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,

- 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,

For a Review under Article 7 of the RPTL.

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Appellate Division,
Second Department
Docket No: 2017-03016

MEMORANDUM OF LAW OF PROPOSED *AMICUS CURIAE* INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC. IN SUPPORT OF PETITIONERS' MOTION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

SUMMARY STATEMENT

This memorandum of law is submitted by International Council of Shopping Centers, Inc. ("ICSC"), subject to its motion for leave to appear as *amicus curiae* pursuant to 22 NYCRR 500.23(a)(3), in support of the motion by Petitioners-Appellants DCH Auto and DCH Investments Inc. (New York) (collectively "Petitioners") for leave to appeal the Decision and Order of the Appellate Division, Second Department dated December 11, 2019, in *Matter of DCH Auto v. Town of Mamaroneck*, 178 A.D.3d 823 (2d Dep't 2019) (hereinafter "*DCH Auto*").

Commercial leases, including those entered into by ICSC members, often pass along the obligation to pay real property taxes to the tenant and grant the correlative authority to the tenant to commence administrative and judicial challenges of the assessments on which those taxes are based ("Net Leases"). Because of the contractual obligation to pay taxes, a tenant of a Net Lease ("Net Tenant") is the party actually aggrieved by excessive, unequal or unlawful assessments and is typically the party who files the administrative complaint under New York Real Property Tax Law ("RPTL") Article 5 and thereafter commences a judicial review proceeding under RPTL Article 7.

If this Court does not grant leave to appeal the *DCH Auto* decision, its impact on ICSC members (and on all New York Net Tenants obligated to pay real property taxes and authorized to grieve them) will be catastrophic: the contractual allocation

of the right to contest real property assessments, which is an essential and bargained-for element of a net lease, will be abrogated and thousands of pending tax certiorari petitions will be dismissed *ex post facto*, without recourse to the constitutional protections against unequal or excessive assessment.

Under *DCH Auto*, unless a shopping center landlord/owner has timely filed a complaint for administrative review of a real property assessment under RPTL Article 5, a Net Tenant will be barred from filing an Article 7 petition seeking judicial review of the assessment. *DCH Auto* also adversely affects ICSC members who are owner/landlords as it arguably compels them to do an act (the filing of an administrative complaint) which they had bargained away in their Net Leases.

Because Net Leases do not typically require a landlord/owner to file a timely administrative complaint under RPTL Article 5, but instead assign to the Net Tenant the obligation to pay, and the right to challenge, real property taxes and assessments (and the right to receive any refund), the effect of *DCH Auto* is to nullify the provisions of a typical Net Lease transferring to the tenant full responsibility for handling all phases of real estate taxation, including challenging the assessment. Nullification of these provisions of a typical Net Lease has profound implications for the shopping center industry, as well as other tenants (and owners) subject to Net Leases. Undoubtedly, tens of thousands of existing Net Leases, including ICSC's members, stand to be adversely affected by *DCH Auto*.

DCH Auto also adversely affects thousands of pending RPTL Article 7 petitions filed by Net Tenants. This is because it is virtually the universal practice among attorneys representing Net Tenants under Net Leases to file the complaint for administrative review under RPTL Article 5 on behalf of the tenant pursuant to the contractual provisions and or other express authority granted by the owner/landlord. Upon an adverse determination at the administrative level, it is the Net Tenants who file petitions for judicial review of real property assessments under Article 7. Universal authority in New York has long recognized that Net Tenants have standing to commence proceedings for judicial review under RPTL Article 7 as they are aggrieved by the assessment. Longstanding practice, supported by the New York State Department of Taxation and Finance's promulgated regulation and interpretation of RPTL § 524(3) (*see* Petitioners' moving affirmation ¶¶ 109-113), has treated Net Tenants as having standing to file an administrative complaint under Article 5. To deprive Net Tenants of the right to file the administrative complaint creates an untenable anomaly: post-*DCH Auto*, Net Tenants may face dismissal of otherwise timely, sufficiently plead and properly commenced tax certiorari cases because they are unable to retroactively meet a novel condition precedent to commencing an Article 7 proceeding, requiring the administrative complaint to be filed in the owner's name.

DCH Auto principally and erroneously relies on two prior decisions, *Matter of Circulo Housing Development 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. Board of Assessors*, 153 A.D.3d 521 (2d Dep't 2017) ("*Larchmont I*").

Both *Circulo* and *Larchmont I* held that the phrase "person whose property is assessed" in RPTL § 524(3) is limited to "owners" of property. However, neither *Circulo* nor *Larchmont I* addressed the interpretation or application of RPTL § 524(3) with regard to Net Tenants obligated to pay real property taxes and authorized to challenge assessments by Net Leases. Instead, both cases involved entities that were found to not own the property, and were legally neither obligated to pay real property taxes nor authorized to challenge the assessments.

