To be Argued by:
MENACHEM J. KASTNER
(Time Requested: 30 Minutes)

APL-2021-00056
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Appellate Division–First Department Case No. 2019-5793

Court of Appeals

of the

State of New York

In the Matter of the Application of

BROOKDALE PHYSICIANS' DIALYSIS ASSOCIATES, INC. f/k/a Church Avenue Associates, Inc., SAMUEL AND BERTHA SCHULMAN INSTITUTE FOR NURSING AND REHABILITATION FUND, INC. f/k/a Samuel Schulman Institute for Nursing and Rehabilitation Fund, Inc.,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

– against –

THE DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK,

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT BROOKDALE PHYSICIANS' DIALYSIS ASSOCIATES, INC. F/K/A CHURCH AVENUE ASSOCIATES, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), Petitioner-Respondent Brookdale Dialysis states that it has no parents, subsidiaries or affiliates.

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PRELIMINARY STATEMENT

This brief is respectfully offered on behalf of Brookdale Physicians Dialysis Associates, Inc. f/k/a Church Avenue Associates ("Brookdale Dialysis"), which is a petitioner-respondent jointly with Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund, Inc. f/k/a Samuel Schulman Institute for Nursing and Rehabilitation Fund ("Samuel Schulman") (collectively, "Petitioners"), in opposition to the appeal of The Department of Finance of the City of New York ("DOF") from a unanimous Decision and Order of the Appellate Division, First Department, which affirmed the Decision and Order of the Supreme Court, New York County.

From the outset, DOF begins with a misstatement, asserting in the very first paragraph of its brief that the Appellate Division "granted" tax exempt status to Petitioners. The intentional use of the word "granted" is notable, inasmuch as the underlying proceeding arose not from a request that DOF grant a request for tax exempt status, but from DOF's unfounded revocation of the long-standing tax exempt status of Samuel Schulman's Building. This is crucial, as the burden to demonstrate that the revocation was proper in the first instance falls to DOF – not Petitioners. And this is a burden that DOF, despite multiple attempts and the presentation of varying, and often conflicting arguments, has woefully failed to satisfy.

Before addressing the burden which DOF failed to satisfy, the other misstatements offered in the initial pages of DOF's brief are worth discussing – misstatements which DOF has repeated over and over, despite being belied by the Record and the plain language of the relevant statute. Most notably, Brookdale Dialysis did not lease the entire Building. Rather – as was expressly pointed out to DOF by the trial Court years ago, and as DOF even acknowledges (DOF Brief p. 8) – Brookdale Dialysis leases only part of the Building. Because this does not fit with DOF's preferred narrative or support the revocation of tax-exempt status against the entire Building – and because DOF failed to undertake any review of the actual use of the Building (much less its depreciation in value, carrying costs, etc.) as the Supreme Court suggested in 2014 (R. 39) – DOF unabashedly repeats this misstatement.

Likewise, the statement that to "qualify" for tax-exempt status, "the property cannot be used for pecuniary gain" (DOF Brief p. 1) is glaringly inaccurate. Indeed, contrary to DOF's misstatement, both this Court and the language of the statute reveal that exempt property can, in fact, be utilized for financial gain or "profit,"[1] and that it only "shall not be exempt if any officer, member or employee of the owning corporation . . ." receives any pecuniary profits from its operation separate

[1] *See Gospel Volunteers, Inc. v. Speculator*, 33 A.D.2d 407 (3d Dep't 1970) *aff'd* 29 N.Y.2d 622 (1971).

and apart from customary salary. Inasmuch as DOF has never asserted that any "officer, member or employee" of Samuel Schulman has received an untoward profit - - or, indeed, any profit - - from the operation of Brookdale Dialysis, and as DOF certainly did not base the revocation of tax-exempt status on same, this is a red herring.

Misstatements aside, this appeal concerns DOF's third attempt to revoke the long-standing tax-exempt status of a building owned by Samuel Schulman based on the use of a portion of that building by Brookdale Dialysis as an ambulatory dialysis center and renal research facility.[2] DOF admittedly did not analyze the actual use of the building, but revoked the building's tax-exempt status solely "based on the fact that the income exceeds the expenses for the property." (R. 55). That, and only that, is the issue before this Court.

As relevant here, this Court has made it clear that, where a long-standing property tax exemption is revoked, it is the burden of the revoking agency to demonstrate that the property was not being utilized in a manner incidental to the charitable purposes of the owning entity. This Court has thus reiterated that it is the

[2] DOF's first revocation of the building's tax exempt status in 2013 was set aside by the Supreme Court and DOF did not appeal that decision. And, DOF voluntarily reversed its second attempt in 2015.

actual, physical use of the property which is dispositive, and not whether the owner earns a profit.[3]

Despite this settled law, DOF undertook no investigation whatsoever into the actual use of the building at issue before revoking the tax-exempt status which had been in effect for decades, and then faulted the Supreme Court for not undertaking DOF's burden of investigation.[4]

Indeed, in its appeal to the First Department, DOF acknowledged that its entire basis for revoking the tax-exempt status of the Building was centered on its own mistaken belief that the previous Court decision held that Brookdale Dialysis should be treated as an exempt organization, and DOF's determination that, therefore, it need not examine the actual use of the Building but could instead rely on RPTL § 420-a(2). (See DOF's Main Brief to Appellate Division, pp. 16, 18; DOF's Reply Brief to Appellate Division, p. 6; R. 55). DOF thus erroneously relied on RPTL § 420-a(2) (which is wholly irrelevant to our facts) to issue the Determination. Worse, where RPTL § 420-a(2) expressly requires a determination as to the "amount of the carrying, maintenance and depreciation charges of the property," DOF

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[3] *See, e.g., Adult Home at Erie Station v. Assessor, City of Middletown,* 10 N.Y.3d 205 (2008).

[4] In the first proceeding in 2013, the Supreme Court expressly stated "whether [Brookdale Dialysis'] service is reasonably incidental to or in furtherance of the exempt purpose must be considered," yet DOF failed to undertake such investigation notwithstanding the Court's admonition.

admitted at oral argument before the Appellate Division that it conducted no research into these charges, thus destroying its erroneous reliance on RPTL § 420-a(2).

DOF's confessed mistake, and its acknowledgement that it failed to undertake any examination of the use of the Building under RPTL § 420-a(1) demonstrates that the lower Court and the First Department were correct in finding that DOF failed to satisfy its burden of demonstrating that the Determination to revoke the Building's tax-exempt status was properly issued.

In a transparent attempt at misdirection, DOF newly focuses on the purpose and identity of Samuel Schulman as the charitable owner of the Building. First, this is improper, as this argument was raised for the first time on appeal to the First Department. This is crucial, inasmuch as: (i) this was not a basis presented by DOF for its termination of the Building's tax-exempt status (R. 55), and (ii) this deprived Petitioners of the opportunity to address DOF's contentions by the presentation of evidence. Second, this argument is wholly unfounded. The undisputed fact is that Samuel Schulman is a 501(c)(3) tax-exempt organization created to advance the charitable and hospital purposes of, *inter alia*, The Schulman and Schachne Institute for Nursing and Rehabilitation, Inc. (the "Nursing Institute") and The Brookdale Hospital Medical Center ("Brookdale Hospital") and to "promote the general health of the community."

Taking this to the next step, the actual, physical use of the Building as the ambulatory dialysis center for Brookdale Hospital is plainly, at a minimum, incidental (indeed, vital) to the charitable purpose of both Samuel Schulman as well as Brookdale Hospital and the Nursing Institute – the charitable entities with which Samuel Schulman is affiliated, and whose assets Samuel Schulman has undertaken the task of supporting. Thus, this falls right in line with this Court's determination that an ambulatory x-ray unit is integral to the charitable purposes of a medical institution and, as such, is entitled to tax-exempt status under RPTL § 420-a irrespective of any profit which may be realized.[5] Indeed, the use of the Building as an ambulatory dialysis unit is arguably much more integral to a charity focused on community healthcare than, for example, a cafeteria,[6] a housing complex,[7] or a beauty salon,[8] and yet all of these uses have been held sufficiently incidental to the enumerated charitable and hospital purposes to satisfy the statutory requirement that the property be used "exclusively" for such charitable and hospital purposes.

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5 *See Genesee Hosp. v. Wagner*, 47 A.D.2d 37 (4th Dep't 1975) *aff'd* 39 N.Y.2d 863 (1976).

6 *Pace College v. Boyland*, 4 N.Y.2d 528 (1958).

7 *In re United Church Residences of Fredonia, N.Y., Inc. v. Newell*, 10 N.Y.3d 922 (2008).

8 *Matter of Southwinds Retirement Home v. City of Middletown*, 74 A.D.3d 1085 (2d Dep't 2010).

Beyond its admitted failure to conduct the necessary examination into the actual, physical use of the Building, DOF premises its demand for reversal of the lower Court's Order on the assertion that the mere rental of space to a for-profit entity, and the realization of rent therefrom, *ipso facto* serves to remove the property's eligibility for tax-exempt status. This claim has been rejected by the courts time and again, with this Court expressly noting "The question is how the property is used, not whether it is profitable."[9] Thus, again, DOF's basis for revoking the tax-exempt status of the Building as well as the arguments presented by DOF are without merit, and do not support the reversal of the Appellate Order.

As such, it is respectfully submitted that the Order should be affirmed in its entirety.

