

**Matter of Drug Policy Alliance v New York City Tax
Commn.**

2018 NY Slip Op 33484(U)

November 23, 2018

Supreme Court, New York County

Docket Number: 103827/2012

Judge: Paul Wooten

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**In the Matter of the Application of
DRUG POLICY ALLIANCE,**
Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,
-against-

INDEX NO. 103827/2012

MOTION SEQ. NO. 005

**NEW YORK CITY TAX COMMISSION
and NEW YORK CITY DEPARTMENT
OF FINANCE,**

Respondents.

FILED

JAN - 8 2019

The following papers were read on this motion by petitioner for a judgment pursuant to CPLR article 78. COUNTY CLERK'S OFFICE
NEW YORK

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause—Affidavits — Exhibits _____	<u>1, 2, 3, 4, 5, 6</u>
Answering Affidavits — Exhibits (Memo) _____	<u>7, 8</u>
Replying Affidavits (Reply Memo) _____	<u>9, 10</u>

This CPLR article 78 proceeding was brought by Drug Policy Alliance (petitioner or DPA), via Verified Petition filed on September 21, 2012 (Petition), seeking to annul the October 20, 2011 determination of respondent New York City Department of Finance (the DOF), which denied DPA's July 12, 2011 application (Application) for the real property tax exemption, pursuant to Real Property and Tax Law (RPTL) 420-a (1)(a), for its then-recently purchased New York headquarters, condominium unit 15(A) in the building located at 131 West 33rd Street in Manhattan (the Property) (the 2011 DOF Denial).

BACKGROUND

Respondent the DOF is charged with making determinations as to annual real property tax assessments and exemptions, and respondent New York City Tax Commission (the TC) is an independent agency of The City of New York that is responsible for administrative review of the real property tax assessments determined by the DOF, including the review of the exemptions from the real property tax (see Respondents' Mem of Law in Supp of Their Verified

Answer at 4; Verified Answer ¶¶ 10, 37).

Petitioner DPA is a not-for-profit organization incorporated in the District of Columbia and authorized to conduct business in New York State (see Verified Petition ¶ 6). Pursuant to its amended Articles of Incorporation, DPA's purpose is to "operate exclusively for charitable and educational purposes, including but not limited to conducting research and educating the public about medical, scientific and sociological effects of drugs and developments in the drug laws" (see *id.* ¶¶ 7-8). In its Petition, DPA describes itself as:

"the United States' leading organization working to educate the public about drug policy to advance policies that reduce the harms of both drug use and drug prohibition, and seek solutions that promote safety and reduce addiction while upholding the sovereignty of individuals over their own minds and bodies" (see *id.* at 3).

DPA has also been exempt from the Federal income tax pursuant to the Internal Revenue Code section 501(3)(c) since May 1988, and from the New York State and New York City Sales and Use taxes, pursuant to New York State Tax Law section 1116(a)(4), as an educational and charitable non-profit organization, as determined on August 1, 1994 (see *id.* ¶ 6).

On June 28, 2011, DPA purchased the Property to use it as DPA's headquarters and on July 12, 2011, DPA filed the Application for exemption from the New York City real estate taxation, pursuant to RPTL 420-a (1)(a), with the Property Tax Exemption Unit of the DOF (see *id.* ¶¶ 12-13). DPA specified in its Application that its purpose is "Educational" (see *id.*, exhibit 1, tab A). On October 20, 2011, the DOF denied DPA's Application and issued the 2011 DOF Denial (see Verified Petition ¶ 14). The 2011 DOF Denial contained only one sentence of reasoning, stating that "[a]dvocacy of a cause does not qualify as an exempt purpose for property tax exemption" (see *id.*, exhibit 1, tab D).

On February 3, 2012, DPA appealed the 2011 DOF Denial to respondent the TC and requested a hearing before the TC (see *id.* ¶ 15). On August 12, 2012, the TC held a hearing to

allegedly review *de novo* solely the factual submissions that DPA had offered in support of its Application, wherein petitioner also submitted oral and written evidence (the 2012 TC Hearing) (see *id.* ¶¶ 17-19, exhibit 4, 2012 TC Hearing Tr). Petitioner presented three witnesses at the 2012 TC Hearing: (1) Ryan Chavez, petitioner's chief financial officer; (2) Ethan Nadelman, petitioner's executive director; and, (3) Ira Glasser, petitioner's executive director (and former Executive Director of the New York Civil Liberties Union and a member of the Board of Directors of the Asian American Legal Defense Fund) (see *id.*, exhibit 4, 2012 TC Hearing Tr at 15-16). The DOF did not present any witnesses or factual evidence at the 2012 TC Hearing and the Hearing Officer denied DPA's request to cross-examine the Director of the DOF who issued the 2011 DOF Denial (the DOF Director) (see *id.* ¶ 51, exhibit 4, 2012 TC Hearing Tr at 15-16).

On May 25, 2012, the DOF's tax assessment of the Property became final, and on September 21, 2012, DPA filed the Petition to commence the herein proceeding pursuant to CPLR article 78 (see Verified Petition ¶ 16). In its Petition, DPA sought an order declaring (a) that the 2011 DOF Denial is arbitrary and capricious, and contrary to law; (b) that DPA is entitled to the real property tax exemption, pursuant to the New York State Constitution article XVI, section 1, RPTL 420-a (1)(a), and Administrative Code of the City of New York section 11-246; and, (c) directing the DOF to grant petitioner the exemption and legal fees (see Verified Petition). In connection with the Petition, the Court received *amicus curiae* briefs from New York Civil Liberties Union (NYCLU), Nonprofit Coordinating Committee of New York (NPCC) whose brief was joined by the Asian American Legal Defense Fund (AALDEF), and Lawyers Alliance for New York (Lawyers Alliance).

On or about December 3, 2013, the DOF and TC cross-moved to dismiss the Petition pursuant to CPLR 3211 §§ (a)(7) and 7804(f) on the grounds that the DOF's determination of DPA's eligibility for the tax exemption under RPTL 420-a(1) should be upheld as it was rational and made in conformity with well-established legal principles.

After commencement of the within CPLR article 78 proceeding, on September 28, 2012, the TC issued an Opinion and Determination on Application for Correction, signed by the President of the TC, in which the TC denied DPA's Application for the tax exemption under RPTL 420-a (1)(a) (the 2012 TC Determination) (see Verified Answer ¶¶ 39; Petitioner's Verified Mem of Law in Reply, exhibit C). In particular, the 2012 TC Determination stated that petitioner's property was not eligible for the tax exemption, because "while education may be a component of [petitioner's] operation, it is clear from the record that the aims of legislative and policy change overwhelmingly dominate its activities and focus" (see Petitioner's Verified Reply to Respondents' Verified Answer, exhibit C at 12). In addition, the TC found that DPA's "primary purpose is the pursuit of legislative or governmental policy change based on the fact that [DPA] compiles and makes available information to support its positions as charitable or educational" (see *id.*).

On December 16, 2013, this Court issued a Decision and Order in which it held that respondents' decision to deny petitioner's Application was arbitrary or irrational, and directed the DOF to grant petitioner the tax exemption under RPTL 420-a (1)(a) (the 2013 Order).

On January 23, 2014, respondents the DOF and TC appealed the 2013 Order to the Appellate Division, First Department (see Brief for Petitioner-Respondent at 9). The Appellate Division, First Department issued a decision on September 1, 2015, in which the Court held that this Court properly denied respondents' cross-motion to dismiss the Petition but vacated the portion of the 2013 Order granting petitioner the real estate tax exemption under RPTL 420-a (1)(a). The Appellate Court reasoned that this Court erred in resolving the Petition on the merits because the Court did not comply with the "notice provision" under CPLR 3211(c) or did not direct respondents to file an answer (see *Matter of Drug Policy Alliance v New York City Tax Commn.*, 131 AD3d 815 [1st Dept 2015]). As a result, the Appellate Division remanded the matter to the Court to: 1) allow respondents to file an answer; 2) allow petitioner raise

procedural arguments; and, 3) decide the matter on the merits upon a complete record (*see id.*).