This Court granted leave to appeal in *Larchmont I* (and leave to ICSC to file as *amicus*) and in *Matter of Larchmont Pancake House v. Board of Assessors*, 33 N.Y.3d 228 (2019) ("*Larchmont II*"), affirmed *Larchmont I*, 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 lacked standing. *Larchmont II*, 33 N.Y.3d at 236 (emphasis added). Accordingly, this Court had "no occasion to consider the parties' dispute concerning the scope of appropriate challengers under RPTL 524." *Id.* at 240-41.

DCH Auto now presents precisely the occasion to consider the scope of appropriate challengers under RPTL § 524 that this Court found lacking in *Larchmont II*. The Petitioners here -- like many other Net Tenants among ICSC's membership -- have a legal obligation to pay real property taxes and have authority to challenge assessment. Thus, the factual circumstances in *Larchmont II* that deterred this Court from deciding whether "person whose property is assessed" in RPTL § 524(3) should be limited to "owner," as suggested in *Circulo* and *Larchmont I*, are not present in *DCH Auto*. Granting Petitioners' motion for leave to appeal affords this Court the opportunity to address "the scope of appropriate challengers under RPTL 524" left unresolved in *Larchmont II*.

Furthermore, because *DCH Auto* applies *Circulo* and *Larchmont I* -- both founded on the peculiar facts that involved non-owner, non-obligated-taxpayers -- to a contractually-obligated and authorized taxpayer, *DCH Auto* creates new law and a clear conflict with decisions of both Appellate Division and Supreme Court in other departments that contradict the reasoning in *Larchmont I* or which expressly rejected the application of *Larchmont I* to Net Tenants so obligated and authorized. This obvious conflict in authority requires a review and determination by the Court of Appeals so there will be uniformity of judicial authority with respect to a statute of state-wide application. Granting Petitioners' motion for leave to appeal to the Court of Appeals is manifestly appropriate.

In *DCH Auto*, the Second Department also affirmed without discussion the trial court's novel and unsupported holding, in Index No. 23040/09 (Sup. Ct. Westchester Co., Feb. 10, 2017) (O. Peter Sherwood, J.),[1] that filing a RPTL § 524 complaint in the wrong name -- the tenant-taxpayer instead of the owner -- was "a fundamental error which the courts cannot cure." Exhibit G at 9; *DCH Auto* at 825.

This second holding in *DCH Auto* constitutes a new rule regarding which elements of an RPTL § 524 complaint are jurisdictional and which are curable. This new rule elevates technicality over substance in conflict with this Court's precedents regarding the remedial nature of judicial review of tax assessments. This new rule also sharply breaks from past precedent holding imperfect complainant identification to be a curable defect that should not operate as a bar to judicial review of tax assessments. This second obvious conflict in authority requires a review and determination by this Court, because longstanding precedent cannot be overruled by implication and because the new rule threatens dire legal and economic consequences for tenant-taxpayers throughout the state. Granting Petitioners' motion for leave to appeal to the Court of Appeals is manifestly appropriate.

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[1] Annexed as Exhibit G to the Affirmation of Peter Basil Skelos dated September 1, 2020 ("Skelos Affirmation"), also annexed as Exhibit 3 to Petitioners' moving affirmation. The holding is found in the decision and order of Justice Sherwood entered December 16, 2016, which was incorporated in the above-cited judgment affirmed by the Second Department. *See* Exhibit G at 3.

ARGUMENT

For the reasons set forth herein and in Petitioners' motion, ICSC as *amicus curiae* respectfully urges this Court to grant Petitioners' motion for leave to appeal.

POINT I

LEAVE TO APPEAL SHOULD BE GRANTED BECAUSE *DCH AUTO* IMPERMISSIBLY EXPANDS THE NARROW RULINGS IN *CIRCULO* AND *LARCHMONT I* BEYOND THEIR PECULIAR FACTS AND PRESENTS THIS COURT WITH THE OCCASION TO CONSIDER THE SCOPE OF APPROPRIATE CHALLENGERS UNDER RPTL § 524 WITH REGARD TO A PETITIONER CONTRACTUALLY OBLIGATED TO PAY REAL PROPERTY TAXES AND AUTHORIZED TO CHALLENGE ASSESSMENTS

Prior to *DCH Auto*, no decision held that a commercial Net Tenant, expressly obligated to pay real property taxes and authorized to challenge the tax assessment, was nonetheless barred from filing an administrative complaint pursuant to RPTL § 524(3) solely because it was not the "property owner." *DCH Auto*'s reliance on *Circulo* and *Larchmont I* as precedential support for the restrictive interpretation of "person whose property is assessed" in RPTL § 524(3) as limited to "owner" is sorely misplaced. Neither case involved a petitioner contractually obligated to pay real property taxes or authorized in writing to challenge the tax assessment. Furthermore, the holdings of *Circulo* and *Larchmont I* are so captive to their peculiar facts that reliance on them as support for a new rule of broad application epitomizes the old adage that "bad facts make bad law."

