TAX COURT OF NEW JERSEY

TAX COURT MANAGEMENT OFFICE
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Corrected Opinion Notice

Date: January 24, 2019

Ms. Barbara J. Hertz

Jacquelin P. Gioioso, Esq
The Buzak Law Group, LLC

From: Lynne E. Allsop

Re: Barbara J. Hertz v. Borough of Lincoln Park
Docket number: 009897-2017

The attached corrected opinion replaces the version released on January 8, 2019 The Opinion has been corrected as noted below:

Pages 4 and 16, footnotes 8 and 17 – corrected to read February 2018

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

Corrected 1/24/19 – Pgs. 4 and 16, fns. 8 and 17 – corrected to read February 2018

BARBARA J. HERTZ,	:	TAX COURT OF NEW JERSEY
	:	DOCKET NO.: 009897-2017
Plaintiff,	:	
	:	
v.	:	Approved for Publication In the New Jersey Tax Court Reports
	:	
BOROUGH of LINCOLN PARK,	:	
	:	
Defendant.	:	
	:	

Decided: January 8, 2019

Barbara J. Hertz for plaintiff (Pro se)[1].

Jacquelin P. Gioioso for defendant (The Buzak Law Group, LLC, attorneys).

BIANCO, J.T.C.

This opinion shall serve as the court's determination concerning the appeal by plaintiff, Barbara J. Hertz ("Mrs. Hertz"), to the denial of her 2017 Farmland Assessment application by the Municipal Tax Assessor (the "Assessor") of defendant, Borough of Lincoln Park ("Lincoln Park"). The denial was affirmed by the Morris County Board of Taxation (the "Board"). This appeal pertains to Mrs. Hertz's property located at 77 Orchard Drive, Lincoln Park, Morris County, New Jersey, and designated by Lincoln Park as Block 3, Lot 22 (the "Subject Property"). In the

[1] Although not a licensed attorney, Mrs. Hertz has an adept knowledge of the legal system, well beyond that of the average pro se litigant, given the numerous legal proceedings to which she has been a pro se party over the past decade, including previous challenges to Farmland Assessment eligibility of the Subject Property.

alternative, Mrs. Hertz challenges the Subject Property's local property tax assessment. The court has bifurcated the issues and will address the Farmland Assessment challenge first.

For the reasons set forth herein below, the court affirms the Board's denial of Farmland Assessment for the Subject Property and the matter will proceed on Mrs. Hertz's challenge of the Subject Property's local property tax assessment.

BACKGROUND, FACTS, AND PROCEDURAL HISTORY

The Subject Property consists of approximately fifteen and a half acres of vacant land, purchased by Mrs. Hertz on or about May 31, 1973. The Subject Property was known by the trade name "Joy B's Berry Bush Farm" in 1994; and since 1999, by the trade name "Joy B's Farm." From tax years 1986 through 2016, the Subject Property qualified for Farmland Assessment either through the determination of the Assessor, or by judgment pursuant to appeals to the Board and/or the Tax Court.

On July 29, 2016, Mrs. Hertz filed a Farmland Assessment application (Form FA-1), and Gross Sales Form for the Subject Property for tax year 2017 pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 to 23.24 (the "Farmland Assessment Act"). In the application, Mrs. Hertz claimed that all fifteen and a half acres of the Subject Property was actively devoted to agricultural or horticultural use, which comprised ten acres of harvested cropland, three acres of pastured cropland, two and a half acres used for boarding, rehabilitating and training, and a half acre used for renewable energy.[2] Also, in Section 3 of the application, Mrs. Hertz claimed that one and a half acres of wheat, two and a quarter acres of winter rye, a quarter acre of apple quinces, two acres of blackberries, a quarter acre of strawberries, six acres of wineberries, a quarter acre of

[2] The court observes that when added together, these designated areas add up to sixteen acres, not fifteen and a half acres. Furthermore, Mrs. Hertz testified that no land area was in fact used for renewable energy and, therefore, one-half acre should have been taken out.

peppers, one acre of potatoes, one acre of squash, a quarter acre of tomatoes, and one acre of nettles are grown in the Subject Property.[3] In addition to crops, Mrs. Hertz claimed that she has seven acres of maple trees for maple sap, thirty chickens, ten beehives, and six to twelve goats.[4] In the Gross Sales Form, Mrs. Hertz claimed that $2,600 of gross sales were generated from two acres of blackberries, six acres of wineberries, one acre of nettles, one acre of potatoes, a quarter acre of squash, a quarter acre of oregano, ten acres of maple trees, and livestock (one-half acre). She also claimed that she has three acres of non-income producing appurtenant land.[5]

On October 25, 2016, the Assessor inspected the Subject Property to determine whether there were not less than five acres of land devoted to agricultural or horticultural use under N.J.S.A. 54:4-23.2. The inspection lasted nearly two hours. Mrs. Hertz accompanied the Assessor during the inspection, and pointed out the locations of the crops and agricultural activities she claimed in her application.[6]

The Assessor, however, determined that only the following areas were devoted to agricultural or horticultural use:

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[3] The court observes that when added together, these designated areas by add up to fifteen and three-fourths acres, not fifteen and a half acres.

