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.

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

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DISCLOSURE STATEMENT

Pursuant to 22 NYCRR §500.1(f), Petitioners-Appellants DCH Auto, as Tenant Obligated to Pay Taxes and DCH Investments Inc. (New York), as Tenant Obligated to Pay Taxes, submit the following disclosures of any corporate parent, subsidiary, or affiliate.

DCH Auto a/k/a DCH Auto Group (USA) Inc. is a Delaware Corporation. It is a subsidiary of Lithia Motors, Inc., an Oregon corporation.

DCH Investments Inc. (New York) is a New York corporation. It is a subsidiary of Lithia Motors, Inc., an Oregon corporation.

DCH Auto Group (USA) Inc. and DCH Investments Inc. (New York) are related corporate entities.

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QUESTIONS PRESENTED

1. Did Petitioners-Appellants ("Appellants") satisfy the condition precedent requirement in RPTL §706(2) by timely filing administrative grievances that provided Respondents-Respondents ("Respondents") with the statutorily-required notice?

The Appellate Division, Second Department ("Appellate Division") ruled in the negative, which Appellants contend was erroneous.

2. Does the Appellate Division's conclusion that only a property owner may file the RPTL article 5 complaint – rather than an aggrieved party (which includes a net tenant contractually obligated to pay real estate taxes) – contradict the plain language of the Real Property Tax Law ("RPTL") §524(3), the statute's legislative history, and general rules of statutory construction?

The Appellate Division ruled in the negative, which Appellants contend was erroneous.

3. Does the Appellate Division's interpretation of RPTL §524(3) contradict decades of judicial precedent, ORPTS' interpretation of RPTL §524(3), long-established and accepted tax certiorari practice, and Respondent Town's own website, all of which recognized that a party contractually obligated to pay the real property taxes has the right to file the predicate administrative complaints?

The Appellate Division ruled in the negative, which Appellants contend was erroneous.

4. Is the Appellate Division's strict construction of RPTL §524 inconsistent with this Court's repeated directive that tax assessment review proceedings are remedial in nature and the RPTL should be liberally construed so that a taxpayer should not have its right to assessment review curtailed by a technicality?

The Appellate Division ruled in the negative, which Appellants contend was erroneous.

5. Did the Appellate Division err by dismissing this consolidated proceeding when the Respondent Town Board of Assessment Review ("BAR") and Village BAR did not raise any objections to the filing and form of the grievances during the administrative review process, thus waiving any objections they had?

The Appellate Division ruled in the negative, which Appellants contend was erroneous.

6. Did the Appellate Division err by dismissing this consolidated proceeding when Petitioners-Appellants' lease with the property owner authorized it to file the administrative complaints?

The Appellate Division ruled in the negative, which Appellants contend was erroneous.[1]

STATEMENT OF STATUS OF RELATED LITIGATION

Appellants DCH Auto, as Tenant Obligated to Pay Taxes, and DCH Investments Inc. (New York), as Tenant Obligated to Pay Taxes (hereinafter "DCH") state that there is no related litigation pending as of this date.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to New York Civil Practice Law and Rules ("CPLR") §5602(a)(1)(ii) and New York Compilation of Codes, Rules and Regulations ("NYCRR") Title 22, §500.22.

On December 16, 2016, the Supreme Court, Westchester County, per the Honorable O. Peter Sherwood, J.S.C., dismissed the within petitions. R. 12-21.[2] The Supreme Court's Decision and Order only pertained to 700 Waverly Avenue and did not concern assessment challenges to any other properties set forth in the

[1] The issues raised in the above questions presented for review herein were raised before the Supreme Court in the Affirmation of William E. Sulzer in Opposition to Respondents' Motion to Dismiss (R. 269 – 292) and Appellants' Memorandum of Law in Opposition to Respondents' Motion to Dismiss (R. 293 – 324) and before the Appellate Division in Appellants' Brief at 12 – 52 and its Reply Brief at 1-30. Accordingly, these issues have been preserved for appeal to this Court.

[2] Citations to "R." refer to pages of the fully briefed record on appeal that is being submitted contemporaneously with this Brief.

2013 Town petition or the 2010, 2011, or 2013 Village petitions.[3] The Supreme Court entered judgment on February 10, 2017, R. 7-21, and Respondents served DCH with Notice of Entry of the judgment by regular mail on February 15, 2017. R. 5-6.

On March 1, 2017, DCH timely filed a Notice of Appeal of the Supreme Court's judgment. R. 3. On December 11, 2019, the Appellate Division entered its Decision and Order affirming the Supreme Court's judgment. *See Matter of DCH Auto v. Town of Mamaroneck*, 178 A.D.3d 823 (2d Dep't 2019) ("Decision"); R. 361-363. On January 6, 2020, Respondents served DCH with Notice of Entry of the Decision by regular mail. Comp. 18-22.[4]

On February 6, 2020, DCH served and filed with the Appellate Division a Motion for Reargument or for Leave to Appeal. On July 13, 2020, the Appellate Division entered a Decision and Order denying DCH's Motion. Comp. 25. On July 20, 2020, Respondents served DCH with Notice of Entry of the Decision and Order via regular mail. Comp. 23-26.

On August 20, 2020, DCH timely filed a Motion for Leave to Appeal with this Court (Motion No. 2020-608), which was dismissed by Order dated December

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[3] Subsequently, the parties entered a Stipulation that was "So Ordered" by the Supreme Court, which consolidated all RPTL article 7 proceedings into a single proceeding bearing Index number 23040/09, and provided that the judgment to be entered would be confined to 700 Waverly Avenue and the petitions involving challenges to other lots "shall be severed and continue to be litigated…." *See* R. 25.

[4] Citations to "Comp." refer to the Compendium that is being submitted contemporaneously with this Brief.

17, 2020, on the ground that "the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution (*see Burke v. Crosson*, 85 NY2d 10, 18 n 5 [1995])". Comp. 67.

As the Appellate Division's Decision was non-final at that time, the parties subsequently signed – and the Supreme Court entered – the "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings, which dismissed with prejudice the assessment challenges to properties other than 700 Waverly Avenue that remained pending under index number 23040/09, and left remaining only DCH's challenge to 700 Waverly Avenue's assessments. Comp. 33-67. Consequently, the action became final and brought up for review the Appellate Division's Decision. *See Voorheesville Rod & Gun Club v. E.W. Tompkins Co.*, 82 N.Y.2d 564, 568 (1993).

On March 2, 2021, DCH timely filed a Motion for Leave to Appeal with this Court (Motion No. 2021-249). On June 3, 2021, this Court granted DCH's Motion. R. 356.

PRELIMINARY STATEMENT

The RPTL sets out a two-step process for the review of real property tax assessments. First, "a complainant who is dissatisfied with a property assessment may seek administrative review by filing a grievance complaint with the assessor

or the board of assessment review." *Matter of Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d 228, 235 (2019) (citing RPTL §524). Once the board of assessment review issues a notice of determination concerning the grievance, "any 'aggrieved party' may seek judicial review pursuant to RPTL article 7." *Id.* (citing *Matter of Waldbaum, Inc. v. Finance Adm'r of City of N.Y.*, 74 NY2d 128, 132 [1989].)

Prior to the entry of the Decision below, it was undisputed in New York that a net tenant obligated to pay all of the real property taxes pursuant to its lease with the property owner, and authorized by its lease to challenge the real property tax assessment ("Net Tenant"), was an "aggrieved party" or complainant who had standing to file an administrative complaint pursuant to RPTL §524.[5] The reasoning was clear: a Net Tenant is "'bound by his lease to pay an assessment' [and] is 'likely to be put to litigation and expense' as a direct result of its legal obligation.'" *Id.* (quoting *Matter of Burke*, 62 N.Y. 224, 227-228 [1875]). Case law dating to 1956 held that an aggrieved party, which includes, *inter alia*, a Net Tenant, could file the administrative complaint that served as the condition precedent to filing a judicial petition. *See McLean's Dep't Stores, Inc. v. Comm'r of Assessment of the City of Binghamton*, 2 A.D.2d 98 (3d Dep't 1956)

[5] The terms "administrative complaint," "RP-524 Complaint," "RPTL article 5 complaint," and "grievance" all refer to the administrative grievance complaint that is filed with the Board of Assessment Review to challenge the assessment established by the assessor on the tentative assessment roll pursuant to RPTL article 5. Those terms are used interchangeably throughout this Brief.

("*McLean's*"). In subsequent decisions, courts reached the merits of the case where the administrative complaint was filed by a Net Tenant. Guidance issued by the New York State Department of Taxation and Finance, Office of Real Property Tax Services ("ORPTS") made clear that a Net Tenant could file an RPTL article 5 complaint. Owners, tenants and municipalities alike (including Respondent Town of Mamaroneck herein) relied upon this settled law and guidance from ORPTS and accepted that a Net Tenant could file an RPTL article 5 complaint.

So settled was this law that there was not a single reported case that raised the issue until 2012, when the issue was addressed tangentially in the context of a case involving an improperly filed property tax exemption. *See Matter of Circulo Housing Dev. Fund Corp*. v. *Assessor of City of Long Beach*, 96 A.D.3d 1053 (2d Dep't 2012) ("*Circulo*"). Rather than interpret the particular exemption statute at issue in that case (RPTL §420-a), which limited the filing of an exemption application to the property owner and would have disposed of the issue, the *Circulo* court narrowly interpreted RPTL §524 as to only permitting a property owner to file a grievance; because the record owner of one of the properties at issue therein did not file the grievance, it failed to satisfy a condition precedent under RPTL §706(2).

In 2017, in *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), the Appellate Division relied solely upon the unprecedented language in *Circulo* to dismiss RPTL article 7 petitions where the underlying grievances were not filed by the property owner but by a related, family-owned business that operated on the property.

