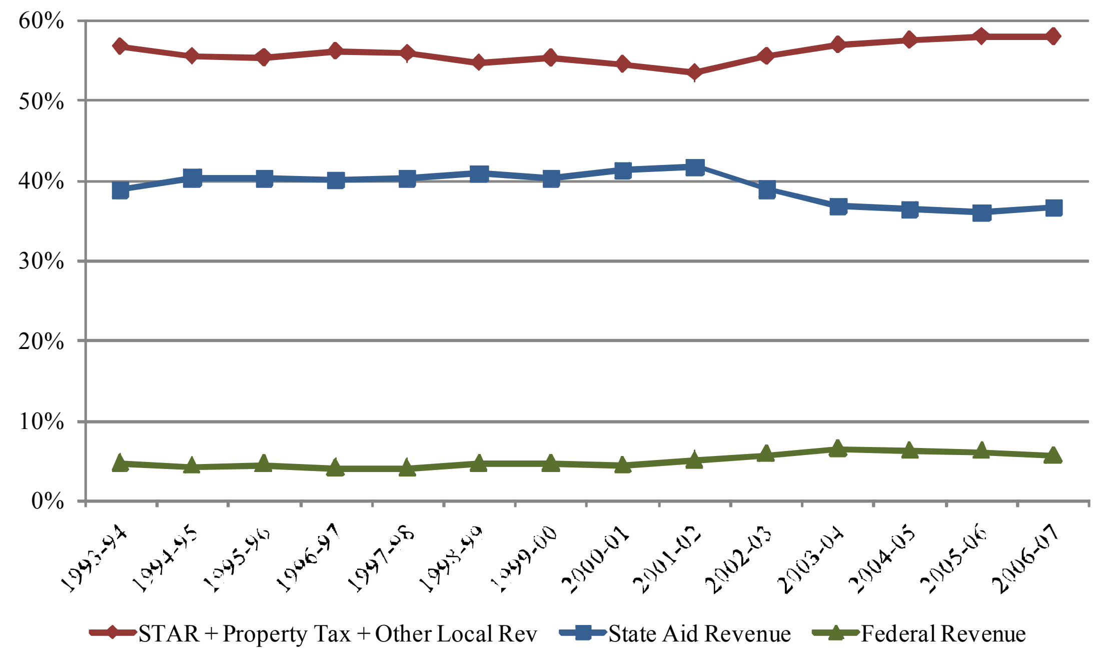


Figure 2: Revenue Distribution, New York State (STAR treated as Local Tax Revenue)



Overall effective property tax rates for schools

Property tax levies reflect the interplay of tax rates and taxable value. While overall taxable property values rose during the study period, school tax levies increased at a faster pace. The result was an increase in overall effective property tax rates.

According to ORPS data, the overall effective property tax rate for school districts statewide in 1993 (tax levies as a proportion of taxable value) was 1.40 percent. As shown in Figure 3, he overall average rate reached a high of 1.72 percent in 2001 before declining to just below 1.6 percent in 2005 – a level roughly 14 percent higher than in 1993.[9]

Figure 4 shows that, measured as a proportion of adjusted gross income (AGI), the average effective property tax rate on residential property fell modestly from the early 1990s to 2001, a period of dramatic income growth driven largely by the boom on Wall Street. After the recession of 2001, this measure of property tax burdens rose again to a level 18.4% higher than the start of the study period as of 2005. The sharp increase in taxes relative to income, starting in 2001-02, results from a dramatic drop in AGI following the 9/11 terrorist attacks and national recession. This measure of tax burden remained relatively high through

[9] For most of the 1990s, ORPS' reported data on property values lagged current values because of poor assessment practices in many localities. Because property values generally rise over time, ORPS' data for most such years understated actual values slightly. Thus, our measures of property burdens are slightly overstated for the earliest years studied, and our measure of long-term increases in property burdens are somewhat understated. ORPS' data reflect actual current values starting in 1999.

2005-06 because residential property tax levies rose at annual rates of 8 to 9 percent, far outpacing income growth for most of the period.

Figure 3: Statewide Effective Property Tax Rate, 1993-2005
Property Tax Levy As a Proportion of Total Value

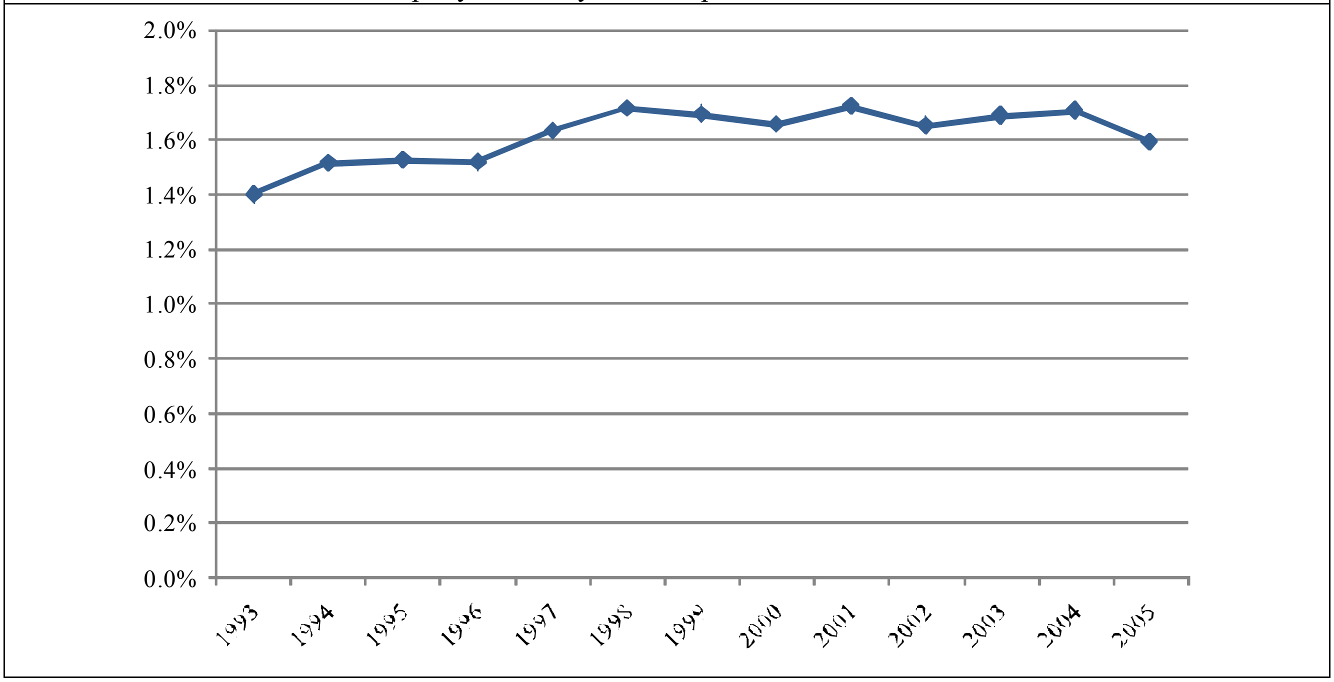
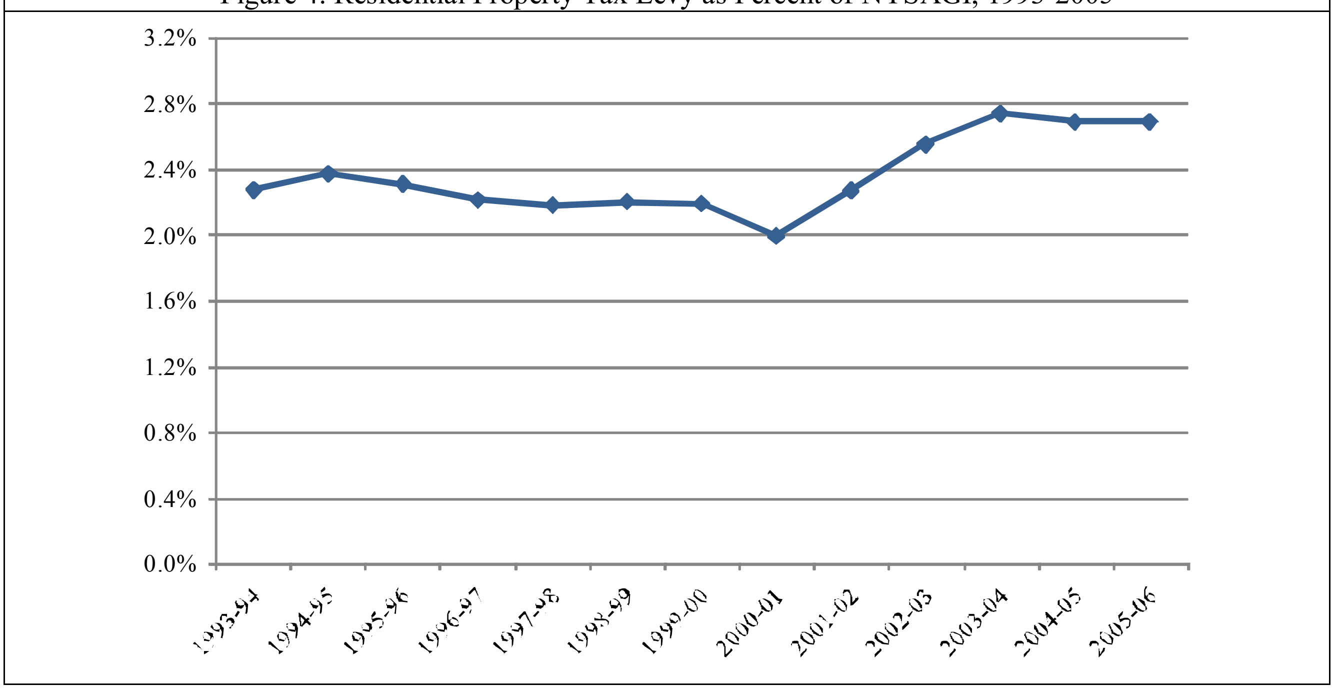


Figure 4: Residential Property Tax Levy as Percent of NYSAGI, 1993-2005



What drove the increases in effective tax rates?

Among the 674 districts for which we have data, 77 percent saw overall effective tax rates (total tax levies as a proportion of total property values) rise over the study period, while effective rates fell in 23 percent of districts. (A similar picture emerges if we analyze residential property taxes only, measuring levies as a share of adjusted gross income.)

To analyze relationships among effective tax rates, revenues and expenditures, we divided all 674 districts outside New York City into quartiles – Quartile One including the 23 percent of districts where effective rates declined; Quartile Two where effective rates rose by up to 20 percent; Quartile Three, where increases ranged from more than 20 percent to 40 percent; and Quartile Four, where increases in effective tax rates were above 40 percent.

Table 2: Factors in Effective Tax Rates, 1993-2005

Quartile	Expenditures	State Aid	Tax Levy	Property Value	Effective Tax Rate
Quartile 1	43.1%	36.3%	95.4%	148.5%	-21.4%
Quartile 2	42.4%	31.4%	100.5%	85.9%	7.9%
Quartile 3	44.0%	25.4%	96.0%	58.0%	24.1%
Quartile 4	29.2%	28.7%	83.5%	23.3%	48.8%

In most districts, the level of spending increases over the period was remarkably similar. In Quartiles One, Two and Three, average per-pupil spending increases (adjusted for inflation) were 43, 42 and 44 percent, respectively. Districts with the largest increases in effective tax rates – those in Quartile Four – tended to have the lowest levels of spending increases during the period, an average of 29 percent after adjusting for inflation and enrollment.

Increases in state aid over time were relatively similar among the groups, ranging from an average 25 percent to 36 percent in adjusted terms. Such aid rose most sharply in those districts where effective tax rates declined, perhaps reflecting wealthier districts' greater ability to spend local resources that would be matched, in part, by state assistance.

Tax levies also rose by fairly similar proportions among the quartiles of districts. School districts with decreases in effective tax rates reported average increases in tax levies of 95 percent, while those with the largest increases in effective rates saw levies rise by 83 percent.

The most striking difference among districts was the change in property values over time. Among districts where effective tax rates declined, property values rose an average 149 percent. Districts in Quartile Two, with relatively low increases in effective tax rates, saw property values rise by 86 percent. Districts with the highest increases in effective tax rates (Quartile Four) reported that property values rose by an average of only 23 percent – an indication that districts with relatively slow growth in their taxable base sought to pay for new spending by imposing heavier additional burdens on local property owners.

In sum, districts in Quartile Four reported the smallest increases in expenditures; increases in state aid that were nearly the average for all districts outside New York City; relatively low increases in total tax levies; relatively high increases in effective tax rates; and property values that grew at less than one-quarter the rate of growth in other districts.

We also analyzed relationships among effective tax rates, revenues and expenditures across school districts in New York City, Long Island, the Westchester-Rockland-Putnam region and Upstate New York. The level of spending increases in real terms over the period was highest in Westchester-Rockland-Putnam at 62 percent and lowest in Upstate New York at 30 percent (see Table 3).

In terms of real state aid trends, New York City saw the largest increases at 65 percent, while Upstate New York had the lowest increases at 26 percent. Increases in tax levies over time were relatively similar among the school districts in different regions, ranging from an average 82 percent in Upstate New York to 107 percent in Westchester-Rockland-Putnam region in real terms. Long Island and Westchester-Rockland-Putnam regions saw the largest declines in effective rates but the largest increases both in tax levies and property values.

