To be Argued by:
WILLIAM MAKER, JR.
(Time Requested: 15 Minutes)

Supreme Court of the State of New York
Appellate Division – Second Department

Docket No.: 2017-03016

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

Petitioners-Appellants,

- against -

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

Respondents-Respondents.

For a Review under Article 7 of the RPTL

BRIEF FOR RESPONDENTS-RESPONDENTS

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The Respondents-Respondents unite in this single brief to oppose the Petitioners-Appellants.

Preliminary Statement

At the heart of this appeal is the distinction between the Real Property Tax Law (RPTL) article that governs assessment review at the administrative level (Article 5) and the RPTL article that provides the procedure for judicial review of assessments (Article 7). For the Petitioners-Appellants to succeed, they must convince this Court to abandon its holdings in *Matter of Circulo Housing Dev. Fund Corp. v Assessor* (96 AD3d 1053 [2d Dept 2012]) and *Matter of Larchmont Pancake House v Bd. of Assessors* (153 AD3d 521 [2d Dept 2017], *rearg and lv denied* — AD3d —, Case No. 2015-05601, Document M243464.pdf [December 26, 2017]), as well as other precedent, and to construe the language of RPTL 524 (3) and RPTL 704 (1) as if they are the same. For the reasons that follow, the Petitioners-Appellants cannot succeed on either front.

Summary of the Respondents-Respondents' Major Arguments

A. The lower court's decision rests on principles established in precedents, particularly *Circulo* and *Larchmont Pancake House* which, on the issues raised on this appeal, are directly on point. Under the principles of stare decisis, it would be wrong to stray from *Circulo/Larchmont Pancake House* and the other precedents (*see*

Point I, below).

B. Not only was the lower court correct in finding that it lacked subject matter jurisdiction, it also was correct that the failure of jurisdiction is an absolute defense that cannot be waived, can be raised at any time and need not be preserved (R. 20-21) (*see* Point II, below).

C. The Petitioners-Appellants had a mechanism in their lease with the owner of 700 Waverly Avenue, Mamaroneck, NY (Subject Property) for challenging the Subject Property's assessment at the administrative level. If they had utilized it, they would have complied with the RPTL 524 (3). They didn't and therefore did not satisfy a vital condition precedent for subject matter jurisdiction (*see* Point III, below).

D. Articles 5 and 7 of the Real Property Tax Law govern different phases of the assessment review process for which the Legislature has provided different rules, as evidenced by the language the statute uses to identify the protagonist in each phase and the legislative history of the Real Property Tax Law. Because the statutory language in RPTL 524 (3) and RPTL 704 (1) are so dissimilar they cannot be given the same meaning without rendering one or the other superfluous.

Recognizing the distinction, this Court, in *Circulo* and again in *Larchmont Pancake House*, construed the two sections as defining different sets of persons with

the complainant at the administrative level being limited to "the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent . . ." (RPTL 524 [3]), and the petitioner in the judicial proceeding being "[a]ny person claiming to be aggrieved by any assessment of real property . . ." (RPTL 704 [1]) — a larger group than just "the person whose property is assessed" or that person's designee. It should do so again here (*see* Point IV, below).

E. Since the Petitioners-Appellants' interest in the Subject Property was as a tenant, it could not be the 'person whose property is assessed' within the meaning of RPTL 524 (3) since leaseholds are personal property and the RPTL establishes the process for assessing and taxing only real property (*see* Point V, below).

F. Because Article 5 dictates the rules for administrative review, while Article 7 establishes judicial procedure, the Courts do not have the same authority to correct fundamental errors in the administrative review that they have in the subsequent court proceeding (*see* Point VI, below).

G. The Respondents-Respondents cannot be estopped from arguing that the Petitioners-Appellants failed to meet the requirements of RPTL 524 (3) (*see* Point VII, below).

Following these points, this brief continues by debunking the Petitioners-Appellants' other arguments.

Point I

Because *Circulo* and *Larchmont Pancake House* are directly on point, stare decisis calls for an affirmance.

"Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court will generally be followed in subsequent cases presenting the same legal problem" (*Matter of State Farm Mut. Auto Ins. Co. v Fitzgerald*, 25 NY3d 799, 819 [2015] [internal quotation marks and citations omitted]).

Stare decisis is almost always applied when statutory construction is involved — as it is here — since "if the precedent or precedents have misinterpreted the legislative intention, the Legislature's competency to correct the misinterpretation is readily at hand" (*People v Hobson*, 39 NY2d 479, 489 [1976] [internal quotation marks and citations omitted]).

The Court of Appeals reflected upon the reluctance of courts to abandon precedent in *Highby v Mahoney* (48 NY2d 15 [1979]) when it illustrated the importance of stare decisis by pointing to two of its own decisions.

> "In *Matter of Cairo* (29 NY2d 527) our court had accepted a construction of statute (EPTL 5-3.3) which was thereafter widely criticized.[1] Five years later in [*Matter of Eckart*, 39 NY2d 493 (1976)],

[1] There is no indication of widespread criticism of *Circulo* or *Larchmont Pancake House* by other courts.

> in an indistinguishable case presenting the same issue, we followed the *Cairo* precedent with the observation, [if] there is to be a constructive change it should come from the Legislature"

(*Highby v Mahoney*, 48 NY2d at 19 [internal quotation marks and citations omitted]).

As *Highby* observed, if there is to be a change in the assessment review process, that change should come from the Legislature. Indeed, tax certiorari law is no stranger to change by legislation. When the Court of Appeals allowed a lower court to reduce an assessment below the value requested in the Article 7 petition, the Legislature stepped in by amending RPTL 720 (1) (b) to prevent that from happening in the future (For a synopsis of these events, *see Matter of Raddison Community Assn. v Long*, 3 AD3d 135, 138-139 [4th Dept 2003], *lv dismissed* 4 NY3d 870 [2005]).

Moreover, even if this Court were to conclude that the Petitioners-Appellants' proposed approach to the assessment review process is a better mechanism, abandoning *Circulo/Larchmont Pancake House* would be wrong for "[i]t is wholly immaterial that the courts might reasonably conclude that what they perceive as the ultimate legislative objectives might better be achieved by more flexible prescriptions, prescriptions which might be judged by some to be more equitable. Whatever may be our view, the Legislature has erected a rigid framework of regulation, detailing as it does throughout specific particulars" (*Hutson v Bass*, 54 NY2d 772, 774 [1981] [internal quotation marks and citation omitted]).

The relevant facts here mirror the relevant facts in *Circulo* and *Larchmont Pancake House*.

Circulo Housing Development Fund Corporation (CHFD) was "formed for the purpose of, inter alia, operating and maintaining housing projects for persons of low income" (*Circulo*, 96 AD3d at 1054. It commenced proceedings under RPTL Article 7 against the assessor of the City of Long Beach with respect to three properties. The disposition of the petition with respect to the parcel referred to by this Court as "the East Hudson Street property" is germane here.

CHFD was the one who "filed the administrative complaint for review of the assessment of the East Hudson Street property" (*Circulo,* 96 AD3d at 1056). Although its petition alleged otherwise, CHFD did not own the East Hudson Street property (*id.* at 1054 and 1056-1057). The owner of the East Hudson Street property "[n]ever filed an administrative complaint for review of the assessment of that property" *(id.* at 1057).