[4] Mrs. Hertz testified that she intended to have livestock, even though she did not have any when she submitted her application in which she claimed acreage was being used for livestock.

[5] The court observes that when added together, these designated areas add up to twenty-four acres, not fifteen and a half acres. Furthermore, there are inconsistencies with regard to the crops listed in the application and Gross Sales Form. With regard to the maple trees, Mrs. Hertz clarified her testimony to explain that she meant to list the number of trees and not the acreage.

[6] Mrs. Hertz also pointed out the locations of alleged crops that she *did not* claim in her application. She did not file an amendment to her original application to account for these alleged crops.

Areas devoted to agricultural or horticultural use	Area (in square feet)	Comment
Nettles	200	
Herbs	54	Three plots
Bee Hives	688	Seven hive boxes. No activity was seen, but still gave credits
Vegetables	400	Fenced in area with no crop seen
Vegetables	200	Fenced in area with one pepper and one squash

		Total Acreage
Total	1542	0.035

The Assessor did not observe many of the activities alleged by Mrs. Hertz on her application to be occurring on the Subject Property.[7] He concluded that more than eighty percent (80%) of the Subject Property was forest-like and was not a suitable environment for five acres of crops to grow. The Assessor testified that he could not find five acres of land actively devoted to agricultural or horticultural use, and that it was not possible for him to have overlooked five acres of crops, as one acre alone is approximately the size of a football field.[8]

On October 27, 2016, the Assessor denied Mrs. Hertz's application based on his aforementioned inspection of the Subject Property, and provided her with a notice of disallowance on October 28, 2016. The reason for the denial was that the "land area devoted to agricultural or

[7] The Assessor noted some signs of scattered berries, but he did not consider them as they appeared to be naturally produced. In a number of instances, he gave Mrs. Hertz credit for areas that appeared to be delineated for crops even though he did not observe any evidence of present growth. The Assessor further observed no livestock on the Subject Property.

[8] The Assessor made additional visits to the Subject Property in July 2017, December 2017, February 2018 and May 2018 to see if there were any changes in the use of the Subject Property. The Assessor testified that he saw no significant changes to alter his initial conclusions.

horticultural use [is] less than five acres." Accordingly, a standard assessment was placed on the Subject Property.

On March 31, 2017, Mrs. Hertz filed a petition of appeal with the Board challenging the denial of Farmland Assessment classification and the Subject Property's local property tax assessment. A hearing was held before the Board on May 4, 2017; the denial of Farmland Assessment and the local property tax assessment were affirmed. The Board's Judgment dated May 26, 2017 indicated Judgment Code 2B, which is "presumption of correctness not overturned." On July 10, 2017, Mrs. Hertz timely appealed the Board's decision to this court claiming that Farmland Assessment should have been granted, and in the alternative, challenging the Subject Property's local property tax assessment on the Subject Property.

APPLICABLE LAW

The Farmland Assessment Act, provides in pertinent part, at N.J.S.A. 54:4-23.2, that:

> For 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.
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> [Id. (emphasis added).]

N.J.S.A. 54:4-23.3 adds that "Land shall be deemed to be in agricultural use when devoted to the production for sale of plants and animals useful to man." Id. (emphasis added).

According to N.J.S.A. 54:4-23.4:

> Land shall be deemed to be in horticultural use when devoted to the production for sale of fruits of all kinds, including grapes, nuts and berries; vegetables; nursery, floral, ornamental and greenhouse products; or when devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with an agency of the Federal Government.

[Id. (emphasis added).]

Under N.J.S.A. 54:4-23.7:

> The assessor in valuing land which qualifies as land actively devoted to agricultural or horticultural use under the tests prescribed by P.L.1964, c.48 and the guidelines describing generally accepted agricultural and horticultural practices developed and adopted pursuant to subsection a. of section 1 of P.L.2013, c.43 (C.54:4-23.3d), and as to which the owner thereof has made timely application for valuation, assessment and taxation hereunder for the tax year in issue, shall consider only those indicia of value which such land has for agricultural or horticultural use. In addition to use of personal knowledge, judgment and experience as to the value of land in agricultural or horticultural use, the assessor shall, in arriving at the value of such land, consider available evidence of agricultural and horticultural capability derived from the soil survey data at Rutgers, The State University, the National Co-operative Soil Survey, the recommendations of value of such land as made by any county or Statewide committee which may be established to assist the assessor, and the guidelines describing generally accepted agricultural and horticultural practices developed and adopted pursuant to subsection a. of section 1 of P.L.2013, c.43 (C.54:4-23.3d).
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> [Id.]
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> And N.J.S.A. 54:4-23.11 further provides that:
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> 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 land as may be actually used in connection with the farmhouse shall be excluded in determining such total area.
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> [Id.]

