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BMW OF NORTH AMERICA, LLC,	:	TAX COURT OF NEW JERSEY
	:	DOCKET NO. 004237-2006
	:	DOCKET NO. 004381-2006
Plaintiff,	:	DOCKET NO. 001138-2007
	:	DOCKET NO. 001141-2007
v.	:	DOCKET NO. 001143-2007
	:	DOCKET NO. 000885-2007
BOROUGH OF WOODCLIFF LAKE,	:	DOCKET NO. 000185-2008
	:	DOCKET NO. 000184-2008
Defendant.	:	DOCKET NO. 000186-2008

MEMORANDUM OPINION

Decided: December 17, 2013

John F. Garippa, Esq., and Lee W. Turner, Esq., for plaintiff (Garippa, Lotz & Giannuario, P.C., attorneys)

Joseph A. Pojanowski, III, Esq., for defendant (Pojanowski & Trawinski, P.C., attorneys)

DeALMEIDA, P.J.T.C.

In this case, the court reviews a decision by a municipal tax assessor to deny farmland assessment applications filed by an automobile manufacturer for approximately 11 acres of land which are a component of the manufacturer's approximately 86-acre North American corporate headquarters in Woodcliff Lake. For the reasons stated more fully below, the court concludes that the assessor correctly determined that the land does not qualify for farmland assessment for tax years 2007 and 2008. The assessor's decisions to deny farmland assessment are, therefore, affirmed, as is the resulting imposition of rollback taxes on the land in question for tax years 2004, 2005 and 2006.

I. Findings of Fact and Procedural History

Plaintiff BMW of North America, LLC (hereinafter "BMW") is the owner of real property in defendant Borough of Woodcliff Lake. The focus of this appeal is an approximately 20-acre parcel which, for many years, was an apple orchard adjacent to BMW's headquarters. That parcel, which was designated in the records of the municipality as Block 602, Lot 1.01 QQ, was part of a larger, approximately 41-acre parcel designated as Block 602, Lot 1, on which was located BMW's headquarters to the north of the orchard. The approximately 45-acre parcel to the south of the subject property contained the headquarters of Ingersoll Rand, an entity unrelated to BMW. BMW assembled the properties, along with four, small residential lots adjacent to the Ingersoll Rand headquarters, with the intention of developing a new North American corporate headquarters campus for BMW after Ingersoll Rand vacated its headquarters.

From 1998 to 2006, Block 602, Lot 1.01 QQ was used by BMW for no purpose other than to host the activities of a tenant farmer who visited the property occasionally to tend to the orchard and harvest apples for sale. BMW paid the farmer to maintain the orchard and all proceeds from the harvested crop were given to the farmer. BMW realized no income from the farming activity.

This arrangement was memorialized in a letter agreement between BMW and VanClar Corporation ("VanClar"), a farming enterprise, effective June 21, 2005 to allow for the farming of Block 602, Lot 1.01 QQ for the 2005 and 2006 seasons. In the contract, VanClar agreed to farm the parcel in such a way as to satisfy the statutory requirements for farmland assessment under New Jersey law. All produce taken from the

property and all proceeds from the harvesting of apples were assigned to VanClar. In exchange, BMW agreed to pay VanClar $30,000 per year.

The letter agreement recognizes BMW's intention to develop the property as part of its expanded North American corporate headquarters:

> Farmer [VanClar] acknowledges BMW's likely intent to construct internal roadways connecting BMW's adjacent sites and other improvements, including parking lots on portions of the Premises, which may reduce the effective acreage of the Premises maintained by Farmer. At which time such improvement plans are more specifically determined, BMW will advise Farmer of such plans and the parties may elect to modify or terminate this Agreement if such development plans are determined by either party, to materially effect (sic) the provisions or assumptions underlying the intent and purpose of this Agreement.

Prior to the development of BMW's new headquarters, VanClar maintained more than 200 apples trees on Block 602, Lot 1.01 QQ. The farming season began each year in April, when VanClar would send three people to the orchard to engage in two days of pruning and removal of pruned materials. From April through August, a farmer would come to the parcel six times for approximately an hour and a half to apply pesticides to the trees. A small pond on the property was used as a water source to dilute concentrated pesticides during the spraying process. In addition, the farmer mowed the orchard three times a year; once each in June, August and November. VanClar harvested apples from the site in late October with a crew of eight to ten people for one to one and a half days. During this period the parcel produced 1,800 to 2,000 bushels of apples a season. The apples were sold by VanClar to customers for use in commercial baking and to make cider for sale at retail.

In the spring of 2004, BMW approached borough officials to request rezoning of all of the parcels to allow for the development of a multi-building corporate campus on the entire 86 acres containing specialized uses not permitted by then-current zoning. In April 2005, the borough adopted a zoning ordinance for the BMW parcels. The ordinance created a new office research zone designed specifically to accommodate BMW's planned construction of its North American headquarters. The ordinance allows for a "planned office development" containing more than one building on an

> area comprised of a minimum contiguous size of 80 acres, to be planned, developed, operated, and maintained as a single entity and containing one or more structures to accommodate office uses, and appurtenant common areas and accessory uses incidental to the predominant use. Special attention shall be given to off-site traffic and circulation, site ingress and egress, on-site parking and circulation, utilities, stormwater management, landscaping, lighting, signage, architectural design and aesthetics, and overall site development compatibility with the surrounding area.

