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

Court of Appeals

of the

State of New York

In the Matter of

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

Petitioners-Appellants,

– against –

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

Respondents-Respondents,

For a Review under Article 7 of the RPTL.

MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS
STATE OF NEW YORK

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Appellate Division, 2d Department
Docket No. 2017-03016

Index No. 23040/09

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that upon the annexed affirmation of Matthew S. Clifford, Esq., dated March 2, 2021, and the papers annexed thereto, and all prior pleadings and proceedings had herein, the Petitioners-Appellants will move this Court, at the Courthouse thereof, located at the Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, on March 22, 2021 at 9:30 o'clock in the forenoon of that date, or as soon thereafter as counsel may be heard, for an order pursuant to C.P.L.R. § 5602 and 22 N.Y.C.R.R. §500.22, granting Petitioners-Appellants leave to appeal to the Court of Appeals from the "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings entered by the Supreme

Court, Westchester County on January 27, 2021, which final judgment was necessarily affected by the Appellate Division's December 11, 2019 Decision and Order on a prior appeal in the action, together with such other and further relief as the Court may deem just and equitable.

Dated: March 2, 2021
Bronxville, New York

GRIFFIN COOGAN SULZER
& HORGAN, P.C.

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DISCLOSURE STATEMENT

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

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

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

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

COURT OF APPEALS
STATE OF NEW YORK

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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 the Board of Assessment Review, *Respondents-Respondents,*	Appellate Division, 2d Department Docket No. 2017-03016 Index No. 23040/09 **AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL**

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MATTHEW S. CLIFFORD, ESQ., an attorney duly admitted to practice law in the Courts of the State of New York, affirms the following under the penalties of perjury:

1. I am an attorney in the law firm of Griffin, Coogan, Sulzer & Horgan, P.C., attorneys for DCH Auto, as Tenant Obligated to Pay Taxes and DCH Investments Inc. (New York), as Tenant Obligated to Pay Taxes, Petitioners-Appellants herein ("Petitioner"), in the above entitled proceedings, and as such, I am fully familiar with the facts and circumstances set forth herein.

2. Pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a)(1)(ii), I submit this affirmation in support of Petitioner's Motion for Leave to Appeal to the Court of Appeals from the "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings entered by the Supreme Court, Westchester County on January 27, 2021 ("'So Ordered' Stipulation and Judgment").[1] This appeal brings up for review all prior orders, including the December 11, 2019 Decision and Order of the Appellate Division, Second Department. *See Matter of DCH Auto v. Town of Mamaroneck*, 178 A.D.3d 823, 825 (2d Dep't 2019) ("Decision").[2]

3. Petitioner previously filed a Motion for Leave to Appeal pursuant to CPLR 5602(a)(1)(i) related to one property and one consolidated proceeding, but because at that time there were severed proceedings involving challenges to other property assessments which remained open and of record, this Court, by Order dated December 17, 2020, dismissed Petitioner's motion on the ground that "the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution (*see Burke v. Crosson*, 85 NY2d 10, 18 n 5

[1] A copy of the "So Ordered" Stipulation and Judgment, with Notice of Entry, is attached hereto as Exhibit 5.

[2] A copy of the Decision, with Notice of Entry, is attached hereto as Exhibit 3.

[1995])." *Matter of DCH Auto, etc. v. Town of Mamaroneck, etc.*, 36 N.Y.3d 941 (2020).[3]

4. Subsequent to entry of this Court's Order, all of the remaining severed proceedings, which also involved a net tenant obligated to pay taxes, were dismissed with prejudice via a "So Ordered" Stipulation and Judgment, since the Second Department's legal determination would have resulted in their dismissal as well. Therefore, the Decision necessarily affects the final "So Ordered" Stipulation and Judgment, and Petitioner now brings this motion pursuant to CPLR 5602(a)(1)(ii), because the Decision is final and ripe for determination by this Court.

5. This appeal only raises issues arising from the Decision. No subsequent issues can be raised and none are raised. There were no subsequent issues; only the subsequent entry of the "So Ordered" Stipulation and Judgment in Index No. 23040/09 below.

6. This application seeks this Court's review of an issue of statewide importance: Whether a net tenant, who is contractually obligated to pay the real property taxes and authorized by its lease to challenge the real property tax assessment, has the authority to file an administrative grievance against a real property tax assessment pursuant to Real Property Tax Law ("RPTL") §524(3).

[3] A copy of this Court's Order is annexed hereto as Exhibit 7.

Determination of this issue is critical because the filing of an administrative grievance under RPTL article 5 is an absolute prerequisite to the filing of a judicial petition seeking assessment review pursuant to RPTL article 7.

7. In its Decision the Appellate Division, Second Department ("Second Department") affirmed the judgment of the Supreme Court, Westchester County, which dismissed the within proceedings as they pertained to a single tax lot in the Town of Mamaroneck, New York. *See* Ex. 3 at 2. Interpreting RPTL §524(3), the Second Department held that by "filing the administrative complaints under RPTL 524 in its own name, [Petitioner] failed to satisfy a condition precedent to the commencement of an RPTL article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner." *Id.* The Second Department reached that determination, notwithstanding the fact that Petitioner is a net tenant contractually obligated by its lease with the property owner to pay all of the real property taxes assessed against the property ("Net Tenant"), and is specifically authorized by its lease to challenge the assessments upon which the taxes are based.

8. Prior to 2012, RPTL §524(3) had always been interpreted to permit the filing of a grievance by a Net Tenant or any non-owner authorized by its lease to grieve the assessments upon which the taxes are based. For example, the Town's website directed all taxpayers (irrespective of their status as owner, tenant

or otherwise) to the statutorily mandated grievance application form ("RP-524 Complaint") and grievance application instructions (Publication 1114 entitled "Contesting Your Assessment in New York State") published by the New York State Office of Real Property Tax Services ("ORPTS"), the state agency charged with overseeing local assessment administration. R. 281.[4] The website specifically stated that "[a]ny person aggrieved by an assessment (*e.g.*, an owner, purchaser, or tenant who is required to pay the real estate taxes pursuant to a lease or written agreement) may file a complaint." *Id*.

9. The Second Department principally relied upon two of its own prior decisions, *Matter of Circulo Housing Dev. Fund Corp*. v. *Assessor of City of Long Beach*, 96 A.D.3d 1053 (2d Dep't 2012) ("*Circulo*") and *Matter of Larchmont Pancake House v. Bd. of Assessors*, 153 A.D.3d 521 (2d Dep't 2017) ("*Larchmont Pancake House I*"), *aff'd on other grounds*, 33 N.Y.3d 228 (2019). In both *Circulo* and *Larchmont Pancake House I*, the Second Department held that the phrase "person whose property is assessed" in RPTL §524(3) applies exclusively to a property "owner." Because the owner did not file the administrative grievance in either case, that Court determined that the respective petitioners failed to satisfy a condition precedent under RPTL §706(2). In *Larchmont Pancake House I*, *the* Second Department held that the Supreme Court lacked subject matter jurisdiction

[4] Citations to "R." refer to pages of the fully briefed record on appeal filed with the Second Department in Docket Number 2017-03016.

because the condition precedent requirement of RPTL §706(2) was not met. In direct contrast to the case at bar, neither *Circulo* nor *Larchmont Pancake House I* involved a Net Tenant authorized to challenge the assessment.

10. In *Larchmont Pancake House I*, the petitioner sought leave to appeal, which this Court granted. In *Matter of Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d 228, 236 (2019) (*Larchmont Pancake House II*), this Court was confronted with two issues: (1) whether that petitioner "qualified, as a non-owner, to seek administrative review pursuant to RPTL 524(3)"; and (2) whether that petitioner met the standard as an "'aggrieved party' with standing to maintain a tax certiorari proceeding pursuant to RPTL article 7." This Court affirmed the Second Department's decision, but on grounds unrelated to the interpretation of RPTL §524(3). Instead, this Court held that because the petitioner was "a non-owner with no legal authorization or obligation to pay the real property taxes," it was "not an aggrieved party within the meaning of RPTL article 7" and thus lacked standing to bring a judicial challenge. *Id.* at 240. As a result, this Court had "no occasion to consider the parties' dispute concerning the scope of appropriate challengers under RPTL 524." *Id.* at 240-41. This Court left that issue open for another day – that day has now arrived.

11. This case presents a separate and distinct set of facts to allow this Court to consider "the scope of appropriate challengers under RPTL 524." *Id.*

There can be no dispute that Petitioner, a Net Tenant who is authorized by its lease to challenge the property's tax assessments, is an aggrieved party under RPTL §704(1). *See Larchmont Pancake House II*, 33 N.Y.3d at 239. The sole issue herein is whether Petitioner qualifies as an appropriate challenger/complainant under RPTL §524(3). In *Larchmont Pancake House II*, this Court neither considered the Second Department's interpretation of RPTL §524(3) as set forth in *Circulo* and *Larchmont Pancake House I*, nor determined whether that interpretation properly includes a Net Tenant like Petitioner.

12. The Second Department, by applying its holdings in *Circulo* and *Larchmont Pancake House I* – both of which involved non-owner, non-obligated taxpayers – to the within facts, has created new and more restrictive law while contemporaneously creating a clear conflict with decisions of both the Appellate Division and Supreme Court in other departments that contradict the reasoning of *Circulo* and *Larchmont Pancake House I*, and which expressly rejected the application of those decisions to a contractually obligated and authorized taxpayer. Specifically, the Second Department's decisions in *Circulo*, *Larchmont Pancake House I* and in this case have created a split in authority with decisions of the Third Department in *McLean's Dep't Stores, Inc. v. Commissioner of Assessment of the City of Binghamton*, 2 A.D.2d 98 (3d Dep't 1956) ("*McLean's*") and *Big "V" Supermarkets, Inc. Store # 217 v. Assessor of Town of E. Greenbush*, 114 A.D.2d

726 (3d Dep't 1985) ("*Big 'V' Supermarkets*"), as well as Supreme Court decisions in the Fourth Department that have confronted the issue subsequent to *Larchmont Pancake House I* being decided. Relying on Fourth Department precedent, these courts have expressly rejected the application of *Circulo* and *Larchmont Pancake House I* to Net Tenants who are authorized to challenge tax assessments: *Rite Aid Corp. v. Town of Irondequoit Bd. of Assessment Review et al.,* Index No. E2017001377, at pp. 9-15 (Sup. Ct. Monroe Cty. Mar. 6, 2018) ("*Rite Aid*"); *Walgreen E. Co., Inc. v. The Assessor and the Bd. of Assessment Review of the Town of Brighton*, Index No. 2017/7289, at pp. 9-15 (Sup. Ct. Monroe Cty. Mar. 9, 2018) ("*Walgreen*"); *Rite Aid Corp. v. Town of Williamson Bd. of Assessment Review et al*., Index Nos. 75978/13, 77375/14, 78812/15, 79802/16 & 81093/17, at pp. 9-15 (Sup. Ct. Wayne Cty. May 17, 2018) ("*Rite Aid 2*").[5]

13. The decisions outside the Second Department are also consistent with an Opinion of Counsel issued by ORPTS, which held, "[a] shopping center lessee who is obligated by lease to pay taxes has the right to administrative and judicial review of the assessment of the property leased." R. 279. Shortly after the Second Department decided *Larchmont Pancake House I*, ORPTS found it necessary to revise this Opinion of Counsel with a note that expressly advised of this split in authority between the Second and Third Departments:

[5] Copies of the decisions in *Rite Aid*, *Walgreen*, and *Rite Aid 2* are annexed hereto as Exhibits 8, 9, and 10, respectively.

> "Pursuant to [*Circulo*] and [*Larchmont Pancake House I*], 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." [6]

14. As a result of the Decision herein, Petitioner is precluded from filing a grievance while similarly situated Net Tenants in the Third and Fourth Judicial Departments are not.

15. It is respectfully submitted that this split in authority requires this Court's review and determination so that there can finally be uniformity among all the State's courts regarding "the scope of appropriate challengers under RPTL 524." *Larchmont Pancake House II*, 33 N.Y.3d at 240-41.

STATEMENT OF PROCEDURAL HISTORY AND TIMELINESS OF MOTION

16. The property at issue in these proceedings is located at 700 Waverly Avenue, Mamaroneck, New York, and is identified as Section 8, Block 26, Lot 1.1 on the Official Tax Map of the Town of Mamaroneck, and as Section 8, Block 111, Lot 1A on the Official Tax Map of the Village of Mamaroneck (the "Subject

[6] *See* 7 Opinion of Counsel SBEA No. 123 (revised December 11, 2017), obtained at https://www.tax.ny.gov/pubs_and_bulls/orpts/legal_opinions/v7/123.htm, on January 16, 2018, a copy of which is attached hereto as Exhibit 11. ORPTS later revised this Opinion of Counsel to consider the impact of *Larchmont Pancake House II*, advising that "a lessee who is not legally responsible for paying the real property tax on the leased property is not entitled to seek judicial review of the assessment under RPTL Article 7." A copy of this revised Opinion of Counsel is annexed hereto as Exhibit 12.

Property"). R. 31. The Subject Property is being used as an automotive service center known as "DCH Toyota City."

17. Petitioner's lease with the property owner, 700 Waverly Avenue Corp., provides, in relevant part, "[t]enant shall have the right, at its sole cost and expense, to contest the amount or validity, in whole or in part, of any Imposition relating to the Demised Premises by appropriate proceedings diligently conducted in good faith …."[7] R. 56. The term "Imposition" includes "all *ad valorem* real estate taxes or other taxes in the nature thereof…" R. 55 (emphasis added). By the inclusion of this language, the property owner/landlord specifically authorized Petitioner (as tenant) to challenge the Subject Property's assessments, upon which the real property taxes are based. The lease permits Petitioner to file in its own name. *See* R. 56.

18. Petitioner timely filed an RP-524 Complaint for the 2009, 2010, 2011, 2013 and 2014 assessment years against the assessments that Respondent Town of Mamaroneck placed on its property for those years.[8] The Town's website instructed the public that "[a]ny person aggrieved by the assessment" could file a grievance. R. 281. The Town's website also directed taxpayers to the RP-524

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

[8] *See* R. 32. The terms "RP-524 Complaint," "complaint" and "administrative grievance" all refer to the administrative grievance complaint that is filed with the Board of Assessment Review to challenge the assessment established by the assessor on the tentative assessment roll pursuant to RPTL article 5. Those terms will be used interchangeably throughout this Affirmation.

Complaint form and grievance application instructions published by ORPTS. *See id*. The ORPTS instructions advised that grievances could be filed by "[a]ny person who pays property taxes" including "tenants who are required to pay property taxes pursuant to a lease or written agreement." R. 247.

19. In each instance, the Town's Board of Assessment Review ("BAR") accepted the grievance applications and acted upon them by considering them, after which it confirmed the Town assessments. R. 35-38, 105, 119, 134, 149-50, 166-67. The Town BAR did not dismiss the grievances, raise any objections, or in any way communicate that it believed that the grievances were defective. *See id*. It did not request a personal appearance from Petitioner, its attorney, or the owner for that matter, and it did not request any information about the Subject Property or about the grievance. *See id*.

20. In compliance with RPTL article 7, judicial petitions challenging the Town assessments on the Subject Property were timely filed for the assessment years 2009, 2010, 2011, 2013 and 2014. *See* R. 34. Only the 2013 petition included a challenge to the assessments of other properties in addition to the Subject Property. R. 157. The Town did not move to dismiss the article 7 proceedings before the return dates on the petitions.

21. Petitioner also timely filed administrative grievances for the 2010, 2011 and 2013 assessment years against the Village assessments placed on the

Subject Property for those years as required by RPTL article 5. R. 33. Like the Town BAR, in each instance, the Village BAR accepted the grievance applications and acted upon them by considering them, after which it confirmed the Village assessments. R. 39-41, 182-83, 199-200, 218-19. For each of the assessment years, the Village BAR did not dismiss the grievances, raise any objections, or in any way communicate that it believed that the grievances were defective. *See id.* It also did not request a personal appearance from Petitioner, its attorney, or the owner, and it did not request any information about the Subject Property or raise any issue about the respective grievances. *See id.*

22. Pursuant to RPTL article 7, judicial petitions challenging the Village assessments on the Subject Property were timely filed for the assessment years 2010, 2011, and 2013. *See* R. 34. Each petition challenged the assessment for the Subject Property and other properties. R. 189, 206-07, 225. The Village did not move to dismiss the article 7 proceedings before the return dates on each of the petitions.

23. On or about September 29, 2016, approximately seven (7) years after the first grievance was filed, Respondents Town of Mamaroneck and Village of Mamaroneck ("Respondents") moved to dismiss each of the pending proceedings on the grounds that the Supreme Court lacked subject matter jurisdiction because the underlying grievances were filed by Petitioner, and not the property owner, and

thus Petitioner purportedly failed to satisfy a condition precedent to filing the petitions. *See* R. 259-268. Citing *Circulo*, Respondents argued that only an owner could properly file a grievance pursuant to RPTL §524(3).

24. On December 16, 2016, the Supreme Court, per the Honorable O. Peter Sherwood, J.S.C., granted the Respondents' motion to dismiss all of the proceedings, finding that Petitioner failed to meet a condition precedent because Petitioner, and not the property owner, filed the predicate grievances. R. 16-17. According to Supreme Court, "the failure of the owner to raise the RP-524 Complaint in the administrative process is a fundamental error which the courts cannot cure because of a lack of subject matter jurisdiction." R. 20. The Supreme Court's Decision and Order only pertained to the Subject Property and did not concern assessment challenges to any other properties set forth in the 2013 Town petition or the 2010, 2011, or 2013 Village petitions.

25. Subsequently, but prior to the entry of judgment, the parties entered a Stipulation which consolidated all article 7 proceedings pending against Respondents into a single proceeding bearing Index number 23040/09. That Stipulation, which was "So Ordered" by the Supreme Court, provided that "the judgment to be entered in the Proceedings shall be confined to adjudicating the assessment of the real property located at 700 Waverly Avenue, Mamaroneck, NY 10543" and "that so much of the petitions in the proceedings bearing index

numbers 10896/10, 9828/11 55966/13 and 61724/13 that challenge the assessments of the other lots … shall be severed and continue to be litigated…." R. 25.

26. On February 10, 2017, the Supreme Court entered Judgment, and on February 15, 2017, Respondents served Petitioner with Notice of Entry of the Supreme Court's Judgment via regular mail.[9]

27. On March 1, 2017, Petitioner timely filed a Notice of Appeal.[10] Petitioner perfected its appeal on October 26, 2017, the appeal was fully briefed on February 13, 2018, and oral argument was held on October 21, 2019.

28. On December 11, 2019, the Second Department entered its Decision affirming the Supreme Court's judgment. *See* Ex. 3.

29. On January 6, 2020, Respondents served Petitioner with Notice of Entry of the Second Department's Decision via regular mail. *See id.*

30. On February 6, 2020, Petitioner served and filed with the Second Department a Motion for Reargument or for Leave to Appeal. On or about February 18, 2020, the International Council of Shopping Centers, Inc. ("ICSC") filed a Cross-motion for leave to appear as *amicus curiae*. On or about February 19, 2020, Respondents filed an opposition to Petitioner's motion. Respondents did not oppose ICSC's Cross-motion.

[9] A copy of the Judgment, with Notice of Entry, is annexed hereto as Exhibit 1.
[10] A copy of the Notice of Appeal filed herein is attached hereto as Exhibit 2.

31. On July 13, 2020, the Second Department entered a Decision and Order denying Petitioner's Motion to Reargue or for Leave to Appeal.[11]

32. On July 20, 2020, Respondents served Petitioner with Notice of Entry of that Decision and Order via regular mail. *See* Ex. 4.

33. On August 20, 2020, Petitioner timely filed a Motion for Leave to Appeal with this Court (Motion No. 2020-608).

34. On or about September 3, 2020, Respondents filed their opposition to Petitioner's Motion for Leave to Appeal.

35. Motions for Leave to File *Amicus Curiae* briefs in support of Petitioner's motion were filed by: Rite Aid Corporation (Motion No. 2020-616); the ICSC (Motion No. 2020-642); J.C. Penney Company Inc., CVS Albany LLC, United Artists Theater Circuit, Inc. and AMF Bowling Centers, Inc. (Motion No. 2020-659); and Stop & Shop Supermarket Company, LLC (Motion No. 2020-694).

36. Respondents opposed each of these motions.

37. On December 17, 2020, this Court granted the *amici's* motions[12] but dismissed Petitioner's Motion for Leave to Appeal on the ground that "the order

[11] A copy of this Decision and Order, with Notice of Entry, is attached hereto as Exhibit 4.
[12] Attached hereto as Exhibit 6 are copies of this Court's Orders.

sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution (*see Burke v. Crosson*, 85 NY2d 10, 18 n 5 [1995])".[13]

38. The parties subsequently entered into – and the Supreme Court signed – the "So Ordered" Stipulation and Judgment, which dismissed with prejudice the assessment challenges to properties other than the Subject Property that remained pending under index number 23040/09, and left remaining only Petitioner's challenge to the Subject Property's assessments.

39. The "So Ordered" Stipulation and Judgment was entered on January 27, 2021. *See* Ex. 5

40. On February 3, 2021, Petitioner served Respondents and the Mamaroneck Union Free School District with Notice of Entry of the "So Ordered" Stipulation and Judgment via NYSCEF. *Id.*

41. Given the foregoing, and pursuant to CPLR §§2103(b)(2) and 5513(b), the time for this application does not expire until March 5, 2021. As such, this application is timely submitted.

42. This Motion for Leave to Appeal is noticed to be heard at a motion day at least eight days and not more than fifteen days after service hereof and, therefore, is in compliance with CPLR §5516.

[13] Subsequent to the entry of this Order, the parties filed with the Supreme Court a stipulation to convert Index No. 23040/09 to electronic filing via the New York State Courts Electronic Filing System ("NYSCEF").

43. On the basis of the foregoing, Petitioner properly and timely moves this Honorable Court for leave to appeal.

JURISDICTIONAL STATEMENT

44. This Court has jurisdiction to hear the present motion and the proposed appeal pursuant to CPLR §5602(a)(1)(ii) and New York Compilation of Codes, Rules and Regulation ("NYCRR") Title 22, §500.22. The Decision and Order of the Second Department, entered on December 11, 2019, was at that time non-final. Now that the "So Ordered" Stipulation and Judgment has been entered, the action became final and will bring up for review the Decision and Order. *See Voorheesville Rod & Gun Club v. E.W. Tompkins Co.*, 82 N.Y.2d 564, 568 (1993). The Court Of Appeals' jurisdiction is now clear pursuant to CPLR 5602(a)(1)(ii).

FACTUAL HISTORY

45. The facts underlying these consolidated proceedings are set forth in the "Joint Stipulation of Facts" (R. 29 – 44), the "Book of Exhibits" (R. 45 – 257), the Affirmation of William E. Sulzer, Esq. in Opposition to the motion to dismiss filed in the Supreme Court (R. 269 – 292), Petitioner's Brief dated October 25, 2017, and Petitioner's Reply Brief dated February 12, 2018, filed with the Second Department, all of which are being submitted together with the instant motion. Petitioner relies upon the facts set forth in the aforesaid documents for purposes of

the instant motion and incorporates them herein by reference. A brief summary of the facts has been provided above for context.

QUESTIONS PRESENTED FOR REVIEW

46. The underlying issue in this case is whether the Second Department was correct in holding that by "filing the administrative complaints under RPTL 524 in its own name, [Petitioner] failed to satisfy a condition precedent to the commencement of an RPTL article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner." Ex. 3, at p. 2. Based upon this interpretation of RPTL §524(3), the Second Department dismissed this consolidated proceeding simply because Petitioner, a Net Tenant who is authorized by its lease to challenge the real property tax assessments, and not the property owner, filed the RPTL article 5 administrative grievances. There is no dispute that Petitioner is an aggrieved party under RPTL §704(1) as it is contractually obligated to pay all of the real property taxes. There also is no dispute that the grievances filed by Petitioner provided Respondents with the statutorily required notice.

47. In the Second Department's view, to "show that a complaint was made in due time to the proper officers to correct such assessment" (*see* RPTL §706[2]), the complaint must be filed by the property owner or by someone identifying themselves on the complaint as an agent of the owner. *See* Ex. 3. In reaching this result, the Second Department has retroactively and erroneously

imposed an additional requirement on the filing of administrative grievances under RPTL §524(3), to wit: that only an owner, or a representative specifically identifying itself on the grievance as an agent of the owner, has the exclusive authority to file a grievance under RPTL article 5. It is respectfully submitted that this unprecedented requirement is contrary to the plain language of the statute, the intent of the statutory scheme, settled case law, ORPTS's interpretation of RPTL §524(3), long-established and accepted tax certiorari practice, and the Town's Internet website, which was intended to provide guidance to a party wishing to challenge its property tax assessment.

48. This case raises important questions of statutory construction, and granting leave to appeal would resolve the aforementioned conflict in the interpretation of RPTL §524(3) between the Second Department on the one hand, and the Third Department and Supreme Courts in the Fourth Department on the other.

49. There are five reasons why this Court should grant Petitioner's Motion for Leave to Appeal.

50. First, the Second Department's Decision contradicts the plain language of RPTL §524(3), is unsupported by the legislative history, and is contrary to established rules of statutory construction. Its conclusion that only the

property owner, or someone identifying itself as an agent of the owner,[14] has the exclusive right to file a grievance is illogical as the right to judicial review is preserved for "aggrieved parties," which, by its plain terms, embodies a much broader group of complainants.

51. Second, the Decision contradicts decades of precedent wherein relief was granted to the petitioner when the predicate administrative grievance was filed by an aggrieved party, even when that party was not the owner of the property. The prior decisions of this Court and the Appellate Division contemplate an interpretation where one party – *i.e.*, the Net Tenant – files both the RPTL §524(3) complaint and the RPTL §704(1) petition. The Decision also contradicts ORPTS's Opinion of Counsel, the ORPTS instructions accompanying the RP-524 Complaint form, long-established and accepted tax certiorari practice, and the Town's own Internet website, which instructed that a tenant obligated to pay property taxes may file a grievance. Additionally, the reasoning underlying *Circulo, Larchmont Pancake House I* and the within Decision is not supported by *Larchmont Pancake House II*, for in that case this Court did not adopt the Second Department's interpretation of RPTL §524(3). Moreover, Supreme Courts in the Fourth Department have expressly rejected the application of *Circulo* and *Larchmont*

[14] The Decision also improperly rewrites the statutory language of RPTL §524(3). The statute uses the terms "person whose property is assessed" and "complainant." Nowhere in this statute is the specific term "owner" used to describe the party given the right to file a complaint under RPTL article 5. The Second Department impermissibly restricted the terminology when it construed the statute to mean an "owner."

Pancake House I to a contractually-obligated and authorized taxpayer. *Rite Aid*, at pp. 9-15; *Walgreen*, at pp. 9-15; *Rite Aid 2*, at pp. 9-15.

52. Third, the Decision is inconsistent with this Court's repeated directive that the law '"relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality.'"[15] *Matter of Great Eastern Mall, Inc. v. Condon*, 36 N.Y.2d 544, 548 (1975) (quoting *People ex rel. N.Y. City Omnibus Corp. v. Miller*, 282 N.Y. 5, 9 (1939)). Notwithstanding the liberal view expressed by this Court in *Matter of Great Eastern Mall*, the Second Department strictly construed RPTL §524(3) and dismissed this consolidated proceeding because the property owner did not file the administrative grievances and Petitioner did not identify itself on the complaint as an agent of the owner, even though Petitioner's lease specifically authorized it to challenge the real property assessments. This is a textbook technicality that was imposed *ex post facto*, and dismissal on these grounds is inconsistent with the remedial nature of the RPTL.

53. Fourth, notwithstanding that the Second Department below did not expressly find that subject matter jurisdiction was lacking, it nevertheless ignored settled case law that holds that any technical objections not raised by the BAR at

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

the grievance stage are waived. The grievances filed herein provided Respondents with the statutorily-required notice. Despite being given proper notice, both the Town BAR and Village BAR accepted the grievances; neither raised any objections nor dismissed the grievances because they were filed by Petitioner and not the owner, and each BAR acted upon the grievances by denying the relief requested. Moreover, at no point in these proceedings have Respondents argued that they would be prejudiced by allowing these proceedings to proceed as filed.

54. Fifth, even assuming, *arguendo*, that Petitioner is not the "person whose property is assessed," the Petitioner's right to challenge the assessment was nevertheless authorized by the specific language in its lease which granted this right. The Second Department never addressed this issue, and its Decision is inconsistent with its own decision in *EFCO Prods. v. Cullen*, 161 A.D.2d 44, 46-47 (2d Dep't 1990) and *Big "V" Supermarkets*, 114 A.D.2d at 727-28, wherein the Second and Third Departments reached the merits even though the predicate administrative grievance was filed in the name of the lessee.

55. Putting the Second Department's holding in context, thousands of leases in New York have been drafted heretofore based upon prior guidance set forth in the case law that a Net Tenant may validly file an administrative grievance. That guidance was also distilled into the Opinion of Counsel cited above as well as the grievance filing instructions written and published by ORPTS, which directed

that "[a]ny person who pays property taxes can grieve an assessment, including: … tenants who are required to pay property taxes pursuant to a lease or a written agreement." R. 247. This guidance has also been relied upon by municipalities, including Respondent Town, in directing that "[a]ny person aggrieved by an assessment" may file an administrative grievance. R. 281.

56. The Decision ignores this precedential guidance and completely failed to even consider the fact that net leases (like Petitioner's herein) typically obligate the tenant to pay all real property taxes, and generally authorize the tenant to grieve the assessment. It is illogical for a tenant to be contractually obligated to pay the real property taxes yet be prevented from exercising its contractual right to challenge the real property assessment upon which the property taxes are based. The Decision has abrogated the rights of an entire group of aggrieved taxpayers herein (including Petitioner) without any statutory mandate to do so in RPTL §524. Under the Decision, unless the property owner (or its designated agent under the owner's name) timely files an administrative grievance for review under article 5, a Net Tenant could be barred from filing an article 7 petition seeking judicial review of the assessment. Such a drastic change in the law should be made prospectively by the Legislature, not retroactively by the Second Department.

57. The Decision also needlessly requires potentially non-interested parties to become involved in the administrative review process. Specifically, it

implicates owners who may have no interest in grieving the assessment because the tenants are contractually obligated to pay the taxes. These non-interested owners might not have access to the relevant data needed to support an assessment challenge and/or might not have any interest in participating in the process. The Decision does not account for situations where the interests of the property owner and lessee are not aligned and the period in which to file a grievance can be as short as 12 business days.

58. In *Larchmont Pancake House II*, 33 N.Y.3d at 239, this Court recognized that the goals of clarity, efficiency, and judicial economy are embodied within the RPTL.

59. The Decision does not promote these goals.

60. The Second Department's decisions in *Circulo* and *Larchmont Pancake House I* have created uncertainty in this area of the law, especially in light of the fact that they run contrary to case law that has existed for over fifty years. The Decision herein has only added to that uncertainty. Specifically, it is not clear from the Decision if a grievance filed in the owner's name and submitting an authorization signed by the Net Tenant would satisfy the Second Department's new standard. It is also unclear if a grievance filed in the name of the Net Tenant and signed by the owner meets those requirements. *See* Ex. 3, at p. 2.

61. Moreover, the Decision results in the unintended but real consequence of eliminating the actual aggrieved parties (*i.e.*, those contractually obligated to pay the taxes) from participating in the administrative review process, and requiring the participation of non-interested parties (*i.e.*, owners who, by contract, passed on the obligation to pay the real property taxes to the tenant). Logically, the result of the Decision severely undermines the effectiveness of the administrative assessment review process and could cause unnecessary litigation because the non-owner aggrieved party would only be able to meaningfully participate in the review of its assessment in the judicial proceeding, after enlisting its uninterested landlord to file an administrative grievance in name only.

62. Furthermore, the Second Department's decisions in *Circulo*, *Larchmont Pancake House I*, and the case at bar have resulted in more litigation that seeks to restrict (and in many cases, preclude) the review of tax assessments in direct contravention to the legislatively-intended remedial nature of the statutory scheme. Municipal attorneys have seized upon the language first appearing in *Circulo* (an exemption case)[16] and subsequently in *Larchmont Pancake House I*

[16] The fact that *Circulo* was an exemption case is critical to the overall analysis of the decisions in *Larchmont Pancake House I* and the case at bar, for in both instances the Second Department relied exclusively on the holding in *Circulo*, which is *sui generis* based upon its own unique facts and the applicable real property tax exemption statutes. Under RPTL article 4, the right to (and eligibility for) an exemption from real estate taxes for privately-owned property is restricted to owners of real property. *See generally* RPTL §§420-a through 489. In such cases, no one other than the owner is eligible to file for an exemption, and if denied by the municipality, no one other than the owner has the right to challenge the denial in an RPTL article 7 proceeding.

and the Decision herein, as grounds to seek dismissal of petitions where the predicate grievances were filed by someone other than the "owner," including Net Tenants, in accordance with the ORPTS instructions which advised that Net Tenants could file grievances.

63. Clarification of the "scope of appropriate challengers under RPTL §524," *Larchmont Pancake House II*, 33 N.Y.3d at 240-41, and its interrelation with RPTL §706(2) would provide much needed guidance on this issue to governmental units, taxpayers, lessors, lessees, Net Tenants, tax certiorari practitioners, and all real estate practitioners, so that the rules of law governing administrative assessment practice are clear prospectively.

64. If this Court does not resolve this issue, the result will be further uncertainty, confusion, and litigation across the State regarding the "the scope of appropriate challengers under RPTL 524." *Id*. at 240-41. Moreover, a failure to resolve this issue will place in jeopardy the validity of countless petitions statewide where the predicate administrative grievance was filed by the Net Tenant.

65. Currently, the Third Department and courts in the Fourth Department interpret RPTL § 524(3) to permit a Net Tenant to file a grievance on its own behalf, while the Second Department interprets § 524(3) to prohibit a Net Tenant

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While the *Circulo* decision serves as valid precedent for cases involving the eligibility for an exemption, its application has now been twisted and manipulated by the Second Department to apply to cases involving the review and reduction of tax assessments where the right to challenge (under RPTL article 5) has, for decades, extended beyond the owner.

from doing so. This Court should harmonize appropriate procedure so that it follows the decades of precedential decisions and does not set a new, highly restrictive, standard for seeking review of a tax assessment.

66. Petitioner presents the following questions for review which are matters of public importance for those responsible for the payment of real property taxes, assessing municipalities, and practitioners across New York State:

A. What does the phrase "person whose property is assessed" in RPTL §524 mean when general rules of statutory construction are employed by the Court? Does this phrase mean "aggrieved party" as found by the Third Department and trial courts in the Fourth Department, or does it now mean exclusively "owner" as held by the Second Department?

B. Whether the Decision contradicts and overturns decades of judicial precedent where relief was granted to the petitioner even though the underling administrative grievance was not filed by the property owner and adds an additional requirement of ownership participation in the grievance process?

C. Whether the Second Department properly interpreted RPTL §524 given the remedial nature of tax assessment review proceedings, whereby the RPTL should be liberally construed such that a

taxpayer should not have its right to assessment review curtailed by a technicality?

D. Whether the Second Department properly dismissed this consolidated proceeding when the grievances provided Respondents with the statutorily-required notice, the Town BAR and Village BAR did not raise any objections to the form of the grievances during the administrative review process, and at no point in these proceedings have Respondents identified any substantial right that would be prejudiced were these proceeding allowed to proceed as filed?

E. Whether the Second Department properly dismissed the consolidated proceeding when Petitioner's lease specifically authorized it to challenge the real property assessments?

67. The issues raised in each of the above questions presented for review were raised before the Supreme Court in the Affirmation of William E. Sulzer in Opposition to Respondents' Motion to Dismiss (R. 270 – 292) and Petitioner's Memorandum of Law in Opposition to Respondents' Motion to Dismiss (R. 293 – 324) and before the Second Department in Petitioner's Brief at pp. 12 – 52 and Petitioner's Reply Brief at pp. 1-30. Accordingly, these issues have been preserved for appeal to this Court.

ARGUMENT

A. The Second Department's Decision contradicts the plain language of RPTL §524(3), is unsupported by the legislative history, and is contrary to established rules of statutory construction.

68. "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." *Patrolmen's Benevolent Ass'n of City of N.Y. v. City of N.Y.*, 41 N.Y.2d 205, 208 (1976). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). A court should not add words to a statute to discern the legislature's intent. *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). "Additionally, [the Court] should inquire 'into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history.'" *Matter of Albany Law School v. N.Y. State Off. Of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 120 (2012) (quoting *Nostrom v A.W. Chesterton Co*., 15 N.Y.3d 502, 507 [2010]).

69. RPTL §524(3) provides, in relevant part, that "a complaint with respect to an assessment … 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."

70. The Second Department completely overlooked the mandatory rules of statutory construction when it concluded that "person whose property is assessed" means "owner," even though the statute does not use the word "owner." The Decision contains no analysis (using mandatory rules of statutory construction) to explain how it re-interpreted "person whose property is assessed" to mean "owner." The Second Department simply relied upon its decisions in *Circulo* and *Larchmont Pancake House I*, even though it did not apply any rules of statutory construction to interpret RPTL §524(3) in those decisions either.

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

72. Recognizing that courts are not empowered to legislate in the guise of interpreting statutes, this Court has observed that the failure of the Legislature to

include or define a term in a statute is a significant indication that the exclusion was intended, and that the omitted term should not be injected into the statute by the judiciary. *See People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) ("We have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended"); *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (1982) ("the failure of the Legislature to provide that mental illness is a valid defense in an action for divorce based upon the ground of cruel and inhuman treatment must be viewed as a matter of legislative design. Any other construction of the statute would amount to judicial legislation.") The fact that the Legislature declined to use the term "owner" in RPTL §524(3) is strong evidence that it did not mean to restrict administrative review of assessments to owners only. RPTL article 5 uses the word "owner" over 100 times. Had the Legislature intended this construction in RPTL §524(3) specifically, it would have used one word ("owner") instead of five words ("person whose property is assessed").

73. Additionally, that the phrase "person whose property is assessed" is not limited exclusively to owners is evident in other provisions in the RPTL. Specifically, RPTL §554(2) provides that an application for the correction of errors can be filed by "an owner of real property, or any person who would be entitled to file a complaint pursuant to section five hundred twenty-four of this chapter …"

RPTL §554(2) (emphasis added). Accordingly, if only owners were entitled to file a complaint under section 524(3), the underlined language in RPTL §554(2) would be rendered meaningless.

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

75. The Decision is not supported by the legislative history underling RPTL §524, and in fact the Second Department's interpretation is so narrow that it defeats the statute's clear purpose: to provide the taxpayer with an opportunity to seek relief from the Board of Assessment Review. The Assembly Memorandum, which, by definition, was written prior to the Legislature passing the bill, provides that one purpose of the bill was to "consolidate the provisions of the [RPTL] relating to administrative review of assessments" into a new title one-A in article 5 of the RPTL. *See* Governor's Bill Jacket (Laws of 1982, Chapter 14) ("Bill Jacket"), Assembly Memorandum, at 1.[17] Significantly, the Assembly

[17] A copy of the Assembly Memorandum is attached hereto as Exhibit 13.

Memorandum uses the word "taxpayer,"[18] and not the word "owner," when discussing administrative review of assessments. For example, the Assembly Memorandum provides, "Section 524 is intended to set forth in one place the requirements which a taxpayer must satisfy to have administrative review of an assessment." *Id.* at 5 (emphasis added). It also provides that the reason for the rearrangement and consolidation of these statutory provisions into a new title one-A of RPTL article 5 was "to clearly delineate the various responsibilities of taxpayers, boards of assessment review and assessors. This will serve to facilitate understanding of the administrative review process by both taxpayers and public officials." *Id.* at 12 (emphasis added). The Assembly Memorandum also uses the term "taxpayer" when referring to parties filing judicial proceedings: "[t]itle one of article seven of the [RPTL] (§§ 700 et seq.) authorizes a taxpayer to institute a proceeding in supreme court to review an assessment." *Id.* at 10 (emphasis added).

