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.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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POINT I

THE DOCTRINE OF *STARE DECISIS* DOES NOT REQUIRE AN AFFIRMANCE BECAUSE *CIRCULO* AND *LARCHMONT PANCAKE HOUSE* ARE NOT DISPOSITIVE

"The doctrine of *stare decisis* provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision." *People v. Bing*, 76 N.Y.2d 331, 337-38 (1990). However, "'*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'" *People v. Hobson*, 39 N.Y.2d 479, 487 (1976) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). The Court should reject Respondents' arguments in this regard for several reasons.

Significantly, there is no case law that holds that a net tenant like DCH, obligated to pay all real estate taxes levied against the property and explicitly authorized in writing by its lease to challenge all real estate taxes, has no right to file a grievance.

Additionally, the relevant facts herein do not mirror those in *Matter of Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach*, 96 A.D.3d 1053 (2d Dep't 2012) and *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)

for the following reasons: (1) Neither *Circulo* nor *Larchmont Pancake House* involved a net 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; (2) Neither case involved a determination of 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 with the Board of Assessment Review. *Circulo* and *Larchmont Pancake House* are factually distinguishable and thus neither mandate the affirmance of the Lower Court's judgment nor bar the relief requested by DCH.

Moreover, *Circulo* and *Larchmont Pancake House* have departed from over 100 years of established precedent that recognized the right of a non-owner aggrieved party to file a grievance. Dating 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* Petitioner's Brief at 25-26).[1]

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[1] Respondents assert (Brief at 52) that *Matter of Burke*, 62 N.Y. 224 (1875) and *Matter of Walter*, 75 N.Y. 354 (1878) "are of no use" since they were predicated on statutes in existence before the current statutory scheme came into being. If Respondents are correct, the Court of Appeals would not have cited those cases in *Waldbaum, Inc. v. Fin. Adm'r of the City of N.Y.*, 74 N.Y.2d 128, 133 (1989) as authority, under the current statutory scheme, for proposition that a non-owner taxpayer could seek assessment review. Respondents have failed to set forth any evidence of a Legislative intent to overrule this line of cases.

Within the last thirty years, and following the 1982 amendments to the Real Property Tax Law ("RPTL") that added section 524, courts have found that a non-owner aggrieved party paying all of the real estate taxes levied against the property had the right to seek administrative review. *See EFCO Products v. Cullen*, 161 A.D.2d 44 (2d Dep't 1990); *Big "V" Supermarkets, Inc., Store # 217 v. Assessor of the Town of E. Greenbush*, 114 A.D.2d 726 (3d Dep't 1985); *Matter of Onteora Club v. Bd. Of Assessors of Town of Hunter*, 29 A.D.2d 251 (3d Dep't 1968); *Matter of Birchwood Vill. LP v. Assessor of City of Kingston*, 94 A.D.3d 1374 (3d Dep't 2012); *Matter of Hangair, LLC v. Hillock*, 126 A.D.3d 1092 (3d Dep't 2015). It is these decisions, not *Circulo* and *Larchmont Pancake House*, which should be followed under the doctrine of *stare decisis*. Prior to *Circulo*, virtually every tax certiorari practitioner and municipality, including the Respondents herein, conducted themselves with the knowledge that non-owner aggrieved parties could file grievances. This understanding included transactional real estate attorneys who drafted leases – like DCH's Lease – which granted the tenant the right to challenge the real estate tax assessments. Contrary to Respondents' assertion, the doctrine of *stare decisis* does not require an affirmance based upon *Circulo* and *Larchmont Pancake House*, because those cases have collided "with a

prior doctrine more embracing in scope, intrinsically sounder, and verified by experience." *Hobson*, 39 N.Y.2d at 479 (quoting *Helvering*, 309 U.S. at 119).[2]

Furthermore, *Circulo* and *Larchmont Pancake House* are in direct conflict with the Third Department's decision in *Matter of 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) ("*McLean's*), which the New York State Office of Real Property Tax Services ("ORPTS"), the agency that oversees local assessment administration, recently acknowledged in a revision to 7 Op. Counsel SBEA 123 (rev. Dec. 11, 2017).[3] *McLean's* stands for the proposition that "[s]ince 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*, 2 A.D.2d at 100.[4]

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[2] If Respondents are correct that *Circulo* and *Larchmont Pancake House* did not break new ground but rather simply followed earlier "precedent" (Brief at 12), it begs the question why Respondents failed to heed that "precedent" at all times relevant hereto by accepting the grievances, acting on the merits, and advising Petitioner of its right to judicial review.

