*To be Argued by:*
MATTHEW S. CLIFFORD
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—Second Department

In the Matter of

**Docket No.: 2017-03016**

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
(914) 961-1300

Westchester County Clerk's Index No. 23040/09

## STATEMENT PURSUANT TO CPLR § 5531

# New York Supreme Court

## Appellate Division—Second Department

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.

---

1. The index number of the case in the court below is 23040/09.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, Westchester County.

4. The action was commenced on or about October 6, 2009 by filing of a Notice of Petition and Petition.

5. The nature and object of the action involves Article 7 of Real Property Tax Law to review assessments.

6. This appeal is from the Judgment of the Hon. O. Peter Sherwood, dated February 10, 2017, which dismissed the Petitions and Ordered that Costs and Disbursements not be Awarded.

7. This appeal is on the full reproduced record.

## TABLE OF CONTENTS

**Page**


TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF QUESTIONS PRESENTED.....1

PRELIMINARY STATEMENT.....3

STATEMENT OF FACTS.....4

Challenges to the Town Assessments.....5

Challenges to the Village Assessments.....9

Further proceedings.....10

The Lower Court's Decision and Order .....11

POINT I: THE LOWER COURT'S TOTAL RELIANCE ON THIS COURT'S DECISION IN *CIRCULO* WAS ERROR AND THEREFORE, THE JUDGMENT MUST BE REVERSED.....12

POINT II: THE LOWER COURT ERRED BY HOLDING THAT PETITIONER, AS THE TENANT OBLIGATED TO PAY REAL ESTATE TAXES, LACKED STANDING UNDER RPTL § 524(3) TO FILE THE COMPLAINTS.....19

A. RPTL § 524(3) Does Not Restrict The Right To File A Complaint Exclusively To The Owner.....19

B. This Court Should Follow Existing Precedent Which Has Interpreted The Language "Person Whose Property Is Assessed" To Include Net Tenants.....24

**Page**

C. The Lower Court Erred By Dismissing The Petitions As The Lease Authorized Petitioner To Challenge The Real Estate Taxes On The Subject Property.....35

POINT III: THE LOWER COURT ERRED BY HOLDING THAT IT LACKED SUBJECT MATTER JURISDICTION TO REVIEW THE ASSESSMENTS.....38

POINT IV: RESPONDENTS'CONTENTION THAT ONLY A PROPERTY OWNER MAY FILE A COMPLAINT IS BARRED BY THE PRINCIPLE OF ESTOPPEL AND HAS OTHERWISE BEEN WAIVED.....45

A. Respondents Have Manufactured A Technical Defect.....45

B. Respondents Are Estopped From Objecting To Any Purported Defects In The Complaints.....47

C. Respondents Failed To Timely Object To The Purported Defects In The Complaints And Thus Have Waived This Objection.....51

CONCLUSION.....53

CERTIFICATE OF COMPLIANCE.....54

## TABLE OF AUTHORITIES

**Cases** **Page**

*1555 Boston Rd. Corp. v. Fin. Adm'r of N.Y.*,
61 A.D.2d 187 (2d Dep't 1978).....47-49, 50

*American Transit Ins. Co. v. Sartor*
3 N.Y.3d 71 (2004).....23

*Ames Dep't Stores v. Assessor*,
102 A.D.2d 9 (4th Dep't 1984).....36

*Ames Dep't Store, Inc., No. 418 v. Assessor*,
261 A.D.2d 835 (4th Dep't 1999).....26, 52

*Arlen Realty & Dev. Corp. v. Bd. of Assessors of Town of Smithtown*,
74 A.D.2d 905 (2d Dep't 1980).....25

*Astoria Fed. Sav. & Loan Ass'n. v. Bd. of Assessors*
212 A.D.2d 600 (2d Dep't 1995).....38-39, 40, 42, 45

*Bergman v. Horne*,
100 A.D.2d 526 (2d Dep't 1984).....46, 47

*Big "V" Supermarkets, Inc., Store # 217 v. Assessor of Town of E. Greenbush*,
114 A.D.2d 726 (3d Dep't 1985).....26, 30, 32-33, 43

*Charles v. Charles*,
296 A.D.2d 547 (2d Dep't 2002).....47

*Chemical Specialties Mfrs. Ass'n v. Jorling*,
85 N.Y.2d 382 (1995).....23

*Cherrypike Estates, Inc. v. Herbert*,
67 Misc.2d 853 (Sup. Ct. Nassau Cty. 1971).....39

*City of Albany v. Town of Coeymans*,
253 A.D. 436 (3d Dep't 1938).....39

**Page**

*City of Rochester v. Assessors of the Town of Canadice*,
136 A.D.2d 966 (4th Dep't 1988).....39

*Columbia Cty. Mental Retardation Realty Co. v. Palen*,
97 Misc.2d 9 (Supreme Ct. Columbia Cty. 1978).....14

*DHI Mgmt. Agency v. City of Yonkers*,
67 A.D.2d 913 (2d Dep't 1979).....51

*Divi Hotels Marketing, Inc. v. Bd. of Assessors of Cty. of Tompkins*,
207 A.D.2d 580 (3d Dep't 1994).....30, 33, 45, 47

*Dutchess Cty. Dep't of Soc. Servs. ex rel. Day v. Day*,
96 N.Y.2d 149 (2001).....24

*EFCO Products v. Cullen*,
161 A.D.2d 44 (2d Dep't 1990).....25, 30, 32, 43

*Financial Indus. Regulatory Auth., Inc. v. Fiero*
10 N.Y.3d 12 (2008).....44

*Hebrew Free Sch. Ass'n v. Mayor, Aldermen & Commonalty*,
99 N.Y. 488 (1885).....14

*Loomis v. Civetta Corinno Constr. Corp.*,
54 N.Y.2d 18 (1981).....46

*Mack v. Assessor of the Town of Ramapo*,
72 A.D.2d 604 (2d Dep't 1979).....22, 24, 25

*Majewski v. Broadalbin-Perth Cent. Sch. Dist.*,
91 N.Y.2d 577 (1998).....19

*Malik v. Tax Comm'n of the City of N.Y.*,
68 A.D.3d 870 (2d Dep't 2009).....24, 35

*Matter of Al-Ber, Inc. v. N.Y. City Dep't of Fin.*,
80 A.D.3d 760 (2d Dep't 2011).....14

**Page**

*Matter of Birchwood Village LP v. Assessor of the City of Kingston*,
94 A.D.3d 1374 (3d Dep't 2012).....43

*Matter of Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Parsons*,
61 Misc.2d 838 (Sup. Ct. Wayne Cty. 1969).....20

*Matter of Bd. of Educ. of City of Jamestown v. Baker*,
241 A.D. 574 (4th Dept. 1934),
*aff'd*, 266 N.Y. 636 (1935).....14

*Matter of Bd. of Managers of Century Condo. v. Bd. of Assessors*,
96 A.D.3d 739 (2d Dep't 2012).....46

*Matter of Burke*,
62 N.Y. 224 (1875).....25

*Matter of Charter Dev. Co., LLC v. City of Buffalo*,
6 N.Y.3d 578 (2006).....14

*Matter of Circulo Housing Dev. Fund Corp. v. Assessor*,
96 A.D.3d 1053 (2d Dep't 2012).....3, 4, 10-15, 31, 43, 50

*Matter of City of Little Falls v. Bd. of Assessors of the Town of Salisbury*,
68 A.D.2d 734 (4th Dep't 1979).....39, 42, 51

*Matter of Ettore I. v. Angela D.*,
127 A.D.2d 6 (2d Dep't 1987).....47

*Matter of Frei v. Town of Livingston*,
50 A.D.3d 1381 (3d Dep't 2008).....42

*Matter of Great Eastern Mall, Inc. v. Condon*,
36 N.Y.2d 544 (1975).....17, 19-20, 27, 33, 41-42

*Matter of Henderson v. Silco*,
36 A.D.2d 439 (4th Dep't 1971).....51

**Page**

*Matter of Larchmont Pancake House v Bd. of Assessors and/or the Assessor of the Town of Mamaroneck*,
153 A.D.3d 521 (2d Dep't 2017).....17-18, 31-32, 33, 34

*Matter of Onteora Club v. Bd. of Assessors*,
29 A.D.2d 251 (3d Dep't 1968).....26, 30, 33, 43

*Matter of Springer v. Bd. of Educ. of the City Sch. Dist. of the City of N. Y.*,
27 N.Y.3d 102 (2016).....19, 22

*Matter of Stein*,
131 A.D.2d 68 (2d Dep't 1987).....21

*Matter of Tennanah Lake Townhouse and Villa Cmty. v. Town of Fremont*,
168 A.D.2d 789 (3d Dep't 1990).....39, 40

*Matter of Vill. of Chestnut Ridge v. Howard*,
92 N.Y.2d 718 (1999).....21

*Matter of Walter*,
75 N.Y. 354 (1878).....25

*Matter of World Buddhist Ch'an Jing Ctr., Inc. v. Schoeberl*,
45 A.D.3d 947 (3d Dep't 2007).....17

*Matter of Yeshivath Shearith Hapletah v. Assessor of the Town of Fallsburg*,
79 N.Y.2d 244 (1992).....17, 33

*McLean's Dep't Stores, Inc. v. Comm'r of Assessment*,
2 A.D.2d 98 (3d Dep't 1956).....25-26, 27-29, 30, 34, 35, 41, 43

