

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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,

Index No. 903157-2022

Petitioners-Plaintiffs

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules (“CPLR”) and a Declaratory
Judgment Pursuant to Section 3001 of the CPLR

-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

**[PROPOSED] AMICI CURIAE BRIEF OF CATSKILL MOUNTAINKEEPER AND WIN
WITH SOUTH FORK WIND, INC. IN OPPOSITION TO PETITIONERS-PLAINTIFFS’
MOTION FOR A PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

PRELIMINARY STATEMENT 2

STANDARD OF REVIEW 3

ARGUMENT 3

I. THE BALANCE OF THE EQUITIES TIPS SQUARELY AGAINST ISSUANCE OF A
PRELIMINARY INJUNCTION 3

CONCLUSION..... 9

TABLE OF AUTHORITIES**CASES**

<i>Aetna Ins. Co v. Capasso</i> , 75 N.Y.2d 860 (1990).....	2
<i>Destiny USA Holdings, LLC v Citigroup Glob. Mkts.s Realty Corp.</i> , 69 A.D.3d 212 (4th Dep’t 2009).....	4
<i>Grumet v. Cuomo</i> , 162 Misc. 2d 913 (Sup. Ct., Albany Cnty. 1994).....	3, 7
<i>Kane v. Walsh</i> , 295 N.Y. 198 (1946).....	3
<i>Lawrence H. Morse, Inc. v. Anson</i> , 185 A.D.2d 505 (3d Dep’t 1992).....	8
<i>Liotta v. Mattone</i> , 71 A.D.3d 741 (2d Dep’t 2010).....	3, 6
<i>Metropolitan Package Store Ass’n, Inc. v. Koch</i> , 80 A.D.2d 940 (3d Dep’t 1994).....	8
<i>Rick J. Jarvis, Assocs. Inc. v. Stotler</i> , 216 A.D.2d 649 (3d Dep’t 1995).....	3
<i>Russian Church of Our Lady of Kazan v. Dunkel</i> , 34 A.D.2d 799 (2d Dep’t 1970).....	3
<i>Seitzman v. Hudson Riv. Assoc.</i> , 126 A.D.2d 211 (1st Dep’t 1987).....	4

STATUTES

New York Real Property Tax Law § 575-b.....	4
NY PUB. SERV. LAW § 66-p(2)(a), (b).....	4

TREATISES

9 N.Y.Prac., Env. Law and Reg. in New York § 4.45 (2d ed. Sep. 2020).....	4
---	---

OTHER AUTHORITIES

Hodgson Russ Renewable Energy Alert, <i>Understanding the Reach and Limits of RPTL § 575-b and the State-Mandated Solar and Wind Real Property Assessment Models</i> (Sept. 8, 2021), https://www.hodgsonruss.com/newsroom-publications-13472.html	5
IEA, <i>Net Zero by 2050</i> (May 2021), https://www.iea.org/reports/net-zero-by-2050	6
Minal Pathal et al., <i>Climate Change 2022: Technical Summary</i> , in CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE SIXTH	

ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Priyadarshi Shukla et al. eds., IPCC 2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_TechnicalSummary.pdf. 6

New York State Department of Environmental Conservation, *Impacts of Climate Change in New York: Climate Change is Already Happening*, <https://www.dec.ny.gov/energy/94702.html>..... 5

New York State Department of Environmental Conservation, *Observed and Projected Climate Change in New York State: An Overview* (August 2021), https://www.dec.ny.gov/docs/administration_pdf/ccnys2021.pdf..... 5

Summary for Policymakers, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Masson-Delmont et al., eds, IPCC 2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf 6

