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.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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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,

Appellants,

Mo. No. 2021-249
(Pin No. 82638)

-against-

Memorandum in opposition to the motion for leave to appeal

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.

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The respondents unite to oppose the motion made by DCH Auto and DCH Investments, Inc. (appellants) for leave to appeal the Decision and Order in *Matter of DCH Auto v Town of Mamaroneck* (178 AD3d 823 [2d Dept 2019]). Boiled to its essence, the issue which this Court is being asked to consider is whether to overturn the longstanding rule, based upon the distinct words of RPTL 524 (3), that

the owner, being "the person whose property is assessed", must be the one to present a complaint initiating an administrative review of an assessment.

Despite 68 pages of argument and some 218 pages of exhibits, the appellants fail to present issues that are novel or of public importance or show a conflict between *DCH* and decisions of this Court rendered after September 30, 1959. (The Real Property Tax Law was first codified in Chapter 959 of the Laws of 1958 and became effective on October 1, 1959 [L. 1958, ch 959, §1616]. Earlier decisions by this Court or other courts interpreted a different set of statutes and therefore those decisions should not be relied upon when interpreting the modern statute).

Nor do the appellants establish a conflict between the Judicial Departments regarding the interpretation of RPTL 524 (3). One of the appellate cases that the appellants cite for this proposition, *McLean's Dept Stores v Commr* (2 AD2d 98 [3d Dept 1956]), was decided before the RPTL was enacted and involved the interpretation of a local law of the City of Binghamton, not state law. Others, *Matter of EFCO Products v Cullen* (161 AD2d 44 [2d Dept 1990]), *Matter of Big "V" Supermarket, Inc., Store #217 v Assessor* (114 AD2d 726 [3d Dept 1985]) and *Matter of Birchwood Vil. LP v Assessor* (94 AD3d 1374 [3d Dept 2012]), are irrelevant because each involved a transaction financed through an Industrial Development Agency. As this Court has noted, "The conveyance of legal title to the

[IDA] with simultaneous lease back to the [developer] is structured merely as a mechanism to facilitate financing and is not a genuine allocation of ownership in the agency" (*Davidson Pipe Supply Co. v Wyoming County Indus. Dev. Agency*, 85 NY2d 281, 286 [1995]). When the developers filed administrative complaints in these cases, they did so as owners, not as tenants.

Summary of the reasons why this Court should not grant leave.

There are two principles on which the opposing sides agree. First, like all judicial review of administrative action, subject matter jurisdiction for a tax certiorari proceeding requires a properly commenced administrative review (*see Matter of Larchmont Pancake-House v Bd. of Assessors*, 33 NY3d 228, 235 [2019] ["[T]he proper filing of an administrative grievance pursuant to RPTL article 5 is a condition precedent to judicial review pursuant to RPTL article 7"] and affirmation of the appellants' counsel at 4, ¶ 6).

Second, only "the person whose property is assessed" or that person's representative, authorized in writing, can file an administrative complaint challenging a real property's assessment (*see* RPTL 524 [3] and affirmation of appellants' counsel at 7, ¶11["The sole issue herein is whether [the appellants] qualif[y] as an appropriate challenger/complainant under RPTL § 524[3]").

That is where the parties' agreement ends. The appellants claim that the administrative reviews were proper because they were entitled to file them in their own names as tenant since they were aggrieved by the assessments (*see* the heading of Point II in the appellants' brief before the Appellate Division at 19 ["The lower court erred by holding that Petitioner, as tenant obligated to pay real estate taxes, lacked standing under RPTL § 524 [3] to file the complaints").

The status assumed by the appellants in the assessment review process is critical. They pursued the challenge at the administrative level, as "DCH Auto As Tenant Obligated to Pay Taxes" (R. 113, 127, 142, 176, 193 and 211).[1] Thus, the appellants cannot argue that they were acting as an agent nominated by the landlord.[2]

In arguing that they were allowed to file the administrative complaint in their own right, the appellants make a fundamental error. They cannot be "the person whose property is assessed" under RPTL 524 (3) for they are not the owners of 700 Waverly Avenue; they are tenants. Under long standing New York law, restated many times by this Court, a leasehold is personal property. Article 3 of the Real Property Tax Law allows only real property to be assessed (*see* RPTL 304 [1] ["All

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[1] Numbers preceded by "R." refer to pages in the Record on Appeal before the Second Department.

[2] The administrative complaint for 2009 was worded differently but the gist is the same.

assessments shall be against the real property itself which shall be liable to sale pursuant to law for any unpaid taxes or special ad valorem levies"]).

The Mamaroneck assessors did not, and by law, could not assess the appellants' leasehold interest. It naturally follows that the appellants were not "the person whose property is assessed" and therefore not persons who could file proper complaints initiating administrative review.

