SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND Part 23

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RACHEL O'BRIEN, CARMINE MORANO, SIMON HEDLEY, STEVEN SHORE, SANDRA JACOBUS SHORE, CARLA STEARNS, and KENNETH FISHEL,

Petitioners - Plaintiffs,

-against

THE CITY OF NEW YORK; ZOHRAN KWAME MAMDANI, in his official capacity as Mayor of the City of New York; THE NEW YORK CITY DEPARTMENT OF FINANCE, and RICHARD LEE, in his official capacity as Commissioner of the New York City Department of Finance,

Respondent - Defendants.

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Present:

Hon. Wayne M. Ozzi

DECISION and

ORDER

Index No.85217/2026

Motion Seq. No. 001

The court marked the motion fully submitted on the 31st day of August, 2026, after hearing argument by counsel for the respective parties The court rules as follows: the petition is granted and the matter returned to the respondent agency as detailed below.

PROCEDURAL HISTORY

This action was commenced with the filing of a verified petition and complaint on August 7, 2026, and amended on August 18, 2026[1], combining requests for relief pursuant to CPLR

1The First Amended Verified Petition added new petitioners, but the two causes of action remain unchanged.

Article 78 and a declaratory judgment action. The petition seeks relief for two distinct actions taken by respondents pursuant to recent amendments to the Tax Law. Specifically, petitioners challenge the propriety of a published list of over 900,000 properties and owners ("Supplemental Roll") and approximately 17,000 notices mailed to individual property owners ("Mailed Notices"). Contemporaneously with the filing of the petition, petitioners filed an order to show cause which sought, *inter alia*, temporary restraining orders preventing respondents from continuing their actions under the amended Tax Law. Respondents filed opposition to the interim relief and the court heard argument on August 10, 2026. After argument, the court signed the order to show cause, including the portions seeking temporary restraining orders. Respondents appealed to the Appellate Division, Second Department. On August 13, 2026, the Appellate Division stayed the aforementioned restraining order.

Respondents filed opposition to the petition with petitioners filing reply papers in further support. The parties appeared in person before the court on August 31, 2026. After argument, the court reserved decision.

PARTIES

Petitioner Rachel O'Brien ("O'Brien") owns a home in Richmond County and claims that said home is her primary residence. Her name and property were included on the Supplemental Roll.

Petitioner Carmine Morano ("Morano") owns a home in Richmond County and claims that said home is his primary residence. His name and property were included on the Supplemental Roll.

Petitioner Simon Hedley ("Hedley") owns a two-family home in New York County and claims that said home is his primary residence. Petitioners sent him a Mailed Notice.

Petitioners Steven Shore and Sandra Jacobus Shore (the "Shores") own a home in New

York County and claim that said home is their primary residence. Petitioners sent them a Mailed Notice.

Petitioner Carla Stearns ("Stearns") lives in a home in New York County and claims that said home is her primary residence. The property is held by a revocable trust and Stearns is the trustee thereof. Petitioners sent her a Mailed Notice.

Petitioner Kenneth Fishel ("Fishel") owns a cooperative apartment in New York County and claims that said apartment is his primary residence. Petitioners sent him a Mailed Notice[2].

Respondent City of New York ("NYC") is a municipality organized and existing under the laws of the State of New York. NYC is responsible for, *inter alia*, the activities of all agencies and employees thereof.

Respondent Zohran Kwame Mamdani is the Mayor ("Mayor" or "Mamdani") of NYC and is sued in his official capacity. As the chief executive of NYC, the Mayor oversees the activities of mayoral agencies and employees thereof.

Respondent New York City Department of Finance ("DOF") is a mayoral agency organized and existing pursuant to the New York City Charter. DOF is charged with, *inter alia*, collection of real estate taxes within NYC.

Respondent Richard Lee is the Commissioner of DOF ("Lee" "Commissioner") and is charged with overseeing the requirements of DOF.

FACTS

The objective facts are largely not in dispute. After Mayor Mamdani assumed office in 2026, he made numerous public overtures to the New York State governor and legislature

[2]The notice concerning Petitioner Fishel's cooperative unit was addressed to the wrong unit owner.

requesting additional funding to assist in the NYC budget. Ultimately, the governor and Mayor Mamdani announced an agreement to propose a surcharge to be assessed on certain high-value homes within NYC. The State legislature agreed to the proposal and amended the Tax Law and New York City Administrative Code, creating what is colloquially referred to as the "Pied-aTerre Tax". Tax Law §§1350-1356 and New York City Administrative Code §§11-3201 through 11-3208 were created as a part of the State budget[3]and became effective May 28, 2026.

