

Circuit Court for Anne Arundel County
Case No. C-02-CV-17-003899

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1248

September Term, 2019

ANNE ARUNDEL COUNTY MARYLAND

v.

PPE CASINO RESORTS MARYLAND, LLC

Leahy,
Nazarian,
Wells,

JJ.

Opinion by Nazarian, J.

Filed: November 2, 2021

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal involves the property tax valuation of the land underneath the Maryland Live! Casino in Anne Arundel County for the 2011–13 and 2014–16 assessment periods. The County’s Supervisor of Assessments grounded his initial assessments on the terms of an agreement styled as a “ground lease,” under which, among other things, the casino operators would pay both a ground rent and a percentage of the revenue from the casino and related businesses to the property owners. The property owners appealed the assessment to the Maryland Tax Court, contending that the Supervisor’s methodology included intangible value not properly included in a real property tax assessment and that the assessment should be determined using a cost approach that focused on the value of the land. The Tax Court agreed and revised the assessment downward. The Circuit Court for Anne Arundel County affirmed the decision of the Tax Court, the County appeals, and we affirm.

I. BACKGROUND

In 2008, PPE Casino Resorts Maryland, LLC (“PPE”) sought to apply for a Maryland casino operator’s license. As part of a complete license application, PPE needed to demonstrate that it had rights to a site on which to build a casino. After “striking out” (its term) on a number of other sites, PPE contacted Simon Property Group about a 9.28 acre site immediately adjacent to the Arundel Mills Mall in Hanover. Negotiations took place over a weekend, and by Monday morning PPE and Simon had reached an agreement that gave PPE the right to build and operate a casino on the site for a ninety-nine-year period. Among other terms, this agreement, memorialized in a document titled “ground

lease,” provided that PPE would pay Simon a base rent of \$2,000,000 per year that would increase 1% annually, plus 1% of the gross retail sales and revenue of the Casino, less an annual credit of \$1,500,000. The lease also ran with the land to any future purchasers of the Mall or the Casino.

The transaction worked: the State ultimately granted PPE a casino license, PPE built what is now the Maryland Live! Casino, and the casino opened on June 6, 2012. The construction then occasioned a new assessment of the property, and the Maryland State Department of Assessments and Taxation (“SDAT”), utilizing the initial assessment prepared by the Supervisor, assessed the land and improvements as of July 1, 2011 as follows:

Tax Years 2012 and 2013

- a. Land: \$85,000,000
- b. Improvements: \$155,955,400
- c. Total: \$240,955,400

The assessment went up as of January 1, 2014:

Tax Years 2014

- a. Land: \$85,000,000
- b. Improvements: \$194,414,800
- c. Total: \$279,414,800

The SDAT took the position that the terms of the ground lease, a relationship entered into by the parties themselves, represented the best and most accurate valuation of the property.

The SDAT viewed the relationship as a unique real estate transaction that, through the various streams of payments, was meant to capture the value of the property.

PPE disputed the assessment. While acknowledging that the relationship between the property owners and casino operators was contained in a document called a “ground lease” that ran with the land, PPE contended that the ground lease encompassed a broader business relationship between PPE and Simon and that the payment streams encompassed intangible values that transcended the value of the real property itself, which was the only element that a property tax assessment should capture. Instead, PPE argued, the assessment should use a cost approach methodology that considered the ground lease, but looked as well to comparable sales of similar land that excluded intangible or business value from the valuation of the real property.

PPE appealed the assessment to the Maryland Tax Court, and Anne Arundel County joined the case as a co-respondent. PPE assessed the value of the land and improvements, using a cost approach, at \$172.4 million for Tax Years 2012–13 and \$191.45 million for Tax Years 2014–16:

1. Tax Years 2012 and 2013
 - a. Land: \$14,000,000
 - b. Improvements: \$158,400,000
 - c. Total: \$172,400,000
2. Tax Years 2014, 2015, and 2016
 - a. Land: \$15,000,000

b. Improvements: \$176,450,000

c. Total: \$191,450,000

The Supervisor, treating all of the payments required in the ground lease as reflecting the value of the real property, proposed an assessment of the land and improvements for Tax Years 2012–13 at \$220.955 million and for Tax Years 2014–16 at \$264.414 million:

1. Tax Years 2012 and 2013

a. Land: \$65,000,000

b. Improvements: \$155,955,400

c. Total: \$220,955,400

2. Tax Years 2014, 2015, and 2016

a. Land: \$70,000,000

b. Improvements: \$194,414,800

c. Total: \$264,414,800

After a three-day trial that included testimony from experts on both sides, the Tax Court agreed with PPE that a cost approach was the correct methodology and assessed the value of the land and improvements at a level in line with PPE’s proposed valuation:

