

Dual-Use Development and The Agricultural Assessment Conversion Penalty

by Sujata Yalamanchili and Daniel Pszonak



Sujata Yalamanchili



Daniel Pszonak

Sujata Yalamanchili is a partner with the New York firm of Hodgson Russ LLP, and Daniel Pszonak, a third-year law student at the University at Buffalo School of Law, is a summer law clerk at the firm.

In this installment of Real Assessment, Yalamanchili and Pszonak examine ways in which developers could avoid jeopardizing the benefits of the New York Agricultural Districts Law when using agricultural land for renewable energy projects.

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Real property taxes often constitute a significant cost of owning and operating real property in New York state. To support and encourage certain types of projects and uses, New York offers various tax incentives, exemptions, and other tax reduction techniques. One such program is the Agricultural Districts Law (ADL), which promotes agricultural use and conservation by authorizing the creation of agricultural districts to provide qualifying

landowners with lower real property tax assessments.

Agricultural land is often well suited for renewable energy projects because of its location, size, and ability to accommodate both agricultural and renewable energy uses. However, without careful planning, using agricultural land for renewable energy projects could risk the loss of important ADL tax benefits. This article examines how developers can avoid jeopardizing the benefits of the ADL program when using agricultural land for renewable energy projects.

Agricultural Assessment Program

The ADL's purpose is "to protect and promote the availability of land for farming purposes."¹ It does this primarily through a tax incentive for agricultural land, providing a lower assessed value on agricultural land that creates tax savings on the difference between the true assessed value of the land and the agricultural assessment.²

Landowners form agricultural districts by submitting a proposal to the county legislative body.³ They must own at least 250 acres of land to be included in the agricultural district.⁴ After receiving the proposal, the county legislative body issues a notice of a public hearing, at which the proposal will be discussed.⁵ After the public hearing, the county legislative body reviews any

¹ N.Y. Dept. of Taxation and Finance, Agricultural Assessment Program: Overview (May 21, 2021).

² *Id.*; N.Y. Agric. and Mkts. Law section 304-a (McKinney); N.Y. Agric. and Mkts. Law section 305(1)(a)-(c) (McKinney).

³ N.Y. Agric. and Mkts. Law section 303(1) (McKinney).

⁴ *Id.*

⁵ N.Y. Agric. and Mkts. Law section 303(2).

reports and recommendations from relevant boards, such as the county planning board, and decides whether to adopt, modify, or reject the proposal.⁶

Land in an agricultural district is eligible for an agricultural assessment under section 305 of New York's Agriculture and Markets Law.⁷ An agricultural assessment is a value determined by a local assessor and is calculated by multiplying the acreage of different soil groups and farm woodland by a given agricultural assessment value.⁸ This number, in turn, is multiplied by a state (or special) equalization rate.⁹ This provides the agricultural assessment value upon which real property taxes are levied.¹⁰ Thus, tax savings are realized to the extent the agricultural assessment value is lower than the true assessment value of the property.¹¹

There are additional eligibility requirements to qualify for an agricultural assessment, primarily based on the size of the land and its output in terms of annual gross sales.¹² Generally, the land must be at least seven acres and must have been used in the last two years for agricultural production.¹³ There are many variations in eligibility, with different thresholds required for the size of the land and the annual gross sales.¹⁴

Also, land outside an agricultural district may receive an agricultural assessment under section 306 of the Agriculture and Markets Law. While not receiving many of the additional benefits that land in an agricultural district receives under section 305, the agricultural assessment under section 306 operates exactly the same as the agricultural assessment under

section 305, with one exception regarding the lookback period for the conversion penalty.¹⁵ This will be discussed further.