COUNTER STATEMENT OF FACTS

A. The Relationship Between The Charitable Entities

Samuel Schulman is a charitable, not-for-profit enterprise created for the purpose of promoting the health of the community in which it is located largely through providing funds and support to the Nursing Institute, a voluntary, not-for-profit residential healthcare facility licensed under Article 28 of the New York State Public Health Law ("PHL") dedicated to providing clinical care in a homelike environment, and Brookdale Hospital, a not-for-profit corporation licensed to

[9] *See, e.g., Adult Home at Erie Station v. Assessor, City of Middletown, supra; Gospel Volunteers, Inc. v. Speculator*, *supra.*

operate a hospital under Article 28 of the PHL. (R. 137) Samuel Schulman, the Nursing Institute and Brookdale Hospital are each exempt from federal income tax as charitable organizations under Section 501(c)(3) of the Internal Revenue Code. (R. 20-21; 58; 137)

In addition to the subject building located at 9701 Church Avenue, Brooklyn, New York (the "Building"), Samuel Schulman owns the property at One Brookdale Plaza, Brooklyn, New York, which is occupied by Brookdale Hospital and the Nursing Institute. It is *not* disputed that this property owned by Samuel Schulman is entitled to exemption from property taxes, and DOF has not revoked that exemption. Brookdale Hospital, the Nursing Institute and the Building are located in the East New York/Brownsville section of Brooklyn.

Brookdale Hospital, founded in 1921, is one of Brooklyn's largest voluntary nonprofit teaching hospitals and a regional tertiary care center and provides general and specialized inpatient care to thousands of people every year. In addition, Brookdale Hospital provides 24-hour emergency services, numerous outpatient programs and long-term specialty care. (R. 22)

Brookdale Hospital furnishes one of Brooklyn's largest, and most experienced full service emergency departments and a regionally recognized Level I Trauma Center. Brookdale Hospital is also a New York State Department of Health ("DOH") designated Stroke Center. Brookdale Hospital's community centered organization

provides numerous outpatient Ambulatory Care services in both on campus and off site facilities, as well as the Nursing Institute.[10] (R. 22; 143)

The Nursing Institute provides care and special rehabilitation services and treatment for patients after the acute phase of their illness, and further provides a range of specialty services through individualized units, including a Dementia Special Care Unit, a Sub-Acute Care Unit, Geriatric Care Units, HIV/AIDS Units, a Ventilator-Dependent Care Unit and a Hospice Care program under the supervision of Hospice of New York. (R. 58; 143)

The 448 bed Nursing Institute, as well as the 86 bed unit of senior assisted and independent living in the Arlene and David Schlang Pavilion, provide both long and short-term care and are located on the Brookdale Hospital campus. The Adult Day Care Program of the Nursing Institute provides a quality program for adults and seniors who have functional impairments that require this level of care. (R. 22; 144)

Brookdale Hospital, Samuel Schulman and the Nursing Institute are all corporately affiliated with each other by reason of being under common control of the same corporate parent, Brookdale Health System, Inc., a Section 501(c)(3) tax-exempt charitable organization. (R. 137) Moreover, there is substantial overlap in

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[10] A report generated by Northwell Health analyzed the state of healthcare in Brooklyn, and provided a strategy for future improvements and advances. As particularly relevant to this appeal, and the community healthcare concerns of Brooklyn, one of the recommendations issued by Northwell was specifically to "protect capital dedicated to supporting ambulatory care development." *See https://www.northwell.edu/sites/northwell/files/20781-Executive-Summary-Brooklyn-Study_0.pdf*

the composition of their respective governing boards. Additionally, around-the-clock medical care at the Nursing Institute is provided by Brookdale Hospital attending physicians. The Nursing Institute also provides rehabilitation services, occupational therapy, physical therapy and speech-language and audiology services and social services, all conducted by Brookdale Hospital employees. (R. 21)

Brookdale Dialysis operates Brookdale Hospital's acute care dialysis facility, providing nephrology services to patients, the overwhelming majority of whom are patients of Brookdale Hospital and/or the Nursing Institute. Specifically, more than 80% of the patients seen at Brookdale Dialysis are seen through referrals from Brookdale Hospital physicians or Emergency Room personnel. (R. 23) The employees of Brookdale Dialysis, including nurses, technicians and staff, are actually Brookdale Hospital employees, who provide services for Brookdale Dialysis under a staffing agreement. The doctors are also part of the Brookdale Hospital Division of Nephrology and Hypertension, which is located on the Brookdale Hospital campus.[11] (R. 59-60; 147)

[11] DOF complains of the relationship between Brookdale Dialysis and Avantus Renal Therapy, based on a website accessed July 25, 2021. (DOF Brief p. 7) Brookdale Dialysis has not occupied the Premises or been associated with Brookdale Hospital since 2019 and another entity now provides the necessary dialysis services. However, as a result of DOF's imposition of mounting penalties and interest and then the repeated threat of a lien sale, Brookdale Dialysis paid that outstanding taxes under protest and will seek to recoup such payment in the event an affirmance. For ease of reading, the facts surrounding the operation of Brookdale Dialysis and the interplay between it, Samuel Schulman, Brookdale Hospital and the Nursing Institute are offered in the present tense, but, in reality, Brookdale Dialysis no longer occupies the Premises.

Brookdale Hospital and Samuel Schulman do not have a dialysis facility apart from that operated by Brookdale Dialysis. Brookdale Hospital also does not own the necessary machines for dialysis treatment on the Brookdale Hospital campus. (R. 23) Rather, those machines which are in Brookdale Hospital and utilized for in-patient procedures are all owned and operated by Brookdale Dialysis. In addition to relying on Brookdale Dialysis to supply machines for in-patient services, Brookdale Hospital relies upon machines owned and utilized by Brookdale Dialysis in the Building in providing approximately 22,000 outpatient dialysis treatments every year. (R. 60; 138-139) Accordingly, Brookdale Hospital denotes and wholly relies upon Brookdale Dialysis as its dialysis unit in the Building, noting on the "Dialysis Unit" segment of its website:

> The Nephrology and Hypertension Division has the ability to provide chronic and acute hemodialysis for in-patient (sic) and nursing home patients in the hospital. For patients in a critical care setting we have the capacity, through our portable hemofiltration unit, to perform hemodialysis at the bedside.
>
> In addition to hospital based hemodialysis, the Division operates at 28 station ambulatory dialysis setting locally. (R. 719)

None of the foregoing facts were challenged in the court below.

B. The Building

At the heart of this appeal is the Building owned by Samuel Schulman wherein Brookdale Dialysis operates the ambulatory dialysis division of Brookdale Hospital

with employees of Brookdale Hospital. (R. 137; 151-152) The Building is a two story structure with a basement, located across the street and directly adjacent to the Brookdale Hospital campus. (R. 60). The Building was rendered exempt from real estate taxes when it was purchased by Samuel Schulman in or around 1975. (R. 137)

C. Brookdale Dialysis Leases the Basement and First Floor of the Building

Pursuant to a lease, dated December 1995, between Brookdale Dialysis, as tenant, and Samuel Schulman, as landlord (the "Lease"), Brookdale Dialysis leased the basement and first floor of the Building (the "Premises"). (R. 68 – 99) The Lease was amended by a First Amendment of Lease, effective March 1, 2014, to extend the term of the Lease and to adjust the rent due. (R. 100-103)

At no point did Brookdale Dialysis lease the second floor of the Building. Accordingly, Brookdale Dialysis does not pay rent for the second floor of the Building, which remains solely under the control of Samuel Schulman.[12] (R. 61; 71; 415) As acknowledged by DOF (yet repeatedly misstated in its brief), Samuel Schulman is in possession of the remainder of the Building – to wit, the second floor (compare DOF Brief p. 8 to pp. 1, 4, 9).

At the time of the negotiations and execution of the Lease, the Building was abandoned and decrepit, in a state of disrepair rendering it unfit for use as a medical

[12] Appropriately, Brookdale Dialysis is also not responsible for the entirety of any taxes, water and sewer charges, etc. assessed against the Building, but only for 60.9% of same. (R. 429)

care facility. The purpose of the Lease was to enable the Building to functionally join the non-profit medical mission of Brookdale. Under the Lease, Brookdale Dialysis was required to renovate and rehabilitate those portions of the Building it leased to enable its use for dialysis services, and to enable patients of Brookdale Hospital and the Nursing Institute to benefit from close access to a dialysis center. (R. 61)

Over the course of two years, Brookdale Dialysis rehabilitated the first floor and basement levels of the Building and refinished the second floor of the Building. Brookdale Dialysis spent its own money on the repair and rehabilitation, spending over $2 million to bring the Building to its present usable state. (R. 61)

D. Brookdale Dialysis' Use of The Premises

At all relevant times, Brookdale Dialysis utilized the Premises for the treatment of individuals suffering from renal failure or dysfunction. As noted on the Brookdale Hospital website, Brookdale Dialysis maintained 28 individual stations in the Building and provided hemodialysis (cleansing blood by pumping it through a dialyzer, and then returning it to the body) and peritoneal dialysis (running a sterile solution of minerals and glucose through a tube into the peritoneal cavity to remove waste products, and then draining the solution). Of the centers in Brooklyn which provide dialysis, only seven others provide peritoneal dialysis. (R. 61 – 62; 719)

The machinery utilized in the Premises was all purchased and is owned by Brookdale Dialysis. The machines cost approximately $15,000 each, and Brookdale Dialysis maintained 34 separate machines for different dialysis uses and functions for a total cost of over $510,000. Brookdale Dialysis incurs all of the costs of repair, inspection and maintenance of these machines. (R. 62)

More than 80% of the patients seen at Brookdale Dialysis are referred by Brookdale Hospital and/or the Nursing Institute, whether through the Emergency Room at Brookdale Hospital, or through medical doctors consulting there. (R. 62)

Approximately 65 people work at Brookdale Dialysis, including doctors, nurses and technicians. All of the individuals working at Brookdale Dialysis in the Building are Brookdale Hospital employees, most of whom are members of 1199 SEIU United Healthcare Workers Union. The employees are "leased" to Brookdale Dialysis by Brookdale Hospital, and then paid by Brookdale Hospital. (R. 62; 147) Brookdale Dialysis does not utilize any portion of the Building for private doctors' offices. Rather, the entirety of the Leased Premises is devoted to dialysis care and research. (R. 63; 147)

For the twelve tax years of 2001-2013, Samuel Schulman received exemption from New York State real property taxation for the Building under RPTL § 420-a, and, accordingly, was not charged real estate taxes by DOF. (R. 417)

Significantly, none of the foregoing facts were challenged by DOF in the Courts below and therefore cannot be challenged by DOF for the first time on this appeal.