Circulo is both peculiar and distinguishable in several ways. The petitioner challenged the denial of real property tax exemption under RPTL § 420-a, for which ownership of the property is an express prerequisite. 96 A.D.3d at 1053; RPTL § 420-a(1)(a). The question here, whether the definition of "person whose property is assessed" in RPTL § 524(3) includes entities other than the owner of a property, was not before the court, because a non-owner cannot seek or be granted exemption. *Al-Ber, Inc. v. N.Y.C. Dep't of Fin.*, 80 A.D.3d 760, 761 (2d Dep't 2011); 10 Op. Counsel SBRPS No. 88, 1999 WL 1958301, at *1 (Aug. 30, 1999).

Because the petitioner claimed to own the relevant property, the court's only consideration was whether the evidence confirmed or denied the petitioner's claim of ownership. On this question, *Circulo* held that the petitioner was not the owner of the property, on grounds unrelated to the interpretation of RPTL § 524(3): the grantee's name on the property deed was not the corporate predecessor of the petitioner, but instead a nonexistent entity, due to the transposition of two words.[2]

[2] Petitioner's corporate predecessor was "Circulo de la Hispanidad Housing Development Fund Corp.," the grantee of another property that *Circulo* held was owned by the petitioner, West Fulton Street. *See* 96 A.D.3d at 1056. Conversely, the East Hudson Street property, unquestionably operated by the petitioner, was erroneously deeded to "Circulo de la Hispanidad Housing Fund Development Corp," a nonexistent entity. *See* the appellate briefs annexed as Exhibit C for a full discussion of the facts. The transposed name is patently a mistake: The Private Housing Finance Law ("PHFL"), which governs the incorporation of such entities, states that the term "housing development fund corporation" or "housing development fund company" must be included as a part of the corporate name as set forth in the certificate of incorporation. PHFL § 573(2).

The court refused to look beyond the deed[3] and affirmed dismissal as to that property because the petitioner was "not the owner." 96 A.D.3d at 1055.

Circulo effectively held that no one can lawfully challenge the taxes or seek an exemption on a parcel deeded to a nonexistent entity. The precedential value of that holding is limited, even in the rare case involving a typographical error in the deed.[4] But because it was decided on such a narrow, peculiar issue, *Circulo* did not "reach the scope of appropriate challengers under RPTL § 524(3)" at issue in *DCH Auto*: property "owned" by a nonexistent entity could never satisfy the requirements of RPTL § 524(3). A nonexistent entity cannot file a complaint on its own behalf, let alone authorize a person to challenge the assessment or obligate another party to pay the taxes.

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[3] *Cf. Abley Props., Inc. v. Reid*, 18 Misc. 3d 1103(A), 2007 WL 4410379, at *2 (Sup. Ct. Kings Co. Dec. 4, 2007) ("The error in grantee name is obviously just that since French Open Realty, LLC was admittedly not in existence at the time of the conveyance").

[4] Another court might deny the motion to dismiss on the grounds that substantial questions of fact exist regarding the allegations of ownership. *See, e.g., De Paulis Holding Corp. v. Vitale*, 66 A.D.3d 816, 817-18 (2d Dep't 2009) (affirming denial of motion to dismiss for failure to state a claim where the "defendant argue[d] that the documentary evidence of the deed 'flatly contradicted' the plaintiff's factual allegations and thus the allegations of the complaint should not be deemed true" because "essential facts have [not] been negated beyond substantial question").

Another court might, when considering the merits, find that the petitioner was the owner of the property as a matter of law based on the circumstances of the transaction. *See, e.g., Matter of Amityville Mobile Home Civic Ass'n v. Town of Babylon*, No. 09973/12, 2014 WL 1102391, at *1 (Sup. Ct. Suffolk Co. Feb. 25, 2014) (where a typographical error in the grantee's name in the deed mistakenly named the entity an "LLP" rather than an "LLC," the court considered that the "the 'LLP' entity did not exist in contrast to the LLC entity which was incorporated some four months before" and reviewed "numerous other real property transfer documents" in the transaction to find "under the circumstances presented, as a matter of law, the respondents demonstrated that the 2003 was intended to and did convey ownership of the subject property to [the] LLC") (emphasis added).

