TEMPORARY RESTRAINING ORDER REJECTED IN THE LATEST ATTACK ON RPTL § 575-b ASSESSMENT MODEL

Hodgson Russ Renewable Energy Alert
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A New York State Supreme Court justice has rejected a request for temporary restraining order ("TRO") sought by municipal officials attempting to once again prevent use of the state-mandated assessment model for solar and wind projects over 1 MW. The Court rejected the TRO on April 24, 2024, and set a preliminary injunction hearing for late May.

Just a week prior to the publication of tentative assessment rolls on May 1 in most jurisdictions around New York State, a group of assessors and municipal officials acting in their official and individual capacity – the latter presumably to obtain taxpayer standing – brought a suit seeking to invalidate the assessment model for wind and solar projects. *Airey, et al. v. State of New York, et al.* (Albany County Index No. 903991-24). This challenge is by a group of dissatisfied assessors who are legally obligated to use the Real Property Tax Law ("RPTL") § 575-b assessment model (the "Model"), which is now on its second iteration. *See* our alert, "2024 Assessment Model Finalized." Previously, assessors filed a similarly-timed lawsuit in 2022 to overturn the inaugural Model. *See* our alert, "Temporary Restraining Order Halts Assessment Model." Though the Model was temporarily restrained at that time, the dispute was resolved by the New York State budget bill in 2023, mooting the litigation. *See* our alert, "RPTL § 575-b is Back!"

While the petitioners sought a TRO once more, this time the Court denied the request. Since the Model is not restrained, assessors are obligated to use the Model for valuing solar and wind projects over 1 megawatt for the current tax year. The litigation will proceed, and the parties are scheduled to return to Court on May 24, 2024

The Petitioners' Claims

Recognizing that municipalities are limited in their ability to sue the State, the Petition focuses mainly on constitutional claims. Specifically, the suit alleges that:

1. RPTL § 575-b is unconstitutional because it infringes on the constitutional and statutory rights, authorities, and obligations of each and every real property tax assessor in the State of New York.

Attorneys

Emanuela (Amy) D'Ambrogio
Joshua Feinstein
Emily Florczak
Michael Risman
Daniel Spitzer
Henry Zomerfeld

Practices & Industries

Real Property Tax Assessment & Eminent Domain

2. RPTL § 575-b is unconstitutional because it unlawfully delegates the power of the Legislature to tax to an unelected administrative agency.
3. RPTL § 575-b violates the equal protection and due process rights of similarly situated wind and solar generation facilities with generating capacity less than 1 megawatt.
4. RPTL § 575-b violates the equal protection and due process rights of similarly situated renewable energy generation facilities.
5. The Model is arbitrary and capricious because it will dramatically increase the tax burdens of properties not given preferential treatment by RPTL § 575-b, and/or necessitate to dramatic cuts in services and/or necessitate dramatic increases in tax rates.

Hodgson Russ Insights

This challenge is an attempt to reverse course on the uniform manner solar and wind projects are now assessed under the Model. The New York State Constitution requires that all real property not exceed full value. N.Y. Const. art. XVI § 2. Absent a legislative mandate, assessors are free to employ an appropriate methodology of their choosing to assess properties in their jurisdictions. There are instances, however, where the Legislature has dictated the method of valuation for certain properties. For example, telecommunication ceilings and special franchise values, which the Department of Taxation and Finance ("DOTF") set using the cost method. *See* RPTL §§ 499-kkkk, 499-llll. These values are prepared by DOTF and reported to assessors who then rely on these values for their assessment rolls. *See id.* The same is true for oil and gas economic units. *See* RPTL §§ 594(1), (2). The Model is not the first time the Legislature has dictated the methodology of valuation of certain property.

Yet the overarching assertion of the Petition is that RPTL § 575-b "infringes on the constitutional and statutory rights, authorities, and obligations of assessors." The most obvious flaw is those statutory rights and obligations were established by the Legislature, which most certainly can amend them, constrained only by the State Constitution. As to the Constitution, it does not contain the word "assessor." And the Petition admits that the Constitution plainly states the "legislature shall provide for the supervision, review and equalization of assessments" under N.Y. Const. art. XVI, § 2. But they conveniently ignore what the Constitution does state: that local governments have the power to adopt local laws for "levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, *consistent with laws enacted by the legislature*. N.Y. Const. art. IX, § 2 (emphasis added).

The Model has been in effect for three-tax year cycles. While some assessors are dissatisfied with the Model, this is simply not a sufficient basis to overturn the legal enactment. While assessors have discretion, the intent behind the Model was to bring about uniformity to valuing wind and solar projects throughout the State, particularly with the growth of renewable projects under the Climate Leadership Community Protection Act (the "CLCPA"). Too many inconsistencies with valuation of renewable projects before the Model was enacted created difficulties in developing these projects, which contravened the CLCPA's goals for increase in renewable energy resources. As a result, many developers lodged assessment challenges. Avoiding these issues, the Legislature enacted RPTL § 575-b.

The statute not only provides the discounted cash flow method for the Model, but it also limits assessment challenge possibilities. Naturally, if assessors use the correct inputs, the output value used for the assessment will be consistent with the Model and there will be no exposure to the locality. To the extent there is a challenge over the methodology of the Model itself (and not errors in the use of the Model inputs), these challenges are venued in the Third Department and are defended by New York State, not the localities. RPTL § 575-b(4)(e). This is a rare instance where the State insulates localities based on legislative acts.