A. Presumption of validity and burden of proof in Property Tax Exemption Generally

New Jersey jurisprudence with regard to the presumption of validity or correctness, and the burden of proof in property tax exemption matters, has long been established:

> The fundamental approach of our statutes is that ordinarily all property shall bear its just and equal share of the public burden of taxation. As the existence of government is a necessity, taxes are demanded and received in order for government to function. 51 Am. Jur., Taxation, § 9, at 42. Statutes granting exemption from taxation represent a departure and consequently they are most strongly construed against those claiming exemption. Teaneck Twp. v. Lutheran Bible Inst., 20 N.J. 86, 90 (1955); Julius Roehrs Co. v. Div. of Tax Appeals, 16 N.J. 493, 497-98 (1954); Trenton v. State Bd. of Tax Appeals, 127 N.J.L. 105, 106 (Sup. Ct. 1941), aff'd sub nom. Trenton v. Rider Coll., 128 N.J.L. 320 (E. & A. 1942). The burden of proving a tax-exempt status is upon the claimant. Trenton v. Div. of Tax Appeals, 65 N.J. Super. 1, 5-6 (App. Div. 1960); Jamouneau v. Div. of Tax Appeals, 2 N.J. 325, 330 (1949); Trenton v. State Bd. of Tax Appeals, supra, 127 N.J.L. at 106; Princeton Cty. Day Sch. v. State Bd. of Tax Appeals, 113 N.J.L. 515, 517 (Sup. Ct. 1934).
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> [Princeton Univ. Press v. Princeton Borough, 35 N.J. 209, 214 (1961) (internal citations omitted).]

Furthermore,

> [W]hile the presumption of correctness attaches to the valuation of the property, the party claiming a property tax exemption "must meet all of the . . . criteria [and] . . . [w]herever there is doubt as to eligibility, the burden of proof is on the applicant." Handbook for New Jersey Assessors, Local Property, Division of Taxation, §§ 1105.11; 412.08 (4th ed. revised 2015). See also Int'l Sch. Servs., Inc. v. W. Windsor Twp., 207 N.J. 3, 24 (2011) (finding that "the burden is on the claimant to establish the right to the exemption.") (internal citations omitted).
>
> [Fields v. Trs. of Princeton Univ., 28 N.J. Tax 574, 579 (Tax 2015).]

There is, however, a clear difference between the process for valuation assessments and that of exemption determinations. While the former involves extensive experience and first-hand knowledge of the property being assessed, the real estate appraisal process, and the marketplace, the latter is an evaluation based significantly on the reliability of representations made by the applicant in the paperwork submitted in support of the application for exemption, and of the actual use of the property for which a tax exemption is claimed.

Moreover, the determination of an exemption is more properly one of statutory and case law interpretation than one requiring any special expertise possessed of an assessor. This court, by analogy,

> has previously determined that "[i]n a proceeding in the Tax Court there is a presumption of correctness in favor of the county board judgment [with regard to value determinations]. . . Statutory interpretation, however, is a question of law . . . and 'statutory construction is ultimately a judicial function.'" O'Rourke v. Fredon, 25 N.J. Tax 443, 450 (Tax 2010) (citations omitted). This court finds no justification why the same reasoning would not apply equally to an assessor, as it does to a county board of taxation.
>
> Accordingly, [the] argument that the presumption of validity extends to the exemption determinations made by the Assessor is unpersuasive and unsupported by case law and statute. The court is satisfied that the presumption of validity afforded the Assessor's original tax assessments does not extend to tax exemptions.
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> [Id. at 582-84.]
>
> It is firmly established within the body of law related to tax exemptions that "[t]he burden of proof is upon him who asserts a tax exemption to establish the asserted right." Jamouneau v. Div. of Tax Appeals, 2 N.J. 325, 330 (1949) (internal citations omitted). Moreover, "[i]t is a fundamental legal tenet that a statute granting exemption from property taxation, such as N.J.S.A. 54:4-3.6, is subject to strict construction and, further, that the party seeking exemption under its terms bears the burden of proving that the bases for it have been established." Int'l Sch. Servs., Inc., 207 N.J. at 15 (citations omitted) (emphasis added).
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> The language from the Handbook for New Jersey Assessors, supra, also draws a clear distinction between the burden of proof in assessment/valuation cases, where the challenger bears the burden of overcoming the strong presumption of validity granted to the assessment set by an assessor, and exemption cases, where the burden is on the property owner seeking the exemption. Id. at §§ 110.5.11, 408.01.
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> [Id. at 584-85.]

B. Burden of proof in the context of Farmland Assessment

The party claiming Farmland Assessment bears the burden of demonstrating that the property is entitled to such local property tax exemption. Our courts mandate that the Farmland Assessment Act:

> [M]ust be strictly construed against the party seeking the tax benefits of the Act, because those benefits are generally equivalent to an exemption, and, here, the benefits would be an exemption. Wishnick v. Upper Freehold Twp., 15 N.J. Tax 597, 606 (Tax 1996). Consequently, plaintiff bears the burden of establishing that [the subject property] qualified for exemption from taxation under N.J.S.A. 54:4-23.12(a).
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> [Van Wingerden v. Lafayette Twp., 18 N.J. Tax 81, 94 (Tax 1999), aff'd, 335 N.J. Super. 560 (App. Div. 2000).]

Moreover, "[t]he burden of proving both that the land is in agricultural or horticultural use and that the land is actively devoted to such use rests with the landowner." Hovbilt, Inc. v. Howell Twp., 138 N.J. 598, 620 (1994).