[3] *See* https://www.tax.ny.gov/pubs_and_bulls/orpts/legal_opinions/v7/123.htm (last visited February 12, 2018) ("Pursuant to *Circulo Hous. Dev. Fund Corp. v. Assessor of City of Long Beach*, 96 AD3d 1053 (2d Dept. 2012) and *Larchmont Pancake House v. Board of Assessors of the Town of Mamaroneck*, 153 AD3d 521 (2d Dept. 2017), a complaint to a Board of Assessment Review filed in any county within the Second Judicial Department . . . must be signed by the property owner. To the extent this Opinion states or implies otherwise, it is superseded. This Opinion is still supported by *McLean's Department Stores, Inc. v. Commissioner of Assessment of City of Binghamton*, 2 AD2d 98 (3d. Dept. 1956), in the Third Judicial Department.)" (Emphasis added).

[4] Respondents argue that because *McLean's* addressed a local law, it is inapplicable. If Respondents are correct, the Court of Appeals would not have cited *McLean's* as authority for

Based upon the foregoing, the Court should find that the doctrine of *stare decisis* does not require an affirmance of the Lower Court's judgment.

POINT II

RPTL §524(3) DOES NOT PRECLUDE A TENANT OBLIGATED TO PAY REAL ESTATE TAXES FROM FILING AN ADMINISTRATIVE COMPLAINT

A. Simple Application Of The Rules Of Statutory Construction Mandates A Determination That A Tenant Under A Possessory Lease Has Standing Under RPTL §524(3) To File A Complaint

It is well settled 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 itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998).

Furthermore, "[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 [courts] have regarded dictionary

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the ability of a non-owner taxpayer to seek assessment review in the *Waldbaum* case: "this court has previously held 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". *Waldbaum,* 74 N.Y.2d at 133 (citing *McLean's*, 2 A.D.2d at 101).

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 Court of Appeals 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); *People v. Ocasio*, 28 N.Y.3d 178, 181 (2016); *Yaniveth R. v. LTD Realty Co.*, 27 N.Y.3d 186, 192 (2016); *Orens v. Novello*, 99 N.Y.2d 180, 185-86 (2002).

In fact, this very Court has consistently utilized this rule of statutory construction and referred to the dictionary to determine Legislative intent. *See e.g., Matter of Brown v. N.Y. State Racing & Wagering Bd.*, 60 A.D.3d 107, 116 (2d Dep't 2009); *People v. Fox*, 3 A.D.3d 577, 578 (2d Dep't 2004); *Aetna Cas. & Sur. Co. v. Cty. of Nassau*, 221 A.D.2d 107, 112 (2d Dep't 1996); *Briarcliff Assocs., Inc. v. Cortlandt*, 144 A.D.2d 457, 459-60 (2d Dep't 1988); *People v. Dobbs Ferry Med. Pavillion, Inc.*, 40 A.D.2d 324, 327-28 (2d Dep't 1973).

In the case at bar, the crux of the issue presented in this appeal is the proper meaning of "whose property" as utilized under RPTL §524(3) to define a "person" who may file a complaint to the Board of Assessment Review.

In applying the aforementioned well-established rules of statutory construction to the facts of this case, as this Court has applied them consistently (*see supra*), the inescapable conclusion is that a possessory tenant, such as DCH, is included as a "person whose property is assessed" who may file a complaint under RPTL §524(3).

First, the RPTL specifically defines the word "property" and, as is relevant to this appeal, the RPTL defines "property" as the land and building. *See* RPTL §102(12)(a) & (b) (Consol. 2017) (definition of "property" when utilized in the chapter is the land and/or the buildings). The RPTL, however, does not specifically define the term "whose" which precedes the word "property". *See* N.Y. RPTL §§102 & 524 (Consol. 2017).

It should be noted that "whose" is the only adjective used in the phrase "person whose property is assessed"; therefore, to define the "person," the adjective "whose" is the crucial word to define in order to identify the "person" who may file a complaint.

