

**THE SILENT KILLER:  
What New Jersey attorneys  
need to know about Chapter 91.**

*By David B. Wolfe<sup>1</sup>*

It is essential that all lawyers who represent real estate owners have a fundamental understanding of N.J.S.A. 54:4-34, L. 1979 c. 91, commonly referred to as “Chapter 91.” The purpose of Chapter 91 is to enable assessors to correctly assess property in the first instance, thereby avoiding the unnecessary expense and effort of litigation.<sup>2</sup> The statute accomplishes this by (i) granting municipal assessors the right to request income information from owners of income producing property, and (ii) barring property owners from appealing their assessments should they fail to respond to the assessor’s request within forty-five (45) days. Accordingly, it is vital that attorneys counsel property owners before they run afoul of the statute’s requirements.<sup>3</sup>

This article will (i) outline the basic provisions of the Chapter 91 statute, (ii) identify some its surprising applications, and (iii) provide a roadmap for challenging a motion to dismiss based upon Chapter 91.

The Chapter 91 statute can be broken down into following eight discreet provisions:

- The request for income and expenses must be in writing.
- The request must be served via certified mail.
- The request can only be made of income producing properties.
- The property owner must respond to the request within forty-five (45) days.

- If the property owner fails to respond within forty-five (45) day time period, the assessor must value the property based upon all available information and attempt to determine the full and fair market value of the property.
- The taxpayer loses its right of appeal if it does not submit a response within forty-five (45) days.
- The statute creates a “good cause” exception for the County Boards to consider when the taxpayer cannot furnish the information within the required period.
- Assessors must include copies of the statute as part of any Chapter 91 request.

N.J.S.A. 54:4-34.

Because Chapter 91 imposes the ultimate sanction on property owners by depriving them of their right to appeal, the initial burden of the statute is on the assessor to strictly comply with the statute’s mandatory requirements. For instance, in *SAIJ Realty, Inc. v. Town of Kearny*, 8 N.J.Tax 191, 197 (Tax 1986), the Tax Court concluded that a municipality’s “failure to comply with the mandatory provisions of chapter 91 renders that statute inapplicable.” The mandatory provisions applicable to the assessor contained in the statute are (i) that the request be sent via certified mail and (ii) that a copy of the statute be provided as part of any request.

Once an assessor satisfies the initial burden of facially complying with the statute, the burden shifts and the statute is strictly construed against the taxpayer because of the significant government interest at stake and the mandatory nature of the statute. In *TMC Properties v. Wharton Borough*, the Tax Court stated that the “strictness with which the

requirements of Chapter 91 are to be enforced has been expressed repeatedly by the Tax Court.” 15 N.J. Tax at 465.

Surprisingly, due to the strict application of the statute, taxpayers can even lose their right to appeal when the Chapter 91 request is arguably illegal or overreaching, provided the assessor has facially complied with the statute’s mandatory requirements. *Tower Center Associates v. Township of East Brunswick* established that a taxpayer must respond in some manner to the assessor’s request within the forty-five (45) day time period even when arguing that the request is illegal and overreaching. 286 N.J. Super. 433, 438 (App. Div. 1996). The appellate court ruled that the taxpayer needs to both (i) respond to the portion of the request not deemed objectionable, and (ii) advise the municipality of its objection with respect to the remainder of the request. In fact, according to the recent decision of *Southland Corp. v. Dover Twp.*, 21 N.J. Tax 573 (Tax 2004), a property owner must still respond to a chapter 91 request or waive its right to appeal the resulting assessment, even when the request is sent to a non-income producing property (one of the statute’s requirements).

Other seemingly draconian results for taxpayers result from the strict application of the statute by the courts. For example, in *Summerton Shopping Plaza v. Manalapan Tp.*, the Appellate Division ruled that the Tax Court correctly dismissed an appeal under the statute when the required information was provided to the attorney for the municipality, but not the assessor. 15 N.J. Tax at 177 (App. Div. 1995). Similarly, in *TMC Properties v. Wharton Borough*, the Tax Court ruled that Chapter 91 precludes a taxpayer from pursuing an appeal when the taxpayer submits a response in time for it to be used by the Assessor (or Revaluation Company), but after the forty-five day time

period had expired. 15 N.J. Tax at 465-66. Again, these seemingly severe results have been justified as the product of the important government interest at stake and the mandatory nature of the Statute.