Larchmont I is also peculiar and distinguishable because the case hinges on the lack of formal legal relationship between two legal entities within a family business that temporarily lacked unity of ownership due to the bequeathment process upon the death of the family matriarch.

In *Larchmont I*, the petitioner operated a restaurant on the subject property, both of which were originally owned by members of the same family. No formal legal relationship between the business and the property existed. Instead, the two operated under an informal arrangement whereby the petitioner paid the taxes and other costs of the property in exchange for rent-free occupancy. *See Larchmont II*, 33 N.Y.3d at 244-51. This arrangement continued without incident until 2009, when the matriarch of the family died. The petitioner was co-owned by the mother and her daughters, but the property was temporarily transferred to a trust before being transferred to the daughters. *Larchmont I*, 153 A.D.3d at 521. During that trust period, the longtime taxpayer petitioner filed the Article 5 complaints to challenge the assessment. *Larchmont I* held that the petitioner lacked standing to file a RPTL § 524(3) administrative complaint because, for the tax years at issue, the petitioner paid the taxes without any legal obligation to do so. *Id.* at 522.

On appeal, this Court held that, regardless of the requirements of RPTL § 524(3), the petitioner was not an aggrieved party because the trust had given the

petitioner no formal "legal authorization or obligation to pay the real property taxes." *Larchmont II*, 33 N.Y.3d at 240.

Ultimately, the *Larchmont* cases were decided based on the absence of formal legal obligation governing the payment of taxes. In *DCH Auto*, Petitioners have a legal obligation to pay taxes. Even more *sui generis*, the absence of such a formal legal relationship -- not unusual for a family business (*see Larchmont II*, 33 N.Y.3d at 244) -- only became relevant because the ownership of the property and the petitioner temporarily differed due to the death of the family matriarch.

As stated by this Court, the "language of an opinion must be confined to the facts before the court. No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." *Dougherty v. Equitable Life Assur. Soc'y of U.S.*, 266 N.Y. 71 (1934); *Campbell Sales Co. v. N.Y. State Tax Comm'n*, 68 N.Y.2d 617, 623 (1986) ("It is well settled that the language of any opinion must be confined to the facts before the court.") (internal marks removed); *see also Brown v. Blumenfeld*, 103 A.D.3d 45, 62 (2d Dep't 2012) (where the court's "holding was made in the context of a case unlike [the case at issue]," it "may properly be interpreted as limited to such a factual circumstance").

To the extent cases so driven by peculiar facts could be said to constitute precedent,[5] *Larchmont I* and *Circulo* at most stand for the limited proposition that a person who is (i) not the property owner, (ii) not contractually obligated to pay the property taxes and (iii) not contractually authorized to challenge tax assessments does not have standing to file a complaint pursuant to RPTL § 524(3). The Second Department's expansion in *DCH Auto* of that narrow concept created new law that, as discussed in Point II, is in conflict with the interpretation of RPTL § 524(3) by other courts (and by state agencies, *see* Petitioners' moving affirmation, ¶¶ 109-111). Because *DCH Auto* creates new law on an issue of statewide application implicating potentially thousands of Net Tenants' Article 7 proceedings, it is appropriate that it be considered by this Court.

In *Larchmont II*, this Court granted leave to appeal and also granted leave to a number of major groups to appear as *amici curiae*. The proposed *amicus*, ICSC, and Stop & Shop Supermarket Co. LLC, argued for reversal of *Larchmont I*'s language limiting RPTL § 524(3), including on the basis that it could ultimately be applied to the detriment of Net Tenants. The New York State School Boards Association, Inc., New York State Conference of Mayors and Municipal Officials, and Association of Towns of the State of New York, argued *inter alia* that taxpayers

[5] *See, e.g., Zangiacomi v. Hood*, 193 A.D.2d 188, 193 (1st Dep't 1993) ("The circumstances in *Calla* were unusual and as *Calla* itself recognized, the case has limited application; its precedential value should be restricted to a precisely similar fact pattern.")

not obligated to pay taxes or authorized by the owner should not qualify under either RPTL § 524 or Article 7. As *amicus*, ICSC also argued that the language in *Larchmont I*, unmoored from the facts of that case, would inevitably be applied in the manner we now find in *DCH Auto*.

While *Larchmont II* was constrained by its peculiar facts from reaching the disputed interpretation of RPTL § 524, this Court took the time to acknowledge the unresolved nature of the dispute (and the ramifications that animated the *amici*'s concerns), in explaining that *Larchmont II* provided "no occasion to consider the parties' dispute concerning the scope of appropriate challengers under RPTL 524." *Id.* at 240-41. This Court's opinion in *Larchmont II* was prescient in its recognition that this day would come, and that determining the rights of a Net Tenant under RPTL § 524 was best left to a case where such facts were squarely before this Court.