Accordingly, before the Court to review the Petition on the merits are the following papers: (1) the Petition; (2) Respondents' Verified Answer; (3) Respondents' Memorandum of Law in Support of Their Verified Answer; (4) Petitioner's Verified Reply to Respondents' Verified Answer; (5) Petitioner's Verified Memorandum of Law in Reply to Respondents' Verified Answer and Memorandum of Law in Support Thereof; (6) Brief of Amicus Curiae NPCC; (7) Brief of Amici Curiae NPCC and Lawyers Alliance; (8) Memorandum of Law of Amicus Curiae NYCLU in Support of Petitioner, as joined by AALDEF; and, (9) Affirmation of Susan R. Gittes in Support of Brief of Amici Curiae NPCC and Lawyers Alliance.

LEGAL STANDARD

"[A] petitioner may seek CPLR article 78 review of the denial of its application for an exemption pursuant to [RPTL] 420-a" (*see Matter of Foundation for Chapel of Sacred Mirrors, Ltd. v Harkins*, 98 AD3d 1044 [2d Dept 2012] [internal citations omitted]; *see also* RPTL 420-a [11]; *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194 [1991] [internal citations omitted]; *Matter of Scarborough School Corp. v Assessor of Town of Ossining, N.Y.*, 97 AD2d 476 [2d Dept 1983]).

"In reviewing administrative proceedings in general, courts are 'limited to considering whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion'" (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363 [1986], quoting CPLR 7803[3]; *see also Matter of Lobaina v Human Resources Admin., Office of Child Support Enforcement*, 79 AD3d 884 [1st Dept 2010]). "The proper test is whether there is a rational basis for the administrative orders Rationality is what is reviewed under . . . the arbitrary and capricious standard" (*Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). As such, a court "may not overturn an agency's decision

merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; see also *Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]). "Indeed, once it has been determined that an agency's conclusion has a 'sound basis in reason' the judicial function is at an end and a reviewing court may not substitute its judgment for that of the agency" (*Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514 [1997], quoting *Pell v Board of Edu.*, 34 NY2d at 231). However, "where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency," such as the Tax Commission (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]; see also *107 Delaware Assocs. v New York State Tax Commn.*, 99 AD2d 29 [3rd Dept 1984], *revd on other grounds*, 64 NY2d 935 [1985]).

Furthermore, CPLR article 78 proceedings are summary in nature and can be resolved "upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" and the court "may make any orders permitted on a motion for summary judgment" (see CPLR 409[b]). Therefore, a motion for summary judgment addressed to the merits of the petition is unnecessary (see *Matter of 1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 1006 [2d Dept 2009]).

DISCUSSION

Preliminarily, pursuant to the New York City Charter section 153(b), the TC is charged with reviewing the DOF's determinations of real property tax exemptions¹ (see NY City Charter § 153[b]). Furthermore, pursuant to section 165 of the Charter, the DOF's tentative determination of a tax exemption is deemed to be a final determination of the TC itself and

¹ The proceedings before the TC are governed by the Tax Commission Rules of City of New York, which are codified under title 21 of the New York City Rules (see 21 RCNY § 1-01 *et seq.*).

becomes subject to *judicial review* on May 25 of a given calendar year, even if there is a pending appeal before the TC to review the DOF's determination of a tax exemption application (see 21 RCNY § 4-01[d]; NY City Charter § 165; see also *Matter of Garth v Assessors of Town of Perinton*, 87 AD3d 1306, 1306 [4th Dept 2011]). Here, DPA filed the Petition on September 21, 2012 to toll the statute of limitations for purposes of a CPLR article 78 proceeding, which statute would expire on September 24, 2012. At that time, the 2011 DOF Denial was deemed to be the final determination of the tax exemption by the TC because the TC issued the 2012 TC Determination on September 28, 2012— *i.e.*, four days after the statute of limitations had lapsed (see Verified Petition ¶ 2; see also *Matter of Garth*, 87 AD3d 1306). Therefore, once issued, the 2012 TC Determination superseded the 2011 DOF Denial and became the final decision of the TC with regard to DPA's Application for the real property tax exemption under RPTL 420-a (1)(a) (see Respondents' Mem of Law in Supp of Their Verified Answer at 2). However, the Court shall review both determinations in rendering its Decision on the merits of the Petition.

DPA argues that the 2013 Order of this Court granting DPA the RPTL 420-a (1)(a) tax exemption is law of the case, and, thus, respondents are trying to rehash their arguments, or, in effect, improperly reargue or renew their cross-motion (see Petitioners' Verified Mem of Law in Reply at 3-4). However, while the Appellate Court was clear that the 2013 Order was correct in denying respondents' cross-motion to dismiss the Petition, the Appellate Court vacated the portion of the 2013 Order which granted the tax exemption to DPA and directed this Court to, *inter alia*, determine the merits of DPA's Petition after respondents have filed their answer and after giving DPA an opportunity to raise procedural arguments (see *Matter of Drug Policy Alliance*, 131 AD3d 815). Moreover, given the summary nature of a CPLR article 78 proceeding, and because there are no triable issues of fact herein, the Court shall determine the

merits of DPA's Petition on the papers submitted, without holding a hearing² (see CPLR 409[b]; see generally *Matter of 1300 Franklin Ave. Members, LLC*, 62 AD3d at 1006).

A. DPA's Procedural Claims

During the 2012 TC Hearing, the presiding Hearing Officer informed the parties that the Hearing was informal and a non-adversarial proceeding (see Verified Petition, exhibit C, 2012 TC Hearing Tr at 1). The Hearing Officer also stated that while DPA might offer factual testimony and ask questions, there would be "no cross-examination of witnesses by other parties" (see *id.*). Furthermore, the Hearing Officer indicated that the purpose of the Hearing was to *de novo* obtain factual information to determine whether DPA's Property is eligible for the exemption from the NYC Real Property Tax "and *not* to review the actions of the New York City Dept. of Finance in denying the initial application" (see *id.* at 1, 4 [emphasis added]). During the Hearing, DPA argued that it had a due process right to cross-examine the DOF Director and DPA took exception when the Hearing Officer denied the request on the ground that the Hearing was not an adversarial proceeding (see *id.* at 4, 24). Specifically, when DPA asked the DOF Director whether he made any factual inquiry beyond DPA's Application, the Hearing Officer did not allow the Director to answer (see *id.*). However, the Hearing Officer stated that the DOF Director might be able to testify if he has factual information to offer regarding the use of the Property (see *id.*). The DOF Director stated that he did not have any such factual information but could make a statement related to the decisions of the Court of Appeals (see *id.* at 25). In response, the Hearing Officer asserted that his legal arguments were not needed (see *id.*).

DPA argues that the TC violated its due process rights during the 2012 TC Hearing when the Hearing Officer (1) denied DPA's request to cross-examine the DOF Director who signed the one-line 2011 DOF Denial, which right is also codified in the New York City Charter

² During the oral argument before this Court on February 20, 2013, respondents conceded that there was "nothing more that [DPA] need[ed] to present as far as their entitlement to the exemption" (see Supplemental Record, Tr at 22).

as part of the New York City Administrative Procedure Act (APA) section 1046 (a)(3)(c)(1), and (2) denied the DOF Director's request to make a statement that "related to Court of Appeals decisions," on the ground that it was about the applicable law (see Petitioner's Verified Mem of Law in Reply at 5-6). Respondents maintain that since the DOF Director had no factual evidence to submit at the 2012 TC Hearing, his testimony in response to any questions relating to the DOF's decision-making process would have been irrelevant in the *de novo* fact-finding Hearing, which was subject to RPTL article 7³ (see Respondents' Mem of Law in Supp of Their Verified Answer at 4, 37, citing *Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 12 [2d Dept 1999]; see also Verified Answer ¶¶ 51-52). Thus, respondents argue that the 2012 TC Hearing did not implicate any due process rights of DPA (see *id.*).