E. The Rental Income From the Building

Samuel Schulman received rent from Brookdale Dialysis' use of the Premises in the Building (to wit, the first floor and basement). (R. 138) It was uncontested in the Courts below that Samuel Schulman utilized the entirety of the rental payments to support Samuel Schulman's charitable purposes and programs, including the care and maintenance of Samuel Schulman's own facilities, as well as those of Brookdale Hospital and the Nursing Institute. (R. 138, ¶6)

Likewise, it was uncontested in the Courts below that no members, officers or trustees of Samuel Schulman profited from the lease of the Premises to Brookdale Dialysis. (Id.)

F. DOF's First 2013 Revocation of the Building's Tax-Exempt Status

On or about March 22, 2013, DOF mailed a notice to "Samuel Schulman Institute c/o Brookdale Hospital Med. Center, Finance Dept.," advising that the tax-exempt status of the Building would be revoked pursuant to RPTL § 420-a, 45 days after the date of the letter. (R. 139) Specifically, DOF noted as the basis for revoking the tax-exempt status:

> [The Building] was previously granted an exemption pursuant to Section 420a of the Real Property Tax Law.

> Properties are eligible for this exemption if they are owned by a qualifying not-for-profit institution that is using the property for an exempt purpose . . . It has come to our attention that this property was leased to a commercial entity that was approved for a Department of Building's permit on September 24, 1996, and the property was no longer eligible for the exemption as of that date. (R. 123; 477)

Thereafter, on or about May 20, 2013, and without conducting any hearing or investigation into the use of the Building or any other relevant factors, DOF revoked the Building's tax-exempt status, and mailed to Samuel Schulman a Notice of Revised Property Tax Assessment (the "2013 Determination"). (R. 125-134; 139)

The 2013 Determination stated "the taxable assessed valuation or tax class of this parcel has been changed," and thereafter reflected the changes from the Building being tax-exempt, with a taxable amount of "0" for the years 2001 through 2012, to the Building being subject to taxation. (R. 123-134)

G. The Court Determines That the Tax-Exempt Status Was Improperly Revoked, Which Determination Was Not Appealed By DOF

Pursuant to Section 6.03 of the Lease, Brookdale Dialysis, as tenant, and Samuel Schulman, as owner, commenced a hybrid Article 78/Declaratory Judgment Proceeding against DOF (the "2013 Proceeding"). (R. 105-119)

DOF sought dismissal of the Petition, and Petitioners sought the annulment of DOF's 2013 Determination revoking the Building's tax-exempt status. Petitioners argued, *inter alia*, that the actual use of the Premises was significantly enmeshed

with and integral to the charitable purpose of Samuel Schulman, as well as of Brookdale Hospital and the Nursing Institute, which Samuel Schulman supports. Accordingly, Petitioners argued, the Building is being used "exclusively" for the prescribed charitable purposes, and the tax-exempt status was improperly revoked.

By Decision and Order of the Honorable Margaret A. Chan, dated February 10, 2014 (the "2014 Order"), the Court held that the Building's tax-exempt status was improperly revoked. (R. 37-39) Specifically, the Court held:

> [As] the DOF is revoking a previously granted tax-exemption, it has the burden of proof that the property is no longer eligible for the exemption. The DOF does not include any evidence to support its cross-motion. It relies on the fact that Brookdale Dialysis is a for profit corporation, and as such, it is not used for tax-exempt purposes. However, the Court of Appeals has stated that the exclusive use language of RPTL § 420-a is not to be read literally. In that Brookdale Dialysis performs a great deal to further the charitable activities of Brookdale Hospital and the Nursing Institute, and is apparently quite enmeshed with them in terms of staffing, whether its service is reasonably incidental to or in furtherance of the exempt purpose must be considered. No such consideration was presented here. (citations omitted). (R. 39)

The 2014 Order was neither appealed nor contested by DOF and the tax-exempt status was reinstated.

H. DOF Again Revokes, And Then Reinstates, The Building's Tax-Exempt Status in 2015

In or around January 2015, DOF issued to Petitioner Samuel Schulman real property tax invoices including taxes assessed against the entire Building. (R. 41-42) Counsel for Brookdale Dialysis then reached out to DOF, providing a copy of the February 10, 2014 Order. (R. 44-49) Upon receipt of the February 10, 2014 Order, DOF reversed course, issuing a new assessment in March of 2015 reflecting the Building as tax-exempt (the "March 2015 Reinstatement").

I. DOF's 2016 Revocation of Tax-Exempt Status, Forming the Basis of This Appeal

One year later, in or around August 2016, and notwithstanding the 2014 Order (which was not appealed) and the March 2015 Reinstatement, DOF again issued tax invoices including property taxes assessed against the entire Building. (R. 44-45) Counsel for Brookdale Dialysis again reached out to DOF regarding what appeared to be another error. Specifically, by correspondence, dated September 1, 2016, counsel provided DOF with a copy of the February 10, 2014 Order and requested confirmation that the assessment be revised to reflect the Building's tax-exempt status as DOF had done in the March 2015 Reinstatement. (R. 52-53)

In response, Theodore Oberman, the Director of Commercial Exemptions and Abatements of DOF, requested additional information from Brookdale Dialysis, including a copy of the current lease for the Premises and information regarding

maintenance and utility costs. Each request for information as to the rent and maintenance and utility costs was complied with. (R. 240-319) Significantly, DOF did not request any information as to the "use" of the Premises or the Building, did not request any information as to the employment status of the individuals performing dialysis treatment in the Premises, did not seek documentation as to any diminution of value or other costs associated with the Building, did not visit the Building and, most importantly, and as reflected in the Record, did not request any information or documentation from Samuel Schulman – the owner of the Building.

By email, sent on April 4, 2017 (the "Determination"), Mr. Oberman wrote to counsel for Samuel Schulman, setting forth the position that, under RPTL § 420-a, a tax-exempt property which is leased to another entity may only retain its tax-exempt status where it is "leased to another qualifying [not-for-profit] organization provided that the income does not exceed the expenses for the leased portion." (R. 55; 408) Mr. Oberman then declared that the income received by Samuel Schulman in rent from Brookdale Dialysis exceeded the expenses for the Building, and that the DOF therefore denied the "exemption application" for the Building based on this receipt of rent. (R. 55)

Notably, the Determination contained no other basis for DOF's revocation of the Building's tax-exempt status, nor was any investigation made by DOF as to the use of the Building (as suggested in the 2014 Order). Furthermore, DOF did not

consider depreciation costs and carrying costs of the Building or the initial costs incurred in repairing the Building and a host of other relevant factors. Thus, the sole issue is whether DOF sustained its burden to demonstrate that the exemption was properly revoked solely because, according to DOF, the rental income exceeded the expenses for the Building. And, despite being aware that Brookdale Dialysis rented only the basement and first floor of the Building, DOF revoked the tax-exempt status for the entire Building, and declined to alter its determination.

In the Article 78 proceeding which is the subject of this appeal (discussed hereinafter), counsel for DOF reiterated that the Determination "is concerned with the fact that the lessor, the owner of the property is making a profit on the lease to the tenant" and contended that revocation was appropriate because Samuel Schulman earned a profit from the rental income. (NYSCEF Doc. 28, pp. 5, 12, 13)

J. The 2017 Article 78 Proceeding

By Notice of Petition and Petition (jointly, the "Petition"), dated July 5, 2017, Petitioners again commenced an Article 78 proceeding against DOF to address this most recent revocation of the tax-exempt status of the Property. (R. 13-35; 368-388)

In opposition, DOF sought dismissal of the Petition and argued, *inter alia*, that an Article 78 Proceeding was an improper method to challenge the revocation of the tax-exempt status (an issue DOF abandoned on appeal), and that, as Brookdale Dialysis was utilizing the Building for profit-making purposes and the owner was

purportedly realizing a profit from the rental, that Petitioners had not demonstrated entitlement to tax-exempt status, thus, improperly shifting its burden onto Petitioners. (R. 361-366)

As to substantive arguments, DOF primarily relied on the contention that "RPTL § 420-a(2) provides that if any portion of such [exempt] real property is leased or used for other, non-exempt purposes, then that portion shall be subject to taxation," and "the legally determinative factor for tax-exempt status is whether the property is used for profit-making purposes." (R. 682-683) DOF further admitted that "the facts relevant to the current Article 78 petition are identical to those of the 2013 petition," but expressed its belief that, although it knowingly chose not to appeal the 2014 Order, the Court had erred in granting the relief sought in the 2013 Petition. (R. 683)

K. The Order

By decision and order, dated August 2, 2018 (the "Order") and entered August 3, 2018, the trial Court granted the Petition and denied DOF's cross-motion. (R. 9-12) In so deciding, the Court noted that the pertinent facts were unchanged from the prior Article 78 proceeding, including the undisputed fact that DOF had not

investigated or considered the actual use of the Building prior to revoking the tax-exempt status. (R. 10)[13]

The Court further noted that, while DOF acknowledged that it bore the burden of demonstrating that the revocation of tax-exempt status was proper, DOF nonetheless tried to shift that burden to Petitioners again. (R. 11) Ultimately, the Court found that DOF – particularly in relying on the Petition itself – had failed to satisfy its burden to demonstrate that it had properly revoked the Building's tax-exempt status. As to DOF's principal argument that Samuel Shulman had realized a profit in the receipt of rent from Brookdale Dialysis, the Court noted that the inquiry does not end whether there is a profit but, rather, the actual use of the exempt property must be considered. (R. 12) The Court then held that DOF failed (again) to consider the use of the exempt property and therefore failed to satisfy its burden of establishing that the revocation of tax-exempt status was proper. (R. 12)

Over one year later, after having failed to meet the deadline imposed by the rules of the Appellate Division and then obtaining a vacatur of the dismissal of the imposed, DOF perfected the appeal of the Order.[14]

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[13] Although not an issue on this appeal, the Supreme Court held that the February 10, 2014 Order was not law of the case notwithstanding that it involved the exact same facts but only differed as to the period and amount involved.