76. There is nothing in the Assembly Memorandum that evidences a legislative intent to limit the filing of an administrative grievance exclusively to the property owner. In fact, there is no evidence to suggest that the Legislature ever contemplated that it was effecting a sweeping change in the law to preclude non-owner aggrieved parties from filing grievances. Had that been the Legislature's

[18] A taxpayer is "someone who pays or is subject to a tax." *Black's Law Dictionary*, at 1690 (10th Ed. 2014). This definition is consistent with Petitioner's lease, under which Petitioner is obligated to pay all real property taxes. Respondents do not dispute that Petitioner is obligated by its lease to pay all real property taxes levied against the Subject Property. R. 32.

intention, it would have so stated in the legislative history. *See Ianotti v. Consol. Rail Corp.*, 74 N.Y.2d 39, 46 (1989) ("there is nothing in the legislative history which indicates that the Legislature ever contemplated that it was effecting such a sweeping change in a fundamental rule of owner liability.") It is worth mentioning that in the same Assembly Memorandum, at pp. 13-14, the Legislature did express an intent to change the law with respect to judicial review of special franchise assessments, indicating that "this bill would supersede the holding in Consolidated Edison Company of New York v. State Board of Equalization and Assessment, 73 A.D.2d 31, 425 N.Y.S.2d 651, aff'd, 53 N.Y.2d 975, 441 N.Y.S.2d 9," which would clarify "the Legislative intent as to the relationships between articles 6 and 7 of the [RPTL] and between titles one and two within article 7 of the [RPTL]." The Legislature is clearly capable of expressing such intent when appropriate.[19]

[19] Respondents below relied upon two memoranda included in the Bill Jacket that were written after the Legislature passed the bill to suggest that the legislative history demonstrated a legislative intent to limit the filing of a grievance to a property owner or designee. *See* Respondents' Brief in Opposition, at 29-30. The two memoranda cited could not have been considered in passing the statute, and as such, merely represent the opinion or interpretation of the writer and not the intent of the Legislature. Even assuming that memoranda drafted after the Legislature passed the bill can assist in determining the Legislature's intent, Respondents chose not to put before the Second Department the memorandum from the July 8, 1982 State Board of Equalization and Assessment ("SBEA", which was later re-organized as ORPTS), which supports the Legislature's statements in the Assembly Memorandum by clearly providing that taxpayers, not just property owners, are the parties eligible to seek administrative assessment review. Respondents likewise failed to mention the July 16, 1982 letter from Michael Whiteman to John H. Goldrick, Counsel to the Governor, which indicated that the "[SBEA was] the author of Assembly 13057" and has "commented fully on those provisions of the bill constituting a recodification of assessment review procedures without substantive change." If the SBEA authored the legislation, then its interpretation that non-owner aggrieved parties (including a tenant obligated to pay real property taxes) did have standing to seek administrative assessment

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

78. Merriam-Webster Dictionary defines the word *whose* as "of or relating to whom or which especially as possessor or possessors."[20] The word *whose* clearly signifies "possession." In applying the aforementioned rule of statutory construction to the facts of this case, the inescapable conclusion is that a possessory tenant, like Petitioner, is included as a "person whose property is

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review under RPTL §524(3) (*see* R. 247) is entitled to deference. *Scotsmen Press, Inc. v. State Tax Appeals Tribunal*, 165 A.D.2d 630, 634 (3d Dep't 1991).

[20] *See* https://www.merriam-webster.com/dictionary/whose (last verified March 2, 2021).

assessed" who may file a complaint under RPTL §524(3). This definition aligns with case law finding that "an assessment truly runs with the land and not with the owner thereof …" *Mack v. Assessor of the Town of Ramapo*, 72 A.D.2d 604, 605 (2d Dep't 1979) (citing *People ex rel. Bingham Operating Corp. v. Eyrich*, 265 A.D. 562, 565 (3d Dep't 1943)). Had the Second Department applied the above rule of statutory construction and accorded the term "whose" its usual and commonly understood meaning, it would not have concluded that the phrase "person whose property is assessed" is restricted exclusively to a property owner.

79. Additionally, Merriam Webster Dictionary defines the word "complainant" as "the party who makes the complaint in a legal action or proceeding" and "one who complains."[21] Using this definition, a complainant cannot be deemed to be limited to a property "owner;" also it must necessarily include non-owners who have an interest and/or stake as a complainant. Had the Second Department applied the above rule of statutory construction and accorded "complainant" its usual and commonly understood meaning, it would not have concluded that the filing of a grievance is restricted exclusively to the property owner.

80. "It has…long been held that statutes which relate to the same or to cognate subjects are in pari materia and [are] to be construed together unless a

[21] *See* https://www.merriam-webster.com/dictionary/complainant (last verified March 2, 2021).

contrary intent is clearly expressed by the Legislature." *Plato's Cave Corp. v. State Liquor Auth*., 68 N.Y.2d 791, 793 (1986); *see Dutchess Cty. Dep't of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001). Similarly, "[w]hen the statutory language at issue is but one component in a larger statutory scheme, it 'must be analyzed in context and in a manner that harmonizes the related provisions and renders them compatible.'" *Matter of Mestecky v. City of N.Y.*, 30 N.Y.3d 239, 243 (2017) (quoting *Matter of M.B.*, 6 N.Y.3d 437, 447 [2006]).

81. The filing of an administrative grievance under RPTL article 5 is a condition precedent to filing a judicial petition under RPTL article 7. *Larchmont Pancake House II*, 33 N.Y.3d at 235. Thus, to support its analysis, the Court must examine the Legislature's intent underlying RPTL §524(3) in the context of the entire statutory scheme governing challenges to real property assessments. As established above, consideration of RPTL §554(2) demonstrates that RPTL §524(3) is not limited to owners.[22] The same is true when the Court considers RPTL §§704(1) and 706(2).

82. RPTL §704(1) identifies the class of persons who have standing to file a tax certiorari petition after the municipality has denied the administrative complaint. It broadly defines eligibility/standing as "[a]ny person claiming to be

[22] RPTL §554(2) provides that an application for the correction of errors can be filed by "an owner of real property, or any person who would be entitled to file a complaint pursuant to section five hundred twenty-four of this chapter …" (emphasis added).

aggrieved by any assessment of real property…" RPTL §706(2) further provides, in pertinent part, "[a] proceeding to review an assessment shall be founded upon a petition setting forth the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified and stating that the petitioner is or will be injured thereby."

83. As far back as the 1870's, New York Courts have included, among the class of aggrieved tax certiorari eligible petitioners, non-owners who are contractually obligated to pay real property taxes because they are the persons aggrieved or injured by the excessive, unequal, or unlawful assessment. *See*, *e.g.*, *Matter of Burke*, 62 N.Y. 224, 228 (1875) ("Either the owner whose title may be clouded by an illegal assessment, or a lessee who is under covenant to pay an assessment, is aggrieved when an invalid assessment is made…"); *Matter of Walter*, 75 N.Y. 354 (1878) (mortgagee was an aggrieved party following foreclosure where there was a deficiency upon sale and there was no proof that the mortgagor was personally liable for the deficiency); *Long Is. Power Auth. v. Assessor of Town of Huntington*, 164 A.D.3d 591, 592 (2d Dep't 2018) (power authority contractually obligated "to pay all taxes levied against the property" is aggrieved and has standing to challenge the tax assessment); *EFCO Prods.*, 161 A.D.2d at 46-47 (a nonfractional lessee who was contractually obligated to directly make payments in lieu of taxes levied against the lessor's undivided parcel was an

aggrieved party with standing to maintain an article 7 proceeding); *McLean's*, 2 A.D.2d at 101 (lessee who was obligated to pay all property taxes under the terms of a lease was an aggrieved party under former Tax Law article 13 and had standing to file an administrative complaint); *Big "V" Supermarkets,* 114 A.D.2d at 727-28 (finding the petitioner, a fractional lessee of a shopping center who was contractually obligated to make payments in lieu of taxes levied against the entire property, was an aggrieved party); *Matter of Onteora Club v. Bd. of Assessors*, 29 A.D.2d 251, 254 (3d Dep't 1968) (finding that the parties filing the grievances and article 7 petition, who were not the owners but rather lessees and sub-lessees of the property, were properly aggrieved parties with standing to seek judicial review); *Ames Dep't Store, Inc., No. 418 v. Assessor*, 261 A.D.2d 835 (4th Dep't 1999) ("*Ames Dep't Store*") (fractional lessee obligated to pay a proportionate share of the real property taxes and which had a contractual right to contest said property taxes, was an aggrieved party within the meaning of section 704(1)).

84. The grounds for review of an assessment at the administrative and judicial levels are identical: the assessment being challenged is excessive, unequal, unlawful, of the property is misclassified. *Compare* RPTL §§ 524(2) *with* 706(1).

85. RPTL articles 5 and 7 are interlocking, interdependent, and pertain to the same subject matter; as such, they are in *pari materia* and should be "construed together and applied harmoniously and consistently." *Rite Aid*, at p. 12; *Walgreen*,

at p. 12; *Rite Aid 2*, at 12. Reviewing RPTL §§524(3) and 704(1) *in pari materia* supports the conclusion that a party aggrieved by an assessment, and not just the property owner, may file an administrative grievance. The purpose of the administrative review process is to permit the BAR to correct excessive, unequal or unlawful assessments and/or errors when the property is misclassified, in effort to assure the accuracy and stability of assessment rolls in advance of the filing of the final assessment roll. *See* RPTL §§512, 525; *Sterling Estates, Inc. v. Bd. of Assessors*, 66 N.Y.2d 122 (1985). That purpose will be no less accomplished where the complainant is the Net Tenant who is authorized by the owner to challenge the real property tax assessment. In fact, prior to the *Circulo* decision, sections 524(3) and 704(1) had always been interpreted to mean the same class of persons, which included a tenant obligated to pay the real property taxes.

86. This Court has directed that "statutes should be construed to avoid results which are absurd, unreasonable or mischievous or produce consequences that work a hardship or an injustice." *People v. Dozier*, 78 N.Y.2d 242, 250 (1991). Notwithstanding, the Second Department has construed RPTL §524(3) to reach a result that is both "unreasonable" and works "an injustice" on Petitioner (as well as those similarly situated) because valid claims for assessment reductions

have thus far been dismissed on unprecedented grounds.[23] The Legislature could not have intended to give non-owner aggrieved parties standing to commence tax certiorari proceedings, and concomitantly limit the class of persons who have standing to file an RPTL article 5 administrative complaint to owners, where the timely filing of the complaint is a condition precedent to commencement of a tax certiorari proceeding under RPTL article 7 (*see* RPTL §706(2)). Moreover, the Second Department never explained why the Legislature would have intended such a result. The Second Department also failed to recognize that Net Tenants are typically authorized by their lease to challenge the real property assessments on the properties they occupy. Because the right to judicial review of a real property tax assessment is granted to persons claiming to be aggrieved (*see* RPTL §704(1)), it is only logical that the right to file a complaint for administrative review (RPTL §524(3)) which is a condition precedent for seeking judicial review, be in favor of the same class of persons who are obligated to pay the taxes when levied. *See McLean's*, 2 A.D.2d at 100-01. Dismissing the consolidated proceeding on this basis, particularly when assessment reductions are warranted, is inconsistent "with the legislative mandate that property not be assessed in excess of full value[,]" *W.T. Grant v. Srogi*, 52 N.Y.2d 496, 513 (1981), and contradicts the intent of the

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

statutory scheme, which is remedial in nature. *See Matter of Great Eastern Mall,* 36 N.Y.2d at 548.

87. Moreover, to interpret RPTL §524(3) to require the owner to sign the authorization on the grievance complaint could also lead to objectionable or unintended results, because the interests of the property owner and lessee are not always aligned. For example, in *Ames Dep't Store*, 261 A.D.2d at 836, the Fourth Department permitted the lessee to maintain an article 7 petition even when the property owner and the municipality had reached an agreement. Similarly, in *Big "V" Supermarkets*, 114 A.D.2d at 728, the Third Department permitted a lessee to maintain an article 7 petition even when the property owner and municipality agreed to arbitrate the issue. Reading RPTL §524(3) to require the property owner to file the grievance or to sign the authorization would have precluded the petitioners in *Ames Dep't Store* and *Big "V" Supermarkets* from challenging the respective assessments.

88. Another rule of statutory construction provides that "[i]f there are two possible interpretations of a statute, the court should adopt that which will produce equal results. A construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination." 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. *See* Section B, *infra*. The Second Department's limitation of the class of those eligible to file a complaint exclusively to a property owner, and not just a "person whose property is assessed," while allowing anyone "aggrieved" to seek judicial review under RPTL article 7 of the same assessment, does not produce equal results because complainants filing an administrative grievance are treated differently than complainants filing a judicial petition. The Legislature could not have intended this result.

89. Based upon the foregoing, this Court should grant Petitioner's motion.

B. The Decision contradicts decades of judicial precedent, ORPTS's interpretation of RPTL §524(3), long-established and accepted tax certiorari practice, and the Town's own website, all of which recognized that a party contractually obligated to pay the real property taxes has the right to file the predicate administrative grievance.

90. Until the Second Department entered its Decision (which primarily relied upon *Circulo*, a real property tax exemption case), no Court, to our knowledge, has previously held that a Net Tenant did not have standing to file a grievance in its own name and on its own accord.

91. Before *Circulo* was decided, it was universally understood that a Net Tenant had standing to file an administrative grievance in its own name and on its own behalf. This Court need look no further than the Town's website, which expressly stated that "[a]ny person aggrieved by an assessment (*e.g.*, an owner,

purchaser, or tenant who is required to pay the real estate taxes pursuant to a lease or written agreement) may file a complaint." R. 281. This is to be contrasted with real property tax exemption cases – like *Circulo* – where only the property owner has the right to file for and receive an exemption. *See e.g.* RPTL §420-a(1)(a); *see generally* RPTL §§420-a through 489.

92. This understanding stems from decades of case law, ORPTS's interpretation (as set forth in an Opinion of Counsel and in the instructions to the RP-524 Complaint form), and the Town's own website, all of which Petitioner's attorney relied upon and followed before filing the within administrative grievances. *See* R. 273-74.

Case Law

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

94. In *McLean's*, the City Commissioner of Assessment denied the complaint for administrative review because the petitioner failed to comply with

the request of corporation counsel that petitioner either submit a power of attorney from the owner or have the owner present at the hearing as required by Local Law No. 1 of 1943. *Id*. The Commissioner also asserted that the petitioner, as a lessee, was not an aggrieved person and moved to dismiss the tax certiorari petition in the absence of the power of attorney. *Id*. The Supreme Court denied the motion and the Third Department affirmed, stating, "petitioner, as a lessee obligated to pay all taxes during the term of the lease, [was] a person aggrieved and thus entitled to the protection of the statute and, in consequence, eligible to undertake the procedure provided by the local law." *Id.* at 101.

95. It is noteworthy that City of Binghamton Local Law No. 1 and former Tax Law §290-c (now RPTL §706[2]) had a similar requirement wherein the petitioner was required to plead that it had served an administrative complaint with the local officials who had the authority to correct the assessment. *Id.* at 99-100. The Third Department's analysis in affirming the denial is instructive to the proper interpretation of RPTL §524(3):

> "Since the right of judicial review is preserved for the benefit of persons claiming to be 'aggrieved', it clearly follows that every complainant whose status is comprehended by that term is entitled to complain to the board and obtain the preliminary review necessarily precedent to the judicial proceeding. The conclusion that such is the meaning and intent of the local law seems inescapable. By no other construction could its validity be sustained." *Id.* at 100-01.

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

> "…petitioner was, under its lease, the owner of such an interest in the property as to constitute it not only a person aggrieved but a person whose property was assessed, within the meaning of the local law. This court held in *People ex rel. Bingham Operating Corp. v. Eyrich*, 265 App. Div. 562, 565, 40 N.Y.S.2d 33, 35 [3d Dep't 1943], that the relator … was not only a person "claiming to be aggrieved" but also a person 'assessed' and … those words … "obviously mean one whose pecuniary interests are or may be adversely affected." *McLean's*, 2 A.D.2d at 101 (italics added).

97. Other Courts have also reached the merits of cases even though the predicate administrative grievances were filed by non-owners.

98. In *EFCO Prods.*, 161 A.D.2d at 46-47, the Second Department found that the commercial lessee of a property under an Industrial Development Agency ("IDA") lease could challenge the property's assessment at both the administrative and judicial levels. The Court stated:

> "The right to challenge an assessment of real property attaches to a landowner, or to a nonfractional lessee (*see, Matter of Waldbaum, Inc. v Finance Adm'r of City of N. Y.*, 74 NY2d 128 [1989] … *supra*), upon allegations that the assessment, *inter alia*, is excessive and that the

> assessment will cause the petitioner to sustain pecuniary injury (RPTL 706)." *Id.* at 47.

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

99. *Big "V" Supermarkets*, 114 A.D.2d at 727, involved a petitioner which, while a partial lessee of a shopping center, was obligated to pay all taxes on the property as an element of its rent and assessments. The lessee filed the administrative grievance in its own name, and subsequently commenced an article 7 proceeding to challenge the assessment. *Id.* The Third Department reached the merits of the case even though the lessee did not own the property, and it found that the lessee was an aggrieved party with standing to commence a proceeding under RPTL §704. *Id.* at 727-28.

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

Department denied the respondents' motion to dismiss, finding "Supreme Court has subject matter jurisdiction over RPTL article 7 proceedings[.]" *Id.*

101. In *Matter of Onteora Club*, 29 A.D.2d at 254, the parties filing the administrative grievances and article 7 petition were not the owners of the property but rather lessees and sublessees of the property. The Third Department found that the petitioners were proper aggrieved parties entitled to seek judicial review even though the owners did not file the administrative grievances.[24]

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

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

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

recognized the fact that non-owner, aggrieved parties file administrative protests and have reached the merits of the case in subsequent judicial proceedings brought by non-owners since the inception of the RPTL and its statutory precursors. The Courts have reached the merits in these circumstances because doing so is consistent with the plain language of the statute and the remedial nature of the law. If the courts in the above cases had applied the Second Department's narrow interpretation herein, they would have precluded those petitioners from challenging the tax assessments.[25] The Decision did not address the above precedent.

104. The Second Department's decisions in *Circulo*, *Larchmont Pancake House I* and this case are likewise not supported by this Court's decision in *Larchmont Pancake House II*. In *Circulo*, the Second Department concluded that "RPTL article 5 requires that the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment." *Circulo*, 96 A.D.3d at 1056 (emphasis in original). The critical distinction is that *Circulo* involved a property tax exemption under RPTL article 4. Exemptions under article 4 are only available to owners of the property, and only owners have standing to apply to the assessor for these exemptions; if the assessor denies the exemption, then the next step

[25] Respondents' prior attempts to explain away some of the cases because they involve IDAs (Respondents' Brief in Opposition at 50-52) miss the point. If actual ownership of the property by the party filing the grievance is what is required to satisfy the condition precedent in RPTL §706(2), then each of the cases involving an IDA tenant should have been dismissed for a failure to satisfy a condition precedent because the tenant, and not the property owner, filed the administrative grievance.

available to an owner is to file a grievance pursuant to RPTL §524(3). Because the petitioner therein did not own one of the properties for which it filed a complaint, and there was no evidence in the record before the Court that the entity that was listed on the deed filed a complaint, the Second Department properly found that the petitioner "did not 'show that a complaint was made in due time to the proper officers to correct such assessment,' as is required (RPTL 706 [2])." *See Circulo*, 96 A.D.3d at 1057. Consequently, the court held that the petitioner failed to satisfy the "condition precedent" under RPTL §706(2). *See id.*

105. In *Larchmont Pancake House I*, 153 A.D.3d at 522, the Second Department simply adopted its holding in *Circulo* and dismissed the proceedings, finding that the condition precedent under RPTL §706(2) was not met because the petitioner, and not the property owner, filed the administrative grievances. The Second Department further held that the failure to meet the condition precedent divested the Supreme Court of subject matter jurisdiction.

106. This Court granted the petitioner's motion for leave to appeal in *Larchmont Pancake House II*. Had this Court agreed with the Second Department's interpretation of RPTL §§524(3) and 706(2) and that court's conclusion that subject matter jurisdiction was lacking, it could have affirmed on that ground and dismissed the case. *See Cayuga Nation v. Campbell*, 34 N.Y.3d 282, 299 (2019) (refusing to review the case on the merits and dismissing the

proceeding where the Court lacked subject matter jurisdiction to consider the parties' dispute). Significantly, in *Larchmont Pancake House II*, 33 N.Y.3d at 237, this Court did not find that subject matter jurisdiction was lacking. This Court also did not accept the Second Department's interpretation of RPTL §524(3) that only a property owner may file a grievance, thus acknowledging that no such bright line statutory restriction exists. Furthermore, this Court did not find that the "condition precedent" under RPTL §706(2) was not met. *Id.* Rather, this Court focused on whether the petitioner had standing under RPTL §704(1) to file the judicial petitions, and found that the petitioner was not an aggrieved party within the meaning of RPTL article 7 and thus lacked standing to file the petitions because it had "no legal authorization or obligation to pay the real property taxes." *Id.* at 240.

107. This Court's decision in *Larchmont Pancake House II* is in accord with the body of case law that recognizes that it is the failure to timely file an administrative grievance with the BAR altogether that deprives a court of subject matter jurisdiction to review the petition challenging the assessment in question. *See Lavoie v. Assessor of the Town of Kent*, 222 A.D.2d 561 (2d Dep't 1995); *Frei v. Town of Livingston*, 50 A.D.3d 1381 (3d Dep't 2008); *Raer Corp. v. Vill. Bd. of Tr. of the Vill. of Clifton Springs*, 78 A.D.2d 989 (4th Dep't 1980). It is notice as to the commencement of the proceeding, and not ownership, which is critical to

establishing subject matter jurisdiction. *See Matter of Great Eastern Mall*, 36 N.Y.2d at 548.[26]

108. Prior to the Decision herein, no court decision of which we are aware had dismissed an article 7 petition on the basis that a condition precedent was not met because a Net Tenant, rather than the owner, filed the predicate administrative grievance. Since the Second Department decided *Larchmont Pancake House I*, courts outside the Second Judicial Department have been confronted with the conflict in judicial authority regarding whether a Net Tenant may file an administrative grievance pursuant to RPTL §524(3). In the Fourth Department, Supreme Court decisions have considered whether the Second Department's interpretation of RPTL §524(3) in *Circulo* and *Larchmont Pancake House I* prohibits a Net Tenant who is authorized by its lease to challenge the assessment from filing an administrative grievance. *See Rite Aid*, at pp. 9-15; *Walgreen*, at pp. 9-15; *Rite Aid 2*, at pp. 9-15. In each of these cases, the municipalities, citing *Circulo* and *Larchmont Pancake House I*, moved to dismiss the article 7 petitions

[26] Courts have held that '"[t]he only things necessary to exercise jurisdiction are that within the time specified a complaint under oath in writing be presented stating the objection and the grounds thereof.'" *Astoria Fed. Sav. & Loan Ass'n*, 212 A.D.2d 600, 601 (2d Dep't 1995) (quoting *Matter of City of Little Falls v. Bd. of Assessors of the Town of Salisbury*, 68 A.D.2d 734, 738 (4th Dep't 1979)). The grievance "sets the jurisdictional parameters of the court and limits the relief available." *Matter of City of Little Falls*, 68 A.D.2d at 739. "In short, the taxpayer must tell the assessors what assessment he protests and why it is wrong." *Sterling Estates*, 66 N.Y.2d at 126. "If the assessors are fully aware of petitioner's grievance and are informed of the exact numerical extent of the claimed overassessment, the important jurisdictional fact in a tax certiorari proceeding has been met." *Cherrypike Estates, Inc. v. Herbert*, 67 Misc.2d 853, 853-54 (Sup. Ct. Nassau Cty. 1971).

because the Net Tenant, and not the property owner, filed the administrative complaints. In each case, the Supreme Court denied the motion to dismiss, holding that application of the interpretation of RPTL §524(3) found in *Circulo* and *Larchmont Pancake House I* to a Net Tenant was contradicted by the rules of statutory construction, decisional authority, and deference to ORPTS's interpretation of that statute. *Rite Aid*, pp. 9-15; *Walgreen*, pp. 9-15; *Rite Aid 2*, pp. 9-15. The courts also relied on the fact that *Circulo* and *Larchmont Pancake House I* were Second Department decisions, while Fourth Department precedent supported the denial of the motions. *Rite Aid*, pp. 9-15; *Walgreen*, pp. 9-15; *Rite Aid 2*, pp. 9-15. The courts further held that, even if the Net Tenants did not fall under the definition of "person whose property is assessed" under RPTL §524(3), the failure to submit an authorization by the property owner was a curable defect, and granted *nunc pro tunc* amendment of the administrative complaints.[27]

ORPTS' Role and Guidance

109. In *Ferraiolo v. O'Dwyer*, 302 N.Y. 371, 376 (1951), this Court observed, "[w]hile practical construction by an officer or agency charged with the

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

administration of a statute, especially when followed by a long period of time, is entitled to great weight and may not be ignored … such an interpretation is not necessarily binding on the court but nonetheless constitutes an element to be considered (citing McKinney's Cons. Laws of N.Y., Book 1, Statutes [1942 ed.], §93) (internal citations omitted).

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

111. Consistent with the above Opinion of Counsel is ORPTS Publication 1114, entitled "Contesting Your Assessment In New York State," which provides

"[a]ny person who pays property taxes can grieve an assessment, including property owners, purchasers, [and] tenants who are required to pay property taxes pursuant to a lease or written agreement." R. 247 (emphasis added).[28] Significantly, the instructions do not state that in order to file a grievance, tenants must either attach to the grievance an authorization signed by the property owner or identify themselves as an agent of the owner; rather, the instructions explicitly state that "tenants who are required to pay property taxes" can grieve the assessment. *See id.* Because the Legislature delegated to ORPTS the authority and responsibility for drafting the complaint form and instructions to be used by all complainants at the administrative grievance stage, its interpretation is entitled to deference from this Court. *See Matter of Koch v. Sheehan*, 95 A.D.3d 82, 89 (4th Dep't 2012), *aff'd*, 21 N.Y.3d 697 (2013); *see also Scotsmen Press*, 165 A.D.2d at 634. Inexplicably, the Second Department's Decision did not address this Opinion of Counsel or the ORPTS instructions.

Long-Standing Tax Certiorari Practice

112. Attorneys in this law firm have collectively practiced in the field of tax certiorari for nearly fifty (50) years. We have filed numerous administrative complaints on behalf of tenants contractually obligated to pay the property taxes and authorized by their lease to file the administrative complaint. We have also

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

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

Town of Mamaroneck's Practice, Procedure and Protocols

113. Even Respondent Town adhered to ORPTS' guidance. The Town specifically adopted ORPTS's interpretation of RPTL §524(3). Prior to April 2014, the Town's Internet website, under the heading "Town Assessor," contained

the following statement: "[a]ny person aggrieved by an assessment (*e.g.* an owner, purchaser, or tenant who is required to pay the real estate taxes pursuant to a lease or written agreement) may file a complaint." R. 281 (emphasis added). The website also directed viewers to Publication 1114, which re-affirms that net tenants are permitted to file a grievance, and to a RP-524 Complaint form (also published by ORPTS).[29] *Id*. The Decision did not address the Town's instructions.

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

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

Review. Each case involved a property owner, so it logical that the Fourth Department used the word "owner" in these decisions.

115. "The precedential value of a judicial opinion is limited to the question presented by the facts of the case before the Court." *J.A. Preston Corp. v. Fabrication Enters., Inc.,* 68 N.Y.2d 397, 407 (1986). An opinion, "like a judgment, must be read as applicable only to the facts and is authority only for what was actually decided." *Rolfe v. Hewitt*, 227 N.Y. 486, 494 (1920). Neither *Raer* nor *Radisson* involved the same set of facts here, *i.e.*, a Net Tenant who filed the predicate grievance. Consequently, those decisions cannot be interpreted as authority for the proposition that a Net Tenant lacks standing to file the predicate administrative grievance pursuant to RPTL § 524(3).

116. Based upon the foregoing, this Court should grant Petitioner's motion.

C. The Decision is inconsistent with the remedial nature of the RPTL, which this Court has instructed should be liberally construed to the end that the taxpayer's right to have the assessment reviewed should not be defeated by a technicality.

117. As early as 1875, this Court described tax certiorari proceedings as being "meant to afford an early, speedy and cheap mode of testing the legality" of the assessment, and "open to any one, owner or lessee, who is likely to be put to litigation and expense by reason of it." *Matter of Burke*, 62 N.Y 224, 228 (1875).

118. For 145 years since the *Burke* decision, this Court has repeatedly held that the law '"relating to review of assessments is remedial in character and should

be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality.'" *Matter of Great Eastern Mall,* 36 N.Y.2d at 548 (quoting *People ex rel. N.Y. City Omnibus Corp. v. Miller*, 282 N.Y. at 9). Additionally, any ambiguity in the statute should be resolved in favor of the taxpayer and against the taxing authority. *See id*. at 547.

119. Recognizing the remedial nature of the RPTL, this Court has held that "mere technical irregularities in the commencement process should be disregarded if a substantial right of a party is not prejudiced. . . . [to] require strict compliance with [the statute] in this context would mean that, under certain circumstances, petitioners would be foreclosed from judicial review of their tax assessments through no fault of their own. We find that approach unduly harsh and contrary to our historically liberal construction of pleading and procedure in tax certiorari proceedings." *Garth v Bd. of Assessment Review for Town of Richmond*, 13 N.Y.3d 176, 181 (2009).

120. Time and again courts have liberally construed the RPTL to sustain a taxpayer's right to assessment review against objections to the form or sufficiency of the grievance or petition. *See Miller v. Bd. of Assessors*, 91 N.Y.2d 82 (1997) (refusing to dismiss an article 7 petition where the predicate grievance complaints lacked authorizations required by RPTL §524); *Matter of Great Eastern Mall*, *supra,* 36 N.Y.2d at 547 (finding service on the deputy town clerk, and not the

town clerk, satisfied the requirements of RPTL §708(3)); *Matter of Tennanah Lake Townhouse and Villa Community, Inc. v. Town of Freemont*, 168 A.D.2d 789, 790 (3d Dep't 1990) (denying a motion to dismiss when "there was at least formal compliance with the statutory requirement of RPTL 524(3) in that each complaint to the Board contained an estimated value of the property in question"); *Astoria Fed. Sav. & Loan Ass'n*, 212 A.D.2d 600 (2d Dep't 1995) (denying a motion to dismiss where the authorization did not bear a date within the same calendar year that the complaint was filed); *Divi Hotels Mktg., Inc. v. Bd. of Assessors of Cty. of Tompkins*, 207 A.D.2d 580, 582 (3d Dep't 1994) (denying a motion to dismiss where the complaint was in the name of the aggrieved party who did not own the property at that time); *Rotblit v. Bd. of Assessors and/or the Bd. of Assessment Review of the Vill. of Russell Gardens*, 121 A.D.2d 727 (2d Dep't 1986) (affirming the denial of a cross-motion to dismiss where proceedings were filed in the name of the prior owner); *Bergman v. Horne*, 100 A.D.2d 526 (2d Dep't 1984) (reversing the dismissal of the petitions where they "did not include a writing authorizing petitioners' counsel to verify the petitions, as required by RPTL 706.")

121. RPTL §706(2) provides, in relevant part, that the judicial "petition must show that a complaint was made in due time to the proper officers to correct such assessment." As this Court recognized in *Sterling Estates, Inc.*, 66 N.Y.2d at 126, "[b]ecause of the important purposes to be served by administrative review,

the Legislature has specified that protest is a condition precedent to a proceeding under [RPTL] article 7 by providing that a petition seeking review 'must show that a complaint was made in due time to the proper officers to correct such assessment' ([RPTL] §706[2])."

122. This "condition precedent" is satisfied by: (1) giving notice to the municipality as to the property and the assessment being challenged by the timely filing of a grievance; and (2) providing a statement that specifies the property being protested and the relief sought. *See id.* at 126-27; *Astoria Fed. Sav. & Loan Ass'n*, 212 A.D.2d at 601; *Tennanah Lake Townhouse*, 168 A.D.2d at 790.

123. The grievances filed herein met all statutory requirements because they set forth the Subject Property's address, its tax map designation, the assessments being challenged, Petitioner's objections to those assessments, and the grounds underlying those objections. *See* R. 100-04, 113-18, 127-33, 142-48, 160-65, 176-81, 193-98, and 211-17.

124. A liberal construction of RPTL §§524(3) and 706(2) would permit the grievance to be filed by anyone who is '"likely to be put to litigation and expense' as a direct result of its legal obligation." *Larchmont Pancake House II*, 33 N.Y.2d at 238 (quoting *Matter of Burke*, 62 N.Y. at 227-28).

125. The Second Department, however, relying upon *Circulo* and *Larchmont Pancake House I*, strictly construed RPTL §§524(3) and 706(2) by

dismissing this consolidated proceeding on the grounds that neither the owner filed the grievance nor did Petitioner identify itself on the grievance form as an agent of the owner – requirements that do not appear in the statute. That Court reached this conclusion even though Petitioner was contractually obligated to pay all of the real property taxes and was authorized by its lease to challenge the real property assessments. The Second Department also ignored *EFCO Products*, 161 A.D.2d at 46-47, and *Big "V" Supermarkets*, 114 A.D.2d at 127, wherein the Courts reached the merits even though the predicate administrative grievance was filed by the tenant in its own name.

126. To be clear, this is a not a case where no grievances were filed and Petitioner filed article 7 petitions seeking relief; nonetheless, the Second Department ruled as if no grievances had been filed and dismissed the petitions accordingly. Moreover, no substantial right of the Respondents had been prejudiced under the circumstances, and at no point have Respondents identified any substantial right that would be prejudiced were the proceedings allowed to go forward as filed.

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

concerning the form of the administrative grievances, *i.e.*, in whose name the grievances were filed. The Second Department's reasoning cannot be squared with one of the stated purposes underlying tax assessment review proceedings, which is to provide a right to relief to an aggrieved taxpayer. "A taxpayer is aggrieved under article 7 where the tax assessment has a 'direct adverse affect on the challenger's pecuniary interest.'" *Larchmont Pancake House II*, 33 N.Y.3d at 237 (quoting *Matter of Waldbaum, Inc. v. Finance Adm'r of City of N.Y.*, 74 N.Y.2d 128, 132 [1989]); *see Matter of Burke*, 62 N.Y. at 228; *Matter of Walter*, 75 N.Y. at 357.

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

129. Based upon the forgoing, the Court should grant Petitioner's motion.

D. The Second Department ignored settled law that holds that technical objections not raised by the BAR at the grievance stage are waived.

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

131. In *Miller*, 91 N.Y.2d at 84, the municipality moved to dismiss the petition with respect to the thirty properties included therein because written authorizations from the owners were not filed with the administrative grievances. The municipality also sought to dismiss the petition where one of the properties sold prior to the grievance filing deadline, and both the grievance and petition with

respect to this property were filed in the name of the prior owner and lacked an authorization from the actual owner. *Id.* Notwithstanding, this Court allowed the article 7 proceedings to go forward since the missing authorizations and filing in the prior owner's name presented technical, not jurisdictional, defects. *Id.* at 86-87. Significantly, this Court's holding in *Miller* is consistent with *Matter of Great Eastern Mall*, 36 N.Y.2d at 548, which recognized that it is notice to the municipality at the grievance stage as to the property and relief sought that establishes the Court's subject matter jurisdiction to review the article 7 petition. [30]

132. Since the Second Department did not dismiss the petitions for a lack of subject matter jurisdiction, it should have reached the same conclusion this Court reached in *Miller*. The purported defect here, if in fact it is considered a defect, is that Petitioner filed the grievances in its own name and not the property owner's name, which is, at most, a technical defect.[31] The grievances set forth all the information required by statute to put Respondents on notice of Petitioner's claims. The Town BAR and Village BAR acted on the complaints without either

[30] Respondents argued before the Second Department that courts do have the same authority to correct mistakes in the administrative (grievance) proceedings as they do in judicial proceedings. Respondents' Brief in Opposition at 40-46. Respondents are mistaken, for in *Miller*, 91 N.Y.2d at 86-87, this Court allowed the judicial proceedings to proceed even though authorizations were missing from the grievances when filed. What a Court cannot do is exercise jurisdiction when no complaint is filed to challenge the subject assessment (*Raer*, 78 A.D.2d at 989) or permit the petitioner to seek additional relief in the judicial proceeding that it did not request in the grievance complaint (*Matter of City of Little Falls*, 68 A.D.2d at 740 and *Radisson Community Ass'n*, 3 A.D.3d at 139).

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

dismissing them or raising any technical objections whatsoever. It was not until September 2016 that Respondents unilaterally changed their position and moved to dismiss the within petitions. Consequently, any objections they had to the form of the grievances must be determined to have been waived.

133. Based upon the forgoing, this Court should grant Petitioner's motion.

E. Even assuming, arguendo, that Petitioner is not the "person whose property is assessed," it was authorized by its lease to challenge the real property assessment, and therefore the Second Department erred in dismissing the consolidated proceeding.

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

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

Property's real property assessments.[32] Moreover, the Second Department's Decision is contrary to its own decision in *EFCO Prods*., 161 A.D.2d at 46-47 and the Third Department's decision in *Big "V" Supermarkets*, 114 A.D.2d at 727-28, wherein the Courts reached the merits even though the predicate administrative grievances were filed in the name of the lessee and not the property owner. [33]

Based upon the foregoing, the Court should grant Petitioner's motion.

[32] Respondents cannot now argue that no authorization from the property owner was attached to the grievances, as this objection was never raised at either the grievance stage or in the underlying proceedings, and therefore has been waived. *See Miller*, 91 N.Y.2d at 86-87.

[33] Respondents raised arguments for the first time in their reply memorandum before the Supreme Court, Westchester County (*see* R.321-31 [Point II], 339-40, 347-48, 351-52) and in their brief before the Appellate Division (*see* Respondents' Brief in Opposition at 36-40 [Point V]). To the extent Respondents raise those arguments here the Court should not entertain them.

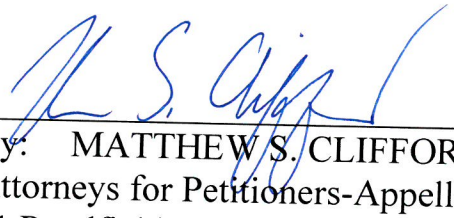
CONCLUSION

WHEREFORE, for all the reasons cited herein, Petitioner respectfully requests that this Court grant Petitioner's Motion for Leave to Appeal, together with such other and further relief as this Court deems just and proper.

Dated: March 2, 2021
Bronxville, New York

Yours, etc.

GRIFFIN, COOGAN, SULZER
& HORGAN, P.C.



By: MATTHEW S. CLIFFORD, ESQ.
Attorneys for Petitioners-Appellants
51 Pondfield Road
Bronxville, New York 10708
(914) 961-1300

EXHIBIT 1

Supreme Court of the State of New York
County of Westchester

----------x

DCH Auto, as Tenant obligated to pay taxes and
DCH Investments Inc. (New York), as Tenant
obligated to pay taxes,

Petitioners,

-against-

Index No. 23040/09

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,

Notice of Entry

Respondents,

For a Review under Article 7 of the RPTL.

----------x

Please take notice that attached is a true copy of the Judgment in this proceeding that was entered in the office of the clerk of this court on February 10, 2017.

Dated: February 15, 2017
White Plains, NY

William Maker, Jr.
Attorney for Respondents Town of Mamaroneck,
its Assessor and Board of Assessment Review
740 West Boston Post Road
Mamaroneck, New York 10543
(914) 381-7815

McCULLOUGH, GOLDBERGER & STAUDT, LLP

By: 

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SHAW, PERELSON, MAY & LAMBERT, LLP
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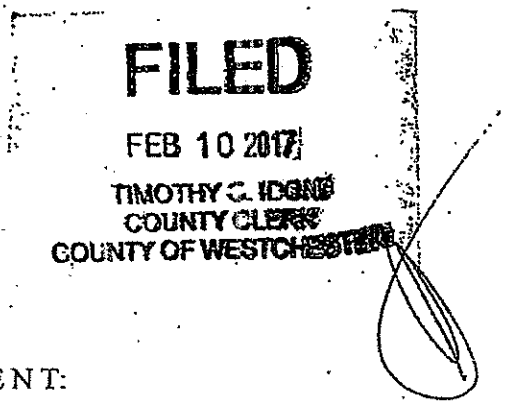


At the Tax Certiorari and Condemnation Part of the Supreme Court of the State of New York held in and for the County of Westchester at the Richard J. Daronco Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601, on _____, 2017

PRESENT:

Honorable O. Peter Sherwood,
Justice of the Supreme Court

----------x

DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes,

Petitioners,

-against-

Index No. 23040/09

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,

Judgment

Respondents,

For a Review under Article 7 of the RPTL.