"Due process of law,' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature" and "the duties of [real property tax] assessors in making assessments are of a judicial nature" (*Stuart v Palmer*, 74 NY 183, 190-91 [1878]; see *Matter of Pacifica Foundation v Lewisohn*, 79 Misc 2d 550 [Sup Ct Trial Term, NY County 1974]). Hence, real property tax "assessors act judicially" (see *Stuart*, 74 NY at 193, citing

³ A taxpayer aggrieved by the denial of a complete tax exemption under RPTL 420-a may avail itself of a *judicial review* of the denial by commencing a proceeding either under CPLR article 78 or under RPTL article 7 (see *Hewlett Assoc. v City of New York*, 57 NY2d 356, 363-64 [1982]; *Matter of Jewish Bd. of Family & Children's Serv., v Shaffer*, 80 AD2d 614, 615 [2d Dept 1981] [noting that "a proceeding pursuant to article 7 of the Real Property Tax Law [is] not the sole remedy available to petitioner [seeking an exemption under RPTL 420-a because a] proceeding pursuant to CPLR article 78 [is also] a permissible vehicle to review the [tax] assessor's determination").

In their Verified Answer, respondents state that although an administrative review of the 2011 DOF Denial on appeal was required pursuant RPTL article 7, where the DOF denies to "wholly exempt a taxpayer's property," the imposed tax becomes a nullity and may be challenged in a CPLR article 78 proceeding (see Verified Answer ¶ 45).

In any event, a real property tax exemption "is analogous to the request for a lower assessment" and in RPTL article 7 proceedings the parties have a right to cross-examination (see 439 E. 88 *Owners Corp. v Tax Commn. of City of New York*, 6 Misc 3d 1014 [Sup Ct, New York County 2002], *aff'd* 307 AD2d 203 [1st Dept 2003]; see e.g. *Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 176 [2014]).

Barhyte v Shepherd, 35 NY 238 [1866]). Furthermore, the TC is subject to the APA, which explicitly provides, in pertinent part, that at the administrative hearing parties shall be afforded due process of law, including the opportunity to "call witnesses, to cross-examine opposing witnesses and to present oral and written arguments on the law and facts" (see NY City Charter §§ 1041-46; 45 RCNY § 1046[a][3][c][1]; see also 439 E. 88 *Owners Corp. v Tax Commn. of City of New York*, 6 Misc 3d 1014[A], 2002 NY Slip Op 50731[U] [Sup Ct, New York County 2002], *affd* 307 AD2d 203, 763 [1st Dept 2003] ["As an adjudicative agency, the Tax Commission is subject to the strictures of the New York City Administrative Procedure Act"]).

Moreover, the Court of Appeals has, as a matter of due process, "recognized a limited right to cross-examine adverse witnesses in administrative proceedings" (*Matter of Gordon v Brown*, 84 NY2d 574, 578 [1994]; see also e.g. *Matter of Friendly Convenience, Inc. v New York City Dept. of Consumer Affairs*, 71 AD3d 577, 578 [1st Dept 2010]). "In assessing whether due process requires the production of particular witnesses for cross-examination, a hearing officer should consider [1] the nature of the evidence, [2] the potential utility of trial confrontation in the fact-finding process, and [3] the burden of producing the witness" (see *Matter of Gordon*, 84 NY2d at 578). In addition, pursuant to APA section 1046(c)(2), DPA bears the burden of proving that the DOF's determination that the Property was not tax-exempt was incorrect (see 41 RCNY § 4-10(c), NY City Charter § 1046[c][2]; Petitioner's Verified Mem of Law in Reply; the 2012 TC Determination at 2).

Here, the Court finds that DPA should have been given the opportunity to cross-examine the DOF Director, in light of its evidentiary burden of proof. The 2011 DOF Denial consisted only of one sentence, and as such was completely devoid of any articulation of factual and rational basis for the summary determination that "advocacy of a cause" constitutes sufficient grounds for a denial of the real property tax exemption under RPTL 420-a (1)(a) (see Verified Petition, exhibit 1, tab D). For example, it is unknown what scope of facts the DOF determined

were falling within the ambit of “advocacy of a cause”—an undefined term coined by the DOF, as the hearing record was devoid of any additional evidence or information from the DOF (see *id.*, exhibit 4, 2012 TC Hearing Tr at 23). Furthermore, the DOF Director was ready and willing to testify, and in particular, make a statement about the cases the DOF considered in determining DPA's Application (see *id.* at 23). This point is important because the DOF has the mandate to make tax exemption determinations in the first instance, not the TC, which function involves not only fact finding but also application of the RPTL and related case law by the DOF. For example, DPA was interested to know whether the DOF made any factual inquiries beyond its Application (see *id.* at 24). Thus, the TC failed to follow applicable laws, rules, and procedures during the 2012 TC Hearing inasmuch as it precluded cross-examination of the DOF Director.

Second, the Court finds that to the extent that the President of the TC made the determination regarding DPA's Application, instead of the Hearing Officer presiding over the 2012 TC Hearing, the TC failed to follow the Regulations of the City of New York and its own Rules. During the Hearing, the Hearing Officer informed the parties that she would “make a written determination on the application . . . and [DPA and the DOF would] receive copies of that” (see *id.* at 1). On September 28, 2012, the TC issued the final 2012 TC Determination, which was signed by the President of the TC. DPA avers that the President of the TC preempted the legal obligations of the Hearing Officer because he himself signed the 2012 TC Determination, despite the fact that he was not even present at the 2012 TC Hearing (see Petitioner's Verified Mem of Law in Reply at 11). DPA also maintains that the 2012 TC Determination shows no evidence of his familiarity with the hearing record (see *id.*). Thus, DPA argues, the President of the TC not only seized the powers of the Hearing Officer, who has the mandate to review and make determinations of exemption claims, but he also vitiated DPA's

right to appeal to the President of the TC⁴ (*see id.*). In that regard, DPA argues that its appeal to the President of the TC would have been meaningless since the President himself signed the 2012 TC Determination (*see id.*).

Respondents do not assert that the Hearing Officer, not the President of the TC, made the findings of fact and conclusions of law set forth in the 2012 TC Determination (*see Verified Answer; Respondents' Mem of Law in Supp of Their Verified Answer*). Rather, they argue that the fact that the President signed the 2012 TC Determination did not vitiate DPA's right to reconsideration of the 2012 TC Determination, because the President's mandate here was *only to indicate his concurrence* with any determination issued on DPA's Application, pursuant to Administrative Code of the City of New York section 11-216(c)⁵ (*see Respondents' Mem of Law in Supp of Their Verified Answer at 38 [emphasis added]*).

In reply, DPA argues that a concurring opinion would mean merely an opinion that agrees with the result but for different reasons, and here, the determination of DPA's Application was "the issue" (*see Petitioner's Verified Mem of Law in Reply at 12*). Thus, DPA maintains that respondents' denial of DPA's right of reconsideration deprived DPA of receiving a different determination or one that would be based on different reasoning, which might have obviated the need for the herein CPLR article 78 proceeding (*see id.*).

Pursuant to the Tax Commission's Rules, Hearing Officers are designated by the

⁴ DPA relied on 21 RCNY § 4-13(b), which gives DPA the right to submit a request for reconsideration to the President of the TC within 15 days of the notice of determination (*see 21 RCNY § 4-13 [(b); see also Petitioner's Verified Mem of Law in Reply at 11-12]*).

⁵ Section 11-216 (c) of the New York City Charter provides:

"§ 11-216. Reduction in assessments; publication.

...
c. In all cases where the reduction in assessment for the current year is for fifty thousand dollars or more, the concurrence of the president of the tax commission shall be required" (NY City Code § 11-216).

Specifically, respondents proffer that since the petitioner was seeking an exemption in the amount of \$339,933, the President of the TC was required to indicate his concurrence with the determination of DPA's Application (*see Respondents' Mem of Law in Supp of Their Verified Answer at 38*).

President of the TC to review and determine real property tax exemption claims (see 21 RCNY § 1-03; see also 2016 Tax Commission Annual Report at 7, https://www1.nyc.gov/assets/taxcommission/downloads/pdf/annual_report.pdf). In addition, it is the mandate of the Hearing Officers to “weigh the strength, credibility and persuasiveness of arguments and facts offered in support of an application, including the . . . documents . . . [or] evidence offered by the Department of Finance” (see 21 RCNY § 4-10[l]). Thus, the Court finds that the President of the TC exceeded his powers in signing the 2012 TC Determination inasmuch as he usurped the mandate of the Hearing Officer to determine DPA’s Application. As a result, if DPA exercised its right to reconsideration of the 2012 TC Determination pursuant to 21 RCNY § 4-13(b), the President of the TC would presumably be asked to review his own decision, thereby eliminating a level of objective review of the rationale and factual findings that the Hearing Officer was legally obligated to make in determining DPA’s Application.