C. Tax assessor's duties and responsibilities under the Farmland Assessment Act

Pursuant to the Farmland Assessment Act,

> [t]he duties and responsibilities of the tax assessor. . . are two-fold. The assessor must first determine if the land is actively devoted to agricultural or horticultural use, and whether the other statutory criteria have been met. If so, the assessor must then value the land. In performing those functions, the assessor's opinion and judgment necessarily are implicated.
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> [Hovbilt, Inc., 138 N.J. at 621.]
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> In assessing the value of the land that qualifies as land actively devoted to agricultural or horticultural use, the assessor may use his or her 'personal knowledge, judgment and experience as to the value of land in agricultural or horticultural use.'
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> [Id. at 620 (quoting N.J.S.A. 54:4-23.7).]

D. Reliance on the Farmland Assessment Application

The tax assessor should be able to rely upon the representations made by the applicant in the Farmland Assessment Application:

> [The] legislative requirement for the filing of the farmland assessment application is to notice the assessor as to the exact agricultural or horticultural use the owner is claiming and the facts relied upon in support thereof so the assessor may check it out and make an informed determination whether the application sets forth

> a claim recognized by the act and whether the facts found by him support the claim. The fact that the assessor is directed to notify the owner of a denial by November 1 of the pretax year clearly manifests that the assessor must make his examination and determination and, if denied, the reasons therefor by November 1. When the assessor makes his physical inspection, naturally and logically, he is guided by the application as to what facts he should investigate.
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> [Interstate 78 Office Park, Ltd. v. Tewksbury Twp., 11 N.J. Tax 172, 181 (Tax 1990).]

Furthermore,

> The farmland application is a necessary factual document without which an assessor cannot make an informed determination whether to grant or deny the application as required by the Legislature. In reaching his determination an assessor is entitled to rely on the claims and data contained therein. To conclude otherwise would make the farmland application a sham rendering it ineffectual and meaningless; it would completely thwart the Legislature's scheme of controlling the granting of farmland assessments as evidenced by the act's requiring the filing of the application and its approval or disapproval in the pretax year.
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> [Id. at 185.]

Tax assessors, however, should not be unduly burdened to look for crops:

> After considering the applicable case law and the public policy behind the Act . . . plaintiffs' farmland assessment claims are to be tested solely by whether the subject property qualifies for farmland assessment according to the specific agricultural use claimed on plaintiffs' application for farmland qualification for 1994. This . . . is necessary in order to avoid burdening municipalities with unreasonable inspection responsibilities and to avoid thwarting the Legislature's plan for controlling the granting of farmland assessments.
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> [Wishnick v. Upper Freehold Twp., 15 N.J. Tax 597, 601 (Tax 1996).]

More appropriately, the burden is always on the property owner claiming Farmland Assessment:

> If . . . a taxpayer decides to change the qualifying crop specified on the application in the period following the application's submission, the taxpayer should bear the minimal burden of notifying the assessor of the change. This would allow the assessor to make an inspection at the appropriate time and would give the assessor a fair opportunity to accumulate evidence in the event the assessor is later required to defend a decision to deny qualification for the property.
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> "[T]he Farmland Assessment Act is akin to tax exemption statutes which must be strictly construed against the party claiming the exemption…." Califon Borough v. Stonegate Props., 2 N.J. Tax 153, 163 (Tax 1981). To permit a taxpayer to come into court and prove a use different from the use certified on the farmland assessment application not only rewards the taxpayer for a lack of diligence, but also burdens the municipality with greater responsibilities in order to avoid possible time-consuming and expensive litigation in the future.
>
> The result here is the best way to ensure that the municipality is not placed at a disadvantage at a trial of the qualification issue which may take place years after the relevant time period and events.
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> [Id. at 606.]

E. Conclusions of Law

Based upon the foregoing, no presumption of correctness or validity attaches to the Assessor's denial of Farmland Assessment, nor to the Board's judgment affirming same. See Fields, 28 N.J. Tax at 582-84. In making his determination, the Assessor was justified in relying on the representations made by Mrs. Hertz in her Farmland Assessment application. See Interstate 78 Office Park, Ltd., 11 N.J. Tax at 181. The Assessor was not required to go to extraordinary measures to determine if the Subject Property qualified for Farmland Assessment, see Wishnick, 15 N.J. Tax at 601, rather, he was simply required to exercise his reasonable judgment and render a reasonable opinion, see Hovbilt, 138 N.J. at 621. Furthermore, it was incumbent upon Mrs. Hertz to notify the Assessor of any changes between what she represented in her application and the actual use of the Subject Property. See Wishnick, 15 N.J. Tax at 606. The burden of proof here squarely lies with Mrs. Hertz to establish that she has met the requirements qualifying the Subject

Property for Farmland Assessment. See Van Wingerden, 18 N.J. Tax at 94; Hovbilt, Inc., 138 N.J. at 620; and Wishnick, 15 N.J. Tax at 606.