The failure of the owner of the East Hudson Street property to file an RP-524 Complaint resulted in the dismissal of the RPTL Article 7 petition with respect to that property, a decision this Court affirmed, even though it recognized that under RPTL 704 (1), CHFD "met the definition of a 'person claiming to be aggrieved' by the assessment" (*Circulo,* 96 AD3d at 1056 [citations omitted]).

This Court explained its holding by pointing out that "in order to maintain a proceeding pursuant to RPTL article 7, the aggrieved taxpayer must . . . allege in the petition that 'a complaint was made in due time to the proper officers to correct such assessment' (RPTL 706 [2]). Failure to comply with this requirement requires dismissal of the petition" (*id.* [citations omitted].

Since (i) RPTL 524 "requires that the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment (*see* RPTL 524[3])"[2] and (ii) the owner of the East Hudson Street property did not do so, "the petition did not show 'that a complaint was made in due time to the proper officers to correct such assessment,' as is required (RPTL 706 [2]) . . . . Accordingly, that branch of [the City's] motion which was to dismiss so much of the petition as concerned the East Hudson Street property was properly granted, albeit not because [CHFD] lacked standing but because a condition precedent was not satisfied" (*Circulo*, 96 AD3d at 1057 [citations omitted]).

To state it starkly, *Circulo* mandates that an otherwise "aggrieved person" be denied relief in a tax certiorari proceeding when the jurisdictional prerequisites of RPTL Article 5 have not been followed, for "[a] petitioner's status as an 'aggrieved'

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[2] *Circulo,* 96 AD3d at 1056 (italics in the original).

person is not the only requirement for commencing a proceeding pursuant to RPTL article 7" (*id.* at 1056).

Circulo is not rooted in tax exemption statutes.

Throughout their brief the Petitioners-Appellants erroneously try to isolate *Circulo* to the tax exemption field. While *Circulo* involved the denial of a tax exemption, its outcome was not dictated by the tax exemption statutes. The opinion is grounded exclusively on the requirements of RPTL 524 (3) which applies to all grievances, including claims of unequal or excessive assessment. The petition insofar as it dealt with the East Hudson Street property was dismissed solely because of the failure to satisfy Article 5's requirement that the property owner be the complainant. Whether the Circulo petitioner or its related party met the standards for the exemption being sought played no part in the decision.

Nonetheless, the Petitioners-Appellants try to distinguish themselves from *Circulo* because they "only seek[] an adjustment to the assessment based upon credible evidence of valuation" (Brief at 16). Any lingering doubt as to whether *Circulo* should be limited to cases involving tax exemptions was put to rest in *Larchmont Pancake House*, however. The petitioner there was not seeking a tax exemption, but a reduction in assessed value, just like the Petitioners-Appellants. Its

petition was dismissed for the exact same reason that the *Circulo* petition was dismissed with respect to the East Hudson Street property: the failure to have the property owner file the administrative complaint.

***Larchmont Pancake House* presented the same situation as *Circulo*.**

Larchmont Pancake House was identical to *Circulo* with respect to the salient facts. Though finding that the *Larchmont Pancake House* petitioner was "an aggrieved party within the meaning of the RPTL" (*Larchmont Pancake House*, 153 AD3d at 522),[3] this Court ordered its petitions dismissed because "the petitioner, which filed the complaints with the Board of Assessment Review, never owned the subject property. "Therefore, the court lacked subject matter jurisdiction to review the assessments , as the petitioner failed to satisfy a condition precedent to the filing of the petitions pursuant to RPTL article 7" (*id.*).

Here, the administrative review was initiated by the Petitioners-Appellants in their own name as complainants (R.32, 33). Just like in *Circulo* and *Larchmont Pancake House*, the Petitioners-Appellants never owned the Subject Property (R. 31-32). Therefore under *Circulo* and *Larchmont Pancake House*, as well as earlier

[3] The Town of Mamaroneck Respondents-Respondents disagree with this finding and argued before this Court on that appeal that the petitions also could be dismissed on the ground that the petitioner's pecuniary interests were not adversely affected by the challenged assessments since the petitioner was not legally or contractually obligated to pay the real property taxes. Since the petitions were dismissed, the Town of Mamaroneck Respondents-Respondents, were not aggrieved by this finding and had no forum in which to contest it (*see* CPLR 5511).

precedents, the lower court was correct to have dismissed the Petitioners-Appellants' petitions.

Earlier precedents

Circulo and *Larchmont Pancake House* did not break new ground. They simply are more recent pronouncements of a long standing rule. For over 50 years it has been "well settled that the court is without jurisdiction to review and correct assessments unless a verified complaint has been timely and *properly filed*, according to law" (*Matter of Onteora Club v Bd. of Assessors*, 17 AD2d 1008, 1009 [3d Dept 1962], *affd* 13 NY2d 1170 [1964] [emphasis added]). "Albeit technical, [when] an express condition precedent to a judicial proceeding i[s] not met, . . . the court lack[s] jurisdiction to review" (*id.*).

Over 35 years ago, the Appellate Division made it clear that to be 'properly filed' the administrative complaint must be filed by the owner of the real property that is assessed. In its 1980 decision in *Raer Corp. v Vil. Bd. of Trustees* (78 AD2d 989 [4th Dept 1980], *lv dismissed*, 52 NY2d 677 [1981]), the Fourth Department laid out the initial steps for administrative review this way: "Such statutes provide that an owner of real property may protest the tax assessment thereon by timely filing with the board of assessment review a complaint. . . ."

The Court of Appeals confirmed this rule in *Sterling Estates, Inc. v Bd. of Assessors* (66 NY2d 122, 126 [1985]): "[T]he 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 time to the proper officers to correct such assessment. Failure to comply with that requirement requires dismissal of the aggrieved taxpayer's petition" (internal quotation marks and citations omitted). (Lest the term "aggrieved taxpayer" cause confusion as to who may file an administrative complaint, the Sterling Estates petitioner was the owner of the real property whose assessment was being challenged [*id.* at 124]).

More than 15 years ago, the Appellate Division once again emphasized this point in *Matter of Raddison Community Assn. v Long*, 3 AD3d 135, 139 [4th Dept 2003], *lv dismissed* 4 NY3d 870 [2005] when it held: "[T]he construction urged by petitioner would be contrary to the purpose of RPTL 524, which requires that a property owner file a complaint with the assessor . . . before seeking relief in court (*compare* RPTL 524, *with* RPTL 706)."

Thus, even if the lower court had decided this case without the benefit of *Circulo*, its conclusion was correct. However, *Circulo* and *Larchmont Pancake House* (decided after the Supreme Court had rendered its decision) do exist. Since

they are directly on point, this Court should employ stare decisis to affirm Justice Sherwood.

Point II

Lack of subject matter jurisdiction cannot be ignored.