The new law imposes a "surcharge" on select 1-3 family homes, residential cooperative units and condominiums. Tax Law §1350. The surcharge applies to homes with valuations over $5 million and cooperative units and condominiums over $1 million.[4] *Id.* The surcharge is further limited to a property / unit that "is not a primary residence". *Id.* The surcharge is to apply as of July 1, 2026, such that it is part of NYC's 2027 fiscal year, which runs from July 2026 through June 2027. *Id.* In practice, the first surcharge payments under the pied-a-terre tax are due by January 1, 2027, with DOF to send such tax bills on or about November 15, 2026. Tax Law §1354. DOF "shall add the surcharge authorized by this article to the statement of account of a covered property". Tax Law §1354(a); Admin. Code §11-3205.

Under the law, DOF is charged with administering the surcharge "to greatest extent practicable . . . in the same manner used to administer and enforce real property taxes". Tax Law §1354(a). In administering the surcharge, DOF is charged with making an "initial determination" of surcharge applicability "based on the information available to [DOF]". Tax Law §1352(a)(1). The amendments expressly contemplate DOF promulgating rules to address the administration and enforcement of the surcharge. Tax §1354(e). DOF enforcement could include penalties of

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[3]While it is not uncommon for the State legislature to approve non-budgetary items as part of the budget legislation, the byproduct of said practice can often be a limited legislative record. For the instant legislation, the legislative history is sparse.

[4]New York City has a complex system for assessments in relation to real property taxes in which cooperatives are evaluated differently than 1-3 family homes. As there is no challenge as to the valuation aspect of the pied-a-terre tax, the court need not delve into that subject.

up to 50% of the value of the surcharge for instances in which, after a hearing, DOF finds that a property owner presented "inaccurate or misleading information . . . that is material . . . and was submitted negligently or in bad faith". Tax Law §1354(e)(2). Respondents are further given the express power to request from the New York State Department of Taxation and Finance "any records" from a tax return submitted by a taxpayer / property owner. Tax Law §1356.

After the passage of the changes to the Tax Law and Administrative Code, DOF published proposed new rules relating to the surcharge in the *City Record* on June 9, 2026. DOF received written comments and convened a virtual public hearing on July 9, 2026. On July 14, 2026, DOF issued its formal findings and the final rules for immediate adoption, citing a "substantial need" for early adoption.[5]The new rules are codified at 19 RCNY §§62-01 through 62-07. In publishing the new rules, DOF included a select summary of testimony received, including suggestions accepted and, more often, rejected by the agency. DOF reports that while it was requested to explain to each assessed owner how his / her respective property was chosen for imposition of the surcharge, DOF reports that "it does not intend to include any analysis" of how it reached any of its "initial determinations", which strongly suggests to the Court that it has in fact no explanation upon which to rely for those "initial determinations." How are property owners expected to make an informed challenge to DOF's determinations without that information?

DOF's new rules also included the following section:

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[5]The City Administrative Procedure Act ("CAPA") is codified in Charter §§1041-1047. CAPA includes provisions for publication of proposed rules, public submission and hearings and publication of final rules to be effective 30 days thereafter. Charter §1043(f)(1)(d) allows the shortening of the 30-day waiting period upon an agency (and mayoral) finding of "substantial need" to implement said rule(s) sooner. Petitioners contend that portions of the newly enacted rules violate State and City statutes. (discussed *infra*). However, there is no allegation that the rule making process violated any express CAPA requirement.

19 RCNY §62-07 Notice of the surcharge amount.

(a) The statement of account required pursuant to §11-129 of the Administrative Code and the assessment roll required pursuant to Chapter 58 of the New York City Charter shall collectively constitute notice of the imposition of the surcharge to an owner, provided that for the fiscal year beginning on July 1, 2026, notice that a payment is due and payable and such assessment roll shall constitute notice of imposition of the surcharge.

(b) For the fiscal year beginning on July 1, 2026, no later than July 25 of such year, the department shall publish an addendum to such assessment roll. Such addendum shall include the phase one market value and information sufficient to identify each covered property or, in the case of a covered property that is a residential cooperative property, each residential cooperative dwelling unit that may be subject to the surcharge. On December 31, the department shall publish a final version of such addendum.

After the enactment of the new agency rules, DOF then took two distinct actions.