ANALYSIS

The initial issue before the court is whether Mrs. Hertz has met the "not less than five acres . . . actively devoted to agricultural or horticultural use" requirement under N.J.S.A. 54:4-23.2.[9]

According to Mrs. Hertz, the Assessor failed to find and measure all crops because he did not fully inspect the Subject Property; in her view, there were more crops that the Assessor did not see or take into account. In preparation for trial, Mrs. Hertz testified that she personally and conservatively measured ninety-seven distinct areas of the Subject Property, consisting of more than seven acres (two acres more than the requisite five-acre minimum), where she claims she is conducting agricultural or horticultural activities. She set stakes in the ground and then used a tape measure and/or paced off the area,[10] and prepared a spreadsheet of her conclusions. Mrs.

[9] "The purpose of section 23 of chapter 51 of the Laws of 1960 [the Farmland Assessment Act] was to counter the adverse impact of property taxation upon agriculture and to provide farmers with some measure of tax relief." East Orange v. Livingston, 102 N.J. Super. 512, 532 (App. Div. 1968), aff'd, 54 N.J. 96 (1969). For further discussion on the purpose and evolution of the Farmland Assessment Act see id. at 532-34.

[10] In some instances, Mrs. Hertz was assisted by un-named individuals. She used a two feet per stride measurement in her paced calculations. In chambers, the court attempted to verify Mrs. Hertz's stride measurement and struggled to meet two feet per stride. In fact, with a judge standing six feet two inches (considerably taller than Mrs. Hertz), the court measured, at best, a twenty-two-inch stride on three attempts, measuring toe to toe. The court's experiment was subsequently stated on the record. Post trial, Mrs. Hertz submitted information as to "The Average Walking Stride Length" which she acquired from Nina K., The Average Walking Stride Length, Cron, https://livehealthy.chron.com/average-walking-stride-length-7494.html (last updated Apr. 11, 2018). The information provided indicates that "Stride length is measured from heel to heel . . . On average, a man's walking stride is 2.5 feet, or 30 inches, according to Arizona State University Extension. A woman's average stride length is 2.2 feet, or 26.4 inches." Lincoln Park's counsel did not object to this post trial submission by Mrs. Hertz. The court observes *arguendo* that

Hertz further testified that her crops are not managed, and that she intentionally left most of the Subject Property unused to maintain the same for a long term. The court observes that the approximately seven acres measured by Mrs. Hertz is significantly smaller than the more than fifteen acres she identified in her application for Farmland Assessment.

Despite Mrs. Hertz's claim that she has met the acreage requirement, the facts and evidence presented here does not support such a finding. Mrs. Hertz's application for Farmland Assessment and her testimony before this court, were substantially inconsistent with what the evidence revealed about the actual activities at the Subject Property. While Mrs. Hertz attempted to explain some of those inconsistencies, the extent of those inconsistencies, among other things, leads the court to conclude that her testimony was substantially not credible and self-serving.

A. Expert Testimony

In the instant matter, Mrs. Hertz engaged a professor in Environmental Studies from Seton Hall University, who teaches ecology courses.[11] The professor received a Bachelor of Science degree in information technology engineering from New Jersey Institute of Technology, and a Master's degree in Business Administration from Seton Hall University. She also took certification programs in organic farming and permaculture design. It was anticipated that the professor was to be offered as an expert witness on behalf of Mrs. Hertz, however, the precise nature of her expertise was never determined. During the voir dire of the proposed expert, she testified that she did not measure the areas where Mrs. Hertz claimed to be conducting agricultural

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whether the stride is measured toe-to-toe (as the court measured) or heel-to-heel (as Mrs. Hertz measured), the distance is the same.

[11] In an earlier proceeding in this matter, the court suggested that Mrs. Hertz consider retaining an expert like a licensed engineer or surveyor, who could assist her in accurately surveying the area she claims is being farmed. Mrs. Hertz did not present testimony or evidence from a licensed engineer or surveyor.

or horticultural activities in a manner generally known as agroforestry.[12] Rather, the professor testified that she simply incorporated Mrs. Hertz's area calculations into a report the professor prepared for trial,[13] and included Mrs. Hertz's spreadsheet of measurements. Besides containing Mrs. Hertz's measurements, the report also corroborated Mrs. Hertz's testimony with regard to the types of purported crops and the nature of the alleged farming operations on the Subject Property; and further included numerous photographs, most of which were taken by the Assessor. While the report was entered in evidence for those very reasons (without objection), the court found that

