To be Argued by:
MATTHEW S. CLIFFORD
(Time Requested: 30 Minutes)

APL 2021-00103
Westchester County Clerk's Index No. 23040/09
Appellate Division–Second Department Docket No. 2017-03016

Court of Appeals

of the

State of New York

In the Matter of

DCH AUTO, as Tenant Obligated to Pay Taxes and DCH INVESTMENTS INC. (NEW YORK), as Tenant Obligated to Pay Taxes,

Petitioners-Appellants,

– against –

THE TOWN OF MAMARONECK, a Municipal Corporation, its Assessor and Board of Assessment Review and THE VILLAGE OF MAMARONECK, a Municipal Corporation, its Assessor and Board of Assessment Review,

Respondents-Respondents,

For a Review under Article 7 of the RPTL.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

GRIFFIN, COOGAN, SULZER
& HORGAN, P.C.
Attorneys for Petitioners-Appellants
51 Pondfield Road
Bronxville, New York 10708
Tel.: (914) 961-1300
Fax: (914) 931-5266
msc@gcshlaw.com

Date Completed: September 29, 2021

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POINT I

THE SUPREME COURT HAD SUBJECT MATTER JURISDICTION TO REVIEW THE ASSESSMENTS

A. The Supreme Court's subject matter jurisdiction is established by the New York Constitution and is implemented by RPTL article 7

Respondents-Respondents ("Respondents") argue that the Supreme Court lacked subject matter jurisdiction because the condition precedent under Real Property Tax Law ("RPTL") §706 was not met. They posit that the condition precedent requirement was not met because DCH, and not the property owner, filed the predicate administrative grievances. *See* Town Brief at 47.[1] The flaw in Respondents' argument is that it assumes that subject matter jurisdiction is contingent upon who files the predicate grievance.

Subject matter jurisdiction is the "power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question … We conclude that jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action." *Hunt v. Hunt*, 72 N.Y. 217, 229, 230 (1878). The Supreme Court "is a court of original,

[1] The Village of Mamaroneck adopted the arguments set forth in the Town's Brief and filed a separate brief raising one additional argument. *See* Village Brief at 3-4. For purposes of clarity, DCH will treat all arguments raised in the Town's Brief as being raised by all Respondents.

unlimited and unqualified jurisdiction," *Kagen v. Kagen*, 21 N.Y.2d 532, 537 (1968); *see* N.Y. Const. art. VI, §7, and "is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed." *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 166 (1967).

The implementing legislation that permits Supreme Court to adjudicate these proceedings is found in RPTL article 7. RPTL §702(1) provides, "[a] proceeding to review an assessment of real property under this article shall be brought at a special term of the supreme court in the judicial district in which the assessment to be reviewed was made." RPTL §704(1) provides, "[a]ny person claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article…." RPTL §706(2) provides, "[s]uch petition must show that a complaint was made in due time to the proper officers to correct such assessment." Section 706 does not specify any particular party that must make the complaint; it only requires that a complaint was filed.

DCH satisfied the condition precedent requirement found in RPTL §706(1) and fully complied with RPTL §524(3). *See* DCH's Brief, at 17-20. Thus, Supreme Court had "the power lawfully conferred [upon it] to deal with the general subject involved in the action." *Hunt*, 72 N.Y. at 230.

Case law supports DCH's contention, because New York courts have consistently exercised subject matter jurisdiction over Article 7 proceedings when

a non-owner aggrieved party filed the predicate administrative grievance. *See Matter of EFCO Products v. Cullen*, 161 A.D.2d 44, 46-47 (2d Dep't 1990); *Big "V" Supermarkets, Inc., Store # 217 v. Assessor of Town of E. Greenbush*, 114 A.D.2d 726 (3d Dep't 1985); *Matter of Birchwood Vill. LP v. Assessor of City of Kingston*, 94 A.D.3d 1374 (3d Dep't 2012); *Matter of Onteora Club v. Bd. of Assessors*, 29 A.D.2d 251, 254 (3d Dep't 1968).

In each of the above cases, a non-owner aggrieved party, like DCH herein, filed the administrative grievance seeking a review of their assessment and/or payments in lieu of taxes pursuant to a PILOT agreement. The non-owner aggrieved party was denied relief at the administrative level and, like DCH, subsequently filed a court petition seeking judicial review. In each case, the court exercised subject matter jurisdiction and rendered a decision on the merits addressing the relief sought by the petitioners who were all parties aggrieved by the respective assessments. Likewise, DCH, which is an aggrieved party, should also receive substantive review of the assessments.[2] The Appellate Division's holdings in *Matter of Circulo Hous. Dev. Fund Corp*. v. *Assessor of City of Long*

[2] Respondents' attempt to distinguish these cases fails given that the grievances were not filed by the property owners and the courts resolved the cases on the merits. *See* Town Brief at 73-75; 76 n.30. If actual ownership of the property by the party filing the grievance is what is required to confer subject matter jurisdiction to the court in an RPTL article 7 proceeding, then each of the cases should have been dismissed for lack of subject matter jurisdiction. The fact that a non-owner IDA tenant or lessee (or sublessee) may seek administrative review is further proof that formal ownership is not the governing factor but rather the status of being aggrieved by the assessment that determines who may file an administrative grievance.