To sidestep this logic, the appellants conflate two disparate sections of the Real Property Tax Law (RPTL 524 [3] and 704 [1]) which serve different purposes, describe different sets of people, and come into play at different points in the overall review of assessments. The Second Department recognized the dichotomy in the statutory language and harmonized the statutory scheme by determining the phrase "the person whose property is assessed" to be synonymous with the word "owner", and RPTL 704 (1)'s phrase, "[a]ny person claiming to be aggrieved by any assessment of real property", to refer to a larger group of potential petitioners for the tax certiorari proceeding that follows the administrative review. In doing so, the Appellate Division did precisely what this Court has directed the lower courts to do (*see Matter of the Town of Irondequoit v County of Monroe*, 36 NY3d 177, 182 [2020] ["When the statutory provision to be interpreted 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" (internal quotation marks and citations omitted)] and *Matter of Aaron J.*, 80 NY2d 402, 407 [1992] where this Court noted an "obligation to harmonize the various provisions of related statutes and to construe them in a way that renders them internally compatible", a proposition that this Court recently repeated in *People ex rel. McCurdy v Warden*, 36 NY2d 251 [2020]).

The Second Department's construction of the phrase in RPTL 524 (3) follows this Court's admonition that when statutes contain completely dissimilar terms, each must be given its own meaning so that neither is rendered superfluous (*see e.g. Matter of Natl. Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 33 NY3d 336, 348 [2019] ["all parts of a statute are intended to be given effect and . . . a statutory construction which renders one part meaningless should be avoided" (citations and internal quotation marks omitted)]. Hence it was incumbent upon the Appellate Division to interpret these phrases so as to give each a place in the assessment review process, which it did.

The Court recognized that article 5 of the Real Property Tax Law controls the administrative review while article 7 governs the judicial challenge of an administrative review and that nether article intrudes upon the domain of the other. It also recognized that by using such disparate phrases, the Legislature limited the

person who must bring the administrative review to one class of person: "the person whose property is assessed"[3] but expanded the group who may sue to have an assessment reduced to anyone "claiming to be aggrieved by any assessment" (RPTL 524 [3] versus RPTL 704 [1]).

To give each of these completely different phrases its own meaning, the Second Department determined that the narrow language of RPTL 524 (3) described the owner of the real property being assessed, but that the Legislature's more expansive language in RPTL 704 [1] meant that potential tax certiorari litigants consist of a larger class, including tenants like the appellants who are obligated to pay the real property taxes levied upon the properties that they rent.

This reconciliation of RPTL 524 (3) and RPTL 704 (1):

(A) is consistent with New York law regarding the nature of leaseholds,

(B) followed this Court's instruction to give meaning to all phrases in a statute,

(C) is supported by (i) RPTL 523-b,

(ii) the form administrative complaint promulgated by the Office of Real Property Tax Services and

(iii) statutes in other states, and

[3] or that person's designee

(D) is the conclusion reached by courts of other states (*see Walgreen Co. v Macomb Twp.*, 280 Mich App 58 [Court of Appeals 2008]).

Against this backdrop, we now give a fuller presentation of our arguments against granting leave.

Point I

There is no split among the Departments, as the only appellate case that directly addressed the issue presented in *DCH* did not interpret state law.

McLean's Dept Stores v Commr (2 AD2d 98 [3d Dept 1956]) is one of the four appellate decisions that have examined in depth the issue of who must file an administrative complaint for the review of an assessment, the other three being the Second Department's trilogy of *Matter of DCH Auto v Town of Mamaroneck* (178 AD3d 823 [2d Dept 2019]), *Matter of Larchmont Pancake House* (153 AD3d 521 [2d Dept 2017], *affd on other grounds* 33 NY3d 228 [2019]) and *Matter of Circulo Housing Dev. Fund Corp. v Assessor* (96 AD3d 1053 [2d Dept 2012]).[4]

McLean's Dept Stores does not indicate a split between the Second and Third Departments for three reasons.

First, *McLean's Dept Stores* was decided before the Real Property Tax Law was codified and before RPTL 524 was enacted in 1982. Its holding cannot be

[4] At issue in *Matter of Onteora Club v Bd. of Assessors* (29 AD2d 251 [3d Dept 1968]) was the forerunner to RPTL 704 (1), not the forerunner to RPTL 524 (3).

considered an interpretation of RPTL 524. If this Court were to grant leave, it would have to measure *DCH* against the statute that currently exists, not the statutes that preceded it.

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

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

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

The corresponding provision in the Binghamton law provided:

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

McLean's Dept Stores, 2 AD2d at 99.

By this disjunctive ("the person assessed or whose property is assessed"), which does not exist in RPTL 524 (3), Binghamton created two categories of grievant. While the City did not define the members of each category, the Third Department determined that tenants obligated by their leases to pay the real estate taxes fell within one of the categories of the local law.