*Mendick v. Sterling*,
83 A.D.2d 749 (4th Dep't 1981).....48

**Page**

*Miller v. Bd. of Assessors*,
164 Misc.2d 62 (Sup. Ct. Suffolk Cty. 1995),
*aff'd*, 236 A.D.2d 408 (2d Dep't),
*aff'd*, 91 N.Y.2d 82 (1997).....45

*Miller v. Bd. of Assessors*,
91 N.Y.2d 82 (1997).....30, 32, 43

*Newsday, Inc. v. Town of Huntington*,
82 A.D.2d 245 (2d Dep't 1981).....33

*Patrolmen's Benevolent Ass'n of City of N.Y. v. City of N.Y.*,
41 N.Y.2d 205 (1976).....19

*People ex. rel. Bingham Operating Corp. v. Eyrich*,
265 A.D. 562 (3d Dep't 1943).....22, 29

*People ex rel. Irving Trust Co. v. Miller*,
264 A.D. 270 (1st Dep't 1942).....51

*People ex rel. N.Y. City Omnibus Corp. v. Miller*,
282 N.Y. 5 (1939).....17, 20, 42

*Plato's Cave Corp. v. State Liquor Auth.*,
68 N.Y.2d 791 (1986).....24

*Rocovich v. Consol. Edison Co.*,
78 N.Y.2d 509 (1991).....19

*Rosner v. Metro. Prop. & Liab. Ins. Co.*,
96 N.Y.2d 475 (2001).....21

*Rotblit v. Bd. of Assessors and/or the Bd. of Assessment Review of the Village of Russell Gardens*,
121 A.D.2d 727 (2d Dep't 1986).....45-46, 47

*Sterling Estates, Inc. v. Bd. of Assessors*,
66 N.Y.2d 122 (1985).....38, 40, 41

**Page**

*Waldbaum, Inc. v. Fin. Adm'r of City of N.Y.*,
74 N.Y.2d 128 (1989).....29-30, 35, 36

*W.T. Grant Corp. v. Srogi*,
52 N.Y.2d 496 (1981).....17

*Young Israel of Far Rockaway, Inc. v. N.Y.*,
33 A.D.2d 561 (2d Dep't 1969).....14

**Statutes**

CPLR 2001.....42

CPLR 3026.....42

McKinney's Consol. Laws of N.Y., Book 1, Statutes § 94.....23

McKinney's Consol. Laws of N.Y., Book 1, Statutes § 193.....21

RPTL § 420-a.....13-14, 15

RPTL § 420-b.....14

RPTL § 522.....16

RPTL § 524.....11, 13, 15, 16, 19, 20-24, 28, 32-35, 43, 45

RPTL § 554.....22

RPTL § 704.....16, 24, 26, 28, 35, 41

RPTL § 706.....28, 34, 38, 40

**Historical Statutes** **Page**

L. 1829, Chap. XIII, Title II, Article Second, § 15, p. 392.....21

L. 1851, Chap. 176, § 6, p. 334.....21

L. 1858, Chap. 338, § 1, p. 574.....21

L. 1874, Chap. 312, §§ 1-2, p. 366.....21

L. 1896, Chap. 908, pp. 25-26.....21

L. 1982, Chap. 714, § 9, pp. 2627-28.....21

Former Tax Law § 290-c.....28

**Local Laws**

City of Binghamton Local Law No. 1 of 1943.....28

**Miscellaneous**

7 Opinion of Counsel SBEA No. 123
(ORPTS rev. 1983).....31

The Merriam-Webster Dictionary.....21

## STATEMENT OF QUESTIONS PRESENTED

1) Whether the Supreme Court, Westchester County (Hon. O. Peter Sherwood, J.S.C.) (the "Lower Court"), erred by dismissing the judicial petitions in these consolidated proceedings for lack of subject matter jurisdiction despite the fact that the property owner, by virtue of a lease, specifically authorized Petitioner-Appellant in writing to file proceedings to contest the real estate taxes?

The Lower Court answered in the negative.

2) Whether a tenant, obligated to pay all real estate taxes levied against the subject property and explicitly authorized in writing by its lease to challenge all real estate taxes, has standing to file a RP-524 Complaint on Real Property Assessment ("RP-524 Complaint") with the Board of Assessment Review?

The Lower Court answered this question in the negative.

3) Whether the principle of estoppel precludes Respondents-Respondents from seeking to dismiss the judicial petitions filed in these proceedings when Petitioner-Appellant satisfied all statutorily-required conditions precedent and: (i) the instruction forms for filing a complaint pursuant to Real Property Tax Law ("RPTL") § 524, published by the New York State Department of Taxation and Finance, Office of Real Property Tax Services and referenced on the Town of Mamaroneck's internet web site during the years in dispute, specifically state that a net tenant who is required to pay ad valorem real estate taxes may file a complaint pursuant to RPTL § 524; and (ii) the Town of Mamaroneck Board of Assessment Review and Village of Mamaroneck Board of Assessment Review acted on those complaints on the merits?

The Lower Court did not address this question.

4) Whether Respondents-Respondents waived any objection to the complaints filed by not timely raising their objections?

The Lower Court answered this question in the negative.

## PRELIMINARY STATEMENT

This appeal concerns whether petitioner-appellant, DCH Auto (hereinafter "DCH" or "Petitioner"), in its capacity as a lessee/tenant obligated to pay taxes and with the written contractual right to challenge real estate taxes, had standing to challenge the assessments fixed by Respondents-Respondents Town of Mamaroneck and Village of Mamaroneck (hereinafter "Respondents").

In its decision and order dated December 16, 2016, the Lower Court, relying exclusively upon this Court's decision in *Matter of Circulo Housing Dev. Fund Corp. v. Assessor*, 96 A.D.3d 1053 (2d Dep't 2012) concluded that it lacked subject matter jurisdiction over these proceedings because the required underlying administrative complaints filed pursuant to RPTL article 5 had been filed by Petitioner and not the property owner, and that only a property owner had the legal standing to file a RP-524 Complaint[1] to obtain administrative review of the tax assessment. (R.16-17).[2] According to the Lower Court, because Petitioner, and not the "property owner", filed the within RP-524 Complaints, Petitioner "did not satisfy 'a condition precedent to the commencement of [these] proceeding[s] ... in that the Owner must have made a complaint regarding the unlawful assessment to the Board for review pursuant to RPTL article 5.'" (R.16-17 [quoting *Circulo*, 96

[1] The terms "RP-524 Complaint", "complaint" and "grievance" all refer to the administrative 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 will be used interchangeably throughout this Brief.

[2] Parenthetical references designated "R.__" refer to pages in the Record on Appeal.

A.D.3d at 1056]). Petitioner contends that the Lower Court's determination was factually and legally erroneous in that RPTL article 5 does not restrict the right to file a complaint exclusively to the property owner; rather the statute grants the right to file to the "person whose property is assessed", which embodies anyone whose pecuniary interests are or may be adversely impacted by an assessment. Accordingly, the judgment of Lower Court should be reversed as a matter of law.

## STATEMENT OF FACTS

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). By a lease agreement dated October 10, 2007, 700 Waverly Avenue Corp. leased the Subject Property to Petitioner for a term of twenty (20) years (the "Lease"). (R.49-99). Pursuant to the Lease, Petitioner is obligated to pay, *inter alia*, all real estate taxes levied upon the Subject Property. (R.54-55). 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).

The Lease specifically authorizes Petitioner to bring proceedings to challenge the Subject Property's assessments: "Tenant 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 ...."[3] (R.56). The term "Imposition" includes "all ad valorem real estate taxes or other taxes in the nature thereof..." (R.55).

Challenges to the Town Assessments

In 2009, Petitioner timely filed a RP-524 Complaint challenging the Town's tentative assessment. (R.32). The Board of Assessment Review ("Town BAR") accepted the RP-524 Complaint, consistent with its practice of instructing non-owner taxpayers that they are eligible to grieve property tax assessments. (R.274). After acceptance and deliberation on the RP-524 Complaint, the Town BAR denied the complaint and did not reduce the Subject Property's assessment. (R.35; 105). Significantly, the Town BAR did not dismiss or reject the complaint based upon it being filed on behalf of Petitioner and not by the owner. (*See* R.105). The Notice of Determination states: "If you are dissatisfied with the determination of the Board of Assessment Review, you may seek judicial review of your assessment pursuant to Article 7 of the Real Property Tax Law ...." (*Id.* [emphasis added]).

On October 6, 2009, Petitioner timely filed an article 7 Notice of Petition and Petition challenging the 2009 final Town assessment. (R.35). The Town accepted the Notice of Petition and Petition and took no immediate action to challenge the proceeding. (*See* R.276).

[3] This right is subject to certain exceptions not relevant to the proceedings or the appeal.

Petitioner followed the identical procedures in assessment years 2010, 2011, 2013 and 2014, filing a RP-524 Complaint with the Town BAR challenging the Town's tentative assessment for the Subject Property. (R.32). Each year, prior to filing the aforementioned complaints, Petitioner's attorney reviewed the applicable statute, case law, and publications issued by the New York State Department of Taxation and Finance, Office of Real Property Tax Services ("ORPTS") for guidance. (R.273-74). One ORPTS manual, published in January 2009, and entitled "What To Do If You Disagree With Your Assessment", provides in relevant part:

> Who may complain? Any person aggrieved by an assessment (e.g., an owner, purchaser or tenant who is required to pay the taxes pursuant to a lease or written agreement) may file a complaint (blank RP-524 form is available in the back of this booklet). (R.235 [emphasis added]).[4]

Consistent with past practices and procedures, Petitioner's attorney consulted, and relied upon, the available state publications prior to the filing of the 2010 and 2011 complaints with the Town BAR. (R.273).