The ordinance includes maximum floor area ratios, limits on impervious coverage and on-site parking requirements, all based on the concept of a unified planned office development on a minimum of 80 acres. The ordinance allows for technical service, product diagnostics, training, research, testing, repair, engineering of company owned products, as well as classrooms, workshops, laboratories, car lifts, bays, car washes, wash bays, spray booths, and similar equipment all to be located indoors.

The detailed ordinance does not permit an orchard or farming as a use. Under the express terms of the ordinance, if a use is not expressly permitted, that use is prohibited. According to expert testimony offered at trial, operation of an orchard on the property would require a use variance. The ordinance does not directly address the use of

pesticides in a farming operation. However, the discharge of any materials that can contaminate any water supply on the property is expressly prohibited. It is undisputed that if the area identified by BMW at trial as being devoted to farming were to be carved from the remainder of the parcel, a planned office development, including BMW's North American headquarters, would not be a permitted use because the parcel would not meet the minimum 80-acre requirement.

In November 2005, BMW filed a site plan application with the Woodcliff Lake planning board for the construction of its North American headquarters. Once completed, the proposed facility would include 556,760 square feet of buildings, including a technical training center, research and engineering facilities, parking lots, retention basin, sidewalks, berms, extensive landscaping, and internal roadways connecting two corporate campuses. BMW later received approval to place hydrogen storage tanks on the property for use in testing and research related to fuel efficient vehicles.

The site plan proposal provided a detailed account of BMW's intended use of the property. Nowhere is mention made of BMW's intension to conduct farming at its North American headquarters. The proposal does not identify an area on the parcel that would be used to harvest apples or any other product. Nor does the proposal address the questions of how a farmer and farm equipment would access the property, how, when and how often farming activity would take place, how the spraying of pesticides would be conducted to ensure the safety of the employees and visitors to the corporate headquarters and whether water captured in a storm water management retention basin proposed for the property could be used in the pesticide application process. The lack of any mention

of proposed farming activity stands in stark contrast to the detailed description of every aspect of the proposed development and uses at the property.

BMW proposed constructing internal connecting roads on the parcel that formerly housed the orchard. The roads were designed to be macadam with concrete curbs, concrete sidewalks, storm drains and electrical boxes. In order to construct the roadways, BMW planned to remove all but 63 of the apple trees. In addition, the roadways required large portions of the former orchard to be re-graded with steep slopes. The proposal also called for the small pond on the subject property to be transformed into a 1.62-acre storm water management facility in the form of a retention basin to capture runoff from the impervious areas of the development. BMW also proposed including 10-foot wide mulch walking trails on property that was formerly the orchard to allow employees and visitors to exercise and enjoy the property during lunch breaks.

The zoning ordinance adopted at BMW's request requires one parking space for every 250 square feet of buildings constructed on the property. In order to accommodate this requirement, BMW planned 292 parking spaces for the parcel that previously housed the orchard. BMW, however, sought a waiver from the parking requirement, given that so much of the proposed building space was for uses other than as office space, which generates a greater need for parking. The borough agreed to the waiver, allowing the 292 parking spaces for the orchard parcel to be "banked." BMW agreed that if it became apparent that BMW's estimate of needed parking at the site proved to be insufficient, the 292 parking spaces authorized for the orchard property would be constructed. Without the banked parking on the former orchard space, BMW would have been permitted to build less square footage of buildings than ultimately was allowed by the borough.

BMW's proposal also included a detailed description of the landscape elements of its plan. Although the plan included the understanding that some existing trees on the property not removed for construction would remain in place, the plan does not mention that any of the existing trees would be harvested in a commercial farming operation.

After considerable public debate and consideration, the borough ultimately approved BMW's application to construct its North American headquarters.

On or about July 25, 2006, BMW submitted to the municipal tax assessor an application for farmland assessment for Block 602, Lot 1.01 QQ for tax year 2007. The application indicated that 15 acres of the parcel were "croplands harvested" for apples and that the parcel was rented to a farmer. The application was accompanied by a December 7, 2005 letter from VanClar to BMW indicating that during 2005 VanClar had harvested apples from approximately 20 acres of the parcel and that "sales have been many times the required $2500.00 plus $5.00 per acre that is specified in the revised Farmland Assessment Act."[1]

In the fall of 2006 while the farmland assessment application was pending and after the October 2006 harvest of apples for the season, blasting and major excavation for the construction of the BMW North American headquarters began on the parcel. The extent to which anyone had access to the apples trees during construction was disputed by

[1] It is unclear why the VanClar letter refers to a monetary threshold of $2,500. For the tax years at issue, the Farmland Assessment Act required that for the two years preceding the year for which farmland assessment is sought agricultural activity on the property must have generated gross sales averaging $500 per year on the first five acres, plus $5 an acre above five acres. N.J.S.A. 54:4-23.5. The application requested farmland assessment for 15 acres. The income element of the statute would be satisfied at $550 ($500 for first five acres and $5 for each of the additional ten acres). N.J.S.A. 54:4-23.5 was amended effective April 15, 2013 to increase the income requirements. L. 2013, c. 43. The court notes that despite a representation to the contrary in the farmland assessment application, BMW does not lease the property to VanClar.

the parties. A representative of VanClar testified that construction officials permitted him access sufficient to harvest apples for the 2006 season. Witnesses on behalf of the borough testified that during visits to the property access to the apple trees was limited or non-existent and no evidence of farming activity was evident at the property.