About that (Missing) Appraisal

Factually the lawsuit asserts that the Model value for a particular project in one of the jurisdictions is significantly less than an appraised value for the same project, based on the appraisal prepared for one of the petitioners. The appraisal is not filed with the lawsuit, so there is no opportunity to review or critique it. It is not known what methodology was employed, but these litigants have advocated for the cost methodology, and appear to be doing so again. Were that the case, the cost method is an inappropriate methodology here as it is reserved for "specialty" property for which, among other things, there is no market and no other method to value such property. *Saratoga Harness Racing Inc. v. Williams*, 91 N.Y.2d 639, 646 (1998) (holding the cost approach should be limited to "unique properties for which there is no market."). The Court of Appeals held that the cost method is disfavored because of the tendency to overvalue properties. *See Saratoga*, 91 N.Y.2d at 643.

The cost method is inappropriate here because these projects are not "specialty" properties. There are four criteria to qualify as a specialty property and to be valued based upon the reproduction cost less depreciation: "(a) the improvement must be unique and must be specially built for the specific purpose for which it is designed; (b) there must be a special use for which the improvement is designed and the improvement must be so specially used; (c) there must be no market for the type of property and no sales of property for such use; and (d) the improvement must be an appropriate improvement at the time of the taking or assessment and its use must be economically feasible and reasonably expected to be replaced." *Matter of Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 357 (1992).

If an assessor asserts that a property is a "specialty" property, the petitioner has the burden of establishing by a preponderance of the evidence that the property does "not fit within the defining characteristics of specialty property." *Matter of Niagara Mohawk Power Corp. v. Assessor of Town of Geddes*, 92 N.Y.2d 192, 199 (1998). We believe solar energy systems fall outside the bounds of the "specialty" property definition because of the third criteria: there must be no market for the type of property. In fact, hundreds of solar energy systems have changed hands in recent years and there is an active market for such systems. Even major wind farms have been sold. Additionally, the income and expenses of renewable energy systems can be reliably determined by qualified appraisers, with or without the Model. Buyers look at the discounted cash flow a project will provide, not how much it cost to build. What a willing buyer will pay a willing seller is still the primary standard for determining taxable value in New York.

Another concern with not seeing the appraisal is that these same advocates have insisted that the Model is defective because it does not include intangible revenues such as the Investment Tax Credit and Renewable Energy Credits. But the State Constitution prohibits the taxing of intangible assets, and qualified appraisers of generating facilities regularly separate out intangibles. Absent the appraisal itself, there is no way of knowing what aspects of the petitioners' advocacy has been

included.

Tax Base Versus Tax Revenue

Another contention is that there is a loss in the tax base because these differing values brought about by the Model. The argument has multiple flaws. First, for the particular project used as an example, there is no true reduction in value of the project as this is the first year it appears on the assessment roll according to the supporting affidavit of an assessor. So there is neither a reduction in taxes nor the tax base as there had been no prior assessed value for the project. Instead, this is new assessed value being added to the tax base – and new taxes.

Second, loss of tax base does not mean loss of tax revenue, it simply deals with the allocation of the tax levy among taxpayers. The tax levy is set by taxing jurisdictions in accordance with state law, the amount of the annual levy is unchanged by a particular property's assessed value. Yet the Petition repeatedly conflates a lower tax base with lower revenue.

Finally, the argument assumes the municipality's appraised value would hold water absent the Model, when it is likely that it would be challenged. As the lawsuit observes, even if there was a situation where the property had already been on the roll and then was reduced in value (like in the case where there is a reduction in an assessment following a legal challenge), the cost of the reduction is shared by all other taxpayers.

The Delegation Claim

The petitioners also assert that the Legislature improperly delegated legislative power by giving "unlawful latitude" to DOTF in establishing the Model, which is a bit curious given they elsewhere assert the Legislature does not have the power to even set the methodology. But the Legislature has, in fact, limited the arena in which DOTF acts by setting a specific methodology, requiring a discounted cash flow methodology rather than the broader income capitalization method employed by appraisers under Uniform Standards of Professional Appraisal Practice. To pass muster the "standards or guides need only be prescribed in so detailed a fashion as is reasonably practicable in the light of the complexities of the particular area to be regulated, since necessity fixes a point beyond which it is unreasonable and impracticable to compel the Legislature to prescribe detailed rules." *Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).

Timing of Relief

A question arises as to what would happen if the Model were overturned. In most communities in the State hosting such facilities, the tentative assessment rolls have been published. Assessors have limited ability to change rolls after the tentative roll is published. Were the Model to be struck down before the final assessment rolls are published on July 1 (in most communities), would assessors then have the option to use a different methodology? Project owners and developers would certainly have the right to file a grievance and lawsuit challenging overassessments, thus leading to exactly the type of uncertainty and increased municipal costs the statute was designed to avoid such a change. And how would this all happen before the July 1 final assessment roll publication date and the July 31 deadline to file tax assessment challenge lawsuits?

We will continue to monitor the status of this challenge and the impact it has on the Model. If you have any questions about the 2024 assessment Model, tax assessment challenges for these projects, or about renewable energy projects generally, please contact Daniel Spitzer (716.848.1420), Amy D'Ambrogio (585.613.3955), Henry Zomerfeld (716.848.1370), or a member of our Real Property Tax Assessment & Eminent Domain Practice.

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