First, DOF compiled a "Supplemental Roll" which it placed on its agency web page on July 24, 2026. The published roll included over 900,000 distinct properties including effectively all 1-3 family homes, residential condominiums and select cooperatives. As part of the publication of the Supplemental Roll on its public page, DOF noted that the publication was "related to" the new surcharge / pied-a-terre tax. It is not disputed that 98-99% of the properties on said Supplemental Roll are not subject to the surcharge. Upon its publication, there was significant reaction, confusion and criticism from property owners, elected officials and media. On August 1, 2026, DOF updated its public page to include a disclaimer that "The vast majority of the properties and units listed in the roll will NOT be subject to the surcharge".

More recently, on August 24, 2026, DOF added further disclaimers, publishing:

The listing of property on this roll does not mean that it is subject to the surcharge. Properties that DOF believes are subject to the surcharge receive notification directly by DOF and are given an opportunity to respond. The vast majority of listed properties will not receive such a notice. Property owners who received a letter that they may be subject to the surcharge should review DOF's FAQ, and if needed, can submit a surcharge exemption application for residential homes and condos or co-ops.

In addition to the broad Supplemental Roll referenced above, DOF compiled a smaller list

of property owners who would be mailed a notice relating to surcharge liability. DOF states that they reviewed multiple databases relating to various real estate tax exemption programs as means to confirm residency. DOF contends that 2025 income tax records were not available during this initial review, but that 2024 returns were available. However, DOF contends that it did not consider 2024 tax returns as dispositive regarding residency. As to the valuation aspect of the properties, DOF estimates that approximately 24,000 1-3 family homes, residential condominiums and cooperative units meet or exceed the value threshold. DOF determined that of those 24,000 properties, approximately 17,000 owners should receive notices regarding surcharge liability. Of the approximately 17,000 properties upon which DOF subjected to the surcharge, "over half" of the properties are not owned by a natural person, but by a trust, partnership, corporation, LLC or other entity.

Starting on July 21, 2026, DOF sent Mailed Notices to the 17,000 property owners in relation to the surcharge. After including pedigree data such as the name and address of the owner, the typical notice informs that:

- There is a "new annual surcharge on certain properties" that are not the "owner's primary residence";
- DOF has determined that the property owner may owe such a tax;
- The amount of the tax[6]and the property's market value;
- The ability to file for an "exemption" within 30 days of the notice date[7];
- The categories of "exemptions": primary residency of the "owner", "tenant or

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[6]The amount of the surcharge varies between 1-3 family homes and condominiums and cooperative units, as well graduating for higher value properties. For the lowest applicable 1-3 family homes, the surcharge is at least $40,000, based upon a rate of .8% and a $5,000,000 threshold.

[7]Although not detailed in the Mailed Notices, in DOF's rules, it included a penalty provision up to 50% of the value of the surcharge for the submission of inaccurate or misleading information after a hearing with a NYC agency.

Petitioner Stearns lives in a property owned by a revocable trust of which she is the designated trustee. Upon receipt of the Mailed Notice, Stearns filed for an "exemption" with DOF on July 29, 2026. On August 24, 2026, DOF sent Stearns a notification that she "qualif[ies] for an exemption from the surcharge".

DOF contends that its records did not reflect that petitioner Fishel had any ownership interest the cooperative dwelling unit in which he resides. DOF, in turn, sent a Mailed Notice to said unit, but in the name of the persons DOF erroneously presumed to be the owners of said unit. Fishel contends that his attempts to file for an "exemption" were very difficult, possibly due to DOF having incorrect ownership records. Fishel appears to have testified at the City Council August 18, 2026. DOF contends that Fishel should have been able to file and submit "documentation demonstrating primary residence". Regardless of the submission status, "on its own review, DOF has already taken the initiative to correct Fishel's ownership interest in the portal." After correcting its records, DOF agreed that Fishel should not be subject to the surcharge. On August 24, 2026, DOF sent Fishel a "Determination that the Property is NOT subject to the surcharge", in which DOF states that it "determined" that the Fishel's home "is not subject to the surcharge."

Through "emergency rule" DOF has extended the deadline for "exemption" applications from August 21 and 24, 2026, to as late as October 6, 2026. DOF has stated that it will mail thousands of notices to property owners, *sua sponte*, both changing and adhering to earlier impositions of the surcharge. DOF has reviewed additional public records and will be notifying approximately 1,210 property owners that DOF will no longer be subjecting their properties to the surcharge. DOF has also stated its intention to send approximately 4,400 owners of property, apparently titled to natural persons, "updated letters" effectively reiterating its initial determination that said property is subject to the surcharge. Finally, DOF will be sending approximately 6,400 owners of property, titled in LLC's, trusts or other entities, that they are

subtenant", majority stakeholder in an owning LLC, corporation or partnership, "immediate family member" or owner or "sole beneficiary" of a trust;

• The alternative ability to seek the exemption from the New York City Tax Commission.

