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What NY Tax Ruling Means For Solar Power Developers

By **Kaitlin Vigars** (September 15, 2020, 3:26 PM EDT)

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On Aug. 20, the New York State Supreme Court, Appellate Division, Fourth Department, issued a decision in Cornell University v. Board of Assessment Review, finding that a solar photovoltaic system is taxable real property.[1] This decision settled, at least in the Fourth Department, a real property tax question long considered — and feared — by solar developers.

Although the decision has the potential for significant impacts on solar development projects throughout New York state, it may be possible to mitigate the financial impact of this tax burden with careful planning and mindful project decisions.

New York State Real Property Tax Law Section 300 distinguishes between real property and personal property, stating that in New York, the former is subject to real property taxation, special ad valorem levies and special assessments, whereas the latter is not subject to such taxation. As used in this statutory scheme, the term "real property" includes, among other things, buildings, and other articles and structures, substructures and superstructures erected upon, under or above the land, or affixed thereto.[2]

In determining whether a building, article or structure is affixed to the land so as to constitute real property, courts have looked to the common law definition of "fixture."[3] Pursuant to such definition, an item is a fixture if it is: (1) actually annexed to real property or something appurtenant thereto; (2) applied to the use or purpose of that part of the realty with which it is connected; and (3) intended by the parties as a permanent accession to the freehold.[4]

Applying this legal framework in Cornell University, the Fourth Department found that a solar photovoltaic system installed by a solar developer lessee on land owned by Cornell University met the common law definition of "fixture" and, therefore, was affixed to the subject land so as to constitute taxable real property. As to the first requirement — annexation — the court found that the solar photovoltaic system at issue was annexed to real property because of the unique way that the system was installed.[5]

In particular, the court noted that the solar photovoltaic system in question was installed using nearly 2,000 piles — 1,600 driven directly into the ground, and 400 others set in concrete footings poured into the ground — with the panels bolted on top of these pilings. The court observed that the system also

included an inverter and other associated equipment installed on a poured concrete slab. Based on these methods of installation, the court concluded that the solar photovoltaic system was annexed to the subject land or something appurtenant thereto.[6]

With regard to the second requirement — application to the purpose of the land to which it is connected — the court found that the solar photovoltaic system at issue met this requirement because the project was generating solar energy specifically to serve Cornell, and was an integral part of the school's sustainability efforts and educational mission. Finally, as to the third requirement — permanency — the court found that the solar photovoltaic system was a permanent addition to the subject land.[7]

In making such determination, the court explicitly noted that the relevant consideration for determining the permanence of an item is not how easily it can be physically removed from the site, but rather the intention of the party attaching it. To this end, the court looked to the agreement between Cornell and the solar developer lessee, which included a 20-year term, subject to two additional five-year extensions and further extension on a month-to-month basis thereafter.[8]

Although the agreement did require the solar developer to remove the system at the end of the lease term, such removal was only required if Cornell opted not to purchase the system. Based on the length and terms of the agreement, the court found that the parties intended for the solar photovoltaic system to be permanent.[9]

In considering the ramifications of this ruling, it is important to note the fact-specific nature of the decision. Such fact-driven analysis limits the broader applicability of the decision and provides ample opportunity to distinguish a different solar project with different characteristics.

For example, using an alternative method of installation that does not involve cementing equipment into the ground, or requiring decommissioning and removal without an option for purchase, likely changes the analysis, and may result in a different outcome. Likewise, a utility-scale solar project that will interconnect to the grid and provide energy for use to multiple off-site purchasers is unlike the solar project in question, and may also command a different result on the issue of taxability.

The Fourth Department's decision in Cornell University is significant in that it settles a long-standing debate about whether and when solar photovoltaic systems may be considered real or personal property. The impact of such decision, however, should not be overstated. As discussed herein, the opinion may only apply to projects that are markedly similar to the one at issue in this case.

Nevertheless, solar developers must be aware of and take into account the Fourth Department's analysis, because such analysis provides a useful guide for solar development, highlighting project considerations and enumerating things to avoid if there are concerns about a potential tax burden. Thus, more than anything, Cornell University illuminates the importance of thoughtful project planning, especially at the earliest stages of project development.

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[1] Cornell University v. Board of Assessment Review, No. CA 19-00339, slip op. 04636, 2020 WL 4876486 (4th Dep't Aug. 20, 2020).

[2] N.Y. Real Prop. Tax Law § 102(12)(b) (Westlaw through L.2019 ch. 758, L.2020 ch.1 to 56, 58 to 167).

[3] Metromedia Inc. (Foster & Kleiser Div.) v. Tax Comm'n of N.Y., 60 N.Y.2d 85, 90 (1983); T-Mobile Ne. LLC v. DeBellis, 143 A.D.3d 992, 995 (2d Dep't 2016), aff'd, 32 N.Y.3d 594 (2018), rearg. denied 32 N.Y.3d 1197 (2019).

[4] Metromedia Inc., 60 N.Y.2d at 90; S. Seas Yacht Club v. Bd. of Assessors & Bd. of Assessment Review , 136 A.D.2d 537, 538 (2d Dep't 1988).

[5] See slip op. 04636, at *2.

[6] Id.

[7] Id.

[8] Id.

[9] Id.