Third, the Court finds that the TC further failed to follow the applicable laws, rules, and regulations inasmuch as the 2012 TC Determination contained findings of fact not based exclusively on the record of the 2012 TC Hearing proceeding.

DPA argues that it was deprived of the ability to explain and refute respondents’ findings and inferences when respondents adduced “facts” and citations in the 2012 TC Determination from DPA’s website after the 2012 TC Hearing and outside the record of the proceedings (see Petitioner’s Verified Mem of Law in Reply at 8-9). Importantly, DPA contends that the “facts” or information respondents allegedly retrieved from DPA’s website were wrong or irrelevant (see *id.* at 9). For example, DPA points out that the TC stated that “DPA played a pivotal role in more than twenty ballot initiatives;” however, New York State does not have ballot initiatives, and in any event DPA’s staff in New York City “has never supported an initiative” (see *id.*). Respondents argue, *inter alia*, that DPA merely disputes respondents’ inferences they drew from the statements on DPA’s website but not the existence of these statements (see

Respondents' Mem of Law in Supp of Their Verified Answer at 38-39). In addition, they maintain that formal rules of evidence do not apply to the hearings before the TC, and even if they were, these citations to DPA's website would be deemed admissions of a party because DPA relied on information obtained from the websites of other non-profit organizations that DPA claims are indistinguishable (*see id.*).

"[I]t is not proper for an administrative agency to base a decision of an adjudicatory nature, where there is a right to a hearing, upon evidence or information outside the record" (*Matter of Simpson v Wolansky*, 38 NY2d 391, 396 [1975]; *Matter of Schroeder v Scoppetta*, 77 AD3d 840, 841 [2d Dept 2010]). Furthermore, "[i]t is important, [in cases where a party had a right to a hearing], that findings of fact be made in a manner such that the parties may be assured that the decision is based on evidence of record, uninfluenced by extralegal considerations, findings of fact in some form being essential so as to permit intelligent challenge by a party aggrieved and adequate judicial review following the determination" (*Matter of Simpson*, 38 NY2d at 396). Furthermore, the APA section 1046(c)(2) provides that with regard to hearings, any findings of fact may be based "exclusively" on the record of the proceedings (*see NY City Charter § 1046[c][2]*).

Thus, the Court finds that the TC deprived DPA of the opportunity to provide evidence or explanation in rebuttal to any inferences or assumptions made by the TC based on the allegedly incorrect information the TC retrieved from DPA's website, especially in light of the fact that the TC had previously requested that DPA provide additional information before or at the 2012 TC Hearing (*see Petitioner's Verified Mem of Law in Reply at 7-9; Verified Answer ¶ 37*).

In conclusion, taking *in toto* the irregularities in conducting the proceedings before the TC and based on their cumulative effect, the Court finds that the 2012 TC Determination was arbitrary and capricious and DPA was deprived of a fair hearing before the TC (*see generally Simpson*, 38 NY2d at 395 ["included in the fundamental requirement of a fair trial [conducted by

an administrative official], absent the waiver, is the entitlement of the party whose rights are being determined to be fully apprised of the proof to be considered, with the concomitant opportunity to cross-examine witnesses, inspect documents and offer evidence in rebuttal or explanation”]; *Korth v McCall*, 275 AD2d 511, 512 [3d Dept 2000]; *Matter of Pacifica Foundation*, 79 Misc 2d 550).

B. DPA's Exemption Claim Pursuant to RPTL 420-a (1)(a)

1. Mandatory Exemption under RPTL 420-a (1)(a)

As guaranteed by the New York State Constitution, RPTL 420-a (1)(a) provides for mandatory real property tax exemption for any real property owned by a not-for-profit

“corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes” (RPTL § 420-a [1][a]; see also NY CONST art. XVI, § 1).

Thus, RPTL 420-a (1)(a) sets forth a two-part test for real property owned by non-profit organizations to qualify for an exemption: (1) the non-profit organizations “must be organized [or conducted] exclusively for one or a combination of the enumerated exempt purposes”—the organization prong; and, (2) “the non-profit organizations must use the real property subject to taxation exclusively for one or more of the exempt purposes”—the property use prong (see *Mohonk Trust v Board of Assessors of Town of Gardiner*, 47 NY2d 476, 484 [1979]; *Matter of Rudolf Steiner Educ. & Farming Assn. v Brennan*, 65 AD2d 868, 869 [3d Dept 1978]).

As for the organization prong, courts determine whether a not-for-profit corporation or association is organized exclusively for the enumerated exempt purposes by examining the purposes recited in its organizational documents, such as the certificate of incorporation and by-laws, or the law under which the business organization was formed (see e.g. *Matter of Swedenborg Found. v Lewisohn*, 40 NY2d 87, 90-91 [1976]; *Matter of Greater Jamaica Dev. Corp. v New York City Tax Commn.*, 25 NY3d 614, 620 [2015]).

However, the determination of the corporation's purpose "is not necessarily dependent solely upon the language of the document pursuant to which it operates" (see *Mohonk Trust*, 47 NY2d at 484). Courts may also determine the corporation's or association's purposes by examining the purposes for which it is also "conducted" (see *id.* ["the determination of an organization's primary purpose may turn upon the extent to which it pursues the various purposes for which it was created"]).

The property use prong, on the other hand, involves the determination of "whether the property's use is reasonably incidental to the primary or major exempt purpose of the [organization]," or "put it differently, . . . whether the property is used exclusively for the statutory purposes depends upon whether its primary use is in furtherance of the permitted purposes" (see *Matter of Merry-Go-Round Playhouse, Inc. v Assessor of City of Auburn*, 24 NY3d 362, 368 [2014], citing *Matter of Yeshivath Shearith Hapletah v Assessor of Town of Fallsburg*, 79 NY2d 244, 250 [1992]; see also *Matter of Greentree Found. v Assessor & Bd. of Assessors of County of Nassau*, 142 AD3d 665, 667 [2d Dept 2016], citing *Matter of Greater Jamaica Dev. Corp.*, 25 NY3d at 623).

In addition, the word "exclusively," as used in RPTL 420-a (1)(a), should not be read literally, but, rather, as meaning "primarily," or "principally" (see *Matter of Symphony Space v Tishelman*, 60 NY2d 33, 38 [1983]; see also e.g. *Matter of Homeland Found., Inc. v Gotovich*, 148 AD3d 708, 709 [2d Dept 2017]).

Generally, "[t]he burden of establishing that the property is entitled to a tax exemption rests with the taxpayer" (*Matter of Greentree Found.*, 142 AD3d at 666, citing *Matter of Merry-Go-Round Playhouse, Inc.*, 24 NY3d at 367; see *Matter of Lackawanna Community Dev. Corp. v Krakowski*, 12 NY3d 578, 581 [2009]).

2. Judicial Review of Exempt Purposes under RPTL 420-a (1)(a)

As early as in 1885, the Court of Appeals of New York found that "[t]he object of the

statute [exempting real property from taxation in New York City] seems to have been, to encourage education generally" (*Chegaray v Jenkins*, 5 NY 376, 378 [1851]). Also in 1885, the Court of Appeals enunciated that "[t]he policy of the exemption is the encouragement of learning" (*Temple Grove Seminary v Cramer*, 98 NY 121 [1885]). Subsequently, in 1904, the Appellate Division, Second Department, in *People ex rel. Bd. of Trustees of Mt. Pleasant Acad. v Mezger*, found that "[in] its broadest sense, the word 'education' comprehends not merely the instruction received at school⁶ or college, but the whole course of training, moral, intellectual, and physical" (*People ex rel. Bd. of Trustees of Mt. Pleasant Acad. v Mezger*, 98 AD 237, 239 [2d Dept 1904], *aff'd* 181 NY 511 [1905]).

In *Matter of Swedenborg Found. v Lewisohn*, however, the Court of Appeals applied a narrow interpretation of "educational purposes" under RPTL 420-a (1)(a) and "concept of education"—to wit, that "education [within the meaning of RPTL 421-a (1)⁷] refers to the development of faculties and powers and the expansion of knowledge *by teaching, instruction or schooling*, [as distinguished from] the much broader process of the communication of facts and ideas" (*Matter of Swedenborg Found.*, 40 NY2d at 94 [emphasis added]).