Now comes *DCH Auto*, which presents precisely the occasion to consider the scope of appropriate challengers under RPTL 524 that was missing in *Larchmont II*, because Petitioners are a Net Tenant contractually obligated to pay real property taxes and authorized to contest the tax assessment. Therefore, Petitioners' motion for leave to appeal should be granted.

POINT II

THIS COURT SHOULD GRANT LEAVE TO APPEAL BECAUSE *DCH AUTO*'S INTERPRETATION OF RPTL § 524 IS IN CONFLICT WITH RULINGS OF OTHER COURTS OF THIS STATE

DCH Auto is expressly at variance with the authority of the Third Department, *McLean's Dep't Stores, Inc. v. Comm'r of Assessments of City of Binghamton*, 2 A.D.2d 98 (3d Dep't 1956); *Big V Supermarkets, Inc., Store # 217 v. Assessor of Town of E. Greenbush*, 114 A.D.2d 726 (3d Dep't 1985), and the Fourth Department, *People ex rel. N.Y., W. Shore & Buf. Ry. Co. v. Johnson*, 29 A.D. 75 (4th Dep't 1898); *Ames Dep't Store, Inc., No. 418 v. Assessor*, 261 A.D.2d 835 (4th Dep't 1999). Additionally, the holding of *DCH Auto* is in direct conflict with rulings of the Supreme Court in the Fourth Department expressly rejecting the application of *Circulo* and *Larchmont I* to Net Tenants contractually obligated to pay real property taxes and authorized to challenge tax assessments. The conflict in authority requires a review and determination by the state's highest court so there will be uniformity of judicial authority with respect to a statute of state-wide application.

In *McLean's*, the question of standing to file an administrative complaint was at the heart of the Third Department's decision, which involved a statutory scheme under a local law identical to the scheme under the RPTL (and equivalent former Tax Law). The Appellate Division held that "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 (relying on the "[fundamental] principal of broad construction applicable to remedial statutes pertaining to the assessment and taxation of property") (emphasis added). This is the rule we advocate on behalf of the *amicus curiae*.

The administrative complaint in *McLean's* was denied because the petitioner-lessee "failed to 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.[6] *Id.* at 100-101. The respondent 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. The Supreme Court denied the motion and the Appellate Division affirmed.

City of Binghamton Local Law No. 1 and former Tax Law § 290-c (now RPTL § 706(2)) had the identical requirement to the extent that 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.* The Third Department's analysis in affirming the denial of the motion is instructive as to the very issue before this Court, *id.* at 100-101:

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[6] We acknowledge the court's holding interpreted a local law. However, the scope and rationale of the court's decision was not defined by a violation of the Home Rule Law. Rather, the court articulated a broader interpretation of standing to file an administrative complaint under the former Tax Law that is at variance with the rule set forth in *Circulo*, *Larchmont I* and *DCH Auto*.

> 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 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.

The court in *McLean's* held that a "person claiming to be aggrieved" (now RPTL § 704(1)) is, by necessity, one and the same as the "person whose property is assessed" and that any person who has standing to seek judicial review may file an administrative complaint. In so holding, the court equated the petitioner's status as a lessee with ownership, *id.* at 101 (emphasis added):

> ... 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) that the relator ... was not only a person "claiming to be aggrieved" but also a person "assessed" and ... "obviously means one whose pecuniary interests are or may be adversely affected".

Finally, speaking to the remedial nature of the statute, the court stated, *id.*:

> The principal of broad construction applicable to remedial statutes pertaining to the assessment and taxation of property is fundamental and that principle, of course, bears with equal force upon the interpretation of local enactments such as that here involved.

Similarly, the Third Department in *Big V Supermarkets* involved a petitioner who was a partial lessee of a shopping center obligated by the lease to pay "all taxes

and assessments" and who, while unquestionably not the owner of the property, filed the administrative grievance in its own name and subsequently commenced an Article 7 proceeding to challenge the tax assessment. The court found that the lessee-taxpayer was an aggrieved party with standing to commence a proceeding under RPTL § 704. 114 A.D.2d at 727.

At least one Fourth Department case, *Johnson,* has interpreted a predecessor statute to RPTL § 524(3) to equate an administrative complainant with the person aggrieved. The court in *Johnson* rejected a similarly restrictive interpretation of former Tax Law § 36, which contained language similar to RPTL § 524(3), *see* 29 A.D. at 78 (alterations in original):

> Such complainant [person aggrieved] shall file with the assessors a statement, under oath, specifying the respect in which the assessment is complained of as incorrect, which verification must be made by the person assessed, or whose property is assessed, or by some person authorized to make such statement and who has knowledge of the facts stated therein.