Under the longstanding, established rules of statutory construction, as the Court of Appeals and this Court have applied consistently, if the Legislature did not define the word, the ordinary import of a particular word (in this case "whose") should be utilized in construing the statute, and, in divining the meaning of a word

not defined in the statute itself, the ordinary import of the word should be established by referring to the dictionary meaning. *See supra* cases.

Referring to the Merriam-Webster Dictionary, (again, as relied upon regularly by this Court for statutory construction, *see id.*) the word "*whose*" is defined specifically as "of or relating to whom or which especially as possessor or possessors."[5] Nowhere does the dictionary definition make reference to, or even intimate to, "owner or owners" but merely "possessor or possessors", which is a much broader category of persons than just the owner.

Thus, based on the ordinary dictionary import of the word, "*whose*" clearly simply signifies "possession".

Consequently, applying the plain meaning of the words used, as defined in RPTL §102(12)(a) & (b), and through basic statutory construction as applied by New York courts, "person whose property" under RPTL §524(3) literally means "the person with 'possession' or a 'possessory interest' in the land and building." Clearly this includes a possessory tenant under a written lease, such as DCH, who has the absolute right to possess the property under the Lease when the complaint was filed.

That "whose" signifies possession given the ordinary everyday import of the words "whose property" can be further illustrated by the following example: If a

[5] *See* https://www.merriam-webster.com/dictionary/whose (last verified February 12, 2018) (emphasis added).

building housing a CVS pharmacy is leased to CVS by the owner/landlord, ABC Realty, anyone walking by the property would refer to the property as "CVS Pharmacy", the legal possessor of the property, and not the owner/landlord ABC Realty.

In sum, applying the basic rules of statutory construction, "whose property" simply means a "person in possession of the land and building"; the bare assertion that the term is restricted or limited to the "owner" without analysis of and reference to the rules of statutory construction runs afoul of the standard applied by countless New York courts including the Court of Appeals and this Court. *See supra* cases.

Finally, it should be noted that, as stated by the Court of Appeals, the RPTL ""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)). It is noteworthy that the Court of Appeals did not limit the breadth and scope of the review of assessments to judicial review; its reference was to all provisions of the Real Property Tax Law. The unprecedented narrowing of the meaning of terms used in the statute not only goes

against the liberal construction sanctioned by the Court of Appeals, but also contradicts decades of statutory construction law as applied in New York.

B. The *Circulo* Court's Determination That The Term "Person Whose Property Is Assessed" Is Limited Exclusively To An "Owner" Was Unprecedented, Unjustifiably Restricted, And Ignored Established Rules Of Statutory Construction.

In *Circulo*, this Court determined that the phrase "person whose property is assessed" referred exclusively to the "owner". The Court's limitation of eligible RPTL administrative complainants to owners was unprecedented, unsupported and did not follow or even consider any rules of statutory construction. The Court did not cite any cases to support its determination. Nowhere in *Circulo* did the Court provide a rationale for dispensing with the established rules of statutory construction. Instead, the Court simply substituted the word "owner" into the statute as being the exclusive definition of "person whose property is assessed."

This Court's decision in *Larchmont Pancake House* provides no additional insight or analysis of the statutory language in RPTL §524(3) because this Court simply adopted its determination in *Circulo*. As in *Circulo*, this Court in *Larchmont Pancake House* did not cite any precedent or employ any statutory construction to again conclude that RPTL §524(3) only permits a property owner to file a grievance.

Inexplicably, this Court failed to apply statutory construction in *Circulo* that it had utilized numerous times before; this omission was critical inasmuch as the

decision hinges on the statutory interpretation of "person whose property is assessed"; the decision fails to cite any precedent or rule of statutory construction.

Had the Court in *Circulo* or *Larchmont Pancake House* considered and/or applied case law precedent and/or the rules of construction, it would have accorded "whose" its usual and commonly understood meaning – "of or relating to whom or which especially as possessor or possessors" – and could not have concluded that the phrase "person whose property is assessed" is restricted to the property owner.