The *Swedenborg Foundation* Court found further that the Foundation's "financial support of scholarly research by others" was insufficient "to constitute educational activity" (*see id.* at 95). Moreover, the Court found significant that the Foundation was not chartered as an educational institution by the New York State Department of Education and was also not chartered by the Board of Regents as an educational corporation (*see id.*).

⁶ The term school includes, "in its broadest sense . . . any institution devoted to instruction of any kind; and in the same broad sense a 'schoolhouse' may be defined as a place or building used for any such purpose" (*see Matter of Townsend*, 195 NY 214, 221 [1909]).

⁷ In 1971, RPTL 421 was amended, and renumbered, to separate the tax-exempt categories into a mandatory exemption in subdivision 1 of section 420-a and a permissive exemption in subdivision 1 of section 420-b (*see Matter of Symphony Space*, 60 NY2d at 38). RPTL 420-a (1) is the former RPTL 421 (1)(a) (*see id.* 37, n 2-3). "Although the categories specified in former section 420 (1)(b) are not exactly the same as those in its present-day counterpart, the statute's general scheme to qualify for a [mandatory] exemption remains . . . effectively identical to that established by Real Property Tax Law § 420-a (1)(a)" (*Matter of Greater Jamaica Dev. Corp.*, 25 NY3d at 636 [Read, J., dissenting]).

Importantly, the *Swedenborg Foundation* Court also stated that "public benefit is not the test of qualification for exemption" (*see id.*). Finally, the Court found that the fact that the Foundation obtained a Federal tax exemption was not outcome-determinative for the purposes of the exemption under RPTL 420-a (*see id.*). Some Courts have interpreted *Matter of Swedenborg Found. v Lewisohn* to also require affiliation with an educational institution or that a significant portion of the activities of the taxpayer seeking exemption should be devoted to an instructional educational program (*see Matter of Rudolf Steiner Educ. & Farming Assn.*, 65 AD2d at 869; *Matter of Asia Socy. v Tax Commn. of City of N.Y.*, 92 AD2d 781, 782 [1st Dept 1983]).

In 1979, the Court of Appeals in *Mohonk Trust v Board of Assessors of Town of Gardiner* signaled a clear departure from narrow interpretation of real property tax exemptions pursuant to the Real Property Tax Law (*see Mohonk Trust*, 47 NY2d at 484). The *Mohonk Trust* Court noted that "while exemption statutes should be construed strictly against the taxpayer seeking the benefit of the exemption, an interpretation so literal and narrow that it defeats the exemption's settled purpose is to be avoided" (*see id.* at 483). To that end, the Court interpreted the word "exclusively" in the statute to mean "principally" or "primarily" and noted that "purposes and uses merely auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption" (*see id.*, citing *Matter of Association of Bar of City of N.Y. v Lewisohn*, 34 NY2d 143, 153 [1974]).

Most importantly, the *Mohonk Trust* Court found that to be eligible for the exemption, the property may be "used primarily for an assortment of charitable, educational, [and] moral improvement of men, women or children purposes" (*see id.* at 484 [internal quotation marks and citations omitted]). To that end, in applying a broad interpretation of the statute, the Court held that the primary use of the Trust's land was for environmental and conservation purposes, which fell within the ambit of the "charitable, educational, and moral improvement of men,

women or children purposes," despite the fact that the incidental use of the Trust's land included a variety of activities, including educational or scientific activities, and despite the fact that the statute did not enumerate environmental and conversation purposes as eligible tax-exempt purposes (*see id.*).

Moreover, the *Mohonk Trust* Court stated that since the Legislature did not remove environmental and conservation purposes "from the broad category of charitable, educational, or mental or moral improvement of man purposes," these purposes properly constituted exempt purposes under the statute (*see id.* at 485). The *Mohonk Trust* Court also emphasized the benefit, or the aspect of public good, of the use of the Trust's land for the environmental and conservation purposes (*see id.* at 484).

In 1979, the Court of Appeals, in *Matter of North Manursing Wildlife Sanctuary (City of Rye)*, explained that for purposes of RPTL 420-a (1)(a), charitable uses of the property must benefit the public, as opposed to *only* the creators of the charitable organizations (*see Matter of North Manursing Wildlife Sanctuary (City of Rye)*, 48 NY2d 135, 140 [1979] [emphasis added]).

In 1982, the Court of Appeals, in *Matter of New York Botanical Garden v Assessors of Town of Washington*, reiterated that *Mohonk Trust* was controlling in that the Botanical Garden continued to be entitled to the exemption under RPTL 420-a (1)(a) because it was organized for an assortment of exempt charitable, educational and moral improvement purposes, which emphasized preservation and environmental concerns, and the use of the subject property accomplished several of its exempt purposes (*see Matter of New York Botanical Garden v Assessors of Town of Washington*, 55 NY2d 328 [1982]). The Court also found that the property was used for charitable purposes because it was "necessary to the public good" and was "open and enjoyed by the public," despite some limitations placed on its use (*see id.* at 336-37).

In 1983, the Court of Appeals in *Matter of Symphony Space v Tishelman* cautioned that

courts should not engage in "dissecting each exempt purpose" and that the statute "may encompass property used primarily for various and varied" tax-exempt purposes (see *Matter of Symphony Space*, 60 NY2d at 37). In reversing the order of the Appellate Division and granting the Petition for the tax exemption therein, the Court noted that in light of recent decisions of the Court, the "decisions of the Tax Commission and the lower courts give the terms 'charitable, educational and moral or mental improvement' an overly narrow interpretation" (see *id.* at 36). In extending *Mohonk Trust*, the Court held that the property used for performing arts qualified under the general categories of RPTL 420-a since the Legislation did not exclude performing arts purposes from the exempt tax purposes under the statute (see *id.* at 38). Similarly to *Mohonk Trust*, the *Symphony Space* Court noted the public benefit of the use of the property for the purpose of the performing arts (see *id.* at 39).

In 2015, the Court of Appeals in *Matter Greater Jamaica Development Corporation v New York City Tax Commission*, focused on the analysis of the meaning of "used exclusively" in RPTL 420-a (see *Matter Greater Jamaica Dev. Corp.*, 25 NY3d at 628-31). The Court reiterated that a property entitled to the real property tax exemption, as construed broadly by Courts, must be (1) used exclusively for carrying out one or more of the exempt purposes, or (2) the use of the property must be reasonably or necessarily incidental to the taxpayer's primary exempt purposes enumerated in RPTL 420-a (see *id.* at 630, 635 [Read, J., dissenting]).

In upholding *Matter of Swedenborg Found. v Lewisohn*, the *Greater Jamaica* Court pointed out that while it held that "public benefit is not the test of qualification for exemption," public benefit or a public purpose is a "factor that Courts might consider in determining whether the property is 'used exclusively' for the tax-exempt purposes but that a property used for a charitable purpose "must *a fortiori* be used for a public purpose" (*id.* at 629).

The Court of Appeals also clarified that RPTL 420-a does not define "charitable" purpose but the definition of charitable purpose in the Internal Revenue Code is impermissibly broad for

purposes of RPTL 420-a (*see id.* at 627). However, in the context of real property tax exemptions courts do not interpret "charitable" in a narrow sense, as "'charitable purposes' is not necessarily limited to free service to the poor," or to "persons in need of assistance and proven objects of charity;" rather, charitable purposes may encompass a purpose of "advancement of an object of general public utility," or a purpose of public usefulness (*see generally Webster Apartments v City of New York*, 118 Misc 91, 93 [Sup Ct 1922], *affd* 206 AD 749 [1st Dept 1923]; *People ex rel. Doctors Hosp. v Sexton*, 267 AD 736, 741 [1st Dept 1944], *affd sub nom.* 295 NY 553 [1945] [internal citations omitted]; *Sherman v Richmond Hose Co. No. 2*, 230 NY 462, 469 [1921]; *see also Matter of Beekman*, 232 NY 365, 370 [1921] ["The test of a charitable gift or use and a charitable corporation is the same."]).

