FOCUS:
REAL PROPERTY LAW

Real Property Taxation of Solar and Wind Energy Systems in New York State

Michael P. Guerrerio

In 2019, the New York State Legislature enacted the Climate Leadership and Community Protection Act ("CLCPA"), which requires New York State to rapidly decrease greenhouse emissions and scale up renewable energy capacity.[1] Specifically, the CLCPA mandates that 70% of statewide electric generation be supplied by renewable energy by 2030 and that 100% be supplied by zero-emission sources by 2040.[2]

In 2020, as part of the Enacted State Budget for fiscal year 2021, the New York State Legislature amended the Real Property Tax Law by creating a new Section 575-b and amending Section 487, and Article 18 of the General Municipal Law.[3] The Budget amendments materially affected the valuation of renewable energy projects for real property tax and assessment purposes and for eligibility of financial assistance from industrial development agencies ("IDAs") which rely on such valuations. Collectively, these amendments are intended to foster a rapid buildout of wind and solar facilities as one essential component of the State's overall goals under the CLCPA, while also shifting the burden away from taxing jurisdictions to owners and developers.

Newly enacted Section 575-b established a process by which the New York State Department of Taxation and Finance (the "Department") would develop a uniform appraisal method for valuing solar and wind energy systems, for real property tax purposes, that local assessors are required to adopt Statewide.[4] Whereas, Section 487 was amended to (1) modify the "Pre-Construction Notice" that a developer must give a taxing jurisdiction prior to commencing construction of a wind or solar energy project,[5] and (2) provide taxing jurisdictions an alternative way to notify developers that it will impose a payment-in-lieu of taxes ("PILOT") agreement.[6] Additionally, GML Article 18 was amended to unequivocally qualify renewable energy projects for IDA financial assistance by expressly including a definition of "renewable energy project" and incorporating such defined term within the broader definition of "project."[7] Further, IDAs may now consider "the contribution of the project to the state's renewable energy goals and emission reduction targets" under the CLCPA, among other criteria for financial assistance.[8]

A key component of the Budget amendments, newly enacted Section 575-b now governs the method of assessment for energy systems.[9] Crucial to an understanding of Section 575-b, is Section 487(9)(a) which provides that PILOT payments may not exceed the amount that would otherwise be payable in taxes absent the Section 487 exemption. The law was enacted in response to widespread variation in methods of assessment for wind and solar projects, with the aim of providing certainty by establishing a uniform assessment methodology to standardize the valuation of energy projects for property tax and assessment purposes, and by extension, calculation of RPTL §487 PILOT payments.

RPTL §487: Tax Exemption for Solar and Wind Energy Systems

Section 487 generally provides a 15-year exemption from real property taxation for the increase in value of real property resulting from the installation of a solar or wind energy system.[10] The exemption is automatically effective within a taxing jurisdiction unless it has adopted a local law, ordinance or resolution opting out of the Section 487 exemption program.[11] In taxing jurisdictions that do opt out, the project is taxable in the same way any other real property improvements are and the assessments levied by the local assessor are subject to RPTL Article 5 administrative review[12] and Article 7 judicial review.[13] In jurisdictions that have not opted out the exemption remains, however, Section 487 authorizes a taxing jurisdiction to demand from the project developer a PILOT agreement during the 15-year exemption term which requires payments in an amount not to exceed what the otherwise applicable taxes would have been absent exemption.[14]

A developer must provide a "Pre-Construction Notice" of its intent to commence project development, which triggers the notice period for a taxing jurisdiction to initiate

a PILOT demand. Prior to the amendments, the taxing jurisdiction was required to provide a PILOT notice within 60 days of receiving the written notification.[15] A taxing jurisdiction's failure to strictly adhere to the statutory procedures for a PILOT notice has been held to be fatal, resulting in a windfall for the developer.[16] Now, section 487 defines Pre-Construction Notice as a hard copy letter addressed to the highest ranking official of a taxing jurisdiction, which must include a specific reference to Section 487(9) and a clear statement of the effect of failing to respond within the 60 day timeframe.[17] Alternatively, a taxing jurisdiction may now adopt a local law or resolution announcing its ongoing intent to enter into PILOT agreements instead of responding to each Pre-Construction Notice directly.[18]

