Circuit Court for Carroll County
Case No. C-06-CV-19-000163

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2123

September Term, 2019

PENGUIN RANDOM HOUSE LLC

v.

MAYOR AND COMMON COUNCIL OF WESTMINSTER

Fader, C.J.,
Leahy,
Reed,

JJ.

Opinion by Fader, C.J.

Filed: April 22, 2021

Penguin Random House, LLC ("Penguin"), the appellant, challenges the decision of the Mayor and Common Council of Westminster ("Westminster"), the appellee, to deny Penguin's request for a refund on a levied special assessment. Westminster imposes a special water and sewer assessment on all newly constructed buildings that connect to water and sewer lines it builds and maintains. The purpose of the assessment is to recover the capital costs of improvements to the city's water and sewer system from properties that benefit specially from the improvements. Penguin contends that the special assessment Westminster charged for Penguin's construction of a new warehouse violated Maryland common law and the United States Constitution because the amount charged was disproportionate to the benefit it will receive based on its anticipated water usage. Penguin sought a refund of the special assessment on that ground, which Westminster denied. The Maryland Tax Court affirmed Westminster's denial, and the Circuit Court for Carroll County upheld the Tax Court's decision on judicial review.

Penguin's challenge is premised on a misunderstanding of how benefits from improvements that are funded by a special assessment are evaluated. Under well-established Maryland law, such benefits are measured by the value accruing to the property from the improvements; the property owner's present or anticipated use of the property is irrelevant. Penguin failed to introduce any evidence to challenge Westminster's presumptively valid legislative judgment that Penguin's property benefitted by an amount at least equal to the amount of the assessment. As a result, we discern no error in the Tax Court's decision, which was based on substantial evidence in the record, and will therefore affirm the circuit court's judgment.

BACKGROUND

Westminster's Special Benefit Assessments for Water and Sewer Service

Sections 124-24 and 160-8 of the Westminster City Code authorize special benefit assessments against any building to which Westminster provides water and sewer service, respectively, "prior to the issuance of a building permit[.]" Westminster imposes these special assessments on all new construction serviced by its water and sewer system to recover its capital costs in building capacity to provide service to new customers. At the relevant time, Westminster imposed such assessments pursuant to Amended Ordinance No. 795 ("Ordinance 795"), which became effective on January 1, 2009.[1]

The preamble to Ordinance 795 identifies that Westminster had "undertaken an extensive review of . . . fees, charges and costs in order to establish and collect reasonable amounts for its services," and that the purpose of the ordinance was "to adopt a comprehensive schedule" "to amend, update and standardize various fees, charges and costs regarding the provision of its utility services[.]" Ordinance 795 thus establishes fee schedules for, among other things, applications, waivers, and extensions of service; permits; connection charges; appeals; meters; main extensions; and service discontinuation. The ordinance also sets the amounts of the special utility benefit assessments for both sewer and water based on the type of use, with separate schedules applicable to single-family dwelling units; multifamily dwelling units; industrial manufacturing; schools and colleges; hospitals and nursing homes; hotels and motels;

[1] In the Tax Court, the parties stipulated that Ordinance 795 was properly enacted.

commercial space; and, as most relevant here, industrial warehousing. For warehousing, the charges are calculated based on the square footage of the warehouse according to the following schedule:

	Sewerage	Water
Up to 2,000 square feet	$5,496	$5,244
Next 3,000 square feet	$1.02 per square foot	$1.00 per square foot
Next 5,000 square feet	$0.84 per square foot	$0.84 per square foot
Next 20,000 square feet	$0.67 per square foot	$0.69 per square foot
All over 30,000 square feet	$0.46 per square foot	$0.46 per square foot

The rates included in the schedule were based on a 2008 cost-of-service study conducted for Westminster by Municipal & Financial Service Group, a public sector utilities consulting firm. Beginning January 1, 2009, these rates have applied uniformly to all new warehouse construction. Westminster has used square footage as the sole method of calculating water and sewer special assessments for warehouses since at least 2004.

Westminster's Special Benefit Assessment Levied on Penguin

Penguin owns and operates a book distribution business in Carroll County that is outside of Westminster city limits, but which is serviced by the city's water and sewer system. During the summer of 2017, Penguin submitted a site plan to Carroll County to expand its facilities, which then comprised roughly 1.3 million square feet, by the addition of a new 189,865 square foot warehouse, in which Penguin intended to store seldom-used books. At the same time, Penguin also submitted a water and sewer service application to Westminster. In the application, Penguin projected that its intended use of the new warehouse would require only 20 employees and the addition of a single restroom. Penguin estimated that each employee would generate a water demand of 15 gallons per day, for a

total of 300 gallons a day. Westminster approved the water and sewer application in June 2017, and Carroll County approved the site plan in September 2017.