----------x

The petitioners, DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes, by their attorneys, Griffin, Coogan, Sulzer & Horgan, P.C., having commenced five proceedings pursuant to Article 7 of the Real Property Tax Law to review assessments made by the Town of Mamaroneck (Town) for assessment years 2009, 2010, 2011, 2013 and 2014 upon the parcels of real property identified in the petitions filed in those proceedings, and three proceedings pursuant to Article 7 of the Real Property Tax Law to

review assessments made by the Village of Mamaroneck (Village) for assessment years 2010, 2011 and 2013 upon the parcels of real property identified in the petitions filed in those proceedings, and

the parties having stipulated to try only the review of the assessments with respect to the parcel of real property designated as Section 8, Block 26, Lot 1.1 on the Town's official tax map, and as Section 8, Block 111, Lot 1A on the Village's official tax map and known by the postal address of 700 Waverly Avenue, Mamaroneck, NY 10543 (Subject Property) and to hold in abeyance the review of the assessments of the other parcels of real property identified in the petitions filed in each of those proceedings, and

the Court having jointly tried these proceedings with respect to the assessments made of the Subject Property, and

the joint trial having been conducted before the undersigned on submissions by the parties with the petitioners having appeared by their attorneys, Griffin, Coogan, Sulzer & Horgan, P.C. (William E. Sulzer and Matthew S. Clifford, of counsel), the respondents in all of the proceedings where the Town of Mamaroneck, its Assessor and its Board of Assessment Review are the named respondents having appeared by their attorney, William Maker, Jr., and the respondents in all of the proceedings where the Village of Mamaroneck, its Assessor and its Board of Assessment Review are the named respondents having appeared by their attorneys, McCullough, Goldberger & Staudt, LLP (Joanna C. Feldman, of counsel), and

the submissions having consisted of (1) a Stipulation of Facts dated September 15, 2016, submitted jointly by the parties, (2) a Book of Exhibits containing twenty-seven exhibits submitted

on behalf of the petitioners and one exhibit submitted on behalf of the respondents, (3) the following items submitted on behalf of the petitioners: (a) the affirmation of William E. Sulzer dated October 27, 2016 and the seven exhibits appended thereto, (b) the petitioners' memorandum of law in opposition dated October 27, 2016, and (c) correspondence from Matthew S. Clifford to the undersigned dated December 1, 2016 and December 8, 2016, and (4) the following items submitted on behalf of the respondents: (i) the respondents' joint memorandum of law dated September 28, 2016, (ii) the respondents' joint reply memorandum of law dated November 29, 2016 and the one exhibit appended thereto and (iii) correspondence from William Maker, Jr. to the undersigned dated December 7, 2016, and

the undersigned having rendered a decision and order dated December 16, 2016, a copy of which is annexed hereto, dismissing the petitions in each of the proceedings for lack of subject matter jurisdiction insofar as those petitions sought a review of the assessments of the Subject Property, and

by stipulation among the attorneys of record dated January 11, 2017, and "So Ordered" by the undersigned on that same day, (a) the proceedings originally bearing index numbers 10896/10, 9828/11, 55966/13 and 67124/13 were consolidated with the proceeding commenced under index number 23040/09, and (b) the petitions in the proceedings originally bearing index numbers 10896/10, 9828/11, 55966/13 and 67124/13 were severed to the extent they challenge the assessments of the lots listed below so that (i) the challenges to those assessments can continue to be litigated under index number 23040/09 and (ii) this judgment, limited to the review of the

assessments of the Subject Property, can be entered, and

the respondents having waived any entitlement they may have to an award of costs and disbursements.

Now, on the joint motion of William Maker, Jr. and McCullough, Goldberger & Staudt, LLP, the attorneys for the Town and Village respondents, respectively, it is

Ordered, Adjudged and Decreed, that the petitions in this consolidated proceeding be and the same hereby are dismissed insofar as they seek review of the assessments of the parcel of real property designated as Section 8, Block 26, Lot 1.1 on the Town's official tax map, and as Section 8, Block 111, Lot 1A on the Village's official tax map and known by the postal address of 700 Waverly Avenue, Mamaroneck, NY 10543, and it is further

Ordered, that the petitions in the consolidated proceeding insofar as they seek review of the assessments of the parcels of real property identified in the table below shall continue to be litigated under this caption and index number:

Address on Assessment Roll Section/Block/Lots (S/B/L)	**Town Assessment Year**	**Village Assessment Years**
1258 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/65D/306B-313	N/A	2010 & 2011
1305 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/79/1B2	N/A	2010 & 2011
1312 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/65C/220-223	N/A	2010 & 2011
1337 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/79/1B3	N/A	2010 & 2011

Address on Assessment Roll Section/Block/Lots (S/B/L)	Town Assessment Year	Village Assessment Years
218-30 W. Boston Post Road Mamaroneck, NY 10543 Town S/B/L: 9/14/65 218 W. Boston Post Road Mamaroneck, New York 10543 Village S/B/L: 9/40/29	2013	2013
236 W. Boston Post Road Mamaroneck, NY 10543 Town S/B/L: 9/14/44 Village S/B/L: 9/40/20B, 20C, 28	2013	2013
260 W. Boston Post Road Mamaroneck, NY 10543 Town S/B/L: 9/14/32 Village S/B/L: 9/40/18, 19, 20A	2013	2013

and it is further

Ordered, that costs and disbursements not be awarded.

ENTER

O. P. Sherwood

Hon. O. Peter Sherwood,
Justice of the Supreme Court

Judgment entered on 2/10, 2017

Honorable Timothy C. Idoni, County Clerk
and Clerk of the Supreme Court
of the State of New York in and
for the County of Westchester

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

In the Matter of the Application of

DCH AUTO, AS TENANT OBLIGATED TO PAY TAXES

Petitioner,

– against –

THE TOWN OF MAMARONECK,
A MUNICIPAL CORPORATION,
ITS ASSESSOR AND BOARD OF ASSESSMENT
REVIEW,

Respondents,

For a Review under Article 7 of the RPTL.

----------X

Index No. 23040/09 –
24838/10 –
14645/11 –
67124/13
66643/14
10896/10 –
9828/11 –
55966/13

These are five tax certiorari proceedings involving the Town of Mamaroneck's (Town) assessments of an improved parcel of land in the years 2009, 2010, 2011, 2013 and 2014, and three tax certiorari proceedings involving the Village of Mamaroneck's (Village) assessments of that same property in the years 2010, 2011 and 2013. The property ("Property") is designated as Section 8, Block 26, Lot 1.1 on the Town's official tax map, and as Section 8, Block 111, Lot 1A on the Village's official tax map (Stipulation of Facts ¶ 1) ("Stip, ¶ ___"). The Property is known by the postal address, 700 Waverly Avenue, Mamaroneck, NY 10543 (*id.*).

The parties have stipulated to the values of the Property for each assessment year at issue. The respondents maintain, however, that these proceedings must be dismissed for lack of subject matter jurisdiction because the petitioner failed to satisfy a condition precedent for challenging the assessments. This Decision and Order is addressed to that issue.

In 1987, non-party 700 Waverly Avenue Corp. (Owner) acquired the Property (Stip., ¶¶ 2 and 3). In 2007, the Owner leased the Property to the petitioner, DCH Investments, Inc. under a twenty (20) year net lease that required the petitioner to pay all ad valorem real estate taxes levied upon the Property for each year of the lease (Stip. ¶¶ 4, 5 and 6).

The parties agree that an RP-524 Complaint[1] commencing the administrative challenge of each assessment was timely made to the Town or the Village Board of Assessment Review (Board), and that each tax certiorari proceeding was timely commenced. Significantly, for purposes of this motion, each challenge was made by the petitioner only (Stip. ¶¶ 10, 12-14). The Owner did not file RP-524 Complaints to the Board in any of the years at issue. However, the Lease authorized petitioner to contest the amount or validity of any ad valorem real estate tax (*see* Book of Exhibits Ex. 1 § 5 [e] [i]). The Lease expressly excuses the Landlord from participating in such contest, except where the applicable law or regulation requires that the proceeding be brought in the name of the Landlord. In that event, the tenant may require the Landlord's participation and cooperation, but at the tenant's sole expense (*see id,* §5[e] [iv]).

According to respondents, any challenge to an assessment must be initiated by the Owner or its authorized agent by submission of a NRP-524 Complaint. Any failure to satisfy this condition precedent is fatal (*see Matter of Circulo Housing Dev. Fund Corp. v Assessor*, 96 AD3d 1053, 1056-1057 [2d Dept 2012]). Respondents insist that "as a result, these proceedings must be dismissed since '[i]t is 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 . . . .

[1] "RP-524 Complaint" is the shorthand used in the Stipulation of Facts for referring to the complaint required by section 524 (3) of the Real Property Tax Law to commence an administrative review by a Board of Assessment Review of a real property assessment, commonly referred to as a "grievance".

Albeit technical, an express condition precedent to a judicial proceeding was not met, and the court lacked jurisdiction to review' (Citation omitted)".

Petitioner opposes the motion. It argues that the court has subject matter jurisdiction, that failure to name the Landlord as the grievant in the administrative process is a mere technicality and that the interpretation of *Circulo* being urged by respondents is inconsistent with the well-established principle that the Tax Law, as it relates to review of assessments, is remedial in nature and should be liberally construed so that the taxpayer's right to have his assessment reviewed is not be defeated by a technicality (*see Matter of Great Eastern Mall v Condon*, 36 NY 2d 544, 548 [1975]). Petitioner also argues that through their practices and actions, respondents have waived any objection to petitioner's standing to file RP-524 Complaints.

DISCUSSION

RPTL §524 (3) states in relevant part that:

> Notwithstanding the provisions of section five hundred twenty-eight of this title, and except in cities with a population of five million or more, a complaint with respect to an assessment shall be on a form prescribed by the commissioner and shall consist of a statement specifying the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified, and the reduction in assessment valuation or taxable assessed valuation or change in class designation or allocation of assessed valuation sought. Such statement shall also contain an estimate of the value of the real property. Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein.

Accordingly, a challenge to an assessment starts by filing an RP-524 Complaint with an assessor or a board of assessment review. RPTL 524 (3) requires that the complaint be made by "the person whose property is assessed." If the challenge is rejected, the grievant may commence a proceeding in the Supreme Court pursuant to RPTL article 7 to review the administrative determination. The Appellate Division, Second Department has held that the only person fitting the definition of "the

person whose property is assessed" is the property owner (*see Circulo*, 96 AD3d at 1056 ["RPTL article 5 requires that the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment" [and the] failure to comply with this requirement requires dismissal of the petition"] [italics in the original; *see also Matter of Raddison Community Assn. v Long*, 3 AD3d 135, 139 [4th Dept 2003] ["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]"]). The Appellate Division described the requirement that the owner must have made a complaint regarding the unlawful assessment to the Board" as "a condition precedent to the commencement of' a proceeding for review pursuant to RPTL article 5 (*see Circulo,* 96 AD3d at 1056).

As described by the Appellate Division, Circulo Housing Development Fund Corporation (CHFD) was "formed for the purpose of, *inter alia*, operating and maintaining housing projects for persons of low income" (*id.* at 1053). It commenced proceedings under RPTL article 7 against the assessor of the City of Long Beach with respect to three properties. As stated by the Appellate Division, CHFD "filed the administrative complaint for review of the assessment of the East Hudson Street property" (*id.* at 1056), the property that is germane here. Although its petition alleged otherwise, CHFD did not own the East Hudson Street property (see *id.* at 1054), and the owner "[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 to the Board resulted in the dismissal of the RPTL article 7 petition with respect to that property,

even though the Appellate Division recognized that under RPTL 704 (1), CHFD "met the definition of a 'person claiming to be aggrieved' by the assessment" (*id.* at 1056).

The Appellate Division explained its holding by pointing out that "the petitioner's status as an 'aggrieved' person is not the only requirement for commencing a [court] proceeding pursuant to RPTL article 7 . . . [A] condition precedent to the commencement of such a proceeding is that the owner must have made a complaint regarding the unlawful assessment to the [Board] for review pursuant to RPTL article 5" *(id.)*. Thus "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])" *(id.)* 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 [was] 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" (*id.* at 1057 [citations omitted]).

The same failure to comply with RPTL 524 (3) occurred here. Petitioner, not the Owner of the Property, filed the RP-524 Complaints to the Town Board and Village Board. Therefore, the petitioner did not satisfy "a condition precedent to the commencement of [these] proceeding[s] . . . [in] that the [O]wner must have made a complaint regarding the unlawful assessment to the Board

for review pursuant to RPTL article 5" (*id.* at 1056). Absent allegations of the filing of grievances to the Board, this court lacks subject matter jurisdiction to review the assessments, even though the petitioner may be an aggrieved person (*see Matter of Frei v Town of Livingston*, 50 AD3d 1381, 1382 [3d Dept 2008], aff'd 13 NY2d 1170 [1964] ["Filing a grievance complaint with the assessor . . . is a condition precedent and jurisdictional prerequisite to obtaining judicial review"]).

Citing RPTL § 554, petitioner argues that the phrase "person whose property is assessed is not equivalent to the word "owner" (*see* Pet. Br., p. 15). RPTL § 554 provides in pertinent part that:

> Whenever it appears to an owner of real property- or any person who would be entitled to file a complaint pursuant to section five hundred twenty-four of this chapter, that a clerical error, an unlawful entry or error in essential fact described in subdivision one of this section is present on the tax roll in regard to his real property, such owner or other person, may, at any time prior to the expiration of the warrant, file an application in duplicate with the county director of real property tax services for the correction of such error.

RPTL § 554 [2] (emphasis added). Petitioner asserts that this language confirms that someone other than the property owner can file a correction of errors and "thus, it can be inferred from RPTL § 554 that the Legislature not only contemplated, but intended that persons other than owners had authority to file administrative grievances pursuant to CPTL § 524" *(id.)*. The court agrees but this does not advance petitioner's cause. One need only examine RPTL § 524(3) to find who else the Legislature has authorized to file an RP-554 Complaint:

> 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.

RPTL § 524 (3). Petitioner is not one of those listed in the statute.

The court recognizes that in two recent decisions, a justice of this court declined to dismiss seemly similar challenges to petitions (see *Larchmont Pancake House v The Assessor and Board of Assessment Review of the Town of Mamaroneck*, Index No. 23529/09, Slip Op at 3 [Sup Ct

Westchester Cnty, April 18, 2014 [Tolbert, J.] *SCS Holding LLC v The Assessor and Board of Assessment Review of the Town of Mamaroneck*, Index No. 21073/09 Slip Op [Sup Ct Westchester Cnty August 4 2015] [Tolbert, J.]). Both cases involved petitioners who were closely related to the owners.

In *Larchmont Pancake House*, ownership of the petitioner, a family-owned business had been transferred from the parents, Frank and Susan Carfora to their children. Although, not reflected in the court's decision, as of the date of the taxable status, the property was owned by the Carforas, not their children. Petitioner paid all of the property taxes. The Town sought to have the petition dismissed on the ground that a condition precedent under RPTL 524 had not been satisfied. The court denied the motion to dismiss, finding that Susan Carfora's daughter, Portia DeGast, who was the president and an owner of petitioner, was also designated as attorney – in – fact of Susan Carfora and was authorized to act on her behalf. The court also criticized the respondents for waiting "so many years after the filing" of the petition to complain of this "technicality" such that the motion was viewed as "a bit disingenuous".

In *CSC Holding*, the owner of the property was Cablevision of Southern Westchester, Inc. (CSW). On respondents' motion to dismiss the petition, petitioner cross-moved to amend the petition by substituting the record owner as the petitioner. The court granted the cross-motion and denied the motion, finding that dismissal would be contrary to the intent of the Legislature. In reaching its decision, the court observed that these cases are "quite [fact] specific or case sensitive" and found that the Town and Village were "noticed of these proceedings . . . [and] in fact knew that the taxes were being grieved". The court also distinguished *Circulo*, finding that although "*Circulo* is an interesting case decided by the Appellate Division, it does not dictate the ruling herein" (*id*).

In this case, petitioner is neither a family member nor an affiliate of the property owner. Petitioner is a mere tenant that is contractually required to pay all ad valorem real estate taxes levied upon the Property during the term of the Lease. Undisputedly, petitioner is "aggrieved" by the decisions of the Boards. However, that fact is not grounds for distinguishing this case from the binding precedent of *Circulo* where the petition alleged that petitioner was responsible for paying real property taxes on the property. In fact, the Appellate Division acknowledged that the petitioner there was "aggrieved," but directed dismissal of the petition because petitioner was not the owner, as RPTL 524 (3) requires *(see id.)*.

As noted, petitioner here also argues that the failure to list the owner in the RP-524 Challenge was a mere technical defect that is not jurisdictional and may be cured (*see Matter of Astoria Fed Savings & Loan Assoc. v Bd of Assessors*, 212 AD2d 600, 601 [2d Dept 1995] [Failure of owner's written RPTL § 524 [3] authorization to bear a date within the same calendar year during which the complaint was filed not jurisdictional and could be cured by submission of a properly dated authorization *nunc pro tunc*]). Petitioner adds that the motion should be denied on the further ground that respondents have waived any objection to petitioner's standing to file RP-524 Complaints because (i) respondents instructed tenants that they had the right to challenge their assessment on respondent's website[2], (ii) acted on petitioner's administrative complaints over several years and (iii) delayed the instant motion to dismiss for years (*see* Opp. Br., p. 29).

[2] Petitioners contend, and respondents do not dispute, that the Town's website referenced an instruction manual published by the New York State Department of Taxation and Finance Office of Real Property Tax Services (ORPTS) which states that "any person who pays taxes may file a grievance" (Stip, ¶ 6). Respondents argue however that the ORTPS manual predates *Circulo* and that "if the ORTPS sources could not save the *Circulo* petitioner, neither should the Town's website" which merely mirrored ORPTS (Reply Br., p. 8).

There can be no disputing that respondents were tardy to assert the defense they are now advancing. However, the law is well settled that the failure of the owner to raise the RP-524 Complaint in the administrative process is a fundamental error which the courts cannot cure because of a lack of subject matter jurisdiction *(see, e.g. Matter of City of Little Falls v Bd. Of Assessors*, 68 AD2d 734 [4th Dept 1979] [Motion in article 7 proceeding alleging overvaluation to amend petition to assert that the assessment was erroneous, illegal, and excessive denied as court was without jurisdiction to consider new objections]; *Matter of Frei v Town of Livingston*, 50 AD3d 1381, 1382 [3d Dept 2008] [Distinguishing between court's authority to correct procedural errors in an article 7 proceeding and the court's inability to bypass major errors made during the article 5 administrative review process. While "pleading and service defects in the commencement of an RPTL Article 7 proceeding . . . may be cured by the procedural statutes preferring liberal construction of pleadings and technical omissions, [t]hose statutes do not override the specific requirements of RPTL 524 regarding filing of assessment grievance complaints"]; and *Matter of Lussi v Bd. of Assessors*, 113 Misc 2d 558, 559 [Sup Ct Essex Cnty 1982] ["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"]).

The want of subject matter jurisdiction is a defense that cannot be waived. It can be raised at any time (*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]"; *Renaldo R. v Chanice R.*, 131 AD3d 885, 886 [1st Dept 2015] ["[T]he issue of subject matter jurisdiction may be raised at any time."]; and *Maspeth Fed. Sav. and Loan Assn v Sloup*, 123 AD3d 672, 674 [2d Dept 2014] ["The issue of subject matter jurisdiction is not waivable, and may be raised at any time"]). The decision of the Appellate Division, Fourth Department in *Matter of Henderson v Silo*, 36 AD2d 439, 441 (4th Dept 1971) is fully consistent with this settled law. In *Henderson*, the assessor already had jurisdiction to change the assessment, as was evidenced by his acceptance of the complaint as valid and changing the assessment *(see id.)*. Having acted on a complaint over which respondents had jurisdiction, they "thereby waived the claimed defect in it" *(id.)*. In this case, the assessor lacked jurisdiction because no proper complainant appeared before the Board in a timely manner.

CONCLUSION

Accordingly, the motion shall be granted. The defense asserted is governed by binding precedent affecting the subject matter jurisdiction of the court. The Owner of the Property did not file RP-524 Complaints challenging the assessments at issue. Because subject matter jurisdiction may not be waived even where prejudice is shown, the petitions must be and are hereby DISMISSED.

DATED: December 16, 2016

ENTER,

O. PETER SHERWOOD
J.S.C.

EXHIBIT 2

NOTICE OF APPEAL, DATED FEBRUARY 28, 2017 [3-4]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes,

Petitioners,

- 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,

For a Review under Article 7 of the RPTL.

----------X

NOTICE OF APPEAL

Index No. 23040/09

PLEASE TAKE NOTICE, that Petitioners DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes, hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, from each and every part of a Judgment of the Supreme Court, Westchester County (Sherwood, J.), filed and entered on February 10, 2017, the Notice of Entry of which was served on the undersigned by regular mail on February 15, 2017. Enclosed herewith is a copy of the Judgment with Notice of Entry.

Dated: February 28, 2017
Bronxville, New York

Yours,

GRIFFIN, COOGAN, SULZER & HORGAN, P.C.
Attorneys for Petitioners

By: _____
Matthew S. Clifford
51 Pondfield Road
Bronxville, New York 10708
(914) 961-1300

To: William Maker, Jr., Esq.
Attorney for Respondents Town of Mamaroneck
its Assessor and Board of Assessment Review
740 West Boston Post Road
Mamaroneck, New York 10543
(914) 381-7815

MCCULLOUGH, GOLDBERGER & STAUDT, LLP
Attorneys for Respondents Village of Mamaroneck,
its Assessor and Board of Assessment Review
1311 Mamaroneck Avenue, Suite 340
White Plains, New York 10605
(914) 949-6400

SHAW, PERELSON, MAY & LAMBERT, LLP
Attorneys for Mamaroneck Union Free School District
115 Stevens Avenue
Valhalla, New York 10595
(914) 741-9870

EXHIBIT 3

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

----------x

In the Matter of DCH Auto, etc., et al.,

Petitioners- Appellants,

NOTICE OF ENTRY

-against-

Docket No. 2017-03016

Town of Mamaroneck, etc., et al.

Respondents- Respondents,

Westchester County Clerk Index No. 23040/09

----------x

Please take notice that attached is a true copy of the Decision & Order that was entered in the office of the clerk of this court on December 11, 2019.

Dated: January 6, 2020

William Maker, Jr.
740 West Boston Post Road
Mamaroneck NY 10543
(914) 381-7815

Attorney for the respondent- respondent, The Town of Mamaroneck, its Assessor and Board of Assessment Review

To: Griffin, Coogan, Sulzer & Horgan, P.C.
51 Pondfield Road
Bronxville, NY 10708
(914) 961-1300

Attorneys for the petitioners-appellants

McCullough, Goldberger & Staudt, LLP
1311 Mamaroneck Avenue, Suite 340
White Plains, NY 10605
(914) 949-6400

Attorneys for the respondent- respondent,
The Village of Mamaroneck, its Assessor
and Board of Assessment Review

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D61500
G/htr

_____AD3d_____

Argued - October 21, 2019

MARK C. DILLON, J.P.
RUTH C. BALKIN
FRANCESCA E. CONNOLLY
ANGELA G. IANNACCI, JJ.

2017-03016

DECISION & ORDER

In the Matter of DCH Auto, etc., et al., appellants,
v Town of Mamaroneck, etc., et al., respondents.

(Index No. 23040/09)

Griffin, Coogan, Sulzer & Horgan, P.C., Bronxville, NY (William E. Sulzer, Matthew S. Clifford, and Kevin M. Brady, Jr., of counsel), for appellants.

William Maker, Jr., Mamaroneck, NY, for respondents Town of Mamaroneck, Assessor of the Town of Mamaroneck, and Board of Assessment Review of the Town of Mamaroneck, and McCullough Goldberger & Staudt, LLP, White Plains, NY (Kevin E. Staudt of counsel), for respondents Village of Mamaroneck, Assessor of the Village of Mamaroneck, and Board of Assessment Review of the Village of Mamaroneck (one brief filed).

In a consolidated tax certiorari proceeding, the petitioners appeal from a judgment of the Supreme Court, Westchester County (O. Peter Sherwood, J.), entered February 10, 2017. The judgment, insofar as appealed from, dismissed the consolidated proceeding insofar as it sought review of certain real estate tax assessments of a parcel of real property designated as Section 8, Block 26, Lot 1.1 on the official tax map of the Town of Mamaroneck, and Section 8, Block 111, Lot 1A of the official tax map of the Village of Mamaroneck, known by the postal address of 700 Waverly Avenue, Mamaroneck, New York.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

This matter was presented to the Supreme Court on stipulated facts and documentary evidence. In a net lease dated October 10, 2007, the owner of 700 Waverly Avenue in Mamaroneck

(hereinafter the subject property) leased it to the petitioner, DCH Auto, later known as DCH Investments, Inc. (New York) (hereinafter together the petitioner), for a period of 20 years. The net lease provided, inter alia, that the petitioner was to pay the real estate taxes for the period of the lease term, that the petitioner had the right to contest any assessment at its sole cost and expense, and that it had the right to settle any such proceeding without the consent of the owner. Furthermore, the owner was not required to join in any such proceeding unless the law required that the proceeding be brought in the name of the owner. If the law required the proceeding to be brought in the name of the owner, the owner was required to cooperate with the petitioner.

By administrative complaints pursuant to RPTL 524, the petitioner, in its name, challenged tax assessments of the Town of Mamaroneck for the subject property for the tax years 2009, 2010, 2011, 2013, and 2014, and the tax assessments for the Village of Mamaroneck for the tax years 2010, 2011, and 2013. After both the Town Board of Assessment Review and the Village Board of Assessment Review denied the administrative complaints on the merits, the petitioner commenced five proceedings pursuant to RPTL article 7 to review assessments made by the Town for tax years 2009, 2010, 2011, 2013, and 2014, and three proceedings pursuant to RPTL article 7 to review assessments made by the Village for tax years 2010, 2011, and 2013.

The Town and the Village moved to dismiss the consolidated proceeding on the ground that the administrative complaints pursuant to RPTL 524 were defective, since they were not brought in the name of the owner, and a complaint pursuant to RPTL 524 was a condition precedent to a proceeding pursuant to RPTL article 7. The Supreme Court granted the motion to dismiss the consolidated proceeding. The court determined that a condition precedent to the commencement of the proceeding was not satisfied, as the administrative complaints for the subject tax years were not filed in the name of the owner as required by RPTL 524(3). Thus, the court dismissed the consolidated proceeding. The petitioner appeals.

RPTL 524(3) provides, in relevant part, that a complaint must be based upon a statement 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. Such written authorization must be made a part of such statement and bear a date within the same calendar year during which the complaint is filed." RPTL 704(1) provides, in relevant part, that "[a]ny person claiming to be aggrieved by any assessment of real property" may commence a judicial proceeding pursuant to RPTL 704(1). Here, the petitioner may qualify as an aggrieved party pursuant to RPTL 704(1), since it paid the real estate taxes in the challenged tax years. However, in filing the administrative complaints under RPTL 524 in its own name, it failed to satisfy a condition precedent to the commencement of an RPTL article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner (*see* RPTL 706[2]; *Matter of Larchmont Pancake House v Board of Assessors and/or the Assessor of the Town of Mamaroneck*, 153 AD3d 521, *affd on other grounds* 33 NY3d 228; *Matter of Circulo Hous. Dev. Fund Corp. v Assessor of City of Long Beach, Nassau County, NY*, 96 AD3d 1053; *Matter of Grecian Garden Apts. v Barlow*, 71 Misc 2d 457 [Sup Ct, Monroe County]).

The petitioner's remaining contentions are without merit.

Accordingly, we agree with the Supreme Court's determination to dismiss the consolidated proceeding.

DILLON, J.P., BALKIN, CONNOLLY and IANNACCI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

EXHIBIT 4

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

----------X

In the Matter of DCH Auto, etc., et al.,

NOTICE OF ENTRY

Petitioners- Appellants,

-against-

Docket No. 2017-03016

Town of Mamaroneck, etc., et al.

Respondents- Respondents,

Westchester County Clerk Index No. 23040/09

----------X

Please take notice that attached is a true copy of the Decision & Order on Motion that was entered in the office of the clerk of this court on July 13, 2020.

Dated: July 20, 2020

William Maker, Jr.
740 West Boston Post Road
Mamaroneck NY 10543
(914) 381-7815

Attorneys for the respondent- respondent
The Town of Mamaroneck, its Assessor and Board of Assessment Review

To: Griffin, Coogan, Sulzer & Horgan, P.C.
51 Pondfield Road
Bronxville, NY 10708
(914) 961-1300

Attorneys for the petitioners-appellants

McCullough, Goldberger & Staudt, LLP
1311 Mamaroneck Avenue, Suite 340
White Plains, NY 10605
(914) 949-6400

Attorneys for the respondent- respondent
The Village of Mamaroneck, its Assessor
and Board of Assessment Review

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M271846
MB/

MARK C. DILLON, J.P.
JOSEPH J. MALTESE
FRANCESCA E. CONNOLLY
ANGELA G. IANNACCI, JJ.

2017-03016 DECISION & ORDER ON MOTION

In the Matter of DCH Auto, etc., et al., appellants,
v Town of Mamaroneck, etc., et al., respondents.

(Index No. 23040/2009)

Appeal from a judgment of the Supreme Court, Westchester County, entered February 10, 2017, which was determined by decision and order of this Court dated December 11, 2019. Motion by the appellants for leave to reargue the appeal, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court. Separate motion by International Council of Shopping Centers for leave to serve and file a memorandum of law in support of the appellants' motion, as amicus curiae.

Upon the papers filed in support of the motions and the papers filed in opposition thereto, it is

ORDERED that the appellants' motion for leave to reargue the appeal, or, in the alternative, for leave to appeal to the Court of Appeals is denied, with $100 costs.

ORDERED that the motion for leave to serve and file a memorandum of law in support of the appellants' motion, as amicus curiae, is denied.

DILLON, J.P., MALTESE, CONNOLLY and IANNACCI, JJ., concur.

ENTER: Aprilanne Agostino

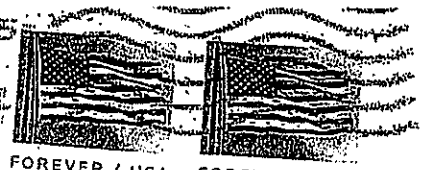
Aprilanne Agostino
Clerk of the Court

July 13, 2020

MATTER OF DCH AUTO v TOWN OF MAMARONECK

MAKER, FRAGALE & DI COSTANZO, LLP
COUNSELLORS AT LAW
350 THEODORE FREMD AVENUE
RYE, NEW YORK 10580

WESTCHESTER NY 105
21 JUL 2020 PM 1 L



GRIFFIN COUGHLIN SULZER & MORGAN
51 PONDFIELD ROAD
BRONXVILLE NY 10708

10708-380599

EXHIBIT 5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes,

Index No. 23040/09

Petitioners,

NOTICE OF ENTRY

-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,

For a Review under Article 7 of the RPTL.

----------x

Please take notice that attached is a true copy of the "So Ordered" Stipulation and Judgment Dismissing Severed Proceedings that was entered in the office of the clerk of this court on January 27, 2021.

Dated: February 3, 2021
Bronxville, New York

GRIFFIN, COOGAN, SULZER & HORGAN, P.C.

By: _____
Matthew S. Clifford
51 Pondfield Road
Bronxville, New York 10708
(914) 961-1300

Attorneys for the Petitioners

To: William Maker, Jr.
740 West Boston Post Road
Mamaroneck, New York 10543
(914) 381-7815

Attorneys for Respondents
the Town of Mamaroneck, its Assessor
and Board of Assessment Review

McCullough, Goldberger & Staudt, LLP
1311 Mamaroneck Avenue, Suite 340
White Plains, New York 10605
(914) 949-6400

Attorneys for Respondents
The Village of Mamaroneck, its Assessor
and Board of Assessment Review

Shaw, Perelson, May & Lambert, LLP
115 Stevens Avenue
Valhalla, New York 10595
(914) 741-9870

Attorneys for the Intervenor-Respondent
Mamaroneck Union Free School District

(All parties served via NYSCEF in accordance with section III [M] of the Joint Protocols for New York State Courts E-Filing [NYSCEF] Cases Filed in Westchester County dated April 1, 2013)

NYSCEF - Westchester County Supreme Court

Confirmation Notice

The NYSCEF website has received an electronic filing on 01/26/2021 09:30 AM. Please keep this notice as a confirmation of this filing.

23040/2009
DCH Auto v. Mamaroneck Town et al
Assigned Judge: E Loren Williams

Documents Received on 01/26/2021 09:30 AM

Doc #	Document Type
7	JUDGMENT - DECLARATORY

Filing User

Filed by court user.

E-mail Notifications

An email regarding this filing has been sent to the following on 01/26/2021 09:30 AM:

MATTHEW S. CLIFFORD - msc@gcshlaw.com
WILLIAM MAKER JR - Wmaker@mfd-law.com
KEVIN E. STAUDT - kstaudt@mgslawyers.com
WILLIAM E. SULZER - alp@gcbslaw.com

Timothy C. Idoni - http://www.westchesterclerk.com
Email: e-file@westchestergov.com

NYSCEF Resource Center, nyscef@nycourts.gov
Phone: (646) 386-3033 | Fax: (212) 401-9146 | Website: www.nycourts.gov/efile

FILED: WESTCHESTER COUNTY CLERK 01/27/2021 09:49 AM INDEX NO. 23040/2009
NYSCEF DOC. NO. 7 RECEIVED NYSCEF: 01/26/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes,

Petitioners,

-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,

For a Review under Article 7 of the RPTL.

Index No. 23040/09

"SO ORDERED" STIPULATION AND JUDGMENT DISMISSING SEVERED PROCEEDINGS

Whereas, DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes ("Petitioner"), by its attorneys Griffin, Coogan, Sulzer & Horgan, P.C., filed notices of petition and petitions against the Town of Mamaroneck, its Assessor and Board of Assessment Review and against the Village of Mamaroneck, its Assessor and Board of Assessment Review with respect to the property commonly known as 700 Waverly Avenue ("700 Waverly Avenue"); and

Whereas, the Town of Mamaroneck, its Assessor and its Board of Assessment Review ("Town Respondents") were and are represented by William Maker, Jr.; and

Whereas, the Village of Mamaroneck, its Assessor and its Board of Assessment Review ("Village Respondents") were and are represented by McCullough, Goldberger & Staudt, LLP (the Village Respondents and Town Respondents shall hereinafter be referred to as "Respondents"); and

Whereas, the Mamaroneck Union Free School District ("School District") was and is represented by Shaw, Perelson, May & Lambert, LLP; and

Whereas, some of the petitions filed by Petitioner herein also challenged the property tax assessments of other properties located in the Town of Mamaroneck and Village of Mamaroneck, respectively, and those proceedings together with the 700 Waverly Avenue petitions were all consolidated by a "So-Ordered Stipulation of Consolidation", a copy of which is annexed hereto as Exhibit "A"; and

Whereas, Petitioner proceeded to trial only with respect to the assessments for 700 Waverly Avenue and all of the other assessments which were also challenged by Petitioner and consolidated under the above captioned special proceeding (Index No 23040/09) were ultimately severed as hereinafter set forth (the "Severed Proceedings"); and

Whereas, this Court issued a decision and order related to the assessments for 700 Waverly Avenue on December 16, 2016, and entered a Judgment on February 10, 2017 (the "Judgment") a copy of which is annexed hereto as Exhibit "B";

Whereas, on appeal the Appellate Division, Second Department affirmed the Judgment by Decision and Order reported as "In the Matter of DCH Auto, etc., et al., appellants, v. Town of Mamaroneck, etc., et al., respondents, 178 A.D.3d 823, 825 (2d Dep't 2019)" a copy of which is annexed hereto as Exhibit "C"; and

Whereas, on July 13, 2020, the Appellate Division, Second Department denied Petitioner's Motion for Reargument and for Leave to Appeal; and

Whereas, by Order dated December 17, 2020, the New York Court of Appeals dismissed Petitioner's Motion For Leave To Appeal, holding as set forth in Exhibit "D" annexed hereto that

"the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution (see Burke v Crosson, 85 NY2d 10, 18 n 5 [1995])"; and

Whereas, Petitioner, Respondents and the School District hereby stipulate and agree and the Court hereby Orders that the Severed Proceedings be and hereby are discontinued and dismissed with prejudice; and

It is further Ordered that the discontinuance and dismissal of the Severed Proceedings is without prejudice to Petitioner's rights with respect to 700 Waverly Avenue arising under CPLR 5602 (a)(1)(ii).

Dated: January 19, 2021

GRIFFIN, COOGAN, SULZER & HORGAN, P.C.

By: _____
Matthew S. Clifford
Attorneys for Petitioner
51 Pondfield Road
Bronxville, New York 10708
(914) 961-1300

Dated: January 14, 2021

By: _____
William Maker, Jr.
Attorney for Respondents Town of Mamaroneck,
Its Assessor and Board of Assessment Review
740 West Boston Post Road
Mamaroneck, New York 10543
(914) 381-7815

FILED: WESTCHESTER COUNTY CLERK 01/27/2021 09:49 AM INDEX NO. 23040/2009
NYSCEF DOC. NO. 7 RECEIVED NYSCEF: 02/03/2021

Dated: 1/14/20

MCCULLOUGH, GOLDBERGER & STAUDT, L.L.P.

By: _____
Kevin E. Staudt
Attorneys for Respondents Village of Mamaroneck, Its Assessor and the Board of Assessment Review
1311 Mamaroneck Avenue, Suite 340
White Plains, New York 10605
(914) 949-6400

Dated: 1/19/21

SHAW, PERELSON, MAY & LAMBERT, LLP

By: _____
Marcia E. Sharff
Attorneys for Mamaroneck Union Free School District
115 Stevens Avenue
Valhalla, New York 10595
(914) 741-9870

SO ORDERED:

Dated: 1/21/21

Hon. O. Peter Sherwood,
Justice of the Supreme Court

1/25/21

4

FILED: WESTCHESTER COUNTY CLERK 01/27/2021 09:49 AM INDEX NO. 23040/2009
NYSCEF DOC. NO. 7 RECEIVED NYSCEF: 02/03/2021

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

In the Matter of the Application of

DCH AUTO, AS TENANT OBLIGATED TO PAY TAXES

Index No. 23040/09
24838/10
14645/11

Petitioner(s),

– against –

THE TOWN OF MAMARONECK,
A MUNICIPAL CORPORATION,
ITS ASSESSOR AND BOARD OF ASSESSMENT
REVIEW,

Respondents,

For a Review under Article 7 of the RPTL.

----------X

In the Matter of the Application of

DCH INVESTMENTS INC. (NEW YORK) AS TENANT
OBLIGATED TO PAY TAXES

Index No. 67124/13
66643/14

Petitioner(s),

– against –

THE TOWN OF MAMARONECK,
A MUNICIPAL CORPORATION,
ITS ASSESSOR AND BOARD OF ASSESSMENT
REVIEW,

Respondents,

For a Review under Article 7 of the RPTL.

----------X

FILED
JAN 11 2017
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

----------X

In the Matter of the Application of

DCH AUTO, AS TENANT OBLIGATED TO PAY TAXES

Index No. 10896/10
9828/11

Petitioner(s),

– against –

THE VILLAGE OF MAMARONECK,
A MUNICIPAL CORPORATION,
ITS ASSESSOR AND BOARD OF ASSESSMENT
REVIEW,

Respondents,

For a Review under Article 7 of the RPTL.

----------X

In the Matter of the Application of

DCH INVESTMENTS INC. (NEW YORK) AS TENANT
OBLIGATED TO PAY TAXES Index No. 55966/13

Petitioner(s),

– against –

THE VILLAGE OF MAMARONECK,
A MUNICIPAL CORPORATION,
ITS ASSESSOR AND BOARD OF ASSESSMENT
REVIEW,

Respondents,

For a Review under Article 7 of the RPTL.

----------X

"SO ORDERED" STIPULATION OF CONSOLIDATION

Whereas, Griffin, Coogan, Sulzer & Horgan, P.C. are the attorneys for the petitioner in each of the proceedings listed above (Proceedings), and

Whereas, William Maker, Jr. is the attorney of record for the respondents in all of the proceedings listed above where the Town of Mamaroneck, its Assessor and its Board of Assessment Review are the named respondents, and

Whereas, McCullough, Goldberger & Staudt, LLP are the attorneys of record for the respondents in all of the proceedings listed above where the Village of Mamaroneck, its Assessor and its Board of Assessment Review are the named respondents, and

Whereas, section 710 of the Real Property Tax Law allows the Court to consolidate two or more proceedings where the same grounds of review are asserted and a common question of law or fact is presented,

Whereas, the Proceedings, insofar as they challenged the assessments of the real property located at 700 Waverly Avenue, Mamaroneck, NY 10543 (700 Waverly), were tried jointly before the Hon. O. Peter Sherwood, a Justice of the Supreme Court, based upon a Stipulation of Facts supported by Exhibits, an affirmation from one of the petitioner's counsel plus exhibits appended to that affirmation and an additional exhibit appended to the respondents' joint reply memorandum of law, and

Whereas, this Court rendered a Decision and Order dated December 16, 2016 dismissing the petitions for lack of jurisdiction in each of the Proceedings insofar as those petitions challenged the assessments of 700 Waverly, and

Whereas, since the same grounds of review are asserted, and common questions of law are presented in each of the Proceedings, there is a basis for consolidating the Proceedings for the purpose of entering a judgment with respect to 700 Waverly.

Therefore, it is stipulated by and between the aforementioned attorneys of record that, subject to the approval of this Court,

(a) all of the Proceedings shall be consolidated as one proceeding under index number 23040/09; and

(b) the title of the Proceedings shall be revised to read:

Supreme Court of the State of New York
County of Westchester

----------x

DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes,

Petitioners,

-against- Index No. 23040/09

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,

For a Review under Article 7 of the RPTL.