The court will credit the testimony offered by BMW with respect to access to the orchard in 2006. In light of the fact that the farmer was at the property on a limited number of days in any growing season, the court finds credible the proposition that the construction officials provided the farmer with sufficient access to harvest apples in 2006. In addition, the court finds that it would not be unusual for defendant's witnesses not to see evidence of farming activity at the property, given that the farmer credibly testified that he needed to access the property only a few days a season to tend to the trees and did not need to store equipment on the property. Moreover, the farming activity described at trial would not necessarily result in a visual disruption to the property.

On October 31, 2006, the municipal tax assessor informed BMW that its tax year 2007 farmland assessment application for Block 602, Lot 1.01 QQ was denied. According to the denial letter, "[t]his property cannot claim Farmland due to a Zone Change and the redevelopment of the property. All acreage is utilized under the new Zone Change which was requested and granted by BMW."

Also on October 31, 2006, the municipal tax assessor informed BMW that as a result of her decision to deny the farmland assessment application for tax year 2007, she filed a farmland rollback assessment appeal for Block 602, Lot 1.01 QQ for tax years 2004, 2005 and 2006. The farmland rollback assessment was based on "zone change" and "development."

On February 20, 2007, Block 602, Lot 1.01 QQ was consolidated with Block 802, Lots 1, 3, 4, 5, and 6 into a singular 65.50 acre parcel, designated as Block 802, Lot 1. This parcel contained the "South Campus" of the BMW North American headquarters, including the land that had previously housed the orchard on which was located the internal connecting roadways, storm water management facility retention basin, walkways, banked parking spaces and remnants of the orchard. The approximately 20-acre parcel to the north containing the "North Campus" of BMW's North American headquarters was designated as Block 602, Lot 1.

Construction continued on the former orchard parcel during the 2007 apple season. BMW executed a June 25, 2007 letter agreement with Steven Clark doing business as Sunshine Orchards, as successor in interest to VanClar, to continue farming the orchard. The agreement provided that Mr. Clark would continue to farm the property referenced in the prior agreement for the 2007 and 2008 seasons. As was the case with the prior agreement, Mr. Clark contracted to farm the property in such a way as to satisfy the statutory requirements for farmland assessment. All produce taken from the property and all proceeds from the harvesting of apples were assigned to Mr. Clark. In exchange, BMW agreed to pay Mr. Clark $30,000 per year. The second letter agreement also acknowledged the fact that BMW intended to develop the property with internal roadways and other improvements, including parking lots, all of which might have an impact on Mr. Clark's farming operations.

On or about July 25, 2007, BMW applied for farmland assessment for tax year 2008 for Block 802, Lot 1, noting that the former Block 602, Lot 1.01 QQ had been consolidated into Block 802, Lot 1. The application indicated that 15 acres of the parcel

are "cropland harvested" for apples. A December 8, 2006 letter accompanying the tax year 2008 application from VanClar states that during 2006, the company farmed the parcel and harvested apples. The letter states that the farming activity during that year generated "many times the required $2500.00 plus $5.00 per acre that is specified in the revised Farmland Assessment Act NJ."

On August 1, 2007, the municipal tax assessor informed BMW in writing that the farmland assessment application for tax year 2008 was denied. The assessor explained her decision as follows:

> The property on which Farmland is being claimed is currently undergoing major construction and the area under which Farmland is claimed is and was also under construction, unreachable due to construction and most all trees were removed. There is no longer 20 acres of trees as this is part of the new construction and major drainage pits are being put there.

BMW filed Complaints in this court challenging the assessor's rejection of its farmland assessment applications for Block 602, Lot 1.01 QQ for tax year 2007 and Block 802, Lot 1, in so far as it incorporated what had previously been Block 602, Lot 1.01 QQ, for tax year 2008. In addition, BMW filed Complaints challenging the imposition of roll back taxes on Block 602, Lot 1.01 QQ for tax years 2004, 2005 and 2006 as a result of the denial of its farmland assessment application for tax year 2007.

After the construction, two internal roadways bisect the property that was once Block 602, Lot 1.01 QQ. The roads, which are improved with macadam and have concrete curbs, sidewalks and other improvements, allow for motor vehicle traffic to move between the two "campuses" of BMW's North American headquarters. The roadways and associated improvements comprise approximately 2.01 acres. In addition,

the storm water management facility retention basin covers 1.62 acres. A large portion of the parcel is the vacant sloping land next to the retention basin "banked" for future parking spaces should the need arise.

Sixty-three apple trees remain on the property after in excess of 200 apple trees were removed during construction. The remaining trees are in two clusters. What the court will refer to as orchard 1 is comprised of 1.77 acres. The area the court will designate as orchard 2 is comprised of 1.41 acres. An area of wetlands and associated buffers constituting 1.86 acres sits between the two collections of trees. Access to the trees is difficult, as the property was extensively re-graded during construction. Slopes on the property range from 25 degrees to 35 degrees with a noticeable hill on the property.