Furthermore, the *Greater Jamaica* Court found that "evidence of an organization's section 501(c)(3) status, by itself, does not create a presumption that the entity is entitled to a tax exemption under section 420-a," but courts may consider the Federal tax-exempt status in determining an entity's eligibility for the exemption under RPTL 420-a (*see id.*). In her dissent, Justice Read repeated the Court of Appeal's caution that "Courts should not interpret the general categories of 'charitable, educational and moral or mental improvement' in section 420-a (1)(a) in a way that is overly narrow or so literal and narrow that it defeats the exemption's settled purpose, even though, in the first instance, exemption statutes are to be construed strictly against the taxpayer seeking the benefit of the exemption" (*see id.* at 634 [Read, J., dissenting]).

Thus, in following the policy of broad construction of the exempt purposes of RPTL 420-a (1)(a), New York courts have held that the exempt charitable, educational, or moral or mental improvement of men, women or children purposes included, for example, preservation of wildernesses areas, providing housing for elderly at below-market rate, providing work therapy and rehabilitation opportunities, providing performing arts instruction, environmental and

conservation purposes, promotion of appreciation of arts/musical theater, providing affordable cooperative housing, informing public about homosexuality, homophobia, and AIDS, and providing drug and rehabilitation services (*see Matter of Greater Jamaica Dev. Corp.*, 25 NY3d at 635 [Read, J., dissenting]; *Mohonk Trust*, 47 NY2d 476; *Matter of Merry-Go-Round Playhouse, Inc.*, 24 NY3d 362; *Matter of Maetrum of Cybele, Magna Mater, Inc. v McCoy*, 24 NY3d 1023 [2014]; *Matter of Dynamite Youth Ctr. Found. v Assessor of Town of Fallsburg*, 207 AD2d 34 [3d Dept 1994]; *Gay Alliance of Genesee Val. v City Assessor of City of Rochester*, 201 AD2d 887 [4th Dept 1994]).

3. DPA's Exemption Claim under RPTL 420-a (1)(a)

In its 2011 DOF Denial, the DOF summarily denied DPA's Application on the grounds that "advocacy of a cause" does not constitute an exempt purpose under RPTL 420-a (1)(a) (*see Verified Petition*, exhibit D). Subsequently, in its 2012 TC Determination, the TC opined that DPA's Property did not qualify for the exemption because (1) DPA's "primary purpose is the pursuit of legislative or governmental policy change based on the fact that [DPA] compiles and makes available information to support its positions as charitable or educational;" and, (2) "while education may be a component of. . . DPA's operation, the aims of legislative and policy change overwhelmingly dominate its activities and focus" (*see Petitioner's Verified Mem of Law in Reply*, exhibit C at 9). Specifically, the TC found that DPA's purposes are:

"(a) to operate exclusively for charitable and educational purposes, including but not limited to conducting research and educating the public about the medical, scientific and sociological effects of drugs and developments in the drug laws.

. . .
(c) to study all federal and state drug laws;

(e) to compile and report the results of all pertinent research concerning the medical, scientific and sociological effects of drugs alcohol, tobacco, narcotics, and all other drugs;

(f) to educate the public and legislators of the need to reform the penalties and legal consequences presently surrounding the possession, use and sale of such drugs; and

(g) to develop model policies for the proper control of drugs" (*see id.* at 2).

The TC also considered DPA's mission statement, as articulated in its 2011 tax returns

as follows:

"The [DPA] envisions a just society in which the use and regulation of drugs are grounded in science, compassion, health, and human rights; in which people are no longer punished for what they put into their own bodies but only for crimes against others; and in which the fears, prejudices, and punitive prohibitions of today are no more. Our mission is to advance those policies and attitudes that best reduce the harms of both drug use and drug prohibition, and to promote the sovereignty of individuals over their minds and bodies" (*see id.* at 3).

In addition, the TC considered DPA's exempt status from Federal income taxation pursuant to 26 USC § 501 (c)(3) (*see id.* at 3).

The TC found that, in 2010, DPA's biggest expenditures consisted of funding exempt program services consisting of "public policy and legal affairs," "grants", and "communications," which included engaging the public in national dialogue on drug policy reform through media and "exposing the public to our messages" (*see id.* at 3-4). Furthermore, the TC found that according to its website, DPA did not provide direct "legal services or referrals to treatment providers" (*see id.* at 4). The TC also found that DPA's advocacy grant program has the Promoting Policy Change fund for drug policy reform organizations and the Special Opportunities fund for time-sensitive drug policy reform opportunities (*see id.* at 4).

In relying on DPA's website, the TC found that DPA does not provide grants to support direct services or academic and journalistic research but may occasionally support research projects or publications that "complement ongoing advocacy efforts" (*see id.* at 4-5). The TC noted that DPA (1) publishes a number of written materials, including the "Safety First A Reality-Based Approach to Teens and Drugs" guide for parents and children, which was distributed in over 300,000 copies, (2) sponsors meetings and conferences, (3) provides scholarships to approximately 500 people annually, including to individuals who were incarcerated or who are dealing with drug addiction, which are in form of waivers of registration fees and sometimes housing and transportation to DPA's conferences; (4) maintains a physical library open to the public on drug policy issues, which occupies approximately 30 feet of wall space in conference

rooms and along the hallways of the Property; (5) engages in lobbying activities, including grassroots lobbying; and, (6) out of DPA's 27 employees, 18 are dedicated to non-administrative work, such as fund-raising or publication of printed materials (*see id.* at 6).

In relying on *Matter of Association of Bar of City of New York v Lewisohn* and *Mohonk Trust v Board of Assessors of Town of Gardiner*, the TC concluded, *inter alia*, that "an organization whose primary purpose is the pursuit of legislative and governmental policy change based on the fact that it compiles and makes available information to support its positions as charitable or educational" cannot be treated as charitable or educational (*see id.* at 8-9, citing *Matter of Assn. of Bar of City of N.Y.*, 34 NY2d 143; *Mohonk Trust*, 47 NY2d 476). The TC reasoned that "[s]uch an expansive interpretation of the statute would open the door to government expenditures in the form of real property tax exemptions on behalf of every group seeking to influence public opinion or government policy on any issue. Organizations compiling and distributing information on issues as diverse as securities regulation, highway safety, hydraulic fracturing regulation and tax reform all could qualify as educational or charitable under the criteria advanced by the DPA" (*see id.* at 9).

In distinguishing *Gay Alliance of Genesee Val. v City Assessor of City of Rochester*, the TC concluded that DPA does not provide any direct services to individuals "affected by drugs or war on drugs," other than scholarships to attend DPA's conferences (*see id.*). The TC found, however, that DPA's goal is similar to Gay Alliance's in that DPA "seeks to end discrimination against addicts and victims of the war against drugs" and some of DPA's activities are educational, such as maintaining a library and publishing pamphlets (*see id.*). In relying on *Matter of Association of Bar of City of New York v Lewisohn*, the TC found that "while education may be a component of the DPA's operation, it is clear from the record that the aims of legislative and policy change overwhelmingly dominate its activities and focus" (*see id.* at 12; citing *Matter of Assn. of Bar of City of N.Y.*, 34 NY2d 143).

In its Verified Petition, DPA stated that its purpose is to (1) "educate the public about drug policies that reduce the harms of both drug use and drug prohibition, and seek solutions that promote safety and reduce addiction;" (2) ensure that the national "drug policies no longer result in arresting, incarcerating, disenfranchising and otherwise harming millions-particularly young people and people of color who are disproportionately affected by the war on drugs;" and, (3) "educate the public about alternatives to existing federal and state drug policies" (see Verified Petition ¶ 7).

In support of its Petition, DPA argues that respondents inappropriately denied it the real estate tax exemption under RPTL 420-a(1)(a) for the Property on the grounds that "advocacy of a cause" is not an exempt purpose, as New York law not only does not define "advocacy" but also does not recognize advocacy as grounds for denial of the mandatory tax exemption (see *id.* ¶ 27). Furthermore, DPA stated that beyond the one-line statement in the 2011 DOF Denial, DPA "had no idea upon which facts [the DOF] had relied in denying [DPA's] [A]pplication" (see *id.* ¶ 8).