Supporting the Third Department's construction of the local law (and the respondents' argument) on the meaning of the disjunctive in legislation is this Court's decision in *Leader v Maroney, Ponzini & Spencer* (97 NY2d 95 [2001]). At issue were the separate standards for asking for an extension of time to serve process contained in CPLR 306-b ("good cause shown" being the first, "in the interest of justice" being the second). The two standards are joined by the word "or" in the statute. This Court held that each standard was to be measured by its own criteria for "[t]hey cannot be defined by use of the same criteria; otherwise, one [standard] would have been sufficient" (*id.* at 104). The Third Department approached the Binghamton law in the same way because it too had two categories separated by the disjunctive "or". RPTL 524 (3) has only one category, however, making *McLean's* a completely different case.

Since the Binghamton law does not apply here, the universe of possible protesters contained in that law is irrelevant, except to emphasize that Binghamton

may have thought it necessary to enlarge the universe of grievants, just as the Legislature did for Nassau County when it enacted RPTL 523-b (*see* pp. 24-26 for an exposition on how this statute fortifies the holding in *DCH*).

The lower court decisions

Exhibits 8, 9 and 10 are Supreme Court decisions rendered by the same jurist. They obviously do not represent the Fourth Department's view of *DCH* and cannot serve to even hint at a split between the Second and Fourth Departments.

One purpose of the tiered review in the New York court system is to give the Court of Appeals the benefit of the analyses by the Appellate Division of issues and arguments made both at the appellate and trial court level in order for this Court to determine whether it needs to settle the law on a particular point (*cf. Vasquez v United States*, 454 US 975, 976 [1981] ["Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts"]). It is only when the Fourth Department speaks to the issue that we will know whether it and the Second Department are at odds with one another.

At the risk of prejudging, it appears that if the Fourth Department ever deals with the contours of RPTL 524 (3), it will side with the Second Department (*see*

Matter of Raddison Community Assn. v Long, 3 AD3d 135, 139 [4th Dept 2003], *lv dismissed* 4 NY3d 870 [2005] ["[T]he construction urged by petitioner would be contrary to the purpose of RPTL 524, which requires that a property owner file a complaint with the assessor . . . before seeking relief in court (*compare* RPTL 524, *with* RPTL 706)"].

Moreover, these three Supreme Court decisions predated *DCH*. Justice Doyle would have been required to follow *DCH* if the motions had been made afterwards (*see Maple Medical, LLP v Scott*, 191 AD3d 81, 90 [2d Dept 2020] ["While the Supreme Court is bound to apply the law as promulgated by the Appellate Division in its own Department, where the issue has not been addressed within the Department, the Supreme Court is obligated to follow the precedent set by the Appellate Division of another Department until its home Department or the Court of Appeals pronounces a contrary rule" (citations omitted)], *Mtn. View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984] [similar] and *Women's Care in Obstetrics and Gynecology v Herrick*, 65 Misc3d 1221A [Sup Ct., Warren County 2019] ["The facts of this case are nearly identical to those before the First Department in *Matter of Schafer* and the Court is therefore bound by that decision"]).

In addition, the decisions contain factual errors and reach erroneous conclusions. Neither Larchmont Pancake House nor Circulo Housing Development

Fund Corporation were tenants with a contractual obligation to pay the real property taxes on the properties they occupied (*cf* Exhibit 8 at 4, Exhibit 9 at 4 and Exhibit 10 at 4). And as this Court pointed out, Larchmont Pancake House was not aggrieved by the assessment.[5]

Finally, Justice Doyle overlooked the Fourth Department's alert in *Raddison Community Assn* to the contrast between RPTL 524 and RPTL 706. Instead, the Fourth Department decision to which he pointed — *Raer Corp. v Vil. Bd. of Trustees* (78 AD2d 989 [4th Dept 1980], *lv dismissed*, 52 NY2d 677 [1981]) — specifically says: "Such statutes provide that *an owner* of real property may protest the tax assessment thereon by timely filing with the board of assessment review a complaint. . . ." (emphasis added).

In sum, at present there is no conflict among the Judicial Departments.

Point II

DCH is simply the most recent pronouncement of a long-standing rule.

The *DCH/LPH/Circulo* decisions[6] did not break new ground. Contrary to the appellants' contention, the trilogy has not created a novel approach to assessment

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[5] (*see Matter of Larchmont Pancake House v Bd. of Assessors*, 33 NY3d 228, 236 [2019] ["petitioner is not an aggrieved party within the meaning of RPTL article 7"]).

[6] The shorthand "LPH" refers to the Appellate Division's decision only.

review that "contradicts decades of precedent" (*see* affirmation of the appellants' counsel at 20, ¶ 51).

Thirty-five years ago, this Court was explicit in *Sterling Estates, Inc. v Bd. of Assessors* (66 NY2d 122, 126 [1985]). "[T]he Legislature has specified that protest is a condition precedent to a proceeding under Real Property Tax Law article 7 by providing that a petition seeking review must show that a complaint was made in time to the proper officers to correct such assessment. Failure to comply with that requirement requires dismissal of the aggrieved taxpayer's petition" (internal quotation marks and citations omitted). (Lest the term "aggrieved taxpayer" cause confusion as to who may file an administrative complaint, the Sterling Estates petitioner was the owner of the real property whose assessment was being challenged [*id.* at 124]).