DOF sent Mailed Notices to petitioners Hedley, Shores, and Stearns dated July 22, 2026, with a notice for Fishel's property dated July 24, 2026. Hedley was the only party in the initial petition that had received a Mailed Notice. Hedley filed an "exemption" application with DOF. After the filing of the petition but before argument on petitioners' request for a temporary restraining order, DOF reversed its initial determination, granted an "exemption" and agreed that Hedley is not subject to the surcharge.

On August 18, 2026, Shores, Stearns and Fishel were added to the action as additional petitioners. Petitioners complain that the "exemption" process was difficult and improperly administered, a point contested by respondents. Nonetheless, the respondents have changed the tax status of the properties of all the added petitioners since their inclusion in the action as detailed below.

DOF stated that it subjected the Shores to the surcharge because "an owner's Social Security number was not associated with the property in the DOF records". After receipt of the Mailed Notice, the Shores filed, or attempted to file, for an exemption through the DOF portal system. The Shores contend that their application did not appear to be accepted while DOF states that the application was accepted, but that the Shores had "not fully submitted their documentation" to prove that their property was their home. DOF further states that despite what it considers a deficient application, the agency reviewed "information available to DOF" and agrees that the Shores should not be subject to the surcharge. On August 24, 2026, DOF sent the Shores a "Determination that the Property is NOT subject to the surcharge", in which DOF states that it "determined" that the Shores' home "is not subject to the surcharge."

subject to the surcharge. At the time of argument, DOF was projecting to send said notices by August 31, 2026.

DISCUSSION

Standing

Before delving into the merits of the petition, respondents challenge the standing of petitioners to maintain this action. In order to have standing to assert a claim, a petitioner must demonstrate that he or she would suffer a harm that is in some way different from that of the public at large. (*see Socy. of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774 [1991]). To the extent there is a statute or government action, the petitioner should demonstrate that the harm pled is within the interest sought to be protected by any such statute. (*see Socy. of Plastics Indus. v County of Suffolk*, 77 NY2d at 773). Generally, if due to the passage of time or circumstances change which render the factual issue moot during the pendency of an action, a court is precluded from considering the underlying question. (*see Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). However, an exception to the concept of mootness exists when there is a likelihood of repetition, either involving "or among other members of the public", it is a phenomenon that would likely evade review, and involves "significant or important questions" that have not been previously passed on. (*Id.*; *see also City of New York v Maul*, 14 NY3d 499, 507 [2010]). In such circumstances, the "public interest in having the legality of the practices settled, militates against a mootness conclusion." (*Matter of Puerto v Doar*, 142 AD3d 34, 44 [1st Dept 2016] *quoting United States v W.T. Grant Co.*, 345 US 629, 632 [1953]).

As to the Supplemental Roll, petitioners were expressly named and their homes were expressly identified in the publication thereof. Respondents do not challenge that petitioners are placed differently than taxpayers at large. Rather, respondents argue that the placement of petitioners' names and homes in the Supplemental Roll caused no harm. To this point, it is noted

that data as to property ownership and real estate tax liability has long been considered "public" information. However, in this instance, respondents expressly compiled, and publicized, a list of such names, properties and tax liabilities, and with knowledge that the pied-a-terre tax did not apply to 98-99% of the names and properties listed, resulting in significant public fanfare. While the propriety of such publication is disputed, *infra*, petitioners asserted that such publication increased their exposure to harassment and other unwarranted intrusions. (*see Matter of Russell v Town of Mount Pleasant*, 45 NY3d 677 [2026], in which the Court of Appeals recognized the potential harms in disclosing emails publicly in the modern age. The current term for such activity is "doxxing".Therefore, petitioners have facially asserted harm to the extent needed to challenge the propriety of the Supplemental Roll.

An authority no less than the United States Supreme Court has recognized that "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs" (*Thunder Basin Coat Co. v. Reich*, 510 US 200, 200-21[1994]).

As to the Mailed Notices, respondents argue that all of the named petitioners who were sent notices levying the surcharge have since had the DOF reverse its decision or grant an "exemption". Therefore, respondents argue, the issue is moot, there is no harm and, therefore, the issue cannot be adjudicated. Petitioners counter that respondents conveniently focus on each individual petitioner after bringing this action, but that there are over 10,000 property owners upon which respondents are applying the surcharge. Petitioners argue that this case meets the mootness exception as; the issue is likely to be repeated as respondents are still sending surcharge notices to over 10,000 property owners: that time constraints and respondents' continual changes to status will make it easier for their actions to evade review; and the issue as novel as the pied-a-terre tax is new, the product of original statutory provisions that have never been subject to review.