1. Tax Years 2012 and 2013

a. Land: \$14,000,000

b. Improvements: \$155,955,400

c. Total: \$169,955,400

2. Tax Years 2014, 2015, and 2016

- a. Land: \$15,000,000
- b. Improvements: \$176,450,000
- c. Total: \$191,450,000

In the course of reaching these numbers, the Tax Court recounted the terms of the ground lease, then asked directly “whether a document self-titled ‘Ground Lease’ should be used as a measure to assess the fair market value of the land for ad valorem tax purposes.” The Tax Court recognized up front that “[u]nder standard appraisal methodology, income producing real property can be valued using the capitalization of income method or the sales comparison approach.” From there, the Tax Court analyzed the terms and conditions of the document itself, recognizing that it included features common to a ground lease and a business arrangement. And after walking through *Supervisor of Assessments v. Ort Children Trust Four*, 294 Md. 195 (1982) and *Supervisor of Assessments v. Berman*, 81 Md. App. 675 (1990), and considering the terms of the transaction memorialized in the ground lease, the Tax Court concluded that the terms of the ground lease were not actual evidence of what a willing buyer would pay a willing seller for this piece of land.

The Tax Court’s analysis turned largely on the uncertainties about the amount of the payments, and the extent to which they depended on business outcomes that couldn’t be predicted with precision. The Tax Court noted, for example, that in the ground lease, “[t]he parties in actuality only agreed to a definite payment of \$2,000,000 increasing at 1%

annually, with an annual credit of \$1,500,000.” This, in the Tax Court’s view, left uncertainty about how much PPE ultimately would pay:

Arguably, then the land was then only worth a guarantee of \$500,000 annually, with annual 1% annual increase based on \$2,000,000, under the willing buyer and willing seller standard. The parties to the lease did not know how much the gross revenue of the casino would eventually total and how certain factors outside their control might affect the gross revenue. Granted, it is certain that the parties anticipated the casino would generate some monies and the financial and other investments of time and effort to build the casino are a testament to that. However, as the court in *Lawrence [Assoc. v. Lawrence Township]*, 5 N.J. Tax 481 (1983) noted, percentage rent is speculative. In this case, it could in theory have been any number, including technically zero. Hence, the lease is not a reflection of the land’s value as presented by [the County].

From this, the Tax Court noted that “[t]he income method is only reliable when the property itself is the income producer,” and that the lease here “derives approximately two-thirds of the ground rent from business oriented percentage rate.” As a result, the lease revenues value more than just the property—they include the value of the operating business, and don’t reflect the amount a willing buyer would pay a willing seller for the property. And because “[t]he Maryland statutory scheme does not require one method of evaluation over another,” the Tax Court found that “[t]he methods used by the [County] to determine the value of the land did not amount to a valuation of the land,” and it declined to rely solely on the lease in valuing the property. The Tax Court considered the cost approach valuation PPE proposed, which included two other casino land transfers, and agreed with PPE’s proposal that the land be valued at \$1,600,000 per acre. The Tax Court then reached its final numbers after resolving disputed positions about the value of the

improvements to the property (including depreciation over the assessment periods) that the County hasn't challenged.

The County appealed the Tax Court's valuation to the circuit court, which affirmed the Tax Court's decision. This appeal followed. We supply additional facts as necessary below.

II. DISCUSSION

The County raises three¹ issues on appeal that coalesce into a version of the core question that the Tax Court itself asked: whether the ground lease, by itself, is an accurate valuation of the property, and thus whether the Tax Court's valuation methodology failed to give proper consideration to its terms. Although the County does, at times, contend that it “is *not* arguing that the Courts below were required to use the ground lease as the sole basis for valuation, or that anytime a lease exists, that lease must be used as the basis for valuation” (emphasis in original), it views the relationship embodied in that document as fundamentally a real estate transaction, not a broader business relationship, and it views

¹ The County phrased the Questions Presented in its brief as follows:

1. Did the Lower Courts err as a matter of law by failing to properly consider the arms-length ground lease between Appellee and its landlord in determining the value of the property in question?
2. Did the Tax Court err as a matter of law in re-characterizing the ground lease as a “business arrangement,” which, if accurate, could constitute an unlawful arrangement under Maryland law?
3. Did the Lower Courts err in mandating the use of an assessment methodology that is not supported by Maryland law or credible evidence?

the revenue PPE pays each year to Simon under that ground lease as reflecting the value a willing buyer would pay a willing seller for the property, and that the Tax Court erred by not relying on it:

The Tax Court, in its opinion, while explicitly recognizing its obligation under established legal principles, chose to disregard the ground lease, and accordingly the value the parties to it placed on the property, by simply holding that the ground lease is not *really* a ground lease, but in fact a business partnership agreement. This flies in the face of the facts and settled Maryland law and constitutes reversible error.