[12] According to the professor's report, "Agroforestry is 'the combination of crops (plants, animals, fungi) and trees in forest-inspired agricultural systems that benefit human communities through greater connection to landscape, improved stewardship of resources, and enhanced economic opportunities. These practices [are intended to] mimic the forest in its design and implementation. The end goal is to produce agricultural crops for home use and commercial sales.'" Citations omitted. The professor's report further indicates that the Agroforestry practices occurring on the Subject Property include "Forest Farming [which] is 'the cultivation of crops under a forest canopy that is intentionally maintained to provide shade levels and habitat that favor growth and enhance production levels of medicinal plants, food crops, and mushrooms,'" and "Forest Gardening [which] is 'the art and science of putting plants together in woodland-like patterns that forge mutually beneficial relationships, creating a garden ecosystem that is more than the sum of its part.'" Citations omitted. Despite these representations in the professor's report, the court notes that the Subject Property is not under a Forest Stewardship Program pursuant to N.J.A.C. 7:3-5.1 to 5.14. See also N.J.S.A. 54:4-23.3., ". . . except that land which is . . . devoted as sustainable forestland . . . shall not be deemed to be in agricultural use unless: . . . a. [t]he landowner establishes and complies with the provisions of [an approved] forest stewardship plan for this land, . . . or [an approved] woodland management plan for this land . . . ; b. [t]he landowner, and [an approved] forester . . . or other [authorized] professional . . . annually attest to compliance with subsection a. [above] . . .; and c. [t]he landowner annually submits an application . . . to the assessor, accompanied by a copy of the plan established pursuant to subsection a. [above]; written documentation of compliance with subsection b. [above]; a supplementary woodland data form setting forth woodland management actions taken in the pre-tax year, the type and quantity of tree and forest products sold, and the amount of income received or anticipated for same; a map of the land showing the location of the activity and the soil group classes of the land; and other pertinent information required by the Director of the Division of Taxation as part of the application for valuation, assessment and taxation, as provided in P.L.1964, c.48 (C.54:4-23.1 et seq.)."

[13] Mrs. Hertz asked the professor to prepare the report and discern whether there were five acres of crops growing in the forest. The professor walked the land and she said she could discern that there are nine acres being farmed but did not personally measure the area(s). Rather, the professor incorporated Mrs. Hertz's measurements. The report was prepared in January 2018.

neither the report nor the anticipated testimony of the professor, in whatever capacity, would have been relevant to determining whether "not less than five acres [of the Subject Property was] . . . actively devoted to agricultural or horticultural use" as required by N.J.S.A. 54:4-23.2 for Farmland Assessment purposes.

Under New Jersey's Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." N.J.R.E. 702, Testimony by Experts.

> "[T]he rule sets forth three basic requirements for the admission of expert testimony:
>
> '(1) the intended testimony must concern a subject matter that is beyond the ken of the average [trier of fact]; (2) the field testified to must be at a state of the art that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.'"
>
> [State v. Townsend, 186 N.J. 473, 491 (2006) (quoting State v. Torres, 183 N.J. 554, 567-68 (2005)).]

Furthermore,

> "the necessity for and admissibility of expert testimony are matters to be determined within the sound exercise of discretion by the trial court." State v. Berry, 140 N.J. 280, 293 (1995) (citation omitted). Generally, a trial court will admit expert testimony if the subject matter at issue, or its specific application, is one with which an average fact finder might not be sufficiently familiar, or if the trial court determines that the expert testimony would assist it in understanding the evidence and determining facts in issue. Id. at 292-93.
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> [State v. Difrisco, 174 N.J. 195, 237 (2002).]

The professor might have been qualified as an expert to offer testimony as to types of crops alleged to be growing on the Subject Property. However, Mrs. Hertz was more than capable to provide that testimony herself; the professor's testimony in that regard would have merely been

corroborative. Conversely, the professor does not have sufficient expertise to offer testimony that the Subject Property met the five acres land requirement; she is not an engineer or land surveyor, and she did not personally measure the area. Rather, the professor merely incorporated Mrs. Hertz's land measurements and spreadsheet. Accordingly, her testimony would not have assisted the court, and the professor was not re-called to testify after her initial voir dire.

B. Measuring Area

Mrs. Hertz has failed to establish that her measurement of the alleged farmed area of the Subject Property was either accurate, reliable, or even factual.[14] She is neither a licensed engineer nor a land surveyor; she essentially used a "rule of thumb"[15] method of measurement, the accuracy of which the court finds is impossible to verify. Moreover, the numerous photographs provided to the court by Mrs. Hertz (which were substantially taken by the Assessor)[16] support the Assessor's practical conclusions with regard to what was occurring on the Subject Property.[17] Similar

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[14] Mrs. Hertz measured the area after the Assessor's initial visit.

[15] "A means of estimation made according to a rough and ready practical rule, not based on science or exact measurement." Rule of Thumb, The Phrase Finder, https://www.phrases.org.uk/meanings/rule-of-thumb.html (last visited Nov. 28, 2018). "The 'rule of thumb' has been said to derive from the belief that English law allowed a man to beat his wife with a stick so long as it is was no thicker than his thumb. In 1782, Judge Sir Francis Buller is reported as having made this legal ruling and in the following year James Gillray published a satirical cartoon attacking Buller and caricaturing him as 'Judge Thumb'. The cartoon shows a man beating a fleeing woman and Buller carrying two bundles of sticks. The caption reads 'thumbsticks - for family correction: warranted lawful!'"" Id.

[16] Some of the photographs were in print form and included in the professor's report. Others were submitted separately on a flash drive but were also part of the said report. It came out in testimony that photographs that were not taken by the Assessor, were taken from various unverified sources. They show a much more manicured arrangement of plantings than exists on the Subject Property. The court gave little weight to the unverified photographs and focused primarily on the Assessor's photographs offered in evidence by Mrs. Hertz.