[14] Despite the then existing ruling that the Building was subject to tax-exempt status, DOF used this lengthy delay in perfecting its appeal to not only continue imposing taxes on the Building, but also to charge compounding interest at a very high rate and to add the Building to the Lien Sale list multiple times. With the interest mounting and because of the threat of a lien sale,

L. DOF's Appeal to The Appellate Division, First Department

In its appeal to the First Department, DOF acknowledged that it bore the burden of demonstrating that the revocation was proper and admitted that it had failed to conduct any analysis (again) as to the actual use of the Leased Premises or the Building, stating "DOF did not conduct a use analysis because it believed, in error, the issue to have been determined by the 2014 Decision," *to wit*, that the "use" of the Building was for exempt purposes.[15] Nonetheless, DOF argued, *inter alia*, that Brookdale Dialysis should be treated as though it were a not-for-profit entity in its own right and that, as Samuel Schulman receives a "profit" via renting the Premises to Brookdale Dialysis, the Building is no longer entitled to tax exempt status.[16] (DOF Brief to First Department, pp. 7-8, 18: NYSCEF Doc. No. 28, p. 7: "We are here today concerned with the fact, again, not to repeat myself, the owner is making a profit on the lease.").

Petitioners were left with no choice, and paid the imposed taxes, interest and penalties to DOF, without prejudice to seeking recoupment.

[15] Thus, in its main Brief to the Appellate Division, DOF asserted that it "accepted that the Building was used strictly for exempt purposes." (DOF Brief to First Department pp. 16, 18 and, Reply Brief, p. 6)

[16] How DOF reached such a conclusion is mystifying. As noted above, it did not conduct any investigation into Samuel Schulman's expenses or profits, or the depreciation of the Building.

M. The Appellate Division Order Affirming the Trial Court

During oral argument, DOF again conceded that it did not conduct any examination into the use of the Building. DOF likewise conceded that it did not conduct any analysis into the depreciation of the Building, whether there was a mortgage, or anything else besides the amount of rent, defeating DOF's reliance on RPTL § 420-a(2) to support its Determination.

Following oral argument, the Appellate Division, First Department issued its Order, dated December 3, 2019, unanimously affirming the Trial Court Order. In brief, the Appellate Division held that Brookdale Dialysis' use of the Premises is "reasonably incident" to Samuel Schulman's charitable purpose, and thereby covered by RPTL § 420-a(1). The Court further noted that Brookdale Dialysis' use of the Leased Premises is "closely analogous" to the use at issue in *Genesee Hospital*,[17] undertaking a detailed discussion of that case and this Court's rationale in finding that the ambulatory x-ray unit in *Genesee Hospital* was entitled to tax exempt status. (R. 725-726)

N. DOF Seeks Leave to Appeal

After entry of the Appellate Division Order, DOF moved the First Department for leave to appeal to this Court. In so doing, DOF improperly argued, for the first time, that the Appellate Division erred in finding the revocation of the tax exempt

[17] 47 A.D.2d 37 (4th Dep't 1975) *aff'd* 39 N.Y.2d 863 (1976).

property to be improper inasmuch as the use of the leased premises served the "primary" charitable purpose of the ***owning*** entity, rather than a purpose "incidental" to that primary purpose.

By decision and order, dated and entered March 19, 2020, the Appellate Division denied DOF's motion for leave.

DOF thereafter sought leave to appeal directly from this Court, first acknowledging that "the dialysis services here are undoubtedly a hospital purpose," and arguing that "if profits are to be claimed, then the non-profit entity is not entitled to real property tax exemption." (DOF Brief Seeking Leave to Appeal, ¶14). Leave was granted and this appeal ensued.

ARGUMENT

POINT I

IT IS DOF'S BURDEN TO PROVE THAT IT PROPERLY REVOKED THE BUILDING'S LONG ESTABLISHED TAX-EXEMPT STATUS

The standard of review in an Article 78 proceeding is whether an administrative agency's determination was arbitrary, capricious or an abuse of discretion, was made in violation of a lawful procedure and/or was affected by an error of law. *New York City Health & Hospitals Corp. v. McBarnette,* 84 N.Y.2d 194 (1994); *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.,* 77 N.Y.2d 753, 757-758 (1991).

As particularly relevant to this matter, it is well established that where, as here, the tax assessor seeks to revoke tax-exempt status, the burden rests on the assessor to prove that it correctly determined that the requirements for tax-exempt status were no longer met. *See, e.g., New York Botanical Garden v. Assessors of Washington*, 55 N.Y.2d 328 (1982). *See also Matter of 471 Columbian Club of Port Jervis, N.Y., Inc. v. Duryea*, 104 A.D.3d 944 (2d Dep't 2013) (Reversing the lower court and finding that the determination to revoke a property's tax-exempt status should have been annulled and directing that the property be listed as tax-exempt, stating "When a municipality withdraws a tax-exemption which had been granted pursuant to RPTL § 420-a(1), it bears the burden of demonstrating that the property is no longer entitled to the exemption.' Here, the respondent failed to sustain that burden.").

DOF asks this Court (as it asked the lower Courts) to shift this burden and demands instead that Petitioners prove, in the first instance, their entitlement to the tax-exempt status which DOF erroneously posits was "granted" by the First Department. (DOF Brief p. 1) This shifting of DOF's legal burden would be patently improper. Moreover, the Record demonstrates that the basis on which DOF revoked the tax-exempt status is premised on: (i) a misreading of the applicable law, (ii) a purported misunderstanding of the lower Court's 2014 Order, and (iii) DOF's own admitted failure to examine the actual use of the Building as suggested by the

lower Court, and mandated by this Court's precedent. As such, DOF failed to meet its burden, and the Appellate Division correctly affirmed the lower Court.

DOF argues at length about the policy issues against tax exemptions in general. First, while there is no dispute that taxation, in general, is necessary for the common good, this does not override the express exemption for hospital/charitable purposes such as those provided by Brookdale Dialysis, Samuel Schulman, Brookdale Hospital and the Nursing Institute.[18] Second, this does not obviate the clear obligation that the taxing entity bears the burden of demonstrating an appropriate revocation of tax exempt status. Here, DOF's sole basis for revocation – "that the income exceeds the expenses for the property" (R. 55) – is not supported by fact or law. Likewise, the rationale newly offered by DOF in this appeal that Samuel Schulman's charitable purposes are not served by Brookdale Dialysis use of the Premises for dialysis treatment is unavailing, as discussed below, and, in any event, cannot be employed to supplement and *then* justify the issuance of the Determination in the first instance.

DOF's argument that tax exempt statutes are to be "construed" in favor of the taxing entity is similarly unavailing. This Court has acknowledged "[w]hile an exemption statute is to be construed strictly against those arguing for nontaxability,

[18] Why DOF had chosen a dialysis unit in a grossly underserved area of Brooklyn as the target of its efforts to maximize funds for the City's coffers is unclear.

the interpretation should not be so narrow and literal as to defeat its settled purpose, which in this instance is that of encouraging, fostering and protecting religious and educational institutions. Such high and traditional purposes should not require for their attainment that religious schools plow their surplus crops back into the ground or move their farms alongside their halls of learning or their halls of learning into farming areas." *People ex rel. Watchtower Bible & Tract Soc'y, Inc. v. Haring*, 8 N.Y.2d 350, 358 (1960). As the Second Department further noted, "implicit in the granting of such power by the Legislature [to terminate tax exemptions], there was engrafted the concomitant precept *that it would be exercised in a reasonable manner* compatible with the statutory purpose, and not in such way as to so undermine the underlying purpose of the statute as to, for all practical purposes, deter others from seeking the tax incentive offered by the statute." *Newsday, Inc. v. Huntington*, 82 A.D.2d 245, 251 (2d Dep't 1981) *aff'd* 55 N.Y.2d 272 (1982) (emphasis in original).

The procedural history reflects that DOF's kneejerk termination of the Building's tax-exempt status (after two failed attempts) has in no way been exercised in "a reasonable manner." Further, DOF's assertion that there can be no exemption where any profit is earned is akin to the hypothetical posited by this Court in *Watchtower*, in that it would promote allowing the Building to lie vacant, and Brookdale Hospital (to say nothing of the surrounding community) to go without a dialysis center rather than run the risk of allowing a dialysis center to occupy the

Premises. Clearly, this would not further the charitable and hospital purposes espoused by Samuel Schulman or, indeed, by the legislature in drafting a statute to allow for such tax exemptions to further charitable work and health care in New York.