Although the Petitioners-Appellants argue that it is too late for the Respondents-Respondents to argue that the Court lacks subject matter jurisdiction, the want of subject matter jurisdiction is a defense that cannot be waived. It can be raised at any time. This precept has been followed by the Court of Appeals and all four of the Appellate Division's Departments (*see Fin. Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008] ["Although the issue of subject matter jurisdiction was not raised in the lower courts, 'a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action' (citation omitted)"], *Strunk v New York State Bd. of Elections*, 126 AD3d 777, 779 [2d Dept 2015] ["[A] defect in subject matter jurisdiction may be raised at any time by any party or by the court itself, and subject matter jurisdiction cannot be created through waiver, estoppel, laches or consent" (internal quotation marks and citations omitted)]", *Matter of Hart Family LLC v Town of Lake George*, 110 AD3d 1278, 1280 [3d Dept 2013] [same and

emphasizing that lack of jurisdiction can be raised even if the issue had not been preserved]), *Renaldo R. v Chanice R.*, 131 AD3d 885, 886 [1st Dept 2015] and *Davis v State of New York*, 64 AD3d 1197, 1197 [4th Dept 2009]).

Hargrove v State (138 AD3d 777 [3d Dept 2016]) is particularly instructive since like these cases, it too involved a plaintiff's failure to comply with a statutory condition precedent for suing a municipality. *Hargrove* was a personal injury action brought against the State. The claimant did not file a timely notice of intention to file a claim under the New York Court of Claims Act but commenced litigation nonetheless. The State moved to dismiss the litigation. Its motion was denied. On appeal, the Appellate Division held: "the claimant's failure to comply with the filing requirements of the Court of Claims Act deprived the Court of Claims of subject matter jurisdiction. . . . Accordingly, the Court of Claims should have granted that branch of the State's motion . . . to dismiss the claim for lack of subject matter jurisdiction" (*id.* at 778 [citations omitted]).

Although the Respondents-Respondents could have made motions to dismiss sooner, the fact that they did not is irrelevant.

Preface to the remaining points.

The Respondents-Respondents could end this brief here. However, because of the multitude of collateral attacks made upon the lower court's decision (and by

implication upon *Circulo* and *Larchmont Pancake House*), it is worthwhile to dispense with them.

Point III

The Petitioners-Appellants could have complied with RPTL 524 (3).

Section 5 (e) (iv) of the lease between the Petitioners-Appellants and the owner of the Subject Property: 700 Waverly Avenue Corp. (700 Waverly) specifically requires the landlord to "join and cooperate in [proceedings to contest the Subject Property's assessment] or permit them to brought by [the Petitioners-Appellants] in [700 Waverly's] name" if local law requires it to participate (R. 56). In order to meet the requirements of RPTL 524 (3), all the Petitioners-Appellants needed to have done was to invoke that section and have 700 Waverly sign the administrative complaint. They did not and must suffer the consequences.

The Petitioners-Appellants' lease demonstrates why the 'doomsday scenario' they predict will result from *Circulo* and *Larchmont Pancake House* will not occur. A tenant that allegedly is aggrieved by an assessment, such as the Petitioners-Appellants can pursue its claim of overassessment by having the property owner sign the RP-524 complaint. The tenant can prepare the complaint for the owner to sign, submit it to the local Assessor or Board of Assessment Review and represent the owner before the Board of Assessment Review. Thereafter, the aggrieved party can

act on its own by pursuing judicial relief in a tax certiorari proceeding. The process is no more complicated than that.

Property owners and aggrieved parties combining their efforts to review assessments is neither impossible, unlikely nor unheard of. The Petitioners-Appellants' lease with 700 Waverly is a perfect example.

Matter of Grecian Garden Apts., Inc. v Barlow (71 Misc 2d 457 [Sup Ct, Monroe County 1972]) is another. There the administrative review was brought "by an agent on behalf of the owner of the property, whereas the petition instituting the proceeding was made by a lessee of the property who was required to pay the taxes" (*id.* at 458) — the exact course chartered by *Circulo* and *Larchmont Pancake House.*

Such an alignment makes economic sense since an owner must anticipate that some day the person paying the tax no longer will be doing so. When that day comes, the owner will be better positioned to find a new payor if the assessment is at its lowest possible level. Likewise, the person that is paying the tax has the incentive to furnish the owner with all the information an owner may need to file an administrative complaint. Furthermore, there is no indication either in this record or in general that landlords and tenants will not co-operate. Nor should this Court assume that they will not.

It is easy to imagine other ways that a tenant can make sure it will meet the

condition precedent for an RPTL Article 7 proceeding. Examples include a lease that frees a tenant from paying the real estate taxes attributable to an assessment for which the owner did not file an administrative complaint when requested to do so, or a lease which grants a tenant a limited power of attorney to sign the owner's name to an administrative complaint and to file it with the Board of Assessment Review.

The lease here cannot be deemed to have appointed the Petitioners-Appellants as 700 Waverly's agent for the purpose of filing grievances. Section 5 (h) of the lease (R. 56) does appoint the Petitioners-Appellants as 700 Waverly's attorney-in-fact to make payments to third parties. This delegation is specifically made only "for the sole purpose of making [such] payments." Obviously if the appointment were meant to extend to the filing of grievances in 700 Waverly's name, the lease would have said so, and there would have been no need for section 5 (e) (iv) to require 700 Waverly to "join and cooperate" with the Petitioners-Appellants in challenging the Subject Property's assessment.

In addition, the complaints themselves say that they are being filed by and on behalf of the Petitioners-Appellants, not 700 Waverly (*see e.g.* R. 113-118).

Contrary to the Petitioners-Appellants' lament that tenants "have no control over their tax burden", or that they will be "without the ability to enforce [their] contractual . . . right to challenge the assessment upon which the real property taxes

were determined (Brief at 37[4]), co-operation between an owner and a payor of the tax is both likely and easily achieved.

Point IV

The proper way to construe the different language of RPTL 524 (3) and RPTL 704 (1) leads to the conclusion that the Petitioners-Appellants are not "the person whose property is assessed."

RPTL 524 (3) and RPTL 704 (1) contain different definitions for the persons who may act thereunder. RPTL 524(3) requires the complainant at the administrative level to be "the person whose property is assessed, or . . . some person authorized in writing by the complainant or his officer or agent . . .", while RPTL 704 (1) is more expansive, permitting "[a]ny person claiming to be aggrieved by any assessment of real property . . . ." to be the petitioner in a tax certiorari proceeding (assuming, of course, that the proceeding is preceded by a proper RPTL 524 (3) complaint).

As a fundamental matter of statutory construction, these dramatically discrete terms cannot be coterminous. In *People v Brancoccio* (83 NY2d 638 [1994]), the Court of Appeals was called upon to construe the Criminal Procedure Law that in one subsection established the impact of an indictment being "filed" in a superior court while misdemeanor charges are pending in an inferior court, and in another

[4] At this juncture of their brief, the Petitioners-Appellants also maintain that an aggrieved party's right to challenge an assessment in its own name before a Board of Assessment Review is an "historically-established legal right". As this brief, *Circulo/Larchmont Pancake House* and the relevant cases that came before them demonstrate, the Petitioners-Appellants are wrong.

subsection described what occurs when a prosecutor obtains an adjournment from that inferior court in order to present the case to a grand jury and an indictment "results".