In February 2012, ORPTS issued Publication 1114 entitled "Contesting Your Assessment In New York State (Previously titled 'what to do if you disagree with your assessment')", which provides in relevant part:

[4] The RP-524 Form referenced in this publication uses the term "Complainant" in: Part Two, paragraphs 5 & 6; Part Three, Sections A, B and D; Part Four; and Part Six. (*See* R.242-45; *see also* R.42.)

**GRIEVANCE PROCEDURES**

Any person who pays property taxes can grieve an assessment, including:

- property owners
- purchasers
- tenants who are required to pay property taxes pursuant to a lease or written agreement.

(R.247 [emphasis added]).

Again, consistent with prior practices and procedures, Petitioner's attorney consulted, and relied upon, Publication 1114 prior to filing the 2013 and 2014 complaint with the Town BAR. (R.274). In each year that Petitioner filed a complaint, Respondents accepted it, without objection. (*Id.*) Until at least late April 2014, the Town's internet website, under the heading "Town Assessor", contained the following statement: "Any 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 a RP-524 Complaint form (also published by ORPTS).[5] (R.281).

[5] The Town did not change this practice until approximately April 2014, when the statement "Any person aggrieved by an assessment ... may file a complaint" was removed from its internet website. (R.275).

In each instance, the Town BAR accepted the RP-524 Complaint, consistent with the guidance set forth on the Town's internet website and the longstanding Town practice of allowing non-owner taxpayers to challenge property assessments. (R.274). Each time a complaint was filed, the Town BAR, after considering the RP-524 Complaint, acted on the merits by denying the complaint and not reducing the Subject Property's assessment; it did not dismiss or reject any of these RP-524 Complaints. (*See* R.36-38). Rather, the Town BAR treated all filed complaints in the same fashion irrespective of whether the complaint was filed in the name of the tenant or in the owner's name. (*See id.*) Similar to the 2009 Notice of Determination, the 2010, 2011, 2013, and 2014 Notices of Determination each advised Petitioner of its right to challenge the Town BAR's determination pursuant RPTL article 7. (R.119; 134; 149-50; 166-67; 182-83; 199-200; 218-19).

In each of the assessment years 2010, 2011, 2013, and 2014, Petitioner also timely filed and served RPTL article 7 petitions challenging the final Town assessment for that assessment year. (R.34).[6] Notably, in each proceeding, the Town accepted the Notice of Petition and Petition and took no immediate action thereafter. (R.276). The Town never rejected any proceeding as improperly commenced. Had the Town sought to dismiss or reject the complaints and/or

[6] The parties stipulated that service upon the Town, as well as notice to the Westchester County Commissioner of Finance, the Superintendent of the Mamaroneck Union Free School District, and the Village Clerk of the Village of Mamaroneck, was timely made on all the Town petitions. (R.34). Petitioner voluntarily discontinued the 2012 proceeding against the Town because its appraiser concluded that no assessment reduction was warranted for that year.

petitions, Petitioner would have immediately challenged such action(s) as arbitrary, capricious, and contrary to law. (R.276).

Challenges to the Village Assessments

In each of the assessment years 2010, 2011 and 2013, Petitioner timely filed a RP-524 Complaint with the Village Board of Assessment Review ("Village BAR") challenging the Village's tentative assessment. (R.33). As with the Town proceedings, Petitioner's attorney followed the same protocols and procedures prior to filing the complaints. (R.272-74). At all times, it was the Village's practice to accept complaints filed by any person aggrieved by an assessment. (R.275).

In each instance, the Village BAR accepted the RP-524 Complaint (*id.*), and after considering each, acted on the merits but did not reduce the Subject Property's assessment. (*See* R.39-41; 182-83; 199-200; 218-19). Significantly, the Village BAR did not dismiss the RP-524 Complaints on the grounds that they were filed by Petitioner and not the owner of the Subject Property. (*See id.*) Moreover, the 2010, 2011, and 2013 Notices of Determination each advised Petitioner of its right to challenge the Village BAR's determination pursuant to RPTL article 7. (R.182-83; 199-200; 218-19).

As with the Town proceedings, in assessment years 2010, 2011, and 2013, Petitioner timely filed and served a Notice of Petition and Petition challenging the

final Village assessment for each year at issue. (R.34).[7] Consistent with its prior practices, the Village accepted the Notice of Petition and Petition and took no immediate action thereafter. (*See* R.276). Had the Village sought to dismiss the grievances and/or petitions as improperly filed, Petitioner would have immediately challenged such dismissal as arbitrary, capricious, and contrary to law. (*Id.*)

Further proceedings

After more than seven years since the initial filing of a complaint against the Town, and more than six years since the initial filing of a complaint against the Village, and more than four years after *Circulo* was decided, Respondents moved to dismiss the pending petitions on the grounds that the underlying RP-524 complaints were filed by Petitioner, and not the owner of the Subject Property. In order to limit the issues before the Lower Court, the parties entered a stipulation resolving all factual issues, including an agreement that the Subject Property was over-assessed in the Town in all years at issue and in the Village in 2010; the only issue for the Lower Court to resolve was whether Petitioner, as tenant obligated to pay real estate taxes under the Lease and therein authorized to challenge the Subject Property's property tax assessment, had legal standing to file a complaint

[7] The parties stipulated that service upon the Village, as well as notice to the Westchester County Commissioner of Finance and the Superintendent of the Mamaroneck Union Free School District, was timely made on all Village petitions. (R.34). Petitioner voluntarily discontinued the 2012 and 2014 proceedings against the Village because its appraiser concluded that no assessment reduction was warranted for those years.

to challenge said assessment. The Lower Court did not request oral argument from the parties.

The Lower Court's Decision and Order

By decision and order dated December 16, 2016 ("Decision and Order"), the Lower Court granted Respondents' motion to dismiss the petitions based on a finding that it lacked subject matter jurisdiction. (R.21). The Lower Court stated: "The Appellate Division, Second Department has held that the only person fitting the definition of 'the person whose property is assessed' is the property owner". (R.14-15 [quoting *Circulo*, 96 A.D.3d at 1056]). Relying solely and exclusively on limited language drawn from *Circulo*, the Lower Court held that Petitioner, a net tenant obligated to pay real property taxes and authorized by its lease to challenge the real property taxes, was not one of the persons whom the legislature intended to permit to file a grievance pursuant to RPTL § 524(3). (R.17). The Lower Court further found that Petitioner failed to comply with RPTL § 524(3), because Petitioner, "not the Owner of the Property, filed the RP 524 Complaint to [sic] the Town Board and Village Board." (R.16). Consequently, the Lower Court concluded that Petitioner failed to satisfy a condition precedent to the commencement of these proceedings, which deprived the Lower Court of subject matter jurisdiction to review the petitions. (R.16-17). The Lower Court also held

that "the assessor lacked jurisdiction [to review the assessments] because no proper complainant appeared before the Board in a timely manner." (R.21).

Subsequently, and prior to the entry of judgment, the parties entered a Stipulation which consolidated the article 7 proceedings pending against the Town and Village into a single proceeding bearing Index number 23040/09. That Stipulation was "So Ordered" by the Lower Court. (*See* R.22-28).

## POINT I

## THE LOWER COURT'S TOTAL RELIANCE ON THIS COURT'S DECISION IN *CIRCULO* WAS ERROR AND THEREFORE, THE JUDGMENT MUST BE REVERSED

In reaching its decision, the Lower Court improperly placed complete reliance on this Court's decision in *Matter of Circulo Housing Dev. Fund Corp. v. Assessor of the City of Long Beach*, 96 A.D.3d 1053 (2d Dep't 2012) as the sole basis for dismissing these proceedings. Given the contrasting and clearly distinguishable facts of *Circulo*, such reliance was erroneous and therefore, the judgment of the lower court must be reversed.

In its Decision and Order, the Lower Court, quoting *Circulo*, stated (R.14-17) (emphasis supplied):

> The Appellate Division, Second Department has held that the only person fitting the definition of "the person whose property is assessed" is the property owner (*see Circulo*, 96 AD3d at 1056 ["RPTL article 5 requires that

> the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment" [and the] failure to comply with this requirement requires dismissal of the petition"]....The Appellate Division described the requirement that the owner must have made a complaint regarding the unlawful assessment to the Board"[sic] as "a condition precedent to the commencement of" a proceeding for review pursuant to RPTL article 5 (*see Circulo*, 96 AD3d at 1056).
>
> . . .
>
> The same failure to comply with RPTL 524(3) occurred here. Petitioner, not the Owner of the Property, filed the RP-524 Complaints to the Town Board and Village Board. Therefore, the petitioner did not satisfy "a condition precedent to the commencement of [these] proceeding[s]...[in] that the [O]wner must have made a complaint regarding the unlawful assessment to the Board for review pursuant to RPTL article 5" (*id.* at 1056).

The Lower Court's error lies in its misapplication and misapprehension of this Court's decision in *Circulo*. The facts of *Circulo* involved the assessor's denial of the petitioner's applications for mandatory real property tax exemptions pursuant to RPTL § 420-a on three separate tax parcels—"East Market Street", "West Fulton Street" and "East Hudson Street". The provisions of RPTL § 420-a, entitled "Nonprofit Organizations; mandatory class" specifically provide (emphasis supplied):

> 1.(a) Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children

> purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section.