Table 3: Factors in Effective Tax Rates, 1993-2005

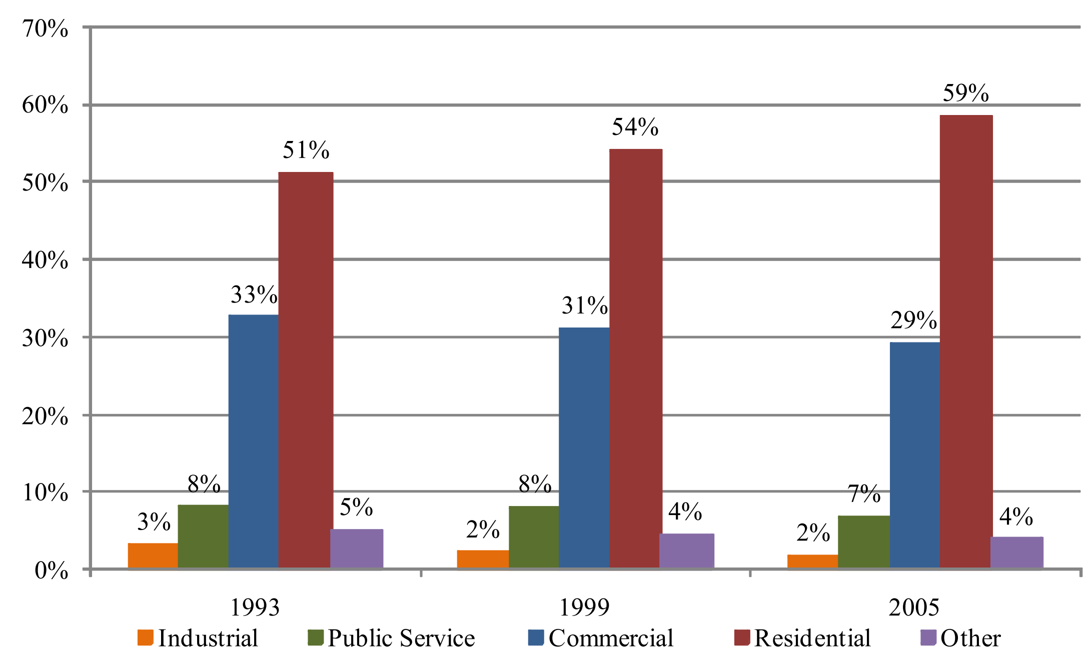
Region	**Real Expenditures**	**Real State Aid**	**Tax Levy**	**Property Value**	**Effective Tax Rate**
New York City	60.4%	65.4%	99.0%	37.0%	45.3%
Long Island	45.5%	40.7%	102.6%	141.0%	-15.9%
WRP	62.3%	55.2%	106.8%	130.6%	-10.3%
Upstate	29.9%	26.1%	82.3%	44.1%	26.5%

Changes in major sources of property tax revenue

Well over 80 percent of all property taxes in New York State are levied on two types of property – residential and commercial. From 1993 to 2005, home values rose and the proportion of total taxes paid by residential property owners jumped from 51.1 to 58.5 percent, according to ORPS data. Taxes on commercial properties fell slightly as a proportion of overall revenues, from 32.6 to just under 30 percent (see Figure 5).

One striking development during the period was the increase in residential property taxes. The total value of residential property in the state doubled, while taxes paid by residential owners rose by 124.2 percent in nominal terms, from $6.2 billion in 1993 to $13.8 billion in 2005. Commercial property values rose by one-third, and taxes levied on those parcels by 75 percent, to a total of $6.9 billion in 2005. (The proportion of increased levy to increased assessment is higher for commercial property because the majority of commercial property value in the state is in New York City, where tax rates on most business properties are significantly higher than those on residential properties.)

Figure 5: Tax Levy Distribution by Property Type, New York State School Districts



After residential and commercial property, the next-largest share of property taxes falls on utility properties – electrical generating plants and power lines, telecommunications lines, railroad tracks and others – which ORPS classifies as "public service." Such property represented 8 percent of taxes in 1993, falling slightly to 7 percent in 2005, despite a 63 percent increase in total property taxes paid. Industrial property declined slightly, as well. Combining commercial, industrial, public service and agriculture and forestry, properties used in various business activities fell from 45.1 percent of the tax levy in 1993 to roughly 38.5 percent in 2005. Other types of property – agricultural, community service (largely government property), recreation, forested lands and vacant lands – make up a small fraction of overall value, some 4 percent in 2005.

Changes in property tax burdens relative to income and property wealth

Measuring changes over time in effective property tax rates relative to taxpayers' income is difficult because of limitations in available data. The two primary data sets used in this report, the state Education Department's ST-3 data on school districts and the Office of Real Property Services' statistics on property parcels, do not allow analysis of incomes at the household level. The Census Bureau's American Community Survey reports both income and property tax payments at the household level, but the Census Bureau cautions against comparing its most recent ACS data with those from earlier years. (We analyzed the 2006 ACS data to provide a recent picture of tax burdens in relation to income and other factors, as discussed below.) In recent months, staff at the New York State Department of Taxation and Finance have worked to allow combination of their data sets on incomes in individual households with ORPS data on property taxes and values at the individual parcel level. Taxation and Finance staff provided useful information to the study team on variations in incomes at the school district level, data that we expect will be useful in future research. For confidentiality and other reasons, it was not possible to use the department's data for analysis at the household level.

To develop a more complete understanding of statewide trends, we examined ST-3 data at the school-district level, segmenting all districts into groups based on income and property wealth. Such analysis shows that effective tax rates rose during the study period in school districts with relatively low average incomes and low property wealth, but declined in districts with the highest levels of income and property wealth.

To analyze effective tax rates relative to income and poverty, we divided all school districts into deciles based on income per pupil, and on property value per pupil (districts were not weighted by size). Effective tax rates rose from 1993 to 2005 in all but the two highest-income deciles, and all but the three highest-property value deciles; in those groups, effective tax rates fell slightly. Differences among the deciles were not very large – Decile 5 in the rankings of districts according to income per pupil had the highest increase in average tax rates, 0.6 percent. Still, there was a clear tendency for tax rates to rise in lower-income and lower-wealth districts, while the opposite was true in wealthier districts.

On the following pages, we show five complementary graphs illustrating the relationships among effective property tax rates, income and wealth.

Figure 6 shows the decline, over time, in effective tax rates among districts with the highest levels of income per pupil and property value per pupil. As mentioned above, effective tax rates in districts with relatively lower incomes and property wealth rose. (At the same time, tax collections in wealthier districts rose at more than twice the rate of those in poorer districts. For example, tax revenues in the top 10 percent of districts ranked by income per pupil rose by 113 percent, while revenues in the lowest ranked 10 percent of districts rose by 48 percent.)

Figure 6: Change in School Districts' Effective Tax Rates, 1993-2005, by Wealth Groups
Deciles of School Districts Ranked by Income and Property Value Per Pupil

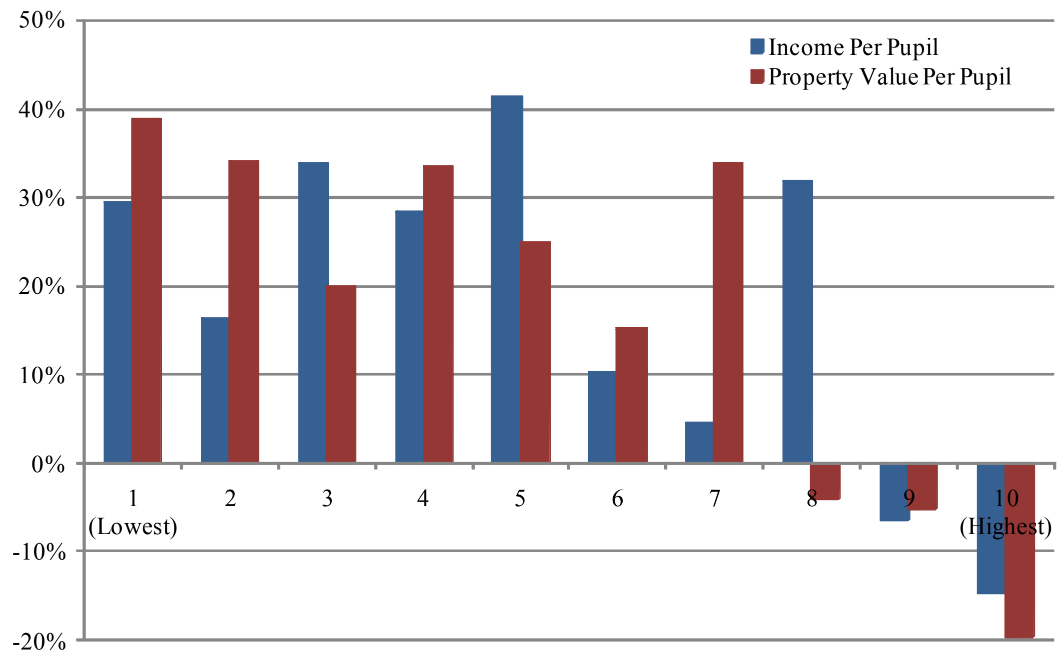
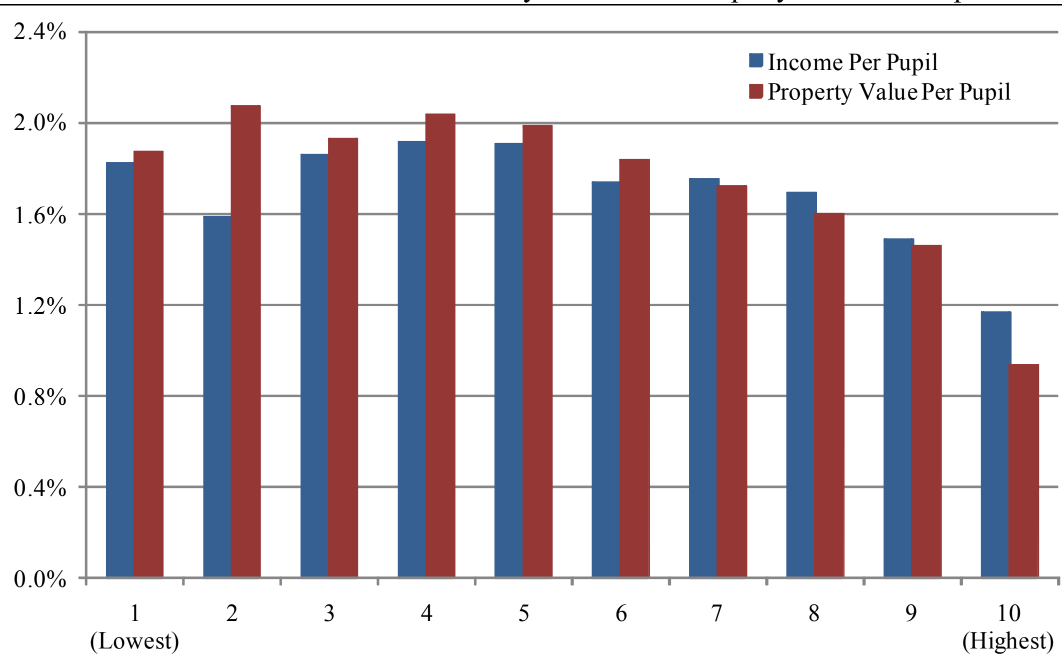


Figure 7 presents effective tax rates in 2005 for each decile of school districts, based on income and property value per pupil. By both measures, average tax burdens are significantly lower in districts with the highest levels of resources, while tax burdens in the second-highest decile are also lower than those in most districts.

Figure 7: School Districts' Effective Tax Rates by Wealth Groups, 2005
Deciles of School Districts Ranked by Income and Property Value Per Pupil



The next group of figures, Figure 8 through Figure 10, are scatterplots that illustrate the effective tax rate in all school districts throughout the state -- first relative to income per pupil, then relative to poverty rates and property value per pupil. Districts with higher incomes and higher property values per pupil tend to have relatively lower tax rates, while those with higher poverty rates generally have higher tax burdens.