A related rule of statutory construction provides, '"if there is nothing to indicate a contrary intent, terms of general import will ordinarily be given their full significance without limitation." *Price v. Price*, 69 N.Y.2d 8, 15 (1986); *see Hahn v. Hagar*, 153 A.D.3d 105, 111 (2d Dep't 2017). In *Circulo*, this Court limited the words "person whose property" to "owner". However, the words "person whose property" are broad and expansive, not restrictive and limiting; they denote possession not ownership. There is no legal precedent to support limiting these words exclusively to the property owner, especially where there is no evidence in RPTL §524(3) of a legislative intent to do so.

Another rule of statutory construction provides, '"[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction.'" *Venes v. Cmty. Sch. Bd.*, 56

A.D.2d 195, 200 (2d Dep't 1977) (quoting McKinney's Cons Laws of NY, Book 1, Statutes §94). In *Circulo*, the Court used a tortured construction of "person whose property is assessed" by substituting the word "owner" in RPTL §524(3) when that word does not appear there. A court should not add words to a statute to discern the legislature's intent. *American Transit Ins. Co. v. Sartor*, 3 N.Y.3d 71, 76 (2004); *Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 394 (1995).

In describing another rule of statutory construction, this Court stated, '"If 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."' *Prego v. N.Y.*, 147 A.D.2d 165, 173 (2d Dep't 1989) (quoting McKinney's Consol. Laws of N.Y., Book 1, Statutes §147). 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. This Court's limitation in *Circulo* and *Larchmont Pancake House* of the class of those eligible to file a complaint to an owner and not just a "person whose property is assessed", does not produce equal results because complainants filing a grievance are treated differently than complainants filing a petition. This Court's conclusion limits 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. 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. It does not make sense, and this Court has never explained why the Legislature would have intended this result or why it chose to deviate from established precedent.

The Court of Appeals has recognized 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). As established in Point I above, *Circulo* and *Larchmont Pancake House* have departed from settled precedent to reach a result that is unreasonable and, as applied by the Lower Court, unjust to DCH.

Based upon the foregoing, this Court should find that DCH had standing to file the RP-524 Complaints herein, it should reverse the judgment and direct the Lower Court to enter judgment in accordance with the Stipulation of Facts.

POINT III

RESPONDENTS MISCONSTRUE RPTL §524(3)

A. Respondents Selectively Apply The Rules Of Statutory Construction

Respondents spend several pages in their brief discussing the word "property". For instance, Respondents argue (Brief at 36-40) that Petitioners' leasehold was not the property assessed, and thus they cannot be the "person whose property is assessed." The Court should reject their argument.

It is settled that arguments raised for the first time in a lower court reply brief should not be considered by the Court. *People v. Minota*, 137 A.D.2d 837, 838 (2d Dep't 1988); *Alrobaia v. Park Lane Mosholu Corp.*, 74 A.D.3d 403, 404 (1st Dep't 2010). Respondents herein raised this argument for the first time in their reply brief before the Lower Court, to which DCH objected. (*See* R.329-33, 347-48, 351-52.) Consequently, this Court should not consider Respondents' argument on appeal.

Even if this Court considers Respondents' argument, it nonetheless should reject it. Preliminarily, and contrary to Respondents' insinuation, DCH has never argued that a leasehold interest should be assessed. Respondents are attempting to confuse the issue.

Additionally, the fact that leaseholds are not assessed for real estate tax assessment purposes has nothing to do with defining "person whose property is

assessed". There is no dispute regarding the term "property". Rather, the issue herein centers on the word "whose", which is undefined in the RPTL.

Under the RPTL, "real property" includes "Land itself, above and under water, including trees and undergrowth thereon and mines, minerals, quarries and fossils in and under the same, except mines belonging to the state". N.Y. RPTL §102(12)(a). The Merriam-Webster Dictionary defines "property" as "something owned or possessed; *specifically*: a piece of real estate".[6] The Legislature used this more encompassing word that means owned or possessed; it did not limit the language to "owner". Thus, the Court should employ a more encompassing construction of "person whose property is assessed" to include those in possession pursuant to a lease (like DCH).