(Emphasis in original).

The Maryland Tax Court, its name notwithstanding, is an administrative agency, and we review its decisions against the same standard as other agency decisions. *Frey v. Comptroller of Treasury*, 422 Md. 111, 136 (2011). When reviewing Tax Court decisions, we look through the decision of the circuit court and review the Tax Court directly. *Id.* at 136–37. The Tax Court’s findings “must meet the substantial evidence standard.” *Gore Enter. Holdings, Inc. v. Comptroller of Treasury*, 437 Md. 492, 504 (2014) (citing *Frey*, 422 Md. at 137). We determine “whether a reasoning mind reasonably could have reached the factual conclusion the [Tax Court] reached.” *State Ins. Comm’r v. Nat’l Bureau of Cas. Underwriters*, 248 Md. 292, 309 (1967). “The legal conclusions of an administrative agency that are ‘premised upon an interpretation of the statutes that the agency administers’ are afforded “great weight,”” whereas agency decisions premised upon case law are not entitled to deference. *Gore*, 437 Md. at 505 (quoting *Frey*, 422 Md. at 138).

First, the County argues that the Tax Court failed to give appropriate consideration

to the terms of the ground lease. In the County’s view, the ground lease memorialized a pure real estate transaction, and the best available information about the value of the property lies in the value these parties placed on it in that document. The Tax Court found, and PPE contends, that the ground lease encompasses a broader business relationship, and that the payments PPE makes to Simon under the agreement include payments for value beyond the real property itself. This assessment put the Tax Court to the initial question of determining what this relationship was and how to allocate the revenue to the value of the land versus the value of other non-property business interests. In finding that the ground lease encompassed more than a pure real estate transaction, the Tax Court analyzed the terms of the agreement itself (beyond its mere title) against Maryland cases describing intertwined business and real estate relationships. And on this record, we cannot say that the Tax Court erred in construing the relationship as it did.

Because the Tax Court relied largely on two cases, *Supervisor of Assessments of Allegany Cnty. v. Ort Children Trust Four*, 294 Md. 195 (1982), and *Supervisor of Assessments of Prince George’s Cnty. v. Berman*, 81 Md. App. 675 (1990), we start with a look at both. *Ort* involved a property subject to a long-term lease that paid a rent below the market rate. 295 Md. at 196–97. The county assessed the property using an income approach to value that utilized market rents, not the lease terms. *Id.* at 197–98. The Tax Court reduced the assessment, noting that the assessor should have given more weight to the actual lease terms and that the owner’s position was “based in facts, most importantly the lease rental and terms which would primarily control the purchase price this property

could expect to produce if placed on the open market for sale.” *Id.* at 199. The Court of Appeals affirmed, agreeing with the county that the lease should be considered part of the real estate being assessed, but affirming the Tax Court’s valuation of the property in the context of the lease agreement and the condition of the property. *Id.* at 210–11.

In *Berman*, we noted that “[a]lthough *Ort* does not mandate that contract rent must be used to value income producing property when a long-term lease is involved, it does require that the [effect] of the lease be considered in any value.” 81 Md. App. at 679. *Berman* involved a mall property whose anchor tenant, Montgomery Ward, paid below-market rent compared to the other tenants. There too, the Supervisor of Assessments imputed a market-level rent to the anchor tenant, but the Tax Court relied on an income method approach and, after considering the actual contract rent, reduced the assessment. In this Court, the Supervisor argued that the Tax Court had ignored its expert’s approaches, all of which were alternatives to the actual income method. We affirmed and held that the Tax Court’s assessment was supported by substantial evidence because it had selected, from alternative valuation methods, an approach that considered the actual rental income. We concluded by noting that “[t]o select among alternatives is not equivalent to ignoring the unselected alternatives, especially where, as here, none of the assessor’s alternatives were, in light of *Ort*’s requirement that contract rent be considered, supported by substantial evidence.” *Id.* at 687.

This case presents the inverse of *Ort* and *Berman*. In those cases, the assessing authorities sought to depart (upward) from the straight contract rent because, in their view,

the rents valued the property below the market. Here, on the other hand, the Supervisor argues that *Ort* and *Berman* compel an assessment that attributes all of the ground lease payments to the value of the property. That position overreads those cases. The Tax Court noted aptly that “while [*Ort* and *Berman*] reference [a] lease as an item that must be considered for its effect on the value of a property, they do not present a clearly defined standard or bright-line rule for consideration of a lease.” To be sure, contract rent is an important consideration because “the market value of property is the value a willing purchaser will pay for it to a willing seller in open market, eliminating exceptional and extraordinary conditions giving the property temporarily an abnormal value.” *Ort*, 294 Md. at 201 (quoting *Rogan v. Calvert Cnty. Comm’rs*, 194 Md. 299, 311 (1950)). But this last caveat is critical—unless the “exceptional and extraordinary conditions” are eliminated, using the straight contract rent might be “misleading as to the fair cash value of the property involved.” See *id.* at 201, 204 (quoting *Springfield Marine Bank v. Prop. Tax Appeal Bd.*, 44 Ill. 2d 428, 431 (1970)).