Figure 8: School Districts' Effective Tax Rate vs. Income Per Pupil, 2005

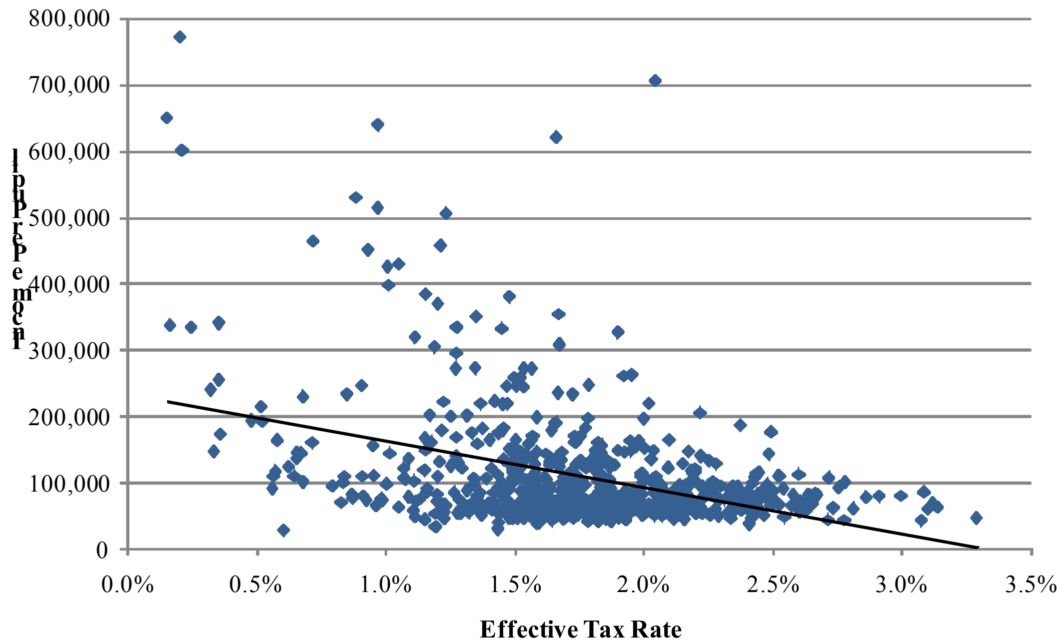


Figure 9: School Districts' Effective Tax Rate vs. Poverty Rate, 2005

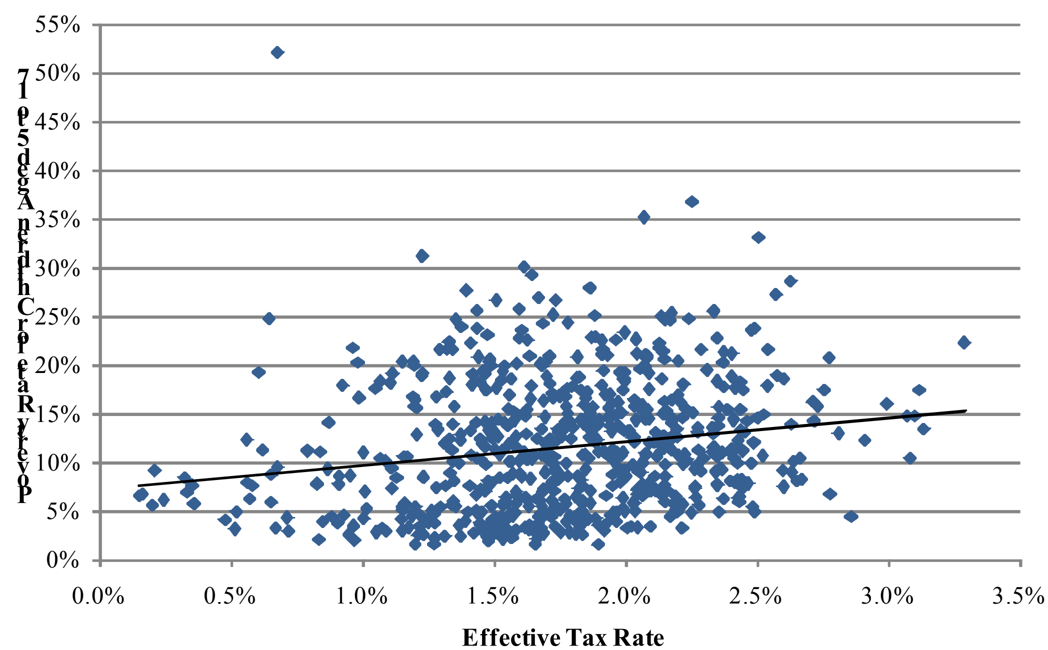
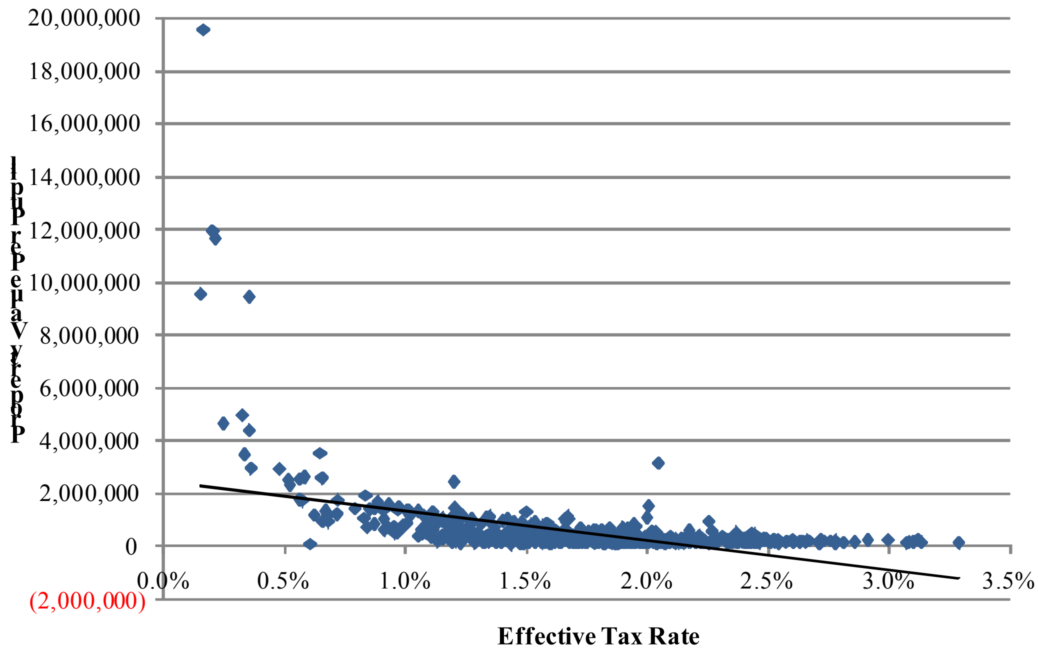


Figure 10: School Districts' Effective Tax Rate vs. Property Value Per Pupil, 2005



The 2005 data illustrated above differ noticeably from the data below, representing the start of our study period. In 1993, higher or lower income per pupil was not particularly associated with higher or lower effective tax rates. Census data for poverty rates at the school-district level are not available for 1993, so we do not attempt such a comparison over time.

Figure 11: School Districts' Effective Tax Rate vs. Income Per Pupil, 1993

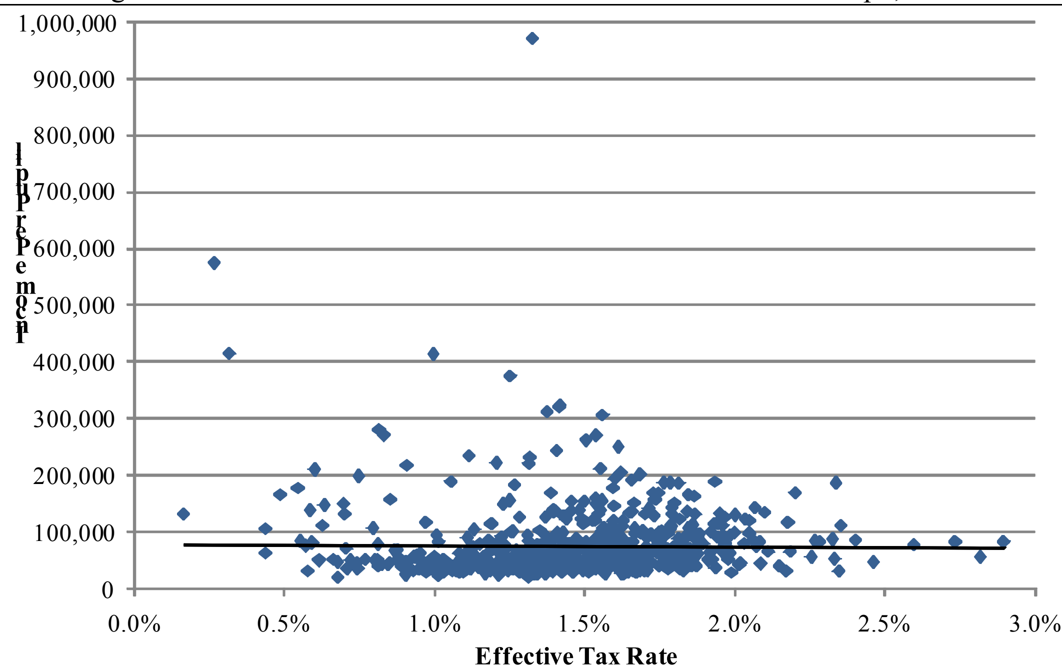
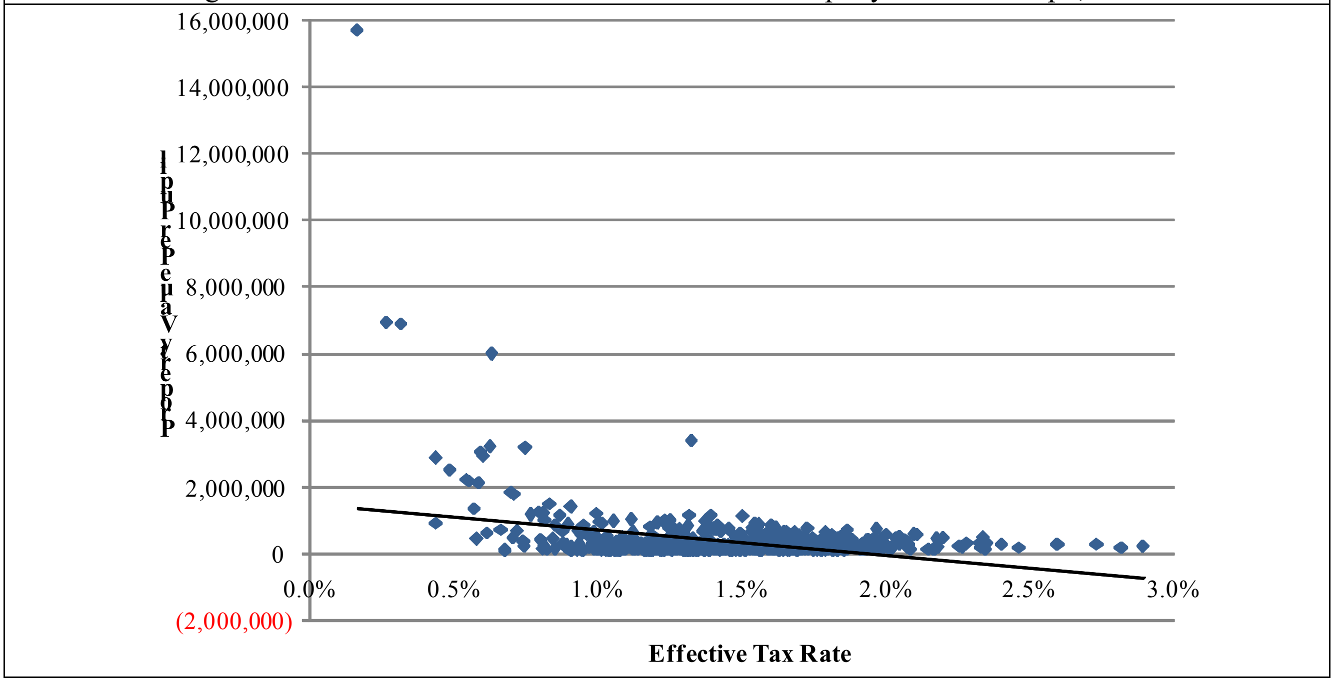


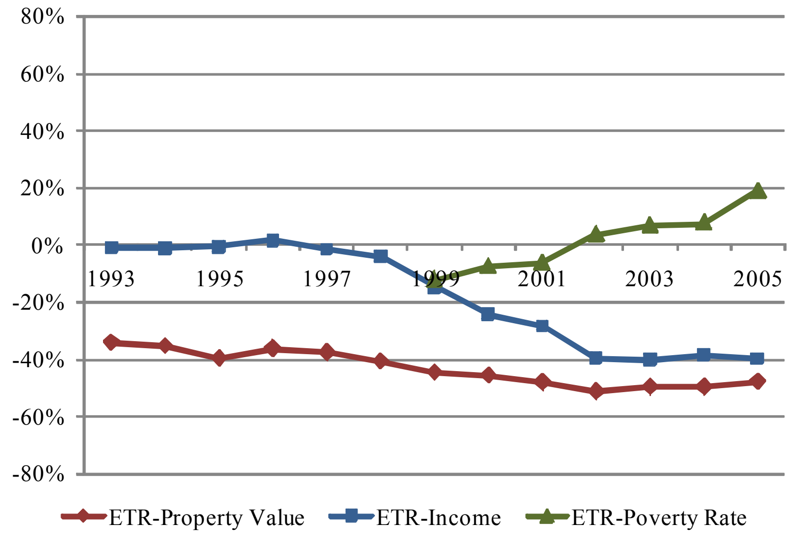
Figure 12: School Districts' Effective Tax Rate vs. Property Value Per Pupil, 1993



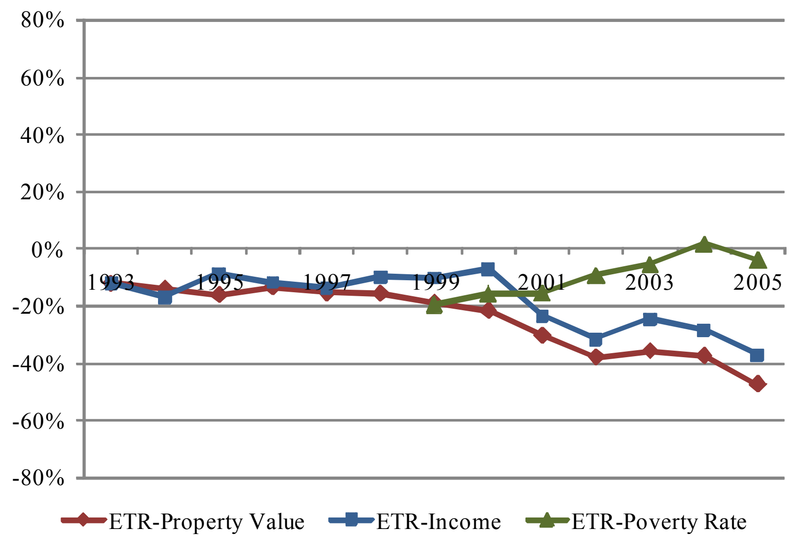
As further illustration of changes over time in the relationship between property tax burdens and economic status, the figures below show trends in correlations between the effective tax rate and three different wealth measures – property value per pupil, income per pupil, and poverty rate for children aged 5 to 17 – for the state as a whole, and for school districts with different need-resource capacity. (Poverty rates are available only from 1999 and later years.) The correlation is calculated based on school district data for each point of time. The blue line rectangles indicates the correlation between effective tax rate and per pupil property value, the red line with diamonds indicates the correlation between effective tax rate and per pupil income, and the green line with triangles indicates the correlation between effective tax rate and poverty rate for children aged 5 to 17.