As to the mootness of the Mailed Notices, the court finds *City of New York v Maul* to be particularly relevant. In *Maul,* plaintiffs were multiple individuals who alleged they were not being provided with proper placements by governmental agencies. (*see generally City of New York v Maul*, 14 NY3d 499 [2010]). As the court process progressed, the individually identified plaintiffs were gradually placed into facilities, to the point that, by the time the matter was at the Court of Appeals, the plaintiffs had been placed, or were being placed. (*Id.,* at 507). Nonetheless, the Court Appeals ruled on the substance of the issue, finding that the case raised substantial novel issues, would likely recur with other members of the public and could possibly evade review. (*Id.*) Likewise, in this instance there is a new law that can potentially double the tax liability for thousands of property owners besides petitioners. Additionally, the surcharge will apply in future years, such that any errors in place for the current fiscal year could recur in future years. The purported errors are likely to evade review as the window for appeals is short and respondents have made numerous modifications in the prior six weeks alone. Finally, the issue is novel in that it is a new tax concept that required the creation of numerous new passages to the Tax Law, Administrative Code and RCNY. Therefore, the court finds it would be improvident to allow respondents' actions to evade review under a theory of mootness. Better to address the issues now rather than later.

Standard of Review

As noted above, the petition does not seek a finding that the amendments to the Tax Law are violative of any Federal or State law. Rather, petitioners contend that respondents acted improperly in their publication of the Supplemental Roll and transmittal of the Mailed Notices.

The court must determine if the respondents'actions were "made in violation of lawful procedure, w[ere] affected by an error of law or w[ere] arbitrary and capricious or an abuse of discretion." CPLR 7803(3). Agencies are entitled to a level of deference, such that a decision with a rational basis must be sustained "even if the court concludes that it would have reached a

different result than the one reached by the agency." (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *see also Matter of Aponte v Olatoye*, 30 NY3d 693, 698 [2018]). However, agency actions and rules "are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." (*NY State Assn. of Counties v Axelrod*, 78 NY2d 158, 166 [1991], *citing Matter of Bates v Toia*, 45 NY2d 460, 464 [1978]).

The Supplemental Roll

Although the actions taken, or not taken, to determine properties subject to the surcharge are heavily debated, *infra*, the significant quarrel with the Supplemental Roll relates to the scope of the data disclosed. The published Supplemental Roll includes over 900,000 properties, while the actual estimate of properties subject to the surcharge was 17,000 and has been modified to likely be below 10,000. Respondents contend that the broadly drafted and published list is not only permissible, but required under the Tax Law and Administrative Code. Petitioners counter that a much more narrowly tailored list was contemplated, and indeed required, by the Legislature and is what should have been produced, and that its over breadth has caused unwarranted publicization of personal information. The court concurs with petitioners.

The primary consideration when interpreting a statute is to give effect to the intention of the legislature. (*see People v Galindo*, 38 NY3d 199, 203 [2022]). There is no dispute that DOF data on property taxes has long been public record, such that the changes to the DOF due to the surcharge are logically public as well. (*see* Admin. Code §11-3205(d)). The Charter requires that the record of assessed value shall be open to the public by January 15 each year and remain accessible until March 1, a requirement that DOF purports was met this past year. NYC Charter §1510. For the current fiscal year, there is no change to property valuation, only a determination as to which properties are subject to the surcharge. As noted previously, as the statutory amendments came with little formal legislative history, the court must glean the legislative intent from the court record and general information regarding the statutes involved. Reviewing the

new passages of the Tax Law and Administrative Code, the legislative package is focused on: a) creating a new revenue stream; b) from high-value dwelling units; c) that do not serve as a primary residence; d) while ensuring that property owners are properly assessed and notified if their property is deemed subject to the surcharge. For publication of the massive Supplemental Roll, respondents rely on Admin. Code §11-3205, which is entitled "Administration of surcharge". The provisions cited by respondents bear no relationship to revenue generation, the manner of valuation or occupancy status. §11-3205 rather seems intended to ensure that owners of property potentially subject to the surcharge be given notice of the levy and that such information be publicly accessible.

