NEW JERSEY LAW REVISION COMMISSION

Draft Final Report Regarding Modifications to Roll-back Taxes Provisions in the Farmland Assessment Act of 1964 – N.J.S. 54:4-23.8

April 11, 2022

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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Project Summary[1]

The Farmland Assessment Act of 1964 ("Act") was enacted to preserve family farms by providing farmers with some measure of economic relief.[2] The Act permits land that is "**actively devoted** to agricultural or horticultural use" to receive special tax treatment provided that the minimum gross sales requirement set forth in the statute is met.[3, 4] The Act also provides separate and independent financial consequences if the land "is applied to a use other than agriculture or horticulture," subjecting the landowner to "roll-back taxes."[5]

In *Balmer v. Twp. of Holmdel*, the Tax Court examined whether a farmer who is unable to resume farming activity but does not apply the land to a use other than agriculture is subject to roll-back taxes.[6] The absence of a statutory definition for the term "applied to a use other than agricultural or horticultural" has led the Tax Courts to develop a common law definition for the term that is not readily apparent from a plain reading of the statute, and appears to deviate from the intent of the Legislature.

Consistent with the legislative intent underlying the Act, the Commission recommends the modification of N.J.S. 54:4-23.8 to clarify that the cessation of agricultural or horticultural activity during a given year is not a change in the property's "use" and does not trigger the imposition of rollback taxes upon the property owner.[7]

Statute Considered

N.J.S. § 54:4-23.8 provides, in relevant part:

> When land which is in agricultural or horticultural use and is being valued, assessed and taxed under the provisions of P.L.1964, c. 48 (C.54:4-23.1 et seq.), **is applied to a use other than agricultural or horticultural**, it shall be subject to additional taxes, hereinafter referred to as roll-back taxes, in an amount equal to the difference, if any, between the taxes paid or payable on the basis of the valuation and the assessment authorized hereunder and the taxes that would have been paid or payable had the land been valued, assessed and taxed as other land in the taxing district, in the current tax year (the year of **change in use**) and in such of the two tax years immediately preceding, in which the land was valued, assessed and taxed as herein provided.

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[1] Preliminary work on this subject was performed by Alyssa Brandley, former Legislative Law Clerk, during her time with the N.J. Law Rev. Comm'n.
[2] *Alcatel-Lucent USA Inc. v. Twp. of Berkeley Heights,* 460 N.J. Super. 243 (App. Div. 2019).
[3] N.J. STAT. ANN. § 54:4-23.2 (West 2021) (emphasis added) (providing that the property will be assessed based upon the productivity value of the land).
[4] N.J. STAT. ANN. § 54:4-23.8 (West 2021). *See Balmer v. Twp. of Holmdel*, 2019 WL 6716716 *3 (Tax Ct. Dec. 9, 2019).
[5] *Balmer v. Twp. of Holmdel,* 2019 WL 6716716 *3 (Tax Ct. Dec. 9, 2019).
[6] *Id*.
[7] *Jackson Twp. v. Paolin*, 181 N.J. Super. 293, 309 (1981). *See* Appendix *infra* at 14-15.

> If the tax year in which a **change in use** of the land occurs, the land was not valued, assessed and taxed under P.L.1964, c. 48 (C.54:4-23.1 et seq.), then such land shall be subject to roll-back taxes for such of the two tax years, immediately preceding, in which the land was valued, assessed and taxed hereunder.
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Historical Background

In 1960, to "counter the adverse impact of property taxation upon agriculture and to provide farmers with some measure of tax relief" the New Jersey Legislature enacted laws relating to the taxation of real and personal property.[8] The Act provided that "in assessment of acreage which is actively devoted to agricultural use, such (taxable) value was not to be deemed to include prospective value for subdivisions or agricultural use."[9]

In *Switz v. Kingsley*, the New Jersey Supreme Court considered the constitutionality of the statutes related to the taxation of real and personal property.[10] Considering the statute's effect on farmland, the Court determined that "the Legislature intended some impact upon the 'standard of value' favorable to this class of property."[11] In passing on the constitutionality of section 23 of what was then N.J.S. 54:4-1, the Court noted that "Art. VIII, s I, par. 1, plainly requires the application of the Same standard of value and the Same rate of tax, to all real property taxable for local use." [12] According to the Court, the preferential treatment of farmland in the statute rendered that portion of the statute unconstitutional.[13]

The decision of the New Jersey Supreme Court in *Switz v. Kingsley* led to the creation of the Governor's Farmland Assessment Committee ("Committee").[14] This Committee was asked to "make a study and develop recommendations with respect to the assessment of farmlands of the State."[15]

In 1963, New Jersey's Commission on State Tax Policy (NJCSTP) noted "the adverse effects of the mounting property tax burden on the farmers of New Jersey."[16] The NJCSTP acknowledged the "view that if agriculture is to serve in New Jersey, the property tax burden on farmlands must be eased."[17] In the spring and summer of 1962, the New Jersey State Grange and the New Jersey Farm Bureau each advised the NJCSTP that "the most satisfactory solution [to the tax burden on farm lands] could be an amendment of Article VIII of the Constitution to include the specific provision of Chapter 51, relating to the valuation of acreage in actual agricultural use…"