Figure 13: Correlations between Effective Tax Rate and Wealth Measures, 1993-2005

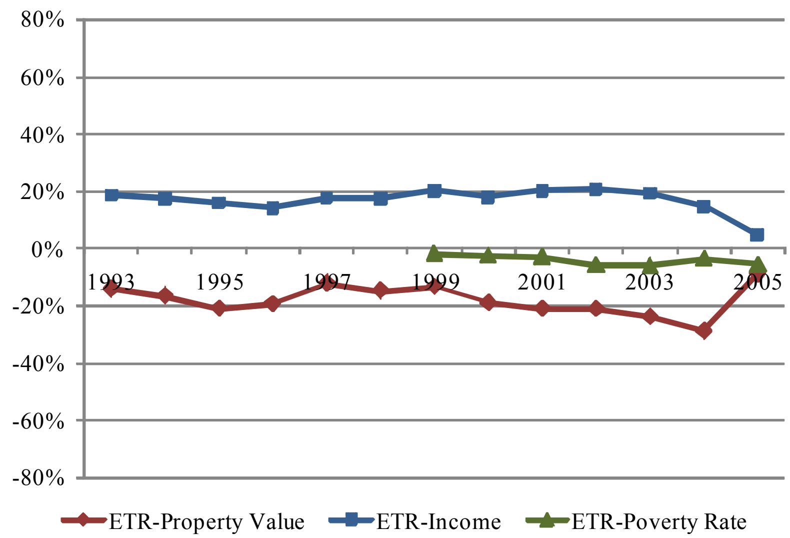
All New York State School Districts



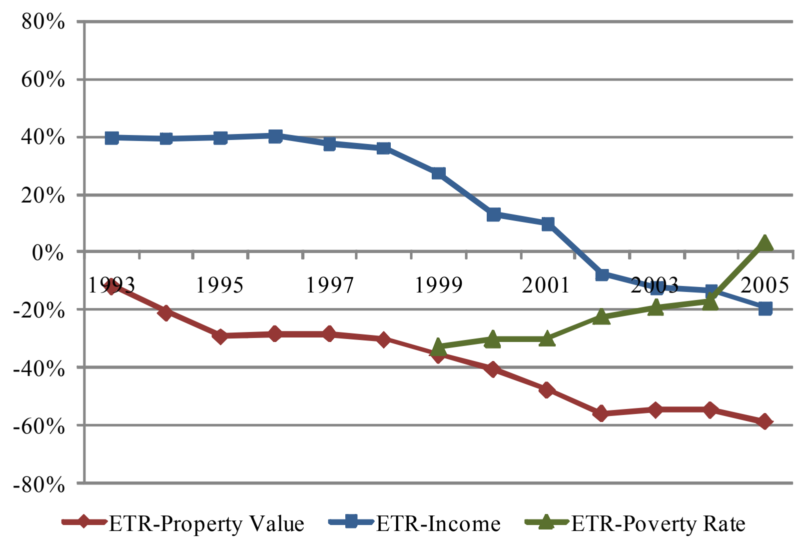
High Need Urban/Suburban School Districts



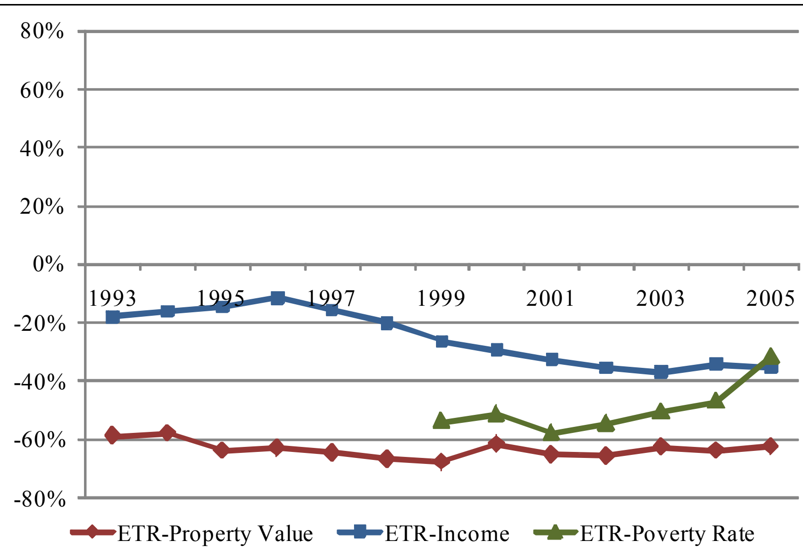
High Need Rural School Districts



Average Need School Districts



Low Need School Districts



In general, there is a negative correlation between effective tax rates and these wealth measures. School districts with higher effective tax rates have lower per pupil income and lower per pupil property value, but higher poverty rates. The gap between effective tax rate and wealth measures has been widening over time, particularly since the late 1990s. This observation holds true for high need urban-suburban, average need and low need school districts. The correlation between effective tax rate and different wealth measures was relatively stable for high need rural school districts.

The above comparisons illustrate that New York's school property tax became more regressive during the study period. School districts with relatively lower income and property value per pupil generally saw significant increases in effective property tax rates, while effective rates in districts with higher incomes and property wealth declined. Observed correlations between effective tax rates, and measures of wealth and income, grew increasingly negative during the period for high need urban-suburban, average need, and low-need school districts.

Further insights emerge from analysis of school districts at the regional level.

III. Major developments among regions and individual districts

School taxes increased at varying rates among regions across the state from 1993-94 through 2006-07. Statewide, after adjusting for inflation, total property tax revenue increased by 32%, state aid to local school districts rose by 42% and total revenue (including STAR, which did not exist at the start of the study period) by 50%. School property tax revenues increased by 45% in New York City in real terms, while the average increase outside the city was 25%. The average effective tax rate rose 45 percent in New York City, and 25 percent Upstate. Long Island and the Westchester-Rockland region saw overall effective tax rates decline, by 16 and 10 percent, respectively.

Statewide, average effective tax rates rose for both residential and commercial properties, the two largest property classes. The statewide increase in overall average property tax rates, and the statewide increase in average tax rates for residential property, were driven by especially large increases in New York City, where market values rose sharply but were outpaced by increases in effective tax rates. The effective school property tax rate on residential property in New York City rose by two-thirds, although the city's average residential effective rate in 2005 was still lower than rates outside the city.

For all districts outside New York City, overall average tax rates and tax rates on residential property rose during the mid- and late 1990s but then declined to around their 1993 level by 2005. (There were important variations among districts outside New York, as detailed below.) Average effective tax rates on commercial property rose modestly outside New York City over the period, and rose sharply within the city, contributing to a significant average increase statewide.

The map in Figure 14 shows the change in school property tax revenues, in real terms from 1993-94 to 2006-07. Property taxes declined (after adjusting for inflation) in many western and northern New York districts, while rising in the eastern and southern parts of the state.

Figure 14: Change in School Property Tax Revenues (Inflation Adjusted), 1993-94 to 2006-07

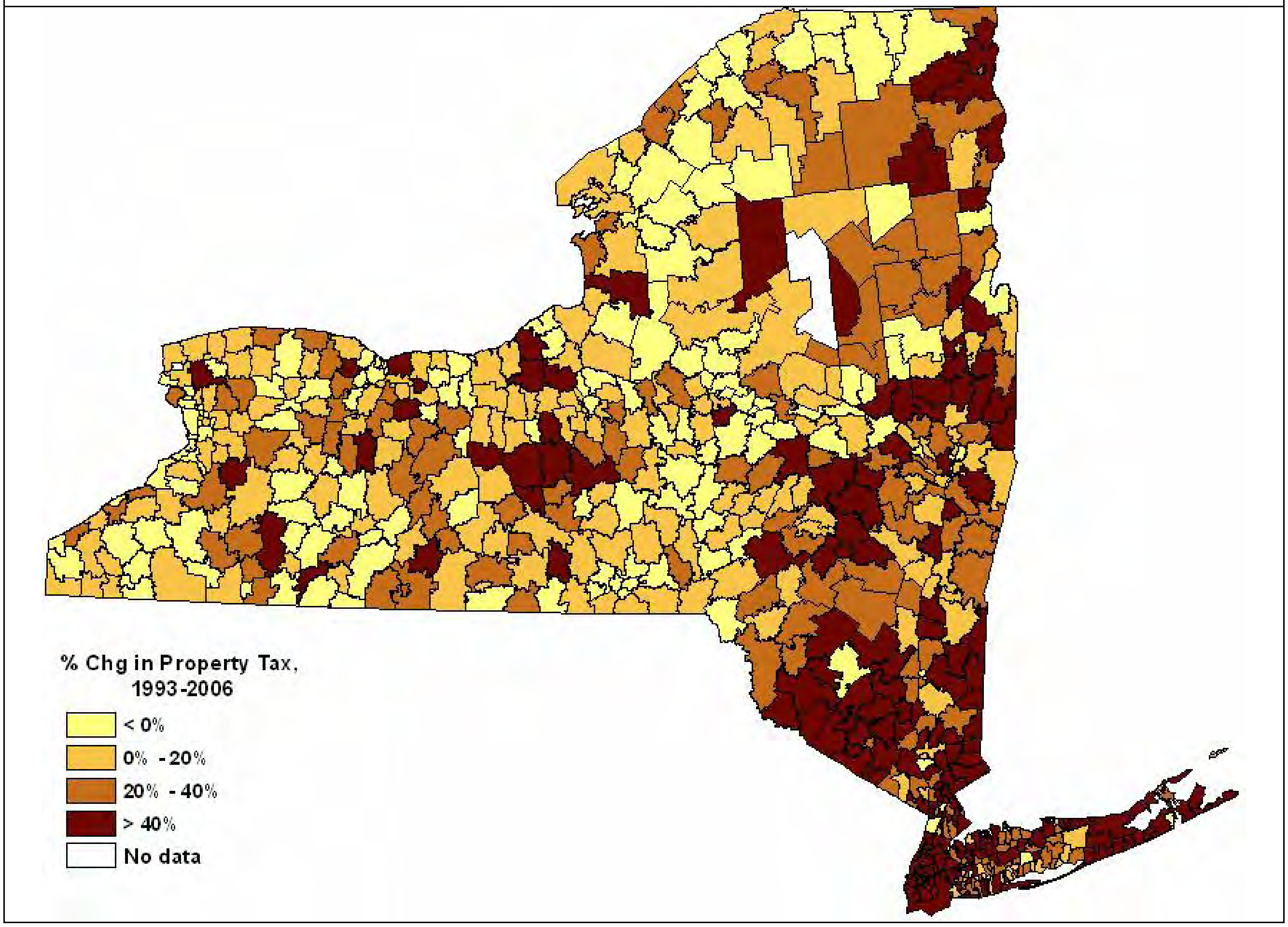


Figure 15 and Figure 16 below show the revenue distribution among all school districts, classified by the Education Department's need resource capacities, for school years 1993-94 and 2006-07. In school year 1993-94, school districts in High Need Rural areas and in the Big Four cities – Buffalo, Rochester, Syracuse, and Yonkers – had the lowest proportion of revenue from property taxes at 28 and 29 percent, respectively. At the same time, they had the highest share of revenue from state aid, at 65 and 54 percent respectively. By 2006-07, property taxes had declined significantly as a share of total revenues in the Big Four districts, falling to only 18% of total revenue. The Big Four districts received nearly two-thirds of total revenue from state aid. That same year, Low Need school districts relied most heavily on property taxes (70% of revenue), and received only 14% of their total resources from state aid.

Figure 15: Revenue Distribution Among School Districts with Various NRC Levels, SY 1993-94

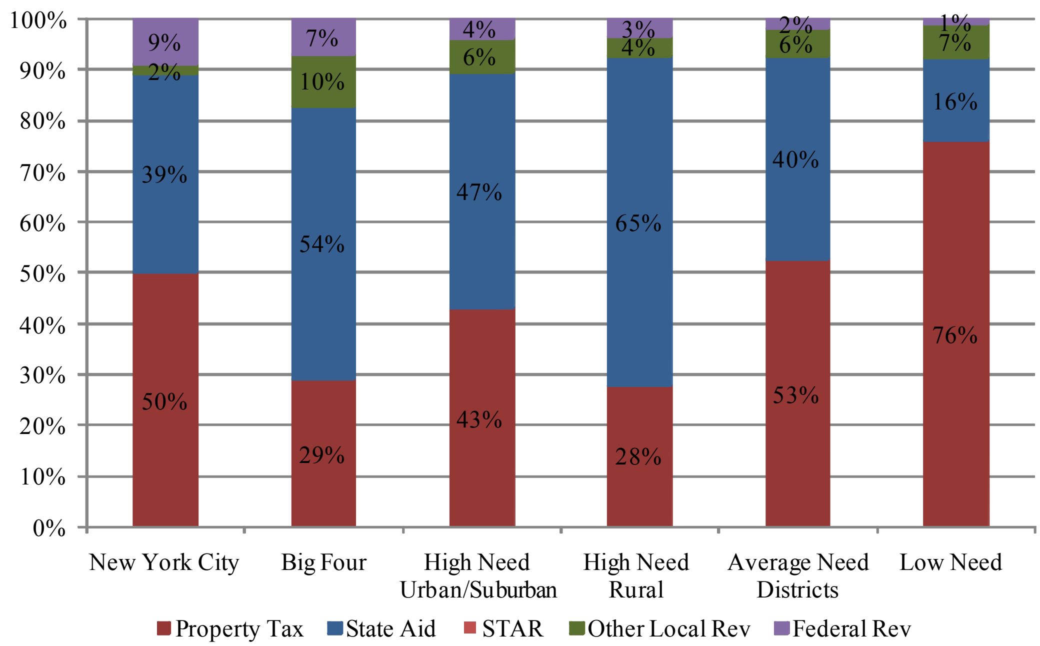
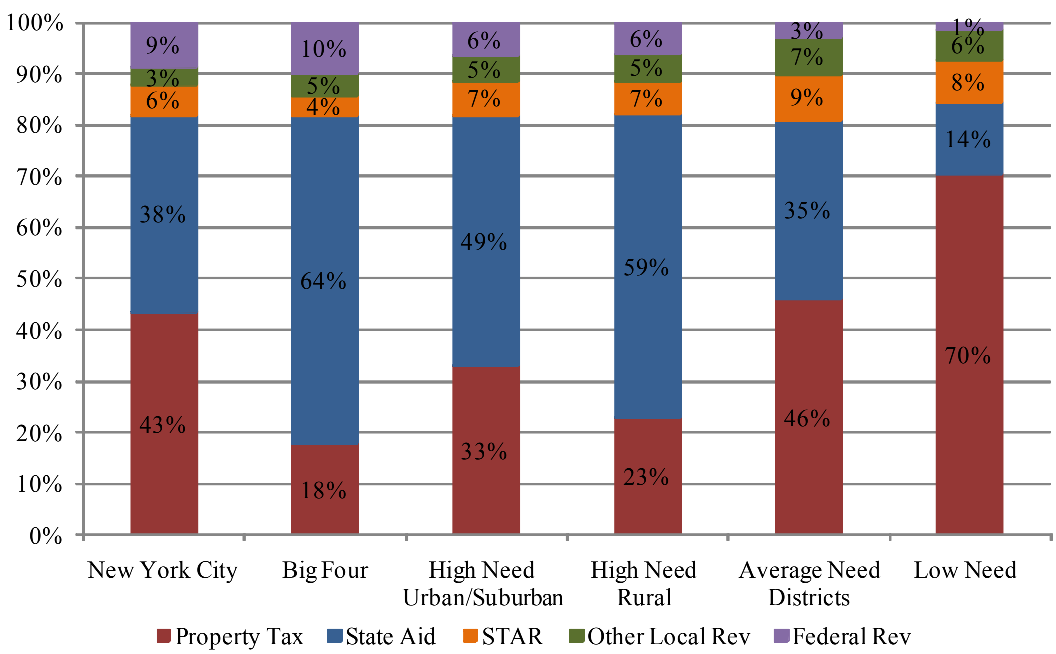