----------x,

and

(c) (i) that the judgment to be entered in the Proceedings shall be confined to adjudicating the assessment of the real property located at 700 Waverly Avenue, Mamaroneck, NY 10543 and identified as Section 8, Block 26, Lot 1.1 on the Official Tax Map of the Town of Mamaroneck and as Section 8, Block 111, Lot 1A on the Official Tax Map of the Village of Mamaroneck,

(ii) that so much of the petitions in the proceedings bearing index numbers 10896/10, 9828/11, 55966/13 and 67124/13 that challenge the assessments of the other lots listed in the table below shall be severed and continue to be litigated under the caption appearing in (b), above

Address on Assessment Roll Section/Block/Lots (S/B/L)	Town Assessment Year	Village Assessment Years
1258 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/65D/306B-313	N/A	2010 & 2011
1305 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/79/1B2	N/A	2010 & 2011
1312 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/65C/220-223	N/A	2010 & 2011
1337 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/79/1B3	N/A	2010 & 2011
218-30 W. Boston Post Road Mamaroneck, NY 10543 Town S/B/L: 9/14/65 218 W. Boston Post Road Mamaroneck, New York 10543 Village S/B/L: 9/40/29	2013	2013
236 W. Boston Post Road Mamaroneck, NY 10543 Town S/B/L: 9/14/44 Village S/B/L: 9/40/20B, 20C, 28	2013	2013
260 W. Boston Post Road Mamaroneck, NY 10543 Town S/B/L: 9/14/32 Village S/B/L: 9/40/18, 19, 20A	2013	2013

and

(iii) that this stipulation or the judgment to be entered in the Proceedings shall not be construed as a withdrawal, waiver, discontinuance or settlement of the challenge to the assessments of those other lots.

Dated: January 11, 2017

GRIFFIN, COGGAN, SULZER & HORGAN, P.C.

By: _____
Matthew S. Clifford
Attorneys for Petitioner
51 Pondfield Road
Bronxville, New York 10708
(914) 961-1300

Dated: January 11, 2017

_____
William Maker, Jr.
Attorney for Respondents Town of Mamaroneck, Its Assessor and Board of Assessment Review
740 West Boston Post Road
Mamaroneck, New York 10543
(914) 381-7815

Dated: January 11, 2017

MCCULLOUGH, GOLDBERGER & STAUDT, L.L.P.

By: _____
Joanna C. Feldman
Attorneys for Respondents Village of Mamaroneck, Its Assessor and the Board of Assessment Review
1311 Mamaroneck Avenue, Suite 340
White Plains, New York 10605
(914) 949-6400

Dated: January 11, 2017

SHAW, PERELSON, MAY & LAMBERT, LLP

By: _____
Marc E. Sharff
Attorneys for Mamaroneck Union Free School District
115 Stevens Avenue
Valhalla, New York 10595
(914) 741-9870

FILED: WESTCHESTER COUNTY CLERK 01/27/2021 09:49 AM INDEX NO. 23040/2009
NYSCEF DOC. NO. 7 RECEIVED NYSCEF: 02/03/2021

SO ORDERED:

Dated: 1/11/17

Hon. O. Peter Sherwood,
Justice of the Supreme Court

EXHIBIT B

FILED
FEB 10 2017
TIMOTHY C. IDOO
COUNTY CLERK
COUNTY OF WESTCHESTER

At the Tax Certiorari and Condemnation Part of the Supreme Court of the State of New York held in and for the County of Westchester at the Richard J. Daronco Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601, on _____, 2017

PRESENT:

Honorable O. Peter Sherwood,
Justice of the Supreme Court

DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes,

Petitioners,

-against-

Index No. 23040/09

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,

Judgment

Respondents,

For a Review under Article 7 of the RPTL.

The petitioners, DCH Auto, as Tenant obligated to pay taxes and DCH Investments Inc. (New York), as Tenant obligated to pay taxes, by their attorneys, Griffin, Coogan, Sulzer & Horgan, P.C., having commenced five proceedings pursuant to Article 7 of the Real Property Tax Law to review assessments made by the Town of Mamaroneck (Town) for assessment years 2009, 2010, 2011, 2013 and 2014 upon the parcels of real property identified in the petitions filed in those proceedings, and three proceedings pursuant to Article 7 of the Real Property Tax Law to

review assessments made by the Village of Mamaroneck (Village) for assessment years 2010, 2011 and 2013 upon the parcels of real property identified in the petitions filed in those proceedings, and

the parties having stipulated to try only the review of the assessments with respect to the parcel of real property designated as Section 8, Block 26, Lot 1.1 on the Town's official tax map, and as Section 8, Block 111, Lot 1A on the Village's official tax map and known by the postal address of 700 Waverly Avenue, Mamaroneck, NY 10543 (Subject Property) and to hold in abeyance the review of the assessments of the other parcels of real property identified in the petitions filed in each of those proceedings, and

the Court having jointly tried these proceedings with respect to the assessments made of the Subject Property, and

the joint trial having been conducted before the undersigned on submissions by the parties with the petitioners having appeared by their attorneys, Griffin, Coogan, Sulzer & Horgan, P.C. (William E. Sulzer and Matthew S. Clifford, of counsel), the respondents in all of the proceedings where the Town of Mamaroneck, its Assessor and its Board of Assessment Review are the named respondents having appeared by their attorney, William Maker, Jr., and the respondents in all of the proceedings where the Village of Mamaroneck, its Assessor and its Board of Assessment Review are the named respondents having appeared by their attorneys, McCullough, Goldberger & Staudt, LLP (Joanna C. Feldman, of counsel), and

the submissions having consisted of (1) a Stipulation of Facts dated September 15, 2016, submitted jointly by the parties, (2) a Book of Exhibits containing twenty-seven exhibits submitted

on behalf of the petitioners and one exhibit submitted on behalf of the respondents, (3) the following items submitted on behalf of the petitioners: (a) the affirmation of William E. Sulzer dated October 27, 2016 and the seven exhibits appended thereto, (b) the petitioners' memorandum of law in opposition dated October 27, 2016, and (c) correspondence from Matthew S. Clifford to the undersigned dated December 1, 2016 and December 8, 2016, and (4) the following items submitted on behalf of the respondents: (i) the respondents' joint memorandum of law dated September 28, 2016, (ii) the respondents' joint reply memorandum of law dated November 29, 2016 and the one exhibit appended thereto and (iii) correspondence from William Maker, Jr. to the undersigned dated December 7, 2016, and

the undersigned having rendered a decision and order dated December 16, 2016, a copy of which is annexed hereto, dismissing the petitions in each of the proceedings for lack of subject matter jurisdiction insofar as those petitions sought a review of the assessments of the Subject Property, and

by stipulation among the attorneys of record dated January 11, 2017, and "So Ordered" by the undersigned on that same day, (a) the proceedings originally bearing index numbers 10896/10, 9828/11, 55966/13 and 67124/13 were consolidated with the proceeding commenced under index number 23040/09, and (b) the petitions in the proceedings originally bearing index numbers 10896/10, 9828/11, 55966/13 and 67124/13 were severed to the extent they challenge the assessments of the lots listed below so that (i) the challenges to those assessments can continue to be litigated under index number 23040/09 and (ii) this judgment, limited to the review of the

assessments of the Subject Property, can be entered, and

the respondents having waived any entitlement they may have to an award of costs and disbursements.

Now, on the joint motion of William Maker, Jr. and McCullough, Goldberger & Staudt, LLP, the attorneys for the Town and Village respondents, respectively, it is

Ordered, Adjudged and Decreed, that the petitions in this consolidated proceeding be and the same hereby are dismissed insofar as they seek review of the assessments of the parcel of real property designated as Section 8, Block 26, Lot 1.1 on the Town's official tax map, and as Section 8, Block 111, Lot 1A on the Village's official tax map and known by the postal address of 700 Waverly Avenue, Mamaroneck, NY 10543, and it is further

Ordered, that the petitions in the consolidated proceeding insofar as they seek review of the assessments of the parcels of real property identified in the table below shall continue to be litigated under this caption and index number:

Address on Assessment Roll Section/Block/Lots (S/B/L)	Town Assessment Year	Village Assessment Years
1258 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/65D/306B-313	N/A	2010 & 2011
1305 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/79/1B2	N/A	2010 & 2011
1312 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/65C/220-223	N/A	2010 & 2011
1337 E. Boston Post Road Mamaroneck, NY 10543 Village S/B/L: 4/79/1B3	N/A	2010 & 2011

Address on Assessment Roll Section/Block/Lots (S/B/L)	Town Assessment Year	Village Assessment Years
218-30 W. Boston Post Road Mamaroneck, NY 10543 Town S/B/L: 9/14/65 218 W. Boston Post Road Mamaroneck, New York 10543 Village S/B/L: 9/40/29	2013	2013
236 W. Boston Post Road Mamaroneck, NY 10543 Town S/B/L: 9/14/44 Village S/B/L: 9/40/20B, 20C, 28	2013	2013
260 W. Boston Post Road Mamaroneck, NY 10543 Town S/B/L: 9/14/32 Village S/B/L: 9/40/18, 19, 20A	2013	2013

and it is further

Ordered, that costs and disbursements not be awarded.

ENTER

O. P. Sherwood

Hon. O. Peter Sherwood,
Justice of the Supreme Court

Judgment entered on 2/10, 2017

Honorable Timothy C. Idoni, County Clerk
and Clerk of the Supreme Court
of the State of New York in and
for the County of Westchester

5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

In the Matter of the Application of

DCH AUTO, AS TENANT OBLIGATED TO PAY TAXES

Petitioner,

-against-

THE TOWN OF MAMARONECK,
A MUNICIPAL CORPORATION,
ITS ASSESSOR AND BOARD OF ASSESSMENT
REVIEW,

Respondents,

For a Review under Article 7 of the RPTL.

----------X

Index No. 23040/09 -
24838/10 -
14645/11 -
67124/13
66643/14
10896/10 -
9828/11 -
55966/13

FILED
DEC 16 2016
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

These are five tax certiorari proceedings involving the Town of Mamaroneck's (Town) assessments of an improved parcel of land in the years 2009, 2010, 2011, 2013 and 2014, and three tax certiorari proceedings involving the Village of Mamaroneck's (Village) assessments of that same property in the years 2010, 2011 and 2013. The property ("Property") is designated as Section 8, Block 26, Lot 1.1 on the Town's official tax map, and as Section 8, Block 111, Lot 1A on the Village's official tax map (Stipulation of Facts ¶ 1) ("Stip, ¶ ___"). The Property is known by the postal address, 700 Waverly Avenue, Mamaroneck, NY 10543 (*id.*).

The parties have stipulated to the values of the Property for each assessment year at issue. The respondents maintain, however, that these proceedings must be dismissed for lack of subject matter jurisdiction because the petitioner failed to satisfy a condition precedent for challenging the assessments. This Decision and Order is addressed to that issue.

In 1987, non-party 700 Waverly Avenue Corp. (Owner) acquired the Property (Stip., ¶¶ 2 and 3). In 2007, the Owner leased the Property to the petitioner, DCH Investments, Inc. under a twenty (20) year net lease that required the petitioner to pay all ad valorem real estate taxes levied upon the Property for each year of the lease (Stip. ¶¶ 4, 5 and 6).

The parties agree that an RP-524 Complaint[1] commencing the administrative challenge of each assessment was timely made to the Town or the Village Board of Assessment Review (Board), and that each tax certiorari proceeding was timely commenced. Significantly, for purposes of this motion, each challenge was made by the petitioner only (Stip. ¶¶ 10, 12-14). The Owner did not file RP-524 Complaints to the Board in any of the years at issue. However, the Lease authorized petitioner to contest the amount or validity of any ad valorem real estate tax (*see* Book of Exhibits Ex. 1 § 5 [e] [i]). The Lease expressly excuses the Landlord from participating in such contest, except where the applicable law or regulation requires that the proceeding be brought in the name of the Landlord. In that event, the tenant may require the Landlord's participation and cooperation, but at the tenant's sole expense (*see id*, §5[e] [iv]).

According to respondents, any challenge to an assessment must be initiated by the Owner or its authorized agent by submission of a NRP-524 Complaint. Any failure to satisfy this condition precedent is fatal (*see Matter of Circulo Housing Dev. Fund Corp. v Assessor*, 96 AD3d 1053, 1056-1057 [2d Dept 2012]). Respondents insist that "as a result, these proceedings must be dismissed since '[i]t is 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 . . . .

[1] "RP-524 Complaint" is the shorthand used in the Stipulation of Facts for referring to the complaint required by section 524 (3) of the Real Property Tax Law to commence an administrative review by a Board of Assessment Review of a real property assessment, commonly referred to as a "grievance".

Albeit technical, an express condition precedent to a judicial proceeding was not met, and the court lacked jurisdiction to review' (Citation omitted)".

Petitioner opposes the motion. It argues that the court has subject matter jurisdiction, that failure to name the Landlord as the grievant in the administrative process is a mere technicality and that the interpretation of *Circulo* being urged by respondents is inconsistent with the well-established principle that the Tax Law, as it relates to review of assessments, is remedial in nature and should be liberally construed so that the taxpayer's right to have his assessment reviewed is not be defeated by a technicality (*see Matter of Great Eastern Mall v Condon*, 36 NY 2d 544, 548 [1975]). Petitioner also argues that through their practices and actions, respondents have waived any objection to petitioner's standing to file RP-524 Complaints.

DISCUSSION

RPTL §524 (3) states in relevant part that:

> Notwithstanding the provisions of section five hundred twenty-eight of this title, and except in cities with a population of five million or more, a complaint with respect to an assessment shall be on a form prescribed by the commissioner and shall consist of a statement specifying the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified, and the reduction in assessment valuation or taxable assessed valuation or change in class designation or allocation of assessed valuation sought. Such statement shall also contain an estimate of the value of the real property. Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein.

Accordingly, a challenge to an assessment starts by filing an RP-524 Complaint with an assessor or a board of assessment review. RPTL 524 (3) requires that the complaint be made by "the person whose property is assessed." If the challenge is rejected, the grievant may commence a proceeding in the Supreme Court pursuant to RPTL article 7 to review the administrative determination. The Appellate Division, Second Department has held that the only person fitting the definition of "the

person whose property is assessed" is the property owner (*see Circulo*, 96 AD3d at 1056 ["RPTL article 5 requires that the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment" [and the] failure to comply with this requirement requires dismissal of the petition"] [italics in the original; *see also Matter of Raddison Community Assn. v Long*, 3 AD3d 135, 139 [4th Dept 2003] ["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]"]). The Appellate Division described the requirement that the owner must have made a complaint regarding the unlawful assessment to the Board" as "a condition precedent to the commencement of" a proceeding for review pursuant to RPTL article 5 (*see Circulo*, 96 AD3d at 1056).

As described by the Appellate Division, Circulo Housing Development Fund Corporation (CHFD) was "formed for the purpose of, *inter alia*, operating and maintaining housing projects for persons of low income" (*id.* at 1053). It commenced proceedings under RPTL article 7 against the assessor of the City of Long Beach with respect to three properties. As stated by the Appellate Division, CHFD "filed the administrative complaint for review of the assessment of the East Hudson Street property" (*id.* at 1056), the property that is germane here. Although its petition alleged otherwise, CHFD did not own the East Hudson Street property (see *id.* at 1054), and the owner "[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 to the Board resulted in the dismissal of the RPTL article 7 petition with respect to that property,

even though the Appellate Division recognized that under RPTL 704 (1), CHFD "met the definition of a 'person claiming to be aggrieved' by the assessment" (*id.* at 1056).

The Appellate Division explained its holding by pointing out that "the petitioner's status as an 'aggrieved' person is not the only requirement for commencing a [court] proceeding pursuant to RPTL article 7 . . . [A] condition precedent to the commencement of such a proceeding is that the owner must have made a complaint regarding the unlawful assessment to the [Board] for review pursuant to RPTL article 5" *(id.)*. Thus "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])" *(id.)* 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 [was] 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" (*id.* at 1057 [citations omitted]).

The same failure to comply with RPTL 524 (3) occurred here. Petitioner, not the Owner of the Property, filed the RP-524 Complaints to the Town Board and Village Board. Therefore, the petitioner did not satisfy "a condition precedent to the commencement of [these] proceeding[s] . . . [in] that the [O]wner must have made a complaint regarding the unlawful assessment to the Board

for review pursuant to RPTL article 5" (*id.* at 1056). Absent allegations of the filing of grievances to the Board, this court lacks subject matter jurisdiction to review the assessments, even though the petitioner may be an aggrieved person (*see Matter of Frei v Town of Livingston*, 50 AD3d 1381, 1382 [3d Dept 2008], aff'd 13 NY2d 1170 [1964] ["Filing a grievance complaint with the assessor . . . is a condition precedent and jurisdictional prerequisite to obtaining judicial review"]).

Citing RPTL § 554, petitioner argues that the phrase "person whose property is assessed is not equivalent to the word "owner" (*see* Pet. Br., p. 15). RPTL § 554 provides in pertinent part that:

> Whenever it appears to an owner of real property- or any person who would be entitled to file a complaint pursuant to section five hundred twenty-four of this chapter, that a clerical error, an unlawful entry or error in essential fact described in subdivision one of this section is present on the tax roll in regard to his real property, such owner or other person, may, at any time prior to the expiration of the warrant, file an application in duplicate with the county director of real property tax services for the correction of such error.

RPTL § 554 [2] (emphasis added). Petitioner asserts that this language confirms that someone other than the property owner can file a correction of errors and "thus, it can be inferred from RPTL § 554 that the Legislature not only contemplated, but intended that persons other than owners had authority to file administrative grievances pursuant to CPTL § 524" *(Id.)*. The court agrees but this does not advance petitioner's cause. One need only examine RPTL § 524(3) to find who else the Legislature has authorized to file an RP-554 Complaint:

> 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.

RPTL § 524 (3). Petitioner is not one of those listed in the statute.

The court recognizes that in two recent decisions, a justice of this court declined to dismiss seemly similar challenges to petitions (see *Larchmont Pancake House v The Assessor and Board of Assessment Review of the Town of Mamaroneck*, Index No. 23529/09, Slip Op at 3 [Sup Ct

Westchester Cnty, April 18, 2014 [Tolbert, J.] *SCS Holding LLC v The Assessor and Board of Assessment Review of the Town of Mamaroneck*, Index No. 21073/09 Slip Op [Sup Ct Westchester Cnty August 4 2015] [Tolbert, J.]). Both cases involved petitioners who were closely related to the owners.

In *Larchmont Pancake House*, ownership of the petitioner, a family-owned business had been transferred from the parents, Frank and Susan Carfora to their children. Although, not reflected in the court's decision, as of the date of the taxable status, the property was owned by the Carforas, not their children. Petitioner paid all of the property taxes. The Town sought to have the petition dismissed on the ground that a condition precedent under RPTL 524 had not been satisfied. The court denied the motion to dismiss, finding that Susan Carfora's daughter, Portia DeGast, who was the president and an owner of petitioner, was also designated as attorney – in – fact of Susan Carfora and was authorized to act on her behalf. The court also criticized the respondents for waiting "so many years after the filing" of the petition to complain of this "technicality" such that the motion was viewed as "a bit disingenuous".

In *CSC Holding*, the owner of the property was Cablevision of Southern Westchester, Inc. (CSW). On respondents' motion to dismiss the petition, petitioner cross-moved to amend the petition by substituting the record owner as the petitioner. The court granted the cross-motion and denied the motion, finding that dismissal would be contrary to the intent of the Legislature. In reaching its decision, the court observed that these cases are "quite [fact] specific or case sensitive" and found that the Town and Village were "noticed of these proceedings . . . [and] in fact knew that the taxes were being grieved". The court also distinguished *Circulo*, finding that although "*Circulo* is an interesting case decided by the Appellate Division, it does not dictate the ruling herein" (*id*).

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NYSCEF DOC. NO. 7 RECEIVED NYSCEF: 02/03/2021

In this case, petitioner is neither a family member nor an affiliate of the property owner. Petitioner is a mere tenant that is contractually required to pay all ad valorem real estate taxes levied upon the Property during the term of the Lease. Undisputedly, petitioner is "aggrieved" by the decisions of the Boards. However, that fact is not grounds for distinguishing this case from the binding precedent of *Circulo* where the petition alleged that petitioner was responsible for paying real property taxes on the property. In fact, the Appellate Division acknowledged that the petitioner there was "aggrieved," but directed dismissal of the petition because petitioner was not the owner, as RPTL 524 (3) requires *(see id.)*.

As noted, petitioner here also argues that the failure to list the owner in the RP-524 Challenge was a mere technical defect that is not jurisdictional and may be cured (*see Matter of Astoria Fed Savings & Loan Assoc. v Bd of Assessors*, 212 AD2d 600, 601 [2d Dept 1995] [Failure of owner's written RPTL § 524 [3] authorization to bear a date within the same calendar year during which the complaint was filed not jurisdictional and could be cured by submission of a properly dated authorization *nunc pro tunc*]). Petitioner adds that the motion should be denied on the further ground that respondents have waived any objection to petitioner's standing to file RP-524 Complaints because (i) respondents instructed tenants that they had the right to challenge their assessment on respondent's website[2], (ii) acted on petitioner's administrative complaints over several years and (iii) delayed the instant motion to dismiss for years (*see* Opp. Br., p. 29).

[2] Petitioners contend, and respondents do not dispute, that the Town's website referenced an instruction manual published by the New York State Department of Taxation and Finance Office of Real Property Tax Services (ORPTS) which states that "any person who pays taxes may file a grievance" (Stip, ¶ 6). Respondents argue however that the ORTPS manual predates *Circulo* and that "if the ORTPS sources could not save the *Circulo* petitioner, neither should the Town's website" which merely mirrored ORPTS (Reply Br., p. 8).

There can be no disputing that respondents were tardy to assert the defense they are now advancing. However, the law is well settled that the failure of the owner to raise the RP-524 Complaint in the administrative process is a fundamental error which the courts cannot cure because of a lack of subject matter jurisdiction *(see, e.g. Matter of City of Little Falls v Bd. Of Assessors*, 68 AD2d 734 [4th Dept 1979] [Motion in article 7 proceeding alleging overvaluation to amend petition to assert that the assessment was erroneous, illegal, and excessive denied as court was without jurisdiction to consider new objections]; *Matter of Frei v Town of Livingston*, 50 AD3d 1381, 1382 [3d Dept 2008] [Distinguishing between court's authority to correct procedural errors in an article 7 proceeding and the court's inability to bypass major errors made during the article 5 administrative review process. While "pleading and service defects in the commencement of an RPTL Article 7 proceeding . . . may be cured by the procedural statutes preferring liberal construction of pleadings and technical omissions, [t]hose statutes do not override the specific requirements of RPTL 524 regarding filing of assessment grievance complaints"]; and *Matter of Lussi v Bd. of Assessors*, 113 Misc 2d 558, 559 [Sup Ct Essex Cnty 1982] ["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"]).

The want of subject matter jurisdiction is a defense that cannot be waived. It can be raised at any time (*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]"; *Renaldo R. v Chanice R.*, 131 AD3d 885, 886 [1st Dept 2015] ["[T]he issue of subject matter jurisdiction may be raised at any time."]; and *Maspeth Fed. Sav. and Loan Assn v Sloup*, 123 AD3d 672, 674 [2d Dept 2014] ["The issue of subject matter jurisdiction is not waivable, and may be raised at any time"]). The decision of the Appellate Division, Fourth Department in *Matter of Henderson v Silo*, 36 AD2d 439, 441 (4th Dept 1971) is fully consistent with this settled law. In *Henderson*, the assessor already had jurisdiction to change the assessment, as was evidenced by his acceptance of the complaint as valid and changing the assessment *(see id.)*. Having acted on a complaint over which respondents had jurisdiction, they "thereby waived the claimed defect in it" *(id.)*. In this case, the assessor lacked jurisdiction because no proper complainant appeared before the Board in a timely manner.

CONCLUSION

Accordingly, the motion shall be granted. The defense asserted is governed by binding precedent affecting the subject matter jurisdiction of the court. The Owner of the Property did not file RP-524 Complaints challenging the assessments at issue. Because subject matter jurisdiction may not be waived even where prejudice is shown, the petitions must be and are hereby DISMISSED.

DATED: December 16, 2016

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.

FILED: WESTCHESTER COUNTY CLERK 01/27/2021 09:49 AM INDEX NO. 23040/2009
NYSCEF DOC. NO. 7 RECEIVED NYSCEF: 02/03/2021

EXHIBIT C

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D61500
G/htr

_____AD3d_____

Argued - October 21, 2019

MARK C. DILLON, J.P.
RUTH C. BALKIN
FRANCESCA E. CONNOLLY
ANGELA G. IANNACCI, JJ.

2017-03016

DECISION & ORDER

In the Matter of DCH Auto, etc., et al., appellants,
v Town of Mamaroneck, etc., et al., respondents.

(Index No. 23040/09)

Griffin, Coogan, Sulzer & Horgan, P.C., Bronxville, NY (William E. Sulzer, Matthew S. Clifford, and Kevin M. Brady, Jr., of counsel), for appellants.

William Maker, Jr., Mamaroneck, NY, for respondents Town of Mamaroneck, Assessor of the Town of Mamaroneck, and Board of Assessment Review of the Town of Mamaroneck, and McCullough Goldberger & Staudt, LLP, White Plains, NY (Kevin E. Staudt of counsel), for respondents Village of Mamaroneck, Assessor of the Village of Mamaroneck, and Board of Assessment Review of the Village of Mamaroneck (one brief filed).

In a consolidated tax certiorari proceeding, the petitioners appeal from a judgment of the Supreme Court, Westchester County (O. Peter Sherwood, J.), entered February 10, 2017. The judgment, insofar as appealed from, dismissed the consolidated proceeding insofar as it sought review of certain real estate tax assessments of a parcel of real property designated as Section 8, Block 26, Lot 1.1 on the official tax map of the Town of Mamaroneck, and Section 8, Block 111, Lot 1A of the official tax map of the Village of Mamaroneck, known by the postal address of 700 Waverly Avenue, Mamaroneck, New York.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

This matter was presented to the Supreme Court on stipulated facts and documentary evidence. In a net lease dated October 10, 2007, the owner of 700 Waverly Avenue in Mamaroneck

(hereinafter the subject property) leased it to the petitioner, DCH Auto, later known as DCH Investments, Inc. (New York) (hereinafter together the petitioner), for a period of 20 years. The net lease provided, inter alia, that the petitioner was to pay the real estate taxes for the period of the lease term, that the petitioner had the right to contest any assessment at its sole cost and expense, and that it had the right to settle any such proceeding without the consent of the owner. Furthermore, the owner was not required to join in any such proceeding unless the law required that the proceeding be brought in the name of the owner. If the law required the proceeding to be brought in the name of the owner, the owner was required to cooperate with the petitioner.

By administrative complaints pursuant to RPTL 524, the petitioner, in its name, challenged tax assessments of the Town of Mamaroneck for the subject property for the tax years 2009, 2010, 2011, 2013, and 2014, and the tax assessments for the Village of Mamaroneck for the tax years 2010, 2011, and 2013. After both the Town Board of Assessment Review and the Village Board of Assessment Review denied the administrative complaints on the merits, the petitioner commenced five proceedings pursuant to RPTL article 7 to review assessments made by the Town for tax years 2009, 2010, 2011, 2013, and 2014, and three proceedings pursuant to RPTL article 7 to review assessments made by the Village for tax years 2010, 2011, and 2013.

The Town and the Village moved to dismiss the consolidated proceeding on the ground that the administrative complaints pursuant to RPTL 524 were defective, since they were not brought in the name of the owner, and a complaint pursuant to RPTL 524 was a condition precedent to a proceeding pursuant to RPTL article 7. The Supreme Court granted the motion to dismiss the consolidated proceeding. The court determined that a condition precedent to the commencement of the proceeding was not satisfied, as the administrative complaints for the subject tax years were not filed in the name of the owner as required by RPTL 524(3). Thus, the court dismissed the consolidated proceeding. The petitioner appeals.

RPTL 524(3) provides, in relevant part, that a complaint must be based upon a statement 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. Such written authorization must be made a part of such statement and bear a date within the same calendar year during which the complaint is filed." RPTL 704(1) provides, in relevant part, that "[a]ny person claiming to be aggrieved by any assessment of real property" may commence a judicial proceeding pursuant to RPTL 704(1). Here, the petitioner may qualify as an aggrieved party pursuant to RPTL 704(1), since it paid the real estate taxes in the challenged tax years. However, in filing the administrative complaints under RPTL 524 in its own name, it failed to satisfy a condition precedent to the commencement of an RPTL article 7 proceeding since it was neither the owner, nor identified in the complaints as an agent of the owner (*see* RPTL 706[2]; *Matter of Larchmont Pancake House v Board of Assessors and/or the Assessor of the Town of Mamaroneck*, 153 AD3d 521, *affd on other grounds* 33 NY3d 228; *Matter of Circulo Hous. Dev. Fund Corp. v Assessor of City of Long Beach, Nassau County, NY*, 96 AD3d 1053; *Matter of Grecian Garden Apts. v Barlow*, 71 Misc 2d 457 [Sup Ct, Monroe County]).

The petitioner's remaining contentions are without merit.

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NYSCEF DOC. NO. 7 RECEIVED NYSCEF: 02/03/2021

Accordingly, we agree with the Supreme Court's determination to dismiss the consolidated proceeding.

DILLON, J.P., BALKIN, CONNOLLY and IANNACCI, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

EXHIBIT D

State of New York
Court of Appeals

Decided and Entered on the seventeenth day of December, 2020

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2020-608
In the Matter of DCH Auto, &c. et al.,
Appellants,
v.
Town of Mamaroneck, &c., et al.,
Respondents.

Appellants having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution (*see Burke v Crosson*, 85 NY2d 10, 18 n 5 [1995]).

John P. Asiello
Clerk of the Court

EXHIBIT 6

State of New York
Court of Appeals

Decided and Entered on the seventeenth day of December, 2020

Present, Hon. Janet DiFiore, *Chief Judge, **presiding**.*

Mo. No. 2020-616
In the Matter of DCH Auto, &c. et al.,
Appellants,
v.
Town of Mamaroneck, &c., et al.,
Respondents.

Rite Aid Corporation having moved for leave to appear amicus curiae on the motion for leave to appeal herein;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is granted and the affirmation is accepted as filed.

John P. Asiello
Clerk of the Court

State of New York
Court of Appeals

Decided and Entered on the seventeenth day of December, 2020

Present, Hon. Janet DiFiore, *Chief Judge, **presiding**.*

Mo. No. 2020-642
In the Matter of DCH Auto, &c. et al.,
Appellants,
v.
Town of Mamaroneck, &c., et al.,
Respondents.

International Council of Shopping Centers, Inc. having moved for leave to appear amicus curiae on the motion for leave to appeal herein;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is granted and the memorandum of law is accepted as filed.

John P. Asiello
Clerk of the Court

State of New York
Court of Appeals

Decided and Entered on the seventeenth day of December, 2020

Present, Hon. Janet DiFiore, *Chief Judge, **presiding.***

Mo. No. 2020-659
In the Matter of DCH Auto, &c. et al.,
Appellants,
v.
Town of Mamaroneck, &c., et al.,
Respondents.

J.C. Penney Company Inc., et al. having moved for leave to appear amici curiae on the motion for leave to appeal herein;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is granted and the brief is accepted as filed.

John P. Asiello
Clerk of the Court

State of New York
Court of Appeals

Decided and Entered on the seventeenth day of December, 2020

Present, Hon. Janet DiFiore, *Chief Judge, **presiding**.*

Mo. No. 2020-694
In the Matter of DCH Auto, &c. et al.,
Appellants,
v.
Town of Mamaroneck, &c., et al.,
Respondents.

Stop & Shop Supermarket Company, LLC having moved for leave to appear amicus curiae on the motion for leave to appeal herein;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is granted and the brief is accepted as filed.

John P. Asiello
Clerk of the Court

EXHIBIT 7

State of New York
Court of Appeals

Decided and Entered on the seventeenth day of December, 2020

Present, Hon. Janet DiFiore, *Chief Judge, **presiding**.*

Mo. No. 2020-608
In the Matter of DCH Auto, &c. et al.,
Appellants,
v.
Town of Mamaroneck, &c., et al.,
Respondents.

Appellants having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution (*see Burke v Crosson*, 85 NY2d 10, 18 n 5 [1995]).

John P. Asiello
Clerk of the Court

EXHIBIT 8

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of

RITE AID CORPORATION,

Petitioner,

vs.

TOWN OF IRONDEQUOIT BOARD OF ASSESSMENT REVIEW, THE ASSESSOR OF THE TOWN OF IRONDEQUOIT, THE TOWN OF IRONDEQUOIT, MONROE COUNTY, NEW YORK.

Respondents.

For review of a Tax Assessment under Article 7 of the Real Property Tax Law

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Decision and Order

Index No.: E2017001377

Appearances

Jacobson Law Firm (Robert I. Jacobson, Esq., of counsel) for the Petitioner
Davidson Fink (Thomas A. Fink Esq. and Jayla R. Lombardo Esq., of counsel) for the Respondents

Daniel J. Doyle, J.

Before the Court are two motions: (1) The Respondents' pre-answer motion to dismiss the petition; and (2) The Petitioner's cross-motion to amend the petition.

Rite Aid, the Petitioner in this matter, operates a retail drug store at 689 East Ridge Road. Rite Aid filed a tax grievance complaint with Respondent Town of

Irondequoit on May 18, 2017. Rite Aid does not own the property in fee; instead, the property is owned by Pontus RAD Portfolio, LLC, and is leased by Rite Aid. The lease signed by Rite Aid's predecessor-in-interest provides that Rite Aid "shall have the right... to appeal the amount of any real estate tax assessed against the Leased Premises." The Board of Assessment Review did not dismiss the complaint, and instead, considered the complaint on its merits before denying the complaint. Rite Aid then commenced this action pursuant to RPTL Article 7 seeking review of the Board's decision.

The Respondents' motion to dismiss is rather straightforward. Relying principally on the Second Department's holdings in *Larchmont Pancake House v Bd. of Assessors*, 153 AD3d 521 [2d Dept 2017] and *Circulo Hous. Dev. Fund Corp. v Assessor of City of Long Beach*, 96 AD3d 1053, 1056 [2d Dept 2012], the Respondents argue here that because the complaint was made by Rite Aid and not the property owner, the Petitioner failed to comply with a jurisdictional condition precedent set forth in RPTL § 524[3] that a complaint be made by the property owner. Respondents argue that because the Fourth Department has not ruled on this application of RPTL 524[3] this Court is bound to apply the Second Department's holdings in *Larchmont* and *Circulo* (*Mtn. View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]).

The Petitioner opposes the motion to dismiss and has made a cross-motion to amend the petition seeking *nunc pro tunc* relief of providing the authorization of the property owner and amending the complaint by adding the property owner to the petition.

The applicable provisions and their purposes

It is well-established that the tax law "relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have [its] assessment reviewed should not be defeated by a technicality" *Matter of Great Eastern. Mall v. Condon*, 36 NY2d 544, 548 [1975] quoting *People ex rel. New York City Omnibus Corp. v Miller*, 282 NY 5, 9 [1939]).

Under Article 7, "*any person* claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article" (RPTL § 704[1] (emphasis added)). The Fourth Department has held that a tenant obligated by its lease to pay real estate taxes is "an aggrieved person" that has standing to commence a tax certiorari petition (see *Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors*, 261 AD2d 835, 835 [4th Dept 1999]).

Prior to the commencement of an Article 7 petition, a challenge to the tax assessment to the property must be made to the board of assessment (see RPTL § 512;

RPTL § 706[2]). The persons "entitled to file complaints in relation to assessments" are articulated in RPTL § 524 (RPTL § 512[2]). RPTL § 524 governs the submission of complaints to the board of assessment review and provides in pertinent part that:

> a complaint with respect to an assessment shall be on a form prescribed by the commissioner and shall consist of a statement specifying the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified, and the reduction in assessed valuation or taxable assessed valuation or change in class designation or allocation of assessed valuation sought. Such statement shall also contain an estimate of the value of the real property. **Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein** (RPTL § 524[3] (emphasis added)).

Larchmont and *Circulo* and the application of *stare decisis*

Both *Larchmont* and *Circulo* featured petitioner lessees commencing an Article 7 petition after the board of assessment denied their assessment complaints on the merits. In each case, the Respondent moved to dismiss the Article 7 petition on the grounds of subject matter jurisdiction and that the petitioner lacked standing. In each case, the Appellate Division, Second Department held that the petitioner did have standing to commence the action under Article 7 (see *Larchmont Pancake House v Bd. of Assessors*, 153 AD3d at 522; *Circulo Hous. Dev. Fund Corp. v Assessor of City of Long Beach*, 96 AD3d at1056). However, the Second Department dismissed the petitions in both matters holding that RPTL § 524[3] "requires that the *property owner* file a complaint or

grievance to obtain administrative review of the tax assessment (*Circulo Hous. Dev. Fund Corp. v Assessor of City of Long Beach*, 96 AD3d at 1056 (emphasis in the original); *Larchmont Pancake House v Bd. of Assessors*, 153 AD3d at 522 (citing *Circulo*). Both *Larchmont* and *Circulo* held that Supreme Court lacked the jurisdiction to hear the Article 7 petition, essentially treating the fact that the petitioner's complaint as a nullity. An examination of the facts in *Larchmont* and *Circuolo* reveal that though both the petitioners in those cases leased the property and both were contractually responsible for paying the taxes on the property, it was not discussed whether either had a lease in which the owner of the property conferred upon them the right to challenge the tax assessments. Both the decisions in *Larchmont* and *Circulo* refer to the requirement that the "property owner" file the complaint, but the statute does not actually use the word owner, but rather "the person whose property is assessed" (RPTL § 524[3]). Finally, neither petitioner sought relief to either amend the petition or for relief *nunc pro tunc* to provide authorization from the property owner.

While it is true that the Appellate Division is a single statewide court divided into departments for administrative convenience, and, therefore, the doctrine of *stare decisis* requires this Court follow precedents set by the Appellate Division of another department until the Court of Appeals or the Fourth Department pronounces a contrary rule (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]), that

rule is only implicated when the requirements of *stare decisis* are met **and** when the Fourth Department has not ruled on the issue. The *stare decisis* effect of an appellate decision is applied "only as to those questions presented, considered and squarely decided" (*People v Bourne*, 139 AD2d 210, 216 [1st Dept 1988]). Here, as the decisions in *Larchmont* and *Circulo* appear to only involve petitioners who did not have a provision in their leases which authorized them to appeal tax assessments, it does not appear that each decision addressed the factual scenario presented here. Likewise, the petitioner in *Larchmont* and *Circulo* did not seek amendment and nunc pro tunc releif Rite Aid seeks in this case.

If the Court were to find that it were bound by the *stare decisis* application of *Mountain View Coach Lines, Inc. v Storms*, the Court could look instead to *Divi Hotels Mktg. Inc. v Bd. of Assessors of County of Tompkins*, 207 AD2d 580, 581 [3d Dept 1994]. In *Divi*, the Third Department reversed the trial court's order denying the petitioner's cross-motion to amend and granting the respondent's motion to dismiss in a case where the complaint before the board of assessment was in the name of an entity that would otherwise have standing to commence an Article 7 petition but did not, at the time, own the property. The Third Department denied dismissal and allowed the amendment by "adopting a broad and practical view" reasoning:

> The petition in both the administrative and judicial proceedings clearly identified the subject realty by tax map section, block and lot number,

> thereby permitting precise identification of the owner from respondents' own records, and contained allegations to the effect that the respective matters were being pursued on behalf of the owner of the property, a party with undeniable standing, pursuant to authority duly granted. Thus viewed, there can be no reasonable question, first, that we are dealing with a mere misnomer and, second, that no prejudice to respondents resulted *(Divi Hotels Mktg. Inc. v Bd. of Assessors of County of Tompkins,* 207 AD2d at 581–82).

Indeed, the Second Department's view that an improper or missing authorization on a complaint before the board of assessment review was not so sacrosanct as to not allow nunc pro tunc amendment. In *Astoria Fed. Sav. & Loan Ass'n v Bd. of Assessors,* 212 AD2d 600 [2d Dept 1995], the Second Department permitted the nunc pro tunc amendment of the administrative complaint that had a defective authorization holding:

> The only things necessary to the exercise of jurisdiction are that within the time specified a complaint under oath in writing be presented stating the objection and the grounds thereof. Contrary to the appellants' contention, defects in the form of the complaint have expressly been held not to be jurisdictional. The appellants received adequate notice of the commencement of the proceeding, and no substantial right of the appellants would 'be prejudiced by disregarding the defect. The defect may thus be properly cured by submission of a properly dated authorization nunc pro tunc *(Astoria Fed. Sav. & Loan Ass'n v Bd. of Assessors,* 212 AD2d at 601 (internal citations and quotations omitted)

Thus, as the Second Department did not overrule *Astoria* in *Larchmont* and *Circulo* and the Third Department also permitted the nunc pro tunc relief sought by the Petitioner in this case, *Larchmont* and *Circulo* do not mandate dismissal in this case. Moreover, as set forth below, the Fourth Department is not silent on this issue.

The Law of the Fourth Department

In discussing Supreme Court's jurisdiction over a tax certiorari petition, the Fourth Department has held that for the purposes of Supreme Court's jurisdiction, all that is required is that:

> if a complaint or a reasonable substitute therefore has been timely filed with the Review Board, that gives jurisdiction, and that other requirements are procedural and may be supplied by amendment or may be deemed waived by action of the Board (*Raer Corp. v Vil. Bd. of Trustees of Vil. of Clifton Springs*, 78 AD2d 989, 989 [4th Dept 1980]).

The Fourth Department's holding was consistent with the Court of Appeals holding in *W.T. Grant Co v Srogi*:

> the primary purpose of the tax petition is to give notice to the taxing authority so that it may take such steps as may be advisable to defend the claim. That being the case, where adequate notice has been given, we see no good reason to adhere blindly to a rule which precludes a court from granting the relief justified by the proof (*W. T. Grant Co. v Srogi*, 52 NY2d 496, 513 [1981]).