When Penguin applied for a permit to begin construction, Westminster issued an invoice for water and sewer special assessment fees calculated pursuant to the rates set forth in Ordinance 795, which amounted to $99,793 for water and $99,705 for sewer, for a total of $199,498. Penguin disputed the assessment in writing, complained that the amount was "excessive in relation to the benefit being conferred upon the property," and requested that the assessment instead be calculated based on Penguin's expected water usage. After Westminster declined to change the assessment amount, and because Penguin could not begin construction without the building permit, Penguin paid the assessment. Penguin then submitted a claim for a refund.

Westminster held a hearing on Penguin's refund request in March 2018, presided over by Tammy Palmer, Westminster's Director of Finance and Administrative Services. Penguin's two witnesses testified that the warehouse addition would replace off-site storage and would use fewer employees than an ordinary warehouse. They testified that the "realistic number" of employees in the warehouse at any given time would be around eight and that their actual water use would most likely be less than the projected 15 gallons per day per full-time employee.

In April 2018, Ms. Palmer issued a written denial of the refund request. In explaining the basis for her conclusion that the special assessment was valid, Ms. Palmer stated that she believed that "the [Westminster Common Council] made a reasonable legislative judgment about the total costs of water and sewer related capital projects over

time," and that the costs imposed upon Penguin and others were "based on a definite and just plan." Ms. Palmer's letter included an extensive discussion of the evidence presented at the hearing and Maryland case law concerning special assessments.

Penguin timely appealed to the Maryland Tax Court, which held a hearing in January 2019. Westminster called three witnesses. Ms. Palmer testified that Ordinance 795 was lawfully enacted and that it applied to all new construction to which Westminster provides water and sewer service. Edward J. Donahue, III, president of the consulting firm Westminster had retained in setting the applicable rates, testified as an expert in municipal rate setting. He testified that the special assessment was intended to "recover the capital costs related to the amount of capacity built to handle new customers"; that the special assessment charges were not related to the amount of water consumed by individual users; and that, in his opinion, the square-footage methodology was not an unreasonable or arbitrary way to assess the benefits of the system. Eric Callocchia, a senior manager at the same consulting firm, testified as an expert in water and sewer rate setting. Mr. Callocchia opined that Westminster's method for calculating assessments was a reasonable way to apply the costs of the water and sewer system to the eventual benefits of that system. He also explained that the study underlying the calculation of water and sewer assessments assumed that a warehouse of the size Penguin proposed "would have 450 some employees." Penguin elected not to call any witnesses.

In March 2019, the Tax Court affirmed Westminster's denial of Penguin's refund claim. *Penguin Random House, LLC v. Westminster*, No. 18-MI-00-0346, 2019 WL 1752585 (Md. Tax Ct. Mar. 7, 2019). The Tax Court summarized Penguin's argument as

"that the assessments are grossly disproportionate to the amount of sewer and water that will be used in the expanded warehouse facility," and the "central issue" as "whether Westminster could or should have imposed an alternate assessment in response to [Penguin's] fairness argument." *Id.* at *2. The Tax Court concluded that Westminster "made a reasonable legislative judgment about the total costs of water and sewer related capital projects over time and imposed those costs on the public generally based on a definite and just plan," which was extrapolated from the calculations of the 2008 cost-of-service study. *Id.* Observing that Westminster "has for many years based these assessments on square footage of proposed improvements rather than linear square footage," the court stated that "square footage is more appropriate in the context of water and sewer improvements because it better reflects the theoretical impact of a particular improvement on the water and sewer systems." *Id.* The court further stated that an assessment "based on the anticipated number of employees for individual use could result in equally disparate assessments." *Id.*

After distinguishing cases on which Penguin relied, the Tax Court concluded that Westminster's use of square footage to calculate the assessment "does not have a constitutionally disproportionate impact on [Penguin]" because its "property is not different from other properties in Westminster in a manner that makes use of the square foot rule unfair." *Id.* at *3. Although "[Penguin's] present use of the property may have a lesser burden" than the way other properties are used, "the space inside the building will not change. Under the applicable statutes, all owners are treated the same regardless of a different or changing use." *Id.* In other words, "[t]he fact that [Penguin] will use less water

and sewer than other warehouses . . . does not alter the reasonableness of Westminster's legislative apportionment of the capital costs of the system." *Id.* The court thus held that Westminster's use of square footage "provide[d] an appropriate assessment of the potential impact on water and sewer service by [industrial and commercial] uses," including warehouses like Penguin's. *Id.* at *4.