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[8] *City of E. Orange v. Livingston Twp.*, 102 N.J. Super. 512, 531-532 (Law. Div. 1968), aff'd, 54 N.J. 96 (1969).
[9] *See* N.J.S. 54:4-1. An Act Relating to the Taxation of Real and Pers. Prop. for the Use of Local Gov't (1960).
[10] *Switz v. Kingsley*, 37 N.J. 566 (1962).
[11] *Switz*, 37 N.J. at 585.
[12] *Id.* Emphasis and capitalization original.
[13] *Id.*
[14] *City of E. Orange v. Livingston Twp.*, 102 N.J. Super. 532.
[15] *Id.*
[16] *Id.*
[17] *Id.* citing State Tax Policy Comm'n, Ninth Report at 109-111 (Jan. 10, 1963).

which had been declared invalid by the Supreme Court in *Switz v. Kingsley*.[18] The NJCSTP deferred making a recommendation on this issue and left the "disposition of this particular tax question to the Governor's special committee.[19]

In the wake of the *Switz* decision, the Governor's Committee examined the economic impact of property taxation on New Jersey agriculture, and considered "(a) the desirability of continuing the family farm in New Jersey and the farmer's problem; (b) the interests of the municipalities and the problems of the assessors; and, finally, (c) the interests of all the people of New Jersey in maintaining 'open' space, the beauty of our countryside and in the availability of agricultural products fresh from the farm."[20] At the conclusion of its study, the Committee recommended "the introduction of a legislative bill proposing a constitutional amendment which would permit the separate assessment of agricultural lands."[21]

Senate Concurrent Resolution No. 16, proposed a constitutional amendment to encourage the retention of agriculture as an industry in New Jersey and to preserve agricultural lands in an open space condition. Although the proponents of the resolution anticipated incidental benefits to the State such as "fostering agriculture in the State for the good of the general economy, ameliorating problems of urban growth in rural municipalities, and encouraging the preservation of open spaces" their primary objective was to "provide farmers with some economic relief by permitting farmlands to be taxed upon their value as on-going farms and not on any other basis."

On November 5, 1963, the proposed constitutional amendment to provide preferential tax treatment to eligible farmlands was submitted to, and approved by, the New Jersey electorate during the general election.[22] In addition to the preferential treatment of farmland, Article 8, section 1, subsection b., paragraph 1, provided that:

> [a]ny such laws shall provide that when land which has been valued in this manner for local tax purposes **is applied to a use other than for agriculture** or horticulture it shall be subject to additional taxes in an amount equal to the difference, if any, between the taxes paid or payable on the basis of the valuation and the assessment authorized hereunder and the taxes that would have been paid or payable had the land been valued and assessed as otherwise provided in this Constitution, in the current year and in such of the tax years immediately preceding, not in excess of 2 such years in which the land was valued as herein authorized….[23]

In 1964, Chapter 48 served as the enabling legislation for this constitutional provision.

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[18] State Tax Policy Comm'n, Ninth Report at 110.
[19] *Id.*
[20] *City of E. Orange v. Livingston Twp.*, 102 N.J. Super. 532 (citing Report of Governor's Farmland Assessment Committee (Mar. 20, 1963).
[21] *Id.* at 533 (citing the recommendation of the Report of Governor's Farmland Assessment Committee (Mar. 20, 1963).
[22] *Id.* at 532 (citing Report of Governor's Farmland Assessment Committee (Mar. 20, 1963).
[23] N.J. Const. art. VIII, § 1, ¶ 1(b) (emphasis added). *See discussion infra* regarding "roll-back taxes."

Farmland Assessment Act of 1964[24]

The Act grants preferential treatment to land of a certain size that is actively devoted to agricultural[25] or horticultural use[26] and has been for at least two successive years immediately preceding the tax year in issue.[27] Whether or not a property is eligible for the farmland assessment depends upon whether the land is actively devoted to agricultural, or horticultural use.[28] To be considered "actively devoted" to either of these uses, the gross sales of agricultural or horticultural products must have averaged at least $1,000 per year for the two-year period immediately preceding the tax year in issue.[29]

To comply with the constitutional requirements in Article 8, section 1, subsection b., paragraph 1, the Legislature enacted N.J.S. 54:4-23.8. This statute provides that "[w]hen land in agricultural or horticultural use… *is applied to a use* other than agricultural or horticultural it shall be subject to … roll-back taxes…."[30] A County Board of Taxation has the ability to recoup taxes when land that was previously assessed as farmland "is applied to a use other than agricultural or horticultural."[31] The constitutional, and statutory, phrase "*as applied to a use other than agricultural*" does not clearly indicate the condition(s) that subject the owner to roll-back taxes. While the Act "should… be understood in terms of its evident intent and purpose…"[32] of easing the tax burden on farmlands, the absence of explanatory language regarding a "change in use" has resulted in the common law filling that void.