As set forth below, the revocation of the Building's long-standing tax-exempt status was improper and contrary to law, and DOF failed to meet its burden of proving that the Determination was properly issued. As such, it is respectfully submitted that the Order should be affirmed in its entirety. *See Matter of 471 Columbian Club of Port Jervis, N.Y., Inc. v. Duryea, supra; Pacer Inc. v. Planning Bd.*, 217 A.D.2d 47 (3d Dep't 1995) ("The Constitution and the State Legislature, in the furtherance of the general welfare, have established a clear policy that charitable institutions are to be free, if they so choose, from local taxes; respondent's attempt, in the instant matter, to circumvent that which has been ordained by higher authority is patently illegal."). *See also People ex rel. Watchtower Bible & Tract Soc'y, Inc., supra* at 678 ("Historically and in reason, the only test is whether the farm operation is reasonably incident to the major purpose of its owner. There can be no doubt about that here.").

POINT II

DOF FAILED TO DEMONSTRATE THAT IT PROPERLY REVOKED THE BUILDING'S LONG ESTABLISHED TAX-EXEMPT STATUS UNDER RPTL § 420-a(1)

A. As the Determination Was Incorrectly Issued, the Order Should Be Affirmed

At the outset, it must be recognized that the entire Determination was, according to DOF, premised on its misunderstanding that Brookdale Dialysis should be considered as though it were, in its own right, a not-for-profit entity. (DOF Brief to the First Department, p. 16). *See* subpoint L, p. 22, *supra*. In light of its self-inflicted error, DOF (again) conducted no examination into the use of the Building, and instead issued its Determination based on its reading of RPTL § 420-a(2) that, where a tax-exempt property is leased to a not-for-profit entity, the exemption can be revoked where the rent paid exceeds the "carrying, maintenance and depreciation costs" of the property. (R. 55, 408). Inasmuch as the Premises were not leased to a not-for-profit entity, the requirements of RPTL § 420-a(2) are irrelevant, and DOF thus revoked the Building's tax-exempt status improperly by its own admission.

B. As the Building is Entitled to Tax-Exempt Status Under § 420-a(1), Such Status Was Improperly Revoked and the Order Should Be Affirmed

RPTL § 420-a codifies the legislature's intent that real property owned by non-profit institutions conducted for *inter alia*, charitable or hospital purposes, shall be exempt from real estate taxes. As particularly relevant to this appeal, RPTL § 420-a(1) states:

> (a) Real property owned by a 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 either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.
>
> (b) Real property such as specified in paragraph (a) of this subdivision shall not be exempt if any officer, member or employee of the owning corporation or association shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees; or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

Thus, the legislature has explicitly provided that, where exempt real property is leased to another entity, two criteria must be satisfied for the property to be entitled to tax-exempt status: (i) the real property must be owned by a charitable institution; and (ii) the real property must be used "exclusively" for carrying out one or more of the owner's charitable functions, whether by the owner or "another such corporation or association." Indeed, in its opposition to the Petition, DOF acknowledged that these two items comprise the relevant factors for determining the tax-exempt status of a property under RPTL § 420-a(1), despite then adding a third, unsubstantiated

prong in its appeal to the First Department and in the instant appeal - - that the owning entity cannot realize a financial profit from the rental. (R. 684) In so doing, DOF has rewritten RPTL § 420-a(1).

Only if the exempt property is *not* used exclusively pursuant to § 420-a(1), is there then a need to consider RPTL § 420-a(2), which provides that the property is entitled to an exemption, as long as the property is: (i) used for one of the specifically enumerated charitable purposes; (ii) by an institution "which owns real property exempt from taxation . . . or whose real property if it owned any would be exempt from taxation," and (iii) as long as "moneys paid for such use do not exceed the amount of the carrying, maintenance and depreciation charges of the property or portion thereof, as the case may be."

Crucially, unlike RPTL § 420-a(2), RPTL § 420-a(1) does not require that the moneys paid for the use of the exempt property "not exceed the amount of the carrying, maintenance and depreciation charges of the property."

Here, the Determination was solely "based on the fact that the income exceeds the expenses for the property." (R. 55) However, this requirement only comes into play if the exemption falls under RPTL § 420-a(2). Here, RPTL § 420-a(2) is not relevant because, *inter alia*, Petitioners satisfied the requirements of RPTL § 420-a(1), entitling the Building to maintain its tax-exempt status.

This Court has made clear that when considering an exemption under RPTL § 420-a(1), it is the actual use of the property which is determinative, not whether rent is paid or a profit is made. *See, e.g., Adult Home at Erie Station v. Assessor, City of Middletown*, 10 N.Y.3d 205 (2008) ("[A]n economic benefit to a charitable organization does not by itself extinguish a tax-exemption. The question is how the property is used, not whether it is profitable."). Consequently, on this prong alone, it is evident that, as a result of DOF's admitted failure to consider the use of the Building at all (as the Supreme Court suggested in the 2013 Proceeding), DOF did not and could not meet its burden to demonstrate that the tax-exempt status of the Building was properly revoked, and the Order should be affirmed. *Id.* (R. 8-12)

In any event, even disregarding DOF's admitted failure to conduct any use analysis, it is evident that the use of the Premises as an ambulatory dialysis unit satisfies the "exclusive use" prong – and, therefore, satisfies RPTL § 420-a(1), and we do not get to RPTL § 420-a(2), on which DOF evidently relied in issuing the Determination.

i. The Building Is Used "Exclusively" For The Intended Charitable Purposes

The Courts have broadly construed the requirement that the real property be used "exclusively" in furtherance of the intended charitable purposes. Specifically, in the context of RPTL § 420-a, "exclusively" has been understood to mean "principally" or "primary," or even incidental to the charitable purposes of the owner

entity *See, e.g., Adult Home at Erie Sta., Inc. v. Assessor & Bd. of Assessment Review of City of Middletown, supra; Hapletah v. Assessor of Fallsburg,* 79 N.Y.2d 244 (1992) ("Real Property Tax Law § 420-a(1)(a) provides that real property owned by a corporation or association organized or conducted exclusively for religious purposes, if used exclusively for such purposes, shall be exempt from taxation. The term 'exclusively', in this context, has been broadly defined to connote 'principal' or 'primary' such that purposes and uses merely 'auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption.'").

DOF offers the newfound argument – raised for the first time in the eight years that the tax-exempt status of the Building has been before the Courts – that the use of the property must be "minor," and a "natural consequence of the non-profit owner." (DOF Brief pp. 23-25) This is not only incorrect, but irrelevant and not supported by the statute or by case law. Again, it is the actual use which is pertinent and whether that use supports "one or more" of the charitable purposes of the owner.[19]

As noted above, uses which are auxiliary or incidental to, or part of, the charitable mission of the non-profit owner do not remove that property from tax-

[19] DOF offers dictionary definitions of "incidental," but it is unclear as to for what purpose. To the extent DOF seems to be arguing that a hair salon in a nursing home is more in-line with satisfying the "exclusive" requirement than a dialysis unit in a hospital, this is preposterous. *See, e.g., Matter of Southwinds Ret. Home, Inc., supra.*

exempt status, even when the property is leased to a for-profit entity. *See, e.g.*, *Matter of Maetreum of Cybele, Magna Mater, Inc. v. McCoy*, 24 N.Y.3d 1023 (2014); *Mohonk Trust v. Board of Assessors*, 47 N.Y.2d 476 (1979); *Storm King Art Ctr. v. Tiffany*, 280 A.D.2d 606 (2d Dep't 2001) ("To qualify for a tax-exemption under RPTL § 420-a(1)(a), real property must be owned by a nonprofit corporation or association that is organized or conducted for one or more exempt purposes, and the property itself must be used primarily for such purposes. Purposes and uses which are merely auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption."); *Pets Alive, Inc. v. Wanat*, 288 A.D.2d 386 (2d Dep't 2001) ("Purposes and uses which are merely auxiliary or incidental to the main and exempt purpose and use of the property will not defeat the exemption.").

It is uncontested that the Premises are used wholly as an ambulatory dialysis center and for the treatment and research of renal diseases. (R. 61-63; 719) The employees of Brookdale Dialysis are all employees of Brookdale Hospital, and no portion of the Premises are used for private doctor's offices. (R. 63) Moreover, more than 80% of the patients treated at Brookdale Dialysis are referred by Emergency Room personnel or physicians from Brookdale Hospital or the Nursing Institute. (R. 62) Neither Brookdale Hospital nor Samuel Schulman/the Nursing Institute maintains a separate dialysis facility with the necessary machines or equipment on the hospital grounds. Consequently, Brookdale Hospital both utilizes and recognizes

Brookdale Dialysis as its center for ambulatory dialysis treatment. (R. 719) These are uncontested facts.

The function of Brookdale Dialysis is therefore not only in accord with the mission and charitable purposes of Samuel Schulman, Brookdale Hospital and the Nursing Institute, but is integral, vital and necessary to those charitable missions and, as the lower Court held, "Brookdale Dialysis performs a great deal to further the charitable activities of Brookdale Hospital and the Nursing Institute, and is apparently quite enmeshed with them in terms of staffing, whether its service is reasonably incidental to or in furtherance of the exempt purpose must be considered. No such consideration was presented here." (R. 39)

As the actual, physical use of the Premises plainly falls within the realm of RPTL § 420-a(1), the Building is therefore entitled to retain its tax-exempt status.[20] *See, e.g., Symphony Space, Inc. v. Tishelman*, 60 N.Y.2d 33 (1983) (Finding petition for tax-exemption should be granted, noting "A 'commercial patina' alone is not enough to defeat tax-exempt status especially when such rentals are merely incidental or auxiliary to the main exempt purpose and do not realize a profit but are used to cover petitioner's costs.")*; St. Luke's Hospital v. Boyland*, 12 N.Y.2d 135

[20] This remains the case whether looking to Samuel Schulman, or Brookdale Hospital/the Nursing Institute, the "charitable healthcare mission" of which Samuel Schulman was organized to support. (R. 137)

(1962) (Apartment housing leased to hospital employees was determined to be utilized for the hospital's charitable purpose, and therefore not subject to taxation).