While the petitioner in *Circulo* utilized all three properties as a collective unit to operate a housing project for homeless individuals, the record showed that "with respect to both the East Hudson Street and the West Fulton Street properties, the petitioner was not the owner of record." *Circulo*, 96 A.D.3d at 1054-55 (emphasis supplied).

Based upon the plain and unequivocal language of RPTL § 420-a, New York courts have consistently held that property ownership is a condition precedent to eligibility for a mandatory exemption.[8] *See Matter of Charter Dev. Co., LLC v. City of Buffalo*, 6 N.Y.3d 578 (2006); *Hebrew Free Sch. Ass'n v. Mayor, Aldermen & Commonalty*, 99 N.Y. 488 (1885); *Matter of Al-Ber, Inc. v. N.Y. City Dep't of Fin.*, 80 A.D.3d 760, 761 (2d Dep't 2011); *Young Israel of Far Rockaway, Inc. v. N.Y.*, 33 A.D.2d 561 (2d Dep't 1969); *Matter of Bd. of Educ. of City of Jamestown v. Baker*, 241 A.D. 574 (4th Dept. 1934), *aff'd*, 266 N.Y. 636 (1935); *Columbia Cty. Mental Retardation Realty Co. v. Palen*, 97 Misc.2d 9 (Supreme Ct. Columbia Cty. 1978).

[8] The same property ownership requirement for the "mandatory class" of exemptions is also embodied in the companion exemption statute for "permissive class" exemptions. *See* RPTL § 420-b.

With this backdrop, it is manifestly clear why the *Circulo* Court determined that the petitioner, which sought an exemption pursuant to RPTL § 420-a but did not own two of the three properties in issue, did not have standing and thus was ineligible to file a complaint/grievance pursuant to RPTL article 5 as to the properties it did not own. Accordingly, in the context of a challenge to the denial of the exemption, the petitioner could not satisfy the required condition precedent. As the *Circulo* Court stated:

> [A] condition precedent to the commencement of such a proceeding is that the owner must have made a complaint regarding the unlawful assessment to the Board for review pursuant to RPTL article 5 (*see* RPTL 524). Here, the entity which filed the administrative complaint for review of the assessment of the East Hudson Street property was Circulo Housing Development Fund Corporation, which, according to the deed to the East Hudson Street property, is not the owner of that property.

*Circulo*, 96 A.D.3d at 1056-57 (emphasis supplied).

It is also noteworthy that in *Circulo*, the Court made specific reference to the fact that the grounds for the filing of the grievance pursuant to RPTL article 5 were based upon "unlawful assessment". *Id.* at 1056. RPTL § 524(2) sets forth the specific grounds for review of filing a complaint to challenge an assessment: "The grounds for review of an assessment shall be that the assessment complained of is excessive, unequal or unlawful, or that real property is misclassified." Unlawful assessments include applications to declare a property "wholly exempt from

taxation". *See* RPTL § 522(10)(a). In the case at bar, the record shows that Petitioner's article 5 complaints were pursued on the basis of "unequal assessment" and "excessive assessment". (R.102; 115; 129; 144; 162; 178; 195; 213; *see* RPTL §§ 522(4) & 522(9)). In other words, Petitioner is not seeking to declare the Subject Property to be exempt from taxation; rather, the instant proceedings are limited to Petitioner's challenging the extent of the assessment imposed by the Respondents, and Petitioner's application only seeks an adjustment to the assessment based upon credible evidence of valuation. (*See* R.35-42).

Unlike exemption applications which require property ownership by the party seeking the exemption, the statutory framework in RPTL articles 5 and 7 for the review of an assessment contains no such ownership requirement. Rather, RPTL article 5 simply requires that the application is to be filed by "the person whose property is assessed, or by some person authorized in writing by the complainant...." RPTL § 524(3). Similarly, RPTL article 7 only requires that an applicant be "[a]ny person claiming to be aggrieved". RPTL § 704(1). *See* Point II, *infra.*

In addition, although the mechanics for initiating proceedings are the same under RPTL articles 5 and 7, the legal standards applied to exemption applications are distinctly different from those applied to assessment review proceedings. The statutory provisions governing the application for and granting of tax exemptions

are strictly construed against the party seeking the exemption. *Matter of Yeshivath Shearith Hapletah v. Assessor of Town of Fallsburg*, 79 N.Y.2d 244 (1992); *Matter of World Buddhist Ch'an Jing Ctr., Inc. v. Schoeberl*, 45 A.D.3d 947 (3d Dep't 2007). Conversely, case law has held that the provisions of the Real Property Tax Law as they relate to the review of "unequal" or "excessive" assessments are to be liberally construed. As the Court of Appeals stated in *W.T. Grant Co. v Srogi*, 52 N.Y.2d 496, 513 (1981):

> [B]ecause the Real Property Tax Law relating to assessment review proceedings is remedial in character, it should be construed in such a way that the taxpayer's right to have his assessment reviewed and the appropriate relief granted should not be defeated by a pleading technicality. (*Matter of Great Eastern Mall v. Condon*, 36 N.Y.2d 544; *People ex rel. New York City Omnibus Corp. v. Miller*, 282 N.Y. 5, 9.)

In the case at bar, the Lower Court's reliance on *Circulo* as the basis to impose an additional legal requirement, namely that the "owner" of the property has the exclusive right to file the RPTL article 5 complaint for a review of an assessment, was entirely misplaced and therefore, the judgment should be reversed.

This Court's decision in *Matter of Larchmont Pancake House v. Bd. of Assessors*, 153 A.D.3d 521 (2d Dep't 2017), albeit based upon different facts, likewise suffers from this Court's exclusive reliance on its decision in *Circulo*, that only an "owner" may file a complaint under RPTL article 5 in a proceeding to review a tax assessment on the basis of it being "unequal" or "excessive". In

*Larchmont Pancake House*, the petitioner was the operator of the property and paid the real property taxes; it had neither an ownership interest in the property nor the contractual right to file RPTL article 5 and article 7 applications for assessment reduction. *Id.* at 521-22. In contrast, Petitioner herein, by virtue of its lease with the landlord/owner of the subject property (R.49-99), was granted in the Lease the contractual right to contest the real estate taxes imposed on the Subject Property (R56). *See* Point II(B), *infra*.[9] There was no such lease in *Larchmont Pancake House*.

[9] As of the date this brief was filed, the petitioner-respondent in *Larchmont Pancake House* had filed a motion, returnable on October 6, 2017, for re-argument of this Court's decision and/or for leave to appeal to the Court of Appeals. In connection with said motion, separate companion motions were filed by International Council of Shopping Centers (also returnable October 6, 2017) and Stop & Shop (returnable October 20, 2017) seeking permission to file briefs as *Amicus Curiae*. In the event the Court grants the respective motions for re-argument and/or for permission to file the brief(s) *Amicus Curiae*, Petitioner herein respectfully requests that the Court also consider the arguments raised therein in its deliberations on the within appeal.

## POINT II

## THE LOWER COURT ERRED BY HOLDING THAT PETITIONER, AS TENANT OBLIGATED TO PAY REAL ESTATE TAXES, LACKED STANDING UNDER RPTL § 524(3) TO FILE THE COMPLAINTS

### A. RPTL § 524(3) Does Not Restrict The Right To File A Complaint Exclusively To A Property Owner

The Lower Court's exclusive reliance on excerpted language in *Circulo* was erroneous because it ignored the totality of the statutory framework and the case law built upon it. "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). '"It is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided.'" *Matter of Springer v. Bd. of Educ. of the City Sch. Dist. of the City of N. Y.*, 27 N.Y.3d 102, 107 (2016) (quoting *Rocovich v. Consol. Edison Co.*, 78 N.Y.2d 509, 515 (1991)). Furthermore, the Real Property Tax 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, 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)).

The plain language of RPTL § 524(3) does not provide that an owner has the sole and exclusive right to file a grievance. Rather, the statute explicitly refers to the "person whose property is assessed" and the "complainant". Nowhere does section 524(3) contain the word "owner". Because the word "owner" does not appear in this provision, a plain reading of the phrase "person whose property is assessed" is open to, and in fact has been the subject of, a much broader interpretation which has included a person legally obligated to pay the taxes on the property. *See Matter of Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Parsons*, 61 Misc.2d 838, 842 (Sup. Ct. Wayne Cty. 1969). If the legislature intended to limit the right to file an administrative complaint exclusively to the property owner it would have used the word "owner" instead of the more inclusive phrase "person whose property is assessed". The omission of the word "owner" and the absence of any statutory definitions for "person whose property is assessed" and "complainant" from section 524(3) is a meaningful indication that the legislature did not intend for the undefined term "person whose property is assessed" to be circumscribed by the word "owner". The legislative intent expressed by this omission cannot be ignored. Nevertheless, the Lower Court ignored that intent.

A historical review of the New York legislation addressing challenges to real property tax assessments shows that, at one time, the word "*owner*" was used in both the early statutes that permitted the filing of sworn affidavits to the assessor to correct an assessment, and in those permitting judicial review of real property tax assessments.[10] The historical evidence that the word "*owner*" was removed by the legislature from the early versions of this statutory scheme is telling, and in so doing, "the Legislature is deemed to have intended a material change in the law". *Matter of Stein*, 131 A.D.2d 68, 72 (2d Dep't 1987) (citing McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 193(a)).