Beach, 96 A.D.3d 1053 (2d Dep't 2012) ("*Circulo*") and *Matter of Larchmont Pancake House v. Bd. of Assessors and/or the Assessor of the Town of Mamaroneck*, 153 A.D.3d 521, 522 (2d Dep't 2017) ("*Larchmont Pancake House I*"), *aff'd on other grounds*, 33 N.Y.3d 228 (2019) – that only an owner may file an administrative grievance – directly contradict and cannot be reconciled with these cases. This Court's decision in *Matter of Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d 228, 237-241 (2019) ("*Larchmont Pancake House II*") was predicated on the petitioner's lack of standing as an aggrieved party, and this Court did not consider the scope of appropriate challengers under RPTL §524(3).

Hargrove v. State, 138 A.D.3d 777 (2d Dep't 2016) does not support Respondents' argument. The New York Court of Claims is a court of limited subject matter jurisdiction, *Borawski v. Abulafia*, 117 A.D.3d 662, 663 (2d Dep't 2014), and the filing requirements of the Court of Claims Act are jurisdictional in nature and therefore are strictly construed. *See Buckles v. State*, 221 N.Y. 418, 423-424 (1917). In *Hargrove*, the Claimant failed to comply with the filing requirements of Court of Claims Act §§10(3) and 11(b), which deprived that court of subject matter jurisdiction. Unlike the Court of Claims Act, the RPTL is a remedial statute that "should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality.'" (*Matter of Great E. Mall, Inc. v. Condon*, 36 N.Y.2d 544, 548 (1975) (quoting

People ex rel. N.Y. City Omnibus Corp. v. Miller, 282 N.Y. 5, 9 [1939]). Thus, *Hargrove* is inapposite.

Contrary to Respondents' assertion, the Appellate Division below did not find that subject matter jurisdiction was lacking. In fact, the words "lack of subject matter jurisdiction" do not appear anywhere in *Matter of DCH Auto v. Town of Mamaroneck*, 178 A.D.3d 823 (2d Dep't 2019) (the "Decision"). *See* R. 361-363. This is consistent with *Larchmont Pancake House II*, where this Court did not find that subject matter jurisdiction was lacking even though a non-owner occupant filed the predicate grievances. In this case, unlike *Larchmont Pancake House II*, it is agreed by the parties that DCH met the definition of an aggrieved party.

B. Respondents' argument that the grievances are defective because DCH filed them goes to the form, and not the substance, of the grievances, and at best presents a technical, not jurisdictional, defect.

It is beyond dispute that alleged defects in the form of the complaint are technical, not jurisdictional, in nature. *See Matter of Miller v. Bd. of Assessors*, 91 N.Y.2d 82, 86-87 (1997); *Matter of Astoria Fed. Sav. & Loan Assoc*. v. *Bd. of Assessors*, 212 A.D.2d 600, 601 (2d Dep't 1995); *Matter of City of Little Falls v. Bd. of Assessors of Town of Salisbury,* 68 A.D.2d 734, 741-742 (4th Dep't 1979). The purported defect here, which we dispute, is that DCH filed the grievances in its own name and on its own behalf. The grievances were filed in accordance with the instructions provided by the New York State Office of Real Property Tax

Services ("ORPTS"), which were set forth on the Town's public website, which advised that a Net Tenant could file a grievance. DCH's counsel relied upon this guidance and the Town's website in the filing of the grievances. *See* R. 276. Respondents' position that DCH's counsel did not rely upon this information is not supported by the Record.

A claimed defect with respect to the name of a petitioner, where there is proper authorization by an appropriate individual (here DCH's lease authorized it to challenge the assessments), is a technical defect which should not operate to bar proceedings. *Matter of Rotblit v. Bd. of Assessors and/or the Bd. of Assessment Review of the Vill. Of Russell Gardens*, 121A.D.2d 727 (2d Dep't 1986) (citing *Bergman v. Horne*, 100 A.D. 2d 526, 527 [2d Dep't 1984]). Moreover, a claimed defect in the form of the administrative grievance is waived if the municipality fails to timely object or acts upon the grievance. *See* DCH's Brief at 56. Respondents knew that DCH was not the property owner, and the Town and Village BARs nevertheless acted on the complaints without either dismissing them or raising any technical objections whatsoever. It was not until September 2016 that Respondents unilaterally changed their position and moved to dismiss the within petitions. Because the grievances provided Respondents with the statutorily-required notice, and at no point during the proceedings have Respondents claimed that they would be prejudiced by allowing the proceedings to

continue, the Appellate Division should have concluded that any objections Respondents had as to the form of the grievances were waived.

POINT II

THE SECOND DEPARTMENT'S INTERPRETATION OF RPTL §524(3) DOES NOT EFFECTUATE THE LEGISLATIVE PURPOSE FOR ASSESSMENT REVIEW

A. The Decision reaches an illogical result and precludes DCH from contesting the assessments which have a direct, adverse affect on its pecuniary interest.