B. Respondents Ignore Portions Of The Governor's Bill Jacket

Respondents argue, for the first time on appeal, that the "legislative history" underlying RPTL §524 evidences an intent on the part of the Legislature to limit the filing of a grievance to the owner or its designee. Specifically, Respondents cite to memoranda included in the Governor's Bill Jacket (Laws of 1982, Chapter 714) from the Division of the Budget and the State Comptroller General as proof that the administrative review process under RPTL §524 is reserved only for

[6] https://www.merriam-webster.com/dictionary/property (last verified February 12, 2018) (emphasis in original).

owners. (Brief at 29-30). Respondents ask the Court to take judicial notice of these documents. (Brief at 30, footnote 5.) The Court should reject Respondents' argument.

It is settled that arguments raised for the first time on appeal should not be entertained by the Court. *Mann v. All Waste Sys., Inc.*, 293 A.D.2d 656 (2d Dep't 2002); *ELRAC, Inc. v. Edwards*, 270 A.D.2d 414 (2d Dep't 2000); *Allstate Ins. Co. v. Bieder*, 212 A.D.2d 693 (2d Dep't 1995). There can be no dispute that Respondents did not raise this argument below, and none of their papers mention this Bill Jacket. (*See* R.260-68, 326-46, 349-50.) Respondents also chose not to include these documents in the Book of Exhibits, which substantially comprises the Record on Appeal. Therefore, the Court should not entertain Respondents' new argument.

If the Court entertains this new argument, it should nonetheless be rejected. The Assembly Memorandum, which was by definition written prior to the Legislature passing the bill, expressly 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." (Emphasis added).[7]

[7] Respondents argue, for the first time on appeal, that Westchester County Tax Act §283.614 makes the owner personally responsible for paying the real property tax levied on the property, and thus taxpayer can only mean owner. (Brief at 30-31). The Court should reject this argument, not only because it was raised for the first time on appeal (*see* R.260-68, 326-46, 349-50), but also because it lacks merit. A taxpayer is "someone who pays or is subject to a tax."

Respondents fail to mention that each memorandum they cite was written after the Legislature had passed the bill. The approved legislation was received by the Governor on July 12, 1982 as evidenced by the notation on the Assembly Cover Sheet.[8] The memorandum from the Division of the Budget was written on July 14, 1982, and delivered to the Governor on July 15, 1982. The memorandum from the State Comptroller was written and delivered to the Governor on July 22, 1982. These documents could not have been considered in passing the statute, and as such, merely represent the opinion or interpretation of the writer and not the intention of the Legislature.

Even assuming that memoranda drafted after the Legislature passed the bill can assist in determining the Legislature's intent, it is interesting that Respondents chose not to mention the memorandum from the State Board of Equalization and Assessment ("SBEA", which was later re-organized as ORPTS), the agency that oversees local assessment administration. That memorandum, written on July 8, 1982 by Michael E. Kupferman and attached to the July 16, 1982 letter to the Governor's Counsel by Robert L. Beebe, Counsel to the SBEA, clearly states that taxpayers, not just property owners, are the parties eligible to seek administrative assessment review: "Moreover, consolidation of these provisions into one title

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Black's Law Dictionary, at 1690 (10th Ed. 2014). That definition is consistent with DCH's Lease, under which DCH is obligated to pay all real property taxes.

[8] The Court may take judicial notice of the Assembly Cover Sheet and other documents contained in the Bill Jacket that DCH must now reference to refute Respondents' new argument. *See Matter of Seidel v. Bd. of Assessors, Cty. of Nassau*, 88 A.D.3d 369 (2d Dep't 2011).

would make it easier for taxpayers and local officials to understand the administrative review process." (emphasis added).

The memorandum also states:

> Further, the new title would clarify an ambiguity concerning the right of a taxpayer to file a complaint with the board of assessment review at an adjourned hearing date. Under present law, a taxpayer may file a complaint with the assessor prior to the hearing of the board of assessment review or with the board of assessment review at such hearing or at any adjourned hearing (RPTL, §1526(3)). However, [RPTL] section 512(2) provides only that the board of assessment review "shall have authority to accept a complaint on any adjourned day." The new title would make these provisions consistent by preserving the authority of the board of assessment review to accept a complaint on any adjourned hearing date, but limiting a taxpayer's right to file a complaint at such time to instances where such a procedure is "authorized" by the board of assessment review. (emphasis added).

The memorandum unambiguously refers to "the right of a taxpayer to file a complaint with the board of assessment review."