Sterling Estates restated this Court's view when it affirmed the Appellate Division in *Matter of Onteora Club v Bd. of Assessors* (17 AD2d 1008 [3d Dept 1962], *affd* 13 NY2d 1170 [1964]) over 55 years ago. There the Appellate Division wrote that it has been "well settled that the court is without jurisdiction to review and correct assessments unless a verified complaint has been timely and *properly filed*, according to law" (*Matter of Onteora Club v Bd. of Assessors*, 17 AD2d 1008, 1009 [3d Dept 1962] [emphasis added]). "Albeit technical, [when] an express

condition precedent to a judicial proceeding i[s] not met, . . . the court lack[s] jurisdiction to review" (*id.*).[7]

These decisions are consistent with the two Fourth Department decisions cited above. We repeat them only to demonstrate how long the rule reiterated by the *DCH/LPH/Circulo* trilogy has been settled law. Forty years ago, the Appellate Division made it clear that to be properly filed an administrative complaint must be filed by the owner of the real property (*see Raer Corp. v Vil. Bd. of Trustees*, 78 AD2d 989, 989 [4th Dept 1980], *lv dismissed* 52 NY2d 677 [1981]). (Admittedly *Raer Corp.* was decided before RPTL 524 [3] existed but its holding advances the argument that state law required an owner to file the administrative complaint both before and after there was an RPTL 524 [3]).

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

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[7] We recognize that *Onteora Club* was decided before RPTL 524 was enacted. We cite the case not to support our arguments about the meaning of RPTL 524 (3) but to point out that in order for courts to have jurisdiction over a challenge to an administrative action, there must be strict compliance with the conditions precedent whatever those conditions may be at the time.

There is nothing novel about *DCH* that warrants this Court's review. It has been the law of this state for more than half a century. The stability of the law may explain why so many commercial leases (like the one to which the appellants are a party) require landlords to participate at the administrative stage of the assessment review process (*see* Point VI, *infra*).

Point III

The appellants' leasehold was not assessed. Hence, the appellants are neither the "person whose property is assessed" nor the "taxpayer".

A. Leases are personal property

No one disputes that RPTL 524 (3) requires a complaint about an assessment to come from the "person whose property is assessed . . . ." Identifying that person starts with determining what "property is assessed".

The appellants' interest in 700 Waverly Avenue is that of a tenant. Leaseholds are not real property (*see Matter of Ft. Hamilton Manor, Inc. v Boyland*, 4 NY2d 192, 197 [1958] ["Under a long line of New York decisions, the interest of a tenant of realty under a real estate lease is not realty but is a chattel real which is personal property"]).[8] The significance of this classification to New York's real property

[8] (*see also PK Rest., LLC v Lifshutz*, 138 AD3d 434, 439 [1st Dept 2016], *First Trust & Deposit Co. v Syrdelco, Inc.*, 249 AD 285, 286-287 [4th Dept 1936] and *Matter of Claim of Ehrsam v City of Utica*, 37 AD 272, 274 [4th Dept 1899]).

assessment and taxation system is reflected in the structure of the Real Property Tax Law.

The RPTL concerns itself only with the assessment and taxation of real property, since New York "does not have a tax on personal property" (*Matter of Mitchel Manor No. 1 Corp. v Bd. of Assessors*, 10 AD2d 854, 855 [2d Dept 1960]) (*see also* RPTL 300's second sentence which explicitly states that "personal property, whether tangible or intangible, shall not be liable to ad valorem taxation"). Accordingly, the statute limits the definition of real property to land, buildings, and other physical elements (*see* RPTL 102 [12]).

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

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

To accomplish the task of taxing real property, assessors are "charged by law with the duty of assessing real property . . ." (RPTL 102 [3]), coming up with assessments based upon "the valuation of real property" (RPTL 102 [2]) and making entries upon assessment rolls of certain information for "each separately assessed parcel of real property" (RPTL 502 [2]). Tax bills are mailed to "each owner of real property at the tax billing listed [on the tax roll]" (RPTL 922 [1] [a]).

Because of this statutory framework, when the County of Nassau assessed a petitioner for the value of the buildings it had constructed on land leased from the federal government, the assessment was stricken. Since the petitioner's leasehold "constitute[d] personal property, called a chattel real", it could not be assessed because New York does not assess personal property (*see Matter of Mitchel Manor No. 1 Corp. v Bd. of Assessors*, 10 AD2d 854, 855 [2d Dept 1960] [citation omitted]).

Although under proper circumstances, a tenant, "aggrieved by any assessment of real property" (RPTL 704 [1]), may bring a tax certiorari proceeding, it does so not because the tenant is the "person whose property is assessed", but because the Legislature has chosen to allow certain persons, in addition to owners, to bring tax

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

In other words, although the statutes allow a "person whose property is assessed" to file an administrative complaint and be a petitioner in an Article 7 proceeding, the inverse is not true. A person who is eligible to be an Article 7 petitioner is not automatically entitled to file a complaint for an administrative review. That person also must be "the person whose property is assessed."