Relying heavily upon *Circulo* and *Larchmont Pancake House I*, the Appellate Division below held that by "filing the administrative complaints under RPTL 524 in its own name, [DCH] failed to satisfy a condition precedent to the commencement of an RPTL article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner." R. 362.

There are five reasons why this Court should reverse the Decision. First, DCH satisfied the condition precedent requirement by timely filing grievances that provided Respondents with the statutorily-required notice. Additionally, the Appellate Division's interpretation of RPTL §524(3) contradicts the statute's plain language, is unsupported by the statute's legislative history, and is contrary to established rules of statutory construction. The statute uses the terms "person whose property is assessed" and "complainant." Nowhere in this statute is the specific term "owner" used to describe the party given the right to file a complaint under RPTL article 5; as a result, the Decision improperly rewrites the statutory language of RPTL §524(3). The Appellate Division's conclusion that only the

property owner, or someone specifically identifying itself as an agent of the property owner, has the exclusive right to file a grievance is illogical as the right to judicial review is preserved for "aggrieved parties," which, by its plain terms, embodies a much broader group of complainants, including Net Tenants.

Second, the Appellate Division's interpretation of RPTL §524(3) contradicts decades of precedent wherein relief was granted to a petitioner-taxpayer when the predicate administrative grievance was filed by a non-owner aggrieved party. The prior decisions of this Court and the Appellate Division contemplate an interpretation where one party – *i.e.*, the Net Tenant – files both the RPTL §524(3) complaint and the RPTL §704(1) petition. The Decision also contradicts ORPTS' Opinion of Counsel, ORPTS' instructions accompanying the RP-524 Complaint form, long-established and accepted tax certiorari practice, and the Town's public Internet website, which specifically instructed that a tenant obligated to pay property taxes may file a grievance. Additionally, in *Matter of Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d 228, 237 (2019) ("*Larchmont Pancake House II*"), this Court did not adopt the Second Department's rigid interpretation of RPTL §524(3) and instead affirmed that decision on other grounds, to wit, the petitioner was not an aggrieved party since it had no obligation to pay the real property taxes and therefore it lacked standing to maintain the proceedings. Notably, Supreme Courts in the Fourth Department have expressly

refused to apply *Circulo* and *Larchmont Pancake House I* to tax certiorari proceedings filed by a contractually-obligated and authorized non-owner taxpayer. *See* Point II.B, *infra*.

Third, the Appellate Division's interpretation of RPTL §524(3) is inconsistent with this Court's repeated directive that the law '"relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality.'"[6] *Matter of Great Eastern 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]). Notwithstanding the liberal view expressed by this Court in *Matter of Great Eastern Mall*, the Appellate Division below strictly construed RPTL §524(3) and dismissed this consolidated proceeding because DCH, and not the owner, filed the grievances. The Appellate Division reached this conclusion notwithstanding the fact that DCH's lease specifically authorized it to challenge the real property assessments and the grievances that were filed by DCH provided Respondents with the statutorily-required notice. This is a textbook technicality that was imposed *ex post facto*, and dismissal on these grounds is inconsistent with the remedial nature of the RPTL.

[6] It is extremely noteworthy that this very decision used the term "taxpayer" and not "owner" to describe the party who is vested with the right to assessment review.

Fourth, the Appellate Division ignored settled case law that holds that objections to the form of the administrative complaint are technical, not jurisdictional, and are waived if not raised by the BAR at the grievance stage. Because Respondents accepted the grievances, acted upon them by denying them and then waited over seven years to object to the filing and form of said grievances, the lower court should have concluded that Respondents' objections were waived.

Fifth, even assuming, *arguendo*, that DCH is not the "person whose property is assessed," DCH's right to challenge the assessments was nevertheless authorized by the specific language in its lease which granted this right. The Appellate Division never addressed this issue, and its Decision is inconsistent with *Matter of EFCO Prods. v. Cullen*, 161 A.D.2d 44, 46-47 (2d Dep't 1990) ("*EFCO Prods.*") and with *Big "V" Supermarkets, Inc., Store # 217 v. Assessor of the Town of E. Greenbush*, 114 A.D.2d 726 (3d Dep't 1985) ("*Big 'V' Supermarkets*"), wherein the Second and Third Departments reached the merits even though the predicate administrative grievance was by the lessee obligated to pay the real estate taxes.

STATEMENT OF THE CASE

The property at issue in these proceedings is located at 700 Waverly Avenue, Mamaroneck, New York, and is identified as Section 8, Block 26, Lot 1.1

on the Official Tax Map of the Town of Mamaroneck, and as Section 8, Block 111, Lot 1A on the Official Tax Map of the Village of Mamaroneck (the "Subject Property"). R. 31. The Subject Property is being used as an automotive service center known as "DCH Toyota City."

Pursuant to its lease with the owner, 700 Waverly Avenue Corp., DCH is obligated to pay, *inter alia*, all real estate taxes levied upon the Subject Property. R. 54-55; 32. At all times relevant hereto, Petitioner timely paid all real estate taxes levied upon the Subject Property by the appropriate taxing authorities. R.272; 32. DCH's lease also provides, in relevant part, "[t]enant shall have the right, at its sole cost and expense, to contest the amount or validity, in whole or in part, of any Imposition relating to the Demised Premises by appropriate proceedings diligently conducted in good faith …."[7] R. 56. The term "Imposition" includes "all *ad valorem* real estate taxes or other taxes in the nature thereof…" R. 55 (emphasis added). By the inclusion of this language, the property owner/landlord specifically authorized DCH (as tenant) to challenge the Subject Property's assessments, upon which the real property taxes are based.

DCH timely filed an RP-524 Complaint for the 2009, 2010, 2011, 2013 and 2014 assessment years against the assessments that Respondent Town placed on its property for those years. R. 32. All of the grievances identified the property,

[7] This right is subject to certain exceptions not applicable here.

explained the grounds for review of the assessments and set forth the relief sought. *See* R. 100-103, 113-118, 127-133, 142-148, and 160-165. The Town's public website instructed that "[a]ny person aggrieved by the assessment" was eligible to file a grievance. R. 281. The Town's website also directed taxpayers to the RP-524 Complaint form and instructions published by ORPTS. *See id*. ORPTS' instructions advised that grievances (*i.e.*, complaints) could be filed by "[a]ny person who pays property taxes" including "tenants who are required to pay property taxes pursuant to a lease or written agreement." R. 247.

In each instance, the Town BAR accepted the grievance applications and acted upon them by considering them, and thereafter confirming the Town assessments. R. 35-38, 105, 119, 134, 149-50, and 166-67. The Town BAR did not dismiss the grievances, raise any objections as to their filing or content, or in any way communicate that it believed that the grievances were defective. *See id*. It did not request a personal appearance at the hearing by DCH, its attorney, or for that matter, the owner, and it did not request any information about the Subject Property or about the grievance. *See id*.

Once the BAR determinations were received, in compliance with RPTL article 7, judicial petitions challenging the Town assessments on the Subject Property were timely filed for the assessment years 2009, 2010, 2011, 2013 and

2014.[8] The Town did not move to dismiss the RPTL article 7 proceedings before the return dates on the petitions.

DCH also timely filed administrative grievances for the 2010, 2011 and 2013 assessment years against the Village assessments placed on the Subject Property for those years as required by RPTL article 5. R. 33. All of the grievances identified the property, explained the grounds for review of the assessments and set forth the relief sought. R. 176-181, 193-198, and 211-217. Like the Town BAR, in each instance, the Village BAR accepted the grievance applications and acted upon them by considering them, after which it confirmed the Village assessments. R. 39-41, 182-83, 199-200, and 218-19. For each of the assessment years, the Village BAR did not dismiss the grievances, raise any objections, or in any way communicate that it believed that the grievances were defective. *See id.* It also did not request a personal appearance from DCH, its attorney, or the owner, and it did not request any information about the Subject Property or raise any issue about the respective grievances. *See id.*

Pursuant to RPTL article 7, judicial petitions challenging the Village assessments on the Subject Property were timely filed for the assessment years 2010, 2011, and 2013. *See* R. 34. Each petition challenged the assessment for the Subject Property and other properties. R. 189, 206-07, and 225. The Village did

[8] *See* R. 34. Only the 2013 petition included a challenge to the assessments of other properties in addition to the Subject Property. R. 157.

not move to dismiss the RPTL article 7 proceedings before the return dates on each of the petitions.

On or about September 29, 2016, approximately seven (7) years after the first grievance and judicial petition were filed, Respondents moved to dismiss each of the pending proceedings on the grounds that the Supreme Court lacked subject matter jurisdiction arguing that the underlying grievances were filed by DCH, and not the property owner, and thus DCH purportedly failed to satisfy a condition precedent to filing the petitions. *See* R. 259-268. Citing *Circulo*, Respondents argued that only an owner had the legal standing to file a grievance pursuant to RPTL §524(3).

On December 16, 2016, the Supreme Court, Westchester County, granted the Respondents' motion to dismiss all of the proceedings, finding that DCH failed to meet a condition precedent because DCH, and not the property owner, filed the predicate grievances. R. 16-17. According to Supreme Court, "the failure of the owner to raise the RP-524 Complaint in the administrative process is a fundamental error which the courts cannot cure because of a lack of subject matter jurisdiction." R. 20.

On December 11, 2019, the Appellate Division affirmed the Supreme Court's judgment, concluding that by "filing the administrative complaints under RPTL §524 in its own name, [DCH] failed to satisfy a condition precedent to the

commencement of an RPTL article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner." *See* R. 362.