The Tax Court took direction from *Ort* and *Berman* in determining a valuation for the land that didn’t also include payments for value beyond the value of the land. The Tax Court absolutely needed to consider the rent negotiated by the parties to the contract, and it did. It highlighted several characteristics of the arrangement that it considered hallmarks of a typical ground lease: the document was “self-labeled a ground lease,” the parties referred to themselves as “landlord” and “tenant,” and the document included a section captioned “Grant of lease” that granted a leasehold interest in the property. Along with

other standard leasing provisions, the ground lease included several contingencies and speculative provisions. The Tax Court noted the payment of 1% of PPE’s gross retail sales and revenue to Simon Property Group was “variable throughout the duration of the Ground Lease and [was] directly correlated to the operation of the casino business enterprise” and concluded that the ground lease “must be considered in determining the value of the Subject Property.”

After analyzing the characteristics of the ground lease itself, the Tax Court examined valuations offered both by PPE and the Supervisor. For the tax years 2012 and 2013 the land was valued as of January 1, 2011, but the casino didn’t open until June 6, 2012. As such, the Tax Court found (citing a New Jersey Tax Court case) that the lease term requiring payment of 1% of the gross retail sales and revenue could not contribute to an accurate valuation because of the land the payment was altogether speculative as of January 1, 2011. *See Lawrence Assocs. v. Lawrence Twp.*, 5 N.J. Tax 481, 569 (1983) (stating that when an “income stream” (from percentage rent) has yet to materialize, it is considered “speculative”). Although everyone anticipated significant profits from the casino, this venture was a new enterprise in this location and a new relationship between these parties. Without information from past sales and revenue from a casino located in this area or information from a similar deal negotiated between these parties, it was not unreasonable for the Tax Court to find that revenue projections increased the valuation beyond what a willing purchaser would pay for the land. The Tax Court also found that including all of the casino revenue in the valuation would attribute the land value more

properly attributable to the broader business relationship. Based solely on the ground lease, as of 2011 “[a]rguably, [] the land was then only worth a guarantee of \$500,000 annually, with a 1% annual increase based on \$2,000,000, under the willing buyer and willing seller standard.” Including the uncertain additional casino revenue also raised the concern, as the Tax Court noted, that “[i]f the income of the Casino dropped from its current numbers, the requisite property assessment would theoretically have to change, perhaps drastically. Such a possibility shows that a valuation using the lease is an analysis of the business more so than the property.” The Tax Court appropriately acknowledged and considered the terms of the ground lease in reaching its ultimate valuation, and its treatment of that relationship is supported by substantial evidence in the record.

Second, the County argues that the Tax Court incorrectly characterized the ground lease as a business partnership. That overreads the Tax Court’s opinion. The Tax Court never refused to consider the ground lease as a lease—it read the substantive terms of the agreement and analyzed whether they valued the land alone or a broader relationship. And based on those terms, the Tax Court found specifically that “the percentage rent language of the ground lease *suggests a business arrangement* between the parties which *must be considered* in determining the value of the Subject Property.” (Emphases added.) This was the Tax Court’s only mention of a “business agreement,” but in any event doesn’t undermine the Tax Court’s analysis of the substantive terms of the relationship embodied in the ground lease.

Finally, the County argues that the Tax Court used the incorrect assessment method

in reaching its ultimate valuation. The County contends that the Tax Court’s assessment was “not supported by competent evidence” because the Tax Court did not rely on the ground lease even though, as discussed above, the Tax Court did consider it.

The Tax Court recognized that “[t]he Maryland statutory scheme does not require one method of evaluation over another. The courts have repeatedly echoed the willing purchaser and willing seller approach to arrive at the value of a property.” It acknowledged the assessment methods presented by both sides and chose to follow the sales comparison method, the method offered by PPE, over the County’s rent income approach. PPE’s expert, Ronald Lipman, “estimate[d] the value of the site as though vacant and available to be developed to its highest and best use” based on probable alternative buyers for the Arundel Mills Mall property and comparable land sales, including two other Maryland casino properties along with vacant land in Las Vegas, Nevada. Mr. Lipman’s testimony and the data on which he relied provided more than sufficient evidentiary support for the Tax Court’s conclusion that “[t]he methods used by the [Supervisor and the County] to determine the value of the land did not amount to a valuation of the land.”

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED. ANNE ARUNDEL COUNTY
TO PAY COSTS.**