Applying the requirements that only the timely service of a written complaint is a jurisdictional requirement and that the other requirements imposed by RPTL are procedural in nature, the Fourth Department has repeatedly held that a board of assessment's decision on the merits and failure to dismiss the complaint constitutes a subsequent waiver of any claimed defects (see *Skuse v Town of S. Bristol*, 99 AD2d 670 [4th Dept 1984] (board's deciding the complaint on the merits waived the alleged lack of written authorization for the board of managers to represent the property owners); *City*

of Little Falls v Bd. of Assessors of Town of Salisbury, 68 AD2d 734, 740 [4th Dept 1979] (the board's deciding the complaint on the merits waived the failure to state the extent of the overvaluation and file a single application for each parcel); *Henderson v Silco*, 36 AD2d 439, 440 [4th Dept 1971] (the board by acting on complaint that was not verified and was given to the Supervisor instead of the Assessor, waived any jurisdictional claim)).

Thus, the Fourth Department has held that should the board of assessment act on the merits of a timely filed complaint, any alleged defects (even those otherwise going to jurisdiction) are waived. Here, the Respondent Board of Assessment received a timely complaint and rather than dismissing it for the reasons sought in their motion, they ruled on its merits. Therefore, even if *Larchmont* and *Crisculo* were correctly decided that a lessee's complaint to a board of assessment is a jurisdictional defect, the law of the Fourth Department holds that such a jurisdictional defect is waived if the board of assessment rules on the merits.

The rules of statutory construction and decisional authority do not favor the Respondents' restrictive construction of the Second Department's reading of RPTL § 524[3]

As discussed above, the Court of Appeals has held that the statutory scheme regarding tax assessment challenges is remedial in nature. The interpretation of a remedial statute requires that it " must be liberally construed to effect or carry out the

reforms intended and to promote justice "(*Dewine v State of New York Bd. of Examiners of Sex Offenders*, 89 AD3d 88, 92 [4th Dept 2011] quoting McKinney's Statutes § 321). A liberal construction of a statute "is one that is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute, though actually it is not within the letter of the law" (*Dewine v State of New York Bd. of Examiners of Sex Offenders*, 89 AD3d at 92 (providing a liberal interpretation of the SORA statute)).

Here, the Respondents urge the Court to read RPTL § 524[3] to require that the property owner sign the authorization portion of the grievance complaint. First, the text of RPTL § 524[3] is not so restrictive. The text of RPTL § 524 [3] states in pertinent part:

> 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 (RPTL § 524[3] (emphasis added)).

While the Respondents would read the language that the statement " must be made by the person whose property is assessed" as only consisting of the property owner, such a construction is not favored by the decisional authority that holds that a lessee who is obligated to pay taxes as part of a lease and the right to challenge the assessment possesses the" requisite unitary property interest" necessary to maintain an Article 7 action (*Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors*, 261 AD2d 835, 835 [4th Dept 1999] quoting *Waldbaum, Inc. v Fin. Adm'r of City of New York*, 74 NY2d

128, 134 [1989]).

To interpret RPTL § 524[3] to require that the deeded property owner sign the authorization on the grievance complaint would also lead to objectionable results in that there are times in which the interests of the deeded property owner and lessee are not aligned. For example, in *Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors*, the Fourth Department permitted the lessee to maintain an Article 7 petition even when the deeded owner and the municipality reached an agreement on the issue (*Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors* 261 AD2d at 835). And again in *Big V Supermarkets, Inc., Store No. 217 v Assessor of Town of E. Greenbush*, 114 AD2d 726 [3d Dept 1985], the Third Department held that a lessee could maintain an Article 7 petition even where the deeded property owner and municipality agreed to arbitrate the issue (*Big V Supermarkets, Inc., Store No. 217 v Assessor of Town of E. Greenbush*, 114 AD2d at 728).

Reading RPTL §524[3] to require that the deeded property owner sign the authorization of the grievance complaint would have precluded the petitioners in *Ames* and *Big V* from challenging their tax assessments. It is a fundamental rule of statutory construction that "of two constructions which might be placed upon an ambiguous statute one which would cause objectionable consequences is to be avoided" (*People v Ortega*, 127 Misc 2d 717, 724 [Sup Ct 1985], affd, 118 AD2d 523 [1st Dept 1986], affd, 69

NY2d 763 [1987]; McKinney's Statutes § 141).

The Respondents also argue that RPTL § 524[3] ("the person whose property is assessed") is found in Article 5 and pertains to administrative complaints before the board of assessment review and that the standing provision of RPTL § 704[1] ("Any person claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article by filing a petition") is found in a different article and should, therefore, be construed separately. The filing of a grievance complaint under Article 5 and its review by the board of assessment is a jurisdictional prerequisite to filing a petition under Article 7 (RPTL § 706; *Grossman v Bd. of Trustees of Vil. of Geneseo*, 44 AD2d 259, 263 [4th Dept 1974]). The two articles are interlocking and pertain to the same subject matter and, as such, the *pari materia* rule of statutory construction (see Statutes § 221) requires that both articles be "construed together and applied harmoniously and consistently" (*Baldine v Gomulka*, 61 AD2d 419, 422 [3d Dept 1978] (internal citations omitted)). In interpreting the phrase "person claiming to be aggrieved by an assessment," one court held that it should not be so narrowly construed:

> The statute requires that the petition be brought by a "person claiming to be aggrieved by an assessment" (RPTL § 704 [1]). It does not state that a person may only be aggrieved if he has a statutory obligation to make tax payments. An individual may be "aggrieved" as a result of a contractual assessment. Such individuals include lessees who are bound to make payments to a landlord, contract vendees, and indemnitors. The key is

> whether the party's pecuniary interests are or may be adversely affected' by an assessment not whether the adverse effect is the result of a contract or direct tax liability (*Pass & Seymour, Inc. v Town of Geddes*, 126 Misc 2d 805, 807 [Sup Ct 1984] (internal citations and quotations omitted)).

The logic in interpreting the language of RPTL § 704[1] applies equally to the language of RPTL 524[3]. The Respondents' argument that since a leasehold is personalty and not an estate in land it is not subject to taxation under RPTL § 300 the phrase in RPTL § 524[3] "the person whose property is assessed" can only apply to the property owner. The assessment of real estate tax under RPTL Article 3, administratively challenged under RPTL Article 5 and judicially challenged under RPTL Article 7 is an assessment against the real property. As such, the Court of Appeals has held that where there is an agreement by a leaseholder to pay taxes, a tax assessment may properly be entered against the leaseholder despite the fact that a leasehold is personalty and not an estate in land (see *Oak Is. Beach Ass'n, Inc. v Mascari*, 47 Misc 2d 21, 26 [Sup Ct 1965], affd sub nom. *W. Gilgo Beach Assn., Inc. v Mascari*, 25 AD2d 497 [2d Dept 1966], affd sub nom. *W. Gilgo Beach Assn. v Mascari*, 18 NY2d 861 [1966]).

Finally, RPTL § 524[3] delegates to the Commissioner of the Department of Taxation and Finance to create the grievance complaint form used by property owners in making complaints. The Commissioner promulgated both the form RP-524 grievance

complaint, as well as its instructions. The instructions to the form under the heading "GRIEVANCE PROCEDURES" state:

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

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

The instructions do not advise the reader that purchasers or tenants have to obtain the property owner's authorization to use the grievance process, rather, the instructions explicitly state that "tenants who are required to pay property taxes" can grieve the assessment. The RP-524 form and the RP-524 form instructions do not, in fact, distinguish between property owners, purchasers and tenants. Lastly, in explaining Part four (("Designation of representative") of the RP-524 form (the portion of the form the Respondents' contend the property owner needed to designate Rite Aid to represent them on the grievance), the instructions simply state that if "you designated someone to represent you before the BAR, then list your name, your representative's name, sign and date." If Respondents' interpretation is correct, then the Commissioner's instructions to the RP-524 form are incorrect and should have advised that only a property owner can grieve an assessment and that a purchaser and tenant was required to be designated by the property owner. Because the Legislature deferred to the Commissioner of the Department of Taxation and Finance to promulgate the RP-524

form and its instructions, the Commissioner's determination that a tenant can grieve the assessment is instructive and is entitled to some deference (see *Koch v Sheehan*, 95 AD3d 82, 89 [4th Dept 2012], affd, 21 NY3d 697 [2013]).

Conclusion

Based upon the foregoing, it is hereby

ORDERED that the Respondents' motion to dismiss is denied in its entirety; and it is further

ORDERED that the Petitioner's cross-motion is granted in its entirety.

Dated: February 20, 2018

The Honorable Daniel J. Doyle
Supreme Court Justice

EXHIBIT 9

FILED

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

2018 MAR -9 AM 11:36

MONROE COUNTY CLERK

In the Matter of the Application of

WALGREEN EASTERN CO., INC.,

Petitioner,

vs.

THE ASSESSOR AND THE BOARD OF ASSESSMENT REVIEW OF THE TOWN OF BRIGHTON.

Respondents.

For review of a Tax Assessment under Article 7 of the Real Property Tax Law

Decision and Order

Index No.: 2017/7289

Appearances

Jacobson Law Firm (Robert I. Jacobson, Esq., of counsel) for the Petitioner
Davidson Fink (Thomas A. Fink Esq. and Jayla R. Lombardo Esq., of counsel) for the Respondents

Daniel J. Doyle, J.

Before the Court are two motions: (1) The Respondents' pre-answer motion to dismiss the petition; and (2) The Petitioner's cross-motion to amend the petition.

Walgreen Eastern Co., Inc. ('Walgreens), the Petitioner in this matter, operates a retail drug store at 1650 Elmwood Avenue in the Town of Brighton. Walgreens filed a tax grievance complaint with Respondent Town of Brighton on May 10, 2017.

Walgreens does not own the property in fee; instead, the property is owned by Flower Shop Brighton, LLC, and is leased by Walgreens. The lease signed by Walgreens provides that Walgreens "shall have the right to contest the validity or amount of any tax or assessment levied against the Leased Premises." The Board of Assessment Review did not dismiss the complaint, and instead, considered the complaint on its merits before denying the complaint. Walgreens then commenced this action pursuant to RPTL Article 7 seeking review of the Board's decision.

The Respondents' motion to dismiss is rather straightforward. Relying principally on the Second Department's holdings in *Larchmont Pancake House v Bd. of Assessors*, 153 AD3d 521 [2d Dept 2017] and *Circulo Hous. Dev. Fund Corp. v Assessor of City of Long Beach*, 96 AD3d 1053, 1056 [2d Dept 2012], the Respondents argue here that because the complaint was made by Walgreens and not the property owner, the Petitioner failed to comply with a jurisdictional condition precedent set forth in RPTL § 524[3] that a complaint be made by the property owner. Respondents argue that because the Fourth Department has not ruled on this application of RPTL 524[3] this Court is bound to apply the Second Department's holdings in *Larchmont* and *Circulo* (*Mtn. View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]).

The Petitioner opposes the motion to dismiss and has made a cross-motion to amend the petition seeking *nunc pro tunc* relief of providing the authorization of the

property owner and amending the complaint by adding the property owner to the petition.

The applicable provisions and their purposes

It is well-established that the tax law "relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have [its] assessment reviewed should not be defeated by a technicality" *Matter of Great Eastern. Mall v. Condon*, 36 NY2d 544, 548 [1975] quoting *People ex rel. New York City Omnibus Corp. v Miller*, 282 NY 5, 9 [1939]).

Under Article 7, "*any person* claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article" (RPTL § 704[1] (emphasis added)). The Fourth Department has held that a tenant obligated by its lease to pay real estate taxes is "an aggrieved person" that has standing to commence a tax certiorari petition (see *Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors*, 261 AD2d 835, 835 [4th Dept 1999]).

Prior to the commencement of an Article 7 petition, a challenge to the tax assessment to the property must be made to the board of assessment (see RPTL § 512; RPTL § 706[2]). The persons "entitled to file complaints in relation to assessments" are articulated in RPTL § 524 (RPTL § 512[2]). RPTL § 524 governs the submission of

complaints to the board of assessment review and provides in pertinent part that:

> a complaint with respect to an assessment shall be on a form prescribed by the commissioner and shall consist of a statement specifying the respect in which the assessment is excessive, unequal or unlawful, or the respect in which real property is misclassified, and the reduction in assessed valuation or taxable assessed valuation or change in class designation or allocation of assessed valuation sought. Such statement shall also contain an estimate of the value of the real property. **Such statement must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein** (RPTL § 524[3] (emphasis added)).

Larchmont* and *Circulo* and the application of *stare decisis

Both *Larchmont* and *Circulo* featured petitioner lessees commencing an Article 7 petition after the board of assessment denied their assessment complaints on the merits. In each case, the Respondent moved to dismiss the Article 7 petition on the grounds of subject matter jurisdiction and that the petitioner lacked standing. In each case, the Appellate Division, Second Department held that the petitioner did have standing to commence the action under Article 7 (see *Larchmont Pancake House v Bd. of Assessors*, 153 AD3d at 522; *Circulo Hous. Dev. Fund Corp. v Assessor of City of Long Beach*, 96 AD3d at1056). However, the Second Department dismissed the petitions in both matters holding that RPTL § 524[3] "requires that the *property owner* file a complaint or grievance to obtain administrative review of the tax assessment (*Circulo Hous. Dev. Fund Corp. v Assessor of City of Long Beach*, 96 AD3d at 1056 (emphasis in the original);

Larchmont Pancake House v Bd. of Assessors, 153 AD3d at 522 (citing *Circulo*). Both *Larchmont* and *Circulo* held that Supreme Court lacked the jurisdiction to hear the Article 7 petition, essentially treating the fact that the petitioner's complaint as a nullity. An examination of the facts in *Larchmont* and *Circuolo* reveal that though both the petitioners in those cases leased the property and both were contractually responsible for paying the taxes on the property, it was not discussed whether either had a lease in which the owner of the property conferred upon them the right to challenge the tax assessments. Both the decisions in *Larchmont* and *Circulo* refer to the requirement that the "property owner" file the complaint, but the statute does not actually use the word owner, but rather "the person whose property is assessed" (RPTL § 524[3]). Finally, neither petitioner sought relief to either amend the petition or for relief *nunc pro tunc* to provide authorization from the property owner.

While it is true that the Appellate Division is a single statewide court divided into departments for administrative convenience, and, therefore, the doctrine of *stare decisis* requires this Court follow precedents set by the Appellate Division of another department until the Court of Appeals or the Fourth Department pronounces a contrary rule (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]), that rule is only implicated when the requirements of *stare decisis* are met **and** when the Fourth Department has not ruled on the issue. The *stare decisis* effect of an appellate

decision is applied "only as to those questions presented, considered and squarely decided" (*People v Bourne*, 139 AD2d 210, 216 [1st Dept 1988]). Here, as the decisions in *Larchmont* and *Circulo* appear to only involve petitioners who did not have a provision in their leases which authorized them to appeal tax assessments, it does not appear that each decision addressed the factual scenario presented here. Likewise, the petitioner in *Larchmont* and *Circulo* did not seek amendment and nunc pro tunc releif Walgreens seeks in this case.

If the Court were to find that it were bound by the *stare decisis* application of *Mountain View Coach Lines, Inc. v Storms*, the Court could look instead to *Divi Hotels Mktg. Inc. v Bd. of Assessors of County of Tompkins*, 207 AD2d 580, 581 [3d Dept 1994]. In *Divi*, the Third Department reversed the trial court's order denying the petitioner's cross-motion to amend and granting the respondent's motion to dismiss in a case where the complaint before the board of assessment was in the name of an entity that would otherwise have standing to commence an Article 7 petition but did not, at the time, own the property. The Third Department denied dismissal and allowed the amendment by "adopting a broad and practical view" reasoning:

> The petition in both the administrative and judicial proceedings clearly identified the subject realty by tax map section, block and lot number, thereby permitting precise identification of the owner from respondents' own records, and contained allegations to the effect that the respective matters were being pursued on behalf of the owner of the property, a party with undeniable standing, pursuant to authority duly granted. Thus

> viewed, there can be no reasonable question, first, that we are dealing with a mere misnomer and, second, that no prejudice to respondents resulted (*Divi Hotels Mktg. Inc. v Bd. of Assessors of County of Tompkins*, 207 AD2d at 581–82).

Indeed, the Second Department's view that an improper or missing authorization on a complaint before the board of assessment review was not so sacrosanct as to not allow nunc pro tunc amendment. In *Astoria Fed. Sav. & Loan Ass'n v Bd. of Assessors*, 212 AD2d 600 [2d Dept 1995], the Second Department permitted the nunc pro tunc amendment of the administrative complaint that had a defective authorization holding:

> The only things necessary to the exercise of jurisdiction are that within the time specified a complaint under oath in writing be presented stating the objection and the grounds thereof. Contrary to the appellants' contention, defects in the form of the complaint have expressly been held not to be jurisdictional. The appellants received adequate notice of the commencement of the proceeding, and no substantial right of the appellants would 'be prejudiced by disregarding the defect. The defect may thus be properly cured by submission of a properly dated authorization nunc pro tunc (*Astoria Fed. Sav. & Loan Ass'n v Bd. of Assessors*, 212 AD2d at 601 (internal citations and quotations omitted)

Thus, as the Second Department did not overrule *Astoria* in *Larchmont* and *Circulo* and the Third Department also permitted the nunc pro tunc relief sought by the Petitioner in this case, *Larchmont* and *Circulo* do not mandate dismissal in this case. Moreover, as set forth below, the Fourth Department is not silent on this issue.

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In discussing Supreme Court's jurisdiction over a tax certiorari petition, the Fourth Department has held that for the purposes of Supreme Court's jurisdiction, all that is required is that:

> if a complaint or a reasonable substitute therefore has been timely filed with the Review Board, that gives jurisdiction, and that other requirements are procedural and may be supplied by amendment or may be deemed waived by action of the Board (*Raer Corp. v Vil. Bd. of Trustees of Vil. of Clifton Springs*, 78 AD2d 989, 989 [4th Dept 1980]).

The Fourth Department's holding was consistent with the Court of Appeals holding in *W.T. Grant Co v Srogi:*

> the primary purpose of the tax petition is to give notice to the taxing authority so that it may take such steps as may be advisable to defend the claim. That being the case, where adequate notice has been given, we see no good reason to adhere blindly to a rule which precludes a court from granting the relief justified by the proof (*W. T. Grant Co. v Srogi*, 52 NY2d 496, 513 [1981]).

Applying the requirements that only the timely service of a written complaint is a jurisdictional requirement and that the other requirements imposed by RPTL are procedural in nature, the Fourth Department has repeatedly held that a board of assessment's decision on the merits and failure to dismiss the complaint constitutes a subsequent waiver of any claimed defects (see *Skuse v Town of S. Bristol*, 99 AD2d 670 [4th Dept 1984] (board's deciding the complaint on the merits waived the alleged lack of written authorization for the board of managers to represent the property owners); *City*

of Little Falls v Bd. of Assessors of Town of Salisbury, 68 AD2d 734, 740 [4th Dept 1979] (the board's deciding the complaint on the merits waived the failure to state the extent of the overvaluation and file a single application for each parcel); *Henderson v Silco*, 36 AD2d 439, 440 [4th Dept 1971] (the board by acting on complaint that was not verified and was given to the Supervisor instead of the Assessor, waived any jurisdictional claim)).

Thus, the Fourth Department has held that should the board of assessment act on the merits of a timely filed complaint, any alleged defects (even those otherwise going to jurisdiction) are waived. Here, the Respondent Board of Assessment received a timely complaint and rather than dismissing it for the reasons sought in their motion, they ruled on its merits. Therefore, even if *Larchmont* and *Criscuio* were correctly decided that a lessee's complaint to a board of assessment is a jurisdictional defect, the law of the Fourth Department holds that such a jurisdictional defect is waived if the board of assessment rules on the merits.

The rules of statutory construction and decisional authority do not favor the Respondents' restrictive construction of the Second Department's reading of RPTL § 524[3]

As discussed above, the Court of Appeals has held that the statutory scheme regarding tax assessment challenges is remedial in nature. The interpretation of a remedial statute requires that it " must be liberally construed to effect or carry out the

reforms intended and to promote justice "(*Dewine v State of New York Bd. of Examiners of Sex Offenders*, 89 AD3d 88, 92 [4th Dept 2011] quoting McKinney's Statutes § 321). A liberal construction of a statute "is one that is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute, though actually it is not within the letter of the law" (*Dewine v State of New York Bd. of Examiners of Sex Offenders*, 89 AD3d at 92 (providing a liberal interpretation of the SORA statute)).

Here, the Respondents urge the Court to read RPTL § 524[3] to require that the property owner sign the authorization portion of the grievance complaint. First, the text of RPTL § 524[3] is not so restrictive. The text of RPTL § 524 [3] states in pertinent part:

> 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 (RPTL § 524[3] (emphasis added)).

While the Respondents would read the language that the statement " must be made by the person whose property is assessed" as only consisting of the property owner, such a construction is not favored by the decisional authority that holds that a lessee who is obligated to pay taxes as part of a lease and the right to challenge the assessment possesses the" requisite unitary property interest" necessary to maintain an Article 7 action (*Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors*, 261 AD2d 835, 835 [4th Dept 1999] quoting *Waldbaum, Inc. v Fin. Adm'r of City of New York*, 74 NY2d

128, 134 [1989]).

To interpret RPTL § 524[3] to require that the deeded property owner sign the authorization on the grievance complaint would also lead to objectionable results in that there are times in which the interests of the deeded property owner and lessee are not aligned. For example, in *Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors,* the Fourth Department permitted the lessee to maintain an Article 7 petition even when the deeded owner and the municipality reached an agreement on the issue (*Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors* 261 AD2d at 835). And again in *Big V Supermarkets, Inc., Store No. 217 v Assessor of Town of E. Greenbush,* 114 AD2d 726 [3d Dept 1985], the Third Department held that a lessee could maintain an Article 7 petition even where the deeded property owner and municipality agreed to arbitrate the issue (*Big V Supermarkets, Inc., Store No. 217 v Assessor of Town of E. Greenbush,* 114 AD2d at 728).

Reading RPTL §524[3] to require that the deeded property owner sign the authorization of the grievance complaint would have precluded the petitioners in *Ames* and *Big V* from challenging their tax assessments. It is a fundamental rule of statutory construction that "of two constructions which might be placed upon an ambiguous statute one which would cause objectionable consequences is to be avoided" (*People v Ortega,* 127 Misc 2d 717, 724 [Sup Ct 1985], affd, 118 AD2d 523 [1st Dept 1986], affd, 69

NY2d 763 [1987]; McKinney's Statutes § 141).

The Respondents also argue that RPTL § 524[3] ("the person whose property is assessed") is found in Article 5 and pertains to administrative complaints before the board of assessment review and that the standing provision of RPTL § 704[1] ("Any person claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article by filing a petition") is found in a different article and should, therefore, be construed separately. The filing of a grievance complaint under Article 5 and its review by the board of assessment is a jurisdictional prerequisite to filing a petition under Article 7 (RPTL § 706; *Grossman v Bd. of Trustees of Vil. of Geneseo*, 44 AD2d 259, 263 [4th Dept 1974]). The two articles are interlocking and pertain to the same subject matter and, as such, the *pari materia* rule of statutory construction (see Statutes § 221) requires that both articles be "construed together and applied harmoniously and consistently" (*Baldine v Gomulka*, 61 AD2d 419, 422 [3d Dept 1978] (internal citations omitted)). In interpreting the phrase "person claiming to be aggrieved by an assessment," one court held that it should not be so narrowly construed:

> The statute requires that the petition be brought by a "person claiming to be aggrieved by an assessment" (RPTL § 704 [1]). It does not state that a person may only be aggrieved if he has a statutory obligation to make tax payments. An individual may be "aggrieved" as a result of a contractual assessment. Such individuals include lessees who are bound to make payments to a landlord, contract vendees, and indemnitors. The key is

> whether the party's pecuniary interests are or may be adversely affected' by an assessment not whether the adverse effect is the result of a contract or direct tax liability (*Pass & Seymour, Inc. v Town of Geddes*, 126 Misc 2d 805, 807 [Sup Ct 1984] (internal citations and quotations omitted)).

The logic in interpreting the language of RPTL § 704[1] applies equally to the language of RPTL 524[3]. The Respondents' argument that since a leasehold is personalty and not an estate in land it is not subject to taxation under RPTL § 300 the phrase in RPTL § 524[3] "the person whose property is assessed" can only apply to the property owner. The assessment of real estate tax under RPTL Article 3, administratively challenged under RPTL Article 5 and judicially challenged under RPTL Article 7 is an assessment against the real property. As such, the Court of Appeals has held that where there is an agreement by a leaseholder to pay taxes, a tax assessment may properly be entered against the leaseholder despite the fact that a leasehold is personalty and not an estate in land (see *Oak Is. Beach Ass'n, Inc. v Mascari*, 47 Misc 2d 21, 26 [Sup Ct 1965], affd sub nom. *W. Gilgo Beach Assn., Inc. v Mascari*, 25 AD2d 497 [2d Dept 1966], affd sub nom. *W. Gilgo Beach Assn. v Mascari*, 18 NY2d 861 [1966]).

Finally, RPTL § 524[3] delegates to the Commissioner of the Department of Taxation and Finance to create the grievance complaint form used by property owners in making complaints. The Commissioner promulgated both the form RP-524 grievance

complaint, as well as its instructions. The instructions to the form under the heading "GRIEVANCE PROCEDURES" state:

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

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

The instructions do not advise the reader that purchasers or tenants have to obtain the property owner's authorization to use the grievance process, rather, the instructions explicitly state that "tenants who are required to pay property taxes" can grieve the assessment. The RP-524 form and the RP-524 form instructions do not, in fact, distinguish between property owners, purchasers and tenants. Lastly, in explaining Part four (("Designation of representative") of the RP-524 form (the portion of the form the Respondents' contend the property owner needed to designate Walgreens to represent them on the grievance), the instructions simply state that if "you designated someone to represent you before the BAR, then list your name, your representative's name, sign and date." If Respondents' interpretation is correct, then the Commissioner's instructions to the RP-524 form are incorrect and should have advised that only a property owner can grieve an assessment and that a purchaser and tenant was required to be designated by the property owner. Because the Legislature deferred to the Commissioner of the Department of Taxation and Finance to promulgate the RP-524

form and its instructions, the Commissioner's determination that a tenant can grieve the assessment is instructive and is entitled to some deference (see *Koch v Sheehan*, 95 AD3d 82, 89 [4th Dept 2012], affd, 21 NY3d 697 [2013]).

Conclusion

Based upon the foregoing, it is hereby

ORDERED that the Respondents' motion to dismiss is denied in its entirety; and it is further

ORDERED that the Petitioner's cross-motion is granted in its entirety.

Dated: March 6 2018

The Honorable Daniel J. Doyle
Supreme Court Justice

EXHIBIT 10

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

COPY

In the Matter of the Application of

RITE AID CORPORATION,

Petitioner,

vs.

TOWN OF WILLIAMSON BOARD OF ASSESSMENT REVIEW, THE ASSESSOR OF THE TOWN OF WILLIAMSON, and THE TOWN OF WILLIAMSON, WAYNE COUNTY, NEW YORK,

Respondents.

For review of a Tax Assessment under Article 7 of the Real Property Tax Law

Decision and Order

Index No.: 75978/2013
77375/2014
78812/2015
79802/2016
81093/2017

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Appearances

Jacobson Law Firm (Robert I. Jacobson, Esq., of counsel) for the Petitioner
E. Stewart Jones Hacker Murphy LLP (Patrick L. Seely, Jr., Esq., of counsel) for the Respondents

Daniel J. Doyle, J.

Before the Court are two motions made in the above-referenced matters: (1) The Respondents' summary judgment motion dismissing the petitions for 2013-2017 on the grounds that the Petitioner failed to comply with a condition precedent in order to initiate the proceedings; and (2) The Petitioner's cross-motion to amend the petition.

Rite Aid, the Petitioner in this matter, operates a retail drug store at 4061 Route

104 in the Town of Williamson. The parties share a history of litigating the assessed value of this parcel (*Rite Aid Corp. v Haywood*, 130 AD3d 1510, 1511 [4th Dept 2015]) Rite Aid filed tax grievance complaints with Respondent Town of Williamson for tax years 2013-2017. Rite Aid does not own the property in fee; instead, the property is owned by Gladstone Family, LLC, and is leased by Rite Aid. The lease signed by Rite Aid's predecessor-in-interest provides that Rite Aid "shall have the right... to appeal the amount of any real estate tax assessed against the Leased Premises." The Board of Assessment Review did not dismiss the complaint, and instead, considered the complaint on its merits before denying the complaint. Rite Aid then commenced this action pursuant to RPTL Article 7 seeking review of the Board's decision.

The Respondents' summary judgment motion is rather straightforward. Relying principally on the Second Department's holdings in *Larchmont Pancake House v Bd. of Assessors*, 153 AD3d 521 [2d Dept 2017] and *Circulo Hous. Dev. Fund Corp. v Assessor of City of Long Beach*, 96 AD3d 1053, 1056 [2d Dept 2012], the Respondents argue here that because the complaint was made by Rite Aid and not the property owner, the Petitioner failed to comply with a jurisdictional condition precedent set forth in RPTL § 524[3] that a complaint be made by the property owner. Respondents argue that because the Fourth Department has not ruled on this application of RPTL 524[3] this Court is bound to apply the Second Department's holdings in *Larchmont* and *Circulo* (*Mtn. View Coach*

Lines, Inc. v Storms, 102 AD2d 663, 664 [2d Dept 1984]).

The Petitioner opposes the motion to dismiss and has made a cross-motion to amend the petition seeking *nunc pro tunc* relief of providing the authorization of the property owner and amending the complaint by adding the property owner to the petition.

The applicable provisions and their purposes

It is well-established that the tax law "relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have [its] assessment reviewed should not be defeated by a technicality" *Matter of Great Eastern. Mall v. Condon*, 36 NY2d 544, 548 [1975] quoting *People ex rel. New York City Omnibus Corp. v Miller*, 282 NY 5, 9 [1939]).

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assessment to the property must be made to the board of assessment (see RPTL § 512; RPTL § 706[2]). The persons "entitled to file complaints in relation to assessments" are articulated in RPTL § 524 (RPTL § 512[2]). RPTL § 524 governs the submission of complaints to the board of assessment review and provides in pertinent part that:

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> 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 (RPTL § 524[3] (emphasis added)).

While the Respondents would read the language that the statement " must be made by the person whose property is assessed" as only consisting of the property owner, such a construction is not favored by the decisional authority that holds that a lessee who is obligated to pay taxes as part of a lease and the right to challenge the assessment possesses the" requisite unitary property interest" necessary to maintain an

Article 7 action (*Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors*, 261 AD2d 835, 835 [4th Dept 1999] quoting *Waldbaum, Inc. v Fin. Adm'r of City of New York*, 74 NY2d 128, 134 [1989]).

To interpret RPTL § 524[3] to require that the deeded property owner sign the authorization on the grievance complaint would also lead to objectionable results in that there are times in which the interests of the deeded property owner and lessee are not aligned. For example, in *Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors*, the Fourth Department permitted the lessee to maintain an Article 7 petition even when the deeded owner and the municipality reached an agreement on the issue (*Ames Dept. Store, Inc., No. 418 v Assessor, Bd. of Assessors* 261 AD2d at 835). And again in *Big V Supermarkets, Inc., Store No. 217 v Assessor of Town of E. Greenbush*, 114 AD2d 726 [3d Dept 1985], the Third Department held that a lessee could maintain an Article 7 petition even where the deeded property owner and municipality agreed to arbitrate the issue (*Big V Supermarkets, Inc., Store No. 217 v Assessor of Town of E. Greenbush*, 114 AD2d at 728).

Reading RPTL §524[3] to require that the deeded property owner sign the authorization of the grievance complaint would have precluded the petitioners in *Ames* and *Big V* from challenging their tax assessments. It is a fundamental rule of statutory construction that "of two constructions which might be placed upon an ambiguous

statute one which would cause objectionable consequences is to be avoided" (*People v Ortega*, 127 Misc 2d 717, 724 [Sup Ct 1985], affd, 118 AD2d 523 [1st Dept 1986], affd, 69 NY2d 763 [1987]; McKinney's Statutes § 141).

The Respondents also argue that RPTL § 524[3] ("the person whose property is assessed") is found in Article 5 and pertains to administrative complaints before the board of assessment review and that the standing provision of RPTL § 704[1] ("Any person claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article by filing a petition") is found in a different article and should, therefore, be construed separately. The filing of a grievance complaint under Article 5 and its review by the board of assessment is a jurisdictional prerequisite to filing a petition under Article 7 (RPTL § 706; *Grossman v Bd. of Trustees of Vil. of Geneseo*, 44 AD2d 259, 263 [4th Dept 1974]). The two articles are interlocking and pertain to the same subject matter and, as such, the *pari materia* rule of statutory construction (see Statutes § 221) requires that both articles be "construed together and applied harmoniously and consistently" (*Baldine v Gomulka*, 61 AD2d 419, 422 [3d Dept 1978] (internal citations omitted)). In interpreting the phrase "person claiming to be aggrieved by an assessment," one court held that it should not be so narrowly construed:

> The statute requires that the petition be brought by a "person claiming to be aggrieved by an assessment" (RPTL § 704 [1]). It does not state that a

> person may only be aggrieved if he has a statutory obligation to make tax payments. An individual may be "aggrieved" as a result of a contractual assessment. Such individuals include lessees who are bound to make payments to a landlord, contract vendees, and indemnitors. The key is whether the party's pecuniary interests are or may be adversely affected' by an assessment not whether the adverse effect is the result of a contract or direct tax liability (*Pass & Seymour, Inc. v Town of Geddes*, 126 Misc 2d 805, 807 [Sup Ct 1984] (internal citations and quotations omitted)).

The logic in interpreting the language of RPTL § 704[1] applies equally to the language of RPTL 524[3]. The Respondents' argument that since a leasehold is personalty and not an estate in land it is not subject to taxation under RPTL § 300 the phrase in RPTL § 524[3] "the person whose property is assessed" can only apply to the property owner. The assessment of real estate tax under RPTL Article 3, administratively challenged under RPTL Article 5 and judicially challenged under RPTL Article 7 is an assessment against the real property. As such, the Court of Appeals has held that where there is an agreement by a leaseholder to pay taxes, a tax assessment may properly be entered against the leaseholder despite the fact that a leasehold is personalty and not an estate in land (see *Oak Is. Beach Ass'n, Inc. v Mascari*, 47 Misc 2d 21, 26 [Sup Ct 1965], affd sub nom. *W. Gilgo Beach Assn., Inc. v Mascari*, 25 AD2d 497 [2d Dept 1966], affd sub nom. *W. Gilgo Beach Assn. v Mascari*, 18 NY2d 861 [1966]).

Finally, RPTL § 524[3] delegates to the Commissioner of the Department of

Taxation and Finance to create the grievance complaint form used by property owners in making complaints. The Commissioner promulgated both the form RP-524 grievance complaint, as well as its instructions. The instructions to the form under the heading "GRIEVANCE PROCEDURES" state:

> Any person who pays property taxes can grieve an assessment, including:
>
> - property owners
> - purchasers
> - tenants who are required to pay property taxes pursuant to a lease or written agreement

The instructions do not advise the reader that purchasers or tenants have to obtain the property owner's authorization to use the grievance process, rather, the instructions explicitly state that "tenants who are required to pay property taxes" can grieve the assessment. The RP-524 form and the RP-524 form instructions do not, in fact, distinguish between property owners, purchasers and tenants. Lastly, in explaining Part Four (("Designation of representative") of the RP-524 form (the portion of the form the Respondents' contend the property owner needed to designate Rite Aid to represent them on the grievance), the instructions simply state that if "you designated someone to represent you before the BAR, then list your name, your representative's name, sign and date." If Respondents' interpretation is correct, then the Commissioner's instructions to the RP-524 form are incorrect and should have advised that only a property owner can grieve an assessment and that a purchaser and tenant was required

to be designated by the property owner. Because the Legislature deferred to the Commissioner of the Department of Taxation and Finance to promulgate the RP-524 form and its instructions, the Commissioner's determination that a tenant can grieve the assessment is instructive and is entitled to some deference (see *Koch v Sheehan*, 95 AD3d 82, 89 [4th Dept 2012], affd, 21 NY3d 697 [2013]).

Conclusion

Based upon the foregoing, it is hereby

ORDERED that the Respondents' motion to dismiss is denied in its entirety; and it is further

ORDERED that the Petitioner's cross-motion is granted in its entirety.

Dated: May 2, 2018

The Honorable Daniel J. Doyle
Supreme Court Justice

STATE OF NEW YORK, COUNTY OF WAYNE:
I, Michael Jankowski, Clerk of the County of Wayne of the County Court of said County and of the Supreme Court being Courts of Record having a common seal
DO HEREBY CERTIFY that I have compared this copy with the original filed or recorded in this office and that the same is a correct transcript thereof and of the whole of said original.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the said County and Courts.
Date 5/7/18
FACSIMILE SIGNATURE USED PUR TO SEC () OF CO LAW

EXHIBIT 11

Volume 7 - Opinions of Counsel SBEA No. 123

Opinions of Counsel index

Assessment review (standing) (shopping center lessee) (residential tenant) - Real Property Tax Law, §§ 524, 704:

> A shopping center lessee who is obligated by lease to pay taxes has the right to administrative and judicial review of the assessment of the property leased. However, a residential apartment tenant does not.

We are asked if a lessee in a shopping center has standing to bring a complaint before the board of assessment review and, subsequently, an Article 7 proceeding for judicial review of the assessment of the property containing the leased premises. We are also asked whether a tenant in an apartment complex has similar standing.

Section 524(3) of the Real Property Tax Law specifies that a complaint to the board of assessment review 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." While this language implies that the complainant must be an "owner" of the property or his agent, the courts have construed this language more broadly as having to be read in conjunction with Article 7 of the RPTL.

Pursuant to that Article "any person claiming to be aggrieved by any assessment of real property upon any assessment roll" may commence a judicial proceeding for review of that assessment (§ 704(1)). Section 706(2) provides, however, that a petitioner must show that "a complaint was made in due time to the proper officers" to correct the assessment complained of. In *McLean's Department Stores v. Commissioner of Assessment*, 2 A.D.2d 98, 153 N.Y.S.2d 342 (3d Dept., 1956), the court concluded 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 [of assessment review] and obtain the preliminary review necessarily precedent to the judicial proceeding" (*id.*, 153 N.Y.S.2d, at 345).

The same court has defined an "aggrieved person" as "one whose pecuniary interests are or may be adversely affected [by an assessment]" (*People ex rel. Bingham Operating Corp. v. Eyrich*, 265 App. Div. 562, 40 N.Y.S.2d 33, at 35 (3d Dept., 1943)). More specifically, a lessee of property obligated to pay taxes during the term of the lease has been held to be a "person aggrieved" and therefore entitled to seek review of an assessment (*McLean's Department Stores*, *supra*; *see also*, *Matter of Burke*, 62 N.Y. 224 (1875); and, *Arlen Realty and Development Corp. v. Board of Assessors*, 74 A.D.2d 904, 425 N.Y.S. 2d 855 (2d Dept., 1980)). In 4 Op. Counsel SBEA No. 87, we concluded that where a mortgagee could be directly affected by an assessment, the mortgagee would have standing to obtain review of an assessment on the mortgaged premises (*see also*, *Suburbia Federal Savings and Loan Association v. Mayor*, 76 A.D.2d 841, 428 N.Y.S.2d 323 (2d Dept., 1980), in which the court held that where a mortgagee's alleged injury is not direct but only a mere possibility, the mortgagee is not an "aggrieved person" entitled to commence a certiorari proceeding). On the facts related to us, therefore, we conclude that the shopping center lessee has standing to obtain administrative and judicial review of the assessment of the property leased.

The same conclusion does not necessarily apply to apartment dwellers. We have not found any reported cases applicable to the rights of residential lessees to challenge assessments. It would appear that, based on the judicial decisions cited above, a tenant must demonstrate his obligation to pay directly the taxes levied on the property or, in some manner, demonstrate that he will be "directly injured" by the assessment. Absent such a showing, a residential renter would be in the same position as the petitioners in the *Suburbia Federal* case, *supra*.

It should be noted that Chapter 471 of the Laws of 1978 established assessable property interests for those who rent residential real property. That Chapter made such persons liable for the payment of taxes due on the rental premises and likewise afforded them an opportunity to challenge the assessments on such premises. The effective date of this Chapter, however, has been indefinitely postponed (L.1982, c.893).

It is our opinion, therefore, that without the statutory interest provided by Chapter 471, without liability for the payment of the taxes on the rented property, or absent some other direct injury resulting from the assessment, tenants of residential apartment units do not have standing to complain before the board of assessment review in regard to the assessment of the property in which their apartments are located.

September 7, 1982

NOTE: Revised to incorporate statutory references changed by Chapter 714 of the Laws of 1982, effective January 1, 1983. 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 (Dutchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Westchester) 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.