STATEMENT OF INTEREST OF AMICI CURIAE

Proposed *amicus curiae* Catskill Mountainkeeper (“Mountainkeeper”) is a 501(c)(3) non-profit organization dedicated to protecting the Catskills’ natural heritage while promoting smart development and supporting local communities in building a sustainable economic future.¹ In keeping with this mission, Mountainkeeper seeks to expand renewable energy resources throughout New York State. As a founding member of the NY Renews coalition, Mountainkeeper successfully advocated for the passage of the Climate Leadership and Community Protection Act (“CLCPA”), which requires New York to rapidly decrease greenhouse gases and scale up renewable energy capacity.²

Proposed *amicus curiae* Win With South Fork Wind, Inc. (“Win With Wind”) is an independent, nonpartisan group of residents of East Hampton and other towns on the South Fork of Long Island. Win With Wind aims to produce fact-based information regarding the benefits of wind energy. The group has spent years advocating for the South Fork Wind Farm, which will be New York State’s first offshore wind farm. Win With Wind seeks to bring the communities that comprise the South Fork of Long Island to the forefront of clean energy leadership in order to responsibly address the global climate crisis, which threatens the environment, the oceans, fisheries, the food supply, human health, safety from extreme weather events, and ultimately human life on Earth.³

Mountainkeeper and Win With Wind have an interest in this proceeding because they are

¹ See Affirmation of Michael B. Gerrard in Support of Proposed Order to Show Cause for Leave to File an Amicus Brief, dated June 10, 2022 (“Gerrard Aff.”), ¶ 3.

² *Id.* ¶ 5.

³ *Id.* ¶ 8.

actively dedicated to expanding renewable energy resources in New York State and fighting climate change. An order granting the preliminary injunction would frustrate those efforts and undermine their goals of a sustainable economic future by delaying or disrupting the development of renewable energy projects that are urgently needed to avoid the worst impacts of climate change.

PRELIMINARY STATEMENT

Petitioners-Plaintiffs (“Petitioners”) seek to have this Court grant the extraordinary remedy of preliminary injunctive relief to preclude the use of the wind and solar appraisal model (“Model”) required by Real Property Tax Law § 575-b. The New York State Department of Taxation and Finance (“DTF”) promulgated the Model, as mandated by Real Property Tax Law § 575-b, following input from stakeholders, including assessors, renewable energy developers, and the public. Implementing the Model will provide certainty to renewable energy developers, lenders, investors, and taxing authorities, which will facilitate the rapid development of renewable energy facilities necessary for the State to meet its statutory climate change goals.

Without conceding any other points, this brief focuses on the third element of the Court’s preliminary injunction analysis, the balance of the equities. *See Aetna Ins. Co v. Capasso*, 75 N.Y.2d 860 (1990) (explaining that party seeking preliminary injunction must “show [1] a probability of success, [2] danger of irreparable injury in the absence of an injunction, and [3] a balance of the equities in their favor”). Here, enjoining implementation of the Model would impede the State from meeting its statutory climate change goals and harm the public’s interest in avoiding climate change, while denying the request for an injunction would cause no immediate or irreparable harm to Petitioners. Therefore, the balance of the equities favors denying the request for a preliminary injunction and vacating the temporary restraining order

(“TRO”) that is currently in effect.

STANDARD OF REVIEW

Injunctive relief is not “an absolute right, but an extraordinary remedy to be granted or withheld by a court of equity in its exercise of discretion.” *Kane v. Walsh*, 295 N.Y. 198, 205 (1946); *see also Rick J. Jarvis, Assocs. Inc. v. Stotler*, 216 A.D.2d 649, 650 (3d Dep’t 1995) (“It is the general rule that a preliminary injunction is a drastic remedy and should be issued cautiously[.]”). Accordingly, “a party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, *by clear and convincing evidence*, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant’s favor.” *Liotta v. Mattone*, 71 A.D.3d 741, 741-42 (2d Dep’t 2010) (emphasis added).

Finally, “[i]t is well settled that temporary injunctions which in effect give the same relief which is expected to be obtained by final judgment, if granted at all, are granted with great caution and only when required by urgent situations or grave necessity, and then only on the clearest of evidence.” *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 (2d Dep’t 1970); *see also Grumet v. Cuomo*, 162 Misc. 2d 913, 929-30 (Sup. Ct., Albany Cnty. 1994).