Penguin sought judicial review in the Circuit Court for Carroll County, which affirmed on the ground that the Tax Court's decision was "not erroneous as a matter of law" and that "substantial evidence in the record" supported the decision. This timely appeal followed.

DISCUSSION

"The Tax Court is 'an adjudicatory administrative agency in the executive branch of state government.'" *Comptroller v. Wynne* (*Wynne I*), 431 Md. 147, 160 (2013) (quoting *Furnitureland S., Inc. v. Comptroller*, 364 Md. 126, 137 n.8 (2001)). In reviewing a decision of the Tax Court, we apply "the same standards of judicial review as contested cases of other administrative agencies under the State Administrative Procedure Act." *Wynne*, 431 Md. at 160 (citing Md. Code Ann., Tax Gen. § 13-532(a)(1)). In doing so, "we 'look through' the decision of the Circuit Court to directly review the agency decision[.]" *Wynne v. Comptroller* (*Wynne II*), 469 Md. 62, 80 (2020). For factual conclusions made by the Tax Court, we apply "the 'substantial evidence' standard, in which 'we consider whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Green v. Church of Jesus Christ of Latter-Day Saints*, 430 Md. 119, 132 (2013) (quoting *Frey v. Comptroller*, 422 Md. 111, 136 (2011)).

Although we accord the Tax Court "a degree of deference" in interpreting Maryland tax law, that deference does not extend to its interpretations of other areas of law or the federal or State constitutions. *See Wynne I*, 431 Md. at 160-61; *Green*, 430 Md. at 132 ("The deference we accord to the agency's factual findings does not extend to the agency's purely legal conclusions.").

I. SPECIAL ASSESSMENTS IN MARYLAND LAW

A special assessment is "a tax upon property levied according to *benefits* conferred on the property." *Leonardo v. Bd. of County Comm'rs of St. Mary's County*, 214 Md. 287, 307 (1957). Special assessments are levied to "defray the expense of a local municipal improvement," *Montgomery County v. Schultze*, 302 Md. 481, 489 (1985), by providing a mechanism to distribute the cost of the improvement to the properties that will benefit directly from the service, *see Maryland & Pa. R.R. v. Nice*, 185 Md. 429, 431-32 (1945). Although a special assessment is not a tax, it is "an exercise of the *taxing power*[.]" *Gould v. Mayor & City Council of Baltimore*, 59 Md. 378, 380 (1883).

To justify a special assessment, the improvement for which it is assessed must have "both a public purpose and a special benefit to the properties to be assessed over and above that accruing to the public." *Schultze*, 302 Md. at 489, 491. The theory underlying a special assessment is that "[n]o *burden* is imposed by [the assessment] upon the person on whom it operates. It is a mere requisition, that the owners of property, the value of which is enhanced . . . , shall pay for the improvement in a *ratio* to the benefit derived from it." *Alexander v. Mayor & City Council of Baltimore*, 5 Gill 383, 396 (1847); *see also* 4 John Martinez, Local Government Law § 24:1 (2d ed. 2020) (identifying the "nexus between

special assessments and private benefits" as the fundamental distinction between special assessments and taxes or other fees). Thus, "because the improvement for which the assessment is levied causes an enhancement of the property's value," the property owner suffers "no pecuniary loss" by being required to pay the assessment. *Schultze*, 302 Md. at 489; *see also Gould*, 59 Md. at 380 ("In the payment of the assessment thus made, the adjacent owner is supposed to be compensated by the enhanced value of [the owner's] property, arising from the improvement.").

Special assessments are "subject to constitutional limitations." *Leonardo*, 214 Md. at 307. A special assessment constitutes an unconstitutional taking if the property on which the assessment is levied is "not being benefitted by the improvement to an extent substantially equal to the amount of the assessment[.]" *Schultze*, 302 Md. at 491. Conversely, a special assessment has no constitutional infirmity if the property is "increased in value . . . to an amount substantially equal to the sum [the owners] are required to pay." *Leonardo*, 214 Md. at 307.