Respondents contend that the meaning of "aggrieved party" under RPTL §704(1) is "more expansive," *i.e.* includes a larger class of persons, than "person whose property is assessed" under RPTL § 524(3). Town Brief at 33. There is no support for this contention. All that is clear is: (1) the language is different; (2) each term is more expansive than "owner;" (3) all case law prior to *Circulo* interpreted the terms interchangeably.

Respondents allege that because RPTL §524 and RPTL §704 use different language, the Legislature intended to limit the filing of grievances to owners. Respondents claim that the Appellate Division's construction of RPTL §524(3) has harmonized the statutory scheme. *See* Town Brief at 34-35. To the contrary, the Appellate Division's construction has not harmonized the statutory scheme, and it fails to fulfill an underlying purpose of assessment review.

There can be no dispute that the purpose of assessment review proceedings is to permit an aggrieved taxpayer to contest an unequal, excessive, illegal, or otherwise misclassified assessment. *See* RPTL §§524 and 704; *see also* DCH's Brief at 21-23 (citing the legislative history which refers to "taxpayers" in the context of administrative review proceedings). "A taxpayer is aggrieved under article 7 where the tax assessment has a 'direct adverse affect on the challenger's pecuniary interest.'" *Larchmont Pancake House II*, 33 N.Y.3d at 237 (quoting *Matter of Waldbaum, Inc. v Finance Adm'r of City of N.Y.*, 74 N.Y.2d 128, 132 [1989]). As this Court recognized:

> "Besides the property owner, the lessee of an undivided assessment unit may be aggrieved by a tax assessment 'if legally bound by the lease to pay the entire assessment on behalf of the owner at the time it is laid' (*Waldbaum*, 74 NY2d at 133; *see also Matter of Burke*, 62 N.Y. 224, 227-228 [1875]). Much like an owner, a lessee who is 'bound by his lease to pay an assessment' is 'likely to be put to litigation and expense as a direct result of its legal obligation (*Burke*, 62 NY at 227-228)."

Larchmont Pancake House II, 33 N.Y.3d at 238.

This Court further recognized that the filing of an administrative grievance pursuant to RPTL article 5 is a condition precedent to judicial review pursuant to RPTL article 7. *Id.* at 235. The right of judicial review is preserved for persons claiming to be aggrieved, including a tenant obligated to pay all of the real property taxes. *Matter of Waldbaum*, 74 N.Y.2d at 132; *McLean's Dep't Stores, Inc. v. Comm'r of Assessment of the City of Binghamton*, 2 A.D.2d 98, 100 (3d

Dep't 1956) ("*McLean's*"); *Larchmont Pancake House II*, 33 N.Y.3d at 235. Logically, a construction that harmonizes the statutory scheme would be one that permits the same persons for whom judicial review is preserved – aggrieved parties – to file the grievance that serves as the condition precedent to seeking judicial review. *See* DCH's Brief at 29-30. Typically it is the same party that files both the grievance and petition, whether it is the owner who is aggrieved or, if the property is leased, it is the tenant obligated to pay all of the real property taxes.

Notwithstanding, in *Circulo* the Appellate Division strictly construed RPTL 524(3) to permit only a property owner to file a grievance while permitting any aggrieved party to file a judicial petition, resulting in the different treatment of property owners and aggrieved parties. In *Circulo*, neither the owner nor a Net Tenant filed the grievance, so the court held that because the owner did not file the grievance, the condition precedent was not met. To expand this holding to mean that only an owner, and not a Net Tenant, can file a grievance yields a result that is illogical and absurd, and violates the rule of statutory construction that provides that "statutes should be construed to avoid results which are absurd, unreasonable or mischievous or produce consequences that work a hardship or an injustice." *People v. Dozier*, 78 N.Y.2d 242, 250 (1991). Moreover, "[a]dherence to the letter will not be suffered to 'defeat the general purpose and manifest policy intended to be promoted.'" *Surace v. Danna*, 248 N.Y. 18, 21 (1928) (Cardozo, C.J.) (quoting

Spencer v. Myers, 150 N. Y. 269, 275 [1896]). Yet this is precisely what the Appellate Division has done. *Circulo* expanded upon RPTL §524(3) by inserting an ownership requirement where none previously existed. The Appellate Division carried forward that error in *Larchmont Pancake House I* and the Decision below. The Appellate Division never explained why the Legislature would have intended to limit the filing of a grievance to a property owner but intended judicial review to be open to any aggrieved party. The Legislature could not have intended this illogical result.

B. Respondents' argument regarding the State-mandated grievance form is misleading.

Respondents argue that form "RP-524," published by ORPTS, supports the Appellate Division's interpretation of RPTL §524. *See* Town Brief at 40-41. Respondents point to the form, which asks for the "owner" and not the "aggrieved party" to sign, as proof that only an owner may file an administrative grievance.