DPA argues further that in granting it the tax exemption, this Court should follow *Gay Alliance of Genesee Val. v City Assessor of City of Rochester*, which is binding on this Court because the Second Department has not spoken on this issue and because the Fourth Department found that a not-for-profit organization educating the public about homosexuality, homophobia, and AIDS, and promoting gay rights is eligible for the real property tax exemption under RPTL 420-a (1)(a) (see Verified Petition ¶ 13, discussing *Gay Alliance of Genesee Val.*, 201 AD2d 887). DPA asserts that it should be granted the tax exemption for the Property because New York courts and the City of New York apply RPTL 420-a (1)(a) broadly and inclusively to include, as taken together, various educational, charitable and moral purposes of not-for-profit organizations (see Verified Petition at 13-15).

In their Answer, respondents maintain that the review of all evidence proffered by DPA

revealed that DPA was "organized and conducted for purposes of promoting legislative or governmental reform of existing state and federal drug laws and policies" (see Verified Answer ¶ 58). Furthermore, respondents contend that DPA claimed that its purposes are "educational" on the Application (see *id.*). Moreover, the evidence proffered by DPA showed that DPA's "primary activities consisted of compiling and disseminating information that was either supportive or related to its pursuit of legislative change through publications, media, internet, or public speaking," which activities could not be characterized as educational or charitable under the prevailing case law (see *id.* ¶¶ 59, 74). Respondents further aver that DPA is not organized for charitable or moral and mental improvement purposes as DPA merely provides referrals, rather than actual assistance to the people adversely affected by the current drug laws and policies of the government and even if providing referrals can be considered charitable, this is not the primary purpose or activity of DPA (see *id.* at 25).

In addition, respondents maintain that DPA is not organized for an educational purpose because, unlike in *Gay Alliance* and *Baldwin Research*, DPA does not claim that it provides services or direct assistance to community programs or citizens and its charitable status is based only on its advocacy grants programs, media interviews, public speaking, and distribution of DPA's publications (see Respondents' Mem of Law in Supp of Their Verified Answer at 24; Verified Answer ¶ 64; see also *Matter of Swedenborg Found.*, 40 NY2d 87; *Baldwin Research Inst., Inc. v Town of Amsterdam*, 21 Misc 3d 1106A [Sup Ct, Montgomery County 2006], *affd* 45 AD3d 1152 [3d Dept 2008]).

Respondents aver that the Court should follow *Matter of Swedenborg Found. v Lewisohn*, which interpreted "educational" purposes "to refer to the development of faculties and powers and the expansion of knowledge by 'teaching, instruction or schooling'" (see *id.* at 16-21; *Matter of Swedenborg Found.*, 40 NY2d 87). Thus, respondents argue that this Court should adopt a narrow judicial construction of the term "education" as what is required is that

DPA must engage in teaching, or have organized instructional programs, or have some direct affiliation with a recognized educational institution (see Respondents' Mem of Law in Supp of Their Verified Answer at 16-29).

Moreover, respondents maintain that a broad or expansive interpretation of RPTL 420-a would open the door for tax exemption "expenditures" to every group seeking to influence public opinion or government policy because they could claim that their primary purpose is to "educate the public," even while engaging in compiling and distributing information on any aspect of government policy or regulations (see Respondents' Mem of Law in Supp of Their Verified Answer at 16). For example, organizations compiling and distributing information about securities regulation, highway safety, hydraulic fracturing and tax reform would become eligible for an exemption (see *id.*).

In its reply papers, DPA avers that respondent's insistence on the requirement of providing direct services to qualify for the exemption is misguided because there is no legal authority to support that position and DPA in fact provides numerous services to the public (see Petitioner's Verified Mem of Law in Reply at 15). Thus, considered holistically, DPA's activities fall within the categories of charitable, educational and mental and moral improvement under RPTL 420-a (1)(a) (see *id.*). Lastly, DPA argues that respondents' reliance on *Matter of Association of the City Bar of New York v Lewisohn* is misplaced because the case is not on point as the *Bar Assn.* was held ineligible for the real property tax exemption on the grounds that it is a professional organization, and DPA has established that it is not a professional organization that advances economic interests of its members (see *id.* at 15-16; citing *Matter of Assn. of the City Bar of N. Y.*, 34 NY2d 143).

Here, upon due review of the complete record and after hearing oral arguments, the Court finds that DPA has met its burden of proof to establish that the Property qualifies for the real property tax exemption under RPTL 420-a (1)(a) as a matter of law (see generally *Matter of*

Greentree Found., 142 AD3d at 666; *Matter of Merry-Go-Round Playhouse, Inc.*, 24 NY3d at 362). As an initial matter, the Court finds that the Legislature did not explicitly exclude "advocacy" or "pursuit of legislative or governmental policy change" from the categories of exempt purposes in RPTL 420-a (1)(a) (see *Matter of Symphony Space*, 60 NY2d 33). Therefore, respondents' denial of the tax exemption solely on the basis that DPA is an advocacy group or because its primary purpose is pursuit of legislative or governmental policy change is contrary to the law (see generally *id.*; *Mohonk Trust*, 47 NY2d 476).

As NYCLA correctly points out, the undefined standard of "advocacy for cause" is too imprecise to apply neutrally as the TC does not explain what types of advocacy would disqualify an organization from the tax exemption, or what criteria to apply to determine that an organization's activities constitute advocacy (see Mem of Law of Amicus Curiae NYCLA in Supp at 2-10, citing *Big Mama Rag, Inc. v United States*, 631 F2d 1030, 1040 [DC Cir 1980]). Thus, NYCLA argues, without the definition of "advocacy of cause," government officials and people of common intelligence alike are left to apply their subjective views to interpret what qualifies as "advocacy" (see *id.* at 5). Moreover, as NYCLA correctly maintains, respondents failed to specify how "advocacy" differs from public education (see *id.*).

Moreover, similar to *Gay Alliance*, the Court finds that DPA is "organized or conducted exclusively for charitable, educational or moral or mental improvement of men, women, and children" (see *Gay Alliance of Genesee Val.*, 201 AD2d at 890 [emphasis added]). As in *Gay Alliance*, DPA identified its organizational purpose as educational and is exempt from federal taxation (see *Gay Alliance of Genesee Val.*, 158 Misc 2d at 129). In *Gay Alliance*, the City Assessor denied the exemption to Gay Alliance on the basis that "educational exemptions were limited to applicants which 'conduct organized instructional programs, with a curriculum, classes, and a faculty' (see *id.*). Furthermore, the Assessor stated that "advocacy" is not a purpose disqualifying from the tax exemption, unless advocacy is the only purpose (see Brief for

Gay Alliance of Genesee Valley, Inc., dated November 9, 1933).

Gay Alliance, as did DPA here, maintained that it was organized for a combination of "charitable, educational, and moral and mental improvement purposes" (*see id.*; *see also* Verified Petition ¶ 8). There, similar to respondents, the City Assessor argued that "[a] charitable organization [must] provide[] a necessary commodity or services to needy persons" (*see id.* at 131). Furthermore, the City Assessor maintained that Gay Alliance was not charitable because it did not distribute funds to needy persons and was not educational because Gay Alliance expressed a viewpoint and did not conduct classes (*see id.*). The lower court in *Gay Alliance* rejected these arguments as "fallacious," and inconsistent with the language of RPTL 420-a and *Mohonk Trust v Board of Assessors of Town of Gardiner* and *Matter of Symphony Space v Tishelman*, which establish that non-profit institutions may be organized or conducted for two or more exempt purposes (*see id.* at 131-32). Importantly, the lower court stated that "to the extent that Alliance is an advocacy group . . . It advocates not homosexuality but the legitimate rights and needs of the gay and lesbian community, rights recognized by the City in its anti-discrimination ordinance. This is essentially an educational function. [As t]hese activities also serve to build tolerance and understanding between the community and the larger public, contributing to the moral and mental improvement of the entire community" (*see id.* at 133).

Here, the TC had already conceded in the 2012 TC Determination that DPA's goal is similar to Gay Alliance's in that DPA "*seeks to end discrimination against addicts and victims of the war against drugs*" and that some of DPA's activities are educational (*see* Petitioner's Verified Mem of Law in Reply, exhibit C at 9 [emphasis added]). Moreover, similar to *Gay Alliance*, DPA advocates for the need for a reform of the existing drug law in the area of "the penalties and legal consequences surrounding the possession, use and sale of [certain] drugs," which, for example, have adverse effect especially on people of color and those suffering from

drug addiction (see Verified Petition ¶ 8).