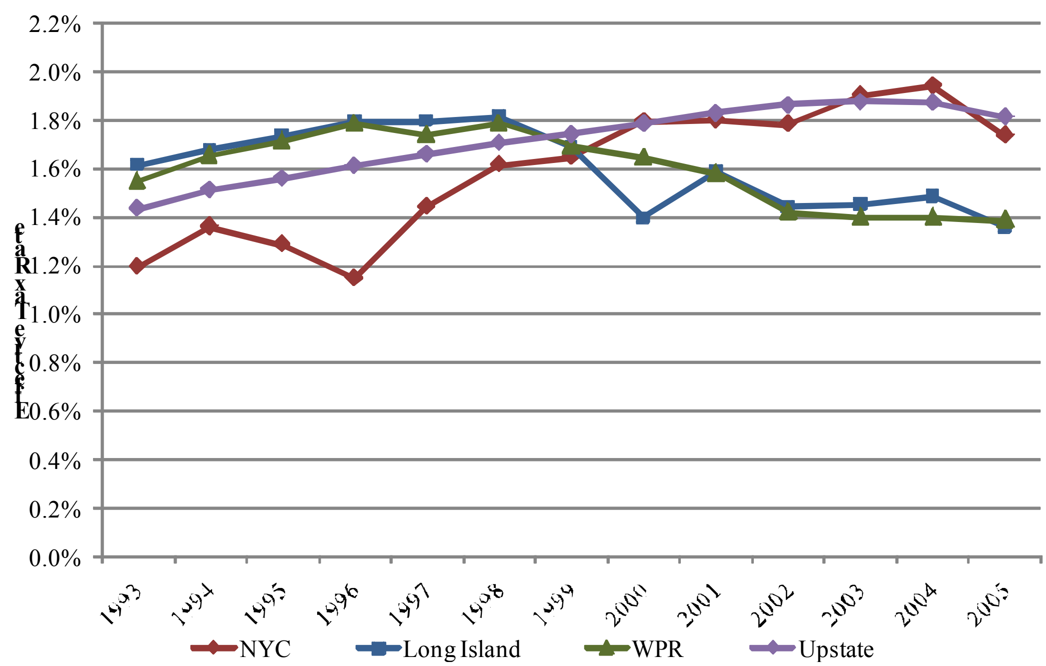
Figure 16: Revenue Distribution Among School Districts with Various NRC Levels, SY 2006-07



Effective property tax rates among school districts

As shown in Figure 17 and Figure 18, effective tax rates rose and fell at varying levels among different regions of the state, and among school districts in the Education Department's need-resource categories. Effective tax rates declined on Long Island and in the suburban counties immediately north of New York City, while increasing in the city and Upstate. In New York City, taxable values for many properties are significantly lower than market values because of state law that limits assessment changes. For example, assessment increases on one-, two- and three-family houses cannot exceed 6 percent in a single year or 20 percent over five years, regardless of market value. Because market values in much of the city rose sharply during the study period, the figures for taxable value used in this study are likely to produce higher effective tax rates than would be found with market values. More detailed analysis of effective tax rates in the city is beyond the scope of the study.

Figure 17: Effective Tax Rate, NYS Regions, 1993-2005



Elsewhere in the state, the effective property tax rate steadily increased in high need rural districts from 1993 to 2005, driven by an 83 percent increase in tax levies while property values rose only 37 percent. By 2005, high need rural districts had the highest effective tax rate among the need-resource categories, at 1.83%. Over the same period, average effective tax rates in low-need districts declined. While tax levies in those districts rose by especially high amounts – an average 111 percent – property values increased even more sharply, by an average 134 percent. High need urban/suburban school districts had the second highest effective tax rate in 2005, at 1.8%, while low need school districts had the lowest effective tax rate at 1.3%.

As a group, the Big Four school districts had the second lowest effective tax rate among need resource categories in 2005 at 1.33 percent, which was virtually unchanged from the effective rate in 1993. The Big Four school districts had the lowest increase in property values and tax levies for the study period compared to school districts with other need and resource capacities. There is a wide variation in trends in property values, tax levies and effectives tax rates among the Big Four school districts. Property values in Yonkers increased significantly at 92 percent, while the tax levies increased by only 31 percent, with the effective tax rates declining by 32 percent from 1993 to 2005. Property values for the school districts in Buffalo and Rochester declined by nearly 15 percent from 1993 to 2005, while the effective tax rates increased by over 30 percent. Syracuse showed the largest increase in effective tax rate among the Big Four districts at 99 percent, reflecting more than a doubling of its tax levy and a modest increase in property values.

Figure 18: Effective Tax Rate by Need and Resource Category, 1993-2005

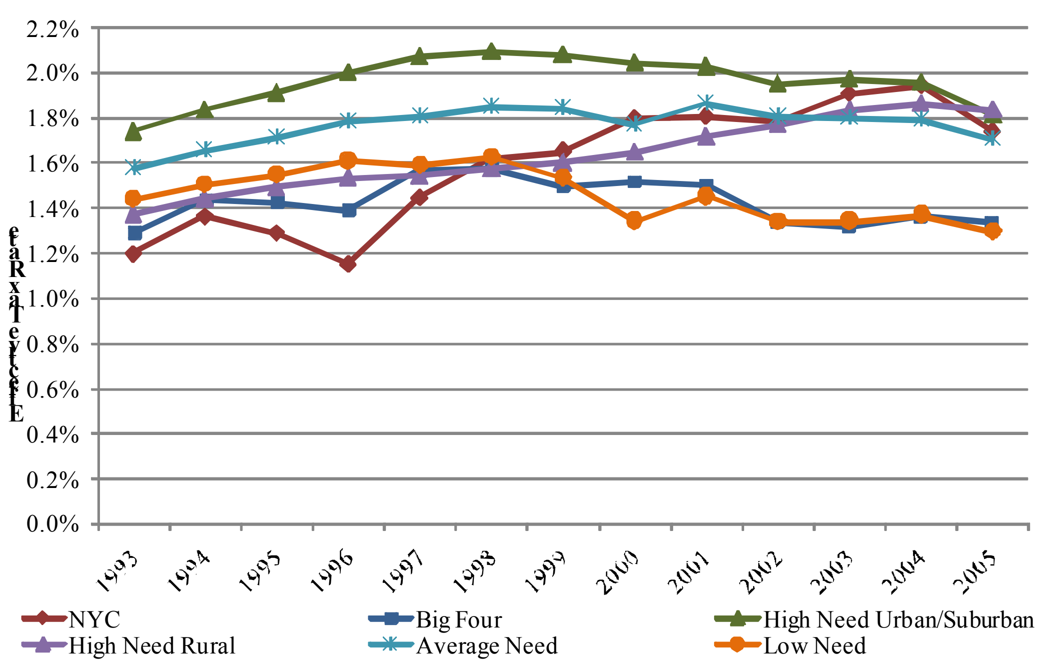
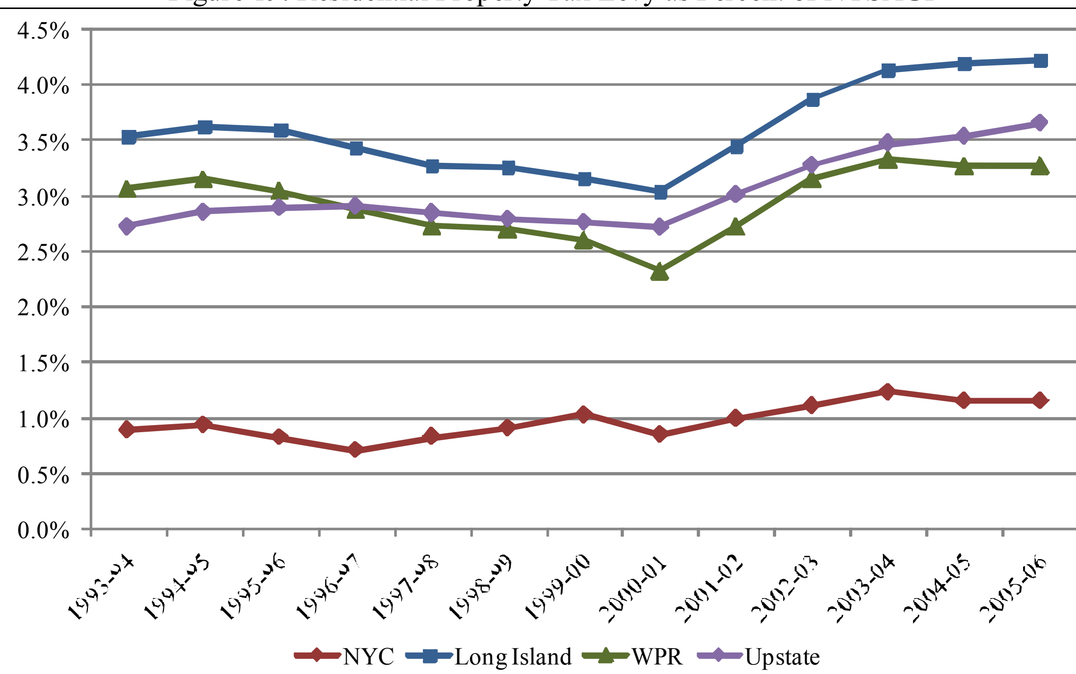


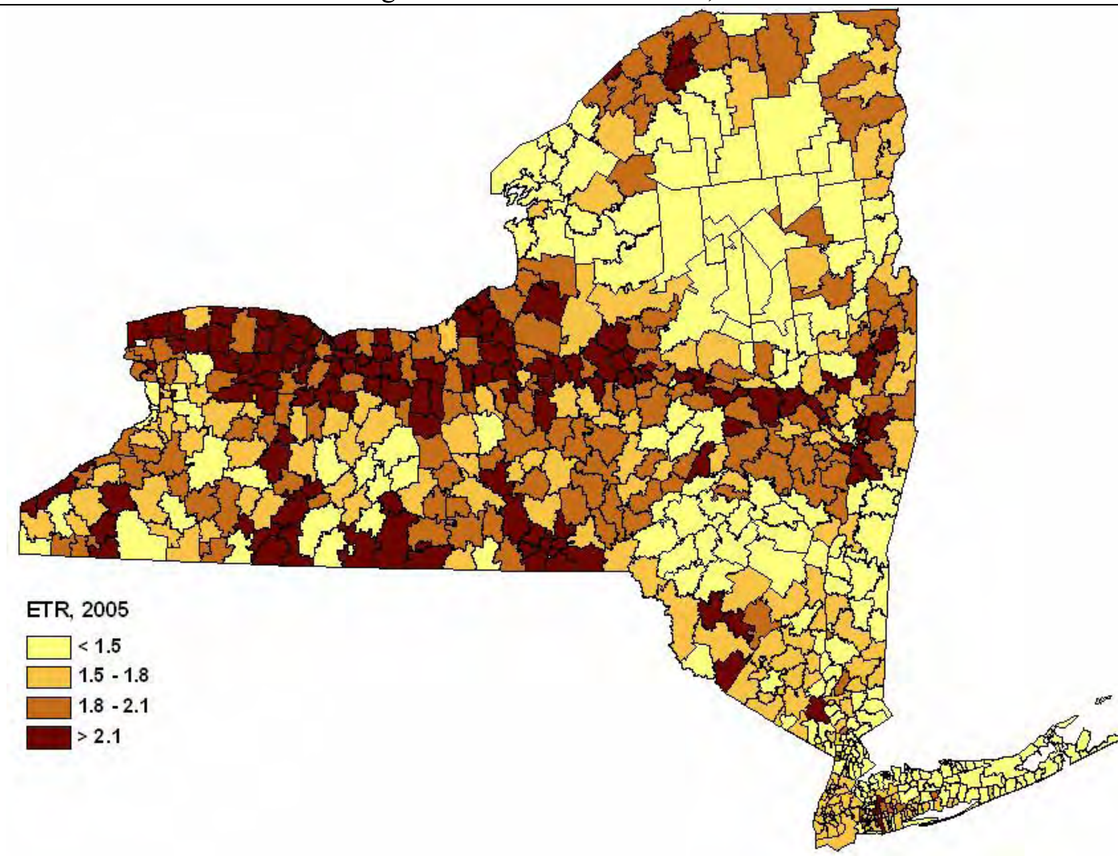
Figure 19: Residential Property Tax Levy as Percent of NYSAGI



As shown in Figure 19, on Long Island, school property taxes represented the equivalent of just over 5 percent of adjusted gross income in 2005, nearly the same level as in 1993. In New York City, its northern suburbs and Upstate, school taxes declined as a share of AGI over the period.

Although property tax revenue has declined as a share of overall revenues in most school districts in western New York, where property values are much lower, those school districts have higher effective property tax rates compared to the school districts in the eastern part of the state (see Figure 20).