Because of the reduction in the number of trees, farming activity on the property was reduced after construction. Pruning activity is accomplished in just one half to three quarters of a day. Pesticide spraying is completed in a half hour. Mowing takes place on the same number of days as before construction, but is completed in just a half hour. The harvest is completed with four workers in a "short" day. The parcel now produces 500 to 600 bushels of apples a season.

Although the Complaints challenge the assessments on all of the parcels for tax years 2006 through 2008, at the parties' request the court held a trial only on the question of whether the municipal tax assessor correctly denied BMW's farmland assessment applications for tax years 2007 and 2008 and whether, as a result, the assessor correctly applied roll back taxes on the parcel for tax years 2004, 2005 and 2006.

After trial, the parties submitted post-trial briefs. The municipality argues that farmland assessment of the property is not warranted for several reasons: (1) BMW has not satisfied the minimum 5 acre requirement of the Farmland Assessment Act. According to the borough, the only evidence of farming in the record is of the 1.77-acre orchard 1 and the 1.41-acre Orchard 2. The borough contends that all of wetlands, wetlands buffers, the retention basin and the remainder of what once was the orchard cannot be considered to be actively devoted to farming; (2) The predominate use of the property is as a component of BMW's North American headquarters. According to the municipality, the former orchard parcel is used predominately for the internal connector roadways, the storm water management facility retention basin, the parking "bank" and to comprise the minimum 80 acres necessary for the construction of BMW's North American headquarters. Under the borough's argument, any harvesting of apples is incidental to the overriding use; (3) BMW has not satisfied the income requirements of the statute because it has realized no income from farming activities; and (4) farmland assessment cannot be granted to the parcel because commercial farming activity on the property violates the zoning ordinance specially requested by BMW to allow for the construction of its headquarters.

The taxpayer counters all of these arguments. According to BMW: (1) the harvesting of apples remains the predominate use of 11 acres of the former orchard; (2) the wetlands, wetlands buffers and retention basin should all be considered as land actively dedicated to farming and, when considered together, this land satisfies the five-acre statutory requirement; (3) the income requirements of the statute are satisfied as long as the farming activity generates sufficient income, regardless of who realizes that

income; and (4) the use of the property to harvest apples is not inconsistent with zoning, and was recognized as a proposed continued use during the application process.

II. Conclusions of Law

Pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1, et seq. (the "Act") and paragraph 1(b) of Article VIII, Section 1 of the New Jersey Constitution, eligible farmland is assessed at a lower standard than other lands in the State. See New Jersey State League of Municipalities v. Kimmelman, 105 N.J. 422, 437 (1987). The Constitutional provision permitting preferential treatment of farmland was enacted in the 1963 general election. "Preserving New Jersey's Forestland Through the Farmland Assessment Act," 17 Rutgers L.J. 155 (1985). The primary goal of the constitutional amendment and the Act was "to preserve the 'family farm' by providing farmers with some measure of economic relief by permitting farmland to be taxed based on its value as a continuing farm and not on any other basis." Hovbilt, Inc. v. Township of Howell, 138 N.J. 598, 619 (1994); accord Van Wingerden v. Township of Lafayette, 303 N.J. Super. 614, 618 (App. Div. 1997); Urban Farms, Inc. v. Township of Wayne, 159 N.J. Super. 61, 67 (App. Div.), certif. denied, 78 N.J. 330 (1978). "Other benefits such as the maintenance of open spaces and the preservation of the beauty of the countryside, although incidental to the principal objective, were also significant factors in the passage of the amendment." Hovbilt, supra, 138 N.J. at 619 (citing Township of Andover v. Kymer, 140 N.J. Super. 399, 404 (App. Div. 1976) and Township of Galloway v. Petkevis, 2 N.J. Tax 85, 91 (Tax 1980)).

Because farmland assessment represents a departure from the general principle that all property bear its fair share of the public burden of taxation, the Act, which

accords treatment equivalent to a partial tax exemption, is construed against the party seeking preferential treatment. Van Wingerden v. Township of Lafayette, 18 N.J. Tax 81, 94 (Tax 1999), aff'd, 19 N.J. Tax 205 (App. Div. 2000). In addition, the assessor's determination denying a farmland application is presumed to be correct and the taxpayer bears the burden of proving entitlement to farmland assessment. Hovbilt, supra, 138 N.J. at 620; Brighton v. Borough of Rumson, 22 N.J. Tax 39, 52 (Tax 2005), aff'd, 23 N.J. Tax 60 (App. Div. 2006); Miele v. Township of Jackson, 11 N.J. Tax 97, 99 (App. Div. 1989). The county board judgment on a farmland assessment matter cannot be overturned until the taxpayer has produced sufficient competent evidence "'definitive, positive, and certain in quality and quantity to overcome the presumption.'" Wyer v. Township of Middletown, 16 N.J. Tax 544, 546 (Tax 1997)(quoting Township of Bryam v. Western World, Inc., 111 N.J. 222, 235 (1988)). It is against the backdrop of these precedents, and in light of the purpose of the Act, that the court must examine BMW's claims.

According to the Farmland Act,

> [f]or general property tax purposes, the value of land, not less than 5 acres in area, which is actively devoted to agricultural or horticultural use and which has been so devoted for at least the 2 successive years immediately preceding the tax year in issue, shall, on application of the owner, and approval thereof as hereinafter provided, be that value which such land has for agricultural or horticultural use.
>
> [N.J.S.A. 54:4-23.2.]

