STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of the Application of TOWN OF BLENHEIM, TOWN OF CARLISLE, TOWN OF COBLESKILL, TOWN OF CONESVILLE, TOWN OF ESPERANCE, TOWN OF JEFFERSON, TOWN OF MIDDLEBURGH, TOWN OF SHARON, TOWN OF SUMMIT, DONALD AIREY, as Town Supervisor for the Town of Blenheim, AND CYNTHIA A. WEST,

Petitioners-Plaintiffs,

DECISION & ORDER
Index No. 903157-22

-against-

AMANDA HILLER, in her official capacity as the Acting Tax Commissioner and General Counsel of the New York State Department of Taxation, and the NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Respondents-Defendants.

Supreme Court, Albany County
Motion Return Date: June 17, 2022

Present: Julian D. Schreibman, JSC

Appearances:

Lewis & Greer, P.C.
Attorneys for Petitioners-Plaintiffs
510 Haight Avenue, Suite 202
Poughkeepsie, New York 12603
By: Dylan Harris, Esq.

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondents-Defendants
The Capitol, Division of State Counsel
Albany, New York 12224
By: Melissa A. Latino, Esq., AAG, of Counsel

Schreibman, J.:

This hybrid Article 78/declaratory judgment proceeding arises from respondent's establishment of a uniform appraisal model ("the Model") to be utilized in assessing the value of

wind and solar energy producing real property pursuant to RPTL § 575-b. The petitioners are a group of local municipalities within the State of New York ("the Towns") and two individual resident-taxpayers ("Taxpayers"). They contend that the Model is invalid because it was not promulgated in accordance with the provisions of the State Administrative Procedure Act ("SAPA") or pursuant to Article IV § 8 of New York's Constitution, both of which govern rulemaking procedures. They allege that respondent's failure to substantially comply with the strictures for rulemaking set forth in SAPA resulted in a Model which was not properly vetted and will result in artificially low assessments of solar energy producing properties. Petitioners applied for, and obtained, a temporary restraining order enjoining use of the Model pending the outcome of this proceeding. Before the Court is respondent's pre-answer motion to dismiss the petition on the grounds that it is untimely, that petitioners lack standing, and for failure to join all necessary parties. Petitioners oppose. The motion is denied as discussed herein.

The pertinent facts are as follows:

Real Property Tax Law § 575-b which first became effective on April 19, 2021,[1] governs the manner in which solar and wind energy producing properties are assessed. The statute provides that the assessed values for "solar or wind energy systems ... shall be determined by a discounted cash flow approach[.]" (RPTL § 575-b [1]). To that end, and as relevant here, the statute required respondent to: "identify and publish" an assessment model for such properties producing greater than one megawatt of energy "within one hundred eighty days of the effective date of this section[.]" (§575-b [2]). Paragraphs [b] and [c] of the statute further provide that

[1] The statute was amended in 2022 to add provisions governing the procedure for complaints by property owners concerning their assessments. The amended version became effective on April 9, 2022.

> "[b] ...prior to such publication, such discount rate or rates shall be published in preliminary form on the department's website and notice thereof shall be sent to parties who have requested the same. The department shall then allow at least sixty days for public comments to be submitted, and shall consider any comments so submitted and make any changes it deems necessary prior to publishing the final discount rate or rates; and
>
> (c) In the formulation of such a model and discount rate, the New York state department of taxation and finance shall consult with the New York State Assessors Association. Provided, further, in the formulation of such a model and discount rate, the New York state department of taxation and finance shall be authorized to take into account economic and cost characteristics of such solar and wind energy systems located in different geographic regions of the state and consider regionalized market pressures in the formulation of the appraisal model and discount rate required under this section."

Respondent released a preliminary model on or about August 2, 2021, which was then subject to the sixty-day public comment period pursuant to § 575-b [b]. The public comment period closed on October 1, 2021. A revised model, which respondent maintains was developed based upon the public comments received, was published by respondent on October 14, 2021 ("October 2021 Model"). The publication was entitled "Final solar and wind appraisal methodology" and explained that assessors were to use the model and discount rates therein to value and assess subject properties in 2022.