Since the challenges to the assessments here required the administrative review to be submitted by "the person whose property is assessed", the filing of an administrative complaint by the owner of 700 Waverly Avenue was a sine qua non. Without it, a condition precedent for subject matter jurisdiction in these Article 7 proceedings is missing (*see Matter of Larchmont Pancake House v Bd. of Assessors*, 33 NY3d 228, 235 [2019] ["[T]he proper filing of an administrative grievance pursuant to RPTL article 5 is a condition precedent to judicial review pursuant to RPTL article 7"]).

B. The appellants are not "taxpayers".

In tax certiorari litigation, it is common for a tenant that is obligated to pay real estate taxes pursuant to a lease to refer to itself as the "taxpayer". It is not. Neither the County of Westchester, the Mamaroneck Union Free School District, the Town of Mamaroneck nor the Village of Mamaroneck have taxed the appellants based upon the value of the real property they have leased from 700 Waverly Avenue Corp. They have taxed the owner of the property, the appellants' landlord. While the appellants may pay those taxes, they do so because of their contractual relationship with their landlord, not because the taxes have been imposed directly upon them (*see* affirmation of the appellants' counsel at 18, ¶ 46 ["Petitioner . . . is contractually obligated to pay all of the real property taxes"]).

Further proof lies in the Westchester County Tax Act which makes an owner personally responsible for paying the real property taxes levied upon the owner's property (*see* Westchester County Tax Act § 283.614 [1] ["Notwithstanding any general, special or local law to the contrary, whenever any tax . . . levied or assessed upon or against the property of any persons . . . except a municipal corporation . . . shall at any time remain unpaid, such unpaid tax or assessment shall become the personal liability of the owner of the property"]).[9]

[9] In counties where specific tax acts do not exist, owners are personally liable for the real estate taxes levied upon their properties if they reside in the municipality where their property is located (*see* RPTL 926 [1]. Dictum to the contrary in *Matter of Mack v Assessor* (79 AD2d 604, 605 [2d Dept 1979]) is, respectfully, incorrect.

Thus, "taxpayer" means the owner of the property being assessed, not someone who, for whatever reason, pays the real estate taxes. This makes sense since assessors only assess real property and taxing authorities only tax the owners of the real property that is assessed. Though the appellants may have paid their landlord's taxes, they are not the "taxpayer" within the meaning of that term.

Point IV

The difference in the language of RPTL 524 (3) and RPTL 704 (1) means that the appellants were not "the person whose property is assessed."

The appellants constantly conflate RPTL 524 (3) and RPTL 704 (1) (*see e.g.* affirmation of the appellants' counsel at 39, ¶ 85) when in fact they serve different purposes and contain different definitions for the persons who may act thereunder. RPTL 524(3) requires the complainant at the administrative level to be "the person whose property is assessed, or . . . some person authorized in writing by the complainant or his officer or agent . . .", while RPTL 704 (1) permits "[a]ny person claiming to be aggrieved by any assessment of real property . . . ." to be the petitioner in a tax certiorari proceeding (assuming, of course, that the proceeding is preceded by a proper RPTL 524 [3] complaint).

As a fundamental matter of statutory construction, these dramatically discrete terms cannot be synonymous. In *People v Brancoccio* (83 NY2d 638 [1994]), this

Court was called upon to construe the Criminal Procedure Law that in one subsection established the impact of an indictment being "filed" in a superior court while misdemeanor charges are pending in an inferior court, and in another subsection described what occurs when a prosecutor obtains an adjournment from that inferior court in order to present the case to a grand jury and an indictment "results".

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

Since the words: "the person whose property is assessed" found in RPTL 524 (3) are so unlike the words: "[a]ny person claiming to be aggrieved by any assessment of real property" appearing in RPTL 704 (1), they cannot be given the same meaning without stripping one of them of all meaning. These appellations create two different sets of people, with RPTL 524 (3) referring to the owner of the real property or the owner's designee, and the sobriquet in RPTL 704 (1) referring to a larger group than just "the person whose property is assessed" or that person's designee.

To treat them as if they describe the same persons would render one of the phrases superfluous, a result that must not occur (*see Matter of Natl. Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 33 NY3d 336, 348 [2019] ["[A]cceptance of the PSC's interpretation of section 2 would require us to disregard the accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided" [citations and internal quotation marks omitted], *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001] ["We have recognized that meaning and effect should be given to every word of a statute"], *Matter of Branford House, Inc. v Michetti*, 81 NY2d 681, 688 [1993] ["A construction rendering statutory language superfluous is to be avoided" [citations omitted] and *Rocovich v Con Edison*, 78 NY2d 509, 515 [1991] ["It is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided" [citation omitted]).[10]

The Second Department followed this Court's mandate of statutory construction in the *DCH/LPH/Circulo* trilogy by interpreting the phrase "person whose property is assessed" as being synonymous with the word "owner". This