Respondents also ignore a July 16, 1982 letter from Michael Whiteman to John H. Goldrick, Counsel to the Governor, wherein Mr. Whiteman states:

> As you are aware, the [SBEA] is the author of Assembly 13057 and has, I am quite sure, commented fully on those provisions of the bill constituting a recodification of assessment review procedures without substantive change.

If the SBEA authored the bill, its interpretation should be accorded deference by this Court.

Shortly after passage of the bill, on September 7, 1982, the SBEA released an Opinion of Counsel addressing the standing of a non-owner aggrieved party to obtain administrative assessment review. 7 Op. Counsel SBEA No. 123 (*See* R.279-80.) Consistent with RPTL §524(3), the Opinion of Counsel letter found that non-owner aggrieved parties (including a tenant obligated to pay real estate taxes such as DCH), did have the capacity to seek administrative assessment review. *See id.*

C. Form RP-524

Respondents argue (Brief at 31-32) that the placement of the word "owner" in certain portions of the Complaint form published by ORPTS demonstrates the purported "soundness" of *Circulo* and *Larchmont Pancake House*. Respondents ignore the portions of the same form which use the term "Complainant",[9] which has long-been interpreted to include non-owners.

Additionally, Respondents' argument ignores the instructions that accompany the form, which provide that "any person who pays property taxes can grieve an assessment." (R.247, *see* R.235.) Respondents' argument also contradicts their prior construction of RPTL §524(3), the RP-524 form, and the instructions, as Respondent Town specifically directed taxpayers to the ORPTS instructions. Furthermore, the Town BAR and Village BAR accepted the

[9] *See* RP-524 Complaint Form: Part Two, paragraphs 5 & 6; Part Three, Sections A, B and D; Part Four; and Part Six.

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.)

D. RPTL 523-b

Respondents argue that RPTL §523-b evidences the Legislature's intent to give non-owners the right to file administrative grievances in Nassau County but withheld that right in the rest of the State (Brief at 32-34). The Court should reject this argument.

First, this Court has held that it will not consider arguments raised for the first time in a reply brief. *Minota*, 137 A.D.2d at 838; *Garlasco v. Smith*, 250 A.D. 534, 536 (1st Dep't 1937), *aff'd*, 276 N.Y. 666 (1938). Respondents first raised this argument in their reply brief before the Lower Court. (*See* R.339-340). Therefore, this Court should not consider their argument.

Second, even if the Court considers Respondents' argument, the Court should find that it lacks merit, because the New York City-modeled revision of the Nassau County assessment system is inapposite. In the late 1990's, when Nassau County shifted its administrative review procedure to permit year-round review of assessments, the system followed the one implemented by the New York City Tax Commission, the only other year-round administrative assessment review body in

the State. However, the history of the legislation shows that while the State Legislature adopted much of the same terminology and language found in the New York City Charter, it did not intend to change the class of people who could validly file an administrative grievance.

Instead, in response to a home rule message from the Nassau County Legislature requesting the ability to have year-round administrative assessment review, the State Legislature enacted RPTL §523-b which created the Nassau County Assessment Review Commission ("ARC").[10] ARC has the authority to administratively review assessments on a year-round basis. N.Y. RPTL §523-b(7)(a) (Consol. 2017). In drafting the bill and subsequent revisions thereto, Nassau County and the State Legislature modeled the language used by New York City and the New York City Tax Commission, the only other year-round administrative assessing authority in New York State. The Budget Report on Bills accompanying the legislation admitted this fact:

> Although this legislation is patterned after the New York City Tax Commission, there are several questionable provisions unique to this bill which encroach on the rights of the taxpayer.[11]

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[10] *See* Governor's Bill Jacket to Laws of 1998, Chapter 593, at page 7 (September 9, 1998 letter from Bruce A. Blakeman, Presiding Officer of the Nassau County Legislature, to James McGuire, Counsel to the Governor), available at: http://digitalcollections.archives.nysed.gov/index.php/Detail/Object/Show/object_id/32507 (last visited on February 12, 2018). The Court may take judicial notice of this document.

[11] Budget Report on Bills, page 4.

Historically, New York City has had a separate administrative assessment procedure as the City conducts the administrative review of assessments year round. That can be contrasted with the rest of the State (excepting Nassau County), which has a limited window for administrative assessment review, typically between two and three months. In the Town of Mamaroneck, as in most Westchester County towns, the administrative review of assessments begins upon the filing of the tentative roll on June 1 and ends when the final assessment roll is filed on September 15.

