

TEMPORARY RESTRAINING ORDER HALTS ASSESSMENT MODEL FOR WIND AND SOLAR PROJECTS UNDER REAL PROPERTY TAX LAW § 575-B

Hodgson Russ Renewable Energy and Municipal Alert
April 29, 2022

In a prior alert, we advised of the new assessment model concerning wind and solar projects that went into effect for this tax year under Real Property Tax Law (“RPTL”) § 575-b (the “Model”).[1] On April 29, 2022, Albany County Supreme Court (Ryba, J.) granted a temporary restraining order enjoining the Department of Taxation and Finance (“DOTF”) and its “agents, officers, contractors, employees, or affiliates, and all others acting on its behalf . . . from taking any actions, official or otherwise, to implement, or to direct or induce the implementation of the Model by [DOTF] or any assessor or assessing unit” (the “TRO”).[2] The TRO will remain in effect until a preliminary injunction hearing is held on May 27, 2022, unless it is vacated earlier. The impact this ruling has on tentative tax assessment rolls that are about to be published is anything but clear.

Arguments Raised in the Lawsuit

The Model Violates the New York State Administrative Procedure Act

The lawsuit raises a number of arguments, including under the New York State Constitution, but focuses largely on the contention that DOTF failed to “substantially comply” with the New York State Administrative Procedure Act (“SAPA”).[3] SAPA governs the rule-making process, requiring a number of steps before an agency rule is finalized and effective. SAPA generally applies to “any department, board, bureau, commission, division, office, council, committee or officer of the state” or to any “public benefit corporation or public authority” that has at least one member who is appointed by the governor and is authorized by law to make regulatory rules.[4] DOTF falls under this definition, and is a rule-making body.

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A “rule,” as defined by SAPA is, in relevant part, “the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof.”[5]

Under SAPA’s multi-step process, an agency proposing a rule must publish notice of the rule,[6] allow for proposed revisions to the proposed rule,[7] and must include an analysis of the impact of the proposed rule, including a regulatory impact statement and regulatory flexibility analysis.[8] Upon completion of the process, the final rule must be filed with the Secretary of State, along with publication of a notice of adoption in the State Register in order to be effective.[9]

Petitioners-Plaintiffs (“Petitioners”) argue that the Model is a “rule” under SAPA, and therefore DOTF was required to comply with SAPA.[10] In Petitioners’ view, because the Model is an across-the-board “rigid numerical formula” concerning the taxation of real property, it falls under the definition of a “rule.”[11] Accordingly, DOTF was to strictly follow SAPA in creating and implementing the Model. In a letter from DOTF prior to the lawsuit, DOTF took the position that the Model is not a “rule” because RPTL § 575-b “contains no reference whatsoever to rules, and [DOTF] has not, in fact, promulgated any rule in relation to the solar and wind valuation model.”[12]

For purposes of the TRO, the Court found that Petitioners were likely to prevail on the argument that SAPA did indeed apply to the Model. The Court reasoned that the Model establishes a numerical policy uniformly “without regard to individualized circumstances or mitigating factors,” and therefore it constituted a “rule” under SAPA. The Court went on to find there would be irreparable injury if the Model was allowed to go forward and the balancing of the equities favored granting the TRO.

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The impact of the decision may not be long term. DOTF has already indicated that the next iteration of the Model will be issued through the SAPA process, curing the only defect raised. The validity of the other claims is yet to be tested.

Based on the language of the TRO, assessors again have discretion - for now - to set assessment values for wind and solar projects pending the outcome of this litigation. The language of the TRO is not clear whether assessors are completely prohibited from using the Model entirely or if the Model simply is no longer mandatory as the only option to value wind and solar projects.

For most municipalities hosting renewable energy projects, the tentative assessment rolls will be published by May 2 (since May 1 is a Sunday this year). The TRO does not provide for service upon assessing units and assessors, so there is a question of notice and applicability beyond the parties to this litigation. Given the timing of the TRO, assessors may not have proper notice of the TRO prior to publishing the tentative assessment rolls. Therefore, the tentative assessment rolls may reflect assessment values based on the Model. Nothing in the TRO requires assessors to change any values that may have been set on the tentative assessment rolls. If a property owner is dissatisfied with the assessment on the tentative assessment roll, they must file a grievance challenging the valuation by Grievance Day. This is typically the fourth Tuesday in May in most jurisdictions outside of New York City. This year, the deadline is May 24, 2022. Failure to file a grievance bars a taxpayer from commencing a lawsuit challenging the assessment.

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The decision will undoubtedly increase uncertainty. Can an assessor change the assessment away from the Model based on the TRO even if the tentative roll has been set? The TRO is not necessarily retroactive, and assessors may have limited ability (or desire) to move away from the tentative assessment roll as it will likely encourage litigation.

We will continue to monitor the status of the Model given this litigation. If you have any questions about the impact this litigation has on the valuation and taxation of wind or solar projects, tax assessment challenges for these projects, or about renewable energy projects generally, please contact [Daniel Spitzer](mailto:dspitzer@hodgsonruss.com) (716.848.1420), [Henry Zomerfeld](mailto:hzomerfeld@hodgsonruss.com) (716.848.1370), or a member of our [Renewable Energy Practice](#).

[1] *Understanding the Reach and Limits of RPTL § 575-b and the State-Mandated Solar and Wind Real Property Assessment Models*, Hodgson Russ Renewable Energy Alert, Sept. 8, 2021, available from <https://www.hodgsonruss.com/newsroom-publications-13472.html>.

[2] *Granted Order to Show Cause with Temporary Restraining Order, Matter of Town of Blenheim, et al. v. Amanda Hiller, in her official capacity as Acting Tax Commissioner and General Counsel of the New York State Dep't of Taxation and Finance, et al.*, Index No. 903157-22, available from <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=kzCTNhy5Ie4kuhGjVg5C1g==> (brackets and ellipsis added).

[3] *Verified Petition-Complaint ¶ 1, Matter of Town of Blenheim, et al. v. Amanda Hiller, in her official capacity as Acting Tax Commissioner and General Counsel of the New York State Dep't of Taxation and Finance, et al.*, Index No. 903157-22, available from <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=ljFFYeVLOeLooegINfis5Q==>.

[4] SAPA § 102(1).

[5] *Id.* § 102(2)(a).

[6] *Id.* § 202(1)(a).

[7] *Id.* § 202(4-a)(a).

[8] *Id.* §§ 201-a, 202(1)(f)(vi, vii).

[9] *Id.* § 203(1).

[10] *Verified Petition-Complaint ¶ 67.*

[11] *Id.* ¶ 67.

[12] *Id.* ¶ 57 (brackets added).