The Act defines agricultural or horticultural use to include the farming of apples. The statute provides that land

> shall be deemed to be in agricultural use when devoted to the production for sale of plants and animals useful to man . . . .
>
> [N.J.S.A. 54:4-23.3.]

In addition,

> [l]and shall be deemed to be in horticultural use when devoted to the production for sale of fruits of all kinds . . . .
>
> [N.J.S.A. 54:4-23.4.]

Apple trees are useful to man because they produce edible fruit which is a common element of the human diet. It is clear, therefore, that the harvesting of apples falls within the statutory definition of agricultural or horticultural use within the meaning of N.J.S.A. 54:4-23.3 and -23.4. The municipality does not dispute that the harvesting of apples took place on the subject property in the two-year period preceding the tax years at issue. This element of the farmland assessment statute is also satisfied.

The municipality, however, contends that plaintiff has not established that five acres are actively devoted to agricultural use. As noted above, at best, according to the municipality, only the 3.189 acres of land on which apples trees are situated could be considered to be actively devoted to farming.

According to N.J.S.A. 54:4-23.11:

> In determining the total area of land actively devoted to agricultural or horticultural use there shall be included the area of all land under barns, sheds, seasonal farm markets selling predominantly agricultural products, seasonal agricultural labor housing, silos, cribs, greenhouses and like structures, lakes, dams, ponds, streams, irrigation ditches and like facilities, but land under and such additional lands as may be actually used in connection with the farmhouse shall be excluded in determining such total area.

The court finds that the two areas of apples trees – what have been designated here as orchard 1 and orchard 2 – are actively devoted to agricultural purposes. The court finds that these two areas are 1.77 acres and 1.41 acres for a total of 3.18 acres. The remainder of the property, however, cannot be considered actively devoted to agricultural or horticultural use within the meaning of N.J.S.A. 54:4-23.2 and cannot be included in the calculation to reach the statutory minimum of five acres.

As explained by the Appellate Division in Township of Andover v. Kymer, 140 N.J. Super. 399, 403 (App. Div. 1976), farmland assessment is not limited to

> only the fertile or cultivated areas of the farm. Woodland, wet areas and other acreage having a marginal value for agricultural or horticultural use may also be given such tax advantage, as long as it is part of, appurtenant to, or reasonably required for the purpose of maintaining, the land actually devoted to farm use, particularly where it has been part of the farm for a number of years.
>
> [Ibid.]

The record contains no testimony that the wetlands and wetlands buffers in the vicinity of the apple trees are part of, appurtenant to, or reasonably required to maintain the apple orchard. Compare Sinopoli v. Borough of Rumson, 19 N.J. Tax 334 (Tax 2001)(accepting as credible testimony that open lawns adjacent to flowers, shrubs and trees harvested for sale, were necessary to provide sunlight and drainage to harvested plants), aff'd, 20 N.J. Tax 235 (App. Div. 2002). There is nothing in the record suggesting that the apples trees benefit from the wetlands and wetlands buffers in any significant way. In fact, the farmer who tended the orchard for many years testified that prior to construction large portions of the parcel, some of which were located acres away from the wetlands and wetlands buffers, regularly produced apples for harvest. Based on

the record before the court, these areas cannot be found to be reasonably required to maintain the orchard.

It is true that the wetlands and wetlands buffers had previously been included as farmland when the entire 20-acre parcel was considered actively devoted to farming. During those years they may well have been "part of" or "appurtenant to" the farm, which itself easily exceeded the statutory minimum. After construction of BMW's North American headquarters, however, it would be necessary to include the wetlands and wetlands buffers in order to reach the minimum five acres because the reduced number of apple trees occupies only 3.189 acres. The Director's regulations suggest that land appurtenant to farmland, but not itself actively devoted to agricultural or horticultural activity, may not be included to reach the statutory minimum of five acres.

N.J.A.C. 18:15-1.1 defines "appurtenant woodland" as

> a wooded piece of property which is contiguous to, part of, or beneficial to a tract of land, which tract of land has a minimum area of at least five acres devoted to agricultural or horticultural uses other than the production for sale of trees and forest products, exclusive of Christmas trees, to which tract of land the woodland is supportive and subordinate.

"Supportive and subordinate woodland" is defined by the Director, Division of Taxation as:

> a wooded piece of property which is beneficial to or reasonably required for the purpose of maintaining the agricultural or horticultural use of a tract of land, which tract of land has a minimum area of at least five acres devoted to agricultural or horticultural uses other than to the production for sale of trees and forest products, exclusive of Christmas trees.
>
> [N.J.A.C. 18:15-1.1.]

The Director's regulations also provide that

> a wooded piece of property as described in the definition of supportive and subordinate woodland in N.J.A.C. 18:15-1.1 shall be presumed to be supportive and subordinate woodland when its area is less than the area of the farmland property qualifying for agricultural or horticultural uses other than the production for sale of trees and forest products, exclusive of Christmas trees.
>
> [N.J.A.C. 18:15-2.8(a).]

Although these regulations concern woodlands, their import is applicable to appurtenant wetlands and wetlands buffers. In order for such areas to be granted preferential treatment as farmland they must be beneficial to or reasonably required for the purpose of maintaining the agricultural or horticultural use of a tract of land which itself meets the five-acre statutory minimum for farmland assessment. The appurtenant wetlands and wetlands buffers, which are not actively devoted to agricultural or horticultural activity and which do not produce a crop cannot be used to reach the five-acre criterion.