PILOT Agreements for Solar and Wind Energy Systems

Under Section 487, a single project could be subject to more than one PILOT agreement on PILOT schedules and payments negotiated with each affected taxing jurisdiction and for a term not to exceed 15 years.[19] Whereas, the same project may now be eligible for financial assistance with a local IDA which, under Article 18 of the GML, are commonly authorized to negotiate a single PILOT agreement on behalf of all taxing jurisdictions affected by the project and for a term of 15 years or more.[20]

Section 487 also provides that payments made pursuant to a PILOT agreement may not exceed the amount that would otherwise be payable in taxes if the project were not exempt.[21] A key provision that asserts the estimated assessed value as the financial linchpin of a prospective project for all parties involved. The Budget amendments enacted Section 575-b to ensure a standard and uniform method of assessment for all projects in the State with an aim to provide certainty to all parties involved: developers, lenders, investors, and taxing authorities, concerning the assessment of such facilities and the property taxes derived therefrom. The standard assessment methodology will impact negotiated PILOT amounts which, as required by Section 487, may not exceed the corresponding assessed value of the project.

Section 575-b: Assessment Model for Solar or Wind Energy Systems

Section 575-b mandates that solar and wind projects of at least one megawatt must be assessed for real property tax values under the Discounted Cash Flow methodology using a model formula (the "Model") and discount rates established by the Department of Taxation and Finance. Pursuant to Section 575-b, the Department must consult with the New York State Energy Research and Development Authority ("NYSERDA") and the

New York State Assessors Association ("NYSAA") to annually develop the standardized Model, while applying a discount rate to the Model that is published by the Department.[22] The Discounted Cash Flow ("DCF") is a form of analysis that attempts to project and forecast future cash flows that are then discounted to a net present value.

Following a 60-day comment period ending in October 2020, the Tax Department promulgated the final model for the 2022 fiscal year, which was updated from time to time. As of the 2022 assessment rolls, all local assessors were required to use the Model for solar and wind energy systems with a nameplate capacity of at least one megawatt. However, implementation of the Model was halted by Albany County Supreme Court Justice Christina L. Ryba in *Town of Blenheim v. Hiller*,[23] which granted a temporary restraining order enjoining the Department "from taking any actions, official or otherwise, to implement, or to direct or induce the implementation of the Model by DOTF or any assessor assessing unit."[24]

Town of Blenheim v. Hiller: Temporary Restraining Order Halts Assessment Model for Wind and Solar Projects

In *Town of Blenheim*, a group of nine Towns collectively commenced a hybrid CPLR Article 78 and CPLR 3001 Declaratory Judgment action seeking to enjoin and nullify the official action of the Department of Taxation and Finance in developing and promulgating the Model under Section 575-b based, among other things, on the Department's failure to put the Model through the State Administrative Procedure Act ("SAPA") process.[25] The petition was brought by order to show cause with an application for a temporary restraining order enjoining the Department from further implementing the Model and preserving the status quo, which the Court granted.[26]

In opposition to the petition, the State explained that in enacting the statute the Legislature intended to create a uniform method of assessment for all taxing authorities to rely on so that developers of renewable energy facilities can better anticipate the associated tax burden.[27] The law was enacted in response to widespread variation in methods of assessment for wind and solar projects, with the aim of providing certainty as to potential cost for developers and investors, informing the discussions on PILOTs as to the tax obligation, and reducing the potential for litigation.[28] The legislation was considered a necessary component of reaching New York State's goals of reducing greenhouse gas emissions by 40% (from 1990 levels) by 2023, and generating 70% of the State's electricity from renewable energy sources by 2030.[29]

The Towns asserted they would suffer irreparable injuries as the implementation of the assessment Model for wind and solar projects would displace the tax burden borne by solar and wind energy systems onto all other real property taxpayers in each assessing unit and cause corresponding cuts to services offered by that assessing unit.[30] The Towns asserted the Model promulgated by the Department results in a vastly reduced value on solar and wind generating properties resulting in depressed property tax revenues from the project than would otherwise be raised, and the difference would be spread among all other Town taxpayers.[31]