ARGUMENT

I. THE BALANCE OF THE EQUITIES TIPS SQUARELY AGAINST ISSUANCE OF A PRELIMINARY INJUNCTION

The balance of the equities favors denial of Petitioners’ motion for a preliminary injunction, because enjoining implementation of the Model would harm the State’s interest in meeting its climate change goals as well as the public’s interest in avoiding climate change,

while denying the request for an injunction would have no immediate or irreparable impact on the Petitioners. “In ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation.” *Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.*, 69 A.D.3d 212, 223 (4th Dep’t 2009); *see also* 9 N.Y.Prac., Env. Law and Reg. in New York § 4.45 (2d ed. Sep. 2020) (“In balancing the equities, the court may also include such matters as the public interest . . . and the effect of the preliminary injunction on non-parties.”). This includes consideration of whether “damage will be done [to] . . . the public policy of this State.” *Seitzman v. Hudson Riv. Assoc.*, 126 A.D.2d 211, 215 (1st Dep’t 1987).

A preliminary injunction delaying implementation of the Model would harm the public interest and run afoul of public policy by delaying construction of renewable energy facilities necessary to meet the State’s climate change goals. In 2019, the New York Legislature enacted the CLCPA, which requires that 70% of statewide electric generation be supplied by renewable energy by 2030 and that 100% be supplied by zero-emission sources by 2040. NY PUB. SERV. LAW § 66-p(2)(a), (b). In 2021, to help the State meet those requirements, the Legislature amended Real Property Tax Law § 575-b to standardize the assessment methodology for renewable energy facilities. As amended, the statute directs DTF to create a tax appraisal model for wind and solar energy facilities based on a discounted cash flow methodology. The aim of the Model is to provide certainty to developers, lenders, investors, and taxing authorities concerning the assessment of such facilities and the property taxes derived therefrom.⁴ As

⁴ *See* Hodgson Russ Renewable Energy Alert, *Understanding the Reach and Limits of RPTL § 575-b and the State-Mandated Solar and Wind Real Property Assessment Models* (Sept. 8, 2021), <https://www.hodgsonruss.com/newsroom-publications-13472.html> (“The Model is intended to alleviate one of the significant issues in developing renewable projects in New York,

directed, DTF created and published the Model to be used by the assessors for facilities that were operational as of the taxable status date of March 1, 2022. Further enjoining implementation of the Model will foster uncertainty among developers, lenders, investors, and taxing authorities, which will delay or disrupt projects that are under development.

In addition, the public at large has a compelling interest in the State meeting the climate change goals set out in the CLCPA. The greenhouse gas emissions generated by burning fossil fuels are having serious impacts on the climate in ways that affect New Yorkers. Already, the average annual temperature in New York State has risen 1.3°C since 1970, and sea levels have risen more than one foot since 1900.⁵ By 2100, sea levels are expected to be 18 to 75 inches higher than they are today, and some regions of the State may experience an average temperature increase of 6.7°C.⁶ Moreover, as the Intergovernmental Panel on Climate Change found in its April 4, 2022 report, rapid and immediate reductions of greenhouse gas emissions are necessary to limit the increase in average global temperatures to no more than 1.5°C above pre-industrial levels. Any increase in excess of 1.5°C would gravely endanger the wellbeing of

which is the inability to be sure of tax costs [Before RPTL § 575-b], Assessors [were] not required to establish values until after projects [were] constructed or at least partially constructed, as of the taxable status date. Now developers and project buyers can utilize the Model to determine what the taxable valuation will be, absent significant disagreement on the Model inputs.”).

⁵ New York State Department of Environmental Conservation, *Impacts of Climate Change in New York: Climate Change is Already Happening*, <https://www.dec.ny.gov/energy/94702.html> (noting that temperatures have increased by 2.4°F).