At some point thereafter, respondent discovered a "computational error" in the October 2021 Model. Although no specifics concerning the error are provided, on January 6, 2022, respondent published a revised model ("January 2022 Model") which it asserts corrected the "computational error" which it further characterizes as a typographical error. Respondent acknowledges that the error "resulted in an underestimation of energy outputs for VDER projects and, therefore, produced artificially low assessment values." However, respondent maintains that correction of the error did not result in any substantive changes to the October 2021 Model, and that all assumptions and other calculations in that model remained unchanged.

By letter dated February 8, 2022, petitioners requested that respondent issue a declaratory ruling as to, *inter alia*, whether the models promulgated by respondent pursuant to RPTL § 575-b met the definition of "Rules" under (SAPA), whether the January 2022 Model was the final model respondent would require assessors to use, and whether respondent considered any other model, *i.e.*, the October 2021 Model, to have been adopted. By letter dated March 2, 2022, respondent's counsel responded to petitioners' letter stating, in sum, that a declaratory ruling was not required because the models were not "Rules" as defined by SAPA. In that regard, the letter noted that RPTL § 575-b did not require the promulgation of any rules. The letter concluded by stating that respondent considered its "solar and wind valuation model and discount rates ... binding upon all assessing units." The instant proceeding ensued.

Statute of Limitations

In seeking dismissal, respondent raises several threshold issues, the first of which is the statute of limitations. Notwithstanding the hybrid nature of this matter, it is governed by the four month limitations period set forth in CPLR § 217 [1]. (*Adirondack Medical Center-Uihlein v Daines*, 119 AD3d 1175, 1176 [3rd Dept. 2014]). The four month period begins to run when the challenged action becomes "final and binding on the petitioner[.]" (CPLR § 217 [1]). An action or determination becomes final and binding when "the agency ... reache[s] a definitive position on the issue that inflicts actual, concrete injury and ... the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party[.]" (*Best Payphones, Inc. v Dept. of Information technology and Telecommunications of the City of New York*, 5 NY3d 30, 34 [2005]).

Respondent, as movant, has the burden of demonstrating "the existence of a final and binding determination[.]" (*Turner v Bethlehem Cent. School Dist.*, 265 AD2d 640, 641 [3rd Dept.

1999]). Moreover, "any ambiguity or uncertainty created by the [respondent] must be construed against it[.]" (*Id.*) Respondent contends that the limitations period began running on October 2021 when it published the October 2021 Model on its website under the title "*Final* solar and wind appraisal methodology" and expired in February 2022, prior to the commencement of this proceeding. (Emphasis added). Respondent argues that the revisions in the January 2022 Model correcting unspecified computation errors did not substantively change the October 2021 Model and thus did not alter the definitive position reached with respect to the use of that model. However, as noted, respondent's motion submissions do not offer any specific detail concerning the "computational error" that required correction. All that can be gleaned from respondent's submissions is that some error in the October 2021 Model produced artificially low assessment values for properties generating between one and five megawatts of electricity. Given the present record's vagueness concerning the computational error, the Court cannot conclude whether the October 2021 Model was final for statute of limitations purposes. More importantly, respondent's publication of the January 2022 Model creates, at minimum, a question as to whether an ambiguity on the issue which must be resolved against respondent. (*Adirondack Medical Center-Uhlein*, 119 AD3d at 1177). Accordingly, respondent has failed to meet its burden on the present record and its motion to dismiss on statute of limitations grounds is denied.

Separately, petitioners argue that because the Model constitutes a "Rule" as defined by SAPA, their time within which to commence this proceeding did not begin to run until they exhausted their administrative remedies. Section 205 of the SAPA provides that a special proceeding to challenge a "Rule" cannot be maintained unless the petitioner "has first requested the agency to pass upon the validity or applicability of the rule in question[.]" Respondent's regulations likewise provide for respondent to issue declaratory rulings on its own rules. (20

NYCRR § 2375.3 [a] [1] [ii]). Petitioners argue that once the models were published, they could not commence an Article 78 proceeding until they exhausted their administrative remedies by seeking a declaratory ruling from respondent. They argue that they timely sought the declaratory ruling by their letter dated February 8, 2022, and timely commenced this proceeding within four months thereafter. Whether the models constitute "Rules" is an ultimate issue in this matter. In view of the denial of the motion for the reasons already discussed, the Court need not reach the issue at this time.