As also admitted by DOF, in addition to being integral to Brookdale Hospital and Samuel Schulman/the Nursing Institute, the function and operation of Brookdale Dialysis as an outpatient dialysis center is vital to the health of the community and, in particular, residents of the East New York/Brownsville area of Brooklyn, which is a particularly underserved area. (R. 582-588) Thus, Brookdale Dialysis' role as the only outpatient dialysis center in the area is necessary to serve the local residents of East New York/Brownsville, further warranting the continuation of the long-standing tax-exempt status of the Building. Indeed, expanding access to critical, unmet local healthcare needs is in itself a charitable purpose, carried out in support of Samuel Schulman's charitable purpose to "promote the general health of the community."

DOF relies heavily on *Genesee Hospital v. Wagner*, 47 A.D.2d 37 (4th Dep't 1975) *aff'd* 39 N.Y.2d 863 (1976). In doing so, DOF carefully avoids a substantial portion of that case which, when read in its entirety (as the Appellate Division did), militates in favor of affirming the Order.

In this regard, the Court in *Genesee Hospital* considered several different uses of the building which the tax assessor claimed rendered the building subject to taxation – including the utilization of suites in the building for private doctor's

offices, separate and apart from the services those doctors were providing within the hospital, and the use of separate space for an ambulatory x-ray unit, a dietary unit and a lab, office and research area for the chief of surgery. Notably, DOF focuses entirely on the private doctors' suites, which the *Genesee Hospital* Court noted to be "only incidentally related to the hospital's function of providing health care to the community" and which was "in direct competition with privately developed professional buildings in an area which serves the identical function as far as the private practice of medicine is concerned." *Id.* at 46. Consequently, the Court held that the competitive private practice of medicine for pecuniary benefit separate and apart from the hospital and going "well beyond the hospital's traditionally nonprofit functions" are subject to taxation. *Id.* at 44, 47.

Here, there are no private medical offices in the Building, nor can the use of the Premises in any way be considered to be separate from the very institution which advertises, associates with and relies on those dialysis services. (R. 719) Rather, it is clear that – contrary to the private offices in *Genesee Hospital* – the Premises are specifically utilized in furtherance of the hospital and charitable purposes of Samuel Schulman and Brookdale Hospital. Likewise significant is that the very employees who perform the dialysis services and research at the facility are actually employed by Brookdale Hospital. (R. 62) Lastly, there can be no contention that Brookdale Dialysis – as the only dialysis treatment center in the area -- could feasibly be

considered to be in direct competition with any local commercial enterprises. Thus, *Genesee Hospital* offers no grounds for the reversal of the Order.

To the contrary, *Genesee Hospital* actually supports affirmance of the Order. In this regard, the use of the Premises as an ambulatory dialysis unit is much more akin to the use of the *Genesee Hospital* building for an ambulatory x-ray unit and an ambulatory care unit, which this Court held were entitled to tax-exempt status. To this end, the tax assessor in *Genesee Hospital* contended that, because the radiologists operating the ambulatory x-ray unit were earning a commission separate and apart from any hospital salary for their work at the ambulatory x-ray unit (i.e., profiting from the use of the building), the portion on the building which was utilized for such ambulatory x-ray services should not enjoy tax-exempt status. *Id.* at 46. The Fourth Department, as affirmed by this Court, held that this did not vitiate the tax-exempt status of this portion of the building, as, irrespective of the commission payments made, the use presented a hospital use protected under RPTL § 420-a(1). *Id*. at 46. Consequently, *Genesee Hospital* supports the affirmance of the Order.

Thus, it is evident that the Building, even to the extent that the first floor and basement thereof are leased to Brookdale Dialysis, is being used in support of and for the benefit of Samuel Schulman/the Nursing Institute and Brookdale Hospital, in accord with the charitable and hospital missions of these interrelated non-profit entities. The Building is therefore entitled to tax-exempt status as being utilized for

"one or more" enumerated purposes under § 420-a(1), and the DOF erred as a matter of law by revoking such status. *Id.* *See also, Pace College v. Boyland*, 4 N.Y.2d 528 (1958) (Where college cafeteria was operated by an outside organization for profit, and where college received a commission for such use, college remained entitled to tax-exempt status, as the cafeteria was "part of the conventional operation of a private school, college, hospital or other benevolent institution."); *Hapletah v. Assessor of Fallsburg*, 79 N.Y.2d 244 (1992).

In a transparent attempt to distort the facts of this matter to conform with other cases, DOF contends, again for the first time, that the use of the Premises as an ambulatory dialysis unit is somehow "a guise or pretense." (DOF Brief p. 32) Beyond parroting the words of the statute, there is no indication whatsoever as to how the utilization of the Building for such dialysis services and renal research, which uses are explicitly advertised on the Brookdale Hospital website, could possibly be a "guise or pretense" for the charitable healthcare purposes of Samuel Schulman, Brookdale Hospital and the Nursing Institute, and it is respectfully submitted that this argument should be rejected accordingly. (R. 719). *See, e.g.*, *Matter of Greentree Found. v. Assessor & Bd. of Assessors of Cnty. of Nassau*, 142 A.D.3d 665, 668 (2d Dep't 2016) (Finding property entitled to tax-exempt status, because, *inter alia*, "Nor is there any evidence that [owner]'s exempt use of the property was "a guise or pretense" for a use which primarily benefitted only

[owner]."); *Matter of Viahealth of Wayne v. VanPatten*, 90 A.D.3d 1700 (4th Dep't 2011) ("Where property is being used in support of a general hospital for various outpatient services and care, such as the services provided here by the physicians and staff of RGH and by petitioner's X ray units and laboratories, the property is tax-exempt inasmuch as those services fulfill primary hospital purposes.").

ii. Samuel Schulman's Receipt of Rent From Brookdale Dialysis Does Not Deprive the Building of its Tax-Exempt Status

The Determination was based in large part on the speculative notion that simply because Samuel Schulman is feasibly profiting from the rent it received from Brookdale Dialysis, the exemption is automatically extinguished.[21]

First, this would amount to a new requirement under RPTL § 420-a(1) and it is, of course, settled law that "an administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute." *Emunim v. Fallsburg,* 78 N.Y.2d 194, 204 (1991).

Second, this contention has repeatedly been rejected by New York Courts, including this Court which has expressly held "The question is how the property is used, not whether it is profitable." *Adult Home at Erie Station, Inc.,* 10 N.Y.3d at 216. *See also Congregation Rabbinical Coll. of Tartikov, Inc. v. Town of Ramapo,*

[21] Specifically, and without legal citation, DOF contends that "§ 420-a(1) also requires … that the owning corporation not make a profit from such use of the property." (DOF Brief p. 15) Significantly, § 420-a(1) says no such thing. Indeed, the Record is bereft of any support for DOF's assertion of a "profit."

72 A.D.3d 869 (2d Dep't 2010) *aff'd* 17 N.Y.3d 763 (2011); *Hapletah v. Assessor of Fallsburg, supra.*

As further affirmed by this Court, "[t]he fact that an organization makes a profit from its operations does not make it a commercial enterprise so long as all profits are devoted to the permitted corporate purposes. Similarly, rental income which is used for carrying out the corporation's charitable purposes is not such profit as will disqualify it from an exemption." *Gospel Volunteers, Inc. v. Speculator, supra*.[22] Thus, DOF's entire argument has been rejected time and again by New York Courts.

A similar argument was made by the taxing agency, and then soundly rejected by this Court, in *In re United Church Residences of Fredonia, N.Y., Inc. v. Newell*, 10 N.Y.3d 922 (2008), wherein the tax assessor revoked tax-exempt status issued to a non-profit entity tasked with providing housing for low-income seniors. In so doing, the assessor argued that, between the rents paid by the seniors and the receipt of various governmental subsidies, the petitioner was in fact receiving market rent for the properties. The Fourth Department agreed with the assessor, holding that, because the rent received was at fair market value, the petitioner failed to demonstrate that the land was used primarily for charitable purposes. *Matter of*

[22] As unrefuted in the Record, all rental paid by Brookdale Dialysis to Samuel Schulman "is used by [Samuel Schulman] to support [Samuel Schulman's] charitable programs and services . . ." (R. 138)

United Church Residences of Fredonia, N. Y., Inc. v. Newell, 43 A.D.3d 1403, 1405 (4th Dep't 2007).