⁶ *Id.*; New York State Department of Environmental Conservation, *Observed and Projected Climate Change in New York State: An Overview* (August 2021), at 3, https://www.dec.ny.gov/docs/administration_pdf/ccnys2021.pdf (noting that temperatures in some regions of New York could increase by 12°F).

humans and the natural ecosystems on which human life depends.⁷ A rapid buildout of a large number of wind and solar facilities is one essential component of limiting temperature rise.⁸

Whereas issuance of a preliminary injunction would cause immediate harm to the State's interest and the public's interest in fighting climate change, denial of the injunction would have only a limited impact, if any, on the Petitioners—and any impact would be purely monetary in nature. Petitioners argue that the balance of the equities favors preliminary relief on the grounds that “[they] and the public as a whole stand to suffer if the Model is implemented by DTF and every assessor and assessing unit in New York State applies the Model for the 2022 tax year.” (Affirmation of Dylan C. Harris Supp. TRO, Dkt. No. 3 (“Harris Aff.”) ¶ 35.) However, Petitioners fail to support that assertion with any evidence of immediate impact, much less with the clear and convincing evidence that is required to obtain the extraordinary remedy of a preliminary injunction. *See Liotta v. Mattone*, 71 A.D.3d at 741-42.

Indeed, Petitioners' sole example of a project where implementation of the Model would allegedly affect local tax revenues, an “approved solar array in the Town of Sharon” (Harris Aff. ¶ 13), has not been built. By their own admission, the project will not generate tax revenues this

⁷ Minal Pathal et al., *Climate Change 2022: Technical Summary*, in CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Priyadarshi Shukla et al. eds., IPCC 2022) at TS-23 to TS-40, https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_TechnicalSummary.pdf.

⁸ IEA, *Net Zero by 2050* (May 2021) at 14, <https://www.iea.org/reports/net-zero-by-2050>; *Summary for Policymakers*, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Masson-Delmont et al., eds, IPCC 2021) at 36, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf (“[T]here is a near-linear relationship between cumulative anthropogenic CO₂ emissions and the global warming they cause.”).

year, whether or not the Model is implemented. (*See* Affidavit of David A. Jones, II, Dkt. No. 8 (“Jones Aff.”) at ¶ 7 n.1 (“The Solar array is under construction and will not be on the Assessment Roll until 2023.”).) Petitioners argue that the Model nonetheless will cause harm because the project will generate less revenue under the Model than it would have generated under some alternative valuation method.⁹ (*See id.* ¶ 7.) However, the possibility that implementing the Model will cause *next year’s* tax revenues from one particular project to be less than they might have been under some alternative valuation method does not support granting *emergency relief* such as a preliminary injunction. *Grumet v. Cuomo*, 162 Misc. 2d at 930 (“To warrant preliminary injunctive relief, the irreparable harm alleged must be immediate, specific, non-speculative, and non-conclusory.”).

Ultimately, Petitioners have alleged no harm at all. Rather, any tax revenue that the municipal Petitioners eventually do receive from the project will be new, incremental revenue, whether or not the Model is in use at the time the assessments are set. When a property is added to the assessment roll—such as the approved solar energy system in the Town of Sharon that Petitioners reference—that is added value. Added value results in new tax revenue, which reduces the tax burden on all taxpayers within the jurisdiction, including the taxpayer Petitioners.¹⁰

⁹ The Jones Affidavit does not provide a copy of the appraisal it relies upon in comparing the two methodologies. The Jones Affidavit also references two exhibits that do not appear anywhere in the record. *See Jones Aff.* ¶¶ 1 (referencing an “Exhibit ‘A’”), ¶ 7 (referencing an “Exhibit ‘E’”).

¹⁰ Aside from the fact that Petitioners have offered no evidence of harm to taxpayers, taxpayers do not have standing to challenge assessments on neighboring properties. There is a statutory process for taxpayers to challenge assessments on their own properties for being too high, which begins with filling out a Form RP-524. But there is no statutory process for taxpayers to challenge assessments on *other* properties for being too low.