Respondents' argument is misleading because it ignores the fact that the term "Complainant," which also appears on form RP-524, has long-been interpreted to include non-owners. Respondents also ignore the companion materials issued by ORPTS that directly contradict their argument, to wit: ORPTS' instructions set forth in Publication 1114 entitled "Contesting Your Assessment in New York State," provides that "[a]ny person who pays property

taxes can grieve an assessment." R. 247.[3] Respondents' argument regarding the RP-524 form makes no sense when read with the form's instructions.

The argument regarding the wording of the form is especially opportunistic when advanced by the Town, particularly since the Town's website directed taxpayers to Publication 1114 when submitting grievances and the website itself also stated, as late as April 2014, "[a]ny person aggrieved by an assessment (e.g. an owner, purchaser, or tenant who is required to pay the real estate taxes pursuant to a lease or written agreement) may file a complaint." R. 281. Respondents now argue that non-owner aggrieved parties should be precluded from obtaining relief because they relied upon the specific guidance given by the State and the Town.

C. RPTL 523-b does not support Respondents' argument

RPTL §523-b does not evidence a legislative intent to give non-owners the right to file administrative grievances in Nassau County only. In fact, the New York City-modeled revision of the Nassau County assessment system is inapposite.

In the late 1990's, when Nassau County shifted its administrative review procedure to permit year-round review of assessments, the system followed the one implemented by the New York City Tax Commission, the only other year-round administrative assessment review body in the State. However, the history of the legislation shows that while the State Legislature adopted much of the same

[3] An earlier version of these instructions provided the same guidance. *See* R. 235

terminology and language found in the New York City Charter, it did not intend to change the class of people who could validly file an administrative grievance.

Instead, in response to a home rule message from the Nassau County Legislature requesting the ability to have year-round administrative assessment review, the State Legislature enacted RPTL §523-b which created the Nassau County Assessment Review Commission ("ARC").[4] ARC has the authority to administratively review assessments on a year-round basis. RPTL §523-b(7)(a). In drafting the bill and subsequent revisions thereto, Nassau County and the State Legislature modeled the language used by New York City and the New York City Tax Commission. The Budget Report on Bills accompanying the legislation stated "this legislation is patterned after the New York City Tax Commission[.]"[5]

When crafting a year-round assessment system for Nassau County, the State Legislature adopted the terminology used by New York City. Compare the language of RPTL § 523-b(6), which created ARC and became effective in 1999:

> (6) Application for correction of assessment for taxation. (a) During the period from January second through March first, any person or corporation claiming to be aggrieved by the assessment of real estate may apply for correction of such assessment. Such application shall be duly verified by a person having personal knowledge of the facts stated therein, provided that if the application is signed by someone other than the person or an officer of the corporation claiming to be

[4] *See* NY Bill Jacket, 1998 S.B. 5098, Ch. 593, at 6 (Westlaw 1998) (September 9, 1998 letter from Bruce A. Blakeman, Presiding Officer of the Nassau County Legislature, to James McGuire, Counsel to the Governor).
[5] *See id.* at 3.

> aggrieved, the application must be accompanied by a duly executed power of attorney or authorization or as otherwise prescribed by the rules and regulations of the commission.

with the New York City Charter §163(b), the language of which was last amended in 1984:

> b. During the time that the books of annual records of the assessed valuation of real estate are open for public inspection, any person or corporation claiming to be aggrieved by the assessed valuation of real estate may apply for correction of such assessment. Such application shall be duly verified by a person having personal knowledge of the facts stated therein, provided that if the application is signed by someone other than the person or an officer of the corporation claiming to be aggrieved, the application must be accompanied by a duly executed power of attorney as prescribed by the rules and regulations of the tax commission.[6]

Nothing in the legislation or in the legislative materials purported to give Nassau County taxpayers or aggrieved parties greater rights to administrative review under §523-b than under §524. The difference was that the language was taken from a new source.

Further, there is no evidence that RPTL §523-b "increases the pool" of permissible grievants in Nassau County, as Respondents claim. It is just as reasonable to argue that the statutes in New York City and Nassau County were simply clarifying the plain meaning of RPTL §524, as interpreted by New York

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[6] *See* http://www.nyc.gov/html/records/pdf/section%201133_citycharter.pdf (last visited September 29, 2021).

courts from *McLean's* up until *Circulo*. In any event, RPTL §523-b is inapposite to the interpretation of RPTL §524.

POINT III

BEFORE *CIRCULO* WAS DECIDED, NO NEW YORK COURT HELD THAT RPTL §524(3) ONLY PERMITTED A PROPERTY OWNER TO FILE A GRIEVANCE.

A. The Second Department was the first New York court to dismiss Article 7 proceedings pursuant to RPTL §524(3) because the predicate administrative grievances were not filed by the property owner.

Respondents argue that *Circulo*, *Larchmont Pancake House I*, and the Decision "did not break new ground" but rather were "more recent pronouncements of a long-standing rule." Town Brief at 30. Respondents claim "*Circulo* and its progeny simply followed these precedents." *Id*. at 32. The Court should reject Respondents' fallacious argument.