This Court reversed the Fourth Department's order, holding that the mere receipt of subsidies which resulted in a profit to the charitable entity owner did not serve to remove the leased units from RPTL § 420-a tax-exemption. 10 N.Y. 3d at 938. *See also Congregation Rabbinical Coll. of Tartikov, Inc. v. Town of Ramapo, supra* at 765 ("an economic profit made by a religious corporation 'does not by itself extinguish a tax exemption.'"); *Matter of Adult Home at Erie Station, Inc. v. Assessor & Bd. of Assessment Review of City of Middletown*, *supra* (Rejecting contention that RECAP's receipt of market rents rendered the property subject to taxation, holding "The issue is not whether RECAP benefits, but whether the property is 'used exclusively' for RECAP's charitable purposes. RECAP could lose its exemption under RPTL 420-a(1)(b) if the economic benefit went to its officers or employees personally, but an economic benefit to a charitable organization does not by itself extinguish a tax-exemption.").[23]

Further on point with the instant matter, where the entire basis for the Determination was that the rent received by Samuel Schulman purportedly exceeded the Building's carrying costs, is *Congregation Rabbinical College. of Tartikov, Inc.*

[23] There is absolutely no claim by DOF in the Record that any economic benefit went to Samuel Schulman's officers or employees.

v. Town of Ramapo, supra. In *Congregation Rabbinical College of Tartikov,* the tax assessor contended that the property was no longer eligible for tax-exempt status because it was being leased to a for-profit entity, and because "plaintiff's annual income from the property exceeded the carrying, maintenance, and depreciation charges of the property." This Court rejected the assessor's claims and found the tax-exempt status was improperly revoked, noting:

> The crucial issue in determining whether property is tax-exempt pursuant to Real Property Tax Law § 420-a(1) is whether the primary or principal use of the property is a tax-exempt purpose of its owner. The fact that the property is leased or licensed to other parties, or the fact that the owner derives some profit from the use of the property, does not defeat a tax-exemption pursuant to Real Property Tax Law § 420-a(1), so long as the primary or principal use of the property is for a tax-exempt purpose of its owner" and finding that the assessor failed to meet its burden. 72 A.D.3d at 871.

Congregation Rabbinical College of Tartikov is directly on point with this matter, where DOF admittedly did not give any consideration to the actual, physical use of the Building but rendered its decision entirely and solely on the notion "that the income exceeds the expenses for the property." (R.[24] 55; 408). As the Second Department, held, as affirmed by this Court, the receipt of a profit over the carrying costs "does not defeat a tax-exemption pursuant to Real Property Tax Law § 420-a

[24] The Appellate Division Order in the Record appears to be incomplete. The full decision is available at 178 A.D.3d 443.

(1), so long as the primary or principal use of the property is for the tax-exempt purpose of its owner." 72 A.D.3d at 871. Notably, while the Appellate Division cited to *Tartikov* in its Order, DOF's brief glaringly fails to discuss *Tartikov*. As such it is submitted that, as in *Congregation Rabbinical College of Tartikov*, DOF failed to meet its burden of demonstrating that the Building's tax-exempt status was properly revoked, and the Order should be affirmed.

DOF next takes issue with the fact that Samuel Schulman utilizes the rent received from Brookdale Dialysis to support its charitable mission of providing funds to support Brookdale Hospital and the Nursing Institute, and contends this is improper. (R. 137) In so arguing, DOF relies on cases which present drastically different scenarios from the one at hand.

For example, DOF relies heavily on *Matter of Lackawanna Cmty. Dev. Corp. v. Krakowski*, 12 N.Y.3d 578 (2009), wherein the charitable institution, tasked with community development, leased its tax-exempt property to Now-Tech Industries, Inc., a for-profit manufacturing corporation which was utilizing the property to manufacture goods (also for profit), a use wholly unrelated to the charitable purposes of the owner. While expressing some concerns as to whether the property should have been tax-exempt in the first instance, this Court reiterated that the critical question is the actual or physical use of the property, and rejected the overbroad contention that the rental of the property to a commercial for profit manufacturing

company furthered any charitable purposes simply because it may promote "economic development." *Id.* at 582.

Clearly, the use of tax-exempt property for purely commercial manufacturing purposes in *Lackawanna* is a far cry from this matter, where the Building is used as an ambulatory dialysis center supporting the charitable and hospital purposes of both Samuel Schulman and its associated charities, Brookdale Hospital and the Nursing Institute, and where the rental received from same supports such charitable purposes monetarily.

Similarly, *Matter of Greater Jamaica Dev. Corp. v. N.Y.C. Tax Comm'n*, 25 N.Y.3d 614 (2015), which concerned the provision of "reasonably-priced parking" in Jamaica, Queens, is inapposite, wherein this Court determined that the use of the property as a parking lot did not comport with the enumerated uses set forth in RPTL § 420-a as it was not incidental to an exempt purpose. Again, dialysis services plainly meet the requirement of a "hospital" use, as admitted by DOF, and therefore fall within the delineated categories of covered uses.

Likewise, DOF's reliance on *Stuyvesant Square Thrift Shop, Inc. v. Tax Com. of N.Y.*, 76 A.D.2d 461 (1st Dep't 1980) *aff'd* 54 N.Y.2d 735 (1981) is misplaced. *Stuyvesant Square* considered the question of whether the property owner "Thrift Shop," a not-for-profit entity comprised of various not-for-profit entity members, was entitled to an initial exemption where the burden of proof was on the owning

entity to show entitlement to an exemption. Noting that "There is here no assertion that the city, through its governing board, had adopted any local law, ordinance or resolution entitling those in the same category as Thrift Shop to exemption," the Court held that the Thrift Shop did not satisfy the initial prong for an unqualified right to tax-exempt status inasmuch as "the real property is not owned 'by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, moral or mental improvement of men, women or children.'" 76 A.D.2d at 464. This Court then further noted that the Thrift Shop is solely a "profit making venture" and therefore the use of the property at issue also would not satisfy the requirements for the tax-exempt status.[25] *Id.* at 465. Similarly, DOF's reliance on *Association of the Bar v. Lewisohn*, 34 N.Y.2d 143 (1974) to support the contention that "the Appellate Division's holding in this matter directly contravenes long-standing Court of Appeals precedent" is unfounded. (DOF Brief p. 14). In *Association of the Bar*, this Court found that the petitioners' properties did not qualify for exemption because the owning entities -- a bar association and an Explorers Club created for scientific purposes -- were not "organized and conducted primarily for charitable or educational purposes." *Id.* at 153-154. This is wholly

[25] Significantly, the Court noted in passing that it was "readily apparent" that the distribution of profits to charitable organizations by Thrift Shop did, in fact, meet the third requirement, later codified in part as § 420-a(1)(b), that the profits received not inure to the officers, members or employees of the charitable organization. *Id.* at 464.

irrelevant here, where Samuel Schulman's qualification as a non-profit organized for charitable and hospital purposes has never been in question.

Stuyvesant Square and *Association of the Bar* are both drastically off point from this matter, where it is uncontested that the owner of the Building, Samuel Schulman, satisfies the necessary requirements under § 420-a(1), where the use of the Premises is not merely incidental but integral to the charitable and hospital purposes of Samuel Schulman and the overarching focus on healthcare in the community, and where it is undisputed that no officer, member or owner of Samuel Schulman is profiting from any profit received.[26] (R. 138) Further distinguishing this matter from *Stuyvesant Square*, here, we are considering a situation where the Building held a long-standing tax-exempt status (and, thus, DOF bears the burden of demonstrating that the Building is not being used "exclusively" in conjunction with charitable purposes) – we are not considering, as the Court did in *Stuyvesant Square,* an initial application for tax-exempt status where the burden rests on the taxpayer. Thus, *Stuyvesant Square* and *Association of the Bar* offer little, if any, guidance on the matter at hand, and certainly do not mandate the reversal of the Order.

[26] Contrary to DOF's contention, there is no prohibition against the owner entity realizing a profit. Rather, RPTL § 420-a(1) expressly speaks to "office[s] member[s] and owner[s]," being precluded from profiting. In other words, these individuals may not use the charitable entity to "self deal" themselves undue fiscal reward.

On point, however, with this matter to the extent DOF relies on the payment of rent to defeat a long-standing exemption, is *Gospel Volunteers, Inc. v. Speculator,* 33 A.D.2d 407 (3d Dep't 1970) *aff'd* 29 N.Y.2d 622 (1971). In determining that camp sites were entitled to an exemption of property taxes, despite, *inter alia*, the collection of rent from visitors renting cabins, trailers and lodge houses "with varying prices," the Court held:

> The fact that an organization makes a profit from its operations does not make it a commercial enterprise so long as all profits are devoted to the permitted corporate purposes . . . Similarly, rental income which is used for carrying out the corporation's charitable purposes is not such profit as will disqualify it from an exemption. *Id.* at 411.

It is undisputed that, like the owner in *Gospel Volunteers*, Samuel Schulman not only ensures that the Premises are used for a purpose incidental to its own charitable purposes, but has used the rental income received from Brookdale Dialysis for its charitable and hospital purposes. (R. 138) Consequently, it is evident that Samuel Schulman's acceptance of rent from Brookdale Dialysis does not vitiate the long-standing tax-exempt status of the Building, and the Order should be affirmed.

iii. DOF Failed to Demonstrate A Proper Revocation Under RPTL § 420-a(2)

As discussed above, after having conceded that Petitioners satisfied the "use" requirement of RPTL § 420-a(1)(a), DOF erroneously relied on RPTL § 420-a(2) in issuing the Determination. (R. 55) Initially, once RPTL § 420-a(1) is satisfied, the exemption is mandatory and RPTL § 420-a(2) is inapplicable. However, even were RPTL § 420-a(2) applicable, DOF still did not satisfy its burden. To this end, RPTL § 420-a(2) allows the continuance of the exemption "so long as any moneys paid for such use do not exceed the amount of the carrying, maintenance and depreciation charges of the property or portion thereof, as the case may be." However, as it expressly acknowledged at the Appellate Division during oral argument, DOF did not conduct *any* investigation into the Building, nor ask any information from Samuel Schulman, as to whether there was a mortgage or carrying charges in connection with the Premises or what the depreciation of the Building was. Indeed, as one Justice noted (and DOF did not contest), had there been a proper evaluation of both sides of the ledger, there may have been a loss sustained by Samuel Schulman.[27] This admitted failure to engage in even a cursory examination into the actual depreciation or carrying charges of the Building before revoking the Building's tax-exempt status destroys DOF's reliance on RPTL § 420-a(2) and

[27] *See* Oral Argument at the Appellate Division, First Department, November 6, 2019, 16:38:40-16:39:40.