ARGUMENT

POINT I

THE APPELLATE DIVISION'S CONCLUSION THAT DCH FAILED TO SATISFY THE CONDITION PRECEDENT WAS ERRONEOUS, AND ITS INTERPRETATION OF RPTL §524(3) CONTRADICTS THE PLAIN LANGUAGE OF THE STATUTE, IS UNSUPPORTED BY THE STATUTE'S LEGISLATIVE HISTORY, AND IS CONTRARY TO ESTABLISHED RULES OF STATUTORY CONSTRUCTION.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." *Patrolmen's Benevolent Ass'n of City of N.Y. v. City of N.Y.*, 41 N.Y.2d 205, 208 (1976). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). A court should not add words to a statute to discern the legislature's intent. *See American Transit Ins. Co. v. Sartor*, 3 N.Y.3d 71, 76 (2004); *Matter of Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 394 (1995). "Additionally, [the Court] should inquire 'into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history.'" *Matter of Albany Law School v. N.Y. State Off. Of Mental Retardation &*

Dev. Disabilities, 19 N.Y.3d 106, 120 (2012) (quoting *Nostrom v A.W. Chesterton Co*., 15 N.Y.3d 502, 507 [2010]).

A. DCH satisfied the condition precedent to filing the judicial petitions

RPTL §524(3) provides, in relevant part:

> "[A] complaint with respect to an assessment shall be on a form prescribed by the commissioner and shall consist of a statement specifying the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified, and the reduction in assessed valuation or taxable assessed valuation or change in class designation or allocation of assessed valuation sought. Such statement shall also contain an estimate of the value of the real property. Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein." (Emphasis added).

Pursuant to RPTL §706(2) the judicial petition "must show that a complaint was made in due time to the proper officers to correct such assessment."

In *Matter of Sterling Estates, Inc. v. Bd. of Assessors*, 66 N.Y.2d 122, 126 (1985), this Court recognized that "[b]ecause of the important purposes to be served by administrative review, the Legislature has specified that protest is a condition precedent to a proceeding under [RPTL] article 7 by providing that a petition seeking review 'must show that a complaint was made in due time to the proper officers to correct such assessment' ([RPTL] §706[2])."

A court lacks subject matter jurisdiction to review a petition if no grievance is filed whatsoever challenging the property's assessment. *See Lavoie v. Assessor of the Town of Kent*, 222 A.D.2d 561 (2d Dep't 1995); *Matter of Frei v. Town of Livingston*, 50 A.D.3d 1381, 1382 (3d Dep't 2008); *Raer Corp. v. Vill. Bd. of Tr. of the Vill. of Clifton Springs*, 78 A.D.2d 989 (4th Dep't 1980). "'The only things necessary to exercise jurisdiction are that within the time specified a complaint under oath in writing be presented stating the objection and the grounds thereof.'" *Matter of Astoria Fed. Sav. & Loan Ass'n v. Bd. of Assessors*, 212 A.D.2d 600, 601 (2d Dep't 1995) (quoting *Matter of City of Little Falls v. Bd. of Assessors of the Town of Salisbury*, 68 A.D.2d 734, 738 (4th Dep't 1979)). The grievance "sets the jurisdictional parameters of the court and limits the relief available." *Matter of City of Little Falls*, 68 A.D.2d at 739. "In short, the taxpayer must tell the assessors what assessment he protests and why it is wrong." *Matter of Sterling Estates*, 66 N.Y.2d at 126. "If the assessors are fully aware of petitioner's grievance and are informed of the exact numerical extent of the claimed overassessment, the important jurisdictional fact in a tax certiorari proceeding has been met." *Cherrypike Estates, Inc. v. Herbert*, 67 Misc.2d 853, 853-54 (Sup. Ct. Nassau Cty. 1971).

It is evident from RPTL §524, §706 and the above cases, that to satisfy the condition precedent requirement in RPTL §706, the complainant must timely file a

grievance that identifies the property, the grounds for review of the assessment, and the extent of the relief sought. *See Matter of Sterling Estates*, 66 N.Y.2d at 126; *Matter of Astoria Fed. Sav. & Loan Ass'n*, 212 A.D.2d at 601; *Cherrypike Estates*, 67 Misc.2d at 853-54.

In accordance with the above statutes, case law, ORPTS' Opinion of Counsel and administrative guidance, long-standing tax certiorari practice, and the Town of Mamaroneck's practice, procedures and protocols (which are set forth in detail in Point II, *infra*), DCH filed the within grievances. In so doing, DCH satisfied the condition precedent requirement for all years at issue because the grievances set forth the Subject Property's address and tax map designation, the assessments being challenged, the grounds for review of the assessments (*i.e.*, DCH's objections to the assessments), and the relief sought.

Notwithstanding, the Appellate Division held that the condition precedent requirement was not met because the owner did not file the grievances and DCH did not identify itself in the grievances as an agent of the owner. *See* R. 362. In effect, the Appellate Division treated the grievances as a nullity because they were filed by DCH and not the owner. This was error because DCH provided the statutorily-required notice to Respondents and in *Larchmont Pancake House II*, 33 N.Y.3d at 237, this Court did not either find that subject matter jurisdiction was lacking or that the condition precedent was not met, even though the petitioner, and

not the owner, filed the predicate grievances. Furthermore, and as set forth below, RPTL §524(3) does not limit the filing of a grievance to the property owner.

B. Neither the plain language of RPTL §524, nor the underlying legislative history, supports the Appellate Division's conclusion that only a property owner may file a grievance.

The Decision herein is not supported by the plain language of the statute. The plain language of RPTL §524(3) does not provide that an owner has the sole and exclusive right to file a grievance. The statute does not use the word "owner." If the Legislature had intended for owners to have exclusive standing to file, it would have drafted the statute to read, "[s]uch statement must be made by the 'owner[,]' or by some person authorized in writing by the 'owner' or his officer or agent to make such statement who has knowledge of the facts stated therein." The plain language also does not provide that a non-owner cannot file a grievance in its own name and/or on its own behalf.

Recognizing that courts are not empowered to legislate in the guise of interpreting statutes, this Court has observed that the failure of the Legislature to include or define a term in a statute is a significant indication that the exclusion was intended, and that the omitted term should not be injected into the statute by the judiciary. *See People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) ("We have firmly held that the failure of the Legislature to include a substantive, significant

prescription in a statute is a strong indication that its exclusion was intended"); *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (1982) ("The failure of the Legislature to provide that mental illness is a valid defense in an action for divorce based upon the ground of cruel and inhuman treatment must be viewed as a matter of legislative design. Any other construction of the statute would amount to judicial legislation.") The fact that the Legislature declined to use the term "owner" in RPTL §524(3) is strong evidence that it did not mean to restrict administrative review of assessments to owners, or their agents, only. RPTL article 5 uses the word "owner" over 100 times. Had the Legislature intended this construction in RPTL §524(3) specifically, it would have used one word ("owner") instead of five words ("person whose property is assessed").

It is also noteworthy that RPTL §524(3) further provides, "or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein" (emphasis added). The Legislature's use of the word "complainant" rather than the word "owner" implies that the complainant can be someone other than the property owner. Otherwise, the Legislature would have used the language, "some person authorized by the property owner."

The legislative history underlying RPTL §524 also does not support the Appellate Division's highly-restrictive interpretation of that statute, an

interpretation so narrow that it defeats the statute's clear purpose: To provide the taxpayer (who is not necessarily the property owner) with an opportunity to seek assessment relief from the board of assessment review. The Assembly Memorandum, which, by definition, was written prior to the Legislature passing the bill, provides that one purpose of the bill was to "consolidate the provisions of the [RPTL] relating to administrative review of assessments" into a new title one-A in article 5 of the RPTL. *See* Governor's Bill Jacket (Laws of 1982, Chapter 14) ("Bill Jacket"), Comp. 104. Significantly, the Assembly Memorandum uses the word "taxpayer,"[9] and not the word "owner," when discussing administrative review of assessments. For example, the Assembly Memorandum provides, "Section 524 is intended to set forth in one place the requirements which a taxpayer must satisfy to have administrative review of an assessment." Comp. 108 (emphasis added). It also provides that the reason for the rearrangement and consolidation of these statutory provisions into a new title one-A of RPTL article 5 was "to clearly delineate the various responsibilities of taxpayers, boards of assessment review and assessors. This will serve to facilitate understanding of the administrative review process by both taxpayers and public officials." Comp. 115 (emphasis added). The Assembly Memorandum also uses the term "taxpayer"

[9] A taxpayer is "someone who pays or is subject to a tax." *Black's Law Dictionary*, at 1690 (10th Ed. 2014). This definition is consistent with DCH's lease, under which DCH is the taxpayer because it is obligated to pay all real property taxes. Respondents have stipulated that DCH is obligated by its lease to pay all real property taxes levied against the Subject Property. *See* R. 32.

when referring to parties filing judicial proceedings: "[t]itle one of article seven of the [RPTL] (§§ 700 et seq.) authorizes a taxpayer to institute a proceeding in supreme court to review an assessment." Comp. 113 (emphasis added).

There is nothing in the Assembly Memorandum that evinces a legislative intent to limit the filing of an administrative complaint exclusively to the property owner. In fact, there is no evidence to suggest that the Legislature ever contemplated that it was effecting a sweeping change in the law to preclude non-owner aggrieved parties from filing grievances. Had that been the Legislature's intention, it would have so stated in the legislative history. *See Iannotti v. Consol. Rail Corp.*, 74 N.Y.2d 39, 46 (1989) ("there is nothing in the legislative history which indicates that the Legislature ever contemplated that it was effecting such a sweeping change in a fundamental rule of owner liability.") It is worth mentioning that in the same Assembly Memorandum, the Legislature did express an intent to change the law with respect to judicial review of special franchise assessments, indicating that "this bill would supersede the holding in Consolidated Edison Company of New York v. State Board of Equalization and Assessment, 73 A.D.2d 31, 425 N.Y.S.2d 651, aff'd, 53 N.Y.2d 975, 441 N.Y.S.2d 9," which would clarify "the Legislative intent as to the relationships between articles 6 and 7 of the [RPTL] and between titles one and two within article 7 of the [RPTL]." Comp.