Much of the early appellate case law concerning special assessments in Maryland arose in the context of street paving, particularly in Baltimore. In *Mayor & City Council of Baltimore v. Howard*, the Court of Appeals upheld the validity of a paving assessment authorized by a city ordinance to be charged to the owners of the lots fronting the paved roads because "[t]he paving of streets is *prima facie* for the benefit of the parts or districts of a town through which they pass," and so could be levied directly "on such districts for

that purpose[.]"[2] 6 H. & J. 383, 392 (1825). Notably, the Court went on to observe that "though in particular instances [an improvement] may turn out not to be practically for the benefit of the immediate district, yet that cannot affect the validity of the ordinance, which had such benefit in view." *Id.*; *see also Alberger v. Mayor & City Council of Baltimore*, 64 Md. 1, 9 (1885) (upholding special assessment for street paving).

Our appellate courts have subsequently confirmed the availability of special assessments to recover costs associated with other public improvements that provide special benefits to particular properties, including community property maintenance projects, *see Williams v. Anne Arundel County*, 334 Md. 109, 117-19 (1994), erosion prevention, *see Leonardo*, 214 Md. at 296, and the construction and improvement of water and sewer facilities, *see Dinneen v. Rider*, 152 Md. 343, 365 (1927); *Welch v. Coglan*, 126 Md. 1, 7 (1915).

The manner and calculation of a special assessment is a "legislative question[.]" *Leonardo*, 214 Md. at 307. A "legislative judgment" to adopt a particular method of levying an assessment "is entitled to the highest deference." *Williams*, 334 Md. at 123; *see also Bassett v. Ocean City*, 118 Md. 114, 120 (1912) (stating that where "the improvement is one that may specially benefit the property upon which the assessments are made, the legislative determination of the question of benefits should be regarded as conclusive").

[2] In a companion case, *Mayor & City Council of Baltimore v. Moore*, the Court of Appeals rejected a special assessment for road paving where the preamble to the ordinance specified that the assessment was not for the special benefit of the properties assessed, but instead was for the benefit of travelers and for safe navigation generally. 6 H. & J. 375, 382 (1825).

Such a judgment is "presumed correct," and, where a special assessment is "imposed according to a definite and just plan, [it] will not be disturbed where neither fraud nor mistake appears." *Schultze*, 302 Md. at 490; *see also Dinneen*, 152 Md. at 364 (upholding the validity of a front foot methodology for a special assessment for water and sewer improvements that was applied uniformly).

"[I]n calculating a special assessment for improvements," a municipality "has broad discretion to choose the method used to decide what benefits a property receives from an improvement and to apportion the costs to individual properties." 13 McQuillin Mun. Corp. § 37:171 (3d ed. 2020). More than a century ago, the Court of Appeals recognized that available methods for calculating assessments included "by the front foot, by the area of the fronting lots, or by their value[.]"[3] *Bassett*, 118 Md. at 123 (quoting *City of Baltimore v. Johns Hopkins Hosp.*, 56 Md. 1, 32 (1881)). A legislative judgment to adopt a particular method of assessment gives rise to "a presumption that local improvements do indeed specially benefit the properties which have been assessed." *Sulzer v. Montgomery County*, 60 Md. App. 637, 650 (1984). Because "exact equality in assessments of this type is impossible," *Silver Spring Mem'l Post No. 2562 Veterans of Foreign Wars v. Montgomery County* (*V.F.W.*), 207 Md. 442, 453 (1955), the fact that "[o]ccasional hardships may result from the adoption of [a particular] mode" of assessment is not a basis for striking it down, *Bassett*, 118 Md. at 123. "'[I]n the absence of a showing of arbitrary

[3] A "front foot" assessment is "a method of property assessment based upon the length of frontage of the property[.]" *Front-foot rule*, Merriam-Webster.com Dictionary, accessed March 23, 2021, https://www.merriam-webster.com/dictionary/front-foot%20rule.

action and plain abuse of power,' the legislative body's decision is final." *Williams*, 334 Md. at 123 (quoting *Pumphrey v. County Comm'rs of Anne Arundel County*, 212 Md. 536, 542 (1957)).