First, *Circulo*, *Larchmont Pancake House I* and the Decision below represent a significant departure from settled law. *See* DCH's Brief at 41-46. If Respondents are correct that *Circulo*, *Larchmont Pancake House I* and the Decision below did not break new ground, and case law has always recognized that only a property owner may file a grievance, it begs the question why was the Town advising readers on its public web site that "[a]ny person aggrieved by the assessment" was eligible to file a grievance, and also directing readers to the RP-

524 Complaint form and instructions published by ORPTS? *See* R. 281. The answer is simple: Before the Town changed its position following the issuance of the *Circulo* decision, the Town previously interpreted RPTL §524(3) in the same manner as the courts, ORPTS and tax certiorari practitioners, which all recognized that an aggrieved party could file a grievance pursuant to RPTL §524(3). Respondents' self-serving argument strains credulity.

Second, "[t]he precedential value of a judicial opinion is limited to the question presented by the facts of the case before the Court." *J.A. Preston Corp. v. Fabrication Enters., Inc.,* 68 N.Y.2d 397, 407 (1986). An opinion, "like a judgment, must be read as applicable only to the facts involved, and is an authority only for what is actually decided." *Rolfe v. Hewitt*, 227 N.Y. 486, 494 (1920). None of the cases cited by Respondents serve as precedent because they did not involve the same set of facts presented herein, *i.e.*, the dismissal of petitions pursuant to RPTL §524(3) where the predicate administrative grievances were filed by the Net Tenant, and not the owner. *See* Town Brief at 30-32. In fact, in each of those cases the property owner was the party who filed the grievance. *See Raer Corp. v. Vill. Bd. of Trustees*, 78 A.D.2d 989 (4th Dep't 1980) (the owner's oral application wholly failed to comply with RPTL §524, which requires a written application); *Radisson Cmty. Ass'n v. Long*, 3 A.D.3d 135, 139 (4th Dep't 2003) (finding that the petitioner, who owned the property, could not seek additional

relief in its petition when that relief was not requested in the grievance); *Matter of Sterling Estates, Inc. v. Bd. of Assessors*, 66 N.Y.2d 122, 126 (1985) (denying a motion to amend the petition to seek relief that was not requested in the grievance). The fact that these decisions use the word "owner" or address what an "owner" may do pursuant to RPTL §524(3) does not render them to be precedent as they relate to a Net Tenant.

B. There is a split in authority among the Departments regarding the interpretation of the phrase "person whose property is assessed."

Respondents first claim that there is no split between the Departments on what "person whose property assessed" means and they attempt to discredit *McLean's*. *See* Town Brief at 48-50. Respondents ignore the OPRTS Opinion of Counsel, which clearly identified the split in opinion. *See* Comp. 99. In fact, the Opinion specifically states that its guidance is not supported in the Second Judicial Department but is still supported by *McLean's* in the Third Judicial Department. *Id.* [7]

Respondents next argue that because *McLean's* was decided before the creation of RPTL 524, it is irrelevant to the interpretation of that statute. Respondents make a distinction without a difference. Regardless of the decision's age, there is no more direct precedent than *McLean's*. It is the only decision prior

[7] This Opinion of Counsel was subsequently updated to take into consideration *Larchmont Pancake House II*. *See* https://www.tax.ny.gov/pubs_and_bulls/orpts/legal_opinions/v7/123.htm. (last visited September 29, 2021).

to *Circulo* that directly confronts the issue of whether a "person whose property is assessed" includes a tenant obligated to pay all of the real property taxes. Moreover, this Court subsequently endorsed and ratified *McLean's* by citing to it in *Matter of Waldbaum,* 74 N.Y.2d at 133.

McLean's was also cited by ORPTS in its Opinion of Counsel dated 1982 endorsing the right of a tenant obligated to pay all of the real property taxes to file administrative grievances. *See* 7 Op. Counsel SBEA No. 123 (R. 279-280). This opinion has been relied upon by taxpayers and assessing municipalities since it was issued in 1982.[8]

Respondents next argue that *McLean's* construed a local law of the City of Binghamton, and the lessee had the right to administrative review because lessees fit the category of those who could ask for review "within the meaning of the local law". Town Brief at 48-49. Respondents are mistaken.

McLean's explicitly defines the language "person whose property is assessed" as being the same as "person aggrieved," while also clarifying that a lessee is an "owner of such an interest in the property" so as to allow a non-owner aggrieved party to challenge the assessment at both the administrative and judicial levels. *McLean's*, 2 A.D.2d at 100. The Third Department held:

[8] The Opinion of Counsel, issued shortly after RPTL §524 was enacted in 1982, is entitled to deference. *See Kolb v. Holling*, 285 N.Y. 104, 112 (1941) ("The practical construction put upon a constitutional provision, as well as upon a statute, by the Legislature or by departments of State government, is entitled to great weight, if not controlling influence, when such practical construction has continued in operation over a long period of time.")

> "Since the right of judicial review is preserved for the benefit of persons claiming to be 'aggrieved', it clearly follows that every complainant whose status is comprehended by that term is entitled to complain to the board and obtain the preliminary review necessarily precedent to the judicial proceeding. The conclusion that such is the meaning and intent of the local law seems inescapable. By no other construction could its validity be sustained." *Id.*

Respondents attempt to sow confusion around this point when the Third Department's holding is perfectly clear and not limited to the interpretation of a Binghamton local law.