In *Gay Alliance*, the lower court also emphasized that the organization provided a telephone hotline, outreach and support programs for gay and lesbian youth and minorities, AIDS-related programs for survivors of AIDS victims and safe sex workshops, and a free newsletter (see *Gay Alliance of Genesee Val.*, 158 Misc 2d at 129, 133).

The Appellate Division, Fourth Department upheld the lower court's decision on the grounds that Gay Alliance's activities, which were provided free of charge to the general public, included "peer facilitation counselling program, a speakers bureau providing speakers to high school and university classes and other organizations and the publication of a monthly newspaper," and thus, the Court found that Gay Alliance was "organized or conducted exclusively for educational or moral or mental improvement of men, women, and children" (see *Gay Alliance of Genesee Val.*, 201 AD2d at 888 [emphasis added]).

Similar to *Gay Alliance*, here, DPA's activities fall within its exclusive or primary purposes of "charitable, educational or moral or mental improvement of men, women, and children," which are available free of charge to the public and for the public benefit. Some of these activities might be characterized as direct assistance services, although charitable activities need not be limited to free services to persons in need of assistance (see e.g. *Matter of New York Botanical Garden*, 55 NY2d 328; *Mohonk Trust*, 47 NY2d 476; see generally *Webster Apartments*, 118 Misc 91, 93). For example, as in *Gay Alliance*, DPA provides a phone support for inmates and former inmates to provide referrals for legal representation services and referrals to community-based organizations; court observation and case support to assist arrested persons and provide them with referrals for legal representation; and, a youth education services program that works directly with youth and youth servicing organizations (see *Chavez Aff in Supp of Verified Reply and Verified Mem of Law*; Verified Petition ¶ 20 and exhibit 2, tab B). Furthermore, DPA partners with the New York City Department of Education

to educate high-school teens and young adults on the risk of drug abuse and conducts educational meetings and training sessions with local government agencies, public officials, allied organizations, and community members (*see id.*).

In addition, DPA launched a project to educate fans of music festivals of the effects of "party drugs," which includes a website with educational materials for music fans, and DPA is working with music festival promoters to provide guidance on harm reduction services on-site at music events (*see id.*). DPA also gives public lectures, speaks at conferences, gives radio and television interviews, and has speaking engagements regarding drug laws, legislative initiatives and referendums (*see id.*). DPA established advocacy grant programs, sponsors meetings and conferences, and provides scholarships in the form of waivers of the registration fee and housing and transportation to its biennial conferences for students, people who have been incarcerated and people who are dealing with addiction (*see id.*). For example, DPA distributes nearly a million dollars per year in grants to organizations dedicated to reducing the harms of drugs (*see Verified Petition, exhibit C, 2012 TC Hearing Tr at 11*).

As in *Gay Alliance*, DPA writes and publishes a quarterly newsletter, in addition to peer-reviewed publications, fact sheets, pamphlets and other written materials, including the Safety First guide for children and parents, and others on overdose prevention and treatment options, including methamphetamine and methadone (*see id.*). Finally, DPA maintains a website, prepares educational videos, and operates physical and on-line library (*see id.*).

Furthermore, the Court finds that the characterization of DPA's primary or exclusive activities as consisting of compiling and merely distributing information is unsupported by the record. In that regard, *Matter of Swedenborg Foundation v Lewisohn* is factually distinguishable as the primary purpose of the Swedenborg Foundation was to "disseminate the writings and religious views of Emanuel Swedenborg" (*see Matter of Swedenborg Found., 40 NY2d at 90, 95* [The organizational documents of the Swedenborg Foundation provided, *inter alia*, that "the

purposes and powers of the Society are to print, publish, circulate and distribute the theological, scientific and other works and writings of Emanuel Swedenborg.")). Here, while some of DPA's activities or written materials might include compiling and disseminating information not all of them fall within this category, as DPA, for example, also researches, tracks, and prepares analyses of drug legislation and executive policies, and develops model policies for the proper control of drugs (*see e.g.* Verified Petition ¶¶ 7, 74).

Additionally, the Court finds that while respondents acknowledged that DPA maintains the Lindesmith Library, which they stated was not a major educational activity, they failed to account for the fact that the Library in fact houses a collection of more than 15,000 documents and videos available to the public and has been accessed online by nearly a million visitors per year (*see* Verified Answer ¶¶ 66-67; 2012 TC Hearing Tr at 16; Brief for Amici Curiae NPCC and Lawyers Alliance at 10). As NPCC and Lawyers Alliance correctly point out, in the age of digitalization of information and books, and decreased need for brick-and-mortar libraries, the twenty-first century education need not be provided in the setting of traditional schooling, and school libraries also deliver information and books to students via digital access to their collections and resources (*see* Brief for Amici Curiae NPCC and Lawyers Alliance at 8-9). Moreover, New York courts have already established that education also need not take place in a traditional setting (*see e.g. Mohonk Trust*, 47 NY2d 476 ["education" can take place in an undeveloped wilderness reservation]; *see also Matter of New York Botanical Garden*, 55 NY2d 328).

The Court also finds unpersuasive respondents' argument that the decision to grant the tax exemption to DPA would open the flood gates of the tax exemption expenditures to other groups similar to DPA who seek to influence public opinion or government policy, which would result in significant revenue loss to the City of New York. According to NPCC and Lawyers Alliance, the data compiled by the Office of Tax Policy of the DOF shows that in 2015 the value

of tax revenue from the charitable tax exemptions amounted only to \$229.3 million and constituted only 1.5% of the total value of all real property tax exemptions (see Brief of Amici Curiae NPCC and Lawyers Alliance at 5). Thus, the loss of the real property tax revenue was minor (see *id.*).

In conclusion, the Court finds that DPA proffered the requisite amount of evidence to establish that DPA uses the Property exclusively or primarily for its exempt purposes. Therefore, the Court finds that DPA has met its burden of proof, and, in accordance with the prevailing precedent in the State of New York, the Court declares that DPA is entitled to the real property tax exemption under RPTL 420-a(1)(a) for the Property, and to the costs and disbursements incurred in the herein CPLR article 78 proceeding (see RPTL § 420-a [1][a]; *Mohonk Trust*, 47 NY2d 476; *Matter of Symphony Space*, 60 NY2d 33; *Gay Alliance of Genesee Val.*, 201 AD2d 887). As a result, the 2011 DOF Denial and 2012 TC Determination are arbitrary and capricious and both are hereby annulled. Furthermore, DPA's request for legal fees is denied.

In light of the foregoing, the Court need not address the parties' remaining contentions, including DPA's Constitutional claims.

CONCLUSION

Accordingly, it is hereby

ORDERED that the Petition of petitioner Drug Policy Alliance is granted, and the 2011 DOF Denial and 2012 TC Determination are hereby annulled; and, it is further,

ADJUDGED that respondent New York City Department of Finance is directed to grant petitioner a tax exemption pursuant to New York State Constitution article XVI, section 1, RPTL 420-a (1)(a), and Administrative Code of the City of New York section 11-246; and it is further,

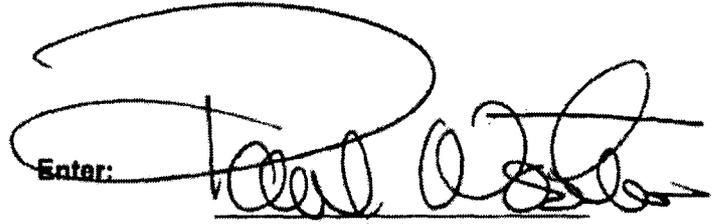
ORDERED that the within matter shall be referred to a JHO/Special Referee to hear and determine the amount of the refund to which petitioner Drug Policy Alliance is entitled for the

real property taxes paid by Drug Policy Alliance, including pre- and post-judgement interest, as well as petitioner's costs and disbursements incurred in this proceeding; and it is further,

ORDERED that petitioner Drug Policy Alliance shall serve a copy of this Order with Notice of Entry upon respondents, the Special Referee's Clerk in the General Clerk's Office, and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 11/23/18

Enter: 
PAUL WOOTEN J.S.C.

FILED

JAN - 8 2019

COUNTY CLERKS OFFICE
NEW YORK


Clerk