[10] (see also *Matter of Khan v* Annucci, 186 AD3d 1370, 1372 [2d Dept 1370, 1372], *Matter of Level 3 Communications, LLC v Erie County*, 174 AD3d 1497, 1501 [4th Dept 2019] [same]). *JJM Sunrise Auto, LLC v Volkswagen Group of Am., Inc.* 149 AD3d 1051, 1052 [2d Dept 2017] and *Matter of Level 3 Communications, LLC v Clinton County* (144 AD3d 115 [3d Dept 2016])

construction is consistent with New York case law which characterizes leases as personal property and with New York statutory law which limits assessments to real property. It also allows the phrase "person whose property is assessed" to retain its vitality and to have purpose in the statutory scheme. Far from creating "an additional requirement . . . that only an owner has the exclusive authority to file a grievance under RPTL article 5" (affirmation of the appellants' counsel at 19, ¶ 47), the Appellate Division simply avoided an interpretation that would have rendered the phrase in RPTL 524 (3) meaningless and superfluous (*see Matter of Mestecky v City of New York*, 30 NY3d 239, 243 [2017] ["We have recognized that meaning and effect should be given to every word of a statute and that an interpretation that renders words or clauses superfluous should be rejected" (internal quotation marks and citation omitted)].

Point V

The Appellate Division's interpretation of RPTL 524 (3) is supported by another statute in the RPTL, by the form of administrative complaint promulgated by the State and by statutes and case law from other states.

A. RPTL 523-b

Further proof of the Legislature's decision to differentiate between complainants in administrative reviews and petitioners in tax certiorari proceedings

can be found in its creation of the Assessment Review Commission for Nassau County.

This statute, added to the Real Property Tax Law in 1998, does not limit the persons who may file grievances to the persons described in RPTL 524 (3). It increases the pool to "any person or corporation claiming to be aggrieved by the assessment of real estate. . . ." (RPTL 523-b [6] [a]). The clash in the language of RPTL 524 (3) and RPTL 523-b proves that the Legislature's intent was to make the set of persons who may file administrative complaints pursuant to RPTL 524 smaller than the group of persons who may do so in Nassau County. Otherwise, it would have conformed the class of permissible RPTL 524 (3) complainants to the class created by RPTL 523-b.

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

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

the RPTL 524 (3) definition, the Legislature intended that when RPTL 524 applies, it is the property owner who must file the administrative complaint.[11]

RPTL 523-b also illustrates that if there is to be a change in the assessment review process, that change should come from the Legislature. This has happened before in the field of tax certiorari. When this Court allowed a lower court to reduce an assessment below the value requested in the Article 7 petition, the Legislature stepped in to amend RPTL 720 (1) (b) to prevent that from happening in the future (For a synopsis of these events, *see Matter of Raddison Community Assn. v Long*, 3 AD3d 135, 138-139 [4th Dept 2003], *lv dismissed* 4 NY3d 870 [2005]).

B. *Form RP-524*

The form for administrative complaints promulgated by the New York State Office of Real Property Tax Services is further proof that the Second Department was correct. In paragraphs one and two on page one, the form asks for the "Name and telephone no. of owner(s)" and the "Mailing Address of owner(s)" (R. 100)[12], not for information about a possible aggrieved person who is not the owner.

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[11] Other states are more expansive (see e.g., Conn General Stat § 12-111 [a]).

[12] We refer to only one of the administrative complaints filed in these proceedings because all the forms are identical.

Paragraph 7 on page one asks for the "[p]roperty owner's estimate of market value of property . . ." (*id.*).

Since RPTL §524 (3) allows an owner to have a representative file an administrative complaint on the owner's behalf, paragraph three on page one of the form provides spaces within which can be inserted the "Name, address and telephone no. of representative of owner. . ." (R. 100).

Part Four of the form, entitled "DESIGNATION OF REPRESENTATIVE TO MAKE COMPLAINT", is where the owner makes the actual designation. At the beginning of Part Four, the owner (or one of its officers if the owner is not an individual) is identified by name, followed by the appellation: "as complainant (or officer thereof)" (R. 103). The owner then names the representative and signs Part Four above the line that reads "Signature of owner (or officer thereof)" (*id.*). By "complainant", the form is referring to the property owner.

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

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

C. Michigan

The phrase "the person whose property is assessed on the assessment roll" appears in section 211.30 (4) of the statutes of State of Michigan. It was interpreted in the context of the procedure for an administrative review of an assessment in *Walgreen Co. v Macomb Twp.* (280 Mich App 58 [Court of Appeals 2008]) — a case remarkably similar to this one. There a tenant obligated to pay the real property taxes filed the administrative review with the Michigan equivalent of New York's Board of Assessment Review. It argued, among other things, that it "was a party in interest because it was responsible for paying the property taxes" (*Walgreen Co.*, 280 Mich App at 61) and therefore had the right to protest the assessment at the administrative level. The Court of Appeals disagreed, pointing out that "because petitioner did not provide the board of review with any indication that it was the agent of a 'person whose property is assessed on the assessment roll', the statute [controlling the procedures before the Board of Review, viz. Mich. Comp. Laws § 211.30 (4)] does *not* give petitioner any rights" (*Walgreen Co.*, 280 Mich App. at 65).