Respondents' argument that the local law contained the disjunctive "person whose property is assessed" or "person assessed," which does not exist in the RPTL, is irrelevant. *See* Town Brief at 49-50. The fact that another category of grievants may exist (*i.e.*, "person assessed") is irrelevant to the Third Department's holding. The court specifically interpreted "tenants" as belonging to the category "person whose property is assessed":

> "We consider that the determination at special term must be sustained, also, upon the further and broader ground that petitioner was, under its lease, the owner of such an interest in the property as to constitute it not only a person aggrieved but a person whose property was assessed." *McLean's*, 2 A.D.2d at 100.

There is no separate treatment of a purported additional category, and no inference that the analysis or conclusions would be different if there had been. The court clarifies and emphasizes its conclusion that the "aggrieved person" and

"person whose property is assessed" concepts mean the same thing, and "obviously mean one whose pecuniary interests are or may be adversely affected." *Id.* (citing *People ex rel. Bingham Operating Corp. v. Eyrich*, 265 A.D. 562, 565 [3d Dep't 1943]). The language and concepts interpreted are identical, and the conclusions reached are consistent with the remedial nature of the RPTL.

Respondents disregard the Supreme Court decisions arising out of the Fourth Department cited in DCH's Brief because they were issued by the Supreme Court and not by the Appellate Division, Fourth Department. *See* Town Brief at 50. Respondents fail to mention that these courts reached their decisions based upon Fourth Department precedent, recognized rules of statutory construction, and guidance published by ORPTS. These Courts expressly rejected the Second Department's narrow interpretation of RPTL 524(3) set forth in *Circulo* and *Larchmont Pancake House I.*

C. *Circulo* is firmly rooted in exemption statutes

Notwithstanding Respondents' insistence to the contrary, *Circulo* is firmly rooted in exemption statutes. *See* DCH's Brief at 41-42. Instead of citing to the ownership requirement found in RPTL §420-a pertaining to the exemption sought, the court in *Circulo* cited RPTL §524(3), and in interpreting that provision, it added an ownership requirement: "RPTL article 5 requires that the *property owner* file a complaint or grievance to obtain administrative review of the tax

assessment." *Circulo*, 96 N.Y.3d at 1056 (emphasis in original). The court had clear authority to dismiss the case pursuant to RPTL 420-a since the property owner did not file the grievance. In addition, the entity filing the grievance was neither the owner, nor the "person whose property is assessed," which includes a Net Tenant. Instead, the court added an ownership requirement to RPTL §524(3), which contains no such requirement. The court provided no reasoning and cited no rules of statutory construction to reach this result.

D. This Court may consider its own decisions to interpret RPTL §524

Respondents argue that this Court's decisions in *Matter of Burke*, 62 N.Y. 224 (1875) and *Matter of Walter*, 75 N.Y. 354 (1878) cannot be used to interpret the RPTL because the statutory scheme purportedly changed in the early 1880's. Town Brief at 75. Respondents premise this argument on their selective quotation from one sentence from *People ex rel. Walkill Valley R.R. Co. v. Ketor*, 101 N.Y. 610 (1885). Respondents' reliance upon this decision is misplaced, for it assumes that a change in the law occurred that affected who may file a grievance. There is nothing in the decision that suggests the new statute changed any provision concerning who may file a grievance.[9] The full sentence (including the portions Respondents omitted) provides: "Chapter 269 provides a new and complete system for reviewing, upon *certiorari*, and correcting errors of assessors; and all

[9] Respondents have not placed any part of Chapter 269 of the Laws of 1880 before this Court.

the provisions of the act show that it was the intention of the legislature that the proceedings should be speedily conducted and speedily brought to a termination." *Id.* at 611 (emphasis in original). The second half of the sentence suggests that the changes pertained both to the speed with which writs of certiorari were obtained and with which judicial proceedings were resolved. *Id.* Consequently, this decision does not support Respondents' argument.

Respondents' argument also ignores the fact that this Court has cited *Burke* and *Walter* in analyzing the RPTL. *See Matter of Waldbaum*, 74 N.Y.2d at 133; *Larchmont Pancake House II*, 33 N.Y.3d at 237-239. Decisions from this Court are far more relevant for determining the legislative intent underlying RPTL §524 than a decision from the Michigan Court of Appeals and statutes from the States of Michigan, Colorado, Nevada and Wyoming.

POINT IV

THE COURT SHOULD FIND THAT RESPONDENTS ARE ESTOPPED FROM ARGUING THAT RPTL §524(3) PRECLUDES DCH FROM FILING THE GRIEVANCES.