Cases

Cessation of Farming Activity

In *Jackson Twp. v. Paolin*, the County Board of Taxation imposed roll-back taxes on several parcels of a farmer's land "because of a cessation of farming activity on the properties…."[33] The taxpayer appealed.[34]

When Patsy Paolin was in his seventies, his health began to decline and he was much less active than he had been in his earlier years.[35] In 1978, his left leg was amputated, and he spent

[24] N.J. STAT. ANN. §§ 54:4-23.1 – 54:4-34 (West 2021).
[25] N.J. STAT. ANN. § 54:4-23.3 (West 2021) (to be deemed an agricultural use, the land must be devoted to the production for sale of plants and animals useful to man).
[26] N.J. STAT. ANN. § 54:4-23.4 (West 2021) (a horticultural use requires land that is devoted to the production for sale of fruits of all kinds, vegetables, nursery, floral, ornamental and greehouse products).
[27] N.J. STAT. ANN. § 54:4-23.2 (West 2021).
[28] *Balmer,* 2019 WL 6716716, at *3 (citing *Brunswick Tp. v. Bellemead Dev. Corp.*, 8 N.J. Tax 616, 620 (Tax Ct. 1987
[29] N.J. STAT. ANN. § 54:4-23.5a. (West 2021).
[30] *Id.* (emphasis added)
[31] N.J. STAT. ANN. § 54:4-23.8 (West 2021).
[32] *City of E. Orange v. Livingston Twp.*, 102 N.J. Super. 535.
[33] *Jackson Twp. v. Paolin*, 181 N.J. Super. 293 (1981). The taxpayer also appealed from the county tax board judgment denying him a farmland assessment. This issue, however, exceeds the scope of the instant Memorandum.
[34] *Id*.
[35] *Id*. at 298.

several months in a hospital and a convalescent home.[36] With limited exception, he conceded that because of his health "everything was lost insofar as his farming was concerned."[37] The tax assessor "characterized Paolin's activity on the property in 1978 as "non-use," indicating that the property was not "actively devoted to agricultural use within the intendment of the Farmland Assessment Act" and "should not have received [the] assessment for that year."[38]

In a case of first impression, the *Paolin Court* construed the roll-back section of the Farmland Assessment Act.[39] "[T]he issue is squarely presented whether the loss of farmland assessment automatically triggers the imposition of roll[-]back taxes."[40] The Court questioned "whether a finding that a property is not 'actively devoted to agricultural… use' in any given year requires a finding that the property 'is applied to a use other that agricultural or horticultural…' so as to trigger the [imposition] of roll[-]back taxes."[41]

The *Paolin Court* conducted an examination of the pertinent words in the roll-back section of the Act. Using the American Heritage Dictionary of the English Language, the Court examined the definition of the words "apply" and "change."[42] The definition of these terms suggested to the Court "that the Legislature intended an active conversion from one positive type of land use to another."[43] The Court noted that the synonyms for these terms[44] indicated "rather cogently that the Legislature intended that the use of a property had to be fundamentally different from active devotion to agricultural use before roll[-]back taxes would be assessable."[45] The Court continued that, "[t]he Legislature could have provided that roll-back taxes would be due when the land under farmland assessment simply ceased to be actively devoted to agricultural use."[46] Thus, "if this language had been adopted, "non-use" of a property that had been farm-qualified would unquestionably trigger a roll-back tax assessment in addition to denial of farmland assessment for

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[36] *Id*.
[37] *Id*.
[38] *Id*. at 299-300.
[39] *Id*. at 302.
[40] *Id*. at 301.
[41] *Id*.
[42] *Id.* at 303. As defined by the American Heritage Dictionary, the terms "apply" and "change" are defined as follows: **apply**: ... 2. To put to or adapt for a special use.... 4. To devote (oneself or one's efforts) to something. **change**: ... 1.a. The process or condition of changing; alteration or modification; transformation. b. The replacing of one thing for another; substitution. 2. A transition from one state, condition, or phrase to another; the change of seasons. 3. Something different; variety.
[43] *Id*. at 303.
[44] *Id*. quoting the American Heritage Dictionary (Synonyms: change, alter, vary, modify, transform, convert, transmute. These verbs mean to make or become different. Change implies a fundamental difference or a substitution of one thing for another: change his mind; change trains. Alter usually means to make less of a difference or adjustment. Vary implies shifting circumstances or conditions that cause differences with some regularity. Modify can mean to restrict, limit, or qualify, and sometimes to make less extreme. Transform refers to complete change in outer form or appearance and often also in character and function. Convert can refer to moderate change designed to adapt something to new use or different conditions; to chemical change; to change in belief or doctrine; or to the exchange of something for equivalent value, either in the same form (convert dollars into pounds) or a different form (convert real estate into cash). Transmute suggests almost magical basic change that elevates something in value).
[45] *Id.* at 303.
[46] *Id*.

the current year."[47] The Court recognized that, "instead of providing that cessation of the qualifying activity would trigger a roll-back, the Legislature chose to use words that connote more than a mere cessation or lapse of use, and even more than an alteration or modification of a qualified use."[48]