The Court concluded that since the statute contained different words ("filed" and "results"), "[w]e should credit the Legislature with having intentionally made the distinction [for w]hen * * * the Legislature uses unlike terms in different parts of a statute it is reasonable to infer that a dissimilar meaning is intended" (*id.* at 642 (internal quotation marks and citations omitted).

In fact, when construing the Real Property Tax Law, the Appellate Division has taken the same approach. *Matter of Level 3 Communications, LLC v Clinton County* (144 AD3d 115 [3d Dept 2016]) required the Third Department to construe the terms "distribution" and "transmission" in the context of the assessment of fiber optic installations. The Court appreciated that these terms "are independently used in separate subdivisions of RPTL 102 (12)." It "therefore treat[ed] the Legislature's distinct use of those terms as evincing a separate meaning for each" (*id.* at 119 [citations omitted]). The Court summed up with unassailable logic: "To attribute the same meaning to distribution and transmission would render one of these terms superfluous, an outcome to be avoided" (*id.*). (*See also Intl. Union of Painters & Allied Trades v New York State Dept. of Labor*, 147 AD3d 1542, 1546 [4th Dept

2017] ["When the Legislature uses unlike terms in different parts of a statute it is reasonable to infer that a dissimilar meaning is intended"]).

The words: "the person whose property is assessed" found in RPTL 524 (3) are so unlike the words: "[a]ny person claiming to be aggrieved by any assessment of real property" appearing in RPTL 704 (1), they cannot have the same meaning. The proper construction of RPTL 524 (3) and RPTL 704 (1) is the one that this Court reached in both *Circulo* and *Larchmont Pancake House*. These appellations create two different sets of people, with RPTL 524 (3) referring to the owner of the real property or the owner's designee, and the sobriquet in RPTL 704 (1) referring to a larger group than just "the person whose property is assessed" or that person's designee. To treat them as if they describe the same persons would render one of the phrase superfluous, a result that Courts must avoid when construing statutes (*see Rocovich v Con Edison*, 78 NY2d 509, 515 [1991] ["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" [citation omitted]).

The Petitioners-Appellants' argument (Brief at 23) that the only way to achieve the conclusion reached by the Supreme Court is to "insert the word owner into [RPTL 524 (3) (quotation marks omitted)]" ignores that this Court has determined that the phrase person "whose property is assessed" is synonymous with the word "owner."

When explaining the steps in reviewing an assessment, this Court began: "If the property owner is dissatisfied, RPTL article 5 provides for administrative review, followed by judicial review under RPTL article 7" (*see Circulo*, 96 AD3d at 1056). The Court continued by citing specifically to RPTL 524 (3) after writing these words: "RPTL article 5 requires that the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment (*id.* [italics in original]).

In *Larchmont Pancake House*, this Court again cited RPTL 524 (3) specifically when it wrote: "RPTL article 5 requires that the property owner file the complaint or grievance to obtain administrative review of a tax assessment" (citations omitted) (*Larchmont Pancake House*, 153 AD3d at 522). There is no need to insert any words into the statute to realize that the lower court reached the correct result.

The process leading to the enactment of RPTL 524 (3) also provides a solid foundation for *Circulo/Larchmont Pancake House*.

The legislative history of RPTL 524

The Legislature understood that it was making the property owner (or its designee) the only person empowered to file an administrative complaint when it re-codified the law on real property assessment and taxation in 1982. Contained in the Governor's Bill Jacket for Chapter 714 of the Laws of 1982 are a report on the proposed legislation from the Division of the Budget and a memorandum from the

State Comptroller to the Counsel to the Governor.

In paragraph 4 (a) of its report, the Division of the Budget stated that a reason to support the Bill is that it "would facilitate the assessment review process by better defining the review responsibilities of property owners, assessment review boards and assessors." Similarly, in describing the Bill, the State Comptroller noted that "it also includes separate sections setting forth the responsibilities of property owners as to complaints (section 524)."[5]

The term "taxpayer" appearing in the Memorandum before the Legislature when the re-codification was voted upon does not conflict with the Division of the Budget or the State Comptroller. Though assigning liability for paying real property taxes to certain tenants of certain types of residential property, RPTL 304 (2) makes it clear that "[n]othing in this subdivision shall relieve the owner of real property from the obligation for paying all taxes due on the real property under his ownership. . . ."

Furthermore, the Westchester County Tax Act makes the owner personally responsible for paying the real property tax levied upon the owner's property (*see* Westchester County Tax Act § 283.614 [1] ["Notwithstanding any general, special or local law to the contrary, whenever any tax . . . levied or assessed upon or against

[5] This Court may take judicial notice of items contained in a Governor's Bill Jacket (*see State v Green*, 96 NY2d 403, 408 n. 2 [2001]) even though they are not part of the record (*see Affronti v Crosson*, 95 NY2d 713, 761 [2001] and *Matter of Seidel v Bd. of Assessors*, 88 AD3d 369, 378 [2d Dept 2011])

the property of any persons . . . except a municipal corporation . . . shall at any time remain unpaid, such unpaid tax or assessment shall become the personal liability of the owner of the property"]). Thus, "taxpayer" means the owner of the property being assessed, not someone who, for whatever reason, pays the real property taxes levied upon a parcel of land. This makes sense since assessors only assess real property and taxing authorities only tax the owners of the real property being assessed. Though the Petitioners-Appellants may have paid the taxes levied upon the Subject Property, they are not the "taxpayer" within the plain meaning of that term (*cf. Matter of Banos v Rhea*, 25 NY3d 266, 278 [2015]).

Even the form used to initiate a grievance demonstrates the soundness of *Circulo/Larchmont Pancake House*.

Form RP-524

In paragraphs one and two on page one of Form RP-524, the form asks for the "Name and telephone no. of owner(s)" and the "Mailing Address of owner(s)" (R. 113), not for information about possible aggrieved parties who are not the owners of the real property whose assessment is being questioned.

Since RPTL § 524 (3) allows an owner to have a representative file an administrative complaint on the owner's behalf, paragraph three on page one of the form provides spaces within which can be inserted the "Name, address and telephone

no. of representative of owner. . . ." (R. 113).

Part Four of the form, entitled "DESIGNATION OF REPRESENTATIVE TO MAKE COMPLAINT", is where the owner makes the actual designation. At the beginning of Part Four, the owner (or one of its officers, if the owner is not an individual) is identified by name, followed by the appellation: "as complainant (or officer thereof)" (R. 116). The owner then names the representative and signs Part Four above the line at the end which reads "Signature of owner (or officer thereof)." By "complainant", the form is referring to the property owner.

In addition, Part Five on page 4 of the form asks for the "Signature of owner or representative" (R. 116). Part Six allows for a stipulated reduction to an assessment before the complaint is presented to the Board of Assessment Review. Such stipulation is signed by the Assessor and the "Complainant or representative" (R. 116).