Estoppel is an equitable doctrine used to promote fairness and justice. *See Charles v. Charles*, 296 A.D.2d 547, 550 (2d Dep't 2002). '"The doctrine of equitable estoppel may successfully be invoked, in the interest of fairness, to prevent the enforcement of rights which would ultimately work fraud or injustice

upon the person against whom enforcement is sought …'" *Id.* at 548-49 (quoting *Matter of Ettore I. v. Angela D.*, 127 A.D.2d 6, 14 [2d Dep't 1987]). An estoppel defense '"may also be invoked where the failure to promptly assert a right has given rise to circumstances rendering it inequitable to permit the exercise of the right after a lapse of time.'" *Id.* at 549 (quoting *Matter of Ettore I.*, 127 A.D.2d at 12). "A municipality may be estopped by its misleading nonfeasance if there would otherwise be a manifest injustice." *1555 Boston Rd. Corp. v. Fin. Adm'r of N.Y.*, 61 A.D.2d 187, 192 (2d Dep't 1978). The estoppel doctrine is applicable to tax certiorari proceedings. *See id.*; *see also Mendick v. Sterling*, 83 A.D.2d 749, 750 (4th Dep't 1981).

In *1555 Boston Rd. Corp.*, the city tax commission reneged on a settlement agreement reached with the petitioner for assessment reductions in pending proceedings in exchange for petitioner agreeing not to file an article 7 proceeding for the 1973/74 tax year. In the pending article 7 proceedings, the city argued that the petitioner had waived its right to challenge the assessment for the 1973/74 tax year as it had failed to file an article 7 proceeding in that tax year. Reversing the Supreme Court's decision, the Appellate Division found that the city was estopped from raising this argument, because, *inter alia*, the city took a contrary position in another proceeding:

> "[T]he city prevailed on its contention that the real estate owner could not withdraw from the settlement *even*

> *though* it had not been approved by the Comptroller. Under the circumstances it is not only egregiously unfair, but an act of effrontery, for the city to here insist that it may renege on its agreement after the petitioner, in reliance on the settlement, failed to take legal steps, which it now cannot take, to challenge the assessment for the year 1973/74."

1555 Boston Rd. Corp., 61 A.D.2d at 191-92 (emphasis in original). The Appellate Division found that the trial court's acceptance of the city's argument resulted in "manifest injustice, of an exceptional nature, since it [was] clear that the petitioner did not file a certiorari proceeding for the current year, despite a minimal offer of reduction, in reliance on the city's promise of more substantial reductions for the earlier years." *Id.* at 192.

In the case at bar, Respondents' actions have resulted in this very type of manifest injustice to DCH. It was Respondents' initial position that DCH, as a Net Tenant, had the right and eligibility to file a grievance. The Town specifically directed taxpayers to the ORPTS instructions which state, "[a]ny person who pays property taxes can grieve an assessment …." *See* R. 281. DCH relied upon this guidance. *See* R. 276. Furthermore, the Town BAR and Village BAR accepted the grievances as filed by DCH, deliberated thereon, issued determinations on the merits, and then advised DCH in the Notices of Determination of its right to seek judicial review of its assessment under RPTL article 7. *See* R. 275. It was not

until September 2016 that Respondents unilaterally changed their position and moved to dismiss the within petitions.

Had the respective Town and Village BARs dismissed or rejected the grievances based upon DCH's purported lack of standing, DCH would have immediately challenged the dismissal as arbitrary, capricious, and contrary to law. R. 276. DCH relied to its detriment upon the Town's website, ORPTS publications and Respondents' actions. *Id*. DCH was never timely advised of the purported defect and thus could not have remedied it. Respondents should be estopped from objecting to the purported defects in the complaints given their prior position, directions to the ORPTS publications, and actions. The cases cited by Respondents are factually distinguishable and provide no basis for denying the invocation of the estoppel doctrine. *See* Town Brief at 56-59.

POINT V

THE COURT SHOULD NOT ENTERTAIN RESPONDENTS' ARGUMENTS THAT WERE FIRST RAISED IN REPLY PAPERS OR ON APPEAL

A. The Court should not address Respondents' untimely-raised arguments.

Generally, arguments raised either for the first time in reply papers or on appeal should not be entertained by the court. *See Guiterrez v. Iannacci*, 43 A.D.3d 868 (2d Dep't 2007); *Alrobaia ex rel. Severs v. Park Lane Mosholu Corp.*,

74 A.D.3d 403, 404 (1st Dep't 2010); *McMillan v. State*, 72 N.Y.2d 871, 872 (1988); *Scheemaker v. State*, 70 N.Y.2d 985, 986 (1988).

The Town's Brief includes numerous arguments that were first raised either in a reply memorandum of law before the Supreme Court[10], in their brief before the Appellate Division[11] or before this Court.[12] Consequently, the Court should not entertain these arguments.

B. Even assuming the Court addresses Respondents' untimely-raised arguments, it should reject those arguments entirely.

1. DCH qualifies as a "person whose property is assessed."

Respondents assert that because leaseholds are not property, and assessors only assess real property, DCH cannot be the "person whose property is assessed". *See* Town Brief at 22-24. Respondents' hyper-technical argument lacks merit.

Preliminarily, DCH has never argued that a leasehold interest should be assessed. Additionally, the fact that leaseholds are not assessed for real estate tax assessment purposes has nothing to do with defining "person whose property is assessed." There is no dispute regarding the term "property."