Standing

Respondent next asserts that petitioners lack the standing necessary to maintain this proceeding. Parties challenging governmental action must pass a two-pronged test to pass this threshold. (*New York State Ass'n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). The first prong of the test requires a showing that petitioners will suffer an "injury-in-fact, meaning that [petitioners] will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural." (*Id.*) In this regard, speculative financial loss generally will not pass muster. (*Roulan v County of Onandoga*, 21 NY3d 902, 905 [2013]). The second prong requires petitioners to show that harm alleged "falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted[.]" (*Id.*)

Respondent argues that while the Towns are disgruntled with the newly enacted RPTL § 575-b, they lack standing because they are not being taxed themselves and are not directly impacted by the tax assessments of the energy systems. Respondent further argues that any harm resulting from the models is purely speculative since there is no way of knowing how use of the as-yet untested discounted cash flow approach model will affect the tax assessments of energy

systems and the overall tax base of municipalities. According to petitioners, respondent misconstrues the object of this proceeding. Petitioners explain that the instant proceeding does not challenge whether the models are correct. Rather, they argue that the sole challenge is to whether the Model is a "fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute [RPTL § 575-b] it administers[.]" (*Schwartfigure v Hartnett*, 83 NY2d 296, 301 [1994]). If so, it is a "Rule" and respondent was required to comply with SAPA's rulemaking requirements when it promulgated the Model. (*Id.*) Under SAPA, respondent would have been required to, *inter alia*, publish a notice of a proposed Model in the State Register (SAPA § 202 [1] [a]) and to accompany the publication with analyses detailing the impacts of the proposed rule and any potential flexibility in its implementation to curtail potential impacts. (SAPA §§ 201-a, 202 [1] [f] [vi, vii]).

The Court cannot ascertain, on the present record, whether the Model is a "Rule." On the one hand, RPTL § 575-b authorized respondent to "take into account economic and cost characteristics of such solar and wind energy systems located in different geographic regions of the state and consider regionalized market pressures in the formulation of the appraisal model and discount rate[.]" (RPTL § 575-b [c]). To the extent respondent did, and incorporated the same into the Model, it may not be a "rigid numerical policy invariably applied across-the-board to all claims without regard to individualized circumstances[.]" (*Schwartfigure,* 83 NY2d at 301). To the extent the Model does *not* account for regionalized or individualized circumstances, it is likely more than an interpretation of § 575-b, and thus within the ambit of SAPA's definition of a "Rule." (*Id.*)

If the Model is a "Rule," the second prong of the standing test will have been satisfied because petitioners fall within the zone of interest that SAPA was enacted to protected. With respect to the first prong, respondent's alleged failure to promulgate the models in accordance with

the SAPA, without more, is insufficient to confer standing. (*Bloomfield v Cannavo*, 39 Misc.3d 1216(A) [Sup. Ct., New York County 2013]). However, the petition here alleges that the Towns and Taxpayers will directly suffer economic harm if the January 2022 Model is implemented. Their allegations are supported by the expert affidavit of David A. Jones, II, who is a duly appointed assessor for several of the Towns, and who has been a New York State Certified Real Estate Appraiser since 1997. Mr. Jones opines that the January 2022 Model, if applied, will result in "a precipitous fall in market values, and therefore assessments, on solar and wind installations for Towns across the State of New York." He further opines that the loss in tax revenue "will have to be absorbed by all other individual and corporate taxpayers" including the petitioners herein. The Jones affidavit provides sufficient detail to elevate petitioners' alleged harm above that which is speculative or "conjectural." (*Nurse Anesthetists*, 2 NY3d at 211). Nevertheless, the determination of the ultimate issue of whether the Model is a "Rule" must abide the filing of the certified return. As such, respondent's motion to dismiss for lack of standing will be held in abeyance pending respondent's submission of the same.