Figure 20: Effective Tax Rate, 2005

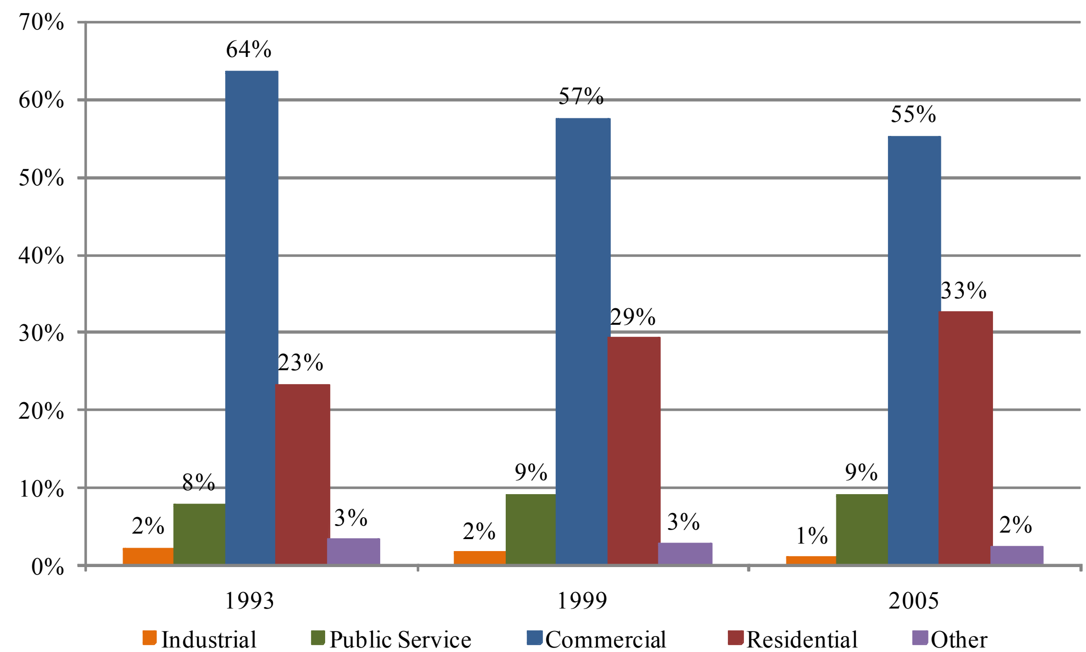


Distribution of property taxes among property classes

In 2005, nearly 90% of all property tax was levied on two classes of property – residential and commercial. The residential share increased by 7%, from 51% in 1993 to 59% in 2005. The share of tax levy for most other property types, including commercial, public service, and industrial properties, declined between the study years, from 1993 to 2005.

The share of property tax levy for different types of property is significantly different in New York City, compared to the rest of the state. New York City relies heavily on property tax from commercial properties, though such reliance has declined over time. In 1993, about 64% of all property tax in the city was collected from commercial properties, while in 2005 it declined to 55%. Tax levies from residential properties made up about 23 percent of all property tax levies in 1993, but 33% in 2005 (see Figure 21).

Figure 21: Tax Levy Distribution by Property Type, New York City School District



A 2006 study by New York City's Independent Budget Office found that the effective property tax rate for all property taxes in the city fell by half, from 2.26 percent to 1.33 percent, from fiscal 1993 to 2007. Total market value of property in the city doubled during the period, but various exemptions and laws restricting increases in assessments limited growth in "billable" value to 46 percent. Total property tax levies rose by \$5.2 billion, or 62 percent, representing a significant share of the statewide increase in overall levies. (These figures represent the city's overall property tax, as the IBO study did not separately analyze taxes collected for school purposes.) Overall effective tax rates for cooperative apartments, condominiums and small apartment buildings dropped most sharply, more than 50 percent each. The effective tax rate on one-, two- and three-family homes fell by 39 percent, and that on most business property (Class 4 under the city's property classification) by an average of 12 percent. The effective tax rate on utility property, on the other hand, rose 30 percent from 1993 to 2007.[10]

As mentioned elsewhere in this report, the effective tax rate for school property taxes in New York City rose during the period, as indicated by the ST-3 reports city education officials submitted to the state Education Department. Unlike most school districts across the state, the city's education budget is included within a municipal budget that also includes significant revenue from income, business and other taxes.

[10] *Twenty-Five Years After S7000A: How Property Tax Burdens Have Shifted in New York City*, New York City Independent Budget Office, December 5, 2006.

In districts outside New York City, the share of all school property taxes that was imposed on commercial properties remained relatively constant over the period, declining slightly from 18% in 1993 to 17% in 2005 (see Figure 22). On the other hand, the property tax levy from residential properties increased by seven percentage points, or more than 10 percent, from 1993 to 2005.

Figure 22: Tax Levy Distribution by Property Type, School Districts Outside NYC

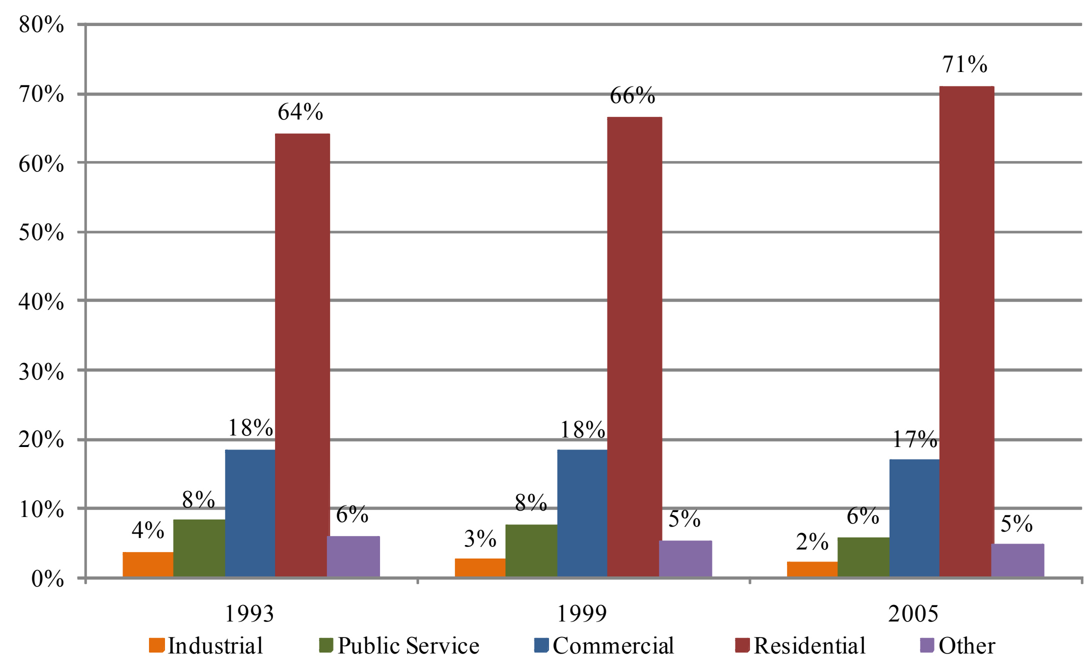
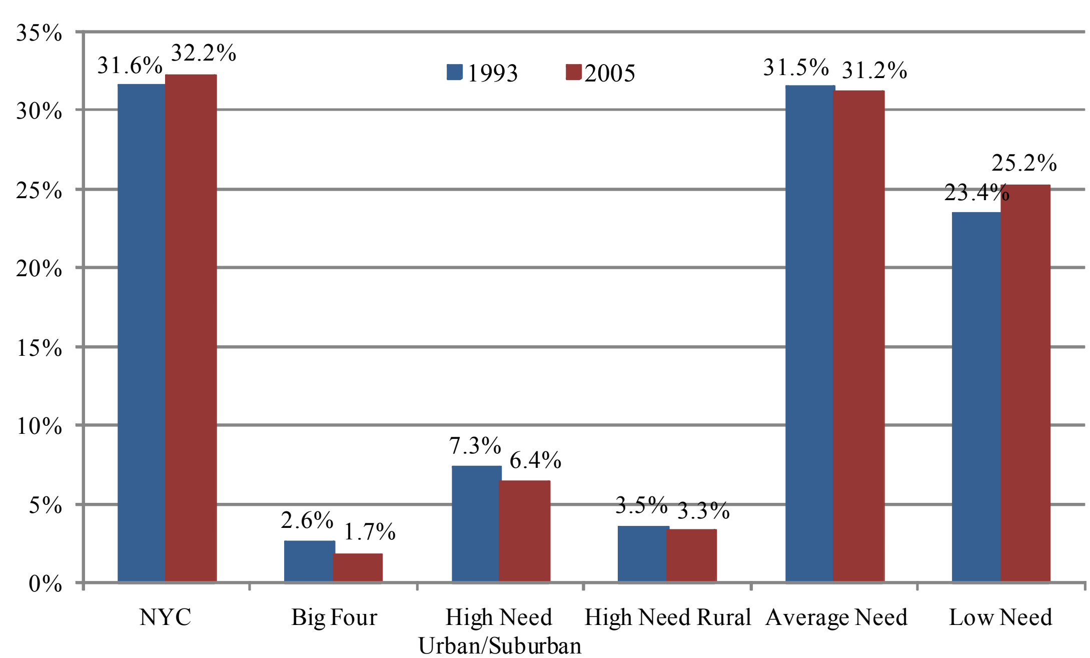


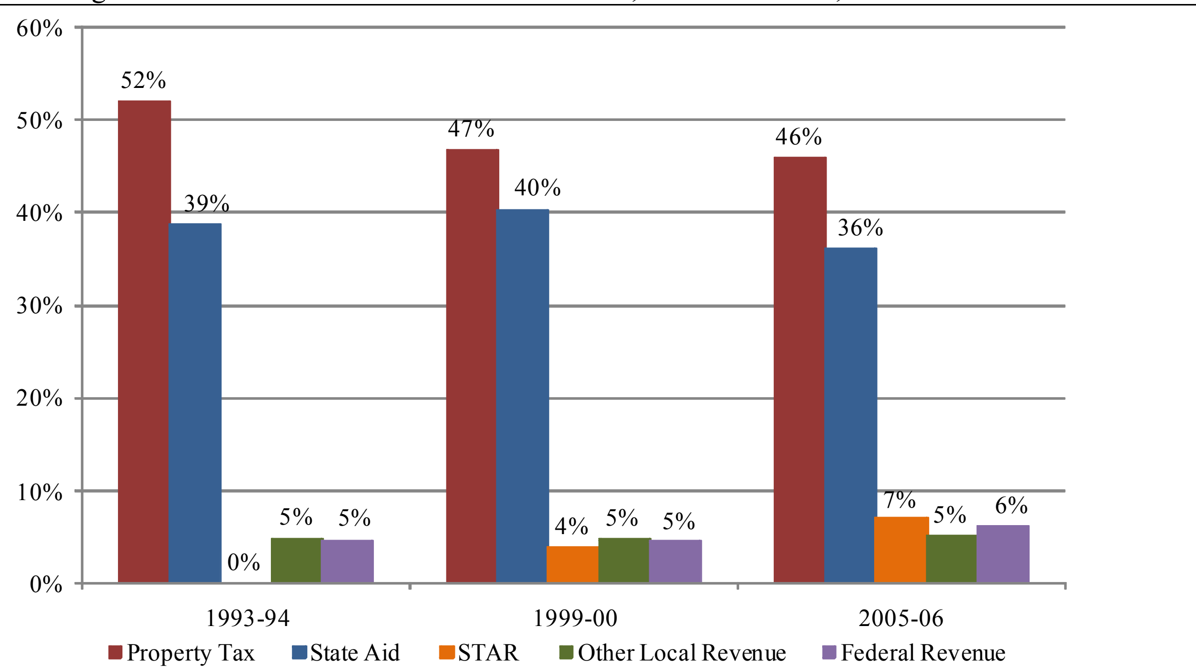
Figure 23: Total School Tax Levy Distribution Across NRC School Districts, 1993 vs 2005



Although effective tax rates have increased among high need rural and high need urban/suburban school districts over time, these school districts combined levy less than 10% of property tax statewide (see Figure 23). However, the high need rural and high urban/suburban districts represent about 30% of all school districts statewide. Nearly one-third of all school property taxes are levied by New York City, and another one-third by districts the Education Department classifies as average need. Low need school districts represent about 20% of all school districts and contribute about 25% of the statewide property tax levy. Such proportions changed little during the study period.

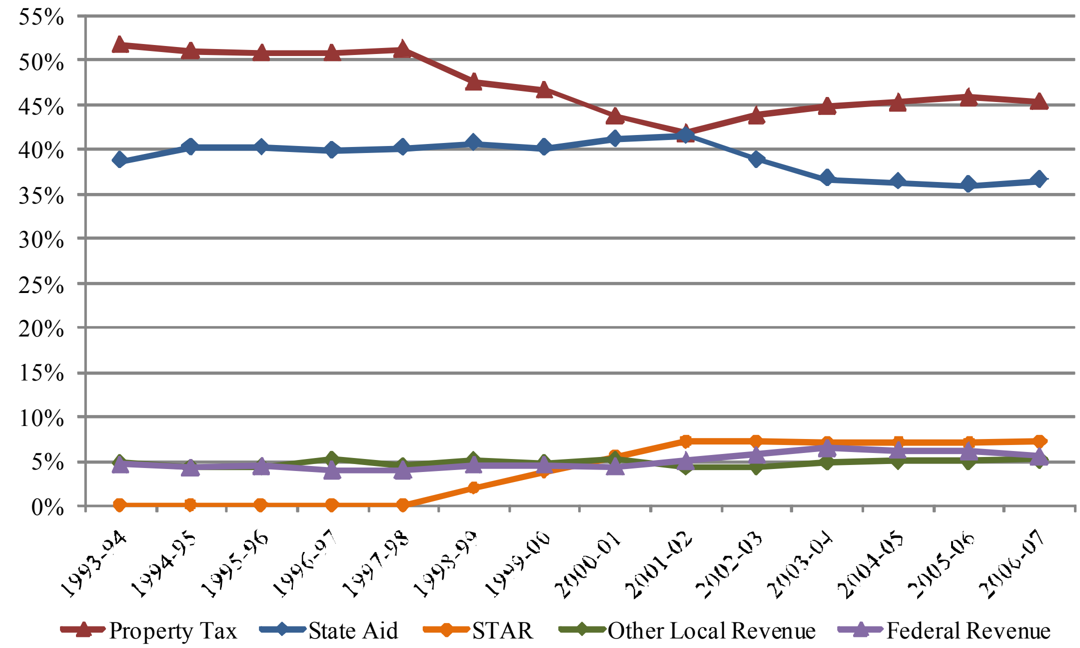
In school year 1993-94, nearly 52% of school district total revenue was raised from property taxes, and another 39% from state aid. Federal revenue and other local revenue made up less than 10% of school districts' total revenue. Both property taxes and state aid as share of total revenue have declined with the introduction of STAR (see Figure 24).

Figure 24: School District Revenue Distribution, New York State, Selected Years



Property taxes as a share of total revenue declined from 1993-94 to 2001-02, while state aid as a share of total revenue increased during that period. Around 2001-02, property taxes and state aid made up roughly equal shares of total revenue. In the years since, the property tax share of overall revenues has risen while the role of state aid has declined (see Figure 25). The share of other local revenue and federal aid has been relatively stable over time. Revenues from STAR have played a stable role in overall revenues since the program was fully implemented in 2001.