Legislative judgments are not, however, beyond question. For example, although use of a front foot rule has been approved for assessing the benefits of public improvements from, among other things, street paving, *V.F.W.*, 207 Md. at 451, and construction of a municipal sewer system, *Harlan v. Bel Air*, 178 Md. 260, 268-69 (1940), the Court of Appeals has cautioned that it "should never be employed when it can not be a fair standard by which to measure benefits," *id.* at 268. An assessment that "is obviously unjust and confiscatory" violates both Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution. *Id.*

Particularly relevant for our purposes, Maryland's appellate courts have long recognized that in assessing the benefit to a property for purposes of determining the permissible amount of a special assessment, the benefit is measured by the "enhanced value of [the] property[.]" *Alexander*, 5 Gill at 396. In assessing enhanced value, courts consider not the present use of the property but the property's value if given its "most valuable monetary use." *V.F.W*, 207 Md. at 448-49; *see also* 14 McQuillin Mun. Corp. § 38:6 (3d ed. 2020) (identifying the basis for the validity of special assessments as "enhancement of values"). Accordingly, an assessment will not be held "unconstitutional because, owing to its present particular use, the [property] assessed is not benefitted by the improvement," 5 M.L.E. Con. Law § 260 (2021), as long as the property is benefitted when considering other possible uses, *see, e.g.*, *Friedenwald v. Baltimore*, 74 Md. 116, 126 (1891) (holding

that the trial court had "properly refused" a property owner's request for a jury instruction that benefits could be assessed only if they "ma[d]e the property more valuable to use," because "the rule as settled in this state" was that "the enhanced value of the property is the true standard by which to measure the benefits"); *Mayor & City Council of Baltimore v. Proprietors of Green Mount Cemetery*, 7 Md. 517, 536-37 (1855) (upholding a paving assessment charged to a cemetery property whose owner was "indifferent to [the paving]" because, regardless of the owner's indifference, the paving "must be viewed practically as a benefit conferred on the property").

Thus, in *Consolidated Gas, Electric Light & Power Company v. Mayor & City Council of Baltimore*, the Court of Appeals upheld an assessment against the property of a utility company when the City of Baltimore took part of the company's property to build a road. 130 Md. 20, 24 (1917). The utility company argued that the property's use as a power plant was not benefitted at all by the road and that because the terms of its 999-year lease on the property restricted it only to that use, no other use should be considered. *Id.* at 23-24. The Court disagreed because "[t]he assessment of street benefits is a proceeding in rem. It involves a charge upon the property itself on account of an increase in its value resulting from the improvement which the proceeding has in view." *Id.* at 26. That is, "[i]f there is in fact an enhancement of the market value of the land in consequence of the street being opened," the assessment may be made, and "[t]he fact that the land was being used for a particular purpose would not preclude an inquiry as to its availability for other uses which would add to its value in the market." *Id.* at 26, 27. In assessing the benefits

conferred by the improvement, the Court concluded, "all the available uses of the land may properly be considered."[4] *Id.* at 27.

The Court of Appeals came to a similar conclusion in *V.F.W.*, 207 Md. at 445. There, Montgomery County built a road through a six-acre tract that the V.F.W. owned and used "as a Post home for the organization and for its various social functions," to reach a new school that the county was constructing. *Id.* at 445-46. The V.F.W. objected on the ground that its property, unlike that of nearby subdivisions, was not benefitted at all by the road based on the property's current and intended use. *Id.* The Court of Appeals rejected that argument, concluding that it was "really a variation of the objection to considering the use of its land for any purpose other than that to which it is presently put[.]" *Id.* at 450. Considering the benefit to the property if it were used for suburban development—"its most valuable monetary use"—the Court affirmed the assessment, which it concluded was neither "unwarranted" nor "a taking of the appellant's property without due process of law."[5] *Id.* at 453.

[4] Observing the need for consistency between the assessment of damages for a taking of private property and the assessment of the value of benefits accruing to private property from a public improvement, the Court observed that "[i]t would be a very illogical rule which would require damages to be estimated with due regard to all the uses to which the land may be adapted, and would exclude from consideration all but its actual and present use for the purposes of the benefit assessment." *Consol. Gas*, 130 Md. at 27.