Necessary Party

Finally, respondent argues that the petition must be dismissed pursuant to CPLR § 1003 due to petitioners failure to join all necessary parties. Necessary parties are defined as "[p]ersons who ought to be parties to the action or who might be inequitably affected by a judgment in the action[.]" (CPLR § 1001 [a]). Respondent argues that because respondent was required to develop the Model in consultation with the New York State Energy and Research Development Authority ("NYSERDA") (RPTL § 575-b [1] [a]), and to consult with the New York State Assessors Association ("NYSAA") in formulating the discount rate and model (§ 575-b [1] [c], they are necessary parties to this proceeding. It argues that annulment of the legislation would "impact

[their] initiatives or require [them] to take certain action." In opposing dismissal on this ground, petitioners first argue that, under SAPA § 205, respondent was the only agency they were required to name as a party hereto. Neither of these arguments are persuasive.

Respondent, for its part, overlooks the fact that petitioners do not seek to annul the Model's enabling legislation, *i.e.*, RPTL § 575-b. As petitioners point out, the Model itself is not legislation and their purpose in bringing this proceeding is to ensure that it was properly promulgated. Petitioner's argument overlooks the fact that while SAPA § 205 requires that the agency that promulgates a rule "shall be to be made a party to the proceedings," it neither states nor implies that the promulgating agency is the *only* necessary party in such proceedings. The questions then, are (i) whether NYSERDA and NYSAA might be "inequitably affected" by a judgment in this matter and/or (ii) whether "complete relief" can be accorded in their absence.

Petitioners make repeated assurances in their opposing papers that they are not asking this Court to determine if the Model is good or bad, and only seek a determination as to whether respondent promulgated the Model in substantial compliance with the requirements of SAPA. Petitioners point out that while NYSERDA and NYSAA were to be consulted in formulating the Model, respondent was the only party vested with the authority to create, adopt, and publish the final Model. In their capacity as consultants, neither NYSERDA nor NYSAA had final decision making authority, and thus were not agencies subject to SAPA for purposes of promulgating the Model. (SAPA § 102 [1]). The Court agrees with petitioner that NYSERDA and NYSAA will not be "inequitably affected" by the adjudication of the narrow question presented and that "complete relief" can be accorded in their absence. Notably, any judgment in petitioners' favor on this question will not require NYSERDA or NYSAA to take any action. (Compare, *City of New York v Long Island Airports Limousine Serv. Corp.*, 48 NY2d 469 [1979]).

The Court observes that the third cause of action in the petition, as pleaded, is not limited to the issue of SAPA compliance. Rather, the third cause alleges that respondent lacked a rational basis for the Model's distinction between otherwise similarly situated properties based solely upon their respective energy output and seeks annulment of the Model as arbitrary and capricious. In other words, petitioners' third cause of action is a direct challenge to the rationale that went in to developing the Model, irrespective of SAPA compliance issues. The broader scope of this question might support an application by NYSEDRA and/or NYSAA to intervene on the subject inasmuch as respondent was obligated to, and presumably did, consult with them in formulating the Model. (CPLR §§ 401, 1012(a)(2)). But, because respondent retained ultimate decision - making authority, NYSEDRA and NYSAA are not indispensable parties for purposes of CPLR § 1001 [a]. Accordingly, it is hereby

ORDERED that the branch of respondent's motion to dismiss the petition herein as untimely is denied; the branch of respondent's motion to dismiss the petition for lack of standing is held in abeyance pending the filing of an answer and certified return; and the branch of respondent's motion to dismiss the petition for failure to join necessary parties is denied; and it is further

ORDERED that respondent shall file a certified record and answer within twenty days of the entered date of this Decision and Order.

This shall constitute the Decision and Order of the Court. The original Decision and Order is being filed with the Albany County Clerk via NYSCEF. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

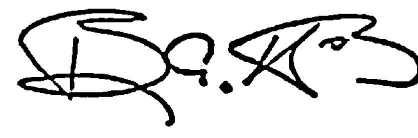
SO ORDERED.

Dated: December 6, 2022
Kingston, New York

ENTER,

JULIAN D. SCHREIBMAN, JSC

Papers considered: Notice of Motion to Dismiss Melissa A. Latino, Esq. Assistant Attorney General, of Counsel dated June 10, 2022, Affirmation by Tobias A. Lake, Esq. dated June 9, 2022, and Memorandum of Law in Support by Melissa A. Latino, Esq. Assistant Attorney General, of Counsel dated June 10, 2022, with Exhibits A-E; and Affirmation in Opposition by Dylan C. Harris, Esq. dated June 16, 2022, with Exhibits A-F.



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