Conversion Penalty

A conversion under the Agriculture and Markets Law is defined as "an outward or affirmative act changing the use of agricultural land and shall not mean the nonuse or idling of such land."¹⁶ Conversion occurs when property can "no longer be used for agricultural production."¹⁷ A local assessor makes the ultimate determination whether land has been converted to a nonagricultural use,¹⁸ but the law provides the opportunity for administrative or judicial review of this determination.¹⁹

When land receiving an agricultural assessment is converted, a penalty is imposed.²⁰ It applies even if the land stopped receiving the agricultural assessment up to five years earlier, when it is part of an agricultural district, or up to eight years earlier, when it is not part of an agricultural district.²¹

By way of example, if a given parcel of land had received an agricultural assessment but the assessment ended three years ago, the conversion penalty would still apply. But if the parcel had not received an agricultural assessment within the last five years — or within the last eight if the parcel was receiving an agricultural assessment

¹⁵ N.Y. Agric. and Mkts. Law section 305 (McKinney); N.Y. Agric. and Mkts. Law section 306 (McKinney) ("If land which received an agricultural assessment pursuant to this section is converted at any time within eight years from the time an agricultural assessment was last received, such conversion shall subject the land so converted to payments in compensation for the prior benefits of agricultural assessments.").

¹⁶ N.Y. Agric. and Mkts. Law section 301 (McKinney).

¹⁷ *Pezzo v. Mazzetti*, 202 A.D.2d 935, 937, 609 N.Y.S.2d 699, 701 (3d Dept. 1994); see also N.Y. Dept. of Taxation and Finance, Conversion of Agricultural Lands (Mar. 27, 2019) ("An affirmative act occurs at the point the land can no longer be used for agricultural production" (also citing *Pezzo*)).

¹⁸ Conversion of Agricultural Lands, *supra* note 17.

¹⁹ See N.Y. Agric. and Mkts. Law section 305(1)(d)(iii)(b) (McKinney); N.Y. Agric. and Mkts. Law section 306(2)(b)(ii) (McKinney).

²⁰ N.Y. Agric. and Mkts. Law section 305(1)(d) (McKinney); N.Y. Agric. and Mkts. Law section 306(2) (McKinney).

²¹ N.Y. Agric. and Mkts. Law section 305(1)(d)(i) (McKinney); N.Y. Agric. and Mkts. Law section 306(2)(a)(i) (McKinney) ("If land which received an agricultural assessment pursuant to this section is converted at any time within eight years from the time an agricultural assessment was last received, such conversion shall subject the land so converted to payments in compensation for the prior benefits of agricultural assessment.").

⁶ N.Y. Agric. and Mkts. Law section 303(4).

⁷ N.Y. Agric. and Mkts. Law section 305 (McKinney).

⁸ N.Y. Dept. of Taxation and Finance, *supra* note 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

outside an agricultural district — there wouldn't be a conversion penalty.

Regardless of the difference in the lookback period between land inside and outside an agricultural district, the conversion penalty is the same.²² It is five times the taxes saved in the last year the property benefited from the agricultural assessment, plus 6 percent interest compounded annually for each year the property benefited from the agricultural assessment, up to five years.²³ This penalty is levied as a tax on the property in accordance with the date the assessor determines the conversion occurred.²⁴

Sections 305 and 306 provide certain exemptions that may be used to minimize the conversion penalty. First, the statutes provide that the penalty should apply only for the portions of the parcel that are deemed converted by the assessor.²⁵ Thus, if half the parcel is converted, only half the penalty would apply.

Second, the statutes eliminate the conversion penalty when land is converted for "oil, gas, or wind exploration, development, or extraction activity."²⁶ The land will still lose the benefit of the agricultural assessment, but the landowner will not be liable for the conversion penalty.²⁷

Landowners, particularly developers, should be aware that an additional penalty may be imposed. If land is converted, the statutes require the landowner to notify the local assessor within 90 days.²⁸ If the assessor is not notified, a penalty of up to double the amount owed may be imposed.²⁹

The Department of Taxation and Finance has indicated it will use a "primary use" test to determine whether a conversion took place. This

seems to contradict the law as discussed above, which deems a conversion when the land is no longer used for agricultural production.³⁰ Also, the department's guidance on its website contradicts the primary use test by providing:

It is important to bear in mind that ceasing agricultural production while still within the five-year or eight-year period (whichever is applicable) does not necessarily result in a conversion. Some other activity must also occur on the land that prevents it from being used agriculturally.³¹

These conflicting methods of determining a land-use conversion are significant for developers interested in dual-use development, in which the agricultural use is maintained alongside the renewable energy project.

Dual-Use Development

Dual-use development is increasingly being employed for agricultural lands, particularly for joint solar and agricultural uses. This dual use is known as "agrivoltaics."