In addition, the record contains no credible evidence supporting the conclusion that the storm water management facility retention basin on the subject property is actively devoted to agricultural or horticultural activity or is necessary to maintain the orchard. While the farmer credibly testified that before construction water from the then-existing, smaller pond was used to assist in the pesticide application process, no such testimony exists with respect to the post-construction period. Indeed, the record contains credible evidence that the pond was expanded and transformed into a storm water management facility designed to retain and process runoff from the impervious areas of BMW's headquarters. The retention basin's mechanics ensure that runoff, which would

be polluted with oil, grease, gasoline, dust and other impurities from parking lots, roadways and other areas, would be held in the facility for a specified number of hours to allow impurities to filter down as sediment. The retention basin is not designed to provide water for use in the farming of an edible harvest. The record contains no credible evidence that the retention basin was used at any point after construction for farming purposes.

Nor is the court convinced by the suggestion of one witness that the retention basin assists farming activity because it might prevent an early frost from settling on the apple trees. This testimony was entirely speculative. There is no evidence in the record regarding temperatures at the parcel, the timing of frosts, or the exact influences that the retention basin has on the settling of frost on the trees. The record is too sparse on this point for a determination that the retention basin is in any meaningful way associated with the maintenance of the apple trees. The court does not, therefore, include the retention basin in the calculation of property actively devoted to agricultural or horticultural activity.

The court reaches the same conclusion with respect to the vacant, sloping land adjacent to the orchards on which the "banked" parking spaces are located. The record contains no credible evidence that this land is in any way beneficial to the farming operation or is reasonably necessary to the harvesting of apples. This portion of the parcel is nothing more than an open space near the apple trees.

On the basis of these findings the court concludes that BMW has not established that the parcel contained five acres actively devoted to agricultural or horticultural activity as of the relevant valuation dates. This finding alone would be sufficient to

affirm the assessor's denial of BMW's farmland assessment applications for tax years 2007 and 2008. Because the trial raise two other important issues, the court will, in the event that its findings with respect to the five-acre requirements are overturned on appeal, make findings of fact and conclusions of law regarding whether BMW established the income criterion of the statute and whether the parcel's predominate use was for agricultural or horticultural activity.

The municipality contends that BMW did not satisfy the financial requirements of the Act. During the relevant periods, the statute provided:

> [L]and, five acres in area, shall be deemed to be actively devoted to agricultural or horticultural use when the amount of the gross sales of agricultural or horticultural products produced thereon . . . have averaged at least $500.00 per year during the two-year period immediately preceding the tax year in issue . . . .
>
> In addition, where the land is more than five acres in area, it shall be deemed to be actively devoted to agricultural or horticultural use when the amount of the gross sales of agricultural or horticultural products produced on the area above five acres . . . have averaged at least $5.00 per acre during the two-year period immediately preceding the tax year in issue . . . .
>
> [N.J.S.A. 54:4-23.5.]

The municipality contends that BMW's financial arrangement with the farmer who harvests apples at the subject property does not satisfy the statute. According to the municipality, the property owner must realize the statutorily required income from farming activity to qualify for farmland assessment. It is undisputed that the proceeds of the apple harvest are realized by the farmer, not BMW, and that the property owner pays VanClar to maintain and farm the orchard.

The argument raised by the municipality was rejected by Judge Hopkins in Bloomingdale Indus. Park v. Borough of Bloomingdale, 1 N.J. Tax 145 (Tax 1980). In that case, the property owner leased a parcel to a farmer who operated a livery stable on the property. The tenant farmer realized all profits from the farming activity. When the owner applied for farmland assessment for the parcel, the municipality denied the application on the grounds that the owner of the property had not realized income from the farming activity. The court unequivocally rejected this position:

> Defendant's position with respect to the owner being required to show such gross sales is in error. The criteria is not whether the owner of the land had gross sales but, rather, whether agricultural or horticultural products produced thereon have gross sales in excess of the designated amounts. This is clear from a reading of N.J.S.A. 54:4-23.1 through 23.7, wherein the criteria is all directed to land use and gross sales from such use rather than gross sales by the owner.
>
> [Id. at 148.]

This understanding of the law was also approved without discussion by the Appellate Division in Kymer, supra, where the property owner permitted the former owner to occupy and farm the property rent free.

This court finds itself in accord with Judge Hopkins' holding in Bloomingdale. There is no statutory provision requiring that the income produced by farmland be realized by the property owner in order for farmland assessment to be granted. As is the case in so many aspects of local property taxation in New Jersey, it is the use of the land that controls its entitlement to preferential treatment. Where a parcel of sufficient size is actively dedicated to the predominant purpose of agricultural or horticultural activity generating sufficient income, that parcel is entitled to farmland assessment, regardless of

who realizes that income. The fact that the income may be assigned to a tenant farmer rather than the property owner does not negate the statutory preference. The purposes of the Farmland Assessment Act – to promote farming and to preserve open space from development – are in no way hindered by a tenant farmer keeping the profits of farming activity. To the contrary, to the extent that the Farmland Assessment Act is intended to protect family farmers, as has been recognized by our Supreme Court, the tenant farmer relationship may well further that interest. A small farmer who may not have the financial means to own land might under a tenant farmer arrangement continue to operate a farming business by reaping the financial benefits of farming activity on the property of another. This would permit the small farmer to remain in business and assist in preserving the property from development by according to its owner beneficial tax treatment.