116-117. The Legislature is clearly capable of expressing such intent when appropriate.

C. The Appellate Division's interpretation of RPTL §524(3) is contrary to several rules of statutory construction.

The Appellate Division's interpretation of RPTL §524(3) contradicts several rules of statutory construction. For example, this Court has held that "[i]n the absence of any controlling statutory definition, [courts] construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as 'useful guideposts' in determining the meaning of a word or phrase." *Rosner v. Metro. Prop. & Liab. Ins. Co.*, 96 N.Y.2d 475, 479-80 (2001) (quoting *Matter of Vill. of Chestnut Ridge v. Howard*, 92 N.Y.2d 718, 723 [1999]). This Court has applied this basic rule of statutory construction in countless cases, utilizing the normal dictionary meaning of words not specifically defined in a statute to divine the Legislature's intended meaning of the words used. *See e.g.*, *People v. Andujar*, 30 N.Y.3d 160, 163 (2017); *Matter of Madeiros v. N.Y. State Educ. Dep't*, 30 N.Y.3d 67, 75 (2017); *Matter of Orens v. Novello*, 99 N.Y.2d 180, 185-86 (2002).

Merriam-Webster Dictionary defines the word *whose* as "of or relating to whom or which especially as possessor or possessors."[10] The word *whose* clearly signifies "possession." In applying the aforementioned rule of statutory construction to the facts of this case, the inescapable conclusion is that a possessory tenant, like DCH, is included as a "person whose property is assessed" who may file a complaint under RPTL §524(3). This definition aligns with case law finding that "an assessment truly runs with the land and not with the owner thereof …" *Mack v. Assessor of the Town of Ramapo*, 72 A.D.2d 604, 605 (2d Dep't 1979) (citing *People ex rel. Bingham Operating Corp. v. Eyrich*, 265 A.D. 562, 565 (3d Dep't 1943)). Had the Appellate Division applied the above rule of statutory construction and accorded the term "whose" its usual and commonly understood meaning, it would not have concluded that the phrase "person whose property is assessed" is restricted exclusively to a property owner.

Additionally, Merriam Webster Dictionary defines the word "complainant" as "the party who makes the complaint in a legal action or proceeding" and "one who complains."[11] Using this definition, a complainant cannot be deemed to be limited to a property "owner;" also it must necessarily include non-owners who have an interest and/or stake as a complainant. Had the Appellate Division applied the above rule of statutory construction and accorded "complainant" its usual and

[10] *See* https://www.merriam-webster.com/dictionary/whose (last verified July 27, 2021).
[11] *See* https://www.merriam-webster.com/dictionary/complainant (last verified July 27, 2021).

commonly understood meaning, it would not have concluded that the filing of a grievance is restricted exclusively to the property owner.

Another rule of statutory construction provides that "statutes which relate to the same or to cognate subjects are in pari materia and [are] to be construed together unless a contrary intent is clearly expressed by the Legislature." *Matter of Plato's Cave Corp. v. State Liquor Auth*., 68 N.Y.2d 791, 793 (1986); *see Matter of Dutchess Cty. Dep't of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001). "When the statutory language at issue is but one component in a larger statutory scheme, it 'must be analyzed in context and in a manner that harmonizes the related provisions and renders them compatible.'" *Matter of Mestecky v. City of N.Y.*, 30 N.Y.3d 239, 243 (2017) (quoting *Matter of M.B.*, 6 N.Y.3d 437, 447 [2006]). The Appellate Division failed to either consider RPTL §§ 524 and 704 together or to harmonize them, and instead held that a different standing requirement applied to each.

There can be no dispute that RPTL §524 and RPTL §704 relate to the same subject matter, *i.e.*, the review of a real property tax assessment. The grounds for review of an assessment at the administrative and judicial levels are identical: the assessment being challenged is excessive, unequal, unlawful, or the property is misclassified. *Compare* RPTL §524(2) *with* §706(1). The filing of an RPTL article 5 complaint is a condition precedent to filing a judicial petition under RPTL

article 7. *Larchmont Pancake House II*, 33 N.Y.3d at 235. Thus, to support its analysis, this Court must examine the Legislature's intent underlying RPTL §524(3) in the context of the entire statutory scheme governing challenges to real property assessments. RPTL §§704(1) and 706(2) do not limit assessment review to property owners.

RPTL §704(1) identifies the class of persons who have standing to file a tax certiorari petition after the municipality has denied the administrative complaint. It broadly defines eligibility/standing as "[a]ny person claiming to be aggrieved by any assessment of real property…" RPTL §704(1). "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.*, 74 N.Y.2d at 132). A lessee is 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.'" *Id.* at 238 (quoting *Waldbaum*, 74 N.Y.2d at 133). This is because "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." *Id.* (quoting *Matter of Burke*, 62 N.Y. at 227-228).[12]

[12] There is no dispute that DCH, which is contractually obligated to pay all of the real property taxes and is authorized by its lease with the owner to challenge the tax assessments, is an "aggrieved party." *See Larchmont Pancake House II*, 33 N.Y.3d at 239 ("A contractual obligation to assume the undivided tax liability ensures the requisite direct pecuniary impact, irrespective of whether the taxpayer is a fractional lessee … or a nonfractional lessee.")

As far back as the 1870's, New York courts have included, among the class of aggrieved tax certiorari-eligible petitioners, non-owners who are contractually obligated to pay real property taxes because they are the persons aggrieved or injured by the excessive, unequal, or unlawful assessment. *See*, *e.g.*, *Matter of Burke*, 62 N.Y. at 228 ("Either the owner whose title may be clouded by an illegal assessment, or a lessee who is under covenant to pay an assessment, is aggrieved when an invalid assessment is made…"); *Matter of Walter*, 75 N.Y. 354 (1878) (mortgagee was an aggrieved party following foreclosure where there was a deficiency upon sale and there was no proof that the mortgagor was personally liable for the deficiency); *Long Is. Power Auth. v. Assessor of Town of Huntington*, 164 A.D.3d 591, 592 (2d Dep't 2018) (power authority contractually obligated "to pay all taxes levied against the property" is aggrieved and has standing to challenge the tax assessment); *EFCO Prods.*, 161 A.D.2d at 46-47 (a nonfractional lessee who was contractually obligated to directly make payments in lieu of taxes levied against the lessor's undivided parcel was an aggrieved party with standing to maintain an article 7 proceeding); *McLean's*, 2 A.D.2d at 100 (lessee who was obligated to pay all property taxes under the terms of a lease was an aggrieved party under former Tax Law article 13 and had standing to file an administrative complaint); *Big "V" Supermarkets,* 114 A.D.2d at 727-28 (a fractional lessee of a shopping center who was contractually obligated to make payments in lieu of taxes

levied against the entire property was an aggrieved party); *Matter of Onteora Club v. Bd. of Assessors*, 29 A.D.2d 251, 254 (3d Dep't 1968) (parties filing the grievances and article 7 petition, who were not the owners but rather lessees and sub-lessees of the property, were properly aggrieved parties with standing to seek judicial review); *Matter of Ames Dep't Store, Inc., No. 418 v. Assessor*, 261 A.D.2d 835 (4th Dep't 1999) ("*Ames Dep't Store*") (fractional lessee obligated to pay a proportionate share of the real property taxes and which had a contractual right to contest said property taxes, was an aggrieved party within the meaning of section 704[1]).

RPTL §706(2) provides, in relevant part, "[s]uch petition must show that a complaint was made in due time to the proper officers to correct such assessment." The term "complaint" refers to the administrative complaint discussed in RPTL §524(3).

The foregoing analysis of RPTL §524, §704 and §706 and the decisional case law cited above leads to the inescapable conclusion that RPTL articles 5 and 7 are interlocking, interdependent, and pertain to the same subject matter; as such, they are in *pari materia* and should be "construed together and applied harmoniously and consistently." *Rite Aid Corp. v. Town of Irondequoit Bd. of Assessment Review et al.,* 2018 WL 11243801, *5 (Sup. Ct. Monroe Cty. Feb. 27, 2018) ("*Rite Aid*"); *Walgreen E. Co., Inc. v. The Assessor and the Bd. of*

Assessment Review of the Town of Brighton, Index No. 2017/7289, at p. 12 (Sup. Ct. Monroe Cty. Mar. 9, 2018) ("*Walgreen*"), *see* Comp. 68-82; *Rite Aid Corp. v. Town of Williamson Bd. of Assessment Review et al.*, Index Nos. 75978/13, 77375/14, 78812/15, 79802/16 & 81093/17, at p. 12 (Sup. Ct. Wayne Cty. May 17, 2018) ("*Rite Aid 2*"), *see* Comp. 83-97. Reviewing RPTL §§524(3) and 704(1) *in pari materia* supports the conclusion that a party aggrieved by an assessment, and not just the property owner, may file a grievance.

Permitting a Net Tenant to file a grievance fulfills the purpose of the administrative review process, which is to permit the BAR to correct excessive, unequal or unlawful assessments and/or errors when the property is misclassified, in effort to assure the accuracy and stability of assessment rolls in advance of the filing of the final assessment roll. *See* RPTL §§512, 525; *Matter of Sterling Estates,* 66 N.Y.2d at 126. Confirming that a Net Tenant has the right to file a grievance will not overturn precedent; rather, it would be consistent with precedent because before *Circulo* was decided, RPTL sections 524(3) and 704(1) had always been interpreted to mean the same class of persons, which included a Net Tenant (*see* Point II, *infra*). The Appellate Division failed to recognize that Net Tenants, as a class, are typically authorized by their respective leases to challenge the real property assessments on the properties they occupy.