Figure 25: Revenue Distribution, New York State, SY 1993-94 - SY 2006-07



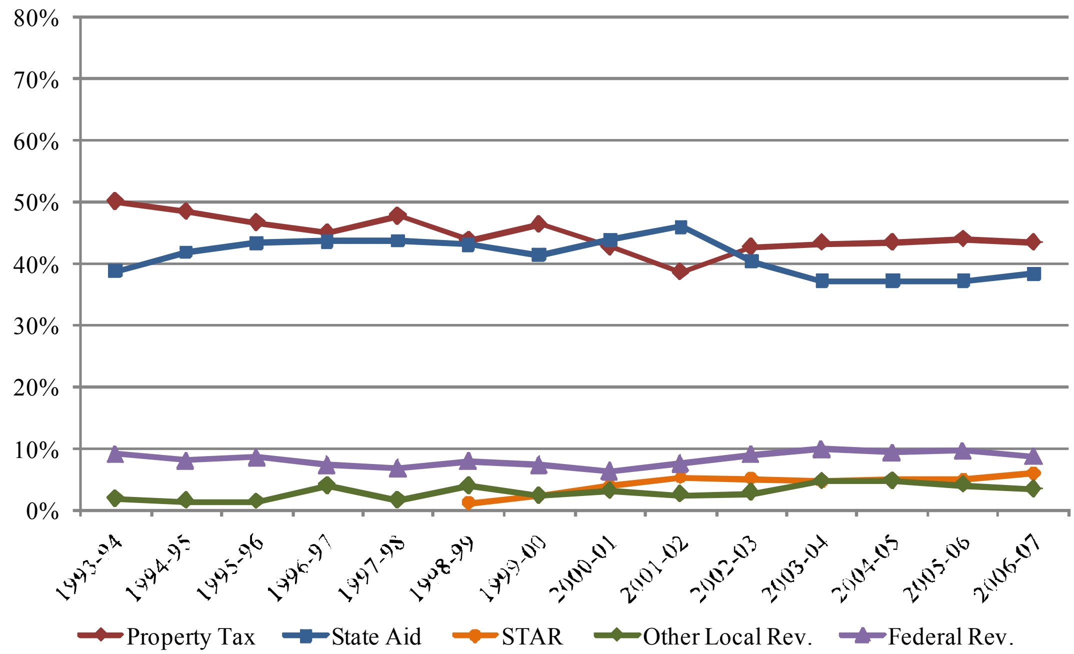
Reliance on different revenue sources, by region

School districts reliance on major sources of revenue varies across different regions of the state. As shown on Figure 26, New York City raises slightly more money from property tax than it receives from state aid. (Fluctuations in such measures for the New York City school district may reflect, at least in part, changes in the city's internal accounting for school revenues relative to those for other municipal programs.)

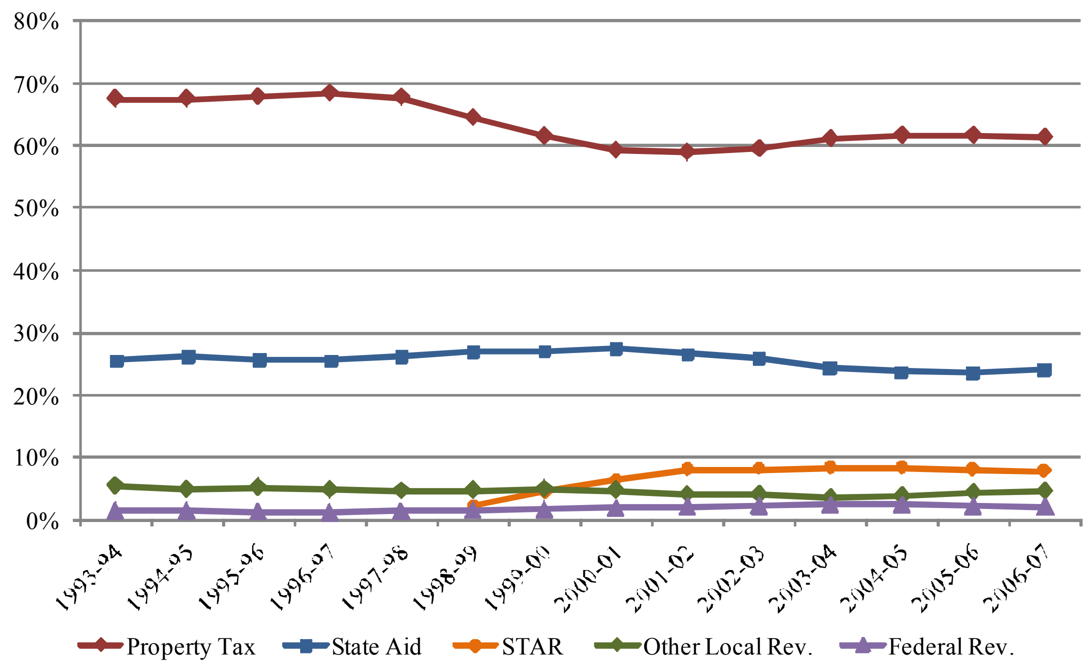
School districts in Long Island and the Westchester-Rockland-Putnam region raise a significantly higher share of revenues from property taxes, while receiving relatively little from state aid, compared to districts elsewhere in the state. Finally, school districts in upstate New York rely far more on from state aid, and raise proportionally less revenue from property taxes, compared to downstate districts. These proportions changed relatively little during the study period.

Figure 26: Revenue Distribution Among NYS Regions

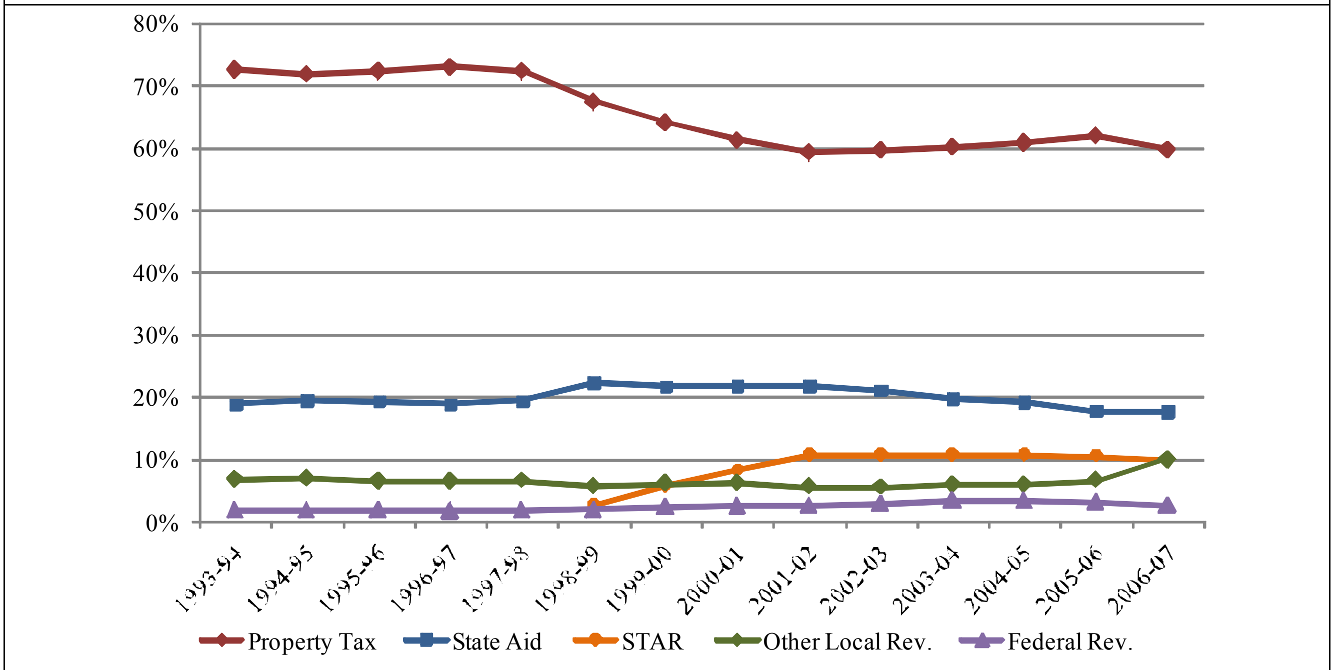
New York City



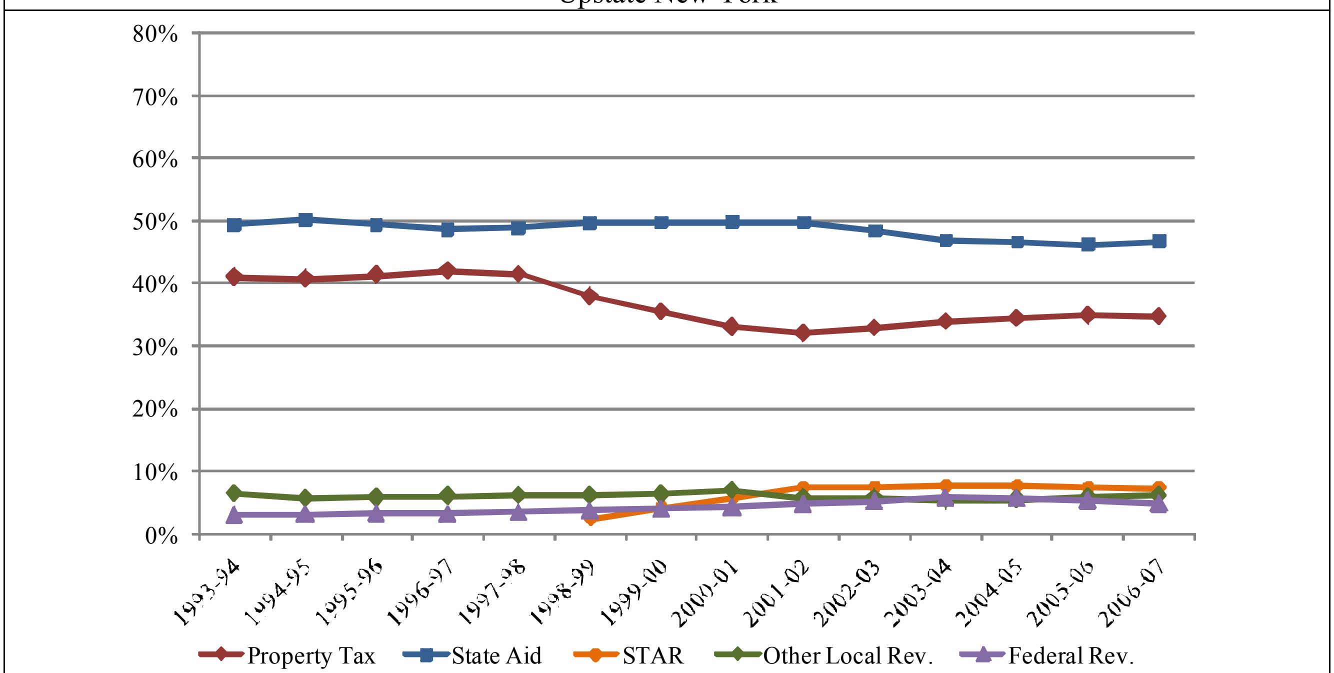
Long Island



Westchester-Rockland-Putnam



Upstate New York



IV. Property tax burdens at the household level: ACS data for 2006

To obtain a picture of property tax burdens relative to incomes at the individual household level, and taxes relative to senior-citizen status, the study analyzed the U.S. Census Bureau's American Community Survey (ACS) data for 2006. The ACS data are difficult to compare with previous years because of changes in survey methodology over time. Nonetheless, they provide useful information about recent property tax burdens at a level not readily susceptible to analysis with data from other sources.

The 2006 ACS data were weighted to represent the estimated universe for New York State and regions. After weighting the number of sampled households and excluding households reporting a negative value or zero for household income, we find a total of 3,914,848 households.

For this part of our analysis, property tax burden is measured as the percentage of property taxes in household income (both self-reported by respondents). Data on actual property taxes are not available from the 2006 ACS data; rather, respondents report the level of taxes paid as one of 64 categories. For our analysis, we used the midpoint of each category range to represent the given category.[11]

New York State is divided into four regions: New York City; Long Island; Westchester, Putnam and Rockland; and all other counties, grouped here as Upstate.[12]

The ACS asks respondents to indicate whether a resident of the household is 65 or older. We use this as a proxy indicator of ownership by senior citizens.

Property tax burden, household income, and property taxes

Table 4 presents regional distributions in the median values of property tax burden, household income, and property taxes. In the State of New York as a whole, the median property tax burden was about $4.56 per $100 of household income, ranging from $2.98 in New York City to $7.24 in Long Island. In the Westchester-Rockland region and upstate, median property burdens were $5.75 and $4.29 per $100 of household income, respectively. Median household income in the state as a whole was $50,010, ranging from $45,610 in the Upstate to $80,000 in Long Island. Median property taxes were $3,050, ranging from $2,450 in NYC to $7,500 in Long Island.

Table 4: Property Tax Burden, Household Income, and Property Taxes, NYS Regions

Region	**Median Value**		
	Property Tax	**Household Income**	**Property Taxes**
Long Island	7.24	80,000	7,500
New York City	2.98	45,800	2,450
Westchester-Putnam-Rockland	5.75	75,000	7,500
Upstate	4.29	45,610	2,550
All Regions	4.56	50,010	3,050

[11] Since respondents who lived in institutional or non-institutional group quarters reported neither property taxes nor household income, responses related to both institutional and non-institutional group quarters (GQs) were excluded for analysis. The ACS data considers co-ops and condominiums as a form of ownership, so they are included in owner-occupied units.

[12] These four regions were constructed from public use microdata area (PUMA) codes (available from 2006 ACS data) and Census 2000 PUMA Maps (available from Census Bureau website, http://www.census.gov/geo/www/maps/puma5pct.htm).