In holding that a person authorized to verify an administrative complaint did not have to have personal knowledge of the facts, the court declared: "[Tax Law § 36] defines the procedure to be taken by persons or corporations who deem themselves aggrieved by over or unequal valuation, and, like all laws of procedure, is not to be strictly construed so as to deprive persons aggrieved of the remedy, but so construed as to advance the remedy given." 49 A.D. at 78.

Similarly, in *Ames* the Fourth Department held that, the petitioner, who was a fractional tenant obligated to pay a proportional share of real property taxes, 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." 261 A.D.2d at 835.

The conflict among the departments is clear. Since *Larchmont I* was decided, courts have been confronted with this conflict of authority addressing the right of a party obligated to pay taxes to file an Article 5 complaint. In the Fourth Department, several Supreme Court cases recently considered whether the interpretation of RPTL § 524(3) in *Larchmont I* bars Net Tenants from filing administrative complaints: *Rite Aid Corp. v. Town of Irondequoit Board of Assessment Review*, Index No. E2017001377 (Sup. Ct. Monroe Co. Mar. 6, 2018) (hereinafter "*Rite Aid*"), *Walgreen Eastern Co. v. Assessor of Town of Brighton*, Index No. 2017/07289 (Sup. Ct. Monroe Co. Mar. 8, 2018) (hereinafter "*Walgreen*"), and *Rite Aid Corp. v. Town of Williamson Board of Assessment Review,* Index No. 75978/13 (Sup. Ct. Wayne Co. May 17, 2018) (hereinafter "*Rite Aid 2*" and together with *Rite Aid*, the "*Rite Aid* cases").[7]

[7] The foregoing decisions are annexed as Exhibits D, E and F to the Skelos Affirmation, as well as Exhibits 8, 9 and 10 to Petitioners' moving affirmation.

Like many members of ICSC, the petitioners in those cases, Rite Aid Corp. and Walgreen Eastern Co., are commercial Net Tenants under Net Leases imposing the obligation to pay real estate taxes and granting the authority to tenants to challenge the underlying real property assessments in administrative and judicial proceedings. In these cases, the assessors, citing *Larchmont I*, moved to dismiss the Article 7 petitions because the Net Tenants filed the administrative complaints. *Walgreen* and the *Rite Aid* cases represent the leading edge of many potential cases dealing directly with the confusion and prejudicial harm ICSC seeks to avoid. They underscore the importance of resolving the unsettled state of real property tax law procedure involving commercial Net Tenants.

The courts in *Walgreen* and the *Rite Aid* cases ultimately denied the motions to dismiss. Those courts held that applying the interpretation of RPTL § 524(3) found in *Larchmont I* and *Circulo* to Net Tenants was contradicted by the rules of statutory construction, decisional authority and deference to an overseeing agency's interpretation (*Rite Aid*, pp. 9-15; *Walgreen*, pp. 9-15; *Rite Aid 2*, pp. 9-15). Those courts further relied on the fact that *Larchmont I* and *Circulo* were Second Department decisions, while Fourth Department precedent supported denial of the motions (*Rite Aid*, pp. 8-9; *Walgreen*, pp. 8-9; *Rite Aid 2*, pp. 8-9). Critically, those courts also held that, even if the respective petitioner-taxpayers 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 to that effect (*Rite Aid*, pp. 6-7; *Walgreen*, pp. 6-7; *Rite Aid 2*, pp. 6-7).

Thus, *Walgreen* and the *Rite Aid* cases are strong evidence of both judicial disagreement with the decision in *DCH Auto* and the unresolved conflict in the law. The very fact that the courts in *Walgreen* and the *Rite Aid* cases were compelled by the language of *Larchmont I* and *Circulo* to engage in an extensive analysis of the competing arguments of the parties and to weigh the lofty imperatives of *stare decisis*, comity, statutory construction and agency deference speaks loudly to the need for the Court of Appeals to clarify the law as it affects Net Tenants.

Unless *DCH Auto* is reversed, thousands of presently-pending tax certiorari petitions filed by Net Tenants may be subject to motions to dismiss similar to those made by the assessors in the *Walgreen* and the *Rite Aid* cases, and face dismissal or costly, uncertain and intensive motion practice to avoid dismissal. Indeed, courts outside the Second Department, like those in *Walgreen* and the *Rite Aid* cases, may well decide similar cases differently in the future due to *DCH Auto*.

Because the opportunity to resolve this conflict is squarely presented by the facts in *DCH Auto*, we respectfully submit that this Court should grant leave to appeal.