Furthermore, interpreting the statutes *in pari materia* avoids the inequitable result that would follow from the Appellate Division's novel interpretation of RPTL §524 permitting only an owner to file an administrative complaint on the one hand, but then interpreting RPTL §704(1) to permit any aggrieved party to file a judicial petition.

This Court has directed 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). The Appellate Division's overly restrictive interpretation of RPTL §524(3) causes a result that is both "unreasonable" and works "an injustice" on DCH (as well as those similarly situated) because its otherwise valid claims for assessment reductions have thus far been dismissed on unprecedented grounds.[13] The Legislature could not have intended to give non-owner aggrieved parties standing to commence RPTL article 7 petitions, while concomitantly limiting the class of persons who have standing to file an RPTL article 5 administrative complaint to owners, where the timely filing of the complaint is a condition precedent to commencement of a tax certiorari proceeding under RPTL article 7. The Appellate Division never explained why the Legislature would have intended such a result.

[13] The parties stipulated that should the Court ultimately deem these proceedings to have been validly commenced, DCH would be entitled to assessment reductions for assessment years 2009, 2010, 2011, 2013 and 2014 against the Town and for assessment year 2010 against the Village. *See* R. 35-39.

Because the right to judicial review of a real property tax assessment is granted to persons claiming to be aggrieved (*see* RPTL §704(1)), it is only logical that the right to file a complaint for administrative review (RPTL §524(3)) which is a condition precedent for seeking judicial review, be in favor of the same class of persons who are obligated to pay the taxes when levied. *See McLean's*, 2 A.D.2d at 100. It is illogical to prohibit an aggrieved party from filing a grievance. Dismissing the consolidated proceeding simply because the Net Tenant, and not the owner filed the grievance (particularly when statutorily-required notice was provided and assessment reductions are warranted) is inconsistent "with the legislative mandate that property not be assessed in excess of full value[,]" *W.T. Grant v. Srogi*, 52 N.Y.2d 496, 513 (1981), and contradicts the intent of the statutory scheme, which is remedial in nature (*see* Point *III, infra*). It bears repeating that an assessment "runs with the land and not with the owner thereof." *Mack,* 72 A.D.2d at 605.

To interpret RPTL §524(3) to require the owner to sign the authorization on the grievance complaint could also lead to objectionable or unintended results, because the interests of the property owner and lessee are not always aligned. Several examples demonstrate this point. Owners who have contracted away the obligation to pay property taxes may have no interest in grieving the assessment because another party (the tenant) is contractually responsible for paying the taxes.

Additionally, non-interested owners might not have access to the relevant data needed to support an assessment challenge and/or might not have any interest in participating in the process.

Interests of owners and tenants could also be adverse. In *Ames Dep't Store*, 261 A.D.2d at 836, the Fourth Department permitted the lessee to maintain an RPTL article 7 proceeding even when the property owner and the municipality had reached an agreement. Similarly, in *Big "V" Supermarkets*, 114 A.D.2d at 728, the Third Department permitted a lessee to maintain an RPTL article 7 proceeding even when the property owner and municipality agreed to arbitrate the issue. Reading RPTL §524(3) to require the property owner exclusively to file the grievance or to sign the authorization would have precluded the petitioners in *Ames Dep't Store* and *Big "V" Supermarkets* from challenging the respective assessments.

Moreover, requiring an owner to sign an authorization might not be practical under the circumstances. The Decision fails to appreciate the fact that the time between the filing of the tentative assessment roll and Grievance Day (*i.e.*, the statutory deadline to file a grievance) can be as short as eleven (11) business days, which was the case in 2021 for Westchester County towns (including Mamaroneck). In communities that conduct annual revaluations like Respondent Town, assessments can change from year to year, and a tenant would not know if it

is necessary to file a grievance until the tentative assessment roll is published. Assuming a tenant determines that filing a grievance is necessary to protect its rights, the tenant must be able to track down the owner and persuade the owner to file a grievance, all within a time frame that can be as short as eleven (11) business days. As a practical matter, there simply may not be enough time to obtain an owner's cooperation to file a grievance in such a short time frame, particularly if the owner is located out of state or does not wish to cooperate.

Another rule of statutory construction provides that "[i]f there are two possible interpretations of a statute, the court should adopt that which will produce equal results. A construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination." N.Y. Statutes §147 (McKinney's 2021). Case law precedent establishes that a reasonable interpretation of RPTL §524(3) includes those who are empowered and authorized (in this case, by contract) to seek a reduction in assessment (*see* Point II, *infra*). The Appellate Division's limitation of the class of those eligible to file a complaint exclusively to a property owner, and not just a "person whose property is assessed," while allowing anyone "aggrieved" to seek judicial review under RPTL article 7 of the same assessment, does not produce equal results: Complainants filing an administrative grievance are treated differently than complainants filing a judicial petition. Again, the Legislature could not have intended this result.

POINT II

THE APPELLATE DIVISION'S INTERPRETATION OF RPTL §524(3) CONTRADICTS DECADES OF JUDICIAL PRECEDENT, ORPTS' INTERPRETATION OF THAT STATUTE, LONG-ESTABLISHED AND ACCEPTED TAX CERTIORARI PRACTICE, AND THE TOWN'S PUBLIC WEBSITE, ALL OF WHICH RECOGNIZED THAT A PARTY CONTRACTUALLY OBLIGATED TO PAY THE REAL PROPERTY TAXES HAS THE RIGHT TO FILE THE PREDICATE ADMINISTRATIVE GRIEVANCE.

Until the Appellate Division's Decision below (which primarily relied upon *Circulo*, a real property tax exemption case), to our knowledge, no court held that a Net Tenant lacked standing to file a grievance in its own name and on its own behalf. In fact, it was universally understood pre-*Circulo* that a Net Tenant had standing to file an administrative grievance in its own name and on its own behalf. This understanding stems from decades of case law, ORPTS' interpretation (as set forth in an Opinion of Counsel [R. 279-280] and instructions to the RP-524 Complaint form [R. 235 and 247]), and the Town's public website, which expressly stated that "[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. This is to be contrasted with real property tax exemption cases – like *Circulo* – where only the property owner has the right/standing to file for and receive an exemption from real estate taxation. *See e.g.* RPTL §420-a(1)(a); *see generally* RPTL §§420-a through 489. As

explained below, the Decision is contrary to judicial precedent, administrative guidance, long-standing tax certiorari practice, and the Town's public website.

A. The Decision ignored judicial precedent wherein the courts addressed the merits of the case even though the administrative grievance was filed by a non-owner aggrieved party.

The Appellate Division's interpretation of RPTL §524(3) contradicts decades of case law involving the judicial review of assessments where the courts reached the merits, even though the predicate administrative grievance was filed by an aggrieved party other than the owner. In fact, not only has a non-owner aggrieved party been permitted to file an administrative grievance in all of the reported cases prior to *Circulo*, the issue has been considered so definitively settled that it was not raised in any case prior to 2012 with one exception: *McLean's*, *supra*, 2 A.D.2d at 99.

In *McLean's*, the City Commissioner of Assessment denied the administrative complaint because the petitioner failed to comply with the corporation counsel's request that petitioner either submit a power of attorney from the owner or have the owner present at the hearing as required by local law. *Id*. The Commissioner also asserted that the petitioner, as a lessee, was not an aggrieved person and moved to dismiss the tax certiorari petition in the absence of the power of attorney. *Id*. The Supreme Court denied the motion and the Third

Department affirmed, stating, "petitioner, as a lessee obligated to pay all taxes during the term of the lease, [was] a person aggrieved and thus entitled to the protection of the statute and, in consequence, eligible to undertake the procedure provided by the local law." *Id.* at 100.

It is noteworthy that the City of Binghamton local law and former Tax Law §290-c (now RPTL §706[2]) had a similar requirement wherein the petitioner was required to plead that it had served an administrative complaint with the local officials who had the authority to correct the assessment. *Id.* at 99. The Third Department's analysis in affirming the denial is instructive to the proper interpretation of RPTL §524(3):

> "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.* at 100.

The Third Department in *McLean's* held that a "person claiming to be aggrieved" (now codified in RPTL §704[1]) is, by necessity, one and the same as the "person whose property is assessed" (now RPTL §524[3]) and that any person who has standing to seek judicial review may file an administrative complaint. In

so holding, the Third Department effectively equated the petitioner's status as a lessee with ownership:

> "…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, within the meaning of the local law. This court held in *People ex rel. Bingham Operating Corp. v. Eyrich*, 265 App. Div. 562, 565, 40 N.Y.S.2d 33, 35 [3d Dep't 1943], that the relator … was not only a person 'claiming to be aggrieved' but also a person 'assessed' and … those words … 'obviously mean one whose pecuniary interests are or may be adversely affected.'" *Id.* at 100 (italics added).

Other courts have likewise reached the merits of cases even though the predicate administrative grievances were filed by non-owner aggrieved parties. In *EFCO Prods.*, 161 A.D.2d at 46-47, the Second Department found that the commercial lessee of a property under an Industrial Development Agency ("IDA") lease could challenge the property's assessment at both the administrative and judicial levels. The court stated:

> "The right to challenge an assessment of real property attaches to a landowner, or to a nonfractional lessee (*see, Matter of Waldbaum, Inc. v Finance Adm'r of City of N. Y.*, 74 NY2d 128 … *supra*), upon allegations that the assessment, *inter alia*, is excessive and that the assessment will cause the petitioner to sustain pecuniary injury (RPTL 706)." *Id.* at 47.

Significantly, *EFCO's* lease granted it the right to contest the PILOT payments and to file the appropriate challenges. *Id.* at 46.