[5] Although not identified expressly as an exception to the general rule, the Court of Appeals has treated railroad and street railway property differently than other types of property. *See, e.g.*, *V.F.W.*, 207 Md. at 450 (recognizing a "difference between railroad and street railway rights of way and other property, insofar as special assessments are concerned"); *Nice*, 185 Md. at 436 (rejecting special assessment for paving against railroad right-of-way on the ground that there was "no evidence that the repaving will confer any

Our courts have similarly focused on the benefits to the property generally, rather than to the present use of the property, in cases in which special assessments have been invalidated. In *Leonardo v. St. Mary's County*, for example, the Court of Appeals held that an assessment for the erection of a seawall to prevent erosion could not be charged to lots that received no benefit from the improvement because they were already protected by a previously erected private seawall.[6] 214 Md. at 310. And in *Schultze*, the Court remanded for a determination of whether properties subject to an assessment were charged more than the benefit they received. 302 Md. at 492-93. In both cases, the Court's focus was on the benefits accruing to the properties, not any particular use of the properties.

In *Washington Suburban Sanitary Comm'n v. Evans*, 62 Md. App. 577 (1985), the case on which Penguin relies most heavily, this Court similarly focused on the benefit to the property. There, the use of a front foot method for calculating a special assessment for a water and sewer charge resulted in assessing one irregularly shaped lot double the amount assessed against other properties of roughly similar sizes. *Id.* at 586. This Court held that the assessment was unconstitutional as applied to the subject property because it was "far

practical benefit upon the right of way by enhancing the railroad use, so as to form the basis for a special assessment"); *United Railways & Elec. Co. v. Baltimore*, 127 Md. 660, 673 (1916) (rejecting special assessment for paving against railroad property on the ground "that a railway company can[not] be specially benefited over and above the other inhabitants or travelers on the streets by improved pavements").

[6] In *Leonardo*, the Court upheld the use of the front foot method to assess the properties that were benefitted by the erection of the seawall. 214 Md. at 307-08. The Court observed that "[t]he mode of assessment is a legislative question, subject to constitutional limitations," and that in arguing that a different method of assessment would have been better, "[t]he appellants neither assert[ed] nor attempt[ed] to prove that the benefits received were not substantially in accord with their assessments." *Id.*

in excess of those levied against similarly benefited properties[.]" *Id.* Most notably for our purposes—and, as we will discuss, contrary to the position advocated by Penguin—this Court's decision in *Evans* did not focus on the value of the improvement to the property owner's current or anticipated use of the property. Instead, the Court focused on the amount of the charge as compared to the amount assessed against other properties of the same size.[7] *See id.* The Court did not mention, much less consider, the amount of water and sewer services that each of those properties would actually use. *Id.*

From these cases, we discern the following rules to assess the validity of a special assessment:

- A special assessment must have "both a public purpose and a special benefit to the properties to be assessed over and above that accruing to the public." *Schultze*, 302 Md. at 489; *V.F.W.*, 207 Md. at 448.

- The amount of a special assessment may not exceed the benefits accruing to the property. *See Schultze*, 302 Md. at 489; *Leonardo*, 214 Md. at 307.

- Legislative judgments concerning the manner and calculation of a special assessment, including the determination that properties are specially benefitted in the amount assessed, are accorded the "highest deference." *Williams*, 334 Md. at 123.

- Nonetheless, a legislative body may not choose a mode of assessment that is not "a fair standard by which to measure benefits," *Harlan*, 178 Md. at 268, nor may

[7] Although the Court in *Evans* stated that the assessment was "disproportionate to the benefit received," its analysis focused on a comparison between the amount of the assessment charged against the particular property and the amount charged against other similarly sized (but not similarly shaped) properties. 62 Md. App. at 586. *Evans* appears to be unique in Maryland special assessment jurisprudence in basing its constitutional evaluation on that comparison—i.e., vis-à-vis neighboring properties—rather than on comparing the amount of the special assessment and the benefits accruing to the subject property. Regardless, as relevant here, the Court's attention focused squarely on the respective benefits accruing to the properties, not to the present uses of those properties.

it impose against a property an assessment that is "far in excess of those levied against similarly benefited properties," *Evans*, 62 Md. App. at 586.

- In assessing the value of the benefits accruing to a property from an improvement, the relevant consideration is the most valuable use of the property, not its current or anticipated use. *V.F.W.*, 207 Md. at 448-49; *Consol. Gas*, 130 Md. at 27.

With these principles in mind, we will now turn to the case at hand.