"In the absence of any controlling statutory definition, [courts] construe words of ordinary import with their usual and commonly understood meaning, and in that connection [courts] 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)). The Merriam-Webster Dictionary defines the word *whose* as "of or relating to whom or which especially as possessor or possessors."[11] The word *whose* clearly signifies "possession". Therefore, under the plain meaning of the words used, RPTL § 524(3) literally

---

[10] *See, e.g.*, L. 1829, Chap. XIII, Title II, Article Second, § 15, p. 392; L. 1851, Chap. 176, § 6, p. 334; L. 1858, Chap. 338, § 1, p. 574; L. 1874, Chap. 312, §§ 1-2, p. 366; L. 1896, Chap. 908, pp. 25-26; L. 1982, Chap. 714, § 9, pp. 2627-28.

[11] *See* https://www.merriam-webster.com/dictionary/whose (last verified October 25, 2017).

means the one with "possession" or a "possessory interest", which includes a tenant under a written lease. Petitioner herein, the net tenant, fits squarely within this definition. This definition comports with this Court's observation 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)).

Moreover, that the phrase "person whose property is assessed" is not limited exclusively to owners is made clear by other provisions in the Real Property Tax Law. Specifically, RPTL § 554(2) provides that an application for the correction of errors can be filed by "an owner of real property, or any person who would be entitled to file a complaint pursuant to section five hundred twenty-four of this chapter ..." RPTL § 554(2) (emphasis added). Accordingly, if only owners were entitled to file a complaint under section 524(3), the underlined language in RPTL § 554(2) would be rendered meaningless; such an interpretation would be contrary to the fundamental principle of statutory construction that "all parts of a statute are intended to be given effect and ... a statutory construction which renders one part meaningless should be avoided." *Matter of Springer*, 29 N.Y.3d at 107.

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). By using the word "complainant" rather than the word "owner", it implies that the complainant can be someone other than the property owner. Otherwise, the legislature would have likely used the language, "some person authorized by the property owner". Article 5 of the RPTL uses the word "owner" over 100 times. Had the legislature intended to limit the filing of grievances exclusively to owners, the legislature would have so stated by using the word "owner" in section 524(3). The legislature chose not to do so.

To reach the Lower Court's overly restrictive interpretation that only an owner may file a grievance, this Court must insert the word "owner" into the statute, which would violate a basic canon of statutory construction that prohibits a court from adding words to a statute to discern the legislature's intent. *See Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 394 (1995) ("'new language cannot be imported into a statute to give it a meaning not otherwise found therein'") (quoting McKinney's Consol. Laws of N.Y., Book 1, Statutes § 94, at 190); *American Transit Ins. Co. v. Sartor*, 3 N.Y.3d 71, 76 (2004) ("A court cannot amend a statute by adding words that are not there").

For the foregoing reasons, the Court should find that the phrase "person whose property is assessed" is not limited exclusively to the property owner, and

based upon a plain reading of RPTL § 524(3), the Lower Court's Decision and Order was clearly erroneous and the judgment should be reversed.

**B. This Court Should Follow Existing Precedent Which Has Interpreted "Person Whose Property Is Assessed" To Include Net Tenants**

"It has...long been held 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". *Plato's Cave Corp. v. State Liquor Auth.*, 68 N.Y.2d 791, 793 (1986); *see Dutchess Cty. Dep't of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001). As explained in Point II(A) above, the phrase "person whose property is assessed" is not defined in the Real Property Tax Law. RPTL § 704 concerns the same subject matter as RPTL § 524: the challenge of a property's tax assessment. Whereas RPTL § 524 concerns the administrative challenge to an assessment, RPTL § 704 concerns a judicial challenge to the assessment.

RPTL § 704(1) provides, in relevant part:

> Any person claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article by filing a petition....

A person is aggrieved within the meaning of the RPTL when his or her pecuniary interests are or may be adversely affected by an assessment. *Mack*, 72 A.D.2d at 605; *Malik v. Tax Comm'n of the City of N.Y.*, 68 A.D.3d 870, 871 (2d Dep't 2009).

Since as far back as the 1870's, New York courts have included in the class of aggrieved tax certiorari eligible petitioners, non-owners who are contractually obligated to pay real estate taxes because they are the persons injured by the excessive, unequal, or unlawful assessment. *See, e.g., Matter of Burke*, 62 N.Y. 224, 228 (1875) ("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); *EFCO Products v. Cullen*, 161 A.D.2d 44, 46-47 (2d Dep't 1990) (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); *Arlen Realty and Dev. Corp. v. Bd. of Assessors of Town of Smithtown*, 74 A.D.2d 905 (2d Dep't 1980) (petitioner and attorney had authority to act as agent for petitioner's wholly-owned and controlled subsidiary which was aggrieved as a lessee); *Mack*, 72 A.D.2d at 605 (contract vendee who paid the taxes levied upon the property was an aggrieved person and had the right to maintain an article 7 proceeding); *McLean's Dep't Stores, Inc. v. Comm'r of Assessment of City of Binghamton*, 2 A.D.2d 98, 100 (3d Dep't 1956) (lessee who was obligated to pay all property

taxes under the terms of a lease was an aggrieved party under former article 13 of the Tax Law and had standing to file an administrative complaint); *Big "V" Supermarkets, Inc. Store # 217 v. Assessor of Town of E. Greenbush*, 114 A.D.2d 726 (3d Dep't 1985) (finding the petitioner, 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) (finding that the 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); *Ames Dep't Store, Inc., No. 418 v. Assessor*, 261 A.D.2d 835 (4th Dep't 1999) (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)).

Because the right to judicial review of a real property tax assessment is in the favor of persons claiming to be aggrieved, it is only logical that the right to file a complaint for administrative review, which is a condition precedent for judicial review, be in favor of the same class of persons who are obligated to pay the taxes when levied. Thus, a reasonable interpretation of the phrase "person whose property is assessed" should include owners, net lessees (as in this case) and any other persons who meet the definition of "aggrieved" as set forth by RPTL § 704.

This would include lessees who have a contractual right to challenge the assessment and pay all real property taxes levied against the property. Such an interpretation is consistent with the Court of Appeals' instruction that the RPTL as it relates to the review of assessments is remedial in nature and should be liberally construed so that a taxpayer's right to have his or her assessment reviewed is not defeated by a technicality. (*Matter of Great Eastern Mall*, 36 N.Y.2d at 548; *W.T. Grant Corp.*, 52 N.Y.2d at 513.)

Petitioner's interpretation is supported by the decision of the Appellate Division, Third Department in *McLean's Dep't Stores*, 2 A.D.2d at 100, which involved a statutory scheme under a local law similar to the provisions of the RPTL. In *McLean's*, the Commissioner denied the complaint for administrative review because the petitioner failed to comply with the request of corporation counsel that petitioner either submit a power of attorney from the owner or have the owner present at the hearing as required by Local Law No. 1 of 1943. *Id.* at 100. The Commissioner 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.* at 99. The Supreme Court denied the motion and the Appellate Division affirmed. In its decision, the Appellate Division stated:

> [P]etitioner, 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 101.

It is noteworthy that City of Binghamton Local Law No. 1 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 100. The Third Department's analysis in affirming the denial is instructive to the 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 100-101. The Third Department held that a "person claiming to be aggrieved" (now 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 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 ... "obviously mean[s] one whose pecuniary interests are or may be adversely affected".

*McLean's Dep't Stores*, 2 A.D.2d at 101 (italics added).

This broader interpretation also is consistent with the Court of Appeals' decision in *Waldbaum, Inc. v. Fin. Adm'r of City of N.Y.*, 74 N.Y.2d 128, 133 (1989), wherein the Court recognized the right of a non-owner lessee who is solely responsible for paying real property taxes to challenge the assessment under RPTL article 7. In that case, the Court of Appeals held that in order for a fractional tenant to have standing to commence an RPTL article 7 proceeding, they may either have an expressly conferred right via a lease or they must be required to pay the taxes directly. *Id.* at 132. Petitioner herein satisfies both requirements, as the Lease expressly allows Petitioner to challenge the property taxes and Petitioner is obligated to pay all of the property taxes. Significantly, in *Waldbaum* the Court of Appeals made no distinction between the right to challenge the assessment at the administrative level and judicial level. *Id.* The Court of Appeals also cited

*McLean's Dep't Stores* as authority for the ability of a non-owner taxpayer to seek assessment review. *Id.* at 133.[12]

*Miller v. Bd. of Assessors*, 91 N.Y.2d 82 (1997) also support this broader interpretation, wherein the Court of Appeals exercised its subject matter jurisdiction over a real property tax assessment proceeding even where the administrative grievance was filed in the name of the prior owner and neither the grievance nor the petition was accompanied by an authorization from the actual owner.

Other Appellate Division decisions have consistently followed the interpretation that the eligibility to file proceedings is not limited to property owners and recognized the right of a non-owner lessee to administratively challenge its assessment. *See EFCO Products*, 161 A.D.2d at 46-47; *Big "V" Supermarkets,* 114 A.D.2d at 727; *Divi Hotels Marketing, Inc. v. Bd. of Assessors of Cty. of Tompkins*, 207 A.D.2d 580, 582 (3d Dep't 1994); *Matter of Onteora Club*, 29 A.D.2d at 254. As in the within proceedings (with exception to the 2014 proceeding against the Town), the lessees in the above cases, and not the owners, filed the grievances with the boards of assessment review for the properties that were leased. Notwithstanding, neither this Court nor the Third Department found

[12] While *McLean's Dep't Stores* dealt with assessment review before the current scheme for administrative and judicial review was in place under RPTL articles 5 and 7, when the decision was cited by the Court of Appeals in *Waldbaum*, the sections of the RPTL relevant to this case were in effect.

that only the property owner could file a grievance pursuant to section 524(3). Additionally, neither this Court nor the Third Department dismissed the petitions for a purported failure to satisfy a condition precedent pursuant to section 706(2) because the property owner did not file the grievance.