In contrast, Nassau County simply adopted the terminology used by New York City. Compare the language of RPTL §523-b(6), which became effective in 1999:

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

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

> b. During the time that the books of annual records of the assessed valuation of real estate are open for public inspection, any person or corporation claiming to be aggrieved by the assessed valuation of real estate may apply for correction of such assessment. Such application shall be duly verified by a person having personal knowledge of the facts stated therein, provided that if the application is signed by someone other than the person or an officer of the corporation claiming to be aggrieved, the application must be accompanied by a duly executed power of attorney as prescribed by the rules and regulations of the tax commission.[12]

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

[12] *See* http://www.nyc.gov/html/records/pdf/section%201133_citycharter.pdf (last verified February 12, 2018).

POINT IV

SUPREME COURT HAD SUBJECT MATTER JURISDICTION TO REVIEW THE ASSESSMENTS

A. The Supreme Court's Subject Matter Jurisdiction Is Established By The New York Constitution And Is Implemented By RPTL Article 7

Subject matter jurisdiction is the "power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question ... We conclude that jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action." *Hunt v. Hunt*, 72 N.Y. 217, 229, 230 (1878). The Supreme Court "is a court of original, unlimited and unqualified jurisdiction", *Kagen v. Kagen*, 21 N.Y.2d 532, 537 (1968); *see* N.Y. Const. art. VI, §7, and "is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed". *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 166 (1967).

The implementing legislation that permits the Court to adjudicate these proceedings is found in RPTL Article 7. Section 702(1) provides, "A proceeding to review an assessment of real property under this article shall be brought at a special term of the supreme court in the judicial district in which the assessment to be reviewed was made." N.Y. RPTL §702(1) (Consol. 2017). Section 704(1) provides, "Any person claiming to be aggrieved by any assessment of real property

upon any assessment roll may commence a proceeding under this article...." N.Y. RPTL §704(1) (Consol. 2017). RPTL §706(2) provides, "[s]uch petition must show that a complaint was made in due time to the proper officers to correct such assessment." N.Y. RPTL §706(2) (Consol. 2017). Section 706 does not specify any particular party that must make the complaint; it only requires that a complaint was filed.

It is undisputed that "a complaint was made in due time to the proper officers to correct such assessment". DCH timely filed a grievance each year with the Town BAR and Village BAR containing the Subject Property's address, section, block and lot, its objections to the respective assessment, and the grounds underlying those objections. (R.100-04, 113-18, 127-33, 142-48, 160-65, 176-81, 193-98, 211-17.) DCH fully complied with RPTL §524(3). Therefore, the Lower Court had "the power lawfully conferred [upon it] to deal with the general subject involved in the action." *Hunt*, 72 N.Y. at 230.[13]

Case law supports DCH's contention, because New York courts have exercised subject matter jurisdiction to hear Article 7 proceedings when a non-owner aggrieved party filed the predicate administrative grievance. *See EFCO Products*, 161 A.D.2d at 46-47; *Big "V" Supermarkets, Inc., Store # 217*, 114

[13] Contrary to Respondents' assertion (Brief at 21), DCH is not arguing that they have waived their defense of subject matter jurisdiction. DCH has argued that the Lower Court had subject matter jurisdiction, and consequently, the fact that the grievances were filed in DCH's name, and not the owner's, does not present a jurisdictional defect. (*See* Petitioner's Brief at 45-47.)

A.D.2d at 726; *Matter of Onteora Club*, 29 A.D.2d at 254; *Matter of Hangair, LLC,* 126 A.D.3d at 1092. This Court's holdings in *Circulo* and *Larchmont Pancake House* – that only an owner may file an administrative grievance – are in direct contradiction to and cannot be reconciled with these cases.

In each of the above cases, a non-owner aggrieved party, like DCH herein, filed the administrative grievance seeking a review of their assessment and/or tax exemption status. The non-owner aggrieved party was denied relief at the administrative level and, like DCH, subsequently filed a court petition seeking judicial review. In each case, the court exercised subject matter jurisdiction and rendered a decision on the merits addressing the relief sought by the petitioners who were all parties aggrieved by the respective assessments. Likewise, DCH, which is an aggrieved party, should also receive substantive review of the assessments.

