

REAL PROPERTY TAX LAW § 575-B SOLAR AND WIND ASSESSMENT MODEL REMAINS ON HOLD WHILE LITIGATION PROCEEDS

Hodgson Russ Renewable Energy Alert
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State Department of Taxation and Finance could resolve most of the lawsuit simply by publishing the Model through SAPA, but has not done so.

Previously we advised about a Temporary Restraining Order that halted the implementation of the mandatory Real Property Tax Law (“RPTL”) § 575-b “Model” for assessing wind and solar projects over 1 MW.^[1] The key challenge was a procedural one, focused on whether the Model was subject to the provisions of the New York State Administrative Procedure Act (“SAPA”), which has specific requirements as far as public notice and comment on rulemaking. Petitioners successfully contended that they were likely to prevail on the merits because SAPA applied to the Department of Taxation and Finance’s (“DOTF’s”) publication of the Model as it was a rulemaking action, and the Court enjoined implementation of the Model.

On December 6, 2022, the Court rejected the State’s motion to dismiss in part, and held a portion of the motion in abeyance, leaving the injunction in place. The Court specifically held it could not, on the record before it, determine whether the Model was a policy as defined under SAPA. Additionally, it could not without more information determine whether the January 2022 computational correction to the Model re-started the statute of limitations. It outright rejected the State’s argument that the New York State Energy Research Development Agency and the New York State Assessors Association were necessary parties because the law required that they be consulted with in formulating the Model, as their presence was not necessary to adjudicate the case. The DOTF was directed to file the administrative record by December 27, 2022, absent any extensions granted, after which the Court will revisit the remaining questions.

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One aspect the State raised that the Court did not directly address is the question of whether or not the Petitioners have actually been harmed. An assessor’s affidavit offered by Petitioners focused on a solar project that had not yet even been built. Thus, no matter what the assessment of that new project was, it would have actually reduced the cost burden on every other taxpayer by bringing in any tax revenues.

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And the municipalities themselves could suffer no harm because the question is the relative allocation of taxes among taxpayers, not the amount of revenue available to the community.

As the litigation proceeds, it seems that another tax year may be implicated if this is not brought to a conclusion before assessors begin publishing tentative rolls in 2023. This could result in further assessment challenges, something the Model was intended to limit. While New York State's aim was to facilitate uniformity in the assessments of solar and wind projects through the creation and implementation Model, this has been effectively thwarted—at least for now. Delaying the implementation of the Model works to hinder the State's renewable green energy goals.

The DOTF has not explained why it has not simply published the Model through SAPA. This would appear to solve the problem. DOTF would not need to create a different Model, and the broad TRO appears to limit further development of the Model. In fact, RPTL § 575-b does not require annual updates to the Model, only when appropriate in the opinion of the DOTF. Thus SAPA could be employed to move the situation further along.

It is also worth noting that what the TRO does not do: It does not prevent developers and municipalities from using the Model as a basis for discussions on PILOT negotiations. Nor does it prevent assessors who want to use the Model from doing so as a cause of action seeking to throw out the Model entirely has not yet been addressed. Moreover, the TRO does not stop the State from updating the discount rates, which are covered in a separate subsection of RPTL § 575-b than the Model. Since the Model is enjoined, any update in discount rates could not be enforced upon municipalities, but updated discount rates reflecting the steep increase in interest rates over the past year could well reduce unnecessary litigation as the Model at least provides a basis for communications among developers and municipalities.

Additionally, it is not clear if the TRO actually enjoins the state mandate that wind and solar systems are to be assessed on a discounted cash flow basis. The law is set up to mandate using the discounted cash flow method using the challenged Model and the published discount rates. The TRO language does not address the provision of RPTL § 575-b mandating discounted cash flow as the methodology, only the Model that implements this mandatory formula. As litigation drags on, and some assessors reject the statutorily-mandated methodologies, expect this to be an issue.

It is also not clear why municipalities would oppose the use of the Model, especially for smaller systems such as the community solar systems. Another portion of the statute which has not been enjoined requires the State, not the municipality, school district, or county, to defend assessment challenges where the Model was employed. This is a rare instance of the State taking on costs rather than assigning them to municipalities. Given the dollars involved in defending assessments, particularly for towns which are the smallest portion of the revenue stream, use of the Model may be the most prudent exercise by a municipality.

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](#) (716.848.1420), [Henry Zomerfeld](#) (716.848.1370), or a member of our [Renewable Energy Practice](#).

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[1] See *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, available from <https://www.hodgsonruss.com/newsroom-publications-13764.html>.