It is nonsensical to conclude that the legislature mandates that a change to the tax status of less than 17,000 properties requires a re-publication of essentially the entire residential tax roll of over 900,000 properties. Even respondents' initial publication of the Supplemental Roll highlighted the contradiction. While publishing the large list, DOF said the publication was "related to . . . the surcharge" and that the list "includes . . . properties that *may* be subject to the surcharge" *(emphasis added)*. Nothing in the record indicates that DOF regularly creates "addenda" or "supplemental rolls" and it is without argument that the sole purpose of DOF publishing the Supplemental Roll was in conjunction with the imposition of the surcharge. To then determine that said list not only can, but must, contain a list in which 98-99% of the data is irrelevant to its stated purpose is capricious and without legal support. The several disclaimers and explanations following the initial publication of the 900,000 plus Supplemental Roll is strong evidence of an admission by DOF that its release was wrong. In essence, all DOF did to satisfy its obligation to produce and publish a Supplemental Roll of property owners subject to the surcharge was to take the lazy route and merely re-publish the roll of regular real estate tax assessments *(Admin. Code § 11-201 et seq.)* and label it as a list of properties possibly to be surcharged, causing confusion and dismay. It is highly unlikely that this was the intent of the Legislature. "Supplemental roll" is not defined in the Tax Law, the Administrative Code, or the

Regulations of the DOF. A "supplement" is a part added to a book or document to supply additional or later information, correct errors, or the like (Dictionary.com). In the absence of a defined meaning or one developed by precedent, the Court may look to the ordinary or readily understood meaning of words (*People v. Lanham, 177 AD3d 637,638 (2d Dept.); also, McKinney's Statutes,§§ 232,234).*

Mailed Notices

There are two predicates for the imposition of the surcharge: the property meets a minimum value threshold, and the property does not serve as a primary residence. Tax Law §1350. The valuation component of the surcharge standard is not at issue. Petitioners contend that respondents abdicated their responsibility to make a well-reasoned determination as to whether a property was indeed a primary residence and that respondents effectively flipped the burden onto petitioners to demonstrate that their properties were occupied as primary residences. Respondents defend their actions as compliant with the law and note that respondents did what could be reasonably expected in a compressed time period. Again, the court concurs with petitioners.

The duty of determining if a property is a "primary residence" falls to DOF and shall be made on an annual basis. Tax Law §1352(a)(1); Admin. Code §11-3203(a)(1). DOF shall make such "initial determination" "based on information available to" DOF. Tax Law §1352(a)(1); Admin. Code §11-3203(a)(1). Thereafter, DOF shall send a notice to each property owner in which DOF has determined that the property is not occupied as a primary residence. Tax Law §1352(a)(2); Admin. Code §11-3203(a)(2). Said notice shall inform the property owners of their right to submit evidence to DOF to prove that the subject property is occupied as a primary residence. Tax Law §1352(a)(1); Admin. Code §11-3203(a)(1). The legislation expressly requires that the State Department of Taxation and Finance share records with DOF to assist in determining primary residency. Tax Law §1356.

In issuing its report under CAPA, DOF expressly stated that "this final rule provides that DOF will use income tax data to make initial determinations of primary residency for the 2026/2027 fiscal year". Per the newly enacted agency rule, DOF "will make a determination that a covered property . . . is used as a primary residence if . . . a covered owner indicated in their state . . . tax return for the most recent income tax year for which data is sufficiently available to [DOF] that such covered property . . . was such covered owner's permanent home address". 19 RCNY §62-06. Respondents have indicated that DOF has had access to 2024 tax returns since on or before the passage of the legislation, but that 2025 tax returns became available during the pendency of this litigation. In determining which properties would be subject to the surcharge, DOF looked at records for various tax exemptions, compliance initiatives and a combination of cooperative-condominium abatements coupled with tax returns.

Curiously, DOF expressly *refused* to consider 2024 income tax data by itself. DOF explains their actions as follows:

> [w]hen DOF made its initial determination of primary residence in July, the most recent income tax data available to DOF was from the 2024 New York State income tax returns, many of which had been filed over a year ago – before April 15, 2025.
> The Law provides that primary residence should be determined as of the taxable status date which for this fiscal year is January 5, 2026. . . . The 2024 New York State income tax returns indicate a taxpayer's assertion of their permanent home as of December 31, 2024, more than a year prior to the relevant taxable status date, January 5, 2026.
> Affirmation of Michael Smilowitz, NYSCEF # 29

The DOF actions are in direct conflict with the amended Tax Law, Administrative Code, and even its own newly promulgated Rule 62-06. The legislature clearly contemplated that income tax data would be an integral part of DOF undertaking its burden to make its "initial determinations" as to residency. Mere weeks after the passage of the legislation, DOF promulgated rules that affirmatively forward the intent to use such income tax data. But then literally days after the passage of its own rules, DOF argues that using such tax data is

impermissible due to the passage of time. Besides undercutting the statutes and City rules, DOF's opinion that the income tax data lacks value is without support.