In a statutory structure similar to New York's, Michigan concluded that the phrase appearing in RPTL 524 (3) means exactly what the Second Department in says it means: "the person whose property is assessed" is the owner of the property.

D. Colorado, Nevada, and Wyoming

These states have statutes that use the words "owner" and the "person whose property is assessed" synonymously. Colo Rev Statutes Annotated § 37-45-127 (1) requires the administrative body known as the board of directors to publish notice of its meeting to review assessments in newspapers best suited to notify "the owners of property" of where they can find information about the assessments of their property, and of the time and place where they can lodge objections to the assessments. Subsection 2 provides that "any person whose property is assessed" may file written objections to the board. Finally, subsection 3 describes the procedure for an "owner of property" to obtain judicial review of the board's findings on his/her objection. Clearly, the statute considers the "owner[] of property" and the "person whose property is assessed" to be one and the same.

Nev Revised Statutes Annotated § 541.220 (1) and Wyo Statutes Annotated § 41-3-776 (a) are practically identical to the Colorado statute. These three states show that the phrase a "person whose property is assessed" is commonly understood to refer to the owner of that property.

Point VI

The appellants' lease provided a mechanism for the appellants to have complied with RPTL 524 (3).

Section 5 (e) (iv) of the lease between the appellants and the owner of the Subject Property: 700 Waverly Avenue Corp. (700 Waverly) specifically requires the landlord to "join and cooperate in [proceedings to contest the Subject Property's assessment] or permit them to be brought by [the appellants] in [700 Waverly's] name" if local law requires it to participate (R. 56). In order to meet the requirements of RPTL 524 (3), all the appellants needed to have done was to invoke that section of the lease and have 700 Waverly sign the administrative complaint.

The appellants could have prepared the complaint for 700 Waverly to sign, submitted it to the Mamaroneck assessors and appeared before the Board of Assessment Review on behalf of 700 Waverly. Thereafter, the appellants would have had the right to act on their own behalf in pursuing judicial relief in tax certiorari proceedings. The process is no more complicated than that. The appellants did not follow these simple steps and must suffer the consequences.

The lament that the *DCH/LPH/Circulo* trilogy has upset a universally understood procedure of net lessees pursuing administrative remedies for assessment relief is unfounded (*see* affirmation of the appellants' counsel at 43, ¶ 91). Property owners and aggrieved parties combining efforts to review assessments is neither impossible, unlikely nor unheard of.

Moreover, a landlord's participation in the administrative review makes economic sense since an owner must anticipate that eventually the person currently paying the taxes no longer will be doing so. When that day comes, the owner will be better positioned to find a new person to pay the taxes if the assessment is at its lowest possible level. Likewise, the person that is paying the tax has an incentive to furnish the owner with all the information an owner may need to file an administrative complaint. Furthermore, there is no indication either in this record or in general that landlords and tenants will not co-operate, and this Court should not assume that they will not. Indeed, the DCH Lease provides a perfect example of landlord-tenant co-operation.

It is easy to imagine other ways that a tenant can make sure it will meet the condition precedent for an RPTL article 7 proceeding. Examples include a lease that frees a tenant from having to pay the real estate taxes attributable to an assessment for which the owner did not file an administrative complaint when requested to do so, or a limited power of attorney from the owner allowing the tenant to sign the owner's name to an administrative complaint.

And there is *Matter of Grecian Garden Apts., Inc. v Barlow* (71 Misc 2d 457 [Sup Ct, Monroe County 1972]). There the administrative review was brought "by an agent on behalf of the owner of the property, whereas the petition instituting the

proceeding was made by a lessee of the property who was required to pay the taxes" (*id.* at 458) — the exact course for aggrieved tenants chartered by the Appellate Division in *DCH, LPH* and *Circulo*.

What makes *Grecian Garden* so important in this context is that it is cited at the very end of the *DCH* opinion. At the risk of being presumptuous, it seems that by citing *Grecian Garden,* the Appellate Division was pointing to a landlord and a tenant who, as long ago as 1972, knew that net tenants cannot pursue administrative review of assessments in their own names, thereby debunking the appellants' proposition of a universal understanding that net tenants can.

Point VI

The other arguments made by the appellants lack merit.

A. Opinions by ORPTS.

The appellants stress the views of the Office of Real Property Tax Services (*see* affirmation of the appellants' counsel at 11, ¶ 18 and 53-55, ¶¶ 109-111). Materials promulgated by ORPTS should not be part of the analysis. While courts often look to the administrative agencies that oversee the application of statutes, "[w]here . . . the question is one of pure statutory interpretation there is little basis to rely on any special competence or expertise of the administrative agency. In such circumstances, the court need not accord any deference to the agency's

determination and can undertake its function of statutory construction" (*Albano v Bd. of Trustees*, 98 NY2d 548, 553 [2002] [internal quotation marks and citation omitted]). (*See also, Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 524 [2019], *Jackson v Bank of Am., N.A.*, 149 AD3d 815, 821 [2d Dept 2017] and *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 80 [1st Dept 2009]).