The Court also examined the legislative history of the Act.[49] It noted that "[t]here is no suggestion in the available history of the 1963 amendment to the State Constitution or the enactment of the Farmland Assessment Act that the roll-back tax feature was intended to apply automatically upon termination of the active devotion of a property to agricultural use."[50] The imposition of roll-back taxes was intended to "[prevent] abuse of the anticipated farmland assessment system by those who would be involved in pure [land] speculation."[51]

The *Paolin Court* considered the "experience of other states" in dealing with agricultural assessments and roll-back taxes.[52] After an examination of the scholarly works on the subject, the Court said that "[t]hese authorities corroborate the conclusion of the court that roll-back tax provisions in farmland assessment legislation were almost never intended to apply automatically when a farm-qualified property lost its farm qualification."[53] In determining whether a roll-back provision applied in a given circumstance, the Court stated that "the severity of some roll-back provisions would tend… to indicate that they were not designed for imposition on property that becomes under-utilized…."[54] Furthermore, the Court found it "difficult to imagine that the intent of any roll-back provision was to impose an extra tax burden on a landowner who simply grew old or became disabled and no longer could actively devote [the] property to agriculture."[55]

Ultimately, the Court reversed the judgment of the County Board of Taxation which had imposed roll-back taxes against the landowner.[56] The Act is designed, in part, to preserve family farms in New Jersey.[57] The imposition of roll-back taxes "merely because the owner ceased to devote the property to agriculture on an active basis" would subvert the intent of the Act.[58] The failure of a landowner to devote the property actively to agriculture during a given year "was not an application of the property to a use other than agriculture and was not a change in use of the property within the intent of the Act so as to trigger the imposition of roll-back taxes upon the

[47] *Id*.
[48] *Id*. at 303-304.
[49] *See Paolin*, 181 N.J. Super. at 304-306 for an analysis of the history of the constitutional amendment and statutory enactment.
[50] *Id*. at 305.
[51] *Id*.
[52] *Id.* at 306-308 for an analysis of the scholarly works that analyze the farmland assessment and roll-back taxes throughout the country.
[53] *Id*. at 307.
[54] *Id.* at 308.
[55] *Id*.
[56] *Id*. at 309.
[57] *Id*. at 308.
[58] *Id*.

property owner.[59] Roll-back taxes, according to the *Paolin* Court "are not triggered until the land is applied to a more intensive use than that for which it received [a] farmland assessment."[60]

Narrowing of the Paolin Approach Through Inactivity

In the mid-1980s the Tax Court began to require that farmers engage in "continued farmland activity in order to avoid the roll-back provision contained in the Act.[61]

In *Burlington Twp. v. Messer*, the Tax Court considered whether "inactivity" on previously qualified farmland was sufficient to trigger the roll-back tax provisions in the Act.[62] The Court fashioned a two-part test.[63] "[T]o qualify for roll-back taxes a taxing district must prove: (1) the land in the alleged roll-back year or in the two years immediately preceding has been specially taxed as farmland under the act; and, (2) in that year the land has not been applied to agriculture or horticultural use."[64] The Court said that land taxed as farmland, "was taxed lawfully because it was 'actively devoted' as required by the statute; therefore, when the land subsequently [was] not applied to an agricultural … use, [via inactivity or cessation] by operation of law a 'change in use' has occurred…" thereby authorizing the imposition of roll-back taxes.[65]

"Actively Devoted"

The Tax Court appears to have conflated two distinct aspects of the Act – (1) preferential tax treatment as an incentive to landowners to preserve the amount of farmland in the state; and (2) the ability of a taxing authority to recoup taxes when farmland is applied to a use other than agriculture or horticulture.[66] An examination of these two concepts suggests that "[t]he Act defines 'actively devoted' and 'agricultural use' in separate provisions because the terms have separate and independent consequences for farmland assessment."[67]

A parcel of land actively devoted to agricultural use will qualify for a preferential assessment under the Act.[68] Whether or not a parcel receives the farmland assessment is

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[59] *Id*.
[60] *Id*. at 308-309.
[61] *Burlington Twp. v. Messer*, 8 N.J. Tax 274, 283 (1986), aff'd, 9 N.J. Tax 634 (Super. Ct. App. Div. 1987) (interpreting *Jackson Twp. v. Paolin*, 181 N.J. Super. 293 (1981) to "stand[ ] for the proposition that where previously qualified farmland **continues in farmland activity but fails to meet the minimum income requirements** … it is not subject to roll-back taxes") (emphasis added). *See also South Brunswick Twp. v. Bellemead Dev. Corp*. 8 N.J. Tax 616 (1987) (dismissing the suggestion that *Paolin* required a conversion from one type of land use to another to find a change in use) and *Angelini v. Upper Freehold Twp*., 8 N.J. Tax 644, 651 (1987) (finding that "the conscious determination to terminate farming is a change in use resulting in the imposition of roll-back taxes").
[62] *Id*.
[63] *Id*. at 286.
[64] *Id*.
[65] *Id*. *But see Jackson Twp. v. Paolin*, 181 N.J. Super. 293 (1981), N.J. Const. art. VIII, § 1, ¶ 1(b), and N.J. STAT. ANN. § 54:4-23.8 (West 2021).
[66] *See South Brunswick Twp. v. Bellemead Dev. Corp*. 8 N.J. Tax 616 (1987) (finding that for purposes of imposing roll-back taxes, "a change from agricultural use to nonuse … constitute[s] a change in use…) and *Angelini v. Upper Freehold Twp*., 8 N.J. Tax 644, 651 (1987) (finding that "the conscious determination to terminate farming is a change in use resulting in the imposition of roll-back taxes").
[67] *Balmer v. Twp. of Holmdel*, 2019 WL 6716716 (Tax Ct. Dec. 9, 2019).
[68] N.J. STAT. ANN. § 54:4-23.5a. (West 2021).