The proffered interpretation is also consistent with that of ORPTS as set forth in the publications referenced herein (*see* R.228-253) and with 7 Opinion of Counsel SBEA No. 123 (ORPTS rev. 1983), which provides, "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" (R.279); it is also consistent with Respondents' (and other municipalities') practice of accepting grievances filed by non-owner tenants, and for the person seeking administrative review to be one in the same as the person filing the petition. The Lower Court's Decision and Order squarely contradicts the above case law and tax certiorari practice and procedure.

The Lower Court's Decision and Order relied entirely and exclusively on this Court's decision in *Circulo*, which as set forth in Point I was a mandatory exemption case, and therefore completely distinguishable and not dispositive of the instant appeal. *Larchmont Pancake House*, 153 A.D.3d at 522, which also relied exclusively on *Circulo*, is likewise distinguishable. Unlike the within case, the petitioner in *Larchmont Pancake House* was not a net tenant contractually

obligated to pay real property taxes. *Id.* at 521. The lower court in Larchmont Pancake House (Tolbert, J.S.C.), consistent with all prior precedent, determined the petitioner had satisfied the conditions precedent and therefore, had standing to maintain the tax certiorari proceedings. (R.287-89). Moreover, in holding that "RPTL article 5 requires that the property owner file the complaint or grievance to obtain administrative review of a tax assessment", this Court in *Larchmont Pancake House* misinterpreted RPTL § 524(3). Nowhere does section 524(3) use the word "owner".

This Court's decision in *Larchmont Pancake House* directly contradicts *Miller v. Bd. of Assessors*, 97 N.Y.2d 82 (1997) and prior decisions of the Appellate Division wherein the court exercised subject matter jurisdiction and reviewed the merits of petitions where the lessees, not the owners, filed the RPTL article 5 administrative grievance. *See EFCO Products*, 161 A.D.2d at 46 (Court exercises subject matter jurisdiction where the petitioner leased the property from an IDA, finding that the lessee could maintain proceedings to review the determinations because the lessee's pecuniary interests were directly affected]; *Big "V" Supermarkets,* 114 A.D.2d at 727 (Third Department exercises subject matter jurisdiction where the petitioner (1) was a partial lessee of a shopping center, (2) was contractually obligated to make payments in lieu of taxes for the entire property, and (3) had filed the administrative complaint; Court holds that the non-

owner was an aggrieved party); *Divi Hotels Marketing*, 207 A.D.2d at 582 (Third Department exercises subject matter jurisdiction where the prior owner of the property filed the RPTL article 5 administrative complaint and RPTL article 7 petition); *Matter of Onteora Club*, 29 A.D.2d at 254 (Third Department exercises subject matter jurisdiction where lessees and sublessees, not owner, filed RPTL article 5 administrative complaint, and found non-owners therein were aggrieved by the assessments).

This Court's narrow, restrictive and unprecedented construction of RPTL § 524(3) in *Larchmont Pancake House* also violated the Court of Appeal's instruction that the RPTL, as it relates to the review of tax assessments, is remedial in nature and should be liberally construed so that a taxpayer's right to have his or her assessment reviewed is not defeated by a technicality. *Matter of Great Eastern Mall*, 36 N.Y.2d at 548. Rather than using liberal construction of RPTL § 524(3), the Court in *Larchmont Pancake House* added an unprecedented restriction by equating the words "person whose property is assessed" with "owner"; this interpretation was erroneous because in the realm of tax certiorari practice and procedure, strict construction is reserved for exemption statutes. *See Matter of Yeshivath Shearith Hapletah*, 79 N.Y.2d at 248; *Newsday, Inc. v. Town of Huntington*, 82 A.D.2d 245, 249 (2d Dep't 1981). As the wealth of case law precedent demonstrates, a fair and even construction of the phrase "person whose

property is assessed" necessarily includes aggrieved persons such as owners and net tenants who are contractually obligated to pay the real estate taxes. (*See McLean's Dep't Stores*, 2 A.D.2d at 100-101.)

It is incomprehensible to limit the filing of a complaint under RPTL article 5 to a property "owner" while allowing anyone "aggrieved" to seek judicial review under RPTL article 7 of the same assessment. Utilizing this Court's unprecedented construction of RPTL § 524(3) in a tax assessment review proceeding like *Larchmont Pancake House*, and applying the same construction used by the Lower Court herein, non-owner aggrieved parties would have no control over their own tax burden, and the ability to achieve relief would be set by another party without a direct and immediate financial stake in the grievance process. The legislature did not intend this illogical result, where there is a narrow interpretation of who can file an RPTL article 5 complaint and concomitantly, a broad interpretation of who can file an RPTL article 7 petition. Conversely, it would be incongruous for the legislature to permit non-owners who are obligated to pay taxes to file an RPTL article 7 proceeding but limit the class of persons who can file an administrative complaint under RPTL article 5 to owners, where the timely filing of a complaint is the condition precedent to the filing of an article 7 proceeding. *See* RPTL § 706(2). Consequently, this Court should reject the Lower Court's narrow interpretation of RPTL § 524(3) and find that a reasonable construction of the

phrase "person whose property is assessed" refers not just to owners, but rather a broad class of property interest holders including a net tenant who is contractually obligated to pay all real estate taxes.

Finally, Respondents did not argue below that Petitioner was not an aggrieved party under RPTL § 704. Petitioner, who is responsible for paying all real property taxes under the Lease, clearly is aggrieved by the assessment. *See Waldbaum*, 74 N.Y.2d at 133; *Malik*, 68 A.D.3d at 871; *McLean's Dep't Stores,* 2 A.D.2d at 100. Reading RPTL § 704(1) *in pari materia* with RPTL § 524(3), this Court should reverse the judgment of the Lower Court and find that Petitioner qualifies as "the person whose property is assessed" under RPTL § 524(3).

### C. The Lower Court Erred By Dismissing The Petitions As The Lease Authorized Petitioner To Challenge The Real Estate Taxes On The Subject Property

The Lower Court's determination that Petitioner was not "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" was erroneous because the Lease specifically authorized Petitioner to challenge the Subject Property's real estate taxes. (R.17 [citing RPTL § 524(3)]). In fact, by virtue of the Lease, Petitioner is a person "authorized in writing" by the owner to file the RPTL article 5 complaint and therefore, the statutory requirements were satisfied.

It is indisputable that an owner, pursuant to a lease, may authorize a tenant to challenge a property's tax assessment. *See Waldbaum, Inc.*, 74 N.Y.2d at 132 (recognizing that "the lessee of an undivided assessment unit may challenge the assessment if legally bound by the lease to pay the entire assessment on behalf of the owner at the time it is laid"); *Ames Dep't Stores v. Assessor*, 102 A.D.2d 9, 10 (4th Dep't 1984) (finding that a lease granted the lessee the right to contest tax assessments "in its own name, the name of the lessor or both").

The Lease herein provides, in relevant part, "Tenant 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 ...." (R.56). The term "Imposition" includes "all ad valorem real estate taxes or other taxes in the nature thereof..." (R.55). By this language the property owner authorized Petitioner to challenge the Subject Property's real estate taxes. As the Lease specifically authorizes Petitioner to contest the real estate taxes, Petitioner had permission to file a complaint challenging the Town's assessment of the Subject Property in 2009, and to authorize its attorneys to file, as its agent, complaints to challenge the 2010, 2011, 2013, and 2014 assessments fixed by the Town assessor and the 2010, 2011, and 2013 assessments fixed by the Village assessor.

The Lower Court's Decision and Order completely ignored the economic realities involved with commercial net leases in general and the plethora of legal precedent that sanctions the right of an authorized lessee to challenge property tax assessments. Like other commercial net leases, the Lease herein imposed upon the tenant (Petitioner) the obligation to pay real estate taxes together with the correlative right to challenge the assessment (upon which the real estate taxes are based) in administrative and judicial proceedings. Because of the contractual obligation to pay real estate taxes, commercial tenants like Petitioner are among the class of persons "whose property is assessed" and are aggrieved by unequal, illegal or excessive assessments; they are typically the parties who file the administrative complaints under RPTL article 5 and judicial proceedings under RPTL article 7.[13] Moreover, often times it is the financial data provided by the net tenant which forms the basis of the valuation by the municipality for assessment purposes. The Lower Court's Decision and Order abrogated Petitioner's contractual and legal right to contest the real property taxes, which is an essential element of the Lease. Consequently, Petitioner is left with the contractual burden of paying real estate taxes without the ability to enforce its contractual and historically-established legal right to challenge the assessment upon which the property taxes were determined.

[13] For example, a lessor with a long-term lease may have no interest in cooperating with an appeal.

Accordingly, it was error for the Lower Court to dismiss the petitions when the Lease authorized Petitioner to challenge the Subject Property's real estate taxes. Therefore, this Court should reverse the Lower Court's judgment.

## POINT III

## THE LOWER COURT ERRED BY HOLDING THAT IT LACKED SUBJECT MATTER JURISDICTION TO REVIEW THE ASSESSMENTS

The jurisdictional requirements for judicial review of an administrative grievance are found within RPTL article 7. RPTL § 706(2), which sets forth the requirements for the contents of the judicial petition, 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." "Because of the important purposes to be served by administrative review, the Legislature has specified that protest is a condition precedent to a proceeding under Real Property Tax Law 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'". *Sterling Estates, Inc. v. Bd. of Assessors*, 66 N.Y.2d 122, 126 (1985) (quoting RPTL § 706(2)). "'The only things necessary to the exercise of jurisdiction are that within the time specified a complaint under oath in writing be presented stating the objection and the grounds thereof'". *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)). "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)).