Likewise, Petitioners' argument that they would be forced to cut services (*see* Petition, Dkt. No. 1 ¶ 107) as a result of a decrease in municipal tax revenue from implementing the Model is speculative, remote, and conclusory. *See Metropolitan Package Store Ass'n, Inc. v. Koch*, 80 A.D.2d 940, 941 (3d Dep't 1994) (rejecting conclusory allegation that declining to enjoin the collection of an excise tax on liquor would force liquor dealers out of business). It is also baseless. There is no evidence that tax revenues will be reduced as a result of implementing the Model; the facts instead confirm that renewable energy facilities will contribute additional revenue to municipalities. Nor is there any evidence that such facilities will be a drain on municipal resources. Therefore, there is no basis to infer that municipalities would need to cut services as a result of the Court denying the request for a preliminary injunction.

Finally, in balancing the equities, Petitioners "must show that the *irreparable* injury to be sustained by them is more burdensome to them than the harm caused to [respondents] through imposition of the injunction." *Metropolitan Package Store Ass'n, Inc. v. Koch*, 80 A.D.2d 940, 941 (3d Dep't 1994) (emphasis added). Here, Petitioners fail to show that any alleged harm they would suffer due to a purported decrease in tax revenues would be *irreparable*.¹¹ Even if Petitioners were able to demonstrate that they would suffer a loss of tax revenue if their request for an injunction were denied—which they have not done—monetary relief would be sufficient to compensate Petitioners for any monetary loss, and injunctive relief would be inappropriate. *See Lawrence H. Morse, Inc. v. Anson*, 185 A.D.2d 505, 506 (3d Dep't 1992) ("It is . . . well settled that, within the purview of CPLR article 63, an 'irreparable injury' is one which may not be compensated by an award of money damages.").

¹¹ This brief does not address the second prong of the preliminary injunction analysis, irreparable harm, except to the extent necessary to properly balance the equities.

Granting the injunctive relief Petitioners seek would harm the State and the public significantly, while denying the request would cause no immediate or irreparable harm to Petitioners. Further, enjoining implementation of the Model directly conflicts with the Legislature's intent in enacting the CLCPA and Real Property Tax Law § 575-b. Therefore, the balance of the equities overwhelmingly favors denying the request for a preliminary injunction.

CONCLUSION

For these reasons and the reasons discussed by Respondents-Defendants, Mountainkeeper and Win With Wind respectfully urge the Court to deny the preliminary injunction and vacate the TRO.

Respectfully submitted,

Dated: June 10, 2022
New York, New York

/s/ Michael B. Gerrard
Michael B. Gerrard
Arnold & Porter Kaye Scholer LLP
250 W 55th St.
New York, NY 10019
212-836-8000
Michael.Gerrard@arnoldporter.com

Matthew Eisenson
Sabin Center for Climate Change Law
Columbia Law School
435 West 116th St.
New York, NY 10027
508-397-8177
matthew.eisenson@law.columbia.edu

*Attorneys for Catskill Mountainkeeper and Win
With South Fork Wind, Inc.*

CERTIFICATION OF WORD COUNT

Pursuant to 22 NYCRR § 202.8-b(c), I hereby certify that the word count of this memorandum of law complies with the word limits of 22 NYCRR § 202.8-b(a). The total word count for all printed text exclusive of the material omitted under 22 NYCRR § 202.8-b(b) is 2,634 words.

Dated: June 10, 2022
New York, New York

/s/ Michael B. Gerrard
Michael B. Gerrard
Arnold & Porter Kaye Scholer LLP
250 W 55th St.
New York, NY 10019
212-836-8000
Michael.Gerrard@arnoldporter.com

*Attorney for Catskill Mountainkeeper and
Win With South Fork Wind, Inc.*