B. The Town of Mamaroneck website.

A major argument made by the appellants is that the respondents should be estopped from raising the appellants' errors because the Town of Mamaroneck's website invited the appellants to file administrative complaints in their own name (*see* affirmation of the appellants' counsel at 10-11, ¶ 18 and 20 ¶ 51 and 56, ¶113). The legal flaw in this argument (besides the obvious one that the appellants' failure to comply with RPTL 524 [3] deprived the lower court of subject matter jurisdiction) is that estoppel is rarely invoked against municipalities. In *New York State Med. Transp. Assn. v. Perales* (77 NY2d 126, 130 [1990]) this Court reminded litigants and the courts "that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties . . . While we have not absolutely precluded the possibility of estoppel against a governmental agency, our decisions have made clear that it is foreclosed in all but the rarest cases" (internal quotation marks and citations omitted).

The progeny of *New York State Med. Transp. Assn.* have repeated its teaching (*see e. g. W. Midtown Mgt. Group, Inc. v State of New York Dept. of Health*, 31 NY3d 533, 541-542 [2018] ["It is well established that, with rare exceptions, estoppel is not available as a remedy to prevent a government agency from discharging its statutory duties. We have recognized that estoppel may be warranted in unusual factual situations to prevent injustice, but we have limited its use against government agencies to all but the rarest cases" [internal quotation marks and citations omitted] and *Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008] ["It is well settled that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" [internal quotations and citations omitted]). (*See also Matter of Gallo v New York City Dept. of Consumer Affairs*, 170 AD3d 479, 480 [1st Dept 2019]) and *Matter of Wilson v New York City Dept. of Hous. Preserv. & Dev.*, 145 AD3d 905, 907 [2d Dept 2016]).

This rule applies even when a municipal employee dispenses incorrect information (*see Matter of Ryan v Tax Appeals Trib. of the State of NY* 133 AD3d 929, 930 (2d Dept 2015]) ["[T]he doctrine of estoppel does not apply in tax cases unless unusual circumstances support a finding of manifest injustice. Further, it is well established that erroneous advice given by an employee of a governmental

agency is not considered to rise to the level of an unusual circumstance warranting invocation of the doctrine of estoppel" (internal quotation marks and citations omitted) and *Wilson v Neighborhood Restore Hous.*, 129 AD3d 948, 949 [2d Dept 2015] ["[E]quitable estoppel is applied against a municipality performing governmental functions only in the rarest of cases and erroneous advice by a governmental employee will not give rise to an exception to the general rule" (internal quotation marks and citations omitted)].

Here, all that the Town of Mamaroneck did was to refer readers of its website to sources within the State's Office of Real Property Tax Services. Its employees did not personally interact with the appellants in connection the filing of the administrative complaints.

There also is a factual flaw in the appellants' argument. The appellants' counsel submitted an affirmation to the lower court (R. 269-278). In it he recited the steps he takes annually to stay abreast of tax certiorari law (R. 273-274, ¶¶ 12-17). He noted that each year he "consult[s] the applicable statutes and case law" and "check[s] the applicable publication published by ORPTS". He continues by excerpting portions of the ORPTS' publications that he reviews. Nowhere in the affirmation does counsel say that he looked at the Town of Mamaroneck's website before filing the administrative complaints that are the subject of these proceedings.

Detrimental reliance is a fundamental requirement for estoppel (*see Roberts v Paterson*, 19 NY3d 524, 530 [2012]). Since the appellants never read the Town of Mamaroneck's website, they cannot prove that they relied upon it to their detriment.

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

C. Circulo is not rooted in tax exemption statutes.

Squirreled away in a footnote, the appellants erroneously try to isolate *Matter of Circulo Housing Dev. Fund Corp. v Assessor* (96 AD3d 1053 [2d Dept 2012]) to the field of tax exemption (*see* affirmation of the appellants' counsel at 25 n. 16). While *Circulo* involved the denial of a tax exemption, its outcome was not dictated by the tax exemption statutes. The opinion is grounded exclusively on the requirements of RPTL 524 (3) which applies to all grievances. The petition insofar as it dealt with the East Hudson Street property was dismissed solely because of the failure to satisfy Article 5's requirement that the property owner be the complainant. Whether the Circulo petitioner or its related party met the standards for the exemption being sought played no part in the decision.

Conclusion

The issues that the appellants ask this Court to review were answered correctly by the Appellate Division using a straightforward application of well-established case law and an understanding that the statutes governing assessment review create a hierarchy of participants at the different levels of review. There simply is no need for this Court to involve itself in those issues.

Dated: March 18, 2021

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