II. THE SPECIAL ASSESSMENTS AGAINST PENGUIN'S WAREHOUSE ADDITION WERE VALID.

Penguin does not dispute that the water and sewer improvements for which the special assessment was imposed both serve a public purpose and provide a special benefit to the properties assessed over and above that accruing to the public generally. Indeed, our appellate courts have already established both points. *See Williams*, 334 Md. at 122 (recognizing that special assessments for water and sewer services are imposed for a public purpose); *Evans*, 62 Md. App. at 582 ("[T]he construction of water and sewer facilities adjacent to property conveys a special benefit to that property."). Penguin also does not dispute that the special assessment imposed was calculated to recover Westminster's capital costs in constructing and maintaining its water and sewer system. Instead, Penguin mounts an as-applied challenge to the amount of the assessment against its property on the ground that because its projected use of the new warehouse will result in a significantly lower level of water consumption than other warehouses of similar size, the amount of the assessment is disproportionate to the benefit Penguin has received.

We discern no error in the Tax Court's analysis upholding the assessment. As we have observed, Westminster was duly authorized to impose a special assessment to recover

the cost of constructing and maintaining its water and sewer system, and it imposed such an assessment through a validly enacted ordinance. As noted, the city's "legislative determination is presumed to be correct" and entitled to "the highest deference." *Williams*, 334 Md. at 123, 128. Penguin has not provided any reason for us to second guess that legislative judgment. To the contrary, the record before the Tax Court contained substantial evidence to support its conclusion that Westminster "made a reasonable legislative judgment about the total costs of water and sewer related capital projects over time" and that its assessment system was "based on a definite and just plan." *Penguin*, 2019 WL 1752585, at *2. The city presented the study on which its assessment was based and expert testimony supporting the reasonableness of the methodology it employed. The record also demonstrates that Westminster's assessment plan had been consistently applied in the same manner to all industrial warehouse construction according to the schedule set forth in Ordinance 795, so that all similarly sized properties were treated identically. It is therefore a "definite and just plan," *id.*, that uses a methodology with a rational relationship to the benefit reasonably expected to accrue to the assessed properties. Absent evidence of fraud or mistake, there is no basis to disturb that legislative judgment. *See Schultze*, 302 Md. at 490.

In its appeal, Penguin contends that the Tax Court made erroneous factual findings that were not based on substantial evidence in the record; and that the court erred in its legal conclusions that the special assessment complied with Maryland common law, did not amount to an unconstitutional taking, and was not wrongfully collected. We will address each argument in turn.

First, Penguin argues that the Tax Court made two factual findings that were not supported by substantial evidence in the record, both contained in the following passage:

> The City has for many years based these assessments on square footage of proposed improvements, rather than linear road frontage. Square footage is more appropriate to the context of water and sewer improvements because it better reflects the theoretical impact of a particular improvement on the water and sewer systems. Moreover, a determination of water and sewer assessments based on the anticipated number of employees for individual use could result in equally disparate assessments.

Penguin, 2019 WL 1752585, at *2. Penguin contends that the record does not contain substantial evidence to support findings that (1) square footage is a more appropriate measure of the theoretical impact of a particular improvement on water and sewer systems than linear road frontage, or (2) a determination based on anticipated number of employees might result in equally disparate assessments. Undermining both conclusions, Penguin argues, is the undisputed evidence that the "true basis of the special benefits assessment ordinance"—i.e., the assumptions underlying the rates established by Ordinance 795—was the estimated number of employees the city assumed would be employed in a warehouse per square foot, which did not reflect the projected staffing of Penguin's warehouse.

Penguin's contentions are misplaced. The Tax Court did not make a finding that square footage was the best possible method for Westminster's special assessment, nor would that have been an appropriate finding for it to make. As discussed above, a legislative body's choice of the mode of assessment is accorded substantial deference as long as it is "made according to a definite and just plan[.]" *Leonardo*, 214 Md. at 307. The Tax Court found that Westminster's decision to use the square footage method was a reasonable legislative judgment, and that finding was supported by substantial evidence

discussed above. It was Penguin's burden to show that this manner of calculation was unfair, mistaken, or fraudulent. *See Murphy v. Montgomery County*, 267 Md. 224, 237 (1972) (noting that a property owner faces a heavy burden in rebutting a legislative finding that an assessment conferred benefits in a specific amount). Penguin failed to do so.