[17] The Assessor visited the property five times: October 2016, July 2017, December 2017, February 2018 and May 2018.

reasonable observations and conclusions made by an assessor have been previously endorsed by our courts. See, e.g., Interstate 78 Office Park, Ltd., 11 N.J. Tax at 179, where

> [The assessor] first viewed the property in the summer, and again in the fall, of 1985. On these visits he inspected the property by walking along its perimeter and upon the grounds. He observed the hayfield and by using a steel tape he measured its four sides to arrive at the square footage which he then divided to arrive at 3.54 acres. He examined the growth and found that it contained a mixture of various types of grass but no alfalfa. He noticed that there were only three or four horses in an area that was fenced off and saw no farming activity on the balance of the property. What he saw was a 46-acre parcel of ground that was primarily grown up in cedar trees with some rough pasture. He later returned in the fall and took photos of the property. Based on his inspection, his determination that the hayfield was less than five acres and his observation that no other agricultural activity was evident nor had been claimed by the taxpayer in its applications, he revoked the farmland assessment for 1985 and assessed to the taxpayer the differential tax by way of an added assessment.
>
> [Id.]

C. Unmanaged land and naturally occurring crops cannot be counted towards 5 acres requirement

Based upon Mrs. Hertz own testimony and the extensive photographic evidence she provided, the court is satisfied that the Subject Property is substantially unmanaged woodlands. In the court's view, no reasonable person would be able to conclude with any degree of certainty that "not less than five acres [of the Subject Property was] . . . actively devoted to agricultural or horticultural use." N.J.S.A. 54:4-23.2. Clearly, just the opposite is true. The photographs reveal that some parts of Subject Property have been used as a dumping ground for some time and are littered with all kinds of debris and some dilapidated structures. The Subject Property is substantially wooded, with minimal designated areas where any potential farming may occur or

has occurred. Any alleged "farming" appears to be part of the natural occurring growth found in much of northern New Jersey forests.

An illustrative example provided by the N.J. Dep't of Agric., Farmland Assessment Overview 11 (2015)[18] is helpful here. In the example,

> **5 acres of land** are unmanaged but naturally produce wildflowers, berries, herbs, and firewood. The owner sells between $1,750 and $1,900 of plant materials and firewood annually from the parcel. The parcel of land is ineligible for Farmland Assessment because the land was not in a managed agricultural or horticultural use.
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> [Ibid. (emphasis added).]

"The mere haphazard use of land resulting in sufficient income to meet the income requirements of the act does not necessarily qualify the land for such assessment." Ibid. and Brunetti v. Lacey Twp., 6 N.J. Tax 565, 572 (Tax 1984). See also Princeton Research Lands, Inc. v. Upper Freehold Twp., 4 N.J. Tax 402, 411 (Tax 1982) (finding that "[t]he mere planting of trees to be sold at some undetermined future time without requisite care given to the trees to bring them to market is not the production of crops for sale."); and see Gottdiener v. Roxbury Twp., 2 N.J. Tax 206, 218 (Tax 1981) (where, "[t]axpayers' proofs fell far short of the target since there was no evidence establishing how long the animals were there and whether they were products of the farm except for the sketchy references to the fact that they were introduced to the land in the latter part of 1972 and the attempts to establish that they were consigned for sale from April to October 1973. . .Their presence must amount to being 'produce' of the land.").

Assuming, arguendo, Mrs. Hertz actually planted some of the berries on the Subject Property as she claimed (or they were planted on her behalf at her behest), they are clearly indistinguishable from berries that would otherwise grow naturally in the Northern New Jersey.

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[18] Available at https://www.state.nj.us/agriculture/divisions/anr/pdf/farmlandassessmentoverview.pdf.

Crops such as blackberries, raspberries, and wineberries, to name a few, grow naturally throughout New Jersey. See General – Plants Profile for Rubus phoenicolasius (wine berry), U.S. Dep't of Agric. Natural Res. Conservation Serv., https://plants.usda.gov/core/profile?symbol=RUPH (follow "General" hyperlink) (last visited Nov. 28, 2018). While Mrs. Hertz purports to be conducting an agroforestry operation on the Subject Property, the wineberry (rubus phoenicolasius),[19] which she claims to be deliberately growing as part of her claim for Farmland Assessment, "is a vigorous grower" and "invasive in New Jersey." U.S. Dep't of Agric. Forest Serv., Wineberry (2005), available at https://www.fs.usda.gov/naspf/sites/default/files/naspf/pdf/wineberry.pdf.