determined by whether the land is "actively devoted" within the meaning of N.J.S. 54:4-23.5a. To qualify as "actively devoted" to agriculture, the land, five acres in area, must have averaged at least $1,000 per year during the two-year period immediately preceding the tax year in issue for the amount of the gross sales of products produced thereon.[69]

It does not necessarily follow that failing to receive the farmland assessment must result in the imposition of roll-back taxes. "There is no suggestion in the available history of the 1963 amendment to the State Constitution or the enactment of the Farmland Assessment Act that the roll-back tax feature was intended to apply automatically upon termination of the active devotion of a property to agricultural use."[70] Also, the Tax Court has, under certain circumstances, declined to impose roll-back taxes in instances where the cessation of farming activity results from the illness of the farmer.[71] Finally, the imposition of roll-back taxes in instances of non-use would have the seemingly unintended consequence of punishing a farmer for letting the land lie fallow to improve it for future crops.[72]

Both the State Constitution and the Act require that the land be "applied to a use other than agricultural" before the taxing authority may demand roll-back taxes. The decision of the *Messer* Court, however, has led to continued litigation regarding this issue.

Balmer v. Twp. of Holmdel

In 2019, almost four decades after the *Paolin* decision, the Tax Court was called upon to consider whether a landowner's cessation from farming "absent using [the land] for another purpose, constitute[d] a change in use, … sufficient to trigger the farmland roll-back assessment provision of N.J.S.[ ] 54:4-23.8."[73]

In *Balmer v. Twp. of Holmdel*, Ms. Balmer was the sole property owner of approximately twelve acres of land that was assessed as farmland up to and including tax year 2013.[74] In 2013, she became ill, her farmer retired, she was unable to replace him, and she was forced to cease farming.[75] Consequently, she did not seek the statutory farmland assessment for the tax year 2014, because she recognized that her land was not "actively devoted" to agriculture or horticulture.[76]

In 2013, a tax assessor visited Ms. Balmer's property and determined that all agricultural activity had ceased.[77] The inspection revealed that the property was covered in tall grass and there

[69] N.J.S. 54:4-23.5a. provides that "land, five acres in area, shall be deemed to be actively devoted to agricultural… use when the amount of the gross sales of products produced thereon… have averaged at least $1,000 per year during the two-year period immediately preceding the tax year in issue…."
[70] *Paolin*, 181 N.J. Super. at 305.
[71] *See* discussion *supra* of *Jackson Twp. v. Paolin*, 181 N.J. Super. 293 (1981).
[72] *Messer*, 8 N.J. Tax 287 note 2. *See also* N.J. STAT. ANN. § 54:4-23.5a. (recognizing soil conservation program as a reason for a decrease in gross sales).
[73] *Balmer,* 2019 WL 6716716 at *1.
[74] Plaintiff's primary residence was situated on the subject land. *Balmer,* 2019 WL 6716716, at *1.
[75] *Id*.
[76] Plaintiff did not seek farmland assessment any time thereafter, either. *Id*.
[77] *Id*.

was no farming equipment in sight.[78] In 2015, the Township of Holmdel filed a complaint with the Monmouth County Board of Taxation alleging that Ms. Balmer had abandoned farming her land and seeking roll-back taxes against her.[79] The Board granted the imposition of roll-back taxes in the amount of $12,426.07 for tax year 2013 and $11,357.06 for tax year 2012.[80]

Ms. Balmer appealed and argued that the imposition of roll-back taxes was improper because she had not changed the use of the land, which remained vacant and available for farming.[81] Ms. Balmer advanced three arguments.[82] First, that the property was vacant and available for farming.[83] Next, that much like the farmer in *Paolin*, the "use" of her land had not changed.[84] Finally, that the imposition of roll-back taxes violates the Act's legislative intent.[85]

The farming activity on Ms. Balmer's land ceased as a result of her illness and the retirement of her farmer.[86] She urged the Court to consider that, much like the farmer in *Paolin*, she had not changed the agricultural use of her land.[87] The Court acknowledged that "while illness was a factor in both cases, the use of the land is the critical distinguishing element."[88] In *Paolin*, the Court stated that "there was a modicum of farming activity" generously describing the property as "under-utilized."[89] The Court went on to find that because she was not actively farming "the use of Ms. Balmer's land was no longer agricultural."[90]