There simply is no place on the form where the signature of an aggrieved party (other than the owner) is asked for, required or even allowed.[6]

RPTL 523-b

Further proof of the Legislature's decision to differentiate between

[6] Finally, Paragraph 7 on page one asks for the "[p]roperty owner's estimate of market value of property . . . ." (R. 113).

complainants in administrative reviews and petitioners in tax certiorari proceedings can be found in its creation of the Assessment Review Commission for Nassau County.

This statute, added to the Real Property Tax Law in 1998, does not limit the persons who may file grievances to the persons described in RPTL 524 (3). It expands the pool to "any person or corporation claiming to be aggrieved by the assessment of real estate. . . ." (RPTL 523-b [6] [a]). The clash in the language of RPTL 524 (3) and RPTL 523-b must mean that the Legislature did not intend RPTL 524 (3) to be interpreted as allowing persons, other than the "person whose property is assessed," to file grievances. Otherwise, it would have conformed the class of permissible RPTL 524 (3) complainants to the class created by RPTL 523-b.

The failure to synchronize must not have been an oversight since RPTL 523-b (6) (b) specifically incorporates the grounds for contesting assessments contained in RPTL 524 into the grievance process for Nassau County. Hence the Legislature was well aware of RPTL 524 (3) when it enacted RPTL 523-b.

RPTL 523-b demonstrates that if the Legislature had wanted to give persons, other than property owners, the right to pursue administrative review in their own names in places outside of Nassau County, it knew how to do so. By not expanding the RPTL 524 (3) definition, the Legislature intended that when RPTL 524 applies,

it is the property owner who must file the administrative complaint. (Other states are more expansive. For example, in Connecticut, "[a]ny person, including any lessee of real property, whose lease has been recorded . . . and who is bound under the terms of a lease to pay real property taxes and any person to whom title to such property has been transferred since the assessment date, claiming to be aggrieved by the doings of the assessors of such town may appeal therefrom to the board of assessment appeals" (Conn General Stat § 12-111 [a]).

Opinions of counsel for State agencies must give way to Court decisions.

Materials promulgated by the State Board of Equalization and Assessment, now the Office of Real Property Tax Services, should not be part of the analysis. While courts often look to the administrative agencies that oversee the application of statutes, "[w]here . . . the question is one of pure statutory interpretation there is little basis to rely on any special competence or expertise of the administrative agency. In such circumstances, the court need not accord any deference to the agency's determination and can undertake its function of statutory construction" (*Albano v Bd. of Trustees*, 98 NY2d 548, 553 [2002] [internal quotation marks and citation omitted]). (*See also, Jackson v Bank of Am., N.A.*, 149 AD3d 815, 821 [2d Dept 2017] and *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 80 [1st Dept 2009]).

Furthermore, the 1983 SBEA opinion upon which the Petitioners-Appellants

rely — Volume 7 of the Opinions of Counsel SBEA No. 123 — has been abrogated by *Circulo* and *Larchmont Pancake House* — a point conceded by the Office of Real Property Tax Services just last month when it amended this Opinion to advise that to the extent the Opinion may conflict with *Circulo* and *Larchmont Pancake House*, it has been superseded. The same update was made to Volume 12 of the Opinions of Counsel SBRTS No. 33.

Both opinions still incorrectly suggest that *Matter of McLean's Dept Stores, Inc. v Commr.* (2 AD2d 98 [3d Dept 1956]) stands for the proposition that tenants can be proper complainants under RPTL 524. The decision does not for a variety of reasons.

First, *McLean's Dept Stores* did not construe RPTL 524, but a local law in the City of Binghamton. The Third Department made clear that the lessee had the right to administrative review because lessees fit the category of those who could ask for review "within the meaning of the local law" (*McLean's Dept Stores,* 2 AD2d at 101). Therefore, *McLean's Dept Stores* does not support the argument that under RPTL 524, a lessee can file a complaint for the administrative review of an assessment.

Second, Binghamton's local law does not mirror RPTL 524. Insofar as relevant to this discussion, RPTL 524 (3) provides:

> "Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein."

The like provision in the Binghamton law provided:

> "which statement must be made by the person assessed or whose property is assessed, or by some person authorized to make such statement and who has knowledge of the facts stated therein."

McLean Dept Stores (2 AD2d at 99).

By this disjunctive ("the person assessed or whose property is assessed") which does not exist in RPTL 524 (3), Binghamton created two categories of grievant. While the City did not define the members of each category, the Third Department interpreted the local law to include tenants obligated by their leases to pay the real estate taxes on the demised premises. Since the Binghamton law does not apply here, the universe of possible protesters contained in that law is not relevant, except to emphasize that Binghamton may have thought it necessary to enlarge the universe of grievants beyond RPTL 524 (3), just as the Legislature did for Nassau County when it enacted RPTL 523-b.

Point V

The Petitioners-Appellants' leasehold was not the property assessed; hence, they cannot be the "person whose property is assessed."

No one disputes that RPTL 524 (3) requires a complaint about an assessment

to come from the "person whose property is assessed . . . ." To identify the "person whose property is assessed," we must start by determining what "property is assessed."

The Petitioners-Appellants' interest in the Subject Property is that of a tenant under a written lease with the Subject Property's owner: 700 Waverly (R. 31-32). The lease makes certain that it "is not to be construed as creating a partnership or joint venture between the parties, it being the intention of the parties only to create a landlord and tenant relationship" (R. 86, Section 48).

Leaseholds are not real property under New York law (*see Ft. Hamilton Manor, Inc. v Boyland*, 4 NY2d 192, 197 [1958] ["Under a long line of New York decisions, the interest of a tenant of realty under a real estate lease is not realty but is a chattel real which is personal property"], *PK Rest., LLC v Lifshutz*, 138 AD3d 434, 439 [1st Dept 2016] ["[A] lease for years is deemed personalty" (internal quotation marks and citation omitted], *First Trust & Deposit Co. v Syrdelco, Inc.*, 249 AD 285, 286-287 [4th Dept 1936] ["While a lease is an interest in real property and is a chattel real, it is not real estate but personal property. . . ."] and *Matter of Claim of Ehrsam v City of Utica*, 37 AD 272, 274 [4th Dept 1899] ["The term 'real estate' has a precise and well-settled meaning in the jurisprudence of this State, and the interest of a tenant of realty under a lease for years is not real estate, but is a chattel real . . . ."]).

The significance of this classification to New York's real property assessment and taxation is reflected in the structure of the Real Property Tax Law.

Assessors only assess real property.

The Real Property Tax Law concerns itself only with the assessment and taxation of real property, since New York "does not have a tax on personal property" (*see Matter of Mitchel Manor No. 1 Corp. v Bd. of Assessors*, 10 AD2d 854, 855 [2d Dept 1960]). Consistent with this focus, the statute limits the definition of real property to land, buildings and other physical elements (RPTL 102 [12]).

The Legislature, in RPTL 300, has dictated that "[a]ll real property within the state shall be subject to real property taxation . . . ." , and by enacting RPTL 304 (1) has made clear that "assessments shall be against the real property itself. . . ."

To accomplish the task of taxing real property, assessors are "charged by law with the duty of assessing real property . . ." (RPTL 102 [3]), coming up with assessments based upon "the valuation of real property" (RPTL 102 [2]) and making entries upon assessment rolls of certain information for "each separately assessed parcel of real property" (RPTL 502 [2]).