demonstrates that the Determination was not properly issued and the revocation was improper. *See, e.g., Matter of Southwinds Retirement Home, Inc. v. City of Middletown*, 74 A.D.3d 1085 (2d Dep't 2010) ("The City's challenges to the financial information submitted by the petitioner did not suffice to meet its burden of establishing that the amount of rental income received in 2002 for the leased portion of the subject premises exceeded the amount of carrying, maintenance, and depreciation charges attributable to that portion of the premises, even excluding amortization charges").

iv. DOF's Newly Asserted Argument As to Samuel Schulman's Purpose Is Improper and Without Merit

DOF rests on the argument substantively raised for the first time on appeal to the First Department that, because the purpose of Samuel Schulman is "promoting the health of the community by providing funds and managing assets in support of the charitable purposes of [the Nursing Institute] and [Brookdale Hospital]," and because Brookdale Hospital and the Nursing Institute are not named in the proceeding, the use of the Premises as an ambulatory dialysis unit is outside of the purpose of Samuel Schulman. (DOF Brief pp. 27-29)

Initially, this argument was not the basis for the Determination and was offered for the first time on appeal, depriving Petitioners of the opportunity to contest it before the lower Court or, significantly, to provide further evidence as to Samuel Schulman's charitable mission and the functions and interplay between Samuel

Schulman, Brookdale Dialysis and the Nursing Institute, including the management of the Brookdale Hospital and Nursing Institute "assets."[28] Even more significantly, Petitioners were deprived of the opportunity to provide the Court with the Certificate of Incorporation of Samuel Schulman (nor did DOF, which bears the burden of proof, provide such Certificate of Incorporation) which is publicly available and which has provided, since its incorporation in 1973, that Samuel Schulman's purposes include to "promote the general health of the community" and to enlist affiliated organizations to help "assist in the extended (post hospital) care of patients in every way which can promote their well-being and return to normal activities of daily living…" and to "promote any training, instructional activities and research related to rendering care to the sick, aged and disabled…" Plainly, the provision of dialysis services and the undertaking of life-saving renal research fall within these purposes.

Consequently, not only is DOF's newfound argument improper as a matter of law, but it is based on an incorrect assumption as to Samuel Schulman's charitable purposes. As such, it is respectfully submitted that this argument should be rejected

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[28] This was also raised during the oral argument of the Petition, at which time Justice Chan noted it was improperly offered. See NYSCEF Document No. 28, of which this Court can take judicial notice. *See, e.g., Sam & Mary Hous. Corp. v. Jo/Sal Mkt. Corp.*, 100 A.D.2d 901, 903 (2d Dep't 1984) *aff'd* 64 N.Y.2d 1107 (1985) ("In New York, courts may take judicial notice of a record in the same court of either the pending matter or of some other action.").

and disregarded. *See U.S. Bank Nat'l Ass'n v. Beymer*, 161 A.D.3d 543 (1st Dep't 2018) (Holding argument raised for the first time on appeal was not reviewable); *Nexbank, SSB v. Soffer*, 144 A.D.3d 457, 460 (1st Dep't 2016) ("Plaintiff correctly contends that defendants' new argument—which was not raised in either the pleadings, the motion papers below, or in the prior appeal—is not preserved for appellate review and should not be considered.").

In any event, this argument is a red herring, ignoring the express language of § 420-a(1) that the ownership entity may be organized and operated for "more" than one enumerated purposes – including both charitable and hospital purposes – and that the property at issue should likewise be utilized for "one or more of such purposes." There can be no dispute (as per DOF's own acknowledgment) that the Premises is being used for hospital purposes as an ambulatory dialysis unit supporting Brookdale Hospital, and charitable purposes through the rent being utilized to support the charitable goals of Samuel Schulman, Brookdale Hospital and the Nursing Institute. Thus, it appears that this argument has been offered only in the hopes that this Court will overlook the obvious and uncontested facts that Samuel Schulman, Brookdale Hospital and the Nursing Institute are all interrelated sister-entities, and that, as Samuel Schulman bears the "charitable mission of supporting the charitable healthcare mission conducted for the benefit of the public by [the

Nursing Institute] and [Brookdale Hospital]," it is implicit that uses which support Brookdale Hospital and the Nursing Institute support Samuel Schulman. (R. 137)

Again, a similar issue was considered by the Court in *Congregation Rabbinical College of Tartikov*, *supra*, where the non-profit owner of the property was tasked with "generating funds for its educational and religious purposes," and thus leased the property to a for-profit entity to operate a religious summer camp, meanwhile utilizing the license fees received for the property to finance the construction of a religious college. *Id.* at 870. The Court held that the tax-exempt revocation was improper, noting, *inter alia*, that the plaintiff was heavily involved (i.e., enmeshed) in the operation of the summer camp (to wit, the actual, physical use of the property) and that the operation of the summer camp was in furtherance of the charitable plaintiff's charitable purposes. *Id*. at 871. Thus, any contention that the use of the Building and the rental received therefrom are not incidental and ancillary to Samuel Schulman's charitable purpose of "supporting the charitable healthcare mission conducted for the benefit if the public" is without merit. *Id. See also Symphony Space, Inc. v. Tishelman, supra; Gospel Volunteers, Inc. v. Speculator, supra* (Finding property subject to exemption where the owning entity was created, inter alia "to assist financially or otherwise * * * the formation, organization, promotion and operation of any similar non-sectarian, non-profit

organization, or any other religious organization devoted to similar purposes and with similar ideals.").

Simply put, particularly in light of the use of the Premises for the ambulatory dialysis unit of Brookdale Hospital operated by Brookdale Hospital employees and supporting the purposes of Samuel Schulman, or focus on the income earned from the Building which is utilized to support the mission of Samuel Schulman (to wit, supporting the Brookdale Hospital and Nursing Institute facilities), the use of the Building is, at the very least, "reasonably incident" to the charitable purposes of Samuel Schulman and therefore entitled to continue its tax-exempt status, and the Appellate Division Order should be affirmed.[29] *See, e.g., Matter of Adult Home at Erie Station, Inc. v. Assessor & Bd. of Assessment Review of City of Middletown*, *supra; Matter of Paws Unlimited Found., Inc. v. Maloney*, 91 A.D.3d 1173, 1175 (3d Dep't 2012) (Finding entire property was entitled to tax exempt status, holding "Petitioner demonstrated that the property is predominantly used for the animal shelter, with only one quarter of the kennels on the premises used to board pets. Moreover, the money realized from the pet boarding is exclusively used to further petitioner's charitable goals. In our view, this proof was sufficient to make a prima

[29] DOF's contention that the instant scenario – the operation of a dialysis center by hospital employees as part of protected health care service – amounts to a tax loophole whereby a non-profit "could lease its space to any commercial enterprise so long as any tangential relationship to the not-for-profit owner could be invented" is both preposterous and insulting. (DOF Brief p. 42)

facie showing that the boarding operation was reasonably incident to the primary, exempt use of the parcel."); *Plattsburgh Airbase Redevelopment Corp. v. Rosenbaum*, 101 A.D.3d 21 (3d Dep't 2012) ("[I]t appears undisputed that all profits from the property are reinvested to further petitioner's purpose of revitalizing the economy of the local community. Accordingly, we hold that petitioner is entitled to the real property tax-exemptions.").[30]

POINT III

UNDER NO READING OF THE LAW IS DOF ENTITLED TO TAX THE PORTION OF THE BUILDING WHICH IS NOT LEASED TO BROOKDALE DIALYSIS

Lastly, DOF revoked the tax-exempt status for the entire two-story Building on the basis that Samuel Schulman was receiving a profit therefrom, despite DOF's knowledge that Brookdale Dialysis leased only the basement and first floor of the Building. Accordingly, even under DOF's own rationale for revoking the tax-exempt status of the Building, the Determination was issued in error, imposing taxes on the whole Building. Thus, again, the Determination was arbitrary and capricious and DOF failed to satisfy its burden of establishing that the entire Building was no longer entitled to tax-exempt status. The Order should be affirmed accordingly.

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[30] Notably, the Court in *Plattsburgh Airbase Redevelopment Corp.* distinguished *Matter of Lackawanna*, extensively relied on the DOF, because the owning entity in *Lackawanna* "seeking the exemption was no longer actively marketing or further utilizing its ownership of the property to make additional advances to the economic development of the community . . ." Here, there is no claim in the Record that Samuel Schulman ever stopped its charitable purposes and advances to the community.

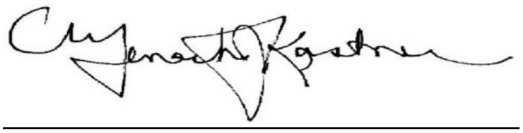
CONCLUSION

As more fully set forth above, the lower Court and the Appellate Division correctly determined that DOF failed to meet its burden to demonstrate that the tax-exempt status of the Building was properly revoked. As such, it is respectfully submitted that the Appellate Division Order should be affirmed in its entirety, together with such other and further relief as this Court shall deem just and proper.

Dated: New York, New York
October 15, 2021

Respectfully submitted,

COZEN O'CONNOR

By: 

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NEW YORK STATE COURT OF APPEALS
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I hereby certify pursuant to 22 NYCRR Part 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
October 15, 2021

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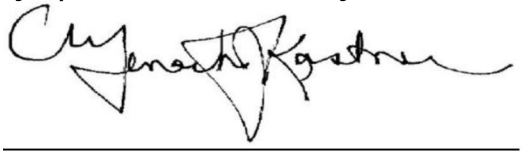
By: 

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On October 15, 2021

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on October 15, 2021

Mariana Braylovskiy

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Qualified in Richmond County
Commission Expires March 30, 2022

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