Respondents' objection (Brief at 50-52) that some of the above cases that involve Industrial Development Agency ("IDA") agreements is a red herring. If actual ownership of the property by the party filing the grievance is what is required to confer subject matter jurisdiction to the Court in an Article 7 proceeding, then each of the cases involving an IDA tenant should have been dismissed for lack of subject matter jurisdiction. Additionally, if as Respondents argue, the tenant under an IDA agreement has merely a "titular status as 'tenant'"

that "masks the economic reality", then a similar economic reality is being masked by DCH's status as net 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.

The fact that a non-owner IDA tenant may seek administrative review is further proof that formal ownership is not the governing factor but rather the status of being aggrieved by the assessment that determines who may file an administrative grievance. It is this same reasoning that permitted this Court to grant an IDA tenant substantive review of its assessment after that tenant had filed the predicate grievance for administrative review. *See EFCO Products*, 161 A.D.2d at 46.[14]

Appellate Division decisions cited by Respondents (Brief at 19-20) do not support their contention that a complaint is only properly filed if done so by the owner, for each of these cases is readily distinguishable.

In both *Matter of Onteora Club v. Bd. of Assessor of the Town of Hunter*, 17 A.D.2d 1008, 1009 (3d Dep't 1962), and *Raer Corp. v. Vil. Bd. of Trustees*, 78

[14] Although not clearly stated, Respondents apparently argue (Brief at 25) that an owner cannot authorize a tenant to file a grievance in the tenant's name. Rather, they imply that an owner may only authorize a tenant to file a grievance in the owner's name. Respondents' position is not supported by RPTL §524(3) because there is nothing in that statute that limits a filing of a grievance to the owner's name. Respondents' position is not supported by case law either. *See Matter of Onteora Club*, 29 A.D.2d at 253 (grievances were filed in the lessee's name).

A.D.2d 989 (4th Dep't 1980), the petitioners therein failed to timely file a grievance with the respective boards of assessment review.

In *Radisson Cmty. Ass'n v. Long*, 3 A.D.3d 135, 138 (4th Dep't 2003), the Appellate Division rejected the petitioner's request to amend its petitions to seek a greater reduction in assessment than requested before the board. Respondents fail to mention that in *Radisson* the petitioner was also the property owner, and thus it follows that the Court used the word "owner". That case did not involve a grievance filed by a net tenant obligated to pay taxes and authorized by its lease to challenge the property taxes.

B. Neither *Circulo* nor *Larchmont Pancake House* Can Be Reconciled With *Miller*

In *Miller v. Bd. of Assessors*, 91 N.Y.2d 82, 87 (1997), the Court of Appeals exercised subject matter jurisdiction over judicial review of a tax assessment proceeding even where the predicate 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. The holding of the Court of Appeals in *Miller* is simply incompatible with this Court's holdings in *Circulo* and *Larchmont Pancake House*, which found that only an administrative grievance filed by the property owner will suffice to allow the Supreme Court to exercise subject matter jurisdiction over a subsequent Article 7 petition. The Court of Appeals sanctioned the exercise of subject matter jurisdiction in a tax certiorari

matter, while this Court failed to do so in both *Circulo* and *Larchmont Pancake House*. As there is no way to reconcile these decisions, this Court is duty bound to heed and apply the standard established by the Court of Appeals.

C. There Was No Filing Error At The Administrative Level

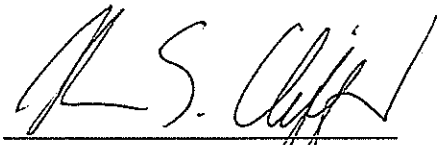
Respondents argue that courts do not have the same authority to correct mistakes made by complainants in the administrative review process as they do to correct mistakes made in the judicial review process (Brief at 40-46). This is a non-issue as there was no filing error made in the administrative review process during any year at issue. DCH, the 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, was the appropriate party to file an administrative grievance. Consequently, the Court should reject the arguments raised in Point VI of Respondents' Brief.

CONCLUSION

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

DATED: February 12, 2018
Bronxville, New York

Respectfully submitted,



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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.

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Dated: February 12, 2018

Matthew S. Clifford