The Court also examined what it considered to be the "plain meaning" of N.J.S. 54:4-23.8.[91] Much like the *Paolin* Court, the *Balmer* Court used a dictionary to discern the plain meaning of the word "change."[92] The *Balmer* Court, however, determined that "doing something different would constitute a change" and that "[n]ot farming is different from farming and constitutes a change [for the purpose of roll-back taxes]."[93] The Court also stated that "both the

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[78] *Id*.
[79] *Id*. at *2.
[80] *Id*. at *2.
[81] *Id*. Instead, the Court applies a "present use" requirement, noting that "[t]he fact that the land was available for farming at that time or sometime in the future is immaterial; it is present use that is critical." *Id.* at *3.
[82] *Id*. at *3.
[83] *Id*.
[84] *Id*.
[85] *Id*. at *5.
[86] *Id*. at *1.
[87] *Id*.
[88] *Id*. at *3.
[89] *Id*. *Contra Paolin*, 181 N.J. Super. at 298, 308 (Paolin conceded that "everything was lost" insofar as his farming was concerned and the assessor characterized the activity on the property in 1978 as "non-use") (notably, the description of the property as under-utilized appears in the following context "a consideration of the severity of some roll-back provisions would tend by itself to indicate that they were not designed for imposition on property that becomes under-utilized, **as Paolin's property in the present case,** but rather only on property that has been applied to a more intensive and presumably more profitable use….").
[90] *Id*.
[91] *Id*. at *5.
[92] *Id*. at *4. *Compare* note 43 *supra.*
[93] *Id*.

New Jersey Constitution and N.J.S.[ ] 54:4-23.8 clearly and unambiguously stated that a previously qualified land not being used for agricultural use will be subject to roll-back taxes." [94]

The Court denied Mrs. Balmer's motion for summary judgment, concluded that the imposition of roll-back taxes was appropriate, and granted summary judgment in favor of the municipality.[95]

Division of Taxation – Department of the Treasury

The Handbook

In New Jersey, property taxes are of continuous concern to the citizenry.[96] In an effort to ensure that the laws regarding property taxation are followed in a uniform manner, the New Jersey Division of Taxation publishes the *Handbook for New Jersey Assessors*.[97] For almost a half century, the *Handbook* "has been an essential tool for New Jersey assessors to use on a daily basis."[98] This reference guide was written to assist assessors and citizens answer questions concerning property tax assessments such as roll-back taxes.[99]

The Farmland Assessment Act permits the Division of Taxation to impose roll-back taxes upon a landowner to recapture a portion of the taxes which would have been collected if the land had been taxed at the same market value standard as all other property.[100] According to the *Handbook*, "rollback taxes are applied if the use of the land changes from agricultural/horticultural use to a nonfarm use."[101] The "loss of Farmland Assessment for inadequate or under devotion during the tax year does not automatically result in rollback taxes as a change in use."[102]

The *Handbook* sets forth an example of what could constitute a "change in use" that subjects the landowner to roll-back taxes. Hypothetically, if the owner of a 200-acre farm divides the farm into two equal sized farms, and both continue in agricultural or horticultural use and meet all other requirements then neither would be subject to roll-back taxes.[103] If, however, one parcel is used to construct housing then that parcel would lose the Farmland Assessment and the taxes

[94] *Id*. at *5 (citing N.J. Const. art. VIII, § 1, ¶ 1(b), and N.J. STAT. ANN. § 54:4-23.8a. (West 2021)). To be clear neither the New Jersey Constitution nor the enacting statute uses the language "not being used for." Rather, N.J. STAT. ANN. § 54:4-23.8a. provides for roll-back taxes when previously qualified farmland "is applied to a use other than for agriculture."
[95] *Id*. at *6.
[96] HANDBOOK FOR NEW JERSEY ASSESSORS, PREFACE (PROP. ADMIN. – LOCAL PROP., DIV. OF TAX'N – DEPT. OF THE TREASURY, STATE OF N.J. 2021). [Hereinafter *Handbook*].
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at § 616.24.
[101] *Id.*
[102] *Id. See also* N.J.A.C. 18:15-7.1 (providing that when land is applied to a use other than agricultural the land becomes ineligible for the farmland assessment and is subject to roll-back taxes).
[103] *Id.* at § 616.25.