The court agrees that while most income taxes forms are filed in the year after the income was earned, the information in the forms relates to events up to December 31 of the tax year. In addition to the qualitative information concerning income and expenses, said forms include the place of residency for the taxpayer. According to respondents, State tax data for the most recently completed tax year is not available until well into the ensuing year – in this case DOF states it was not provided 2025 tax date until August of 2026. DOF further contends that it could not wait until such data was available to make its initial determination as to residency, so it effectively made such determinations for most properties without the benefit of any tax date. This action is clearly arbitrary and contrary to law as it is hostile to the newly enacted laws that contemplate the usage of income tax data by DOF as a means to administer the surcharge. The Court concurs with petitioners that the requirement for an "initial determination" by DOF contemplated an *individualized* determination based on information available to it, including but not limited to, 2024 tax returns. By neglecting to do so, DOF failed to do its due diligence, making its actions arbitrary and capricious.

DOF appears to create a bright-line standard for income tax data that is not only unfounded in the statutes, but generally imprudent. While DOF is correct that the 2024 tax returns reflect a residency date of December 31, 2024, there is nothing in any statute that prohibits using that data in 2026. The Tax Law and the Administrative Code contain no such date limitation and the DOF rule further *requires* that DOF recognize one's primary residence noted on the return if the "return *for the most recent income tax year* for which data is sufficiently available". The absurdity of respondents' position is illustrated as the infirmity it cites regarding tax returns would seemingly replicate itself in future fiscal cycles – DOF has painted this year's process as expedited due to the recent passage, such that future years will

suffer the same inability to get the most current tax date. The unfortunate result of DOF's refusal to consider those 2024 returns is that many homeowners who have resided in their homes for many years prior to December 31, 2024 improperly received the mailed notices.

The Burden Shifting

The refusal to use the tax data that was "sufficiently available" to DOF unfairly shifted the burden to thousands of homeowners to prove their basic residency. While the court can perceive difficulties in ascertaining primary residency for certain properties held in trust or entity ownership, there is no justification for this approach with regards to natural persons. This shifted burden is not hyperbolic, as many property owners, perhaps unsophisticated, may need to consult with legal or accounting professionals merely to prove residency, despite such information being readily available to DOF. Furthermore, by placing the burden on homeowners, DOF may require a person to provide otherwise protected data or documents in order to avoid the surcharge. As part of the CAPA report, DOF expressly stated that documentation presented by property owners, such as their tax forms, "is not subject to any statutory tax secrecy provisions". Yet if such tax information is obtained directly from the State, as contemplated by law, the income tax documents remain private. (*see* Admin. Code §11-3207). By placing the burden on the property owner to prove their residency, DOF potentially forces a property owner to render formerly private information available for public consumption.

While DOF accuses the petitioners of wordsmithing, the transmission of Mailed Notices and notation that an "exemption" is possibly available is indicative of the improper administration of the surcharge. There is no reference in any of the enabling statutes to exemptions, just merely definitions of what is, and is not, a primary residence. As to the four distinct petitioner properties initially subjected to the surcharge, DOF inexplicably ruled the two were "not subject to the surcharge" while the other two were granted "exemptions". This

disparate categorization of the four properties, which are all primary residences, is further indicia of the arbitrary approach taken by DOF.

Similarly, in the CAPA report, DOF states that it was requested to include more information in the Mailed Notices to inform as to how the agency determined to subject the property owner to the surcharge. DOF declined to accept the recommendation, citing a "need for effectively administering the program." DOF does not elaborate on this comment, but in other portions of the litigation argues that its actions are justified due to the tight time frames involved. As noted in respondents' filings, they sought the increased funding to use for immediate budget gaps. While every mayoral administration is entitled to pursue its particular fiscal or legislative agenda, it cannot seek such legislative assistance and then insinuate to the court that their administration of the law is hampered by time constraints. Respondents knew, or should have known, that income taxes data has lags in terms of availability and purported legal import. Likewise, respondents knew, or should have known, that large portions of high value dwelling units are owned by other than natural persons.

The improper burden shifting to petitioners is not merely an exaggerated characterization utilized by them to draw attention to the problem they face. Burden shifting implicates a substantive rule of law to be applied. While the state may regulate procedures under which its' laws are carried out, including the burden of persuasion, such power is not unlimited, if "in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Speiser v Randall*, 357 US 513, 523, quoting *Snyder v Massachusetts*, 291 US 97, 105). Unfairly shifting the burden of proof upon a defendant in the context of criminal cases is a common issue, but state statutes unfairly shifting the burden in civil cases have been struck down as well (*Speiser v. Randall, supra*, at 524, citing *Western & A.R. Co. v Henderson*, 279 US 639; *also, Minnehan v. Dept. of Social Services, 10 Mass. L. Rptr., 364).* In *Minnehan,* a Massachusetts statute improperly placed the burden of proof on a

respondent to disprove a report by the State's Department of Social Services of sexual abuse of a child, and to demonstrate that he should not be placed on a State Registry of Perpetrators.