Big "V" Supermarkets, 114 A.D.2d at 727, involved a petitioner which, while a partial lessee of a shopping center, was obligated to pay all taxes on the property as an element of its rent and assessments. The lessee filed the administrative grievance in its own name, and subsequently commenced an RPTL article 7 proceeding to challenge the assessment. *Id.* The Third Department reached the merits of the case even though the lessee did not own the property, and found that the lessee was an aggrieved party with the requisite standing to commence a proceeding under RPTL §704. *Id.* at 727-728.

In *Matter of Birchwood Vill. LP v. Assessor of City of Kingston*, 94 A.D.3d 1374 (3d Dep't 2012), a PILOT agreement granted the lessee the right to protest the assessment that was the basis for determining the amount of PILOT payments due. The aggrieved lessee filed the administrative grievance seeking a review of the real property assessment, which was denied by the BAR. The aggrieved lessee subsequently filed an RPTL article 7 proceeding, and the Third Department reached the merits despite the fact that the non-owner aggrieved party had filed the administrative grievance. Significantly, the Third Department denied the respondents' motion to dismiss, finding "Supreme Court has subject matter jurisdiction over RPTL article 7 proceedings[.]" *Id.*[14]

[14] Respondents' prior attempts to explain away cases because they involve IDAs fail to address the issue. If actual ownership of the property by the party filing the grievance is what is required to satisfy the condition precedent in RPTL §706(2), then each of the cases involving an IDA

In *Matter of Onteora Club v. Bd. of Assessors*, 29 A.D.2d 251, 252 (3d Dep't 1968), the parties filing the administrative grievances and RPTL article 7 petitions were not the owners of the property but rather lessees and sublessees of the property. The Third Department found that the petitioners were proper aggrieved parties entitled to seek judicial review even though the owners did not file the administrative grievances. *Id.* at 253.[15]

In *Ames Dep't Store*, 261 A.D.2d at 835, the Fourth Department held that the petitioner, a fractional lessee obligated to pay a proportionate share of the real property taxes, was an aggrieved party within the meaning of section 704(1) who had "standing to maintain tax certiorari proceedings because its pecuniary interests are directly affected by the tax assessment and because the lease grants it the right to contest the taxes in its own name or in the name of the lessor."

The foregoing cases, spanning over fifty (50) years, all stand for the legal proposition that a non-owner, aggrieved taxpayer has standing to fully litigate an assessment appeal on its own behalf, including the filing of the predicate administrative grievance necessary to obtain judicial review. Courts have recognized that non-owner aggrieved parties file administrative protests and have

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tenant should have been dismissed for a failure to satisfy a condition precedent because the tenant, and not the property owner, filed the administrative grievance.

[15] In *Matter of Onteora Club*, the Court was addressing RPTL §512 which was, at that time, the predecessor statute to RPTL §524. However, that version of RPTL §512 used the same language ("person whose property is assessed") to identify parties eligible to file grievances that RPTL §524 later adopted.

reached the merits in subsequent judicial proceedings brought by non-owners since the inception of the RPTL and its statutory precursors. The Courts reached the merits in these circumstances because doing so is consistent with the plain language of the statute and the remedial nature of the law. If the courts in the above cases had applied the Appellate Division's narrow and restrictive interpretation herein, they would have precluded those petitioners from challenging the tax assessments notwithstanding the fact that the assessments had a direct, adverse effect on their pecuniary interests. The Decision below did not address the above precedent.

B. *Circulo, Larchmont Pancake House* and *DCH* represent a significant departure from established judicial precedent.

In *Circulo*, *Larchmont Pancake House I* and the Decision below, the Second Department departed from the aforementioned precedent where courts allowed a non-owner aggrieved party to file the grievance. The Appellate Division's reliance on *Circulo* and *Larchmont Pancake House I* to dismiss the within petitions because DCH, and not the owner, filed the predicate administrative grievances is misplaced as both decisions are readily distinguishable.

Circulo did not involve a tenant contractually obligated by its lease to pay the real estate taxes and authorized by its lease to challenge the assessment. *See Circulo*, 96 A.D.3d 1054. Rather, *Circulo* involved RPTL article 7 proceedings to

review the denial of property tax exemptions by the City of Long Beach BAR. *Id.* Exemptions under RPTL article 4 are available exclusively to owners of the property, and only owners have standing to apply to the assessor for these exemptions; if the assessor denies the exemption, the next step available to the owner is to file a grievance pursuant to RPTL §524(3). Because the petitioner in *Circulo* did not own one of the properties for which it filed a complaint seeking an exemption, and there was no evidence in the record before the court that the entity that was listed on the deed filed a complaint, the Second Department correctly concluded that the petitioner "did not 'show that a complaint was made in due time to the proper officers to correct such assessment,' as is required (RPTL 706 [2])." *See Circulo*, 96 A.D.3d at 1057. Critically, instead of citing to the ownership requirement found in RPTL §420-a pertaining to the exemption sought, the court 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." *Id.* at 1056 (emphasis in original). This was the first time that an ownership requirement had been applied to RPTL §524(3), and the Second Department gave no reasoning and cited no rules of statutory construction to reach this result.

Larchmont Pancake House I is likewise distinguishable. During the relevant timeframe the property was owned by Susan Carfora, and the business that

operated on the property (a restaurant) was owned by Ms. Carfora and her daughters, Irene Corbin and Portia DeGast. *Larchmont Pancake House I*, 153 A.D.3d at 521. Unlike DCH, the business was not contractually obligated to pay the property taxes. *See id*. In fact, there was no lease agreement between the property owner and the business owners; instead the property owner and business operated under an informal agreement whereby the business paid the property taxes and occupied the property rent-free. When Ms. Carfora died in 2009, the property was temporarily transferred into a trust before being transferred to its beneficiaries (her daughters). *Id.* It was the business that filed the RPTL article 5 complaints challenging the assessment. *Id*.

The Second Department, without citing any rules of statutory construction, simply adopted its holding in *Circulo* and dismissed the proceedings, finding that the condition precedent under RPTL §706(2) was not met because the business owners, and not the property owner, filed the administrative grievances. *Id*. The Second Department held that the failure to meet the condition precedent divested the Supreme Court of subject matter jurisdiction. *Id*.

This Court granted the petitioner's motion for leave to appeal. In *Larchmont Pancake House II*, 33 N.Y.3d at 237-238, this Court did not resolve the parties' arguments regarding RPTL §524(3), and instead focused on whether the petitioner had standing under RPTL §704(1) to file the judicial petitions. This Court

concluded that the petitioner was not an aggrieved party within the meaning of RPTL article 7 and thus lacked standing to file the petitions because it had "no legal authorization or obligation to pay the real property taxes." *Id.* at 240.

Significantly, this Court did not find that subject matter jurisdiction was lacking, nor did it affirm the Second Department's decision on those grounds. *Id.* at 237-240. Had this Court agreed with the Second Department's interpretation of RPTL §524(3) and §706(2) and the conclusion that subject matter jurisdiction was lacking, it could have affirmed on that ground and dismissed the case. *See Cayuga Nation v. Campbell*, 34 N.Y.3d 282, 299 (2019) (refusing to review the case on the merits and dismissing the proceeding where the Court lacked subject matter jurisdiction to consider the parties' dispute). This Court also did not adopt the Second Department's holding that that only a property owner may file a grievance pursuant to RPTL §524(3), thus acknowledging that no such restriction exists in the statute. *Larchmont Pancake House II*, 33 N.Y.3d at 240-41. Furthermore, this Court did not find that the "condition precedent" under RPTL §706(2) was not met, even though the business, and not the property owner, filed the grievances. *Id.* at 237.

This Court's decision in *Larchmont Pancake House II* is in accord with the body of case law which recognizes that the failure to timely file an administrative grievance with the BAR altogether that deprives a court of subject matter

jurisdiction to review the judicial petition challenging the assessment in question. *See Lavoie*, 222 A.D.2d at 561; *Matter of Frei*, 50 A.D.3d at 1382; *Raer Corp.*, 78 A.D.2d at 989.

Since *Circulo* and *Larchmont Pancake House I* were decided, courts outside the Second Judicial Department have been confronted with the Second Department's departure from judicial precedent, and the resulting conflict in judicial authority regarding whether a Net Tenant has the right to file an administrative grievance pursuant to RPTL §524(3). In the Fourth Department, Supreme Court decisions have considered whether *Circulo* and *Larchmont Pancake House I* prohibit a Net Tenant from filing an administrative grievance. *See Rite Aid*, 2018 WL 11243801, *2-*6; *Walgreen*, at pp. 2-15; *Rite Aid 2*, at pp. 2-15. In each of these cases, the municipalities, citing *Circulo* and *Larchmont Pancake House I*, moved to dismiss the RPTL article 7 petitions because the Net Tenant, and not the property owner, filed the administrative complaints. In each case, the Supreme Court denied the motion to dismiss, holding that application of the interpretation of RPTL §524(3) found in *Circulo* and *Larchmont Pancake House I* to a Net Tenant was contradicted by the rules of statutory construction, decisional authority, and deference to ORPTS' interpretation of that statute. *Rite Aid*, *supra,* *2-*6; *Walgreen*, pp. 9-15; *Rite Aid 2*, pp. 9-15. The courts also noted that *Circulo* and *Larchmont Pancake House I* were Second Department decisions,

while Fourth Department precedent supported the denial of the motions. *Rite Aid*, *supra,* *2-*6; *Walgreen*, pp. 9-15; *Rite Aid 2*, pp. 9-15. The courts further held that even if the Net Tenants did not fall under the definition of "person whose property is assessed" under RPTL §524(3), the failure to submit an authorization by the property owner was a curable defect, and granted *nunc pro tunc* amendment of the administrative complaints.[16]

C. ORPTS' Role and Guidance

In *Ferraiolo v. O'Dwyer*, 302 N.Y. 371, 376 (1951), this Court observed, "[w]hile practical construction by an officer or agency charged with the administration of a statute, especially when followed by a long period of time, is entitled to great weight and may not be ignored … such an interpretation is not necessarily binding on the court but nonetheless constitutes an element to be considered." (Citing N.Y. Statutes §93 [McKinney's 1942]) (internal citations omitted).