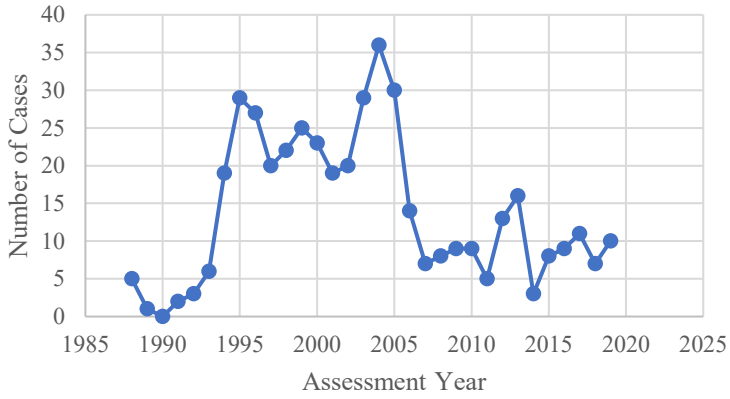
would be "rolled back."[104] The actual use of the land is the sole criterion to determine whether a change in use has occurred.[105]

Frequency of Roll-back Cases

The Commission asked Staff about the frequency with which roll back taxes are sought in a given year.[106] In 1996, the New Jersey Tax Court Management Office implemented a system to track various tax court filings.[107] This system was able to track data concerning farmland roll-back filing for the years 1988 – 2019.[108]

Since 1988, a total of 445 farmland roll-back cases have been filed with the Tax Court.[109] During the years 1998—2019, the number of roll-back filings in a given year ranged from zero filings in 1990 to thirty-six filings in 2004.[110] During the same period, an average of fourteen farmland roll-back cases were filed each year. In 2019, ten farmland roll-back cases were filed in the State of New Jersey.[111] The data suggests that in New Jersey, farmland roll-back cases occur with some frequency.

Fig. 1
Roll Back Tax Cases Since 1988



[104] *Id. See Rossi v. Upper Pittsgrove Twp.*, 12 N.J. Tax 235, 243 (1992) (noting that when farmland is physically converted to residential, commercial, or industrial development the physical change to the land is clearly evident and will sustain a roll-back conclusion).
[105] *See also Rossi*, 12 N.J. Tax at 241 (noting that intended future use is not the test for determining change in use and that the change in use is determined to have occurred when the agricultural devotion terminates and the land is converted to a use other than agriculture, *e.g.*, a mining excavation).
[106] N.J. LAW REV. COMM'N (2021) 'The Roll-back Taxes in the Farmland Assessment Act of 1964'. *Minutes of NJLRC meeting 16 Jul. 2021,* Newark, N.J.
[107] E-mail from Lynne E. Allsop, Dep. Clerk, Tax Ct. Mgmt. Off., to Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm'n (Dec. 07, 2021, 12:24 PM EST) (on file with the NJLRC).
[108] *Id.*
[109] *Id.* Fig. 1.
[110] *Id.* In 1990, the Tax Management office reports that no cases were filed. Conversely, in 2004, there were 36 cases filed. The date set forth in Fig. 1 is based upon the data provided for the first assessment year.
[111] *Id.*

Outreach

Staff sought comments from knowledgeable individuals and organizations including: the New Jersey Department of Agriculture; the New Jersey Department of the Treasury; the New Jersey Agricultural Society; the Tax Law Section of the New Jersey State Bar Association; private practitioners; each of the twenty-one County Tax Boards; and the six Regional Offices of the New Jersey Division of Taxation.

The Commission received support for the proposed modifications from a private practitioner.[112] The commenter stated that the "Act should be clear that the mere cessation of agricultural or horticultural activity on a property, while negating the property's eligibility for farmland assessment, does not by itself trigger the imposition of rollback taxes."[113] The commenter added that "[t]here should be some actual change in use on the property and the [Commission's] proposed amendment to N.J.S. [] 54:4-23.8(b) requiring an active conversion of the land to non-agricultural or non-horticultural use makes it clear that an actual change is required."[114]

Pending Legislation

There is no pending legislation in New Jersey that concerns N.J.S. § 54:4-23.8.

Conclusion

During a given year, a property may fall short of the minimum gross sales requirement set forth in the Act and no longer be considered "actively devoted" to agriculture or horticulture. Under such circumstances, the property will forfeit its preferential farmland assessment.

The history of the Act suggests that the roll-back tax provision in the Farmland Assessment Act was not intended to apply automatically when a farm-qualified property loses its preferential treatment.[115]

The Commission recommends adding language to N.J.S. 54:4-23.8 to provide consistency in the imposition of roll-back taxes. The Appendix that follows proposes the addition of language to clarify that the cessation of agricultural or horticultural activity is not considered a change in the use of the land sufficient to impose roll-back taxes against the landowner.

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[112] E-mail from Thomas M. Olson, Esq., McKirdy, Riskin, Olson & DellaPelle, P.C., to Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm'n (Mar. 21, 2022, 7:57 AM EST) (on file with the NJLRC).
[113] *Id.*
[114] *Id.*
[115] *Jackson Twp. v. Paolin*, 181 N.J. Super. 293, 300-09 (1981).