The prospect for disparate outcomes throughout the state is very real and could have a "broad, unsettling effect" upon previously-established commercial practices, "caus[ing] disorder and confusion in public affairs." *Cf. King v. Cuomo*, 81 N.Y.2d 247, 256 (1993) (citing *Matter of McCann v. Scaduto*, 71 N.Y.2d 164, 178 (1987), *et al.*). As such, this Court should grant Petitioners' leave to appeal, "so that the proper practice may be definitely settled, where there is a conflict of opinion in the various departments of the appellate division on such subject." *Middleton v. Boardman*, 210 A.D. 467 (2d Dep't 1924).

POINT III

THIS COURT SHOULD GRANT LEAVE TO APPEAL BECAUSE *DCH AUTO* WOULD CREATE INEQUITABLE OUTCOMES AND UNDERMINE THE REMEDIAL NATURE OF TAX ASSESSMENT REVIEW PROCEEDINGS BY EMPOWERING RETROACTIVE DISMISSAL ON THE BASIS OF AN ALLEGED TECHNICAL DEFECT THAT PAST PRECEDENT HELD TO BE CURABLE

Even if this Court were to agree with the Second Department on the statutory interpretation of the scope of appropriate challengers under RPTL § 524, *DCH Auto* goes beyond that question: It purports to establish, with little discussion or justification, a novel and draconian consequence for parties that unwittingly fail to meet its interpretation of RPTL § 524.

In the decision affirmed in *DCH Auto*, the Supreme Court held that filing a RPTL § 524 complaint in the wrong name -- the tenant-taxpayer instead of the owner

– was "a fundamental error which the courts cannot cure." Exhibit G at 9. While the Supreme Court described this rule as being based on "law [that] is well settled," *id.*, the cases cited in support exclusively deal with forms of non-compliance with RPTL § 524 unrelated to complainant identity: *City of Little Falls v. Bd. of Assessors of Town of Salisbury*, 68 A.D.2d 734, 738 (4th Dep't 1979) (Article 7 petition could not be amended to assert new grounds not alleged in the RPTL § 524 complaint); *Frei v. Town of Livingston*, 50 A.D.3d 1381, 1382 (3d Dep't 2008) (failure to file the RPTL § 524 complaint with the correct public official "deprives the court of jurisdiction"); *Lussi v. Bd. of Assessors*, 113 Misc. 2d 558, 560 (Sup. Ct. Essex Co. 1982) ("Since the [RPTL § 524] complaint ... did not include inequality as a ground, an Article 7 proceeding could not have been taken alleging inequality."). In affirming this point, the Second Department cites as authority only *Circulo, Larchmont I*, and the similarly inapt *Grecian Garden Apartments, Inc. v. Barlow*, 71 Misc. 2d 457, 458 (Sup. Ct. Monroe Co. 1972) (holding that the Article 7 proceeding was limited to the ground of inequality, because the administrative complaint did not allege that the assessment exceeded market value).[8]

[8] Curiously, *Grecian Garden Apartments* also held that a tenant-taxpayer, as an aggrieved party, could bring an Article 7 petition even if it was not the administrative complainant (in that case, an agent of the owner). 71 Misc. 2d 458-59. This holding in no way supports a rule requiring dismissal of an Article 7 petition because the tenant-taxpayer was the complainant.

None of these cases stand for the proposition that imperfect complainant identification is jurisdictional error or an incurable defect. Instead, all of these cases stem from well-established rules for the aspects of an RPTL § 524 complaint necessary to satisfy RPTL § 706(2)'s condition precedent: specifying the parcel(s) at issue and the grounds for the relief sought through timely notice to the proper municipal officials (*see* Petitioners' moving affirmation, ¶¶ 120-122, & p. 52 n.26).

Conversely, cases dealing directly with complainant identification have held that failure to submit a written authorization from the property owner or "a defect with respect to the name of [the complainant]" in the RPTL § 524 complaint, "where there is proper authorization by the appropriate individual, is a 'technical defect which should not operate to bar the proceedings.'" *Rotblit v. Bd. of Assessors of Vill. of Russell Gardens*, 121 A.D.2d 727 (2d Dep't 1986) (emphasis added) (citing, *inter alia*, *Great E. Mall, Inc. v. Condon*, 36 N.Y.2d 544 (1975)); *see Miller v. Bd. of Assessors of Town of Islip,* 164 Misc. 2d 62, 65-66 (Sup. Ct. 1995), *aff'd,* 236 A.D.2d 408 (2d Dep't), *aff'd as modified on other grounds,* 91 N.Y.2d 82 (1997) (failure of petitioners to include authorization at either the RPTL § 524 complaint or Article 7 petition stage is "a mere technical defect, which would not bar the proceedings and is not a jurisdictional defect" and was cured by later submission); *Astoria Fed. Sav. & Loan Ass'n v. Bd. of Assessors*, 212 A.D.2d 600, 601 (2d Dep't 1995) (authorization dated in the wrong calendar year accompanying RPTL § 524

complaint was "properly cured by submission of a properly dated authorization *nunc pro tunc*"); *Shoecraft v. Town of North Salem*, 24 Misc. 3d 1233(A), 2009 WL 2449873 (Sup. Ct. Westchester Co. Aug. 10, 2009) ("it would work a manifest injustice" to dismiss the Article 7 petitions because "it is abundantly clear ... that the petitions properly named the parcel and the nature of the grievance, and were brought under the name of the actual lessee and resident of the premise.") (*see also* Petitioners' moving affirmation, ¶ 120).