Updated: December 11, 2017

EXHIBIT 12

Volume 7 - Opinions of Counsel SBEA No. 123

Opinions of Counsel index

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Pursuant to that Article "any person claiming to be aggrieved by any assessment of real property upon any assessment roll" may commence a judicial proceeding for review of that assessment (§ 704(1)). Section 706(2) provides, however, that a petitioner must show that "a complaint was made in due time to the proper officers" to correct the assessment complained of. In *McLean's Department Stores v. Commissioner of Assessment*, 2 A.D.2d 98, 153 N.Y.S.2d 342 (3d Dept., 1956), the court concluded 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 [of assessment review] and obtain the preliminary review necessarily precedent to the judicial proceeding" (*id.*, 153 N.Y.S.2d, at 345).

The same court has defined an "aggrieved person" as "one whose pecuniary interests are or may be adversely affected [by an assessment]" (*People ex rel. Bingham Operating Corp. v. Eyrich*, 265 App. Div. 562, 40 N.Y.S.2d 33, at 35 (3d Dept., 1943)). More specifically, a lessee of property obligated to pay taxes during the term of the lease has been held to be a "person aggrieved" and therefore entitled to seek review of an assessment (*McLean's Department Stores, supra*; *see also, Matter of Burke*, 62 N.Y. 224 (1875); and, *Arlen Realty and Development Corp. v. Board of Assessors*, 74 A.D.2d 904, 425 N.Y.S. 2d 855 (2d Dept., 1980)). In 4 Op. Counsel SBEA No. 87, we concluded that where a mortgagee could be directly affected by an assessment, the

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It should be noted that Chapter 471 of the Laws of 1978 established assessable property interests for those who rent residential real property. That Chapter made such persons liable for the payment of taxes due on the rental premises and likewise afforded them an opportunity to challenge the assessments on such premises. The effective date of this Chapter, however, has been indefinitely postponed (L.1982, c.893).

It is our opinion, therefore, that without the statutory interest provided by Chapter 471, without liability for the payment of the taxes on the rented property, or absent some other direct injury resulting from the assessment, tenants of residential apartment units do not have standing to complain before the board of assessment review in regard to the assessment of the property in which their apartments are located.

September 7, 1982

Note: Under *Larchmont Pancake House v. Board of Assessors of the Town of Mamaroneck*, ___ NY3d ___ (2019), a lessee who is not legally responsible for paying the real property tax on the leased property is not entitled to seek judicial review of the assessment under RPTL Article 7.

Updated: April 08, 2019

EXHIBIT 13

THE STATE EDUCATION DEPARTMENT
THE UNIVERSITY OF THE STATE OF NEW YORK
ALBANY, NY 12230

New York State Library

Date: 1/23/2018

To Whom It May Concern:

I do hereby certify that I have compared the attached photocopy of:

85 images from the bill jacket (excluding the text of the bill) for the L. 1982, c. 714 on 16mm microfilm from the collection at the New York State Library.

with the microfilm now on file in the New York State Library, and that such copy so hereto annexed is a true copy of said microfilm.

IN WITNESS WHEREOF, I have hereunto set my hand in the New York State Library in the City of Albany,

Amy Peker
Name

Signature

Senior Librarian
Title

137 w/o bill

CHAPTER 714

LAWS OF 19 82

SENATE BILL _____

ASSEMBLY BILL 13057

13057

IN ASSEMBLY

June 16, 1982

Introduced by COMMITTEE ON RULES—(at request of M. of A. Hochbrueckner)—read once and referred to the Committee on Ways and Means

AN ACT to amend the real property law and the real property tax law, in relation to administrative and judicial review of assessments, and judicial review of state board determinations, in relation to county and state equalization rates and special franchises and to repeal subdivision one of section five hundred twelve and sections five hundred twelve-a, seven hundred seven, seven hundred sixty, fifteen hundred twenty-four and fifteen hundred twenty-six of the real property tax law relating thereto

IN THE SENATE BY: RULES
S. 10470

Bill compared by _____

DATE RECEIVED BY GOVERNOR:
7/12

ACTION MUST BE TAKEN BY:
7/23

GOVERNOR'S ACTION:

DATE JULY 23 1982

Memorandum No. _____

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L2 - 1982
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EREON

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56
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1982

ASSEMBLY

The Assembly bill
by Mr. Rules Calendar No. 1642 Assembly No. 13057
Sen. Rept. No. _____
Entitled: "

AN ACT to amend the real property law and the real property tax law, in relation to administrative and judicial review of assessments, and judicial review of state board determinations, in relation to county and state equalization rates and special franchises and to repeal subdivision one of section five hundred twelve and sections five hundred twelve-a, seven hundred seven, seven hundred sixty, fifteen hundred twenty-four and fifteen hundred twenty-six of the real property tax law relating thereto

" was read the third time DEBATE WAS HAD THEREON

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

AYE	Dist.		NAY	AYE	Dist.		NAY
	12	Mr. Ackerman			1	Mr. LaValle	
	47	Mr. Anderson			29	Mr. Leichter	
	49	Mr. Auer			8	Mr. Levy	
	16	Mr. Babbush			50	Mr. Lombardi	
	45	Mr. Barclay			24	Mr. Marchi	
	18	Mr. Bartosiewicz			5	Mr. Marino	
	23	~~Mr. Beatty~~			19	Mr. Markowitz	
	9	Mrs. Berman			55	Mr. Masiello	
	33	Mr. Bernstein			21	Mr. Mega	
	28	Mr. Bogues			30	Mrs. Mendez	
	41	Mr. Bruno			42	Mr. Nolan	
	34	Mr. Calandra			27	Mr. Ohrenstein	
	25	Mr. Connor			17	Mr. Owens	
	48	Mr. Cook			11	Mr. Padavan	
	60	Mr. Daly			53	Mr. Perry	
	46	Mr. Donovan			36	Mr. Pisani	
	6	Mr. Dunne			57	Mr. Present	
	44	Mr. Farley			39	Mr. Rolison	
	59	Mr. Floss			31	~~Mr. Ruiz~~	
	35	Mr. Flynn			40	Mr. Schermerhorn	
	32	Mr. Galiber			51	Mr. Smith	
	14	Mr. Gazzara			22	Mr. Solomon	
	13	Mr. Gold			56	Mr. Stachowski	
	37	Mrs. Goodhue			43	Mr. Stafford	
	26	Mr. Goodman			54	Mr. Steinfeldt	
	20	Mr. Halperin			3	Mr. Trunzo	
	4	Mr. Johnson			7	Mr. Tully	
	52	Mr. Kehoe			58	Mr. Volker	
	15	Mr. Knorr			10	Mr. Weinstein	
	2	Mr. Lack			38	Mrs. Winikow	

AYES 56
NAYS 2

Ordered, that the Secretary return said bill to the Assembly with a message that the Senate has concurred in the passage of the same.

A13057

NEW YORK STATE ASSEMBLY

REPRINT NO: 001
DATE: 07/01/82

DATE: 07/01/1982
TIME: 07:57:17 PM

BILL: A13057 R.R. NO: 976 SPONSOR: COM. ON RULES--

AN ACT TO AMEND THE REAL PROPERTY LAW AND THE REAL PROPERTY TAX LAW, IN RELATION TO ADMINISTRATIVE AND JUDICIAL REVIEW OF ASSESSMENTS, AND JUDICIAL REVIEW OF STATE BOARD DETERMINATIONS, IN RELATION TO COUNTY AND STATE EQUALIZATION RATES AND SPECIAL FRANCHISES AND TO REPEAL SUBDIVISION ONE OF SECTION FIVE HUNDRED TWELVE AND SECTIONS FIVE HUNDRED TWELVE-A, SEVEN HUNDRED SEVEN, SEVEN HUNDRED SIXTY, FIFTEEN HUNDRED TWENTY-FOUR AND FIFTEEN HUNDRED TWENTY-SIX OF THE REAL PROPERTY TAX LAW RELATING THERETO

YEA	ABRAMSON,E*	YEA	HARENBERG,PE*	YEA	PILLITTERE,JT*
YEA	BARBARO,FJ*	YEA	HARRIS,GH	YEA	PRESCOTT,DW
YEA	BEHAN,JL	YEA	HAWLEY,RS	YEA	PROUD,G*
YEA	BIANCHI,IW*	YEA	HEALEY,PB	YEA	RAPPLEYEA,CD
YEA	BOYLAND,WF*	YEA	HEVESI,AG*	ELB	RATH,DE
YEA	BRAGMAN,MJ*	YEA	HINCHEY,MD*	YEA	REILLY,JM
YEA	BRANCA,JR*	YEA	HIRSCH,S*	YEA	RETTALIATA,AP
YEA	BURROWS,GW	YEA	HOBLOCK,MJ	YEA	RIFORD,LS
YEA	BUSH,WE	YEA	HOCHBRUECKNER,GJ*	YEA	ROBACH,RJ*
YEA	BUTLER,DJ*	YEA	HOYT,WB*	YEA	ROBLES,VL*
YEA	CASALE,AJ	YEA	JACOBS,RS*	YEA	RUGGIERO,RS*
YEA	CHESBRO,RT	ABS	JENKINS,A*	YEA	RYAN,AW
YEA	COCHRANE,JC	YEA	KEANE,RJ*	YEA	SALAND,SM
YEA	COHEN,DL*	YEA	KELLEHER,NW	YEA	SANDERS,S*
YEA	CONNELLY,EA*	YEA	KENNEDY,RL	YEA	SCHIMMINGER,RL*
YEA	CONNERS,RJ*	YEA	KIDDER,RE*	YEA	SCHMIDT,FD*
YEA	COOKE,AT	YEA	KISOR,RM	YEA	SEARS,WR
YEA	DAMATO,AP	YEA	KOPPELL,GO*	YEA	SEMINERIO,AS*
YEA	DANDREA,RA	YEA	KREMER,AJ*	YEA	SERRANO,JE*
YEA	DANIELS,GL*	YEA	KUHL,JR	YEA	SHAFFER,GS*
YEA	DAVIS,G*	YEA	LAFAYETTE,IC*	YEA	SHEFFER,JB
YEA	DEARIE,JC*	YEA	LANE,CD	YEA	SIEGEL,MA*
YEA	DEL TORO,A*	YEA	LARKIN,WJ	YEA	SILVER,S*
YEA	DUGAN,EC*	YEA	LASHER,HL*	YEA	SIWEK,CA
YEA	EMERY,JL	YEA	LENTOL,JR*	YEA	SKELOS,DG
YEA	ENGEL,EL*	YEA	LEVY,E	YEA	SMOLER,H*
NAY	ESPOSITO,JA	YEA	LEWIS,W*	YEA	SPANO,NA
YEA	EVE,AO*	YEA	LIPSCHUTZ,GE*	YEA	STAVISKY,LP*
YEA	FARRELL,HD*	YEA	LOPRESTO,JG	YEA	STEPHENS,WH
YEA	FELDMAN,D*	YEA	MACNEIL,HS	YEA	STRANIERE,RA
YEA	FERRIS,J*	YEA	MADISON,GH	YEA	SULLIVAN,EC*
YEA	FINNERAN,WB*	YEA	MARCHISELLI,VA*	YEA	SULLIVAN,FM
YEA	FLACK,JT	YEA	MAZZA,GR	YEA	SULLIVAN,PM
YEA	FLANAGAN,JJ	YEA	MCCABE,JW*	YEA	TALLON,JR*
YEA	FORTUNE,TR*	YEA	MILLER,HM	YEA	TALOMIE,FG
YEA	FOSSEL,JS	EOR	MILLER,MH*	YEA	VANN,A*
YEA	FREDA,L*	ABS	MONTANO,A*	YEA	VELELLA,GJ
YEA	FRIEDMAN,G*	YEA	MORAHAN,TP	YEA	VIGGIANO,PM*
YEA	GOLDSTEIN,R*	YEA	MURPHY,MJ*	YEA	WALSH,DB*
YEA	GORSKI,DT*	YEA	MURTAUGH,JB*	YEA	WALSH,SP*
YEA	GOTTFRIED,RN*	YEA	NADLER,J*	YEA	WARREN,GE
YEA	GRABER,VJ*	YEA	NAGLE,JF	YEA	WEINSTEIN,HE*
YEA	GRANNIS,A*	YEA	NEHRBURGER,MW*	YEA	WEMPLE,CC
YEA	GREEN,RL*	EOR	NINE,L*	YEA	WEPRIN,S*
YEA	GREENE,A*	YEA	NORTZ,HR	YEA	WERTZ,RC
YEA	GRIFFITH,E*	YEA	ONEIL,JG	YEA	WILSON,CE*
YEA	HAGUE,JB	YEA	ORAZIO,AF*	YEA	WINNER,GH
YEA	HALPIN,PG*	YEA	PAROLA,FE	YEA	YEVOLI,LJ*
YEA	HANNA,TA	YEA	PASSANNANTE,WF*	YEA	ZIMMER,MN*
YEA	HANNON,K	YEA	PERONE,JM		MR. SPEAKER*

YEAS: 143 NAYS: 1

CONTROL: 89802394 CERTIFICATION:_____

LEGEND: YEA=YES,NAY=NO,NV=ABSTAIN,ABS=ABSENT,
ELB=EXCUSED FOR LEGISLATIVE BUSINESS,EOR=EXCUSED FOR OTHER REASONS.

S. 10470

10470

(1642)

BILL NUMBER:

INTRODUCED BY:

M E M O R A N D U M

AN ACT to amend the real property law and the real property tax law in relation to administrative and judicial review of assessments, and judicial review of state board determinations in relation to county and state equalization rates and special franchises, and to repeal subdivision one of section five hundred twelve and sections five hundred twelve-a, seven hundred seven, seven hundred sixty, fifteen hundred twenty-four and fifteen hundred twenty-six of such law

Purpose

This bill is intended to: (1) consolidate the provisions of the Real Property Tax Law relating to administrative review of assessments; (2) define the grounds for administrative, judicial and small claims assessment review and eliminate certain archaic terminology; (3) limit the proof in judicial proceedings to review special franchise assessments; and (4) relocate the provisions of the Real Property Tax Law providing for judicial review of State Board determinations in relation to county equalization and state equalization rates.

Summary of Provisions

This bill would consolidate most existing statutory provisions relating to administrative review of assessments in a new title one-A in article five of the Real Property Tax Law. References to Real Property Tax Law §§522-528 are to sections that would be contained in new title one-A. A distribution table is attached.

S. 10470
10470
1642

Bill section one would amend Real Property Tax Law §339-y(2) by deleting the authority of a board of managers, acting as agent of one or more unit owners, to seek administrative and judicial review of condominium assessments. The substance of these provisions would be transferred to Real Property Tax Law §§524(4) and a new 704(5).

Bill section two would amend Real Property Tax Law §102(4), which defines the term "Board of assessment review", by deleting the reference to Real Property Tax Law §1524 and by replacing it with a reference to Real Property Tax Law §523.

Bill section three would amend Real Property Tax Law §506(1) and (2) by deleting references to Real Property Tax Law §1526 and replacing them with references to Real Property Tax Law §526. This bill section would also delete the last sentence of Real Property Tax Law §506(2), relating to the date for boards of assessment review to meet for the purpose of hearing complaints in relation to assessments, anticipating that this language would be recodified as Real Property Tax Law §512(1) (see, bill section 4).

Bill sections four, five and six would amend Real Property Tax Law §512 relating to the hearing of complaints in relation to assessments. Bill section four would repeal Real Property Tax Law §512(1) and add a new §512(1) specifying the date for meetings of the board of assessment review to hear complaints in relation to assessments. The provisions of existing Real Property Tax Law §512(1) would be transferred to various sections of title one-A (see, attached distribution table). Bill section five would further amend Real Property Tax Law §512 by renumbering subdivision two as subdivision three, and by adding a new subdivision two specifying that the persons entitled to file complaints with the board of assessment review, the time and manner of filing such complaints and the grounds for review would be governed by Real Property Tax Law §524. Bill section six would amend Real Property Tax Law §512(3),

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as renumbered by bill section 5, by deleting the reference to Real Property tax Law §1524 and replacing it with a reference to title one-A, so that the powers and duties of boards of assessment review in respect to the hearing and determination of complaints in relation to assessments would be governed by title one-A. Real Property Tax Law §512 is maintained outside of title one-A because there are assessing units which are required to have boards of assessment review, but which also have assessment calendars established by local law or charter provision that differ from the general provisions of the Real Property Tax Law.

Bill section seven would repeal Real Property Tax Law §512-a. The substance of Real Property Tax Law §512-a would be recodified as Real Property Tax Law §527.

Bill section eight would amend Real Property Tax Law §514 to correct a reference to the "board of review" and to update the assessors' oath to take into account the revised standard of assessment set forth in Real Property Tax Law §305 as added by chapter 1057 of the Laws of 1981.

Bill section nine would add a new title one-A (§§522-528) to article five of the Real Property Tax Law, which would consolidate most of the existing provisions of articles 5 and 15-A relating to administrative review of assessments.

§522 Definitions

This section, read in conjunction with §524(2) of this title, would define the grounds for administrative review of assessments.

Section 522(4) would define "excessive assessment" as a ground for administrative review. Paragraph (a) would codify the traditional ground of "overvaluation". Paragraph (b), when read in conjunction with §522(8) defining "taxable assessed valuation, would make clear that denial of a partial exemption is subject to administrative review (See, Sikora Realty Corp. v. City of New York, 262 N.Y. 312, 186 N.E. 796; Young Womens Christian Association of the City of New York

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v. City of New York, 217 A.D. 406, 216 N.Y.S. 248, aff'd, 245 N.Y. 592, 157 N.E. 858). Paragraphs (c) and (d) are made necessary by chapter 1057 of the laws of 1981 and would make subject to administrative review a failure to comply with either the transition assessment provisions of Real Property Tax Law §1904 or the limitations on increases in assessed value set forth in real Property Tax Law §1805.

Section 522 (6) is derived from Real Property Tax Law §§1802(3) and 1903(7), added by chapter 1057 of the Laws of 1981, and would define "misclassification" as a ground for administrative review. The term "class designation" is defined in §522(3) by reference to Real Property Tax Law §§1802 and 1903.

Section 522(9) would define "unequal assessment" as a ground for administrative review. Paragraph (a), applicable to all assessing units other than special assessing units, would provide for traditional "whole roll" inequality. Paragraph (b) would provide for "class inequality" in special assessing units. These provisions extrapolate the definitions of inequality contained in Real Property Tax Law §§706 and 707. Paragraph (c) is derived from language added to Real Property Tax Law §512(1) by chapter 1022 of the Laws of 1981 and provides for whole roll and class inequality in the case of certain residential real property, regardless of the type of assessing unit in which such property is located.

Section 522(10) would defined "unlawful assessment" as a ground for review. Paragraphs a-e are intended to codify what are traditionally known as "illegal assessments", and with the exception of paragraph (c), were derived from Real Property Tax Law §550(7).

§523 Board of Assessment Review

Section 523(1) would recodify Real Property Tax Law §1524(1)(a), relating to the composition of boards of assessment review with an appropriate change in the

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statutory reference appearing in §1524(1)(a). The last two sentences of this subdivision would recodify Real Property Tax Law §1524(4), relating to compensation for members of boards of assessment review, with an appropriate change in the statutory reference appearing in §1524.

Section 523(2) would recodify Real Property Tax Law §1524(1)(b), relating to disclosure of potential conflicts of interest by members of boards of assessment review, with an appropriate change in the statutory reference appearing in §1524.

Section 523(3) would recodify Real Property Tax Law §1524(2)(e), which authorizes the Nassau County Board of Assessment Review to appoint a secretary.

§524 Complaints with Respect to Assessments

Section 524 is intended to set forth in one place the requirements which a taxpayer must satisfy to have administrative review of an assessment.

Section 524(1) would recodify the first sentence of Real Property Tax Law §1526(3) relating to the time and place of filing complaints in relation to assessments.

Section 524(2) and (3), read in conjunction with the definitions in section 522, would recodify the substance of Real Property Tax Law §512(1) relating to the contents of a complaint and the persons entitled to file a complaint. Additionally, the grounds for review would be expanded to take into account the provisions of Real Property Tax Law, articles 18 and 19 added by chapter 1057 of the Laws of 1981.

Section 524(4) recodifies the substance of Real Property Law §339-y(2), relating to the authority of a board of managers, acting as agent of one or more unit owners, to file a complaint with the board of assessment review.

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§525 Hearing and Determination of Complaints

Section 525 is intended to set forth the powers and duties of the board of assessment review in relation to hearing and determining complaints with respect to assessments.

Section 525(1) recodifies Real Property Tax Law §1524(2)(a), relating to the authority of the board of assessment review to fix the time and place of its meeting to hear complaints with respect to assessments.

Section 525(2) substantially recodifies Real Property Tax Law §1524(2)(b) and the last sentence of Real Property Tax Law §1524(3) relating to the powers and duties of the board of assessment review during the meeting to hear complaints with respect to assessments.

Section 525(3) would consolidate the first four sentences of Real Property Tax Law §1524(2)(c) and the fourth sentence of Real Property Tax Law §512(1), the latter as added by chapter 1022 of the Laws of 1981, relating to the powers and duties of the board of assessment review when determining complaints in relation to assessments.

Section 525(4) would recodify the remainder of Real Property Tax Law §1524(2)(c), relating to individual notice of the board of assessment review's determination and would make a technical correction to the seventh sentence of Real Property Tax Law §1524(2)(c) as added by chapter 1022 of the Laws of 1981.

§ 526 Assessors' Responsibilities

Section 526 would consolidate all of the assessors' responsibilities in relation to the administrative review of assessments, from the time of completion of the tentative assessment roll to the correction of the roll in accordance with the changes ordered to be made by the board of assessment review.

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§526(1) would recodify Real Property Tax Law §1526(1), relating to notice of completion of the tentative assessment roll.

§526(2) would recodify Real Property Tax Law §1526(2), relating to public inspection of the tentative assessment roll.

§526(3) would recodify the last sentence of Real Property Tax Law §526(3), requiring the assessor to transmit complaints received by him to the board of assessment review, with an appropriate change to the statutory reference appearing therein.

§526(4) would recodify the first sentence of Real Property Tax Law §1524(3), requiring the assessor to attend all hearings of the board of assessment review.

§526(5) would recodify Real Property Tax Law §1524(2)(d), requiring the assessor to enter on the assessment roll the changes made by the board of assessment review, with an appropriate change in the statutory reference appearing therein.

§527 Failure to Meet for Purpose of Hearing Complaints

Section 527 would recodify Real Property Tax Law §512-a.

§528 Application of Title

Section 528 would be derived from Real Property Tax Law §§1558, 1560 and 1562(1). When read in conjunction with new §522(5), it is intended to make the applicability of title one-A the same as Real Property Tax Law, Article 15-A.

Bill section ten would amend Real Property Tax Law §552(3) by deleting the reference to Real Property Tax Law §1524 and inserting a reference to Real Property Tax Law §§525 and 526.

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Bill section eleven would amend title one of article seven of the Real Property Tax Law by adding a §701 containing definitions. These definitions are intended to define the grounds for judicial review and would be similar to the definitions in Real Property Tax Law §522.

Bill section twelve would amend Real Property Tax Law §704 by adding a new subdivision five which would recodify the provisions of Real Property Law §339-y(2), relating to the authority of a board of managers, acting as agents for one or more unit owners, to seek judicial review of condominium assessments.

Bill section thirteen would amend Real Property Tax Law §706 by deleting §706(1) and adding a new §706(1), to be read in conjunction with Real Property Tax Law §701, specifying the grounds for review. The change to the last sentence of Real Property Tax Law §706(2) is intended to eliminate the reference to "illegality, error or inequality" without altering the substance of the sentence.

Bill section fourteen would repeal Real Property Tax Law §707 because this section would be superfluous when Real Property Tax Law §706 is read in conjunction with the definitions in §701.

Bill sections fifteen-nineteen would amend Real Property Tax Law §§710, 720(1), 726(1), 726(2) and 726(3), to delete references to "illegal" and "erroneous" assessments in favor of "unlawful" and "excessive" assessments, and to provide for misclassification of real property.

Bill section twenty would add Real Property Tax Law §729, a definitional section, to title one-A of article seven of the Real Property Tax Law. The definitions contained in this section would be similar to those that would be contained in Real Property Tax Law §522, however, the definition of "excessive assessment" would not refer to transition assessments in "approved assessing units", nor to limitations on increases in assessed value in "special assessing units". Additionally, the definition of

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"unequal assessment" would be derived from Real Property Tax Law §730. These provisions are intended to maintain the scope of review currently authorized by article seven, title one-A.

Bill section twenty-one would amend Real Property Tax Law §730(1), relating to the grounds for judicial small claims assessment review, so that it would be read in conjunction with Real Property Tax Law §729. Real Property Tax Law §730(2), relating to individual notice of the hearing officer's determinations, would be amended to delete the reference to Real Property Tax Law §1524, replacing it with a reference to Real Property Tax Law §525(4). Real Property Tax Law §730(4), relating to the contents of the judicial small claims assessment review petition would be amended to add a reference to "taxable assessed value".

Bill sections twenty-two and twenty-three would amend Real Property Tax Law §§729 and 734 to delete references to "erroneous" assessments in favor of "excessive" assessments.

Bill section twenty-four would amend Real Property Tax Law §744(1) to provide that in a judicial proceeding to review a special franchise assessment the state equalization rate or special equalization rate used in determining the final special franchise assessment shall be binding and conclusive on the parties.

Bill sections twenty-five through twenty-seven would repeal Real Property Tax Law §760, relating to judicial review of State Board determinations in relation to county equalization and state equalization rates, and recodify the substance of §760 in new Real Property Tax Law §§830 and 1218.

Bill section twenty-eight would repeal Real Property Tax Law §§1524 and 1526.

Bill section twenty-nine would provide for an effective date.

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Existing Law

Real Property Law §339-y provides for administrative and judicial review of condominium assessments.

Real Property Tax Law §506(1) and (2) and Real Property Tax Law §1526(1) and (2) provide for notice of completion of the tentative assessment roll and public examination of the tentative assessment roll.

Real Property Tax Law §§512 and 1524 provide for administrative review of complaints in relation to assessments before boards of assessment review as defined in Real Property Tax Law §102(4). The scope of the review authorized by these provisions is expressly limited to the determination of whether an assessment is "illegal", "erroneous" or "unequal". The grounds for review are not defined in these provisions except in the case where a complaint specifies that an assessment is unequal and the property is improved by a one, two or three family residence. Additionally, Real Property Tax Law §§1802(3) and 1903(7) provide that the classification of real property pursuant to these sections is also subject to administrative review.

Real Property Tax Law §512-a provides for administrative review of assessments in the event that the board of assessment review fails to meet for this purpose.

Real Property Tax Law §514 requires assessors to make an oath and verification before filing their finally completed assessment rolls.

Real Property Tax Law §552 sets forth the procedure to be used for the correction of clerical errors and unlawful entries on tentative assessment rolls.

Title one of article seven of the Real Property Tax Law (§§700 et seq) authorizes a taxpayer to institute a proceeding in supreme court to review an assessment. The scope of the review authorized by these provisions is whether an assessment if "illegal", "erroneous by reason of overvaluation or misclassification" or "unequal" in

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that the assessment has been made "at a higher proportionate valuation than the assessment of other real property" (assessing units other than "special assessing units"; see, Real Property Tax Law §706) or "at a higher proportionate valuation than the assessment of other real property in the same class" ("special assessing units"; see, Real Property Tax Law §707). The terms "illegality", "erroneous by reason of overvaluation" and "misclassification" are not statutorily defined.

Title one-A of article seven of the Real Property Tax Law authorizes owners of certain residential real property to seek small claims judicial review of the assessment of such property. The scope of review is expressly limited to the determination of whether an assessment is "erroneous by reason of overvaluation" or "unequal" in that the assessment is "at a higher proportion of value than other residential property...or at a higher proportion of value than all property". The phrase "erroneous by reason of overvaluation" is not defined by statute.

Real Property Tax Law §744 governs action by the court in judicial proceedings to review special franchise assessments and subdivision one thereof provides that "the court may take evidence as it may deem necessary...and determine all questions raised by the petition and the answer thereto".

Real Property Tax law §760 provides for judicial review, pursuant to article 78 of the Civil Practice Laws and Rules, of State Board determinations relating to county equalization and state equalization rates.

Statement in Support

The Real Property Tax Law was enacted in 1958 (L.1958, c.959) and recodified most of the real property tax provisions then found in the Tax Law, the Village Law, the Education Law and other miscellaneous statutes. The purpose of this recodification, as noted in the Governor's approval memorandum, was to lighten the

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burden of assessors and provide public officials and taxpayers with a more useful tool in coping with the complicated real property tax system of the State, "Through rearrangement of subject matter, simplification of language and the elimination of obsolete provisions...". This bill is a continuation of that effort.

Administrative review of assessments by locally constituted boards of assessment review is currently governed by various provisions of articles five, fifteen-A, eighteen and nineteen of the Real Property Tax Law. This bill would rearrange and consolidate these statutory provisions into a new title one-A located in article five of the Real Property Tax Law. The focus of this effort is to clearly delineate the various responsibilities of taxpayers, boards of assessment review and assessors. This will serve to facilitate understanding of the administrative review process by both taxpayers and public officials.

More importantly, this bill would also define the grounds for administrative, as well as judical review of assessments. This aspect of the bill is imperative if confusion is to be avoided in the wake of two significant 1981 amendments to the Real Property Tax Law.

Prior to 1981, the scope of administrative and judicial review of assessments was limited to a determination of whether an assessment was "illegal", "erroneous by reason of overvaluation", or "unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other real property on the same roll". Further refinement of these grounds for review was left to case law.

Chapter 1022 of the Laws of 1981 amended the Real Property Tax Law to provide for "small claims" assessment review. This measure amended the administrative review provisions to define an "unequal" assessment, in the case of certain residential real property, in terms of either whole roll or class inequality. Additionally, this measure added a new title one-A to article seven authorizing judicial

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small claims assessment review in the case of certain residential real property where it is alleged that the assessment is "unequal in that it has been made at a higher proportion of value than other residential property on the same roll or at a higher proportion of value than all property on the same roll or erroneous by reason of valuation".

Chapter 1057 of the Laws of 1981 established "special assessing units" and "approved assessing units", provided for various classifications of real property in each, and made "misclassification" a ground for administrative and judicial review. Moreover, this legislation provided for limitations on increases in assessed value applicable to special assessing units, and transition assessments applicable in approved assessing units, which could become the focus of administrative and judicial review. In either of these cases the precise grounds for review are not specified in the statute and presumably left to case law. Finally, chapter 1057 also amended the provisions of title one of article seven to establish "class inequality" as a ground for judicial review in "special assessing units", while retaining "whole roll" inequality for the remainder of the State. However this legislation did not specify whether administrative review in special assessing units is limited to "class inequality", "whole roll" inequality or both.

The combined effect of the 1981 legislation and the reliance on the courts to refine the grounds for administrative and judicial review makes it very difficult for taxpayers and public officials to know the precise grounds for assessment review. This bill would remedy this situation by specifically defining the grounds for administrative, judicial and judicial small claims assessment review. Additionally the uninformative and archaic terms "erroneous" and "illegal", as they relate to assessments, would be deleted in favor of the terms "excessive" and "unlawful".

With respect to judicial proceedings to review special franchise assessments, this bill would supersede the holding in Consolidated Edison Company of New York v.

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State Board of Equalization and Assessment, 73 A.D.2d 31, 425 N.Y.S.2d 651, aff'd 53 N.Y.2d 975, 441 N.Y.S.2d 9, thereby clarifying the Legislative intent as to the relationships between articles 6 and 7 of the Real Property Tax Law and between titles one and two within article 7 of the Real Property Tax Law. This has become more necessary in view of the amendments made by chapter 1057 of the Laws of 1981.

Finally, this bill would remove the statutory provisions concerning judicial review of State Board determinations in relation to county equalizations and state equalization rates from article seven of the Real Property Tax Law, and recodify these provisions in articles eight and twelve where they more properly belong.

Budget Implications:

None on the State or Local level.

FH. -

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BUDGET REPORT ON BILLS

Session Year: 19 82

SENATE

JUL 15 1982

Introduced by:

ASSEMBLY

No.

Committee on Rules

No. 13057

Law: Real Property
Real Property Tax

Sections:

Division of the Budget recommendation on the above bill:

Approve: X Veto: ____ No Objection: ____ No Recommendation: ____

1. Subject and Purpose:

This bill consolidates and recodifies provisions in the Real Property and Real Property Tax Laws concerning administrative and judicial assessment review. It also limits proof of inequality in special franchise assessment appeals to the State equalization rate.

2. Summary of Provisions: Currently, a number of administrative assessment review provisions are scattered throughout Real Property and Real Property Tax Laws. In addition to consolidating these provisions, this bill, effective January 1, 1983, would:

- clarify the conditions under which assessments may be appealed; and

- stipulate that the State equalization rate or special equalization rate shall be the sole factor considered in reviewing the assessment appeal of a special franchise (utilities using a public right of way). This provision would be retroactive to January 1, 1973.

3. Prior Legislative History: None for this bill.

4. Arguments in Support:

a. This bill would facilitate the assessment review process by better defining the review responsibilities of property owners, assessment review boards and assessors.

b. By retroactively restricting evidence in special franchise assessment appeals to the State equalization rate, this proposal could limit potential local government tax refund liabilities that could result from pending court challenges. Utilities such as Con Edison that have filed assessment appeals based on the use of other assessment computation methods would not be eligible for refunds unless the State special equalization rate is used as the basis for the appeal.

5. Possible Objections: Utility companies may argue that their ability to appeal special franchise assessments would be unfairly limited by restricting hearing evidence to the State special equalization rate, rather than allowing the use of such assessment computation methods as all-sales or sample selection. However, these alternative methods had not been available for application in special franchise reviews until a recent Court of Appeals decision. By limiting evidence to the special

Date: ____ Examiner: ____

Disposition: Chapter No. Veto No.

equalization rate, this bill restores the appeals process to its prior state.

6. Other State Agencies Interested: The State Board of Equalization and Assessment strongly supports this bill.

7. Known Position of Others: The New York State Association of Counties, the Association of Towns and New York City support this bill. Utility companies can be expected to oppose the bill.

8. Budgetary Implications: None for the State.

9. Recommendation: This bill consolidates existing administrative assessment review provisions, and establishes the State equalization rate as the sole source of proof of inequality in special franchise assessment appeals. Since the bill would clarify assessment appeals practices and could possibly limit local tax refund liabilities, the Division recommends enactment.

May 14, 1992

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JUL 20 1982

TO COUNSEL TO THE GOVERNOR

RE: SENATE
ASSEMBLY 13057

Inasmuch as this bill does not appear to relate to the functions of the Department of Law, I am not commenting thereon, at this time. However, if there is a particular aspect of the bill upon which you wish comment, please advise me.

ROBERT ABRAMS
Attorney General

Dated: JUL 13 1982

C-714 A-13057

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
ALBANY, NEW YORK
12236

EDWARD V. REGAN
STATE COMPTROLLER

July 22, 1982

JUL 22 1982

REPORT TO THE GOVERNOR ON LEGISLATION

TO: The Honorable John G. McGoldrick, Counsel to the Governor

RE: Assembly Int. 13057

INTRODUCED BY: Committee on Rules

TITLE: AN ACT to amend the real property law and the real property tax law, in relation to administrative and judicial review of assessments, and judicial review of state board determinations, in relation to county and state equalization rates and special franchises and to repeal subdivision one of section five hundred twelve and sections five hundred twelve-a, seven hundred seven, seven hundred sixty, fifteen hundred twenty-four and fifteen hundred twenty-six of the real property tax law relating thereto

EFFECTIVE DATE: January 1, 1983 except that section 24 shall take effect immediately

RECOMMENDATION: No objection

DISCUSSION:

This bill amends the Real Property Law and Real Property Tax Law in relation to the administrative and judicial review of assessments and the judicial review of special franchise assessments.

The bill assembles provisions relating to the administrative review of assessments into new title 1-A of Article 5 of the Real Property Tax Law and includes a definitional section (section 522) for purposes of clarifying the subject area. It also includes separate sections setting forth the responsibilities of property owners as to complaints (section 524), the

requirements as to hearing and determination of complaints by the board of assessment review (section 525) and the responsibilities of the assessors concerning the tentative assessment roll (section 526).

Article 7, which pertains to the judicial review of assessments, is amended by the addition of a new section 701 which sets forth the same definitions employed in the new title 1-A (section 522). A definitional section is also added for use in small claims assessment review (section 729).

Subdivision (1) of section 744 is also amended to provide that evidence on the issue of whether a special franchise assessment is unequal shall be limited to the State equalization rate or the special equalization rate used in determining the final special franchise assessment under review.

The Office of State Comptroller has no objection to this bill.

EDWARD V. REGAN
State Comptroller

By

Joseph L. Cohen
Deputy Counsel

JLC:JLK:kh

A-13057

DAVID GASKELL
SECRETARY OF THE BOARD

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE BOARD OF EQUALIZATION AND ASSESSMENT
AGENCY BUILDING #4 - EMPIRE STATE PLAZA
ALBANY, NEW YORK 12223

ROBERT L. BEEBE
COUNSEL

July 16, 1982

Hon. John G. McGoldrick
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Dear Mr. McGoldrick:

Re: Assembly Bill No. 13057
By: Committee on Rules

The attachments to this letter summarize in detail the recodification which would be accomplished by the above-captioned bill. As described in those materials, the provisions to be recodified relate to the administrative and judicial review of assessments. These provisions, currently located in Articles 5, 15-A and 7 of the Real Property Tax Law, are a combination of sections of law previously recodified from several statutes in 1958 (c.959) and a series of post 1958 amendments to the Real Property Tax Law.

Among the most significant of the recent amendments are those creating the so-called independent board of assessment review (L.1970, c.957), the small claims assessment review program (L.1981, c.1022) and the classification concept of new Articles 18 and 19 (L.1981, c.1057). The above-captioned bill would consolidate these provisions and modernize some of the terminology, particularly by the addition of definitions. The resulting new title 1-A of Article 5 for administrative review and revised titles 1 and 1-A of Article 7 for judicial review would provide a clear statutory structure of the review of assessments.

We are aware that a minor technical problem would apparently be created by the enactment of both this bill and Senate 9184-B (i.e., Real Property Tax Law, §514), but that problem can easily be resolved by an amendment next year.

Bill section 24 of the above-captioned bill would overrule the decisions of the Court of Appeals and Special Term[1] on the issues of pleading and proving inequality in the ongoing litigation between Consolidated Edison and the State Board. Although our position in this aspect of the litigation was upheld by Judge Koreman at Special Term, on appeal, the Appellate Division reversed and the Court of Appeals affirmed the Appellate Division.[2] All of the dissenting judges, Greenblott in the Appellate Division, and Cooke, Jones and Meyer of the Court of Appeals, recorded their agreement with our position on the basis of Judge Koreman's opinion.

On the other hand, the opinion of Judge Mahoney, which was the basis for the four votes in the Appellate Division and the four votes in the Court of Appeals, concluded that "We cannot agree ... that it was the Legislature's intent to foreclose special franchise owners from attempting to prove the inequality of their assessments." Clearly, the passage of the above-captioned bill indicates that this was and is precisely the Legislature's intent.

The lawsuit was commenced because Consolidated Edison wants a fundamental change in the valuation methodology used by the State Board for special fracnhise properties. In our judgment, the most significant reason for the very existence of the ratio issue in this litigation is the confusion of the past several years in regard to the use of the equalization rate in certiorari proceedings commenced by owners of non-special franchise property (Real Property Tax Law, Article 7). The several statutory amendments beginning in 1977 and culminating in chapter 1057 of the Laws of 1981, have produced a host of judicial decisions, many of which are ambiguous and some of which reflect the inconsistent statutory amendments.[3] Consolidated Edison understandably took advantage of this situation, particularly with respect to the Standard Brands[4] decisions and chapter 126 of the Laws of 1979.

The resulting judicial interpretations in this litigation hold that Consolidated Edison may prove ratio and that in special assessing units the equalization rate is not even admissible.

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[1] Consolidated Edison v. State Board of Equalization and Assessment, S.Ct., Albany Co., January 25, 1982, Lowery, J.

[2] Consolidated Edison v. State Board of Equalization and Assessment, 98 Misc.2d 491, rev., 2 App.Div.2d 31, aff'd, 53 N.Y.2d 975 (opinions enclosed).

[3] These amendments and decisions, with which you are quite familiar, are summarized in the recent Court of Appeals opinion in the J.A. Green case, a copy of which is also enclosed.

[4] Standard Brands, Inc. v. Walsh, 92 Misc.2d 903, aff'd, 60 App.Div.2d 605, mot. for lv. to app. denied, 43 N.Y.2d 649.

These decisions effectively supersede section 606, which directs the Board to use the latest state equalization rate or special equalization rate. In addition, the decisions reject the separate and distinct treatment of special franchise properties.

For purposes of the administration of the special franchise assessment program (Real Property Tax Law, Article 6), we believe the Consolidated Edison decisions place the State Board (and, necessarily, the municipalities in which special franchise property is located) in an untenable position. In effect, the equalization rate, which must be used by the State Board pursuant to section 606, cannot be defended in court.