Appendix

The proposed modifications to the existing New Jersey statutes to incorporate the provisions of the Act are shown with underlining (to signify the addition of text) and ~~strikethrough~~ (to mark the removal of text) as follows:

N.J.S. 54:4-23.8. Roll-back taxes; determination of amounts

a. When land which is in agricultural or horticultural use and is being valued, assessed, and taxed under the provisions of P.L.1964, c. 48 (C.54:4-23.1 et seq.), is applied[116] to a use other than agricultural or horticultural, it shall be subject to additional taxes, hereinafter referred to as roll-back taxes~~, in an amount~~.

b. For purposes of subsection a., the cessation of agricultural or horticultural activity shall not subject the land to roll-back taxes in the absence of an active conversion of the land to a non-agricultural or non-horticultural use.[117]

c. Roll-back taxes, as provided for in subsection a. of this section, shall be equal to the difference, if any, between the taxes paid or payable on the basis of the valuation and the assessment authorized hereunder and the taxes that would have been paid or payable had the land been valued, assessed and taxed as other land in the taxing district, in the current tax year (the year of change in use[118]) and in such of the two tax years immediately preceding, in which the land was valued, assessed and taxed as herein provided.

d. If the tax year in which a change in use of the land occurs, the land was not valued, assessed, and taxed under P.L.1964, c. 48 (C.54:4-23.1 et seq.), then such land shall be subject to roll-back taxes for such of the two tax years, immediately preceding, in which the land was valued, assessed, and taxed hereunder.

e. (1) ~~Notwithstanding the provisions of any law, rule, or regulation to the contrary, land~~ Land which is valued, assessed, and taxed under the provisions of P.L.1964, c. 48 (C.54:4-23.1 et seq.) shall not be subject to roll-back taxes if it is ~~and is~~ acquired by:

(a) the State,

(b) a local government unit,

(c) a qualifying tax-exempt nonprofit organization, or

[116] *Paolin*, 181 N.J. Super. at 303 (finding that definitions of 'apply' and 'change' suggest that Legislature intended active conversion from one positive type of land to another is the condition precedent that must be satisfied before roll-back taxes are imposed upon the taxpayer).
[117] *Id.*. *See* HANDBOOK, at § 616.24.
[118] *See supra* note 113 and *see Paolin*, 181 N.J. Super. at 303-304 (finding that "the Legislature chose to use words that connote more than a mere cessation or lapse of use, and even more than an alteration or modification of a qualified use" before roll-back taxes could be imposed on a taxpayer).

(d) the Palisades Interstate Park Commission for recreation and conservation purposes. ~~shall not be subject to roll-back taxes.~~

(2) As used in this section, "acquired," "local government unit," "qualifying tax-exempt nonprofit organization," and "recreation and conservation purposes" mean the same as those terms are defined pursuant to section 3 of P.L.1999, c. 152 (C.13:8C-3).

f. In determining the amounts of the roll-back taxes chargeable on land which has undergone a change in use, the assessor shall for each of the roll-back tax years involved, ascertain:

~~(a)~~ (1) The full and fair value of such land under the valuation standard applicable to other land in the taxing district;

~~(b)~~ (2) The amount of the land assessment for the particular tax year by multiplying such full and fair value by the county percentage level, as determined by the county board of taxation in accordance with section 3 of P. L.1960, c. 51 (C.54:4-2.27);

~~(c)~~ (3)The amount of the additional assessment on the land for the particular tax year by deducting the amount of the actual assessment on the land for that year from the amount of the land assessment determined under ~~(b)~~ subsection (2) hereof; and

~~(d)~~ (4)The amount of the roll-back tax for that tax year by multiplying the amount of the additional assessment determined under ~~(c)~~ subsection (3) hereof by the general property tax rate of the taxing district applicable for that tax year.

Comments

In its current form N.J.S. 54:4-23.8 consists of four, unnumbered block paragraphs. These paragraphs have been lettered a. through f. to improve accessibility and for ease of reference.

Subsection a.

The language of subsection a. has been divided into two separate subsections - a. and c. The substantive language of subsection a. has been retained and sets forth the condition precedent for the imposition of roll-back taxes – the application of the qualified land to a use other than agriculture or horticulture.

Subsection b.

The proposed language contained in subsection b. is based upon the decision of the Tax Court in *Jackson Twp. v. Paolin*, 181 N.J. Super. 293, 308 (1981) wherein the court found it "difficult to imagine that the intent of any rollback provision was to impose an extra tax burden on a landowner who simply grew old or became disabled and no longer could actively devote his property to agriculture."

Consistent with the history of the Farmland Assessment Act, the proposed language in subsection b. clarifies that the cessation of agricultural or horticultural activity does not constitute a change in the land's use for the purpose of assessing roll-back taxes.[119]

[119] *E.g., Andover Twp. v. Kymer*, 140 N.J. Super. 399, 405 (App. Div. 1976) (finding that the "Legislature has incorporated the rollback tax provisions into the act, N.J.S.A. 54:4—23.8, to help protect municipalities from land speculation by providing, where there has been a change in use, for an additional tax on the land that takes into account

Subsection c.

The balance of what originally comprised the first paragraph of this statute is identified as subsection c. The substance of this proposed subsection has not been altered.

Subsections d - f.

The substantive language contained in these newly re-lettered subsection has not been modified. Consistent with the contemporary standards of legislative drafting, these subsections have been structurally modified to promote ease of access, identification, and readability.

the taxes that would have been payable had the land been assessed as other land in the taxing district in the year of change in use and in such of the two tax years immediately preceding in which the land was assessed and taxed as farmland.").