The Supreme Court "has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax was shown to be in reality a penalty for a crime" (*Speiser v. Randall, supra*, at 525).

No crime is involved here, but homeowners are being substantially harmed and penalized needlessly by DOF's method of implementing the Tax Law. By requiring homeowners to seek an "exemption", the mailed notices irresponsibly and unnecessarily caused homeowners to expend time and money, lacked any real guidance as to the proof required, risked a 50% penalty for any submissions deemed "negligent", and risked revelation of confidential matters (i.e. tax returns), which DOF concedes are not regulated by privacy regulations if submitted as part of the "exemption"'application. As already noted in the *Thunder Basin* case, "complying with a regulation later held to be invalid almost always produces the irreparable harm of nonrecoverable compliance costs"

A word about the "exemption process". It is not really an "exemption" as described in the Mailed Notice and elsewhere, inasmuch as a good number of homeowners who received the notices were never subject to the surcharge in the first place. This "exemption" process is nowhere to be found in the enabling legislation or the Administrative Code. An exemption is an official and recognized excuse from an obligation that otherwise would apply. To illustrate: *All* real property within New York State is subject to real property taxation, (Real Property Tax Law § 300), unless specifically exempted (Real Property Tax Law §§ 400 et seq.). Examples include the STAR, senior citizens, and veterans' exemptions under New York tax laws. By contrast, all primary residences, and those under the monetary thresholds, are *not* subject to the surcharge.

To the extent that Tax Law § 1352(2), Administrative Code § 11-3203 and any DOF

regulations provide an "opportunity" to homeowners to submit documentary proof of primary residence after receipt of a Mailed Notice, to the satisfaction of DOF, and permitting DOF to require an owner to provide a certification that his or her property is a primary residence, such provisions are unenforceable as unlawful burden shifting in violation of their due process rights.

Any time constraints imposed by this new legislation do not permit respondents to take shortcuts in implementing the law a manner which violates petitioners'(and all others who received the Mailed Notices) due process rights.

CONCLUSION

Based on the foregoing, it is:

ORDERED that petitioners' First Cause of Action is granted and respondents are directed to remove the current Supplemental Roll from the DOF website, but may replace it with a limited Supplemental Roll reflecting those properties actually subject to the surcharge; and it is further

ORDERED that petitioners' Second Cause of Action for a declaratory judgment, finding that the Mailed Notices are arbitrary and capricious, affected by errors of law, and in violation of the recipients' due process rights, is granted. Respondents failed to properly make individualized "initial determinations" with regard to "primary residences". Respondents are directed to use the most recent available tax (and other available) information in arriving at their "initial determinations" with regards to "primary residences". Such analysis shall apply to the current fiscal year as well as ensuing fiscal years, and it is further

ORDERED that with regard to the Mailed Notices, the following is directed:

1. All previously Mailed Notices are to be cancelled.
2. New Notices may be mailed, in compliance with the intent of the law:

A. The Notice will specifically identify the non-primary residence claimed to be

subject to the surcharge.

B. New Notices will be mailed only after an *individualized* initial determination, utilizing any and all resources and information available to DOF, and other factors identified by its rules (Tax Law 1352(a)). If the DOF claims the target property is not a primary residence, it shall so state in the Notice what factors and information were considered, including, but not limited to, whether or not the property was occupied in a majority of days in the calendar year (Tax Law § 1352(a)).

C. The Notice will disclose the records or documents claimed to support its initial determination of non-primary residence.

D. The Notice will indicate the threshold amount clamed for the target property ($5 million for 1-2-3 family homes, $1 million for co-ops and condos).

E. The Notice will advise the property owner of the right to challenge the DOF's final determinations, and the procedure therefor (but not the "exemption" process, which is eliminated as it improperly shifts the burden)

F. The Notice will advise of the possibility of a 50% penalty if DOF, after a hearing, determines that any documentation provided by the property owner was submitted negligently or in bad faith, per Tax Law § 1354(e)(2).

This is the decision, order, and Judgment of the Court.

ENTER:

:

Dated:
9/29/26

Wayne M. Ozzi
J.S.C.