Furthermore, Penguin does not really dispute that square footage is a better basis for the assessment than linear road footage, and it has not argued below or on appeal that linear road footage would be an appropriate method of assessment. To the contrary, Penguin advocates an assessment based on anticipated number of employees, which it believes would be a better proxy for anticipated water usage. To that extent, the Tax Court's statement that a determination based on number of employees could be subject to equally disparate outcomes is simply common sense. If Westminster assessed warehouses based on estimates of the number of employees who would work there when opened, there would be no guarantee that the number of employees working there and using the water and sewer lines would remain the same in the future.[8] Perhaps most importantly, Penguin fails to offer any explanation for why the number of employees working in a warehouse at any particular time bears any rational relationship to the value accruing to a property—as

[8] Penguin suggests that Westminster could account for changes in the use of warehouses by imposing new or adjusted assessments when such changes occur. But that is not the system Westminster adopted. Westminster's water and sewer assessment is imposed once, at the time a building permit is obtained. Accordingly, Westminster selected a basis for assessment that is reflective of the benefit to the property as it could be used, rather than as its owner anticipated using it at a particular moment in time. In any event, the Tax Court's role was to assess the validity of the special assessment Westminster imposed against Penguin's property, not to determine if Penguin could identify a 'better' system.

opposed to the owner's current use of that property—from the water and sewer improvements at issue. In sum, there was substantial evidence to support the Tax Court's findings.

Penguin's remaining arguments all suffer from a common flaw, which is its focus on its anticipated water use as the foundation for its arguments that the assessment was excessive. As set forth above, the relevant consideration for determining the validity of a special assessment is the benefit accruing to the property from the improvement. Stated simply, the amount of water Penguin presently intends to use is irrelevant.[9] In focusing exclusively on projected water use, Penguin failed to present any evidence to challenge the presumptively correct legislative judgment that the value of its property was benefitted from its connection to Westminster's water and sewer system in an amount at least equal to the amount of the assessment. Accordingly, its challenge under Maryland common law fails.

Penguin's takings claim fails for the same reason. As discussed above, cases in which special assessments have been determined to be unconstitutional focused on the lack of value accruing to the property, *see, e.g.*, *Leonardo*, 214 Md. at 310 (holding that special assessment for construction of a public seawall could not be made against property that

[9] Penguin's actual use is, presumably, the basis for the periodic service charges it pays for water and sewer service, but service charges and special assessments are distinct. As one treatise has explained: "Special assessments are charges imposed to defray the costs of public infrastructure improvements on properties specially benefitted by such improvements. In contrast, service charges are payments based on direct, measurable consumption of publicly produced services." 4 John Martinez, Local Government Law § 24:24 (2d ed. 2020) (alterations and quotations omitted).

was already protected by a private seawall), or the disparate assessments of properties that benefitted equally from the improvement, *see Evans*, 62 Md. App. at 586 (invalidating an assessment charging the subject property double the assessment of similarly sized lots that received "identical benefits from the water and sewer facilities"). *Evans*, in particular, provides no support for Penguin's argument that a special assessment for water and sewer facilities must be based on expected water usage. To the contrary, the very problem that led the Court to strike down the assessment in *Evans* was that similarly sized lots were treated differently. Here, the result Penguin advocates—charging its property significantly less than identically sized properties—is the result *Evans* rejected. Under Ordinance 795, Penguin's warehouse is treated identically to all similarly sized warehouses. *Cf. Oliver T. Beauchamp, Jr., Post No. 94, Am. Legion Dep't of Md., Inc. v. Somerset County Sanitary Comm'n*, 243 Md. 98, 102 (1966) (upholding a special assessment when a "provision [was] made for a uniform . . . rate to be applied to all properties in the same class" because such a rate "was well within the legislative discretion").

Finally, we reject Penguin's argument that the special assessment was "'wrongfully' collected" under Section 20-113 of the Local Government Article. That statute provides in relevant part:

> A claim for a refund may be filed with the tax collector who collects the tax, fee, charge, interest, or penalty by a claimant who . . . pays to a county or municipality a tax, fee, charge, interest, or penalty that is erroneously, illegally, or wrongfully assessed or collected in any manner.

Md. Code Ann., Local Gov't § 20-113 (2013 Repl.; 2020 Supp.). Penguin's contention here appears to piggyback on its other arguments. In light of our resolution of those other

arguments, we conclude that there is nothing wrongful about collecting a special assessment that is valid both constitutionally and under Maryland common law. We thus hold that the special assessment was neither assessed nor collected wrongfully.

For the foregoing reasons, we hold that the Tax Court correctly denied Penguin's refund request and affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.