Based upon our exhaustive analyses of classification and delegation associated with Senate 7000-A of 1981, we believe that in terms of constitutional law it is certain that the Legislature may single out special franchise property for separate tax treatment. Indeed the constitutionality of Article 6 was upheld in Metropolitan Street Railway (174 N.Y. 417), and the system which would be codified by this bill was specifically addressed by Judge Koreman in terms of constitutional issues. In addition, there is no indication in either the Appellate Division reversal or the Court of Appeals affirmance that the appellate courts were concerned with that possibility.

There remains the retroactive effective date (bill section 29) which we recognize may become an issue in the litigation. We believe that a strong case can and will be made for the constitutionality of the provision. In our judgment, it is essential to make the distinction between the special franchise proceeding (wherein ratio is fixed by section 606) and all other non-special franchise Article 7 proceedings, wherein ratio is one of the factors which must be proven (Real Property Tax Law, §720(3); see also, Real Property Tax Law, §305(2)).

Bearing in mind this distinction, we believe the language of Slewett & Farber, Colt and J.A. Green is more than adequate support for the proposition that the effect of this legislation, which would precede the entry of any judgment on ratio in this litigation, may be made retroactive.

Finally, we note two important factors. First, the legislation would in no way foreclose Consolidated Edison (or any special franchsie owner) from the review of the full value of the property. And, second, the larger portion of the utility industry's property, the non-special franchise properties (which are generally overassessed by local assessors (consider the treatment of class three property in new Article 18) is eligible for assessment review under Article 7, with proof of ratio pursuant to section 720(3).

Both because of the utility of the recodification and because of the urgency of the special franchise administrative provision, we respectfully urge that the above-captioned bill be approved.

Very truly yours,

Robert L. Beebe

Attachments:

cc: Mr. Gaskell
Members of the State Board
of Equalization and Assessment

Memorandum

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF EQUALIZATION AND ASSESSMENT

July 8, 1982

TO: Mr. Beebe

FROM: Michael E. Kupferman MEK

SUBJECT: Assembly Bill No. 13057
By: The Committee on Rules

This bill would recodify the provisions of the Real Property Law and the Real Property Tax Law relating to administrative, judicial and small claims judicial review of assessments, and judicial review of State Board determinations of county equalization and state equalization rates. The subject bill would also amend Real Property Tax Law section 744(1) to provide that in a judicial proceeding to review a special franchise assessment, the state equalization or special equalization rate used in determining the special franchise assessment shall be binding and conclusive on the parties.

The attached Memorandum in Support of the subject bill sets forth in great detail the contemplated recodification and includes a distribution table. References in the memorandum to Real Property Law section 339-y(2) are incorrect (Real Property Law §339-y(2) was renumbered subdivision (4) by L.1981, c.1052); however, the subject bill contains the proper statutory references. The need for the recodification is set forth in the memorandum at page 11 et. seq.. Rather than repeating the detail contained in the memorandum, the following is a summary of the major features of the recodification.

Administrative Review of Assessments (Bill sections 1-10 and 28)

As a result of the enactment of the so-called Assessment Improvement Law of 1970 (L.1970, c.957), the statutory provisions governing administrative review of assessments are located in Articles 5 and 15 of the Real Property Tax Law. The subject bill would repeal Real Property Tax Law sections 512(1), 512-a, 1524 and 1526 and reenact the substance of these provisions in a new title one-a, located within Article 5 of the Real Property Tax Law, entitled "Administrative Review of Assessments". This is desirable because adminstrative review of assessments is an integral part of the process of preparing assessment rolls. Moreover, consolidation of these provisions into one title would make it easier for taxpayers and local officials to understand the administrative review process.

The provisions of the new title would also modernize the terminology used to describe the grounds for administrative review, and as modified, would set forth comprehensive definitions of the various grounds for administrative review. In view of the enactment of chapters 1022 and 1057 of the Laws of 1981, which established three separate definitions of inequality and established misclassification as an entirely new ground for review and provided for transition assessments and limitations on increases in assessed value, this aspect of the subject bill is particularly desirable.

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, Real Property Tax Law 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.

Judicial Review of Assessments (Bill sections 11-19)

Chapter 1057 of the Laws of 1981 established one definition of inequality for special assessing units and another for all other assessing units. As a result, there are now two sections in title one of Article 7 of the Real Property Tax Law — section 706 which is applicable to assessing units other than special assessing units and section 707 which is applicable to special assessing units -- governing the contents of petitions for judicial review. The subject bill would repeal Real Property Tax Law section 707 and would amend Real Property Tax Law section 706 to apply to all assessing units.

The grounds for judicial review would be set forth in Real Property Tax Law section 706 and comprehensively defined in a new Real Property Tax Law section 701. The definitions would separately define the term "unequal assessment" for special assessing units and for all other assessing units. The definitions would also clarify several other ambiguities created by chapter 1057 by defining misclassification, and by providing for judicial review of transition assessments and of judicial review of the application of assessment limitations, taking into account the differences between special assessing units and all other assessing units. Additionally, the terminology used to describe the grounds for judicial review would be modernized throughout title one of Article 7 of the Real Property Tax Law. These features of the subject bill are similar to the changes that would be made in relation to administrative review and would facilitate taxpayer and local official understanding of the judicial review process.

Small Claims Judicial Review of Assessments (Bill sections 20-23)

Title one-a of Article 7 of the Real Property Tax Law would be amended by modernizing the terminology used to describe the grounds for review and by adding a new section 729 defining the grounds for small claims judicial review. These changes are similar to the changes that would be made in connection with administrative and judicial review and would also facilitate understanding by the public.

Judicial Review of State Board Determinations in Relation to County Equalization and State Equalization Rates (Bill sections 25-27)

Real Property Tax Law section 760 would be repealed. The substance of this provision would be recodified as new Real Property Tax Law sections 830 and 1218 .

With respect to proof of ratio in a judicial proceeding to review a special franchise assessment, Real Property Tax Law section 744(1) currently provides that in such a proceeding "... the court may take evidence as it may deem necessary ... and hear and determine all questions raised by the petition and the answer thereto." In Consolidated Edison Company of New York v. State Board of Equalization and Assessment, 73 A.D.2d 31, 425 N.Y.S.2d 651 (1980) aff'd ~~w/o~~ 553 N.Y.2d 975, 441 N.Y.S.2d 669 (1981), the Court held that ratio is an issue which may be litigated in a judicial proceeding to review a special franchise assessment alleged to be unequal, and that ratio may be proved by any of the methods set forth in Real Property Tax Law, section 720(3) (i.e., select parcel method, analysis of actual sales or introduction of the state equalization rate). The subject bill (bill section 24) would supercede this Court decision by making the State equalization rate conclusive and binding upon the parties on the issue of whether a special franchise assessment is unequal.

If approved, the bill would become effective on January 1, 1983, except that the provision relating to judicial review of special franchise assessments would take effect immediately and apply to any proceeding commenced on or after January 1, 1973 and not finally determined as of the effective date hereof and to all proceedings hereafter commenced.

M E M O R A N D U M

AN ACT to amend the real property law and the real property tax law in relation to administrative and judicial review of assessments, and judicial review of state board determinations in relation to county and state equalization rates, and to repeal subdivision one of section five hundred twelve and sections five hundred twelve-a, seven hundred seven, seven hundred sixty, fifteen hundred twenty-four and fifteen hundred twenty-six of such law

Purpose

This bill is intended to: (1) consolidate the provisions of the Real Property Tax Law relating to administrative review of assessments; (2) define the grounds for administrative, judicial and small claims assessment review and eliminate certain archaic terminology; (3) limit the proof in judicial proceedings to review special franchise assessments; and (4) relocate the provisions of the Real Property Tax Law providing for judicial review of State Board determinations in relation to county equalization and state equalization rates.

Summary of Provisions

This bill would consolidate most existing statutory provisions relating to administrative review of assessments in a new title one-A in article five of the Real Property Tax Law. References to Real Property Tax Law §§522-528 are to sections that would be contained in new title one-A. A distribution table is attached.

Bill section one would amend Real Property Tax Law §339-y(2) by deleting the authority of a board of managers, acting as agent of one or more unit owners, to seek administrative and judicial review of condominium assessments. The substance of these provisions would be transferred to Real Property Tax Law §§524(4) and a new 704(5).

Bill section two would amend Real Property Tax Law §102(4), which defines the term "Board of assessment review", by deleting the reference to Real Property Tax Law §1524 and by replacing it with a reference to Real Property Tax Law §523.

Bill section three would amend Real Property Tax Law §506(1) and (2) by deleting references to Real Property Tax Law §1526 and replacing them with references to Real Property Tax Law §526. This bill section would also delete the last sentence of Real Property Tax Law §506(2), relating to the date for boards of assessment review to meet for the purpose of hearing complaints in relation to assessments, anticipating that this language would be recodified as Real Property Tax Law §512(1) (see, bill section 4).

Bill sections four, five and six would amend Real Property Tax Law §512 relating to the hearing of complaints in relation to assessments. Bill section four would repeal Real Property Tax Law §512(1) and add a new §512(1) specifying the date for meetings of the board of assessment review to hear complaints in relation to assessments. The provisions of existing Real Property Tax Law §512(1) would be transferred to various sections of title one-A (see, attached distribution table). Bill section five would further amend Real Property Tax Law §512 by renumbering subdivision two as subdivision three, and by adding a new subdivision two specifying that the persons entitled to file complaints with the board of assessment review, the time and manner of filing such complaints and the grounds for review would be governed by Real Property Tax Law §524. Bill section six would amend Real Property Tax Law §512(3).

as renumbered by bill section 5, by deleting the reference to Real Property tax Law §1524 and replacing it with a reference to title one-A, so that the powers and duties of boards of assessment review in respect to the hearing and determination of complaints in relation to assessments would be governed by title one-A. Real Property Tax Law §512 is maintained outside of title one-A because there are assessing units which are required to have boards of assessment review, but which also have assessment calendars established by local law or charter provision that differ from the general provisions of the Real Property Tax Law.

Bill section seven would repeal Real Property Tax Law §512-a. The substance of Real Property Tax Law §512-a would be recodified as Real Property Tax Law §527.

Bill section eight would amend Real Property Tax Law §514 to correct a reference to the "board of review" and to update the assessors' oath to take into account the revised standard of assessment set forth in Real Property Tax Law §305 as added by chapter 1057 of the Laws of 1981.

Bill section nine would add a new title one-A (§§522-528) to article five of the Real Property Tax Law, which would consolidate most of the existing provisions of articles 5 and 15-A relating to administrative review of assessments.

§522 Definitions

This section, read in conjunction with §524(2) of this title, would define the grounds for administrative review of assessments.

Section 522(4) would define "excessive assessment" as a ground for administrative review. Paragraph (a) would codify the traditional ground of "overvaluation". Paragraph (b), when read in conjunction with §522(8) defining "taxable assessed valuation, would make clear that denial of a partial exemption is subject to administrative review (See, Sikora Realty Corp. v. City of New York, 252 N.Y. 312, 186 N.E. 796; Young Womens Christian Association of the City of New York

v. City of New York, 217 A.D. 406, 216 N.Y.S. 248, aff'd, 245 N.Y. 592, 157 N.E. 858). Paragraphs (c) and (d) are made necessary by chapter 1057 of the laws of 1981 and would make subject to administrative review a failure to comply with either the transition assessment provisions of Real Property Tax Law §1904 or the limitations on increases in assessed value set forth in real Property Tax Law §1805.

Section 522 (6) is derived from Real Property Tax Law §§1802(3) and 1903(7), added by chapter 1057 of the Laws of 1981, and would define "misclassification" as a ground for administrative review. The term "class designation" is defined in §522(3) by reference to Real Property Tax Law §§1802 and 1903.

Section 522(9) would define "unequal assessment" as a ground for administrative review. Paragraph (a), applicable to all assessing units other than special assessing units, would provide for traditional "whole roll" inequality. Paragraph (b) would provide for "class inequality" in special assessing units. These provisions extrapolate the definitions of inequality contained in Real Property Tax Law §§706 and 707. Paragraph (c) is derived from language added to Real Property Tax Law §512(1) by chapter 1022 of the Laws of 1981 and provides for whole roll and class inequality in the case of certain residential real property, regardless of the type of assessing unit in which such property is located.

Section 522(10) would defined "unlawful assessment" as a ground for review. Paragraphs a-e are intended to codify what are traditionally known as "illegal assessments", and with the exception of paragraph (c), were derived from Real Property Tax Law §550(7).

§523 Board of Assessment Review

Section 523(1) would recodify Real Property Tax Law §1524(1)(a), relating to the composition of boards of assessment review with an appropriate change to

statutory reference appearing in §1524(1)(a). The last two sentences of this subdivision would recodify Real Property Tax Law §1524(4), relating to compensation for members of boards of assessment review, with an appropriate change in the statutory reference appearing in §1524.

Section 523(2) would recodify Real Property Tax Law §1524(1)(b), relating to disclosure of potential conflicts of interest by members of boards of assessment review, with an appropriate change in the statutory reference appearing in §1524.

Section 523(3) would recodify Real Property Tax Law §1524(2)(e), which authorizes the Nassau County Board of Assessment Review to appoint a secretary.

§524 Complaints with Respect to Assessments

Section 524 is intended to set forth in one place the requirements which a taxpayer must satisfy to have administrative review of an assessment.

Section 524(1) would recodify the first sentence of Real Property Tax Law §1526(3) relating to the time and place of filing complaints in relation to assessments.

Section 524(2) and (3), read in conjunction with the definitions in section 522, would recodify the substance of Real Property Tax Law §512(1) relating to the contents of a complaint and the persons entitled to file a complaint. Additionally, the grounds for review would be expanded to take into account the provisions of Real Property Tax Law, articles 18 and 19 added by chapter 1057 of the Laws of 1981.

Section 524(4) recodifies the substance of Real Property Law §339-y(2), relating to the authority of a board of managers, acting as agent of one or more unit owners, to file a complaint with the board of assessment review.

§525 Hearing and Determination of Complaints

Section 525 is intended to set forth the powers and duties of the board of assessment review in relation to hearing and determining complaints with respect to assessments.

Section 525(1) recodifies Real Property Tax Law §1524(2)(a), relating to the authority of the board of assessment review to fix the time and place of its meeting to hear complaints with respect to assessments.

Section 525(2) substantially recodifies Real Property Tax Law §1524(2)(b) and the last sentence of Real Property Tax Law §1524(3) relating to the powers and duties of the board of assessment review during the meeting to hear complaints with respect to assessments.

Section 525(3) would consolidate the first four sentences of Real Property Tax Law §1524(2)(c) and the fourth sentence of Real Property Tax Law §512(1), the latter as added by chapter 1022 of the Laws of 1981, relating to the powers and duties of the board of assessment review when determining complaints in relation to assessments.

Section 525(4) would recodify the remainder of Real Property Tax Law §1524(2)(c), relating to individual notice of the board of assessment review's determination and would make a technical correction to the seventh sentence of Real Property Tax Law §1524(2)(c) as added by chapter 1022 of the Laws of 1981.

§ 526 Assessors' Responsibilities

Section 526 would consolidate all of the assessors' responsibilities in relation to the administrative review of assessments, from the time of completion of the tentative assessment roll to the correction of the roll in accordance with the changes ordered to be made by the board of assessment review.

§526(1) would recodify Real Property Tax Law §1526(1), relating to notice of completion of the tentative assessment roll.

§526(2) would recodify Real Property Tax Law §1526(2), relating to public inspection of the tentative assessment roll.

§526(3) would recodify the last sentence of Real Property Tax Law §526(3), requiring the assessor to transmit complaints received by him to the board of assessment review, with an appropriate change to the statutory reference appearing therein.

§526(4) would recodify the first sentence of Real Property Tax Law §1524(3), requiring the assessor to attend all hearings of the board of assessment review.

§526(5) would recodify Real Property Tax Law §1524(2)(d), requiring the assessor to enter on the assessment roll the changes made by the board of assessment review, with an appropriate change in the statutory reference appearing therein.

§527 Failure to Meet for Purpose of Hearing Complaints

Section 527 would recodify Real Property Tax Law §512-a.

§528 Application of Title

Section 528 would be derived from Real Property Tax Law §§1558, 1560 and 1562(1). When read in conjunction with new §522(5), it is intended to make the applicability of title one-A the same as Real Property Tax Law, Article 15-A.

Bill section ten would amend Real Property Tax Law §552(3) by deleting the reference to Real Property Tax Law §1524 and inserting a reference to Real Property Tax Law §§525 and 526.

Bill section eleven would amend title one of article seven of the Real Property Tax Law by adding a §701 containing definitions. These definitions are intended to define the grounds for judicial review and would be similar to the definitions in Real Property Tax Law §522.

Bill section twelve would amend Real Property Tax Law §704 by adding a new subdivision five which would recodify the provisions of Real Property Law §339-y(2), relating to the authority of a board of managers, acting as agents for one or more unit owners, to seek judicial review of condominium assessments.

Bill section thirteen would amend Real Property Tax Law §706 by deleting §706(1) and adding a new §706(1), to be read in conjunction with Real Property Tax Law §701, specifying the grounds for review. The change to the last sentence of Real Property Tax Law §706(2) is intended to eliminate the reference to "illegality, error or inequality" without altering the substance of the sentence.

Bill section fourteen would repeal Real Property Tax Law §707 because this section would be superfluous when Real Property Tax Law §706 is read in conjunction with the definitions in §701.

Bill sections fifteen-nineteen would amend Real Property Tax Law §§710, 729(1), 726(1), 726(2) and 726(3), to delete references to "illegal" and "erroneous" assessments in favor of "unlawful" and "excessive" assessments, and to provide for misclassification of real property.

Bill section twenty would add Real Property Tax Law §729, a definitional section, to title one-A of article seven of the Real Property Tax Law. The definitions contained in this section would be similar to those that would be contained in Real Property Tax Law §522, however, the definition of "excessive assessment" would not refer to transition assessments in "approved assessing units", nor to limitations on increases in assessed value in "special assessing units". Additionally, the definition of

"unequal assessment" would be derived from Real Property Tax Law §730. These provisions are intended to maintain the scope of review currently authorized by article seven, title one-A.

Bill section twenty-one would amend Real Property Tax Law §730(1), relating to the grounds for judicial small claims assessment review, so that it would be read in conjunction with Real Property Tax Law §729. Real Property Tax Law §730(2), relating to individual notice of the hearing officer's determinations, would be amended to delete the reference to Real Property Tax Law §1524, replacing it with a reference to Real Property Tax Law §525(4). Real Property Tax Law §730(4), relating to the contents of the judicial small claims assessment review petition would be amended to add a reference to "taxable assessed value".

Bill sections twenty-two and twenty-three would amend Real Property Tax Law §§729 and 734 to delete references to "erroneous" assessments in favor of "excessive" assessments.

Bill section twenty-four would amend Real Property Tax Law §744(1) to provide that in a judicial proceeding to review a special franchise assessment the state equalization rate or special equalization rate used in determining the final special franchise assessment shall be binding and conclusive on the parties.

Bill sections twenty-five through twenty-seven would repeal Real Property Tax Law §760, relating to judicial review of State Board determinations in relation to county equalization and state equalization rates, and recodify the substance of §760 in new Real Property Tax Law §§830 and 1218.

Bill section twenty-eight would repeal Real Property Tax Law §§1524 and 1526.

Bill section twenty-nine would provide for an effective date.

Existing Law

Real Property Law §339-y provides for administrative and judicial review of condominium assessments.

Real Property Tax Law §506(1) and (2) and Real Property Tax Law §1526(1) and (2) provide for notice of completion of the tentative assessment roll and public examination of the tentative assessment roll.

Real Property Tax Law §§512 and 1524 provide for administrative review of complaints in relation to assessments before boards of assessment review as defined in Real Property Tax Law §102(4). The scope of the review authorized by these provisions is expressly limited to the determination of whether an assessment is "illegal", "erroneous" or "unequal". The grounds for review are not defined in these provisions except in the case where a complaint specifies that an assessment is unequal and the property is improved by a one, two or three family residence. Additionally, Real Property Tax Law §§1802(3) and 1903(3) provide that the classification of real property pursuant to these sections is also subject to administrative review.

Real Property Tax Law §512-a provides for administrative review of assessments in the event that the board of assessment review fails to meet for this purpose.

Real Property Tax Law §514 requires assessors to make an oath and verification before filing their finally completed assessment rolls.

Real Property Tax Law §552 sets forth the procedure to be used for the correction of clerical errors and unlawful entries on tentative assessment rolls.

Title one of article seven of the Real Property Tax Law (§§700 et seq) authorizes a taxpayer to institute a proceeding in supreme court to review an assessment. The scope of the review authorized by these provisions is whether an assessment is "illegal", "erroneous by reason of overvaluation or misclassification" or "unequal" as

that the assessment has been made "at a higher proportionate valuation than the assessment of other real property" (assessing units other than "special assessing units"; see, Real Property Tax Law §706) or "at a higher proportionate valuation than the assessment of other real property in the same class" ("special assessing units"; see, Real Property Tax Law §707). The terms "illegality", "erroneous by reason of overvaluation" and "misclassification" are not statutorily defined.

Title one-A of article seven of the Real Property Tax Law authorizes owners of certain residential real property to seek small claims judicial review of the assessment of such property. The scope of review is expressly limited to the determination of whether an assessment is "erroneous by reason of overvaluation" or "unequal" in that the assessment is "at a higher proportion of value than other residential property...or at a higher proportion of value than all property". The phrase "erroneous by reason of overvaluation" is not defined by statute.

Real Property Tax Law §744 governs action by the court in judicial proceedings to review special franchise assessments and subdivision one thereof provides that "the court may take evidence as it may deem necessary...and determine all questions raised by the petition and the answer thereto".

Real Property Tax law §760 provides for judicial review, pursuant to article 78 of the Civil Practice Laws and Rules, of State Board determinations relating to county equalization and state equalization rates.

Statement in Support

The Real Property Tax Law was enacted in 1958 (L.1958, c.959) and recodified most of the real property tax provisions then found in the Tax Law, the Village Law, the Education Law and other miscellaneous statutes. The purpose of this recodification, as noted in the Governor's approval memorandum, was to lighten the

burden of assessors and provide public officials and taxpayers with a more useful tool in coping with the complicated real property tax system of the State, "Through rearrangement of subject matter, simplification of language and the elimination of obsolete provisions...". This bill is a continuation of that effort.

Administrative review of assessments by locally constituted boards of assessment review is currently governed by various provisions of articles five, fifteen-A, eighteen and nineteen of the Real Property Tax Law. This bill would rearrange and consolidate these statutory provisions into a new title one-A located in article five of the Real Property Tax Law. The focus of this effort is to clearly delineate the various responsibilities of taxpayers, boards of assessment review and assessors. This will serve to facilitate understanding of the administrative review process by both taxpayers and public officials.

More importantly, this bill would also define the grounds for administrative, as well as judical review of assessments. This aspect of the bill is imperative if confusion is to be avoided in the wake of two significant 1981 amendments to the Real Property Tax Law.

Prior to 1981, the scope of administrative and judicial review of assessments was limited to a determination of whether an assessment was "illegal", "erroneous by reason of overvaluation", or "unequal in that the assessment has been made at a higher proportionate valuation than the assessment of other real property on the same roll". Further refinement of these grounds for review was left to case law.

Chapter 1022 of the Laws of 1981 amended the Real Property Tax Law to provide for "small claims" assessment review. This measure amended the administrative review provisions to define an "unequal" assessment, in the case of certain residential real property, in terms of either whole roll or class inequality. Additionally, this measure added a new title one-A to article seven authorizing judicial

small claims assessment review in the case of certain residential real property where it is alleged that the assessment is "unequal in that it has been made at a higher proportion of value than other residential property on the same roll or at a higher proportion of value than all property on the same roll or erroneous by reason of valuation".

Chapter 1057 of the Laws of 1981 established "special assessing units" and "approved assessing units", provided for various classifications of real property in each, and made "misclassification" a ground for administrative and judicial review. Moreover, this legislation provided for limitations on increases in assessed value applicable to special assessing units, and transition assessments applicable in approved assessing units, which could become the focus of administrative and judicial review. In either of these cases the precise grounds for review are not specified in the statute and presumably left to case law. Finally, chapter 1057 also amended the provisions of title one of article seven to establish "class inequality" as a ground for judicial review in "special assessing units", while retaining "whole roll" inequality for the remainder of the State. However this legislation did not specify whether administrative review in special assessing units is limited to "class inequality", "whole roll" inequality or both.

The combined effect of the 1981 legislation and the reliance on the courts to refine the grounds for administrative and judicial review makes it very difficult for taxpayers and public officials to know the precise grounds for assessment review. This bill would remedy this situation by specifically defining the grounds for administrative, judicial and judicial small claims assessment review. Additionally the uninformative and archaic terms "erroneous" and "illegal", as they relate to assessments, would be deleted in favor of the terms "excessive" and "unlawful".

With respect to judicial proceedings to review special franchise assessments, this bill would supersede the holding in Consolidated Edison Compan. of New York v.

State Board of Equalization and Assessment, 73 A.D.2d 31, 425 N.Y.S.2d 651, aff'd 53 N.Y.2d 975, 441 N.Y.S.2d 9, thereby clarifying the Legislative intent as to the relationships between articles 6 and 7 of the Real Property Tax Law and between titles one and two within article 7 of the Real Property Tax Law. This has become more necessary in view of the amendments made by chapter 1057 of the Laws of 1981.

Finally, this bill would remove the statutory provisions concerning judicial review of State Board determinations in relation to county equalizations and state equalization rates from article seven of the Real Property Tax Law, and recodify these provisions in articles eight and twelve where they more properly belong.

Budget Implications:

None on the State or Local level.

Distribution Table
(All references are to the Real Property Tax Law)

Existing Law	82-6
§506(2)	
- last sentence	§512(1)
§512 (1)	
- first sentence	Deleted
- second sentence, first clause	§524(1)
- remainder of second sentence	§524(2), (3)
- third sentence	§522(6)(c)
- fourth sentence	§525(3)
- remainder of subdivision	§524(2)
§512(2)	§512(3)
§512(a)	§527
§707	§§701, 706
§760	§§830, 1218
§1524(1)(a)	§523(1)
§1524(1)(b)	§523(2)
§1524(2)(a)	§525(1)
§1524(2)(b)	§525(2)
§1524(2)(c)	
- first four sentences	§525(3)
- remainder of paragraph	§525(4)
§1524(2)(d)	§526(5)
§1524(2)(e)	§523(3)
§1524(3)	
- first sentence	§526(4)
- second sentence	§525(2)
§1524(4)	§523(1)
§1526(1)	§526(1)
§1526(2)	§526(2)
§1526(3)	§524(1)(2)
- first sentence	§526(3)
- second sentence	§526(3)

C. 914 A-13057

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

July 20, 1982

TO: JOHN G. McGOLDRICK
Counsel to the Governor

FROM: PAUL L. GIOIA, Chairman
Department of Public Service

SUBJECT: Assembly Bill 13057

RECOMMENDATION: No Objection

Summary of Provisions:

This legislation would amend the Real Property Tax Law to rearrange and consolidate statutory provisions relating to administrative and judicial review of tax assessments found in Article 5, 15-A, 18 and 19 of that law into a new Title 1-A in Article 5. In addition, the bill would amend subdivision 1 of Section 744 of the Real Property Tax Law to provide that the state equalization rate is conclusive on the issue of inequality in cases challenging special franchise assessments in any proceeding commenced on or after January 1, 1973 and not finally determined.

Discussion:

This Department has no objection to the enactment of legislation recodifying tax assessment procedures; but, the provision that makes the state equalization rate binding on the issue of inequality in cases challenging special franchise assessments is troublesome. It nullifies the Court's holding in Consolidated Edison Company of New York v. The State Board of Equalization and Assessment, 73 A.D.2d 31, 425 N.Y.S.2d 651, aff'd, 53 N.Y.2d 975,

441 N.Y.S.2d 9, that a claim of inequality is a proper ground for review of a utility's special franchise assessment. This Department prefers that a utility have the option of contesting tax assessments on the issue of inequality.

Utility taxes are an expense of providing service and are included in the rates charged consumers. A utility and its ratepayers should have the opportunity of showing inequality in order to obtain fair tax treatment to minimize the affect of taxes on rates. In addition, if a utility is successful in reducing its tax assessment for previous years, the Commission has the authority to order the return of a portion of the tax refund to the company's customers (Section 113(2) of the Public Service Law).

This amendment, however, is one provision in a much larger and comprehensive piece of legislation to recodify the tax assessment law; and, the decision to approve the bill depends on other considerations. Therefore, this Department leaves to the Governor the decision, on balance of all factors, to sign the entire bill if its enactment is in the public interest.

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

July 13, 1982

A#13057 - By Rules (Request of M. of A. Hochbrueckner)

AN ACT to amend the real property law and the real property tax law, in relation to administrative and judicial review of assessments, and judicial review of state board determinations, in relation to county and state equalization rates and special franchises and to repeal subdivision one of section five hundred twelve and sections five hundred twelve-a, seven hundred seven, seven hundred sixty, fifteen hundred twenty-four and fifteen hundred twenty-six of the real property tax law relating thereto

APPROVAL RECOMMENDED

Honorable Hugh L. Carey
Governor of the State of New York
Albany, New York

Dear Governor Carey:

The above bill is before you for executive action.

A#13057 would amend the Real Property Law and the Real Property Tax Law to make technical and substantive changes in the area of real property assessment.

Section 24 of the bill amends the Real Property Tax Law to require that the State equalization rate or special equalization rate shall be used in the review of special franchise assessments and that these rates shall be binding and conclusive on the parties.

For purposes of real property taxes, property is assessed by local assessors, except for public utility pipes and lines in public streets. These pipes and lines are assessed by the State Board of Equalization and Assessment, pursuant to Section 606 of the Real Property Tax Law, which requires the Board to "equalize" the full value of such property by applying the latest equalization rate found by the Board.

A#13057

Chapter 1057 of the Laws of 1981 amended Section 720 of the RPTL which before the 1981 chapter provided for three methods of proving rate in tax review proceedings for all types of property including utility in-street property (also known as special franchise property). The three methods were selected parcels, sales and state rate. The 1981 chapter deleted the state rate method for New York City and Nassau County. This was correct for all other kinds of property, but for special franchise property it meant that both the State Board of Equalization and Assessment and the City were precluded by Section 720 of the RPTL from showing that the Board had done what was required by Section 606.

Actually, Section 720 conflicted with Section 606 before the 1981 chapter, with respect to all taxing jurisdictions in the State but this conflict was not made apparent until the Court of Appeals ruled in Con Ed v Bd. of Assess (73AD2d31[Third Dept. 1980], affd. on majority opin., 53 NY2ed 975 [1981]). This decision in effect authorized a petitioner to completely bypass the long standing legislative mandate of section 606 and to utilize a rate entirely at odds with that required by statute.

Enactment of this bill would resolve the conflict between section 720 and section 606 of the RPTL and would clarify the procedure with respect to trial of this very specialized kind of proceeding. The effect would be to maintain the practice which has been in effect for approximately the past eighty years with respect to such property and proceedings.

Accordingly, I urge your approval of this bill.

Very truly yours,

EDWARD I. KOCH, Mayor

by Margaret L.W. Boepple
Legislative Representative

A 13057

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JUL 19 1982

July 16, 1982

Hon. John G. McGoldrick
Counsel to the Governor
Executive Chambers
State Capitol
Albany, New York 12224

Dear Jack:

The Governor now has before him Assembly 13057, which but for one section is reliably represented by its draftsmen to be a recodification of real property assessment review procedures in this State in light of the passage of twenty-four years since the enactment of the Real Property Tax Law and the recent, significant enactments of chapters 1022 and 1057 of the Laws of 1981 providing for "small claims" assessment review and various classifications of real property of real property in special and approved assessing units, respectively. As you are aware, the State Board of Equalization and Assessment 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. Accordingly, and because those provisions are not of primary concern to me, I will not comment on them.

The one arguably different section of the bill is section 24. As special counsel to thirteen cities, towns and villages in Westchester County, I have been asked to urge upon you the critical significance of that section for local governments of all types throughout the State.

Bill section 24 would amend section 744 of the Real Property Tax Law to provide that in any judicial proceeding to review a special franchise assessment, evidence on the issue of inequality would be limited to the State equalization rate used by the State Board in determining the assessment and that rate would be binding and conclusive on the parties.

Bill section 24 will obviate the following anomalies that will otherwise occur in Article 7 proceedings to review special franchise assessments: Special franchise taxpayers will be able to launch a collateral attack on the State equalization rate in any review proceeding; current sales will become the foil of preference and, in a rising market, will almost always produce a ratio between assessed values and full values more favorable to the taxpayer; in New York City, and Nassau County, as a consequence of chapter 1057 of the Laws of 1981, the State equalization rate, which pursuant to RPTL §606 must be used by the State Board in determining special franchise assessments won't be admissible in any judicial review of such assessments; and in other jurisdictions the State equalization rate that is admissible won't be the same one used by the State Board. (As remarked by Judge Lowery in a recent Special Term decision in the current Consolidated Edison litigation, the State Board determines the amount of any given special franchise assessment before the assessment roll on which it is to be placed has been closed by the local assessor and, perforce, before the equalization rate based on that roll has been determined by the State Board. It would be the sheerest coincidence if the rate used by the State Board in determining a special franchise rate were precisely the same as the rate determined for the roll on which such assessment is placed.)

Putting all of that together, every intelligent special franchise owner will seek Article 7 review on the grounds of inequality every year; with rising property values, he cannot lose. The consequent exposure for local government, including school districts, has been estimated in the billions. The potential disruptions of the courts and the administration of general government and the confusion and uncertainty that will arise if equalization rates are left in question, as they will be, for years after they are established are inestimable.

At first blush, what I have said may boggle the mind. Let me assure you that it becomes no less boggling upon closer scrutiny. To assist you in that scrutiny, I offer the following background.

As you are doubtless aware, the Consolidated Edison Company, starting with assessments for the year 1974, is challenging its special franchise assessments in New York City and Westchester County in a series of proceedings now

numbering over 300. One hundred sixty-eight of those proceedings, covering the first four years involved, have been consolidated for trial.

Similar proceedings have been commenced by other special franchise owners throughout the State, including Brooklyn Union Gas, the New York Telephone Company and Rochester Gas and Electric, and we anticipate that virtually every special franchise owner in the State that has not already commenced such a challenge will do so as the significance of the Con Edison litigation becomes more widely recognized, if only to stake out a claim pending a final disposition of the Consolidated Edison litigation.

In its initial complaints before the State Board of Equalization and Assessment, Consolidated Edison did not explicitly raise the issue of inequality. The claim of inequality was explicitly made by Consolidated Edison, however, in its petitions for judicial review of the State Board's determinations, pursuant to Article 7 of the Real Property Tax Law. As the case has evolved, Consolidated Edison's claim of inequality has become more sophisticated and refined and it has become apparent to the State Board, the intervening local governments, among whom are numbered my firm's clients, and, I dare say, Consolidated Edison itself, that it is undertaking a full-scale collateral attack on the State equalization rate along the lines essayed in 860 Executive Towers* by Nassau County and in Standard Brands** by the taxpayer.

Consolidated Edison argued, of course, that 860 Executive Towers is not controlling because it involved a governmental entity that had a right to judicial review of the relevant State equalization rate pursuant to section 760 of the Real Property Tax Law and was collaterally estopped to deny the validity of that rate in a certiorari proceeding brought by a taxpayer after the rate had been finally determined. Consolidated Edison argued instead that Standard Brands made clear that the State equalization rate is fair game for taxpayers.

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*860 Executive Towers v. Board of Assessors, 53 A.D.2d 463, aff'd sub nom. Matter of Pierre Pellaton Apts. v. Board of Assessors, 43 N.Y.2d 769.

**Standard Brands v. Walsh, 92 Misc.2d 903, aff'd 60 A.D.2d 605.

In a case of special franchise assessments, however, application of the State equalization rate or some other measure of the ratio between assessed values to full values is not a means of testing for inequality of assessment after the fact, that is, after an assessment has been determined by the local assessor. Rather, the governing statute, RPTL §606, directs the State Board in determining a special franchise assessment to multiply the full value thereof established by the State Board by "the latest State equalization rate." Under that and other pertinent statutory provisions, we argued, there is no statutory warrant to review the State equalization rate and, further, there is no constitutional necessity for such a review. In any event, as we argued, such rates should be reviewable, if at all, in an Article 78 proceeding brought in the context and at the time of the administrative proceeding in which the rates are established by the State Board.

As to Standard Brands, that case is readily distinguishable as it involved the application of an equalization rate, after the fact of assessment rather than as an integral part of the assessment process, to test the equality of assessment of a parcel which was itself a significant portion of the sample used in establishing the rate. No such circularity is involved in special franchise assessments as special franchise properties are not considered in establishing equalization rates.

The State Board and the intervening local governments moved for partial summary judgment on the issue of inequality and these arguments and more were made before the courts. Our motion was granted at Special Term by Judge Koreman (98 Misc.2d 491). His decision was reversed by the Appellate Division in a four to one decision (73 A.D.2d 31); presiding Justice Mahoney wrote an opinion for the majority and Justice Greenblott, dissenting, relied on Judge Koreman's opinion. The Court of Appeals affirmed the Appellate Division, four to three, without opinion; the majority relied on Justice Mahoney's opinion in the Appellate Division and the minority relied on Judge Koreman's opinion at special term (53 N.Y.2d 975). As a protagonist for one side in this litigation, I suppose that my evaluation of the opinions in the various courts cannot be regarded as wholly objective. Nonetheless, apart from the outcome, I suggest that Judge Koreman's opinion reflects a fair understanding of the issues involved; Justice Mahoney's opinion is singularly opaque and I can only infer that neither he nor his concurring bretheren fully grasped the issues; and there is little that you can say about the Court of Appeals other than that no member of that Court had sufficient interest to write an opinion.

We are now faced with extensive discovery and the prospect of a trial commencing on November 30, 1982, the result of which under a worst case analysis could be devastating not only for the municipalities involved in the Consolidated Edison litigation but, as a result of the precedent that might be established, for every taxing unit in the State.

And what is the exposure in this case? Consolidated Edison is attempting to establish a ratio between assessed values and full values, and thus to establish its claim of inequality, by the use of all current sales. I cannot tell you with any mathematical or legal certainty what ratio of assessed values to full values that might produce, nor can I tell you with any exactitude the dollar exposure. I can tell you, however, that one extrapolation of sales in New York City resulted in an estimate of an equalization ratio based on all sales of less than one half the equalization rate used by the State Board. Stretching that sample to, if not beyond, its breaking point, some observers have estimated that the aggregate exposure in New York City and Westchester County for refunds of real property taxes previously paid in respect of special franchise properties is well in excess of $2 billion, and that is before taking into account any overvaluation of the full value of special franchise properties or the application of a reduced equalization ratio to privately owned property of all kinds other than special franchise property.

It should be pointed out that any refund of previously paid taxes would be pure windfall to Consolidated Edison and other utilities; they have already paid these taxes and recovered them from their rate payers. The fiscal impact on the taxing units involved could be catastrophic. In the short run, insolvencies would likely ensue; in the long run, local, State and perhaps federal taxpayers would have to make up the resultant budgetary short-falls. And there is no assurance that any of the taxpayers' loss and the utilities' windfall would be passed back to the rate payers.

And all of this because of a judicial decision vindicating a right never before asserted by a utility in this State and now only stumbled upon by a utility concededly blessed with able, thorough and resourceful counsel.

Section 24 of Assembly 13057 would obviate the manifest and manifold problems engendered by the judicially adopted theory that a special franchise taxpayer may, under the guise of seeking review of its special franchise assessment, wage a

collateral attack on the applicable State equalization rate, which is separately determined for multiple purposes and has independent significance and validity. Section 24 would do this by providing explicitly what should have been clear before: In directing the State Board to apply "the latest State equalization rate" to the full value of special franchise properties in determining the assessed value thereof for real property taxation purposes, the Legislature intended to direct the use of a particular methodology and not simply to direct the State Board to equalize the assessments of special franchises with those of other properties. In the language of the bill, the latest State equalization rate would be the only valid measure of equality or inequality and would be binding and conclusive on all parties in an Article 7 proceeding to review a special franchise assessment. In such a proceeding, neither the taxing unit nor the taxpayer would be able to impeach the equalization rate or to establish an alternate ratio on the basis of selected parcels or current sales.

By doing that, the Legislature has obviated: (a) a multiplicity of lengthy and complex trials of the validity of the State equalization rate; (b) continuous uncertainty about the validity of the State equalization rates throughout the State for a variety of purposes ranging from the establishment of ceilings for the real property taxation of railroad property to the payment of State aid for primary and secondary education; (c) the confusion that would reign in the event that one or more such collateral attacks on State equalization rates were successful; and (d) the risk of bankruptcy that would hang over local governments and school districts throughout the State.

At the outset of this letter, I said that section 24 is arguably different from the rest of Assembly 13057, arguably because it appears to overrule the decision of the Court of Appeals in Consolidated Edison Company of New York, Inc. v. The State Board of Equalization and Assessment, et al., 53 N.Y.2d 975. Arguably, however, section 24 does not overrule the Court of Appeals but simply reverses error in that Court. Viewed in that light, section 24 is more akin to a clarification and recodification than to a substantive change and is thus entirely consistent with the remainder of Assembly 13057.