[16] The Decision below also cited *Grecian Gardens Apartments, Inc. v. Barlow*, 71 Misc.2d 457 (Sup. Ct. Monroe Cty. 1972), which held that a tenant-taxpayer could file an article 7 petition even if the predicate grievance was filed by an agent of the owner. This holding does not support the proposition that an RPTL article 7 proceeding must be dismissed because the predicate administrative grievance was filed by a Net Tenant who is authorized by its lease to grieve the assessment. Moreover, the Supreme Court, Monroe County, has since concluded that a Net Tenant may properly file an administrative grievance. *See Rite Aid*, *supra,* at *2-*6; *Walgreen*, pp. 9-15.

The Legislature delegated to ORPTS the authority and responsibility to promulgate the RP-524 Complaint form and its instructions. *See* RPTL §524(3). Shortly after the 1982 amendments were signed into law, ORPTS was asked to opine, "if a lessee in a shopping center has standing to bring a complaint before the board of assessment review and, subsequently, an Article 7 proceeding for judicial review of the assessment of the property containing the leased premises[?]" R. 279 (7 Opinion of Counsel SBEA No. 123). After thoroughly analyzing existing case law, ORPTS advised, "[a] shopping center lessee who is obligated by lease to pay taxes has the right to administrative and judicial review of the assessment of the property leased." *Id.* This opinion, issued nearly 40 years ago, upon which DCH's attorney herein and countless other attorneys in this State have relied, and used as guidance for purposes of filing administrative grievances, is entitled to deference. *Ferraiolo*, 302 N.Y. at 376.

Consistent with the above Opinion of Counsel is ORPTS Publication 1114, entitled "Contesting Your Assessment In New York State," which provides "[a]ny person who pays property taxes can grieve an assessment, including property owners, purchasers, [and] tenants who are required to pay property taxes pursuant to a lease or written agreement." R. 247 (emphasis added).[17] Significantly, the instructions do not state that in order to file a valid grievance, tenants must either

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

attach to the grievance an authorization signed by the property owner or identify themselves as an agent of the owner; rather, the instructions explicitly state that "tenants who are required to pay property taxes" can grieve the assessment. *See id.* The Decision did not address either the Opinion of Counsel or ORPTS' instructions. Because the Legislature delegated to ORPTS the authority and responsibility for drafting the complaint form and instructions to be used by all complainants at the administrative grievance stage, its interpretation is entitled to deference from this Court. *See Matter of Koch v. Sheehan*, 95 A.D.3d 82, 89 (4th Dep't 2012), *aff'd*, 21 N.Y.3d 697 (2013); *Matter of Scotsmen Press, Inc. v. State Tax Appeals Tribunal*, 165 A.D.2d 630, 634 (3d Dep't 1991).

D. Long-Standing Tax Certiorari Practice

Attorneys in this law firm have collectively practiced in the field of tax certiorari for nearly fifty (50) years. We have filed hundreds of administrative complaints on behalf of tenants contractually obligated to pay the property taxes and authorized by their lease to file the administrative complaint. We have also consulted with other tax certiorari practitioners who serve in this capacity. Based upon the collective experiences, it is virtually the universal practice among attorneys representing "Net Tenants" or "contractually obligated" taxpayers in tax certiorari proceedings to file RPTL article 5 complaints in the name of the Net

Tenant/contractually obligated taxpayer and not the property owner. This practice has developed in reliance upon the above-stated long-standing case law precedent, ORPTS' Opinion of Counsel and their instructions accompanying the RP-524 Complaint form. Prior to *Circulo*, virtually every tax certiorari practitioner and municipality in the Ninth Judicial District, including the Respondents herein, conducted themselves with the knowledge that non-owner aggrieved parties had the statutory right/standing to file RPTL article 5 complaints. This understanding also includes transactional real estate attorneys who draft leases – like DCH's lease – which grant the tenant the right to challenge the real estate tax assessments. Upon receiving a BAR determination denying assessment relief, it is those same Net Tenants/contractually obligated taxpayers who file RPTL article 7 petitions for judicial review.

E. Town of Mamaroneck's Practice, Procedure and Protocols

Even Respondent Town adhered to ORPTS' guidance. The Town specifically adopted ORPTS' interpretation of RPTL §524(3). Prior to April 2014, the Town's public Internet website, under the heading "Town Assessor," provided: "[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 (emphasis added). The website also directed

viewers to Publication 1114, which re-affirms that Net Tenants are permitted to file a grievance, and to a RP-524 Complaint form (also published by ORPTS).[18] *Id*. The Decision did not address the Town's public website and its instructions to complainants.

There is simply no merit to Respondents' current position that the Decision presents nothing novel, but rather reflects the law in this State over the past 50 years. Respondents have cited to no decision prior to the within case where an RPTL article 7 judicial petition was dismissed for a failure to meet the condition precedent where a Net Tenant, rather than the property owner, filed the predicate grievance. Respondents' reliance upon *Raer Corp*., 79 A.D. at 939 and *Radisson Cmty. Ass'n v. Long*, 3 A.D.3d 135, 139 (4th Dep't 2003), is misplaced because each case is factually distinguishable. In *Raer*, the property owner failed to file a grievance and nonetheless filed a judicial petition seeking assessment relief. In *Radisson,* the property owner sought to amend its petition to seek a greater reduction in assessment than it requested from the Board of Assessment Review. In each case, the owner and petitioner were one and the same, so it is logical that the Fourth Department used the word "owner" in these decisions.

[18] The Town did not change this practice until approximately April 2014, when the statement "[a]ny person aggrieved by an assessment … may file a complaint" was removed from its Internet website. *See* R. 275.

"The 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 and is authority only for what was actually decided." *Rolfe v. Hewitt*, 227 N.Y. 486, 494 (1920). Neither *Raer* nor *Radisson* involved the same set of facts here, *i.e.*, a Net Tenant who filed the predicate grievance. Consequently, those decisions cannot be interpreted as authority for the proposition that a Net Tenant lacks standing to file the predicate administrative grievance pursuant to RPTL §524(3) or that only a property owner may file a grievance.

POINT III

THE APPELLATE DIVISION'S INTERPRETATION OF RPTL § 524(3) IS INCONSISTENT WITH THE REMEDIAL NATURE OF THE RPTL, WHICH SHOULD BE LIBERALLY CONSTRUED TO THE END THAT THE TAXPAYER'S RIGHT TO HAVE THE ASSESSMENT REVIEWED SHOULD NOT BE DEFEATED BY A TECHNICALITY.

As early as 1875, this Court described tax certiorari proceedings as being "meant to afford an early, speedy and cheap mode of testing the legality" of the assessment, and "open to any one, owner or lessee, who is likely to be put to litigation and expense by reason of it." *Matter of Burke*, 62 N.Y at 228.

For 145 years since the *Burke* decision, this Court has repeatedly held that the law "'relating to review of assessments is remedial in character and 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 Eastern Mall*, 36 N.Y.2d at 548 (quoting *People ex rel. N.Y. City Omnibus Corp. v. Miller*, 282 N.Y. at 9). "A liberal construction ... is one [that] is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute…, though actually it is not within the letter of the law." *People by Schneiderman v. Ivybrooke Equity Enters., LLC*, 175 A.D.3d 1000, 1001 (4th Dep't 2019) (quotation omitted). Additionally, any ambiguity in the statute should be resolved in favor of the taxpayer and against the taxing authority. *Matter of Great Eastern Mall,* 36 N.Y.2d at 547.

Recognizing the remedial nature of the RPTL, this Court has held that:

> "mere technical irregularities in the commencement process should be disregarded if a substantial right of a party is not prejudiced. . . . [to] require strict compliance with [the statute] in this context would mean that, under certain circumstances, petitioners would be foreclosed from judicial review of their tax assessments through no fault of their own. We find that approach unduly harsh and contrary to our historically liberal construction of pleading and procedure in tax certiorari proceedings."

Matter of Garth v Bd. of Assessment Review for Town of Richmond, 13 N.Y.3d 176, 181 (2009).

One of the stated purposes underlying tax assessment review proceedings is to provide a right to relief to an aggrieved taxpayer (like DCH). Time and again, courts have liberally construed the RPTL to sustain a taxpayer's right to assessment review against objections to the form or sufficiency of the grievance or petition. *See Matter of Miller v. Bd. of Assessors*, 91 N.Y.2d 82 (1997) (refusing to dismiss an article 7 petition where the predicate administrative complaints lacked authorizations required by RPTL §524); *Matter of Great Eastern Mall*, 36 N.Y.2d at 547 (finding service on the deputy town clerk, and not the town clerk, satisfied the requirements of RPTL §708(3)); *Matter of Tennanah Lake Townhouse and Villa Cmty., Inc. v. Town of Freemont*, 168 A.D.2d 789, 790 (3d Dep't 1990) (denying a motion to dismiss when "there was at least formal compliance with the statutory requirement of RPTL 524(3) in that each complaint to the Board contained an estimated value of the property in question"); *Matter of Astoria Fed. Sav. & Loan Ass'n*, 212 A.D.2d at 601 (denying a motion to dismiss where the authorization did not bear a date within the same calendar year that the complaint was filed); *Matter of Divi Hotels Mktg., Inc. v. Bd. of Assessors of Cty. of Tompkins*, 207 A.D.2d 580, 582 (3d Dep't 1994) (denying a motion to dismiss where the complaint was in the name of the aggrieved party who did not own the property at that time); *Matter of Rotblit v. Bd. of Assessors and/or the Bd. of Assessment Review of the Vill. Of Russell Gardens*, 121 A.D.2d 727 (2d Dep't

1986) (affirming the denial of a cross-motion to dismiss where proceedings were filed in the name of the prior owner); *Bergman v. Horne*, 100 A.D.2d 526 (2d Dep't 1984) (finding respondents waived objections to petitions that "did not include a writing authorizing petitioners' counsel to verify the petitions, as required by RPTL 706.")

