

ARTS Law Memo

MacDowell Colony wins tax case N.H. Supreme Court says it serves the public good

When a court affirms the value of the arts, it's cause to celebrate. And when an arts organization is motivated to go to court because the case has implications for our field, it deserves our gratitude.

This issue of *Arts Law Memo* summarizes the property tax case that put The MacDowell Colony's status as a charity in question. It also addresses some of the larger issues raised by the legal dispute, which was resolved in March.

THE MACDOWELL COLONY

As The MacDowell Colony prepared to celebrate its 100th anniversary, the 450-acre artist colony located in rural southwestern New Hampshire was in court. At stake was a property tax bill issued by the Town of Peterborough.

Founded in 1907 by composer Edward MacDowell and his wife, Marian, MacDowell is the oldest and arguably the most prestigious artist-in-residence program in the country. Its mission is to nurture the arts by offering creative individuals an inspiring environment in which to produce enduring works.

"For society to enable the production of art, it must necessarily support the artist. Art does not appear from thin air. It is created by an artist."

— Judge Gillian Abramson

More than 250 writers, composers, visual artists, photographers, printmakers, filmmakers, architects and interdisciplinary artists come to the Colony each year. They receive room, board and the exclusive use of one of the 32 studios where lunch is delivered in quaint picnic baskets to each doorstep to ensure a day without interruptions.

In addition to ideal working conditions, artists-in-residence benefit

from the experience of living in a community of exceptional artists.

The MacDowell Colony has hosted some of the nation's most influential artists, including Aaron Copland, Milton Avery, James Baldwin, Willa Cather, Jules Feiffer, Oscar Hijuelos, Arthur Kopit, and Alice Walker.

Thornton Wilder worked on *Our Town*, which is based on the small town life of Peterborough, and Leonard Bernstein completed his *Mass* there.

More recently, Michael Chabon wrote *The Amazing Adventures of Kavalier and Clay*, Wendy Wasserstein worked on several plays and *Gourmet* magazine editor-in-chief Ruth Reichl wrote her memoirs while in residence at MacDowell.

Of course, not all of the 6,000 artists who have been awarded residencies are household names. During the last few years, artists-in-residence included a filmmaker who edited his documentary about the looting of archeological sites in Iraq and a composer who finished the music for a multimedia retelling of the Daedalus and Icarus myth.

As PBS journalist, author and longtime MacDowell Board Chairman Robert "Robin" MacNeil, has noted, MacDowell is a "magic place."

"Any serious work begins as a small seed planted in a soil of lonely confidence," he observed during his Nancy Hanks Lecture on Arts and Public Policy in 2007. "Artists colonies exist to nurture creative people in the first stage, a stage each creative person has to relive again and again."

The Colony's program operates year-round in three four-month long sessions. It is open to professional and emerging artists who submit a two-page application form, a project description, two references and a \$20.00 application fee.

Applications are reviewed by discipline-based panels who rank applicants by degree of talent or excellence,

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- Conducting and disseminating research;
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- Providing access to the national volunteer lawyers for the arts network.



This issue was written by VLAA Executive Director Sue Greenberg with research assistance provided by Lenny Theborge.

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using a rating scale.

Between two applicants of equal rank and similar space needs, preference is given to the artist who had not previously been in residence.

In 2005, 246 artists were selected from 1,765 applications. They came from 31 states, including one from New Hampshire, and 14 countries.

PROPERTY TAX IN A NUTSHELL

In most states, property tax on real estate is the main source of financing for local governments and school districts. Property taxes are an especially important source of revenue in New Hampshire, which has neither a sales tax nor a state income tax.

While states have the prerogative

to tax or not, the authority to assess and collect property taxes typically is delegated to county and local governments, which use some of the money to help pay for municipal services like police, fire, road repair and snow removal.

The tax is usually based on the use of the property (residential, commercial or industrial), the assessed value of the property (including the land).

States have their own criteria for determining eligibility for exemption from property taxes. A charitable organization does not necessarily qualify for exemption because it is incorporated as a nonprofit or has been granted exemption from federal taxes under Section 501(c)(3) of the Internal Revenue Code.

Generally speaking, organizations seeking property tax exemption must convince local authorities that their property is being used exclusively for charitable, religious, educational or governmental purposes and is not leased or used for profit. Once obtained, property tax exempt status often must be maintained by filing annually.

THE DISPUTE

The MacDowell Colony property tax dispute began in 2005 when the Town of Peterborough, like other cash-strapped municipalities elsewhere in the country, decided to look for additional sources of revenue by re-evaluating the charitable status of organizations located within its boundaries.

Some organizations, including all the churches, were left alone. Others were asked to make voluntary payments to help pay for municipal services.

These negotiated "payment-in-lieu-of-taxes" made by tax-exempt organizations (or sometimes by another governmental entity) to local governments are known as PILOTs. Generally, the payments are largely symbolic because they are less than what the local entity would collect if the property were taxed.