Because of this statutory framework, when the County of Nassau assessed a petitioner for the value of the buildings it constructed on land that it had leased from

the federal government, the assessment was stricken. Since the petitioner's leasehold "constitutes personal property, called a chattel real", it could not be assessed because New York does not assess personal property (*Matter of Mitchel Manor No. 1 Corp. v Bd. of Assessors*, 10 AD2d 854, 855 [2d Dept 1960] [citation omitted]).

The Legislature could have included leases within the definition of "real property" for the purposes of the Real Property Tax Law, thereby making a tenant's leasehold "property [that] is assessed"; but it did not. Leases are conspicuously absent from the definition of real property in RPTL 102 (12). Nor were leases defined as 'real property' in the statute that preceded the Real Property Tax Law. The Court of Appeals observed that the absence of leases from that definition must have been intentional. "[N]owhere in the Tax Law [now, the Real Property Tax Law] has the Legislature characterized a leasehold as taxable real property. Such omission is understandable, as a lease for years is deemed personalty" *Grumman Aircraft Eng'g Corp. v Bd. of Assessors* (2 NY2d 500, 507 (1957), *cert denied* 355 US 814, 78 S Ct 14, 2 L Ed 2d 31[1957]).

Therefore, although under proper circumstances, a tenant, "aggrieved by any assessment of real property" (RPTL 704 [1]), may bring a tax certiorari proceeding, it does so not because the tenant is a "person whose property is assessed" within the meaning of RPTL 524 (3), but because the Legislature has chosen to allow certain

persons, in addition to owners, to file tax certiorari proceedings (*see Circulo*, 96 AD3d at 1056 ["While RPTL article 5 requires that the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment, *any person* claiming to be aggrieved by any assessment may file a petition pursuant to RPTL article 7 . . . ." [citations omitted]).

Although the statutes always allow a "person whose property is assessed" to file an administrative complaint and be a petitioner in an Article 7 proceeding, the inverse is not true. A person who is eligible to be an Article 7 petitioner cannot be a complainant if that person is not also the "person whose property is assessed."

As the lower Court, correctly noted (R.14), since a challenge of an assessment starts with an administrative review that must be requested by "the person whose property is assessed", the filing of an administrative complaint by the property owner, 700 Waverly, was a sine qua non. Without it, a condition precedent for these Article 7 proceedings was not be satisfied and the Court lacked subject matter jurisdiction (*Circulo*, 96 AD3d at 1057 and *Larchmont Pancake House*, 153 AD3d at 521).

Point VI

Courts do not have the same authority to correct mistakes in the administrative review that they have to correct errors in court proceedings.

Circulo and *Larchmont Pancake House* examined the interplay of Articles 5 and 7 (*see Circulo,* 96 AD3d at 1056-1057 and *Larchmont Pancake House*, 153

AD3d at 521). As earlier precedents had done, these decisions recognized that a Court's ability to act differs depending upon whether the issue pertains to errors in the administrative review or errors in a tax certiorari petition.

Since Article 7 governs judicial proceedings, Courts, with subject matter jurisdiction, have given petitioners some leeway to correct minor errors in the judicial process. The cases cited by the Petitioners-Appellants are filled with examples of such errors being corrected. For example, while the Court of Appeals in *Matter of Miller v Bd. of Assessors* (81 NY2d 82 [1997]) did reverse the Appellate Division's order affirming dismissal of a tax certiorari petition with respect to 16 properties even though "written authorizations did not accompany the verification of the petition for those properties" (*id.* at 84), it did so because written authorizations from the owners of those 16 properties "were filed prior to the return date of the petition" (*id.* at 86), thereby correcting the defect in the Article 7 proceeding before the proceeding was noticed to be heard.

Ames Dept Stores v Assessor (102 AD2d 9, 13 [4th Dept 1984]) and *Bergman v Horne* (100 AD2d 526,527-28 [2d Dept 1984]) both dealt with Article 7 petitions that were defective because they were not verified. The Appellate Division allowed that mistake to be corrected.

In *Matter of Rotblit v Bd. of Assessors* (121 AD2d 727, 727 [2d Dept 1986]), a tax certiorari proceeding was not dismissed even though it had been brought in the name of a former owner because the authorization for the Article 7 petition (and presumably the administrative complaint) had been executed by the record owner. Similarly, in *Divi Hotels Mkg, Inc. v Bd. of Assessors* (207 AD2d 580 [3d Dept 1994]), the petitioner's counsel attempted to seek review under the owner's name but did not realize that title had been conveyed. Here there is no pretense that the Petitioners-Appellants were acting other than in their own name.

Matter of Bd. of Managers v Bd. of Assessors (96 AD2d 739 [2d Dept 2012]) is particularly instructive because it dealt with an administrative complaint that reported accurately the number of condominium units whose assessments the petitioner wanted to grieve but an Article 7 petition that omitted many of those units. Since the error lay in the Article 7 petition, not the grievance, this Court affirmed the lower court's decision to permit the petitioner to amend its petition.

Finally, *Great Eastern Mall, Inc. v Condon* (36 NY2d 544 [1975]) held that it was proper to serve the pleadings upon the deputy town clerk at a time when RPTL 708 (1) was not as specific as it is today.

On the other hand, Courts always have recognized that they cannot cure

fundamental errors made in the pre-judicial administrative review, since they lack subject matter jurisdiction to do so in the ensuing Article 7 proceeding.

Matter of the City of Little Falls v Bd. of Assessors (68 AD 2d 734 [4th Dept 1979]) illustrates this point. The administrative complaint filed by the City alleged that its property in the Town of Salisbury was overvalued. When it realized that it also should have claimed that the assessment was erroneous, illegal and excessive, Little Falls moved in the Article 7 proceeding for permission "to amend both its 1976-1977 application and the petition" to add these additional grounds (*id.* at 738). The Fourth Department refused to allow this substantive change to its administrative complaint. "The sole objection raised by the City in its application is overvaluation. It may not seek other relief. The court is without jurisdiction to consider any other objection. For this reason, amendment of the application to allege any other objection to the assessment is not permissible" (*id.* at 739).

The Court of Appeals reinforced the limitation in *Sterling Estates, Inc. v Bd. of Assessors* (66 NY2d 122 [1985]). There a property owner filed complaints challenging only the assessed value of its land. In the Article 7 proceedings, it moved to amend its petitions to include, among other things, challenges to the assessed value of the improvements to the land. To allow the petitioner to do so would mean that it would be alleging grounds in the judicial proceeding that were not raised in the

administrative review. The denial of the motion to amend was affirmed in an opinion where the Court of Appeals observed: "In this case, petitioner sought to amend its pleadings to obtain new and different relief based upon injuries not previously protested. The court was without authority to grant that amendment" (*id.* at 124 [citations omitted]). In other words, the *Sterling Estates* petitioner could not alter its administrative complaint.