A liberal construction of RPTL §§524(3) and 706(2) would permit the grievance to be filed by anyone who is '"likely to be put to litigation and expense' as a direct result of its legal obligation." *Larchmont Pancake House II*, 33 N.Y.3d at 238 (quoting *Matter of Burke*, 62 N.Y. at 227-28). DCH clearly falls into this category as it is obligated by its lease to pay all of the real property taxes assessed against the property it occupies. Notwithstanding the remedial nature of the statute and the aforesaid case law that has preserved a taxpayer's right to assessment review, the Appellate Division, relying upon *Circulo* and *Larchmont Pancake House I*, restrictively construed RPTL §§524(3) and 706(2) to hold that the condition precedent was not met because the owner itself did not file the grievance, and DCH did not identify itself on the grievance form as an agent of the owner.

This Court has held that "substance should be preferred over form" in proceedings brought under the RPTL. *Matter of Great Eastern Mall*, 36 N.Y.2d at 548; *Matter of Garth*, 13 N.Y.3d at 180. The Appellate Division below clearly placed form over substance as it dismissed the petitions based upon an alleged

technicality concerning the form of the administrative grievances, *i.e.*, in whose name the grievances were filed. To be clear, this is a not a case where no grievances were filed and DCH filed article 7 petitions seeking relief; yet, the Appellate Division ruled as if no grievances had been filed and dismissed the petitions accordingly. The court ignored the fact that the filed grievances (1) provided Respondents with the statutorily-required notice, and (2) did not prejudice any substantial right of the Respondents under the circumstances; in fact, at no point have Respondents identified any substantial right that would be prejudiced were the proceedings allowed to go forward as filed. The Appellate Division dismissed the petitions based on a newly created and unprecedented technicality that was imposed *ex post facto*; dismissal on these grounds is inconsistent with the remedial nature of the RPTL.

The Appellate Division's holding is untenable because RPTL §706(2) contains no requirement that the complaint must be filed exclusively by the owner or by a party identifying itself as an agent of the owner. *See* RPTL §706(2) ("[s]uch petition must show that a complaint was made in due time to the proper officers to correct such assessment.") If the Legislature had intended that result, it would have drafted the statute to read, "[s]uch petition must show that a complaint was made *by the property owner or by a party designating itself on the complaint*

as an agent of the property owner in due time to the proper officers to correct such assessment." (emphasis supplied).

POINT IV

THE APPELLATE DIVISION IGNORED SETTLED LAW WHICH HOLDS THAT TECHNICAL OBJECTIONS THAT ARE NOT RAISED AT THE GRIEVANCE STAGE ARE WAIVED.

It is well settled that alleged defects in the form of the complaint are technical, not jurisdictional, in nature. *See Matter of Miller*, 91 N.Y.2d at 86-87; *Matter of Astoria Fed. Savings & Loan Assoc*., 212 A.D.2d at 601; *Matter of City of Little Falls,* 68 A.D.2d at 739. 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 People ex rel. MacCracken v. Miller,* 291 N.Y. 55, 64 (1943) (Tax Commission waived objection to form of complaint by acting on it and sustaining the assessment); *Matter of Miller*, 91 N.Y.2d at 87 (the filing of an authorization from a prior owner is a waivable technical defect); *People ex rel. Brooklyn Paramount Corp. v. Sexton*, 255 A.D. 1011 (2d Dep't 1938) (City waived its objections to the grievance where board received the grievance and acted upon it); *Skuse v. Town of S. Bristol*, 99 A.D.2d 670 (4th Dep't 1984) (objections to the sufficiency of information provided or lack of a written authorization is waived when the municipality accepts the grievances and acts upon them).

In *Matter of Miller*, 91 N.Y.2d at 84, the municipality moved to dismiss the petition with respect to the thirty properties included therein because written authorizations from the owners were not filed with the administrative grievances. The municipality also sought to dismiss the petition where one of the properties sold prior to the grievance filing deadline, and both the grievance and petition with respect to that property was filed in the name of the prior owner and lacked an authorization from the actual owners. *Id.* Notwithstanding, this Court allowed the RPTL article 7 proceeding to go forward since the missing authorization and the filing in the prior owners' name presented technical, not jurisdictional, defects. *Id.* at 86-87.

The purported defect here, if in fact it is considered a defect, is that DCH filed the grievances in its own name and not the property owner's name, which is, at most, a technical defect.[19] The Town BAR and Village BAR 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 in the proceedings have Respondents claimed that they would be prejudiced

[19] DCH did file the 2014 Town grievance in the owner's name. *See* R. 160 (grievance filed by "700 Waverly Avenue Corp. by DCH Investments Inc. (New York) as Tenant Obligated to Pay Taxes.") The Decision overlooked this fact.

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

POINT V

EVEN ASSUMING, *ARGUENDO*, THAT DCH IS NOT THE "PERSON WHOSE PROPERTY IS ASSESSED," IT WAS AUTHORIZED BY ITS LEASE TO CHALLENGE THE TAX ASSESSMENT, AND THEREFORE THE APPELLATE DIVISION ERRED IN DISMISSING THIS PROCEEDING.

There can be no dispute that an owner, pursuant to a lease, may authorize a tenant to challenge a property's tax assessment. *See Matter of Waldbaum*, 74 N.Y.2d at 133; *Big "V" Supermarkets*, 114 A.D.2d at 127; *EFCO Products*, 161 A.D.2d at 46-47.

DCH's lease authorized it to challenge the assessments upon which the real property taxes are calculated. R. 56. As such, it was wholly proper for DCH to file a grievance against the Town in 2009, and to authorize Griffin, Coogan, Blose, & Sulzer, P.C., its attorneys, to file, as its agent, grievances on its behalf and/or in the owner's name against the Town and Village. Therefore, it was error for the Appellate Division to dismiss this consolidated proceeding when DCH's lease specifically authorized it to challenge the Subject Property's real property tax

assessments.[20] Moreover, the Appellate Division's Decision is contrary to its own decision in *EFCO Prods*., 161 A.D.2d at 46-47 and the Third Department's decision in *Big "V" Supermarkets*, 114 A.D.2d at 727-28, wherein the courts reached the merits even though the predicate administrative grievances were filed by the lessee and not the property owner.

CONCLUSION

Prior to *Circulo*, all of the reported court decisions and administrative guidance published by the State of New York recognized the right of a Net Tenant to file an RPTL §524 complaint. In *Circulo*, the Second Department never addressed this precedent and held that only the property owner may file an RPTL §524 complaint. That court has subsequently applied that rule in *Larchmont Pancake House I* and the Decision herein which, in turn, has created a split in authority between the Second Department on one hand and the Third Department and Supreme Courts in the Fourth Department on the other hand.

DCH has established that the plain language of the statute, the underlying legislative history, and several rules of statutory construction do not support the Second Department's interpretation of RPTL §524(3). DCH has also established

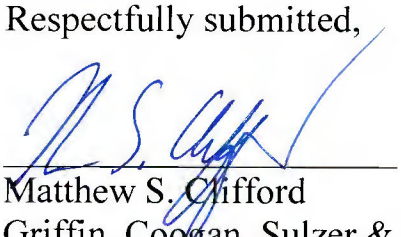
[20] Respondents cannot now argue that dismissal was proper because no authorization from the property owner was attached to the grievances, as this objection was never raised at either the grievance stage or in the underlying proceedings, and therefore has been waived. *See Matter of Miller*, 91 N.Y.2d at 86-87; *Skuse*, 99 A.D.2d at 670.

that judicial precedent, administrative guidance and an opinion from ORPTS, tax certiorari practice, and the Town's own guidance and position before 2014, all acknowledged that a Net Tenant could properly file an RPTL §524 complaint.

This Court can rectify the Second Department's error by reversing the Decision and continuing the long-established precedent giving the right to Net Tenants to file an administrative complaint to contest the assessment upon which their obligation to pay taxes is based.

DATED: July 27, 2021
Bronxville, New York

Respectfully submitted,



Matthew S. Clifford
Griffin, Coogan, Sulzer & Horgan, P.C.
Attorneys for Petitioner-Appellant
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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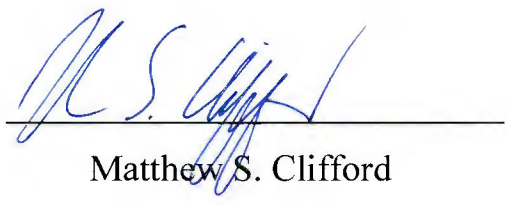
Dated: July 27, 2021



Matthew S. Clifford

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

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

On July 29, 2021

deponent served the within: **BRIEF FOR PETITIONERS-APPELLANTS**

upon:

William Maker, Jr., Esq.
Attorney for Respondents-Respondents
the Town of Mamaroneck, a Municipal Corporation,
its Assessor and Board of Assessment Review
740 West Boston Post Road
Mamaroneck, New York 10543
(914) 949-6400

McCullough, Goldberger & Staudt, LLP
Attorneys for Respondents-Respondents
The Village of Mamaroneck, a Municipal
Corporation, its Assessor and Board of
Assessment Review
1311 Mamaroneck Avenue, Suite 340
White Plains, New York 10605
(914) 949-6400

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

Sworn to before me on 29th day of July 2021

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

T. Heath

Job# 305195