While now "widespread" in New Jersey, wineberries are "highly threatening to native communities." Susan Brookman, Rubus phoenicolasius/NJ, Bugwoodwiki, http://wiki.bugwood.org/Rubus_phoenicolasius/NJ (last updated Aug. 20, 2014). Furthermore, the wineberry is considered a "noxious weed" by the United States Department of Agriculture, and prohibited for sale and distribution in two states. See Legal Status – Plants Profile for Rubus phoenicolasius (wine berry), U.S. Dep't of Agric. Natural Res. Conservation Serv., https://plants.usda.gov/core/profile?symbol=RUPH (follow "Legal Status" hyperlink) (last visited Nov. 28, 2018). In view of these descriptions, intentionally growing wineberries as a forest crop in New Jersey appears to be patently inconsistent with the goal of "putting plants together in woodland-like patterns that forge mutually beneficial relationships" under the concepts of forest gardening and agroforestry discussed by the professor in her report. Moreover, simply because a farmer may be conducting an agroforestry operation, does not mean that the farmer is no longer

[19] Also known as wine raspberry and Japanese wineberry. The wineberry is a member of the Roseaceae (Rose) family. See Susan Brookman, Rubus phoenicolasius/NJ, Bugwoodwiki, http://wiki.bugwood.org/Rubus_phoenicolasius/NJ (last updated Aug. 20, 2014).

obligated to take requisite care of the crops and reasonably delineate the growth areas for Farmland Assessment eligibility. An assessor, upon reasonable inspection, must be able to readily identify growth areas as deliberate and managed, and not merely part of the naturally occurring forest growth.

D. Unused areas of the Subject Property are not "beneficial to a tract of land" under the regulations

Mrs. Hertz claims that she intentionally left most of her areas of land unfarmed for conservation purposes. However, because the unused areas of the Subject Property are much larger than any potential farmland areas, Mrs. Hertz cannot include those unused areas with the five acres. Mrs. Hertz did not provide any credible evidence supporting her claim that those unused areas are devoted to agricultural or horticultural activity or are necessary to maintain her farmland.

"Devoted to agricultural or horticultural use" means: "[l]and that is supportive and subordinate woodland or wetlands and that is contiguous to, part of, or beneficial to land that is cropland harvested, cropland pastured, or permanent pasture." N.J.A.C. 18:15-6.2(a)(13) (1997).

> "Beneficial to a tract of land" means land which enhances the use of other land devoted to agricultural or horticultural production by providing benefits such as, but not limited to, windbreaks, watershed, buffers, soil erosion control, or other recognizable enhancements of the viability of the qualifying land.
>
> "Appurtenant woodland" means 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" means a wooded piece of property which is beneficial to or reasonably required for the purpose of maintaining the agricultural or horticultural uses 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 (1988)]

Furthermore,

> (a) A woodland or wetlands piece of property is presumed to be supportive and subordinate woodland or wetlands when its area is equal to or 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.
>
> (b) An owner claiming farmland assessment for a woodland or wetlands piece of property exceeding the amount set forth in (a) above as presumed to be supportive and subordinate woodland or wetlands, shall submit an explanation and additional proofs as the assessor may require to support the claim that such woodland or wetlands is supportive and subordinate.
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> [N.J.A.C. 18:15-2.8 (1988) (emphasis added).]

CONCLUSION

The court finds that Mrs. Hertz failed to establish that "not less than five acres [of the Subject Property, are] . . . actively devoted to agricultural or horticultural use" as required for Farmland Assessment under N.J.S.A. 54:4-23.2. Accordingly, Farmland Assessment for the Subject Property is not appropriate, and therefore, the decision of the Board denying Farmland Assessment for the Subject Property is affirmed. In reaching this conclusion the court is satisfied that:

(1) Mrs. Hertz failed to prove that she managed not less than five acres of farmland. Most of her alleged "crops" appear to be naturally occurring growth in a forest setting. "[T]he mere haphazard use of land . . . does not necessarily qualify the land for [farmland] assessment." Brunetti, 6 N.J. Tax at 572.

(2) Mrs. Hertz failed to prove that the unused area of the Subject Property is "beneficial to the property" under N.J.A.C. 18:15-6.2. She should have provided "an explanation and additional proofs as the assessor may require to support the claim" under N.J.A.C. 18:15-2.8(b).

(3) Mrs. Hertz's land measurements were unreliable and unverifiable; and, her testimony was not credible, contradictory, and self-serving;

(4) The Assessor appropriately used his personal knowledge, judgment and experience in determining that the Subject Property failed to meet the statutory requirements for Farmland Assessment. He visited the property five times and measured areas that he determined to be actively devoted to agricultural or horticultural use. Furthermore, the Assessor appropriately followed the uniform rules and guidelines, and applied the same without any bias or discriminatory intent.[20] In the court's view, the Assessor fulfilled his statutory obligation to address Mrs. Hertz's application for Farmland Assessment. An assessor should not have to look for undesignated or unidentifiable crops to determine whether land qualifies for Farmland Assessment. Areas alleged to be farmland must be maintained with requisite care, reasonably delineated and readily apparent upon inspection; here, they were not. The Assessor's multiple inspections of the Subject Property are testament to the careful and thoughtful consideration he afforded Mrs. Hertz's Farmland Assessment application.

Therefore, for all the above stated reasons, Mrs. Hertz's appeal of the denial of Farmland Assessment for the Subject Property is denied, and the decision of the Board denying the same is affirmed. The court's order and final judgment as to this count of her complaint will be uploaded on *eCourts.* The case will proceed in regular course to Mrs. Hertz's appeal of the property tax assessment placed upon the Subject Property. The court retains jurisdiction.

[20] See N.J. Const. art. VIII, § 1, ¶ 1. Mrs. Hertz did not raise any allegation as to bias or discriminatory intent of the Assessor during the trial.