In a decision rendered April 29, 2022, the Court held that Petitioner's proof was sufficient to demonstrate a likelihood of success that the Model was promulgated in violation of SAPA.[32] The Court also found irreparable harm would result if a TRO was not granted in that implementation of the Model would result in decreased tax revenue and a corresponding reduction of municipal services available to the affected communities.[33] The petition would later withstand a motion to dismiss on December 6, 2022, where the Court specifically held it could not, on the record before it, determine whether the Model was a policy as defined by SAPA.[34]

The Legislature Trumps *Town of Blenheim* Litigation: *Section 575-b Governs*

After a year of delay and uncertainty, the Legislature enacted Part N of Chapter 59 of the Laws of 2023.[35] Part N of the budget legislation amends Section 575-b so that the Model is not subject to the SAPA, and likewise amends SAPA to exempt appraisal models and discount rates from the requirements of SAPA.[36] A Stipulation of Discontinuance in *Matter of Town of Blenheim* was so ordered by Supreme Court, Albany County, on May 5, 2023.[37] The temporary restraining order issued on April 29, 2022 has been lifted and newly enacted RPTL 575-b is effective, a crucial piece of the State's legislation intended to alleviate the property tax impediments to developing Energy Projects. In accordance with section 3 of Part N, the Department of Taxation and Finance has implemented the 2022 appraisal models and discount rates for use in 2023 by all local assessors.[38]

Finally, assessments determined under the Model remain subject to Sections 512 and 524 of the RPTL in that, assessments promulgated by 575-b and appearing on the assessment roll may be contested by an aggrieved party.[39] However, the grounds for review of an assessment determined under RPTL 575-b "shall be limited to the accuracy of the appraisal model inputs made by the assessor."[40]

1. N.Y. Pub. Serv. Law §66-p(2)(a), (b).
2. *Id.*
3. See 2021 McKinney's Sess. Law News of N.Y. Ch. 59 (S. 2509-C).
4. RPTL §575-b(1)(a)(b)&(c).
5. RPTL §487(8)(b).
6. RPTL §487(9)(a).
7. GML §854(4)&(21).
8. GML §859-a(5)(b).
9. RPTL §575-b(1)(a).
10. RPTL §487(2).
11. RPTL §487(8)(a).
12. See RPTL §524(1).
13. See RPTL §704(1).
14. RPTL §487(9)(a).
15. *Id.*
16. *See, e.g., Laertes Solar, LLC v. Assessor of Town of Harford,* 182 A.D.3d 826, 829 (3d Dept. 2020), *lv. to appeal dismissed in part, denied in part,* 35 N.Y.3d 1119 (2020).
17. RPTL §487(9)(a).
18. RPTL §487(9)(b).
19. RPTL §487(9)(a).
20. GML §854(17).
21. RPTL §487(9)(a).
22. RPTL §575-b(1)(a)(b).
23. *Town of Blenheim, et. al. v. Hiller,* Index No. 903157-22, Albany Co.
24. *Town of Blenheim,* Index No. 903157-22, Order to Show Cause and Decision and Order dated April 29, 2022 at NYSCEF 10 at 2-3.
25. *Id.*, Verified Petition at NYSCEF 1 at 2.
26. *Id.*, Order to Show Cause at NYSCEF 10 at 1-3.
27. *Id.*, Affirmation in Support at NYSCEF 16 at 2-4.
28. *Id.*
29. *Id.*
30. *Id.*, Affirmation in Support at NYSCEF 3 at 3-4.
31. *Id.*
32. *Id.*, Decision and Order at NYSCEF 10 at 7-8.
33. *Id.*
34. *Id.*, Decision and Order at NYSCEF 34.
35. New York State Assembly Bill A03009C and Senate Bill S04009-C, Part N, signed into law May 3, 2023, available at https://tinyurl.com/y4vv4pnd.
36. *Id.*
37. *Town of Blenheim,* Index No. 903157-22, at NYSCEF 81.
38. Appraisal methodology for solar and wind energy projects, NYS Department of Taxation and Finance, available at https://tinyurl.com/nhk595fr.
39. RPTL §575-b(4)(a)-(d).
40. RPTL §575-b(4)(d).

Michael P. Guerriero is a Tax Certiorari and Condemnation Partner at Farrell Fritz, P.C. in Uniondale and current Chair of the NCBA Condemnation Law and Tax Certiorari Committee. Mr. Guerriero is also a member of the Committee on Offshore Wind for the Long Island Association.