Taxpayers can even lose their right to appeal when they never personally receive the request from the assessor. In *ADP of New Jersey v. Parsippany-Troy Hills Tp.*, 14 N.J. Tax 372 (Tax 1994), the Tax Court held that the current owner of a property is barred from appealing when the prior owner failed to make a timely response to the Chapter 91 request. Accordingly, this issue must be examined as part of the standard due diligence of a real estate transaction. Additionally, a taxpayer must specifically inform the assessor of a change in mailing address or risk having their appeal barred by Chapter 91. In an unreported 2004 matter, New Providence Borough successfully argued that notice of a new address sent only to the Tax Collector was insufficient and that the plaintiff was barred from contesting its assessment.<sup>4</sup>

Despite the severe sanction of Chapter 91, many property owners fail to answer the requests within the forty-five (45) day time period. Accordingly, attorneys are left to confront motions to dismiss based upon Chapter 91. Although the statute is strictly construed against taxpayers, there are several areas that counsel should examine as possible defenses to the Chapter 91 motions. As discussed above, assessors must strictly comply with the mandatory provisions of the statute before taxpayers are barred from appealing their assessments. Therefore, attorneys should first ensure that the request was sent via certified mail and that a copy of the statute was included in the mailing.

Additional methods for defending a Chapter 91 motion relate to the timeliness of the motion and the timeliness of the Chapter 91 request itself. The municipality must file

the motion to dismiss “no later than the earlier of (1) 180 days after the filing of the complaint, or (2) 30 days before the trial date.”<sup>5</sup> Furthermore, the assessor must serve the request in time for the response to be useful in establishing the assessment. Accordingly, the request must have been mailed prior to forty-five (45) days before January 10, the date the assessor was required to submit the tax roll.<sup>6</sup>

Another potential defense to consider is whether it was impossible to produce the requested information within the forty-five (45) day time period or whether the information requested was unclear. In *Cassini v. City of Orange*, the assessor sent out requests in late September requesting year-end income and expense for that same year. 16 N.J.Tax 438 (Tax 1997). The Tax Court denied the motion to dismiss because the taxpayer obviously could not comply with the request within forty-five days because the information would not be in existence within that time frame. 16 N.J.Tax 438, 453 (Tax 1997). The court ruled that when a response is impossible or it is unclear what response is being sought, a taxpayer cannot be barred from proceeding with its appeal by Chapter 91.<sup>7</sup> *Id.* There is clearly a tension between this case and the cases that hold a response must be made within forty-five days, even if that response is solely to object to the request. Attorneys should keep this tension in mind when advising clients and when responding to motions to dismiss.

Finally, the statute itself contains a good cause exception to which a taxpayer’s counsel can look to defend against a Chapter 91 motion to dismiss.<sup>8</sup> In *TMC Properties v. Wharton Borough*, the Tax Court recognized a two-step analytical framework in which to examine whether a taxpayer qualifies under the good cause provision of Chapter 91. 15 N.J.Tax at 463. First, the court must determine whether a sufficient response was

made within the forty-five (45) day period. A response is deemed sufficient only when it is “made within the forty-five day time period and ...communicat[es] to the assessor, in reasonable detail, a plausible basis for the taxpayer’s inability to furnish the requested information.” *Id.* Second, the court must determine whether the failure to furnish, or the delay in furnishing the requested information, resulted from good cause. This step is only satisfied if the taxpayer can demonstrate that it ‘could not’ answer the assessor’s request within the statutory limit.” *Id.* The Court only reaches Step Two of the analysis if the taxpayer has satisfied Step One – that is, only if it has informed the assessor within forty-five (45) days that it cannot answer the request. *Id.*

Because of the severe sanctions involved with Chapter 91, its surprising applications and the difficult burden placed upon taxpayers in overcoming motions to dismiss premised on Chapter 91, it is vital that attorneys counsel property owners on its requirements prior to the receipt of the requests. This area of the law is still evolving and there remain internal tensions within the published case-law. To best serve property owning clients, attorneys should stay current with this area of law or consult periodically with practitioners who focus on real property tax appeals.

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<sup>2</sup>*TMC Properties v. Wharton Bor.* 15 N.J.Tax 455, 464 (Tax 1996).

<sup>3</sup>Specifically, the statute provides, “[n]o appeal shall be heard from the assessor’s valuation and assessment with respect to the income-producing property where the owner has failed or refused to respond to such written requests for information within 45 days of such request or to testify on oath when required, or shall have rendered a false or fraudulent account.” N.J.S.A. 54:4-34.

<sup>4</sup>The court grounded its ruling on the decision in *Rubenstein v. Upper Pittsgrove Township*, 12 N.J. Tax 494, 499 (1991), in which notice to the tax collector and not the assessor was deemed insufficient in a farmland exemption matter.

<sup>5</sup>N.J. R. TAX CT R. 8:7(e).

<sup>6</sup>*John Hancock Mut. Life Ins. Co. v. Township of Wayne*, 13 N.J.Tax 417 (Tax 1993.)

<sup>7</sup>This holding was reiterated in 2004 in *Green v. East Orange*, 21 N.J.Tax 324 (Tax 2004).

<sup>8</sup>Although the language in the statute refers only to the County Boards of Taxation, the Tax Court has held that it, too, has the authority under Chapter 91 for “good cause shown to impose... terms and conditions for furnishing the requested information.” *TMC Properties v. Wharton Bor.*, 15 N.J.Tax at 461.