Notably, "defects in the form of the complaint have expressly been held not to be jurisdictional." *Astoria Fed. Sav. & Loan Ass'n*, 212 A.D.2d at 601 (citing *Matter of Tennanah Lake Townhouse and Villa Cmty. v. Town of Fremont*, 168 A.D.2d 789, 790-91 (3d Dep't 1990) and *Matter of City of Little Falls*, 68 A.D.2d at 739-41). However, a failure to file an administrative grievance will result in the dismissal of the judicial petition. *See City of Rochester v. Assessors of the Town of Canadice*, 136 A.D.2d 966 (4th Dep't 1988) (finding the lower court had no jurisdiction to review the assessments on unprotested property); *City of Albany v. Town of Coeymans*, 253 A.D. 436, 439-440 (3d Dep't 1938) ("In the instant proceeding it is clearly established that appellant failed to make timely protest against the assessment of its property and hence the court has no jurisdiction of the subject of the proceeding.")

From the above case law, it is manifestly clear that the conditions precedent are satisfied and subject matter jurisdiction is invoked by: (1) giving notice to the

municipality as to the property and assessment that are being challenged by the timely filing of a grievance; and (2) providing a statement that specifies the property being protested and the relief sought. *See Astoria Fed. Sav.& Loan Ass'n*, 212 A.D.2d at 600; *Matter of Tennanah Lake*, 168 A.D.2d at 789.

Petitioner met the minimum requirements necessary to invoke the Lower Court's subject matter jurisdiction as Respondents indisputably received adequate notice of the commencement of the administrative challenge. The parties have further stipulated that each year's complaint was timely filed with the respective Town and Village BAR. (R.32-33). Additionally, each of the filed complaints sets forth the Subject Property's address, tax map identification, Petitioner's objections to the assessments, and the grounds underlying said objections. (*See* R.100-04; 113-18; 127-33; 142-48; 160-65; 176-81; 193-98; 211-17). Each complaint also contained the required estimate of value for the Subject Property and the requested assessment. *See id.* Consequently, this Court must find that the Lower Court had subject matter jurisdiction over these proceedings.

RPTL § 706 contains no requirement that an RPTL article 5 complaint must be filed by the property owner in order to invoke subject matter jurisdiction. Rather, it only requires that a complaint have been filed. In fact, in *Sterling Estates*, the Court of Appeals discussed the Real Property Tax Law as a procedure and process "by which aggrieved taxpayers obtain administrative and judicial

relief". *Sterling Estates,* 66 N.Y.2d at 125 (emphasis added). "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." *McLean's Dep't Stores,* 2 A.D.2d at 100-101.

The Court of Appeals' decision in *Matter of Great Eastern Mall* is instructive to this Court's analysis of the pleading requirements set forth in RPTL § 706(2). In that case the respondents moved to dismiss the petitions on two separate grounds, with the relevant issue being that the petitioners "failed to maintain the proceedings against the assessors either by naming all three assessors individually or by naming the Town of Victor, as required by section 704." *Matter of Great Eastern Mall*, 36 N.Y.2d at 546. As stated by the Court of Appeals,

> The position taken by respondents is that the failure of petitioners to comply with this technical pleading requirement of subdivision 2 of section 704 renders the petitions jurisdictionally defective and should result in a dismissal.

*Id.* at 548. The Court of Appeals rejected the respondents' position, stating, "[w]e refuse to adopt such a harsh and outmoded view of pleading and procedure." *Id.* As the Court explained:

> The dual legal concepts that mere technical defects in pleadings should not defeat otherwise meritorious claims,

> and that substance should be preferred over form, are hardly novel. Nor should the fact that this is a proceeding to review a tax assessment require application of a different rule. As we said some years ago, '(t)he Tax 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.' (*People ex rel. New York City Omnibus Corp. v. Miller*, 282 N.Y. 5, 9, 24 N.E.2d 722, 724 [1939].) Indeed, that view is mandated by CPLR 2001 and 3026 which are applicable to these article 7 proceedings.

*Id.* (emphasis added and internal footnotes omitted). In light of this mandate from the Court of Appeals, this Court should find that Petitioner has met the requirements necessary to invoke subject matter jurisdiction.

*Matter of Frei v. Town of Livingston*, 50 A.D.3d 1381 (3d Dep't 2008), which the Lower Court cited in its Decision and Order, is inapposite because in that case the petitioner's failure to timely file a complaint with the town assessor warranted a dismissal of his article 7 petition for lack of jurisdiction. Unlike *Matter of Frei*, for each year at issue herein, Petitioner timely filed a complaint with the Town BAR and Village BAR, respectively, with each complaint setting forth the required information to substantiate Petitioner's objections to the assessments. Accordingly, Petitioner satisfied the minimum requirement necessary to invoke the Lower Court's subject matter jurisdiction. *See Astoria Fed. Sav. & Loan Ass'n*, 212 A.D.2d at 601; *Matter of City of Little Falls*, 68 A.D.2d at 738. The Lower Court erroneously treated the complaints filed by Petitioner herein as a

nullity, *i.e.*, as if no complaints whatsoever had ever been filed. The Lower Court's action is unprecedented as there is no case law to support its conclusion that a net tenant – who is directly liable and contractually obligated to pay real property taxes – has no right to file a grievance pursuant to RPTL § 524(3). The Lower Court placed its reliance squarely on this Court's decision in *Circulo* – a mandatory exemption case – to support its decision.[14]

There also is no case law to support the Lower Court's conclusion that "the assessor lacked jurisdiction because no proper complainant appeared before the Board in a timely manner." (R.21.) Petitioner was a proper complainant, and the Lower Court's determination to the contrary contradicts decades of case law involving the review of assessments where Courts exercised subject matter jurisdiction when a non-owner aggrieved taxpayer filed the predicate administrative grievance. *See Miller*, 91 N.Y.2d at 87; *EFCO Products*, 161 A.D.2d at 46; *Big "V" Supermarkets,* 114 A.D.2d at 727; *Matter of Onteora Club*, 29 A.D.2d at 254; *McLean's Dep't Stores*, 2 A.D.2d at 100-101; *see also Matter of Birchwood Village LP v. Assessor of the City of Kingston,* 94 A.D.3d 1374 (3d Dep't 2012) (Court exercised subject matter jurisdiction and decided the article 7 proceeding on the merits despite the fact that the lessee had filed the predicate administrative grievance seeking assessment review).

[14] *See* Point I, *supra*.

If the Lower Court's analysis was correct, that only an owner may file a complaint, then each of the aforementioned cases would have been decided differently. Indeed, as the issue of subject matter jurisdiction may be raised at any time, including *sua sponte* by a court (*see Financial Indus. Regulatory Auth., Inc. v. Fiero,* 10 N.Y.3d 12, 17 [2008]), then the courts in each of the aforementioned cases should have dismissed the respective proceedings for a lack of subject matter jurisdiction, as non-owners filed the administrative complaints and judicial proceedings. It can be reasonably inferred that if those courts believed that a non-owner lacked standing to file a complaint, they would have dismissed the petitions for lack of subject matter jurisdiction.

Based upon the foregoing, this Court should find that the Lower Court had subject matter jurisdiction to review the assessments.

## POINT IV

## RESPONDENTS' CONTENTION THAT ONLY A PROPERTY OWNER MAY FILE A COMPLAINT IS BARRED BY THE PRINCIPLE OF ESTOPPEL AND HAS OTHERWISE BEEN WAIVED

### A. Respondents Have Manufactured A Technical Defect

The purported "defect" raised by Respondents in the Lower Court – that Petitioner filed the RP-524 Complaints herein instead of the owner – is erroneous based upon a plain reading of statutory and case law. The foregoing notwithstanding, this purported defect is at most a technical defect, not a jurisdictional defect. *See, e.g., Astoria Fed. Sav. & Loan Ass'n*, 212 A.D.2d at 600 (affirming the lower court's determination that the authorization's failure to "bear a date within the same calendar year during which the complaint [was] filed" presented a technical, not jurisdictional, defect); *see also Miller v. Bd. of Assessors*, 164 Misc.2d 62, 65-67 (Sup. Ct. Suffolk Cty. 1995) (finding that a RP-524 Complaint lacking an authorization required by RPTL § 524 presented a curable technical defect), *aff'd*, 236 A.D.2d 408 (2d Dep't), *aff'd*, 91 N.Y.2d 82 (1997); *Divi Hotels Marketing*, 207 A.D.2d at 582 (a defect in the name of the party bringing the grievance was deemed to be a curable technical defect, provided the appropriate party authorized the grievance); *Rotblit v. Bd. of Assessors and/or the Bd. of Assessment Review of the Village of Russell Gardens*, 121 A.D.2d 727 (2d Dep't 1986) ("Like an omitted authorization by the petitioner, a defect with respect

to the name of the petitioner, where there is proper authorization by the appropriate individual, is a 'technical defect which should not operate to bar the proceedings'") (quoting *Bergman v. Horne*, 100 A.D.2d 526, 527 (2d Dep't 1984)).