Following *Sterling Estates,* the Appellate Division in *Matter of Frei v Town of Livingston* (50 AD3d 1381, 1382 [3d Dept 2008]) contrasted a court's authority to correct mistakes when it has subject matter jurisdiction and is acting under Article 7 with its inability to ignore or bypass major errors in the Article 5 administrative review process. It did so using a case cited by the Petitioners-Appellants — *Great Eastern Mall, Inc. v Condon* (36 NY2d 544, 548 [1975]). "That case dealt with pleading and service defects in the commencement of an RPTL Article 7 proceeding, which may be cured by procedural statutes preferring liberal construction of pleading and correction of technical omissions. Those statutes do not override the specific requirements of RPTL 524 regarding filing of assessment grievance complaints" (*Matter of Frei,* 50 AD3d at 1382).

Raer Corp. v Vil. Bd. of Trustees (78 AD2d 989 [4th Dept 1980]) provides a powerful example of the limitation placed upon courts when there are major mistakes

in the administrative review. Though sympathetic to the plight of a petitioner who had erred during the administrative review, the Appellate Division dismissed the tax certiorari proceeding, rejecting the property owner's argument that the respondent had waived the deficiencies. "Despite our desire to give liberal construction to these statutes, we are not at liberty to disregard them or in effect annul them. As the above cases indicate, some written complaint must be filed with the board of assessment review indicating the owner's grievance; and such was not done here. Absent that, the board and the court are without jurisdiction" (*id.*).

In *Matter of Raddison Community Assn. v Long* (3 AD3d 135, 139 [4th Dept 2003], *lv dismissed* 4 NY3d 870 [2005]), the Fourth Department summarized the different functions served by Articles 5 and 7 best when it used sections from each article to illustrate the point: "Indeed, the construction urged by petitioner would be contrary to the purpose of RPTL 524, which requires that a property owner file a complaint with the assessor . . . before seeking relief in court (*compare* RPTL 524, *with* RPTL 706")."

Perhaps the following few sentences from a Supreme Court decision sets forth the legal principle as succinctly as possible. "We are well aware of the rule that pleadings shall be liberally construed and that a taxpayer shall not have review of his assessment defeated by a technicality. However, before a court can liberally construe

pleadings, it must have jurisdiction. Since the complaint before the Board of Assessment Review did not include inequality as a ground, an Article 7 proceeding could not have been taken alleging inequality. For us to permit the petitioners to proceed in this action, we would be permitting them to continue an action which they are prohibited from taking directly. Petition dismissed for want of jurisdiction" (*Matter of Lussi v Bd. of Assessors*, 113 Misc 2d 558, 559 [Sup Ct, Essex County 1982]).

Here, as in the foregoing cases, the complaints filed by the Petitioners-Appellants did not confer subject matter jurisdiction upon the Supreme Court in the proceedings that are the subject of this appeal. This deficiency cannot be waived, ignored or corrected.

Point VII

The doctrine of estoppel is rarely imposed upon municipalities when exercising their governmental functions.

A major argument made by the Petitioners-Appellants is that the Respondents-Respondents should be estopped from raising the Petitioners-Appellants' errors. The flaw in this argument (besides the obvious one that the Petitioners-Appellants' failure to comply with RPTL 524 [3] deprived the lower court of subject matter jurisdiction) is that estoppel is rarely invoked against municipalities (*see New York State Med.*

Transp. Assn. v. Perales, 77 NY2d 126, 130 [1990] ["We have repeatedly made clear that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties (citations omitted) . . . While we have not absolutely precluded the possibility of estoppel against a governmental agency, our decisions have made clear that it is foreclosed in all but the rarest cases. (internal quotation marks and citations omitted).

This rule applies even when a municipal employee (here, the Town of Mamaroneck's assessor) dispenses incorrect information (*see Wilson v Neighborhood Restore Hous.*, 129 AD3d 948, 949 [2d Dept 2015] ["[E]quitable estoppel is applied against a municipality performing governmental functions only in the rarest of cases and erroneous advice by a governmental employee will not give rise to an exception to the general rule" (internal quotation marks and citations omitted).

The tax certiorari cases on estoppel cited by the Petitioners-Appellants do not make a case for deviating from the general rule. In *1555 Boston Road Corp. v. Fin. Adm'r of New York* (61 AD2d 187, 192 [2d Dept 1978]), this Court estopped the City of New York from reneging on an agreement it had reached with a property owner.

In *Mendick v Sterling* (83 AD2d 749 [4th Dept 1981]), the Town of Greece supplied the owner with a form administrative complaint. The form omitted the certification that the then statute required. The Appellate Division held that the

municipality could not argue for dismissal on the ground that the complaint submitted by the property owner was faulty for not containing the requisite certification when it was the municipality that had supplied that form to the property owner. In *Henderson v. Silco* (36 AD2d 439 [4th Dept 1971]) the assessor reduced the assessment based upon what the municipality later alleged was a defective complaint.

Here, as the Petitioners-Appellants acknowledge, all the Respondent-Respondent, Town of Mamaroneck did was to refer readers of its web site to sources within the State's Office of Real Property Tax Services. Its employees did not personally interact with the Petitioners-Appellants in connection the filing of the administrative complaints.

It also must be remembered that the record does not contain, nor do the Petitioners-Appellants assert that the web site maintained by the Respondent-Respondent, Village of Mamaroneck contained the same or similar references. Therefore, even if estoppel could be invoked against the Town of Mamaroneck, it cannot be invoked against the Village of Mamaroneck.

Point VIII

The remaining arguments lack substance.

Most of the tax certiorari cases relied upon by the Petitioners-Appellants dealt

with issues other than the definition of "person whose property is assessed." Many examined what it means to be aggrieved by an assessment;[7] in others the petitioners were the owners of the properties at issue,[8] three cases explored the unique treatment of properties developed with the aid of Industrial Development Agencies, two were decided before the modern statutory scheme for administrative review of assessments had been devised and one — *People ex rel. Irving Trust Co. v Miller* (264 AD 270 [1st Dept 1942]) — involved an assessment system governed by a City Charter.

Even the case cited by the Petitioners-Appellants that directly involved an administrative complaint — *Matter of Astoria Federal Savings and Loan Assn v Bd. of Assessors*(212 AD2d 600 [2d Dept 1995]) — should be read as supporting the Respondents-Respondents. There the complaint failed to comply with the statute only because it was not dated in the same year as the year of the challenged assessment. This Court overlooked that mistake but in careful, deliberate language, pointed out that it was doing so because this error "was [a] defect[] in the form of the

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[7] (*see Ames Dept Store v Assessor*, 102 AD2d 9 [4th Dept 1984] [fractional tenant aggrieved, *Arlen Realty & Dev. Corp. v Bd. of Assessors*, 74 AD2d 905 [2d Dept 1980] [lessee aggrieved], *Mack v Assessor*, 72 AD2d 604 [2d Dept 1979] [vendee of an unconditional contract aggrieved], *Onteora Club v Bd. of Assessors*, 29 AD2d 251 [3d Dept 1968] [lessee aggrieved] and *Waldbaum, Inc. v Fin. Adm'r*, 74 NY2d 128 [1989] [under terms of lease tenant not aggrieved]).