Importantly, and what provides a critical distinction between *Larchmont I* and *DCH Auto*, the undisputed facts here demonstrate that there is proper authorization by the appropriate individual.[9] There is no question that, even if RPTL § 524(3) did limit appropriate challengers to the owner of a property, the Petitioners in *DCH Auto* were authorized to file on behalf of the owner pursuant to the relevant lease terms (*see* Petitioners' moving affirmation, ¶¶ 17, 135). The same is true of the many Net Tenants among ICSC's membership concerned about the fate of their tax assessment challenges in light of *DCH Auto*.

And, as discussed in Point II, subsequent to *Larchmont I* being decided, courts outside the Second Department have held that complainant identification issues similar to those presented in *DCH Auto* are curable. In *Walgreen* and the *Rite Aid*

[9] The critical factor in this Court's *Larchmont II* decision was the absence of a formal legal relationship between the property owner and the taxpayer.

cases, the court held that, even if the respective petitioner-taxpayers did not fall under the definition of "person whose property is assessed" under RPTL § 524(3), the failure of the net tenant to submit an authorization by the property owner was not a jurisdictional bar but instead a curable defect and granted *nunc pro tunc* amendment of the RPTL § 524 complaints (*Rite Aid*, pp. 6-7; *Walgreen*, pp. 6-7; *Rite Aid 2*, pp. 6-7).

On appeal, the Second Department in *DCH Auto* did not address the Supreme Court's error in not granting *nunc pro tunc* amendment and, without any discussion of technicality or curability, found that 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." 178 A.D.3d at 825 (emphasis added). This summary rejection of past jurisprudence upholding the curability of imperfect complainant identification elevates form over substance in conflict with this Court's precedents. *See generally W.T. Grant Corp. v. Srogi*, 52 N.Y.2d 496 (1981); ("the RPTL as it relates to the review of assessments is remedial in nature and should be liberally construed so that a taxpayer's right to have their assessment reviewed is not defeated by a technicality"); *Great Eastern Mall*, 36 N.Y.2d at 548:

> The dual legal concepts that mere technical defects in pleadings should not defeat otherwise meritorious claims, and that substance should be preferred over form, are hardly novel. Nor should the fact that this is a proceeding to review a tax assessment require application of a different rule. As we said some years ago, "(t)he Tax Law relating to review of assessments is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality."

As a result, taxpaying Net Tenants who followed the universally-recognized procedure at the time for filing RPTL § 524 complaints[10] could have their right to judicial review of tax assessments terminated with prejudice and without recourse based on a heretofore-curable technicality, resulting in the potential collection of taxes on assessments for which there can be no judicial confirmation that they "in no case exceed full value." N.Y. Const. Art. 16, § 2. By contradicting longstanding jurisprudence holding that technical defects in RPTL § 524 complaints should not defeat otherwise meritorious claims, *DCH Auto* undermines the state's "strong public policy favoring the disposition of actions on the merits." *See, e.g., Eastgate Corp. Park, LLC v. Assessor of Town of Goshen*, 54 A.D.3d 1036, 1039 (2d Dep't 2008); CPLR § 2001.

[10] *See* Petitioners' moving affirmation ¶¶ 109-113, discussing longstanding procedure, practice and guidance with respect to tenants authorized to challenge tax assessments in RPTL § 524 filings.

That the Second Department in *DCH Auto* affirmed the trial court's erroneous holding that imperfect complainant identification was "a fundamental error which the courts cannot cure," and did so without discussing past precedents finding such a technical mistake to be curable, cries out for clarification by this Court. Otherwise, *DCH Auto* appears to overrule or contradict by implication, without analysis, the longstanding jurisprudence cited above. *See New Amsterdam Cas. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg*, 266 N.Y. 254, 261 (1935) ("An opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established.") (quoting Chief Justice John Marshall).

CONCLUSION

For the foregoing reasons, we ask that this Court grant Petitioners' motion for leave to appeal pursuant to CPLR § 5602 and 22 NYCRR 500.22.

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NEW YORK STATE COURT OF APPEALS
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