Property tax burden by homeowners' age

Table 5 shows median property tax burdens by homeowner's age status across regions. In the state as a whole, the median value of property tax burden for senior-citizen households was $5.82 per $100 of household income, while it was $4.21 for households with no resident aged 64 or older. In all four regions, senior citizen households paid higher property taxes relative to income than households without a senior citizen. In either category of homeowner's age, households in New York City had the lowest median property tax burden, while those in Long Island had the highest burden: The median property tax burden for senior-citizen households varied from $4.27 in New York City to $9.69 in Long Island per $100 of household income.

Table 5: Property Tax Burden by Homeowner's Age, New York State Regions

Age Group	Long Island	NYC	WPR	Upstate	All Regions
65 or more	9.69	4.27	7.61	5.19	5.82
Less than 65	6.67	2.65	5.38	4.06	4.21
Total	7.24	2.98	5.75	4.29	4.56

Property taxes by household income, New York State

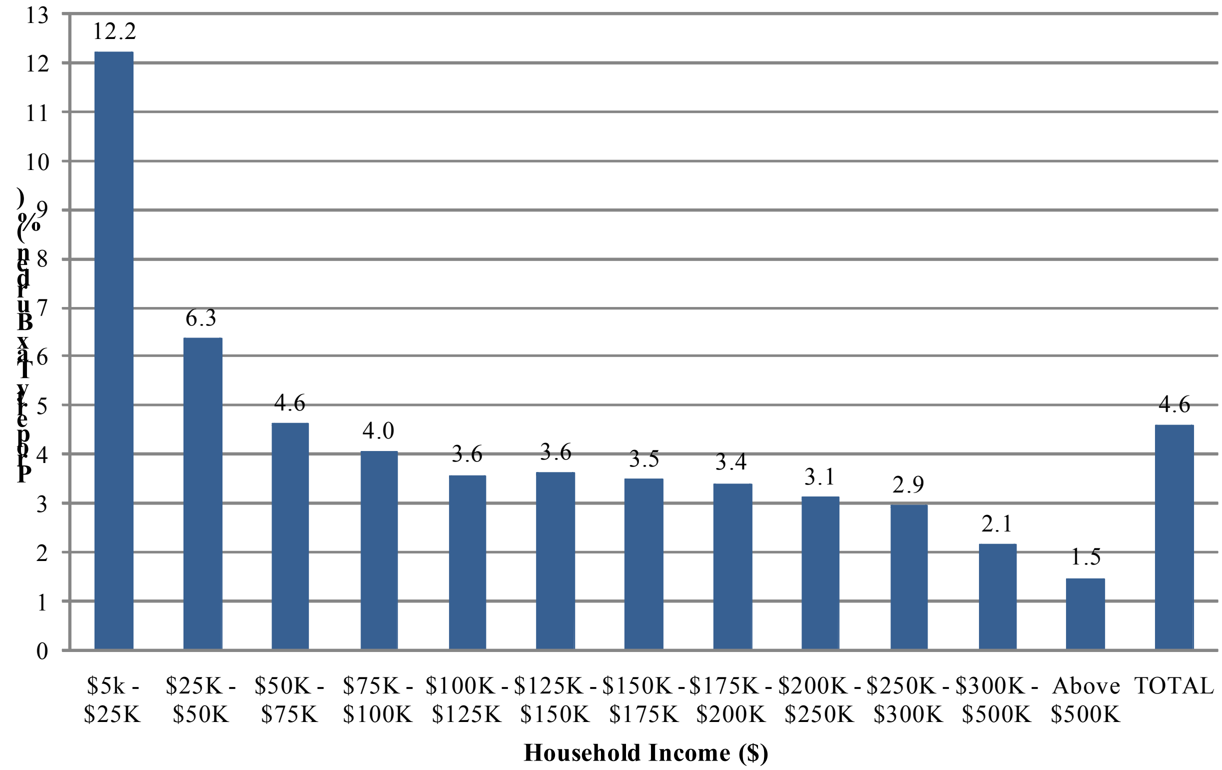
Table 6 shows median property tax burdens by various groups of household income for New York State and across regions. For this analysis, we omit households with income below $5,000 because a number of respondents reported property tax payments that appear inconsistent with reported income.

Table 6: Property Tax Burden by Household Income and Region, 2006

Household Income	Long Island	NYC	WPR	Upstate	Total NYS
$5K - $25K	231.77	13.42	29.13	9.42	12.20
$25 K - $50K	30.31	5.89	13.70	5.40	6.34
$50 K - $75 K	15.87	3.60	9.03	4.11	4.60
$75 K - $100 K	10.44	2.66	7.50	3.69	4.03
$100 K - $125 K	7.98	2.22	6.31	3.21	3.56
$125 K - $150 K	6.30	1.96	5.77	3.09	3.61
$150 K - $175 K	5.78	1.77	5.31	3.03	3.47
$175 K - $200 K	5.15	1.59	5.00	2.83	3.39
$200 K - $250 K	4.31	1.51	4.22	2.53	3.10
$250 K - $300 K	4.03	1.44	3.47	2.04	2.93
$300 K - $500 K	3.50	1.07	2.66	1.90	2.14
Above $500 K	2.63	0.90	1.84	1.26	1.45
TOTAL	**1.69**	**2.98**	**5.75**	**4.29**	**4.56**

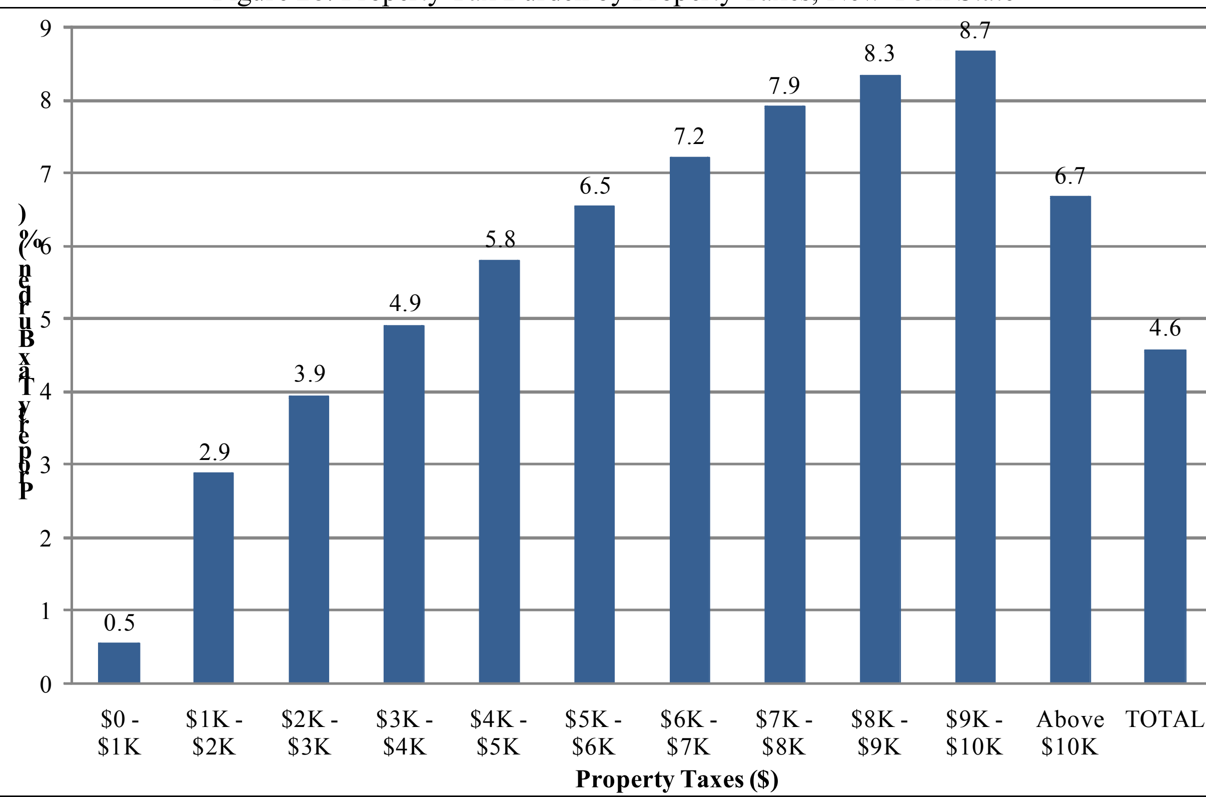
Source: U.S. Census Bureau, 2006 ACS Data.

Figure 27: Property Tax Burden by Household Income, New York State



Source: U.S. Census Bureau, 2006 ACS Data.

Figure 28: Property Tax Burden by Property Taxes, New York State



Source: U.S. Census Bureau, 2006 ACS Data.

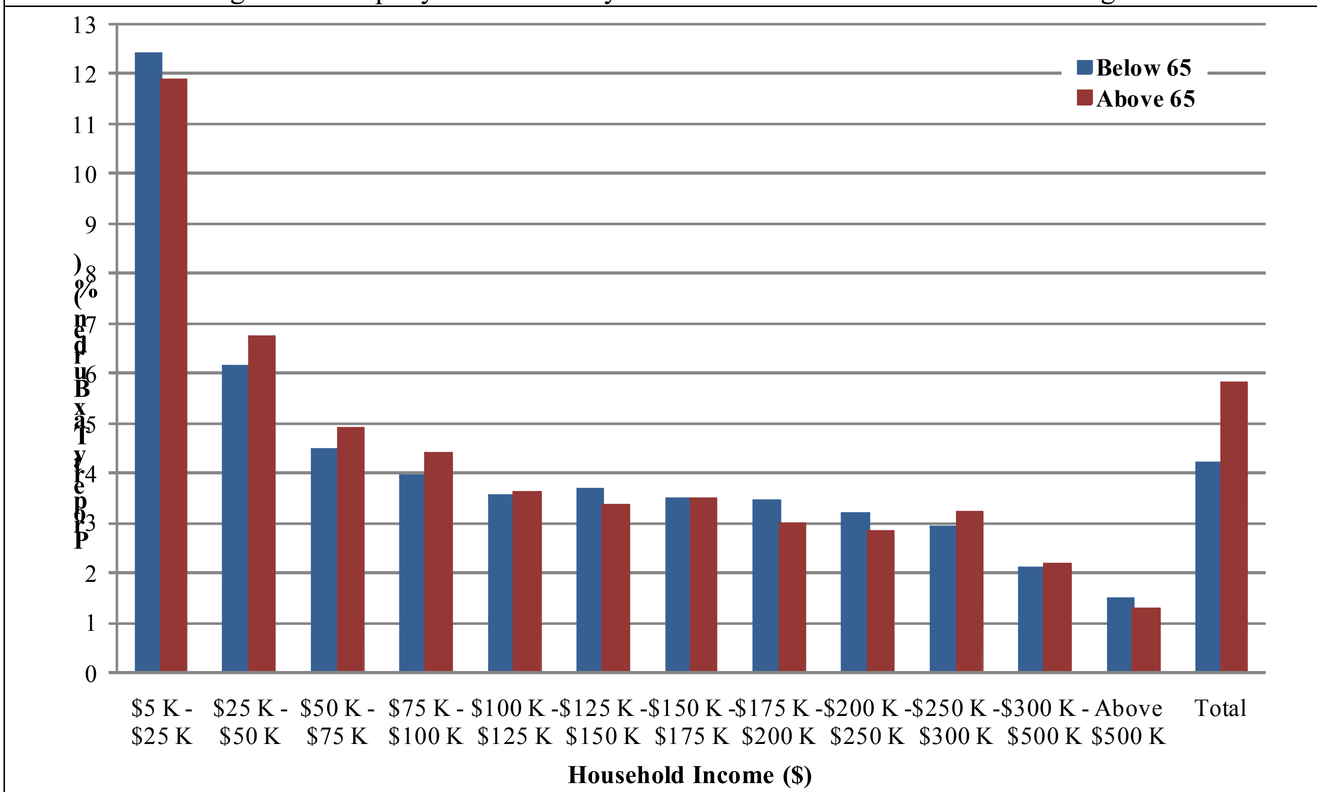
Property tax burdens tend to decline as household income rises, as shown in Figure 27. The tax burden is highest for homeowners with household income of $25,000 or less, declines by two-thirds for households with income between $75,000 to $100,000, and continues to fall as income rises.

Conversely, effective tax rates tend to rise as the total amount of property taxes paid increases, as shown in Figure 28.

Property taxes by household income and homeowner age

Figure 29 shows median property tax burdens by homeowners' age and household income. In general, the tax burden was higher for homeowners above age 65. Regardless of homeowner's age, median property tax burden generally decreased with an increase in household income. In the case of homeowners aged 65 or less, there were larger variations in median tax burden than in the case of homeowners aged 65 or more. But in some groups of household income, tax burdens were higher in the former case than in the latter.

Figure 29: Property Tax Burden by Household Income and Homeowners' Age



Source: U.S. Census Bureau, 2006 ACS Data.

Appendix A

Among major classes of local governmental entities, school districts outside New York City increased property tax collections at twice the rate of other classes of local government from 1993 to 2005, as shown in Table A-1. As a result, the share of total property tax revenues collected by school districts rose from 35 to 42 percent.

Table A-1: Property Tax Collections, Major Classes of Local Government, 1993-2005

	1993	**Share of 1993 Total**	**2005**	**Share of 2005 Total**	**Increase, 1993-2005**
School Districts Outside of NYC	8,099	35%	15,545	42%	92%
Counties Outside of NYC	3,166	14%	4,385	12%	39%
Cities Outside of NYC	678	3%	987	3%	46%
New York City	8,077	35%	11,914	32%	48%
Towns	2,002	9%	2,885	8%	44%
Villages	610	3%	966	3%	58%
Fire Districts	275	1%	494	1%	80%
Total	**22,907**		**37,176**		**62%**
Total Excluding School Districts	*14,808*		*21,631*		*46%*

Source: Office of State Comptroller data; calculations by Rockefeller Institute of Government.

The Nelson A. Rockefeller Institute of Government

The Rockefeller Institute of Government is the public-policy research arm of the State University of New York. Its researchers conduct studies on policy issues affecting the 50 states, with fiscal studies as one major area of emphasis. The Institute maintains a special focus on New York State issues and programs.

The authors of this report were Robert B. Ward, Deputy Director of the Institute and Director of its Fiscal Studies Program; and Lucy Dadayan, Senior Policy Analyst. Donald J. Boyd, a Senior Fellow at the Institute; and Suho Bae, an independent researcher, served as consultants.

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