But PILOTs can add substantial sums to local government coffers. Well-known PILOTs include Harvard University's multi-million payments to Boston and Cambridge and Yale

NEA to Create New Funding Category for Artist Communities

The National Endowment for the Arts is creating a new funding category for artist communities. The goal is to support the work of individual artists, albeit indirectly. NEA Chairman Dana Gioia announced the new grant category on Nov. 7, 2007, at the Freedom to Create forum, which was co-sponsored by the Alliance of Artists Communities and the MacDowell Colony. It is expected to be in place in 2009.

According to the Alliance of Artists Communities (artistcommunities.org), there are more than 250 communities in the United States. They provide dedicated time and space for creative work, and the residencies are provided at no cost to the artists or are heavily subsidized.

Residency programs in the U.S. provide more than \$36 million in direct support of independent artists each year. Taken together, the programs serve upwards of 9,000 artists each year; they are the single largest source of assistance to individual artists.

Gioia said the amount of money allocated to the new grants category will depend on the NEA's budget, which was \$176 million in 1992, fell to a low of \$97.6 in 2000 and increased from \$124.5 in 2007 to \$144.7 in 2008. President Bush has proposed a \$16 million cut to the arts endowment budget for the 2009 fiscal year, to \$128 million.

In the mid-1990s, during so-called "culture wars," when the agency was accused of funding indecent and blasphemous art, Congress limited the NEA's authority to fund individual artists. All fellowships except for writers, a few jazz musicians and "traditional artists" were eliminated.

The new funding category will allow the NEA to broaden its reach.

"Our colonies provide a heat shield for people who wish to support artists, without subjecting those artists to tests of cultural purity or social acceptability," said Robert MacNeil, who chairs the MacDowell Colony board of directors. "Artists who receive MacDowell fellowships do not have to pass through scanners for impiety, no urine tests for politically defined obscenity. The only screening they undergo is from committees of their peers, the only criteria for acceptance is the extent of their talent."

How are artists valued in society?

Here's a paradox: Americans value art, but not the act of creating art.

A national survey of attitudes conducted for the Urban Institute's ground breaking 2003 study, *Investing in Creativity: A Study of the Support Structure for U.S. Artists*, found that people appreciate the arts — 96 percent of respondents said they were greatly inspired by various kinds of art and highly value art in their lives and communities.

But the link between the end product and the effort and resources that go into making it is weak: Only 27 percent of respondents said that artists contribute "a lot" to the good of society.

Other data included in the study reflects a strong sentiment among artists that society does not value art making as legitimate work worthy of compensation — rather, artists say that what they do often is viewed as frivolous and self-indulgent.

department.

In St. Louis, as recently reported by the *Business Journal*, Washington University paid \$2.8 million in 2007 for municipal services — fire protection and ambulances services, sewer fees and utility taxes — to Clayton, University City and the city of St. Louis.

Nationally, the exact number of PILOTs, or the amount collected, is not known. However, jurisdictions across the country are becoming more aggressive in soliciting the payments.

In Peterborough, several nonprofit organization decided to be good neighbors; for example, a summerstock theatre agreed to pay the town \$2,500 a year.

While its annual application for property tax was pending, Peterborough sought to negotiate a PILOT agreement with the MacDowell Colony. The initial request was \$17,000.

The Colony's 450-acre property is valued at just over \$7 million, and property taxes would be about \$150,000 annually.

"They told us, 'just pay \$17,000 and we'll make this problem go away,'" David Macy, resident director of MacDowell, told arts journalist Daniel Grant. "But that sets a very bad precedent," Macy said.

At some point, the organization's

leadership reasoned, the town would come back with a much bigger bill.

But more importantly, they knew that their organization's charitable purpose was being challenged; by agreeing to pay, the organization believed it would be conceding that what the Colony does not benefit society as a whole.

Well-aware that they risked losing their property tax exemption, the MacDowell Colony board of directors unanimously voted to reject the town's PILOT proposal.

Peterborough's Selectmen, overlooking nearly 100 years of precedent, quickly denied the Colony's property tax exemption, issued a \$50,000 bill, then voted to take the matter to court.

LOWER COURT

The town challenged MacDowell's status as a tax-exempt, charitable institution, arguing that the colony does not serve the public good.

New Hampshire law defines a charitable organization as one that advances "the spiritual, physical, intellectual, social or economic well-being of the general public or a substantial and indefinite segment of the general public that includes residents of the state of New Hampshire."

More specifically, the town's lawyers argued that MacDowell is not a public charity because it: 1) does not produce any art itself; 2) does not provide its benefits to the general public or some indefinite segment of the public; 3) it does not serve New Hampshire residents because there is no assurance that state residents will be selected; and 4) there is no requirement that the artists do anything creative while in residence.

In her 22-page ruling issued in March 2007, Hillsborough Superior Court Judge Gillian Abramson dissected the Town's arguments and ruled in favor of the Colony.

"Charitable institutions, such as MacDowell, that are aimed toward enabling artists to significantly contribute to the well being of our society should be supported, not discouraged. By fostering the creation of the arts, MacDowell serves a charitable purpose for the benefit of the general public through its artist-in-residencies program," Abramson wrote.