The courts have held that such defects can be cured, provided the municipality received adequate notice of the commencement of the proceeding and no substantial right of the municipality is prejudiced. *Astoria Fed. Sav. & Loan Ass'n*, 212 A.D.2d at 601. As discussed in Point III above, the complaints herein gave Respondents adequate notice of the commencement of each administrative proceeding. Moreover, Respondents have not, and cannot, identify any substantial right by which they were prejudiced, and have acknowledged that Petitioner was erroneously assessed and entitled to reductions as set forth in the Stipulation of Facts. (*See* R.36-39.) The potential exposure to additional financial liability does not alone constitute prejudice. *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981); *Matter of Bd. of Managers of Century Condo. v. Bd. of Assessors*, 96 A.D.3d 739, 741 (2d Dep't 2012).

That the purported "defect" is, at most, a technical one, is further evidenced by the fact that the Lease authorized Petitioner to challenge the Subject Property's assessment (*see* Point II(C), *supra*).[15] The real estate taxes levied herein (which Petitioner is contractually obligated to pay) are calculated based upon the Subject

[15] Petitioner-Appellant does not concede that there was any defect and makes this argument in the alternative.

Property's Town and Village final assessments, respectively. Petitioner exercised its right under the Lease to challenge the Subject Property's assessment by first filing an administrative complaint for each assessment year at issue and, after the respective Board of Assessment Review denied the complaint, by filing an article 7 petition. Consequently, the purported "defect" herein is akin to a petition or complaint having been filed in the wrong petitioner's name, which is a '"technical defect which should not operate to bar the proceedings'". *Rotblit*, 121 A.D.2d at 727 (quoting *Bergman*, 100 A.D.2d at 527); *Divi Hotels Marketing,* 207 A.D.2d at 582).

**B. Respondents Are Estopped From Objecting To Any Purported Defects In The Complaints**

Estoppel is an equitable doctrine used to promote fairness and justice. *Charles v. Charles*, 296 A.D.2d 547, 550 (2d Dep't 2002). '"The doctrine of equitable estoppel may successfully be invoked, in the interest of fairness, to prevent the enforcement of rights which would ultimately work fraud or injustice upon the person against whom enforcement is sought ...'" *Id.* at 548-49 (quoting *Matter of Ettore I. v. Angela D.*, 127 A.D.2d 6, 14 (2d Dep't 1987)). An estoppel defense '"may also be invoked where the failure to promptly assert a right has given rise to circumstances rendering it inequitable to permit the exercise of the right after a lapse of time'". *Id.* at 549 (quoting *Matter of Ettore I.*, 127 A.D.2d at 12). "A municipality may be estopped by its misleading nonfeasance if there

would otherwise be a manifest injustice". *1555 Boston Rd. Corp. v. Fin. Adm'r of N.Y.*, 61 A.D.2d 187, 192 (2d Dep't 1978). The estoppel doctrine is applicable to tax certiorari proceedings. *See id.*; *see also Mendick v. Sterling*, 83 A.D.2d 749, 750 (4th Dep't 1981) (affirming the Supreme Court's order denying a motion to dismiss, finding that respondents were estopped from alleging a defense based upon an authorized agent's failure the certify the complaint where, *inter alia*, they waited over a year and a half before raising their defense in a motion to dismiss).

In *1555 Boston Rd. Corp.*, the petitioner reached an agreement with the tax commission for a reduction in assessments for the 1971/72, 1972/73, and 1973/74 tax years, and as part of that compromise, the petitioner agreed not to file an article 7 proceeding for the 1973/74 tax year. The city later reneged on the settlement (because it was not approved by the city's comptroller), and in article 7 proceedings involving 1971/72 and 1972/73 tax years, the city argued that the petitioner had waived its right to challenge the assessment for the 1973/74 tax year as it had failed to file an article 7 proceeding in that tax year. Reversing the trial court's decision, this Court found that the city was estopped from raising this argument, because, *inter alia*, the city took a contrary position in another proceeding:

> [T]he city prevailed on its contention that the real estate owner could not withdraw from the settlement even though it had not been approved by the Comptroller. Under the circumstances it is not only egregiously unfair,

> but an act of effrontery, for the city to here insist that it may renege on its agreement after the petitioner, in reliance on the settlement, failed to take legal steps, which it now cannot take, to challenge the assessment for the year 1973/74.

*1555 Boston Rd. Corp.*, 61 A.D.2d at 191-92. This Court found that the trial court's acceptance of the city's argument resulted in "manifest injustice, of an exceptional nature, since it [was] clear that the petitioner did not file a certiorari proceeding for the current year, despite a minimal offer of reduction, in reliance on the city's promise of more substantial reductions for the earlier years." *Id.* at 192. This Court further found, "[t]he city should not be permitted to welch on the agreement as to the earlier years without putting the petitioner in the same position it would have been in had no settlement been arrived at for any of the years in question." *Id.*

In the case at bar, Respondents' actions have resulted in this very type of manifest injustice to Petitioner. As set forth in the Statement of Facts, it was the Town and Village's initial position that Petitioner, as a tenant obligated to pay taxes, had the right and eligibility to file a grievance. The Town specifically directed taxpayers to New York State ORPTS instructions which state, "[a]ny person who pays property taxes can grieve an assessment ...." (R.247). Furthermore, the Town BAR and Village BAR accepted the grievances as filed by Petitioner, deliberated thereon, issued determinations on the merits, and then

advised Petitioner of its right to seek judicial review of its assessment under RPTL article 7. (R.105; 119; 134; 149-50; 166-67; 182-83; 199-200; 218-219.)

Had the respective Town and Village BARs dismissed or rejected the grievances based upon Petitioner's purported lack of standing, Petitioner would have immediately challenged the dismissal as arbitrary, capricious, and contrary to law. (R.276.) Petitioner relied to its detriment upon the ORPTS publications and Respondents' actions. (*Id.*)

It was not until September 2016 that Respondents unilaterally changed their position and moved to dismiss the within petitions.[16] The Lower Court accepted Respondents' arguments and dismissed the within petitions notwithstanding their change in tactics. Respondents' prior statements and actions have deprived Petitioner the opportunity to remedy the purported defect. As in *1555 Boston Rd. Corp.*, the result is not only egregiously unfair, but manifestly unjust, because the within petitions were dismissed on grounds first raised by Respondents in September 2016 that were contrary to their prior position, directions, and actions as they pertain to Petitioner. Respondents should be estopped from objecting to the purported defects in the complaints given their prior position, directions to the ORPTS publications, and actions.

[16] It is noteworthy that the *Circulo* decision was issued in 2012, yet Respondents waited four years before filing its motion to dismiss these proceedings. As set forth in Point I, *supra*, it is Petitioner's contention that *Circulo* is inapplicable to the within proceedings.

## C. Respondents Failed To Timely Object To The Purported Defects In The Complaints And Thus Have Waived This Objection

It is well-settled that a defect in the form of an administrative complaint to review an assessment is waived if the municipality acts upon it. *Matter of Henderson v. Silco*, 36 A.D.2d 439, 441 (4th Dep't 1971); *Matter of City of Little Falls*, 68 A.D.2d at 740; *People ex rel. Irving Trust Co. v. Miller*, 264 A.D. 270, 272 (1st Dep't 1942); *see DHI Mgmt. Agency v. City of Yonkers*, 67 A.D.2d 913 (2d Dep't 1979) (the grant of summary judgment was improper where issues of material fact existed concerning, *inter alia*, whether respondents waived defects in the form of the grievance). A board of assessment review acts upon an administrative complaint when it knowingly accepts the complaint and denies the relief requested therein. *Matter of City of Little Falls*, 68 A.D.2d at 740; *People ex rel. Irving Trust Co.*, 264 A.D. at 272.

Respondents waived any objection they might have had concerning Petitioner's standing to file the within complaints by both failing to follow proper procedure and by delaying the filing of their motion to dismiss the within petitions. When a municipality determines that a petitioner lacks standing to file a complaint challenging the property's assessment, the proper administrative action is to dismiss the complaint. (R.275.) The Town BAR and Village BAR, respectively, did not dismiss Petitioner's grievances, but rather accepted the grievances and acted on the merits by denying the relief requested therein. The Notices of

Determination advised Petitioner of its right to seek judicial review of its assessment under RPTL article 7. (R.105; 119; 134; 149-50; 166-67; 182-83; 199-200; 218-219.)

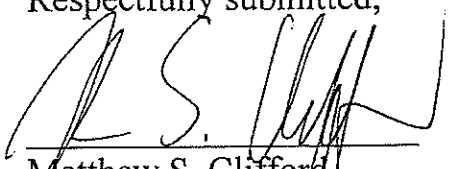
Respondents also accepted service of the article 7 petitions without objection. None of the petitions were rejected for a purported defect. It is respectfully submitted that Respondents, by waiting until September 2016 to move to dismiss the petitions, have waived their objection. *See Ames Department Stores*, 102 A.D.2d at 13 ("Here, respondents failed to timely reject the petition and give notice with due diligence since they delayed 28 days before objecting. Respondents thus waived any objection based on improper verification"). Given this waiver, the Court should reverse the judgment.

## CONCLUSION

This Court should reverse the judgment and direct the Lower Court to enter judgment in accordance with the Stipulation of Facts.

DATED: October 25, 2017
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 § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word 2010.

*Type.* A Monospaced typeface was used, as follows:

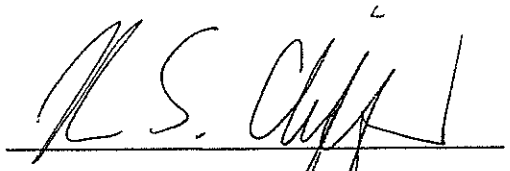
Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

*Word Count.* The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 12,367.

Dated: October 25, 2017



Matthew S. Clifford