[8] (*see e.g. Cherrypike Estates, Inc. v Herbert*, 67 Misc 2d 853 [Sup Ct, Nassau County 1971], *Rochester v Assessors*, 136 AD2d 966 [4th Dept 1988] and *Tennanah Lake Townhouse & Villa Community v Fremont*,168 AD2d 789 [3d Dept 1990]).

complaint . . . ." (*id.* at 601).

The Industrial Development Agency cases

The Petitioners-Appellants cite three cases involving properties owned of record by Industrial Development Agencies (IDAs). IDAs were created for the purpose of attracting commercial and industrial development (*see* General Municipal Law § 852) by making "private financing available to private developers at tax exempt interest rates through the sale of industrial development revenue bonds" (*see Matter of Erie County Indus. Dev. Agency v Roberts*, 94 AD2d 532, 533 [4th Dept 1983], *affd for reasons stated below* 63 NY2d 810 [1984]). A complex arrangement between a developer, an IDA and a lending institution is required in order to accomplish tax exempt financing. One facet is for title to the real property to be formally vested in the IDA, instead of the company that will develop it. The IDA than leases the property back to the company which pays rent equal to the principal and interest on the industrial development revenue bond.[9] When the bond "is paid in full, the [IDA] returns to the company the title to the project [land]" (*Matter of Erie County Indus. Dev. Agency v Roberts*, 94 AD2d at 535).

The Court of Appeals has noted:

[9] For a thorough explanation of the steps involved, *see Matter of Erie County Indus. Dev. Agency v Roberts* (94 AD2d 532, 534-535 [4th Dept 1983]).

> "The conveyance of legal title to the [IDA] with simultaneous lease back to the [developer] is structured merely as a mechanism to facilitate financing and is not a genuine allocation of ownership in the agency. The economic benefits and burdens of ownership are reserved to the [developer] and the [IDA] serves only as a conduit for the tax benefits provided by such an arrangement."

Davidson Pipe Supply Co. v Wyoming County Indus. Dev. Agency (85 NY2d 281, 286 [1995]).

Section 874 (1) of the General Municipal Law mandates that real property in the name of an IDA be exempt from real estate tax (*see also* RPTL 412-a). To avoid the unintended consequence of local municipalities being deprived of tax revenue, the developer agrees to make payments in lieu of taxes to the IDA which remits such payments to the affected taxing jurisdictions in order to make them whole. If all goes as planned, the economy is stimulated with a new job-producing project, the local taxing authorities receive payments equal to what they would receive if the company held title and the company receives the financing and the tax benefits needed to make the investment.

It is through this lens that *Matter of EFCO Products v Cullen* (161 AD2d 44 [2d Dept 1990]), *Matter of Big "V" Supermarkets, Inc., Store #217 v Assessor* (114 AD2d 726 [2d Dept 1985]) and *Matter of Birchwood Vil. LP v Assessor* (94 AD3d 1374 [3d Dept 2012]) must be viewed. Each petitioner was a tenant in a project

funded through an IDA. Their titular status as 'tenant' masks the economic reality explained in *Davidson Pipe Supply*. In these cases, the 'tenants' were 'owners', in every sense of the word except actual title, making them the 'person whose property is assessed'.

The 19th century cases

The Petitioners-Appellants' reliance on *Matter of Burke* (62 NY 224 [1875]) and *Matter of Walter* 75 NY 354 [1874]) is misplaced because each had been decided prior to 1880 and was predicated on statutes that existed before the modern structure for assessment review had begun to take shape (*see People ex rel. Wallkill Val. R.R. v Keator*, 101 NY 610, 611 [1885] ["Chapter 269 [of the laws of 1880] provides a new and complete system for reviewing upon *certiorari* and correcting errors of assessors. . . ."]).

Here, as well as in *Circulo* and *Larchmont Pancake House*, this Court is again called upon to construe the RPTL as it presently exists, not as its forbears may have read. Therefore, the holdings in *Burke* and *Walter* are of no use.

Finally, the Petitioners-Appellants claim or implication that the earlier tax statutes used the word "owner" in defining who may file an administrative grievance fails to acknowledge that the word 'owner' has not been used to define complainant since at least the Laws of 1896.

Point IX

RPTL 554 is consistent with *Circulo* and *Larchmont Pancake House*.

The Petitioners-Appellants seize upon the word 'owner' in RPTL 554 (2) without realizing that the use of that word ties into this Court's construction of RPTL 524 (3).

The reference in RPTL 554 (2) to "any person who would be entitled to file a complaint" simply takes into consideration the provision in RPTL 524 (3) that allows an owner to deputize someone to file an administrative complaint on the owner's behalf. Since an owner can nominate a representative to file a complaint, the Legislature decided that such representative also can act on behalf of an owner when an obvious error in an assessment roll is to be corrected. The legislation is no more complicated than that.

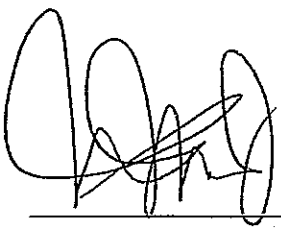
As further proof, 7 Opinions of Counsel SBEA No. 73 – an opinion involving RPTL 554 – begins: "An application for correction of an error on a tax roll (Form EA-554) should be filed by the owner of the real property or his duly authorized agent." Later on page 1, counsel for the SBEA writes: "It should be apparent from the foregoing language that the applicants contemplated in section 554 . . . would only include the owner of the real property . . . and his duly authorized officer or agent."

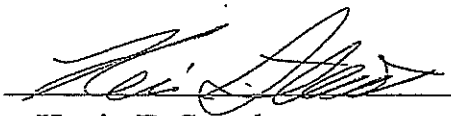
Conclusion

Matter of Circulo Housing Dev. Fund Corp. v Assessor (96 AD3d 1053 [2d Dept 2012]) and *Larchmont Pancake House* (153 AD3d 521 [2d Dept 2017]) are directly on point. The owner of the Subject Property did not file the administrative complaints challenging the assessments at issue. Even though the Petitioners-Appellants may be aggrieved by those assessments within the meaning of RPTL Article 7, its petitions must be dismissed because "a condition precedent [for commencing these proceedings] was not satisfied" (*Circulo,* 96 AD3d at 1056), and therefore this Court lacks subject matter jurisdiction (*see also Larchmont Pancake House* (153 AD3d 521, 522 [2d Dept 2017], *rearg and lv denied* — AD3d —, Case No. 2015-05601, Document M243464.pdf [December 26, 2017]), *Matter of Frei v Town of Livingston*, 50 AD3d 1381 [3d Dept 2008] and *Matter of Onteora Club v Bd. of Assessors*, 17 AD2d 1008 [3d Dept 1962], *affd* 13 NY2d 1170 [1964]).

Dated: January 11, 2018

McCullough, Goldberger & Staudt, LLP



By: 

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Certification of Compliance

This certification is being made pursuant to 22 NYCRR §670.10.3 (f).

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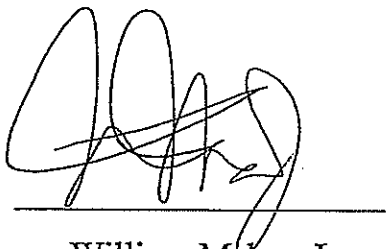

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