The judge also referenced MacDowell's outreach programs, including readings in schools, contributions to the public library and a high profile annual open house called Medal Day, as further evidence of the colony's local impact.

Abramson relied, in part, on another 2007 case, which involved a nursing home facility.

In that case, *Eldertrust of Florida, Inc. v. Town of Epsom*, the state's Supreme Court articulated a four-factor test that looks at the organization's mission, its obligation to perform its stated purpose for the benefit of the public rather than simply for its own members, the ownership and use of the land and whether any of the organization's income or profits are used for any purpose other than the purpose for which the organization was established.

Abramson said MacDowell met all four factors of the *Eldertrust* test, noting that MacDowell's purpose is to promote the arts and making it clear that the artists are not "members" just because they are admitted into

the program or receive the colony's newsletter after being in residence.

"However, even assuming these artists are 'members,' the judge wrote, "MacDowell's charitable purpose is not confined mostly to them. While it is the artists who are admitted to the colony that directly use the property, it is the artists' use of the property that benefits the public.

"MacDowell encourages art by supplying the tranquil environment that artists need to make their art. In so doing, MacDowell benefits not only the artists admitted into the program, but also the general public by facilitating the creation of art."

STATE SUPREME COURT

Peterborough's Selectmen decided to appeal the case to the New Hampshire Supreme Court. In March, the court released its ruling upholding the earlier decision, declaring that The MacDowell Colony, by promoting the arts, is a charitable institution.

The court's unanimous 13-page opinion reinforces Judge Abramson's ruling, saying, "MacDowell's charitable purpose is not to actually create art but to promote it; that is, in the words of its charter, 'to encourage study, research, and production of all branches of art; to develop a sympathetic understanding of their correlation and appreciation of their value; and to broaden their influence.' It is MacDowell, not the individual artists, that performs that stated purpose."

In its decision, the Court said: "The trial court [concluded] that by 'supporting the artistic process,' MacDowell benefits 'at the very least, artists across the world, and, in a broader sense, the general public.' The [trial] court further concluded that MacDowell's artist-in-residence 'program primarily benefits society as a whole.' We agree."

The decision stated that "the relevant inquiry is not whether the public... benefits from the organization's property, but whether the public...benefits

from the organization's performance of its stated purpose.

"While MacDowell does provide services to the Colony Fellows, its charitable purpose is, as the trial court determined, 'promotion of the arts.' The provision of that service benefits a far greater segment of society than the artists who actually use MacDowell's property."

Justices Linda Dalianis and James Duggan offered additional affirmation in a concurring opinion. "Receiving a Fellowship to MacDowell is like receiving a prize or an award for excellence in arts, the benefits of which are of a two-fold nature," the justices said.

"Obviously the individual Fellows benefit, but the general public necessarily receive the benefits of the art produced not only by the artists who become Fellows, but the other artists who compete to become them."

Likening it to the discovery of a medical cure, the justices said, "...even though the 'reward' goes to only one person, the fact that a particular individual some day may qualify to receive the reward is but the instrumentality through which the benefits that will be bestowed upon the public are brought about."

While defending MacDowell's charitable status required significant time and resources, the Colony's board of directors believed the issue was sufficiently important to take the dispute to the highest level.

MacDowell hoped the case would set a precedent, one that would safeguard other charitable organizations from increasing pressure by municipalities to pay taxes they do not owe.

According to the organization's Executive Director Cheryl Young, "Charitable organizations exist to serve real needs in our communities, sustaining a healthy society and enhancing the quality of life for all. The law encouraging charitable uses of property is essential to that end."

As MacDowell's attorney William L. Chapman observed, "The reasoning behind this decision supports a policy of valuing the arts because the arts serve the public good. This logic is relevant at the local, state and national levels."

IMPLICATIONS

Unfortunately, the MacDowell's victory will not end the attacks on nonprofit property tax exemptions.

In December, for example, the Minnesota Supreme Court denied a property-tax exemption to the Rainbow Child Care Center, ruling that the day care center did not qualify for exemption because it charged full price for all of its services.

"There must be a substantial charitable, or gift, component to an organization's operation in order to qualify as an institution of purely public charity," the court said. "That means the organization must provide a substantial proportion of its goods or services free or at considerably reduced rates."

In making its decision, the court gave more weight to one of six factors that are normally used to determine whether or not a nonprofit is eligible for property or sales tax exemption in Minnesota, and it gave no clear guidance regarding what constitutes "substantial" or "considerably reduced rates."

According to Audrey Alvarado, executive director of the National Council of Nonprofit Associations, the case has "broad and profound implications for the nonprofit sector."

The Minnesota Council of Nonprofits and other organizations are encouraging the state legislature to enact a more balanced definition of "purely public charity."

Meanwhile, there is some good news: the Minnesota Department of Revenue, county assessors and nonprofit leaders have agreed to a moratorium, freezing current nonprofit property tax exemptions.



W H I T A K E R F O U N D A T I O N

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