There are four common types of agrivoltaic projects:

- solar grazing, in which livestock at a solar project graze below and around the solar arrays;
- crop production, which involves growing crops below and around the solar arrays;
- apiary or pollinator-friendly approaches, which involve cultivating pollinator-friendly plants and beekeeping around the solar site; and
- conservation, which involves careful site design that ensures long-term conservation.³²

²² N.Y. Agric. and Mkts. Law section 305(1)(d)(i) (McKinney); N.Y. Agric. and Mkts. Law section 306(2)(a)(i) (McKinney).

²³ *Id.*

²⁴ N.Y. Agric. and Mkts. Law section 305(1)(d)(i) (McKinney); N.Y. Agric. and Mkts. Law section 306(2)(a)(ii) (McKinney).

²⁵ N.Y. Agric. and Mkts. Law section 305(1)(d)(i) (McKinney); N.Y. Agric. and Mkts. Law section 306(2)(a)(i) (McKinney); Conversion of Agricultural Lands, *supra* note 17.

²⁶ N.Y. Agric. and Mkts. Law section 305(1)(d)(iv) (McKinney); N.Y. Agric. and Mkts. Law section 306(2)(c) (McKinney).

²⁷ Conversion of Agricultural Lands, *supra* note 17.

²⁸ N.Y. Agric. and Mkts. Law section 305(1)(d)(ii) (McKinney); N.Y. Agric. and Mkts. Law section 306(2)(a)(iii) (McKinney).

²⁹ *Id.*

³⁰ *Pezzo*, 609 N.Y.S.2d at 701.

³¹ Conversion of Agricultural Lands, *supra* note 17.

³² N.Y. State Energy Research and Development Authority, "Solar Installations in Agricultural Districts," at 138-147 (2023).

New York has seen a handful of solar grazing projects and a couple of apiary projects, but there has not been a crop production project yet.³³ Crop production projects are still rare in the United States,³⁴ and research is ongoing regarding crop yields.³⁵ The research that has been done so far has been positive for shade-tolerant and temperate climate crops.³⁶

Potential advantages of an agrivoltaic project include its potential to evade the conversion penalty while diversifying the project's output. However, despite the law seeming to state that only an affirmative act taking land out of its agricultural use will trigger a conversion penalty, the Department of Taxation and Finance and local assessors appear ready to consider an agrivoltaic project a conversion. At the least, it seems likely that assessors would use a partial penalty assessed on all land taken out of agricultural production.³⁷

This could change in a number of ways. If an assessor determines that an agrivoltaic project has converted the land use, it would be possible to appeal that determination and receive a favorable judgment from a court.³⁸ Also, a bill in the New York Senate Agriculture Committee would add solar development to the conversion penalty exemption for land converted for oil, gas, or wind development.³⁹

New York policy could also grow to favor agrivoltaics as a way to both promote renewable energy and conserve agricultural lands. This could push the Department of Taxation and Finance to prompt assessors to view agrivoltaics more favorably.

With agricultural districts spread throughout New York state, the potential for conversion penalties presents significant risk. Now, the law and actions of local tax assessors are likely to be at odds, but there is an opportunity for creative development projects that can be undertaken to avoid, or at least partially avoid, these conversion penalties while perhaps even retaining the tax breaks of the agricultural assessment. ■

³³ See, e.g., inSPIRE, Agrivoltaics Map.

³⁴ See, e.g., *id.*

³⁵ N.Y. Power Authority and Electric Power Research Institute, "Agrivoltaic Leading Practices," at 8-9 (Jan. 2023).

³⁶ N.Y. State Energy Research and Development Authority, *supra* note 32, at 142 ("Available data and research from sites in the United States has demonstrated that shade-tolerant, temperate climate crops including spinach, kale, Swiss chard, broccoli, cauliflower, cabbage, peas, and bush beans can successfully grow under solar panels. Additionally, the same research has shown that some root vegetables, such as carrots, potatoes, and radishes, can also be grown under panels with a longer growth period.").

³⁷ See N.Y. Power Authority and Electric Power Research Institute, *supra* note 35, at 14.

³⁸ See N.Y. Agric. and Mkts. Law section 305(1)(d)(iii)(b) (McKinney); N.Y. Agric. and Mkts. Law section 306(2)(b)(ii) (McKinney).

³⁹ S.4853, Gen. Assemb., Reg. Sess. (N.Y. 2023).