The court, however, finds convincing the argument that the property's predominate use precludes the award of farmland assessment. It is well established that "where the entire parcel seeking farmland assessment qualification also was used for other purposes" the court must determine if the agricultural or horticultural use is the dominant use of the property. Township of Wantage v. Rivlin Corp., 23 N.J. Tax 441, 446 (Tax 2007). If the dominant use of the property is a use other than an agricultural or horticultural use, the property is not entitled to preferential farmland assessment.

The dominant use test was first applied by then-Judge Handler in City of East Orange v. Township of Livingston, 102 N.J. Super. 512 (Law Div. 1968), aff'd, 54 N.J. 96 (1969). In that case, East Orange sought farmland assessment for approximately 2,500 acres it owned in three municipalities. Id. at 518. The land had been acquired by

deed and condemnation for the purpose of collecting and protecting a supply of potable water for the inhabitants of East Orange. The land was mostly vacant, partially heavily wooded, and had numerous low meadows traversed by brooks and streams. Id. at 524. The city collected potable water through a series of wells located over natural underground storage areas for rain water that percolated and infiltrated through the soil across the thousands of acres that constitutes the city's water reserve. Id. at 523. There was no reservoir or man-made water storage facility on the property. Water was pumped from the property to reservoirs located on other parcels. Id. at 524.

The city used the land for water collection and storage purposes for more than sixty years before it applied for farmland assessment. Id. at 522. The farmland assessment application was based on the city's contention that a large portion of the property was woodlands, "permanent pasture," and "farm acreage" associated with several former farmhouses on the property which were occupied by city employees. Id. at 524. The city derived annual income in excess of the statutory minimum from the sale of hay, timber and cordwood grown on the property. Id. at 526. In 1965, income to the city from the sale of timber from the property exceeded $24,000. Id. at 528-529.

The question before the court was whether the city's property should be taxed pursuant to N.J.S.A. 54:4-3.3, which applies to municipal-owned land "used for the purpose and for the protection of a public water supply," and which allows the lands to be taxed "in the same manner and to the same extent as the lands of private persons," or pursuant to the farmland assessment statutes. Judge Handler concluded that the dominate use of the city's land controlled its status under the local property tax laws. He concluded that the protection of a public water supply dominated over the "merely

incidental" agricultural and horticultural uses to which the city put the property. Id. at 529. As the court explained,

> [e]ven though the agricultural use is "active" in the literal sense that East Orange has realized income in excess of $500 per annum for the past two years from the sale of timber, cordwood and hay, compliance with this single criterion does not per se render the Water reserve as land "devoted" to agricultural use.
>
> [Id. at 536 (citation omitted).]

Noting that there can be multiple, simultaneous uses of property, the court held that "[d]epending upon the particular lands involved, one use tends to become dominant." Id. at 537. The court held that because harvesting crops and managing forests on the property supported the recharge and replenishment of the wells, "the agricultural uses of the Water Reserve must be regarded as subservient to its dominant use as a public water supply." Ibid. "Ín no sense, therefore, can it be said that the East Orange Water Reserve is devoted, that is, committed, or dedicated, or set apart or appropriated, or given up wholly or chiefly to the production for sale of agricultural products of any kind within the meaning" of the Act. Ibid. Instead, the land "is devoted to the purpose for which it was originally acquired," the protection of a public water supply. Ibid.[2]

This court applied the dominate use test in Green Pond Corp. v. Township of Rockaway, 2 N.J. Tax 273 (Tax 1981), aff'd, 4 N.J. Tax 534 (App. Div. 1982). There, the property owners purchased undeveloped woodland adjacent to a private residential lake community which they owned and managed. The land was used both for hiking,

[2] Because the holding in East Orange was affirmed by the Supreme Court, the suggestion in Urban Farms, supra, that the agricultural or horticultural use must be exclusive to qualify for farmland assessment is not controlling. See Mt. Hope Mining Co. v. Township of Rockaway, 8 N.J. Tax 570, 579 (Tax 1986).

picnicking and other recreational pursuits by the residents of the community and for the production of woodland products. Id. at 288-291. The court held that the dominate use of the property was as a component of the residential community and not an agricultural or horticultural use. The court held that the recreational use of the property "is consistent with the nature of the entire . . . tract as a residential community and the existence of the plaintiff corporations to manage that community for the benefit of its residents." Id. at 291.

Importantly, the court considered the fact that the agricultural activity was chiefly designed to satisfy the farmland assessment statutes. As Judge Andrew explained:

> The two corporations were formed in 1921 to manage a private residential lake community. Some 50 years later 555 acres of undeveloped woodland were acquired. In the years since then activities were undertaken aimed at producing sufficient agricultural income to satisfy the Farmland Assessment Act. This is particularly evident in the agreement with Donatoni Brothers, Inc., in which that corporation was committed to purchase a certain dollar value of timber just over the statutory minimum for property of this size. Although that fact of itself does not deny a bona fide agricultural use, taken together with the other use of the property it lends credence to the conclusion that the agricultural activities were planned primarily to satisfy the statute.
>
> [Id. at 290.]