Under the RPTL, "real property" includes "[l]and itself, above and under water, including trees and undergrowth thereon and mines, minerals, quarries and fossils in and under the same, except mines belonging to the state." RPTL

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[10] *See* Town Brief, Points I (§§A & B), VII (introduction and §A), IX and XI.
[11] *See id.*, Point I (§D).
[12] *See id.*, Point IV (sections §§C & D).

§102(12)(a). The Merriam-Webster Dictionary defines "property" as "something owned or possessed; *specifically*: a piece of real estate."[13] The Legislature used this more encompassing word that means owned or possessed; it did not limit the language to "owner." This is more evident when the Court considers the dictionary definition of "whose." *See* DCH's Brief at 25. Thus, the Court should employ a more encompassing construction of "person whose property is assessed" to include those in possession pursuant to a lease (like DCH).

2. Respondent mischaracterizes the reason why the 2014 Town grievance included the property owner's name.

Respondents assert that in 2014 DCH apparently "realized that [it] had not been following the proper procedure and so arranged to have [its] landlord challenge that year's assessment." Town Brief at 51. This assertion is wholly disingenuous. In the fall of 2013, William Maker, Jr., Town Attorney, spoke with the undersigned's colleague, William E. Sulzer, Esq., and advised Mr. Sulzer that it was Mr. Maker's position that *Circulo* represented a change in the law and *Circulo* only permitted a property owner to file a grievance. Mr. Sulzer disagreed with Mr. Maker's position but nonetheless filed the 2014 Town grievance in the owner's name to otherwise prevent motion practice in a future Article 7 proceeding.

[13] https://www.merriam-webster.com/dictionary/property (last visited September 29, 2021) (emphasis in original).

To be clear, prior to *Circulo* it was virtually understood and accepted that an aggrieved party could file a grievance pursuant to RPTL §524(3). The meaning of "person whose property is assessed" was never an issue until the Town discovered the *Circulo* decision, which the Town has repeatedly relied upon to bring motions to dismiss otherwise valid claims for assessment relief where a non-owner aggrieved party filed the grievance.

3. There Was No Filing Error At The Administrative Level

Respondents argue that courts do not have the same authority to correct mistakes made by complainants in the administrative review process as they do to correct mistakes made in the judicial review process. *See* Town Brief at 59-68. This is a non-issue as there was no filing error made in the administrative review process during any year at issue. DCH, a Net Tenant, was the appropriate party to file an administrative grievance.

Moreover, none of the cases cited dismissed a petition because a non-owner aggrieved party filed the predicate grievance. *See id.* at 62-67. Rather, Respondents rely upon cases involving the failure to timely file a written grievance altogether[14] or the petitioner's attempt to seek relief in the court proceeding that

[14] *See Matter of Onteora Club v. Assessors*, 17 A.D.2d 1008, 1009 (3d Dep't 1962); *Matter of Frei v. Town of Livingston*, 50 A.D.3d 1381 (3d Dep't 2008); *Raer Corp.*, *supra*.

was not sought in the administrative grievance.[15] Consequently, the Court should reject the arguments raised in Point IX of the Town's Brief.

4. Law from other jurisdictions is irrelevant to interpret RPTL §524

Respondents attempt to bolster their faulty interpretation of RPTL §524 by citing a case from Michigan, in which they cite the parts they like and ignore the parts they do not. Michigan law allowed a non-owner taxpayer to: (1) place its name on the assessment roll; or (2) get authorization from an owner to appear before the Board tribunal. *See Walgreens Co. v. Macomb Twp.*, 280 Mich App. 58 (2008). The tenant taxpayer's grievance was disallowed there because it failed to do either, not because it was a non-owner. The case is distinguishable on its facts and the legal reasoning for the dismissal of the administrative grievance.

Further, neither this decision, nor statutes from Michigan, Colorado, Nevada or Wyoming, has any precedential value here, as the entire statutory scheme in New York is different than the statutory frameworks in those states.

If the New York Legislature intended to limit administrative grievances under RPTL § 524 to mean only "owners," it could have used the word "owner" as it had done myriad times throughout RPTL article 5.

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[15] *See Matter of Sterling Estates, supra*; *Matter of Pollack v. Bd. of Assessors*, 62 A.D.2d 1019 (2d Dep't 1978); *Matter of Waldbaum's, Inc. No. 85 v. Bd. of Assessors*, 106 Misc.2d 556 (Sup. Ct., Nassau County 1980); *Matter of City of Little Falls*, *supra*.

CONCLUSION

This Court should recognize the fundamental right of a Net Tenant, like DCH, to challenge assessments at both the administrative and judicial levels and reverse the Appellate Division's Decision.

DATED: September 29, 2021
Bronxville, New York

Respectfully submitted,

Matthew S. Clifford
Griffin, Coogan, Sulzer & Horgan, P.C.
Attorneys for Petitioners-Appellants
51 Pondfield Road
Bronxville, New York 10708
(914) 961-1300

Of Counsel:

William E. Sulzer
Matthew S. Clifford
Kevin M. Brady, Jr.

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word 2010.

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Dated: September 29, 2021

Matthew S. Clifford