There remain two questions that opponents of the bill might raise: First, whether bill section 24 can constitutionally be made retroactive to cover all open and pending cases; and second, whether a special franchise taxpayer has a constitutional right to judicial review of the State equalization rate in an Article 7 proceeding.

Because there is an explicit effective date provision that makes bill section 24 retroactive and because no trials have been held in any of the open and pending cases save one (Brooklyn Union Gas, in which bill section 24 is of no relevance), bill section 24 presents a slightly different situation from any previously considered by the Court of Appeals, including the situations in Slewett and Farber,* Colt Industries** and J.A. Green.*** In Slewett and Farber, the issue of rate had already been tried and an equalization ratio had been judicially established. The Court of Appeals determined, therefore, that retroactive application of the prohibition on the use of the State equalization rate to prove inequality contained in chapter 1057 of the Laws of 1981 would not be proper. It should be noted by way of further distinction that Chapter 1057 was by its terms to take effect immediately and thus there was an issue of statutory construction involved in the question of whether to give retroactive effect to the statute. In Colt Industries, the issue of inequality had not yet been tried and the Court held, in essence, that no issue of retroactivity was raised because the matter would simply be tried under the law in effect at the time of trial. The fact situation in J.A. Green is much more confusing giving rise, frankly, to an almost incomprehensible opinion about which the only thing that can perhaps be said for certain is that the Court deliberately and explicitly eschewed dealing with any constitutional issues of substantive due process.

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*Matter of Slewett and Farber v. Board of Assessors, 54 N.Y.2d 547.

**Matter of Colt Industries, Inc. v. Finance Administrator, 54 N.Y.2d 533.

***Matter of J.A. Green Constr. Corp. v. Finance Administrator, ___ N.Y.2d ___ (June 17, 1982).

In respect of bill section 24, courts will have no difficulty in establishing legislative intent; the retroactive effect to be given to the bill is explicit. Moreover, the matters that the retroactive provision of the bill will govern are all open and pending and there is no issue of res judicata. On matters of this type, whether they be deemed procedural, evidentiary or remedial involving issues of public policy, the courts have had little difficulty in giving effect to explicit expressions of legislative intent to make statutory provisions retroactive, and we think that the courts will have little difficulty here. We believe further, however, that the courts need not reach the question of retroactivity or, having reached it, decide it favorably, to apply the provisions of section 24 to the pending litigation. Putting aside for the moment any questions of substantive due process, section 24 should have prospective effect even if the retroactive provision of the effective date clause is invalidated, and, we submit, that prospective application would include application to all matters open and pending but not yet tried. That is precisely the holding of Colt Industries. Thus, the retroactive provision of the effective date clause can be viewed not as making a substantive difference but as obviating any question about the Legislature's intent that the provisions of section 24 should govern open and pending cases.

With respect to any question of substantive due process, that is, whether a special franchise taxpayer can be denied the right to challenge the State equalization rate in the context of an Article 7 proceeding, we submit that there is no constitutional right to be able to challenge the State equalization rate in any proceeding. We submit, moreover, that, if there is such a right, it makes more sense in the interests of both judicial economy and the orderly administration of government, involving not only the real property tax system but also numerous other public programs, to require that a special franchise taxpayer feeling itself aggrieved by the State Board's determination of an equalization rate to air that grievance in a timely Article 78 proceeding and not in an Article 7 proceeding under the Real Property Tax Law, which, as here, may be heard years after the fact. Arguments in support of these propositions are set forth fully in our brief before the Court of Appeals in the Consolidated Edison matter and in the joint reply submitted on behalf of all the intervenors in that matter and I enclose copies of those two briefs for convenient reference. It should be noted that constitutional issues were not

discussed in the Appellate Division's opinion, that court having decided the issue as a matter of statutory construction. Since the majority of the Court of Appeals relied on the opinion of the Appellate Division, we can assume that the majority in each of those courts never reached the constitutional questions. In contrast, Judge Koreman reached the constitutional issue and decided that there is no constitutional right of review of the equalization rate in the context of an Article 7 proceeding. By adopting Judge Koreman's opinion, the minority in both the Appellate Division and the Court of Appeals must have reached the same conclusion. Disregarding for the moment the question of retroactivity discussed above, we can, therefore, assume that one Special Term judge, one justice of the Appellate Division and three judges of the Court of Appeals, the only judges who have addressed the issue of substantive due process in Consolidated Edison would uphold the constitutionality of bill section 24. The majority opinions give no hint of what the remaining judges would say on the issue of substantive due process. You may feel that I reflect the optimism of the litigator who has heard only his side of the case. I am confident, however, that a majority of the Court of Appeals would find bill section 24 constitutional as a matter of substantive due process, just as I believe a majority will uphold its applicability to the pending cases, including Consolidated Edison.

In any event, there is only one way in which we will ever find out how the Court of Appeals would vote and that is if the Governor signs the bill and makes the issues presented by it justiciable.

On behalf of the thirteen cities, towns and villages in Westchester County for which this firm is special counsel and, I am confident, on behalf of virtually every other city, town, village, school district and special taxing unit in the State, I urge the Governor's approval of Assembly 13057.

Sincerely,

Michael Whiteman

Enclosures

cc: Robert Beebe, Esq.
John P. MacArthur, Esq.
Lawrence Dittelman, Esq.

TH

A 13057

THE ASSOCIATION OF TOWNS

OF THE

STATE OF NEW YORK

90 State Street
Albany, N. Y. 12207

Telephone
Area Code 518 — 465-7933 or 465-2015

JUL 15 1982

July 14th, 1982

His Excellency Hugh L. Carey
Executive Chamber
State Capitol
Albany, New York 12224

Memorandum in relation to
Assembly 13057
By Committee on Rules

Sir:

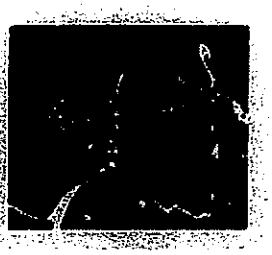
This bill adds a new Title 1-A to Article 5 of the Real Property Tax Law consolidating the existing provisions with respect to administrative review of assessment of real property. In addition, the bill makes numerous technical and clarifying changes in conformance with the amendments enacted by Chapters 1022 and 1057 of the Laws of 1981.

The bill also amends Real Property Tax Law, §744 (1) to provide that in a judicial proceeding to review special franchise assessments on the ground of inequality, the evidence shall be limited to the state equalization rate used in determining the special franchise assessment. Such equalization rate will be conclusive and binding on all parties.

The technical and clarifying amendments of this bill include:

1. A modification in the verification oath to the final assessment roll, which would recite that it conforms to the tentative roll, instead of the present statement that it contains full value assessments (Real Property Tax Law, §514). This change is necessary by reason of the amendments to Real Property Tax Law by Chapter 1057 of the Laws of 1981. However, it is suggested that a future amendment to section 514 delete the reference to section 512 and insert the references to new section 525.

2. A provision that the board of assessment review may meet on as many days as it deems necessary after the third Tuesday in June for the purpose of hearing complaints on assessments (Real Property Tax Law, §512 (1).



Memorandum in relation to
Assembly 13057

3. Definitions for purposes of administrative review of assessments (new §522), definitions for Titles 1 and 1-A of Article 7 (§§701 and 729, respectively). These definitions are deemed necessary because of the changes effected by Chapters 1022 and 1057.

The amendment to Real Property Tax Law, §744 (1), making the state equalization rate sole evidence, binding and conclusive on all parties is intended to overcome the decision in Consolidated Edison Co., of New York v. State Board of Equalization and Assessment, 73 A.D.2d 31, aff'd 53 N.Y.2d 975. In this case it was held that in seeking review of special franchise assessments on the ground of inequality, the petitioner could utilize the evidence authorized in Real Property Tax Law, §720 (3). Such amendment is especially necessary because of the changes made by Chapter 1057 and its impact on judicial review of special franchise assessments. By limiting the evidence to the state equalization rate, evidence of the standard of assessment available in judicial proceedings to other property owners, would not be part of the judicial review of the special franchise assessments. Consequently, this provision would result in savings of litigation expense to local governments affected by judicial review proceedings of special franchise assessments.

It is noted that a transposition of a provision from Real Property Tax Law, §512 to the new paragraph (c) of subdivision 9 of section 522 by this bill, refers to "full" value (page 5, lines 3 and 5). The word "Full" should probably have been deleted because of the new standard of assessment provided in section 305 as added by Chapter 1057. However, this is not fatal to the new paragraph (c), and it could be corrected in future legislation. In any event, it is likely that the courts may hold the standard of value as set forth in section 305 to be synonymous with full value.

The overall objective of this bill to consolidate administrative review provisions in one title is commendable.

The Association of Towns recommends the approval of this bill.

Respectfully submitted:

William K. Sanford

WILLIAM K. SANFORD
Executive Secretary

A13057

National Fuel

JUL 16 1982

July 12, 1982

The Honorable Hugh L. Carey
Governor of New York State
Executive Chamber
State Capitol
Albany NY 12224

ATTENTION: Hon. John G. McGoldrick

Gentlemen:

RE: A. 13057, S. 10470

Inasmuch as certain sections of this bill, notably Section 24 and 26, deprive citizens of this state from the right to challenge the real property tax equalization rate, we believe that this law takes away a constitutional right and, therefore, ask that you veto the proposal.

Sincerely yours,

Charles A. Wood

Charles A. Wood
Administrative Assistant
Department of Public Affairs

A-13057

NIAGARA MOHAWK POWER CORPORATION

300 ERIE BOULEVARD WEST

SYRACUSE, N. Y. 13202

JUL 13 1982

RICHARD F. TORREY
SENIOR VICE-PRESIDENT

July 13, 1982

The Honorable John G. McGoldrick
Executive Chamber
State Capitol
Albany, New York 12224

Re: A.13057 - AN ACT to amend the real property law and the real property tax law, in relation to administrative and judicial review of assessments, and judicial review of state board determinations

Dear Mr. McGoldrick:

Niagara Mohawk Power Corporation wishes to express its strong opposition to this proposed legislation which is now before Governor Carey for his consideration. This legislation makes several changes in the Real Property Law and the Real Property Tax Law regarding judicial and administrative review of assessments.

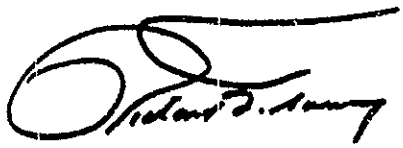
Niagara Mohawk strongly opposes the proposed amendment to Subdivision 1 of Section 744 of the Real Property Tax Law which restricts evidence on the inequality of special franchise assessments to the state equalization rate or to a special equalization rate used in determining any special franchise assessment under review. This legislation makes such equalization rate or special equalization rate binding and conclusive on the parties involved in any judicial or administrative review of such special franchise assessments. This legislation presumes that the State Board of Equalization rates as fixed are correct, and complainants lose a right to submit proof that the State Board determinations may be incorrect.

It should be noted that this same exclusion of proof does not apply to challenges of real property assessment. As a result, utilities are being denied equal protection in not being able to offer proof challenging the rates fixed by the State Board of Equalization in special franchise litigation.

Utilities in New York State presently pay many millions of dollars in real property and special franchise taxes. The utilities should be able to challenge at any time real property or special franchise assessments that are inequitable and should be able to offer any proof of inequality, and not be restricted by a determination of the State Board of Equalization.

Since this proposed legislation severely impairs the rights of a utility to challenge unfair or inequitable special franchise assessments, Niagara Mohawk Power Corporation respectfully requests that Governor Carey veto this legislation.

Sincerely,



A.13057

JUL 15 1982

CORNING
NATURAL GAS CORPORATION
27 E. DENISON PARKWAY • CORNING, N.Y. 14830 • PHONE 607-936-3755

J. EDWARD BARRY
CHAIRMAN OF THE BOARD,
CHIEF EXECUTIVE OFFICER

July 12, 1982

The Honorable Hugh Carey
The Governor of New York
Executive Chambers
State Capital
Albany, New York 12224

Dear Sir:

I am writing to you to express my Company's concern regarding the recently enacted legislation A13057, Section 24, that has passed the Senate and Assembly and will be on your desk this week for signature.

The existing Real Property Tax Law, as interpreted by recent judicial decisions, provides that a utility aggrieved by a special franchise tax assessment may contest the property valuation and equalization rate, as determined by the State Board of Equalization and Assessment (SBEA), upon which assessment is based, by proving overvaluation and inequality, respectively. Proof of inequality -- that the special franchise property is assessed at a disproportionate percentage of full value -- requires evidence that the SBEA derived equalization rate is inappropriate as applied to the property value at issue.

Section 24 of the new law would, in effect, preclude proof of inequality in special franchise tax proceedings by making the SBEA rate binding and conclusive on the utility as regards the issue of inequality.

This provision of the law would take effect immediately and would have application to any proceedings commenced after January 1, 1973 not finally determined on the effective date of the legislation. We believe this law is unconstitutional and prejudicial. Unconstitutional in that it takes away the means to object to an over assessment - unconstitutional in that it is retroactive to 1973 and negates all progress made in existing litigation against any inequities.

We feel it is prejudicial in that everyone has the right to oppose or grieve tax assessments on private property but this law limits this right for utilities to protest a tax assessment for property on public lands.

Increased property taxes on utilities are becoming an oppressive burden and we strongly urge you to vote against this law when it reaches your desk. A vote against will be a vote to retain one of the freedoms we Americans cherish - the right to legally and orderly protest a tax assessment.

Very truly yours,

J. Edward Barry

JEB/pg
cc: T. G. Vath

TH

A-13057

HOWARD SHAPIRO
Director and General Counsel

the energy association of n.y.state
SUITE 601, 111 WASHINGTON AVENUE
ALBANY, N.Y. 12210 TEL. (518) 449-3445

July 16, 1982

Honorable John G. McGoldrick
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

JUL 20 1982

Dear Mr. McGoldrick:

Re: A. 13057 (Rules)

The Energy Association of New York State appreciates the opportunity to offer its comments on the above referenced bill. On behalf of our members, the seven combination electric and gas companies in New York, we oppose A. 13057 and strongly urge that the Governor veto this legislation.

While the focus of the bill is, ostensibly, on the recodification and consolidation of existing provisions of law relating to the administrative and judicial review of assessments, Sections 24 and 29 of the bill, dealing specifically with special franchise assessments upon State utilities, would effect a substantive change to existing law by severely restricting a utility company's ability to contest special franchise assessments which are too high.

Presently, like any other party, a utility company may seek judicial review of an assessment if it determines that its assessment is unequal to that of other realty in the same locale. This legislation, however, would single out and effectively bar only utilities from employing the two most meaningful methods provided for under §720(3) of the Real Property Tax Law for proving inequality -- the "All Sales" and the "Sample Parcel" methods. A utility company's only avenue for proving "inequality" would be to prove they are assessed at a rate other than the equalization rate established by the New York State Board of Equalization and Assessment (SBEA), a rate acknowledged to be based on data which is several years old and which is, therefore, a very poor indicator of the true rate of assessment in effect as of the "status date" of the year in question.

Not only would utilities be unconstitutionally singled out, in violation of the equal protection clause, as the only class

to be shorn of the rights afforded by §720(3) of the Real Property Tax Law, but Section 29 of the bill eliminates such opportunities retroactively with respect to certiorari proceedings commenced on or after January 31, 1973, and not finally determined as of the date the bill is signed into law. The elimination of existing claims without due process raises additional constitutional concerns.

The sponsors' memorandum observes that the bill's effect (i.e., the elimination of a utility's right to challenge the equalization rate established by the SBEA to prove its special franchise assessment is unequal) would be to "limit liabilities of localities and subsequent tax refunds." The sponsors, thus, acknowledge that the bill will leave utilities no opportunity to effectively challenge inequitably high special franchise assessments.

The net result of these limitations, of course, would be the unjustified and improper shifting of the local tax burden from local property owners to utility ratepayers.

For the above cited reasons the Energy Association respectfully urges the Governor to veto A. 13057.

Sincerely,

Howard Shapiro

HS/pjs

A-13057

ORANGE AND ROCKLAND UTILITIES, INC.

one blue hill plaza, pearl river, new york 10965

JAMES F. SMITH
Chairman of the Board and
Chief Executive Officer
914-627-2500

July 15, 1982

The Honorable Hugh L. Carey
Governor of New York
Executive Chamber
State Capitol
Albany, New York 12224

Re: Assembly 13057 (Hochbrueckner)
Senate 10470 (Rules)

Dear Governor Carey:

For years, the New York Public Service Commission has encouraged the State's private utilities to challenge aggressively the imposition of taxes which they regard as unfair. Utility customers have been the beneficiaries of recovered over-assessments through this present process, which is just and fair. Unfortunately, the bills referenced above would, by making binding and conclusive the equalization rate imposed by the State Board of Equalization, deprive the special franchise petitioner of any means of proving a disproportionate assessment of unequal treatment. In essence, the bills would effectively deny special franchise property owners due process and equal protection under the law, which raises the serious question of their constitutionality.

In the final analysis, however, it seems to me that the bills err most grieviously in the lack of concern they demonstrate for the plight of a public already sorely burdened by rising energy costs. If the bills were to become law, any over-assessments paid by private utility companies would have to be recovered in future rate cases, obviously placing a load on the backs of customers.

I hope you will veto this proposed legislation, Governor Carey. A veto would be consistent with your demonstrated concern for the welfare of the State's citizens.

Thank you for your interest.

Sincerely,

James F. Smith

JFS:sb

T.A.H.

A-13057

The Business Council of New York State

15 , 1982

Honorable John G. McGoldrick
Counsel to the Governor
Executive Chamber
State Capital
Albany, New York 12224

JUL 16 REC'D

Dear Mr. McGoldrick:

RE: ASSEMBLY 13057

The Business Council of New York State, Inc. is opposed to A.13057 which would amend the real property law and real property tax law, in relation to administrative and judicial review of assessments, and judicial review of state board determinations.

Currently, special franchise assessment decisions may be reviewed before the court based on evidence and all questions raised by the petition. The proposed amendment to Subdivision 1 of Section 744 of the Real Property Tax Law would restrict evidence on the inequality of special franchise assessments to the state equalization rate or to a special equalization rate used in determining any special franchise assessment under review. This legislation makes such equalization rate or special equalization rate binding and conclusive on the parties involved in any judicial or administrative review of special franchise assessments.

This proposal prevents a decision of the State Board of Equalization on rates from being challenged. It assumes that the fixed rates are correct.

Utilities in New York State pay millions of dollars in real property and special franchise taxes. They should be able to challenge real property and special franchise assessments that are inequitable and should be able to prove this on the basis of inequality, and not be restricted by a determination of the State Board of Equalization.

For the above reasons, The Business Council urges the veto of this proposal.

Sincerely,

Raymond T. Schuler
President

sk

A 13057

CENTRAL HUDSON GAS & ELECTRIC CORPORATION
POUGHKEEPSIE, N.Y. 12602

July 13, 1982

JUL 16 1982

The Honorable Hugh L. Carey
Governor of the State of New York
State Capitol
Albany, New York 12224

Dear Governor Carey:

Re: A 13057

We respectfully request that this measure not be signed into law.

This bill, by amending Section 744 of the Real Property Tax Law, severely limits the type of evidence that is admissible in court to prove inequality of special franchise assessments.

Special franchise property owners should not be differentiated from other property owners and denied equal rights in contesting State Board of Equalization and Assessment determinations which they believe to be inequitable.

Very truly yours,

Joseph F. Furlong

Vice President
Governmental Affairs

JFFurlong/pc

A-13057

NEW YORK STATE ELECTRIC & GAS CORPORATION

Binghamton, New York 13902

SENIOR VICE PRESIDENT

July 16, 1982

Honorable John G. McGoldrick
Executive Chamber
State Capitol
Albany, New York 12224

RE: Assembly Bill 13057

Dear Mr. McGoldrick:

New York State Electric & Gas Corporation opposes Assembly Bill 13057 which would amend the real property law and real property tax law with respect to administrative and judicial review of assessments and determinations of the State Board of Equalization and Assessment, county and state equalization rates, and special franchises.

The primary intent of the proposed legislation is to set forth the procedure for the administrative and judicial review of assessments in accordance with the changes introduced into the Real Property Tax Law by the Real Property Tax Classification Act of 1981.

§24 of the Bill amends RPTL §744 to provide that in a proceeding to review a special franchise assessment the evidence allowable on proof of inequality shall be limited to the state equalization rate or special equalization rate used to determine the final special franchise assessment and that such rate be binding and conclusive on the parties upon any such issue. This provision will restrict review of special franchise assessments to the issues of over-valuation and illegality and effectively denies the special franchise property owner the right to challenge special franchise assessments on the grounds of inequality. No similar restriction applies to owners of other real property. Such a provision is fundamentally unfair, arbitrary and unreasonable and constitutes undue discrimination against special franchise property owners, therby denying such owners due process and equal protection of the law as guaranteed by the Federal and New York State constitutions.

§29 of the Bill provides that the provisions of the Bill are to take effect January 1, 1983 except that §24 of the Bill will take effect immediately and apply to any proceeding commenced on or after January 1, 1973 and not finally determined as of the effective date. This provision makes §24 of the Bill, limiting proof of inequality in special franchise assessment review proceedings, applicable to proceedings commenced between 1973 and January 1, 1983. This retroactivity, which is only applicable to

special franchise property owners, deprives such owners without reasonable cause, of rights to which they were entitled and in reliance on and in furtherance of which such owners have expended considerable time and funds. This provision bears no rational relation to a legitimate state objective and serves no other purpose than to defeat a right vested in special franchise property owners to challenge the assessments of their property from 1973 to 1983 on grounds of inequality. Such a provision denies such owners due process and equal protection of the law as guaranteed by the Federal and New York State constitutions.

NYSEG and other special franchise property owners have commenced proceedings since 1973 which have not been finally determined challenging their assessments on the grounds, among others, of inequality. Enactment of such a provision would impose an unjustified and substantial hardship on such owners who, unlike other real proerty owners, will be precluded from exercising a right which they possessed when the proceedings were commenced.

For the reasons stated, NYSEG opposes this legislation and urges that the Governor veto Assembly Bill 13057.

Very truly yours,

E. Eugene Forrest

EEF/dmg

H

A.13057-A

LAW OFFICES OF
JOHN P. MACARTHUR
284 STATE STREET
ALBANY, NEW YORK 12210

JOHN P. MACARTHUR
KATHLEEN A. MOONEY

AREA CODE 518
465-4784

July 21, 1982

Hon. John G. McGoldrick
Counsel to the Governor
The Capitol
Albany, New York

Re: A.13057-A

Dear Mr. McGoldrick:

I occurs to me that I may unwittingly have caused some confusion with my letter to you dated July 19, which I indicated was submitted on behalf of the City of New York, in view of the fact that you already had received a memorandum on behalf of the City through the usual channels. Both documents are consistent with each other, of course, urging acceptance of the bill; the purpose of the letter was simply to cover a little more thoroughly one or two elements, and it was submitted over my signature rather than in the usual manner only because of the time constraints. I am special counsel to the Corporation Counsel with respect to a number of special franchise proceedings instituted against the City by Consolidated Edison Company and the Brooklyn Union Gas Company, and the letter was intended to set forth the views of that office.

Respectfully,

JOHN P. MacARTHUR

JPM:PLP

A 13057

LAW OFFICES OF
JOHN P. MACARTHUR
284 STATE STREET
ALBANY, NEW YORK 12210

JOHN P. MACARTHUR
KATHLEEN A. MOONEY

AREA CODE 518
465-4784

July 19, 1982

Hon. John G. McGoldrick
Counsel to the Governor
The Capitol
Albany, New York

Re: A.13057-A

Dear Mr. McGoldrick:

The following comments are respectfully submitted on behalf of the City of New York in connection with the Real Property Tax Law amendment bill which I understand you are presently reviewing. The only portions of that bill discussed here are Section 24, which amends Section 744 of the Real Property Tax Law (RPTL), in connection with the assessment of special franchise properties, and the effective date provisions of the bill with respect to that section.

I know that you are familiar with the history of the assessment of conventional real property in this State, and I will therefore not repeat it here except to emphasize that from a time shortly after special franchises were first made taxable, the law pertaining to that process and the review thereof has been different from the law pertaining to more conventional properties. As early as 1912, special franchises were not only required to be assessed by a state agency, a predecessor to the State Board of Equalization and Assessment (SBEA), but the assessments were required to be equalized, through a process enacted that year in what was a predecessor provision to the present RPTL §606. All other property was (and generally continues to be) assessable by the local assessors. All other property was required to be assessed at full value (or, now, a uniform percentage thereof), not equalized.

Through the years, special franchise assessment procedures continued to be distinguished from conventional assessment procedures, and today all of Article 6 and all of Title 2 of Article 7 of the RPTL applies only to such

properties, although it is also true that in the review of such assessments, additional provisions of Title 1 of Article 7 are invoked "so far as practicable" (RPTL §740).

In last year's major amendment to the RPTL, and indeed in the course of the last decade or so of such amendments, the principal issues there considered were of such tremendous effect and importance that almost inevitably the Legislature temporarily lost sight of the unique situation of special franchise assessments, and what therefore resulted was a philosophical and statutory conflict so far as only these properties are concerned. One of last year's amendments involved RPTL Section 720(3) which, in its various recent embodiments, applied to all assessment reviews, since there was no parallel section in those articles of the RPTL which apply only to special franchises; RPTL Section 606 applied and applies only to special franchise properties; and a latent conflict between the two sections became a full-blown problem upon the enactment last December of S.7000-A.

RPTL Section 606 requires SBEA to equalize its special franchise assessments of all post-1953 property by applying to their full values "the latest state equalization rate" or special rate, the calculation of which is prescribed in RPTL Sections 1200, et seq. For example, an assessment placed upon the roll this year (in New York City this occurs in January) would have been calculated and administratively reviewed prior to the Fall of 1981, and the equalization rate mandated by RPTL Section 606 to be applied would have been the then current rate, applied to the then current value. But in subsequent judicial review of that assessment pursuant to the provisions of RPTL Section 720(3), this rate would not even be admissible. In New York City (and Nassau County), the only permissible evidence of rate under RPTL Section 720(3) is evidence derived from selected parcels or current sales. In other jurisdictions these are augmented by the equalization rate, but only the rate derived from "the roll containing the assessment" (in the example considered heretofore, the 1982 rate), not the rate mandated by RPTL Section 606 (the 1981 rate). The result, in brief, is that the very rate mandated by statute (§606) is made inadmissible by statute (§720(3)), and the two or three rates made admissible by statute (§720(3)) are forbidden by statute (§606) to be utilized in the assessment process of special franchises, and in fact cannot be used because they cannot even be known at the time the assessment is made.

This situation might have been resolved by a judicial interpretation to the effect that the particular provisions of RPTL Section 606 should be read as superseding the general provisions of RPTL Section 720(3) so far as special franchises are concerned, but in the one and only proceeding on this question the Courts went precisely the other way; for your readier reference I enclose a copy of Judge Lowery's Decision of January 25, 1982, following the Court of Appeals Decision of last May, a copy of which is also enclosed.

Accordingly, the provisions of Section 24 of the new bill were enacted, doubtless to harmonize these disparate requirements. It seems worthy of note that although the Legislature could have accomplished the same result by amending RPTL Section 720(3) yet again, it chose instead to amend a portion of the law which relates only to special franchise properties, thus emphasizing its appreciation of the particular problem created in the interaction of Article 7 of the RPTL with Section 606, which also relates only to special franchises.

With respect to the effective date, the recent decisions of the Court of Appeals in the Colt (and Equitable), Slewett and J.A. Green proceedings (cited more fully at the end of this letter) should be mentioned, all of which concerned proof of rate in certiorari proceedings to review assessments for claimed inequality, though in the context of conventional rather than special franchise properties. The consolidated Slewett proceeding was begun in 1965; the rate portion thereof was heard in 1978; and an interlocutory judgment as to rate (not a final judgment, because the question of value was still pending) was handed down on June 14, 1978. The Appellate Division Order was entered in April of 1981, and the Court of Appeals Decision was dated January 7, 1982. J.A. Green was begun around 1971, the trial commenced in May of 1980 and the Court of Appeals Decision is dated June 17, 1982. In Colt, which began around 1973, the Court of Appeals Decision in which was handed down the same day as its decision in Slewett, there had been neither a hearing nor a judgment as to rate, and in all three cases (and Equitable) the question was what evidentiary rule was to be applied, the rule having been changed between the time the proceedings were commenced and the time of the Court of Appeals Decisions. Indeed, it changed even between the date these matters were argued before that Court and the date they were decided.

It is perhaps not irrelevant to note that in all of these proceedings the petitioners were seeking to utilize the state rates, for all of the reasons adumbrated in Guth: more accuracy, less burden, less expense and so on than was involved in the other possible ways to prove rate. Before the Court of Appeals, they urged that the various sections of the law there considered were unconstitutional if they were to be read as depriving petitioners of the right to use the state rate.

In any event, the relevant chronology with respect to the evidentiary rules is as follows:

a) Prior to 1961, state rate not admissible;

b) L.1961, c.942, state rate made admissible, but not as an exclusive means of proving rate; Matter of O'Brien v. Assessor of the Town of Mamaroneck, 20 N.Y.2d 587;

c) L.1969, c.302, §1, state rate made admissible as exclusive means of proving rate;

d) Guth Realty v. Gingold, 34 N.Y.2d 440 (1974), same as (c) above, and critical of other methods of proving rate;

e) L.1977, cc.888, 890, allowed use of state rate by property type;

f) L.1978, c.476, codified (e) above as RPTL §307 and deleted reference to property type, but effective only until December 31, 1980;

g) L.1979, c.126, eliminated use of state rate in proceedings commenced after January 1, 1974, and not completed by May 22, 1979;

h) L.1979, c.127, made an exception to paragraph (g) above for small claims and changed 1974 provision thereof to 1977, but also effective only until December 31, 1980;

i) L.1980, c.880, extended (f) above to May 15, 1981;

j) L. 1981, c.3, extended (h) above to May 15, 1981;

k) L. 1981, c.259, extended (i) and (j) above to October 30, 1981;

l) L. 1981, c.1057 (S.7000-A), effective "immediately", made state rate not admissible in New York City and Nassau County, admissible elsewhere with or without selected parcels and/or current sales (§606 rate not admissible by Lowery Decision thereafter).

In Slewett and J.A. Green, Special Term had applied the state rate (holding that the statutes which forbade such application were unconstitutional). Noting that those statutes had themselves expired by their own terms, the Court of Appeals applied the common law and found that use of the state rate as the exclusive means of proving rate was perfectly proper. In Colt, where rate had not yet been tried, it held that the rules applicable to such trial when it in fact took place would be those in effect at the time, regardless of when the proceeding might have been commenced or what other questions might have been decided thereunder. It also referred to the provisions of RPTL Section 720(3) as "procedural", and sustained their constitutionality against equal protection and due process attacks, observing that the Legislature must be shown to have had no "rational basis" and to have acted "unreasonably" for the statute to be struck down on the former ground. On the latter, although it noted that other means of proving rate were "admittedly more cumbersome and expensive", the Court would not "by judicial fiat" alter the Legislature's view of admissibility of evidence.

The conclusion to be drawn from all of this would appear to be that the Court of Appeals approves of use of the state rate; does not think highly of other methods of proving rate; and will sanction the application of state rate on common law grounds or on statutory grounds wherever it can. I am advised that there are no pending special franchise proceedings which antedate 1973, in which case the effective date of Section 24 would be simply declarative of the present law. Besides, as a procedural rather than a substantive amendment, retroactivity is perfectly proper. The only contrary suggestions, by Judge Jason in J.A. Green and by Special Term in Slewett, were made in the context of sustaining use of the state rate; Special Term's Decision in Slewett did not denounce retroactivity with respect to procedural

statutes but only with respect to substantive ones; and the Court of Appeals in J.A. Green explicitly applied current law to a proceeding begun, tried and decided long before, under other rules.

I fear I have trespassed overlong on your patience, but the need is great. As the law presently stands, particularly as interpreted by Judge Lowery, every single special franchise assessment is incorrect as a matter of law, except in jurisdictions whose equalization rate never varies from year to year by the tiniest fraction of a percent; there are, of course, no such jurisdictions.

Respectfully,

JOHN P. MacARTHUR

JPM:PLP
Enclosures

Slewett v. Bd. of Assessors, 54 N.Y.2d 547 (argued 11/18/81, decided 1/7/82)

Colt Inds. v. Finance Admin., 54 N.Y.2d 533 (argued 11/18/81, decided 1/7/82)

J.A. Green Construct. Corp. v. Finance Admin., ____ N.Y.2d ____, N.Y.L.J. 7/6/82.

TH.

A-13057

The Brooklyn Union Gas Company

195 MONTAGUE STREET

BROOKLYN, NEW YORK 11201

JUL 14 1982

EUGENE H. LUNTEY
PRESIDENT
CHIEF EXECUTIVE OFFICER

July 13, 1982

The Honorable Hugh L. Carey
Governor of New York State
The Executive Chamber
Capitol
Albany, New York 12224

Re: Assembly Bill 13057;
Senate Bill 10470

Dear Governor Carey,

The Real Property Tax Law provides for judicial review of assessments and an aggrieved party may, by petition, allege injury on the grounds of illegality, overvaluation and inequality.

Section 24 of the above proposed law seeks to amend sub-division one of section seven hundred forty-four so as to make the state equalization rates or special equalization rate binding and conclusive on the parties, thereby depriving the property owner-petitioner from introducing evidence to challenge the correctness of the rate in support of claimed inequality. Moreover, the proposed amendment, which would take effect immediately, is made applicable to review proceedings commenced after January 1, 1973 and not finally determined on the date the amendment would become effective. Still another defect in the proposed legislation is found in its provision that the conclusive and binding effect of the state rate only applies to special franchise assessments and not to any others.

Since the proposed legislation which makes the state rate binding and conclusive deprives a special franchise owner of its substantial right to redress by some effective procedure, the bill fails to preserve the guarantee provided by the Fourteenth Amendment of the Federal Constitution.

Unless this proposed legislation is vetoed, The Brooklyn Union Gas Company will be required to pay far more than its fair share and equal portion of the aggregate taxes levied upon real property in its franchise area; enactment will result in confiscation of its property, deny it equal protection of the laws, deprive the Company of its property without due process of law, and constitute a taking of its property for public use without providing just compensation therefor; all in violation of the Constitutions of the United States and the State of New York.

Furthermore, energy taxes are the fastest growing tax collections for New York State and local government, especially New York City. Local and state utility taxes paid by the nine major New York State gas and electric companies in 1980 amounted to $1.7 billion, a "windfall" increase of 156% since 1971. This means the average New York State customer, in 1980, paid more than 18 cents out of every $1.00 from his energy bill for utility taxes. The national average for gas customers was less than 6 cents.

Abnormal hidden utility taxes are the worst type of taxes for New York State consumers since they deprive our taxpayers of the benefit to maximize their tax deductions on their Federal income tax return. In addition, as gas rates go up, customers pay not only the higher energy costs, but they also pay the increase in sales and gross receipts taxes even if they conserve and use less gas.

If we are concerned with the findings of the 1980 census count, a fiscal plan to phase in utility tax reductions over the coming years is one of the essential items necessary to minimize escalating energy costs, and hopefully stabilize any further flight of population and businesses to neighboring states and the sun belt.

I hope you will give this matter your careful consideration since energy is every bit as essential as food and medicine.

Sincerely,

Eugene H. Luntz

A-13057

JUL 20 1982

New York State Association of COUNTIES

150 STATE STREET ALBANY, NEW YORK 12207 (518) 465-1473

July 19, 1982

Honorable John G. McGoldrick
Counsel to the Governor
The Executive Chamber
The Capitol
Albany, NY 12224

Re: A.13057
Legislative Memorandum S.84

Dear Mr. McGoldrick:

NYSAC strongly supports the above referenced legislation which would amend the real property tax law in relation to administrative and judicial review of assessments, and judicial review of State Board determinations in relation to county and state equalization rates.

NYSAC is fully supportive of the major purpose of this legislation to supercede the holding in Consolidated Edison Company of New York v. State Board of Equaliation and Assessment, 73 A.D. 2d, 425 N.Y.S. 2d 651, aff'd 53 N.Y.S. 2d 975, 441 N.Y.S. 2d 9, thereby clarifying the legislative intent of the real property tax law that in a judicial proceeding to review a special franchaise assessment, the state equalization rate or special equalization rate used in determining the final special franchaise assessment shall be binding and conclusive on the parties in a certiorari proceeding.

This bill would confirm the authority of the State Board of Equalization and Assessment to set the equalization rate and have a favorable fiscal impact on counties by limiting local certiorari liabilities and subsequent tax refunds.

Please note that this legislation places no restrictions on the ability of the parties to challenge the actual assessment itself, as it is determined by the local assessing official.

NYSAC urges favorable action by the Governor on this legislation at the earliest possible date.

Yours very truly,

Edwin L. Crawford
Executive Director

ELC/mar

Edward W. Livingston
Vice President Community and Government Relations

A-13057

Consolidated Edison Company of New York, Inc.
4 Irving Place, New York, NY 10003
Telephone (212) 460-4286

JUL 12 1982

July 9, 1982

Hon. John G. McGoldrick
Counsel to the Governor
Executive Chamber
State Capitol Building
Albany, N.Y. 12224

Re: A.13057/S.10740 — An act to amend the real property law, and the real property tax law, in relation to administrative and judicial review of assessments, and judicial review of state board determinations, in relation to county and state equalization rates and special franchises and to repeal subdivision one of section five hundred twelve and sections five hundred twelve-a, seven hundred seven, seven hundred sixty, fifteen hundred twenty-four and fifteen hundred twenty-six of the real property tax law relating thereto.

Dear Mr. McGoldrick:

Con Edison appreciates the opportunity to offer its comments on the subject bill, which amends Section 744 of the Real Property Tax Law to provide that, in special franchise assessment proceedings, the State Board of Equalization and Assessment (SBEA) equalization rate shall be binding and conclusive as regards the issue of inequality of assessment. Con Edison opposes this legislation as it would, in effect, preclude proof of inequality by preventing the parties from offering evidence of what the appropriate equalization rate should be.

The Real Property Tax Law has been interpreted to allow a party aggrieved by a special franchise assessment to contest the SBEA property valuation and SBEA equalization rate upon which such assessment is based. To do so, the party must prove over-valuation and inequality. Proof of inequality, (that the special franchise property is assessed at a disproportionate percentage of full value), requires evidence that the SBEA-derived equalization rate is inappropriate as applied to the property value at issue. The proposed amendment would deprive the special franchise petitioner of this means of proving inequality.

The history of the 1978 and 1979 amendments to the

Real Property Tax Law and Section 7000-A manifest a legislative intent to restrict the use of SBEA equalization rates in tax certiorari proceedings, since such rates were deemed of questionable value as a measure of inequality. However, certiorari petitioners had the option of proving inequality by means of 1) the select parcel method, or 2) the sales ratio method. These methods provide for the formulation of an assessment rate based on 1) the rate at which comparable property is assessed, or 2) the actual sales of real property within a given assessing unit.

By contrast, the Legislature now manifests an intent to hold the SBEA rates derived for special franchise purposes as conclusive, thus depriving the special franchise petitioner of any means of proving inequality. By so preventing parties aggrieved from proving inequality, the proposed amendment would effectively deny special franchise property owners their day in court, thus constituting a denial of due process. Moreover, since the bill applies only to a select class, special franchise taxpayers, it also amounts to a denial of equal protection.

In addition, this law would be unconstitutional because of its retroactivity. The amendment provides that it shall apply to any proceeding commenced on or after January 1, 1973 which has not been finally determined as of the effective date. The leading case of Slewett v. Board of Assessors, 78 App. Div. 2d 403 (2d Dep't 1981), explains that, in the field of taxation, whether a retroactive statute will be constitutionally sustained is often a question of degree. In general, a retroactive period which exceeds five years is considered unreasonable and excessive, and therefore is unconstitutional. The immediate legislation, which prevents Con Edison, among others, from contesting alleged inequality of assessments levied up to nine years ago, far exceeds the allowable retroactive period, and therefore, is unconstitutional.

Furthermore, during debate in the Legislature it was asserted that if this bill were not enacted, utility companies challenging assessments for prior years would receive refunds that would constitute windfalls if they prevailed in their litigation. In fact, however, Public Service Law, Section 113(2) (passed in 1977), specifically empowers the Public Service Commission to require that any refunds from any source be passed through to the utility's customers. Since the enactment of this section, the Commission has consistently required utilities to pass refunds through to their customers. The validity of this statute was upheld recently. Orange & Rockland Utilities, Inc. v. Public Service Commission,

86 App. Div. 2d 912 (3rd Dep't 1982).

Finally, it should be noted that vetoing this legislation on the basis of Section 24 would not cause irreparable damage to the other amendments contained in the bill. The remainder of the bill deals with minor, technical alterations, i.e., substitution and addition of words, new definitions, renumbering, etc. These changes could easily be accomplished at a later date.

For the foregoing reasons, we respectfully urge that the bill be vetoed.

Respectfully submitted,

Edward W. Livingston
Vice President

/ld

STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF SERVICE**
COUNTY OF NEW YORK) **BY MAIL**

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

On March 3, 2021

deponent served the within: **MOTION FOR LEAVE TO APPEAL**

upon:

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

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

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on 3rd day of March 2021

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2021

Job# 302008