The significance of this finding was illustrated by the court:

> Plaintiffs assert that the subjective intent of the owners of property regarding its use is irrelevant as long as the acreage and income requirements of the statute are satisfied. That contention must give way to the extent it conflicts with the requirement of dominant agricultural use set forth in East Orange [v, Township of Livingston].
>
> [Id. at 290-291.]

See also Atlantic Coast LEH, LLC v. Township of Little Egg Harbor, 26 N.J. Tax 151 (Tax 2011)(holding that owner's incidental use of property for beekeeping activity was subordinate to commercial exploitation of property to host cellular communications tower that generated rental income).

When viewed through the prism of these precedents, the undisputed facts of this case lead to the conclusion that the dominate use of the subject property is not agricultural or horticultural. BMW's history with the property reveals an intention to use the property as an essential component of its planned North American headquarters. The zoning change requested by BMW envisioned a unified complex of numerous corporate structures on a minimum of 80 acres. The land that BMW claims to host an active farming operation is an integral part of the 80 acres needed to support BMW's extensive corporate headquarters. Without the orchard parcel, BMW would not meet the zoning requirements for its extensive development of the property.

The primary use of this property to support the development of corporate headquarters is highlighted by the fact that the property was developed with bisecting roadways and associated improvements. More than 200 apple trees were removed to accommodate this development. In addition, a large section of the property has been "banked" as 292 parking spaces should the need for additional parking arise from employees and visitors to the BMW corporate complex. The parcel was extensively re-graded with steep slopes, not to facilitate farming, but to allow for the construction of roadways and to assist the functionality of an extended storm water management facility retention basin. The purpose of the retention basin is to collect and process runoff from

impervious areas of the headquarters. Walkways for the use of employees and visitors cut into the orchard area.

The subordinate nature of the farming activity is underlined by the fact that BMW's detailed submissions for its planned development make no mention of continued farming activity at the property. Although the corporation's planned use of the property is described in detail and was the subject of extensive negotiations and regulation by the municipality, BMW produced no evidence that commercial farming activity was ever discussed with municipal planners or elected officials during the development approval process. The court's conclusion on this point is not changed by the fact that the property was sometimes referred to as the "the orchard" in papers and at meetings during the development application process. The court finds that such references were recognition of the historical use of the property and did not evidence a stated intention by BMW to conduct commercial farming activity on the parcel after construction of the new headquarters.

These facts militate toward a finding that the non-agricultural use of the property dominates over the agricultural and horticultural activity. The subject property is not "devoted, that is, committed, or dedicated, or set apart or appropriated, or given up wholly or chiefly to the production for sale of" apples. See East Orange, supra, 102 N.J. Super. at 537. The parcel is, instead, a component of BMW's North American corporate headquarters. This is the purpose for which BMW purchased the property and it is the primary purpose for which it is being used.

Having decided BMW's farmland assessment claims on other grounds, the court does not reach the question of whether BMW's operation of a commercial orchard on the

property is a permitted use under the prevailing zoning ordinance. See Cheyenne Corp. v. Township of Bryam, 248 N.J. Super. 588 (App. Div. 1991)(holding that property devoted to an agricultural or horticultural use in violation of local zoning cannot qualify for farmland assessment), certif. denied, 137 N.J. 312 (1994); accord Sudler Lakewood Land, LLC v. Township of Lakewood, 18 N.J. Tax 451, 460-63 (Tax 1999), aff'd, 19 N.J. Tax 305 (App. Div. 2001). Compare Society of the Hold Child Jesus v. City of Summit, 418 N.J. Super. 365 (App. Div. 2011)(holding that property may qualify for charitable use exemption under N.J.S.A. 54:4-3.6 despite violation of local zoning ordinance).

The assessor's imposition of rollback for tax years 2004, 2005, and 2006 is required by N.J.S.A. 54:4-23.8. That statute authorizes the imposition of roll-back taxes on property previously assessed as farmland as follows:

> [w]hen land which is in agricultural or horticultural use and is being valued, assessed and taxed under the provisions of [the Farmland Assessment Act of 1964], 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 the change in use) and in such of the two years immediately preceding, in which the land was valued, assessed and taxed as herein provided.
>
> [N.J.S.A. 54:4-23.8.]

Here, the assessor determined that the predominate use of the parcel is something other than agricultural or horticultural. Roll back taxes are, therefore, required by statute. Township of Burlington v. Messer, 8 N.J. Tax 274 (Tax 1986), aff'd, 9 N.J. Tax 634

(App. Div. 1987); Wilson v. Township of Hopewell, 23 N.J. Tax 240, 246 (Tax 2006); Township of South Brunswick v. Bellemead Dev. Corp., 8 N.J. Tax 616, 624-25 (Tax 1987); Angelini v. Township of Upper Freehold, 8 N.J. Tax 644, 650-51 (Tax 1987); Township of Hamilton v. Estate of Lyons, 8 N.J. Tax 112, 120 (Tax 1986).

The court will enter an Order affirming the denial of farmland assessment for Block 602, Lot 1.01 QQ for tax year 2007 and Block 802, Lot 1 for tax year 2008, as well as the imposition of rollback taxes on Block 602, Lot 1.01 QQ for tax years 2004, 2005 and 2006.