

NATIONAL HARBOR GRAND,
LLC

vs.

SUPERVISOR OF ASSESSMENTS
OF PRINCE GEORGE'S COUNTY,
et al.

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IN THE

MARYLAND TAX COURT

No. 22-RP-PG-0402 (1-2)

MEMORANDUM AND ORDER

The disputed assessment before the Maryland Tax Court ("Court") is for the property commonly known as MGM National Harbor ("Subject Property"). Improvements to the Subject Property, which is located in Oxon Hill, Prince George's County, Maryland, were constructed from 2014–16 and include a casino, hotel, convention space, and underground garage. The date of finality is January 1, 2019, and the assessment at issue applies to the three-year cycle beginning July 1, 2019 (the "Assessment").

For the reasons listed below, it is this SECOND day of JANUARY 2024, by the Court ORDERED that the Assessment of the Property Tax Assessment Appeals Board for Prince George's County is **REVERSED**, and the proper full cash value for the Subject Property is \$1,005,761,347.

The Assessment

The Assessment computation appealed from the Supervisor of Assessments ("Supervisor," or "Respondent") is as follows:

Improvements (cost approach)

\$1,160,993,059	Hard and soft construction costs
<u>-180,810,366</u>	Exclusion costs (e.g., overtime, mistake corrections, soil remission, and other costs which were not normal construction costs)
\$980,182,67	Total adjusted construction costs
<u>-19,603,653</u>	Depreciation (2%)
\$960,579,020	Total improvements value

Land (income approach)

\$12,482,307	Lease cost
<u>-124,823</u>	Vacancy (1%)
12,357,484	Effective gross income

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<u>-370,724</u>	Expenses (3%)
11,986,760	Net operating income
<u>+ 0.0625</u>	Capitalization rate
\$191,788,160	Total land value
Total Assessed Value	
\$960,579,020	Total improvements value
<u>\$191,788,160</u>	Total land value
\$1,152,367,180	Total Assessed Value (Respondent's Exhibit 1 ("R-1") at 6) (See also Joint Stipulation at ¶18)

The Parties and Their Positions

In its pre-trial memorandum of June 14, 2023, the Respondent modified its assessment as follows:

\$125,561,600	Total land value
<u>1,029,981,800</u>	Total improvements value
\$1,155,543,400	Total Assessed Value

Two days later, in a Joint Stipulation, the Assessment was represented by the parties as follows:

\$125,561,600	Total land value
<u>1,017,351,000</u>	Total improvements value
\$1,142,912,600	Total Assessed Value (Joint Stipulation at ¶3)

Near the end of the hearing, as depicted in Petitioner's Exhibits 51 & 52 ("P-51") (P-52), the Respondent reverted to its original assessment:¹

\$191,788,160	Total land value
<u>960,579,020</u>	Total improvements value

¹ In its post-hearing brief, the Respondent maintained its original assessment position (Respondent's Post-Trial Memorandum at 6, 8, and 9).

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\$1,152,367,180 Total Assessed Value

Petitioner is a Maryland limited liability company affiliated with the fee simple owner of the land. On April 26, 2013, Petitioner entered into a ground lease for the property with MGM National Harbor, LLC ("Tenant"), an unaffiliated party who, at the signing of the lease, was seeking a gaming license to operate a casino on the site. Under the terms of the lease, the Tenant is responsible for paying the property taxes, making the Tenant the real party in interest.

The Tenant paid a fee of \$21 million to the State of Maryland on May 10, 2013, to be considered for a gaming license and the State approved the Petitioner's proposal in December 2013. Over the course of the next years, 2014–16, the Tenant improved the property at a cost of over \$1 billion. The facility opened on December 8, 2016.

The Petitioner values the land and improvements as follows:

Improvements (cost approach)

\$690,106,940 Hard and soft construction costs after exclusion costs (*see* P-15 at

100)

-28,639,945 Depreciation (3.3% - 13.3% depending on the class of asset)

\$661,466,996 Total improvements value (P-15 at 105)

Land (sales comparison approach)

\$1,100,000 Per acre

x 22.9345 Acres

\$25,370,000 Total land value, rounded (P-15 at 94–5)

Total Assessed Value

\$661,466,996 Total improvements value

25,370,000 Total land value

\$686,800,000 Total Assessed value, rounded (P-15 at 105).

Near the end of the hearing, as depicted in P-51 & -52, the Petitioner marked to its original, unrounded assessment:

\$661,466,996 Total improvements value

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<u>25,370,000</u>	Total land value
\$686,836,996	Total Assessed value (P-15 at 105).
In its post-trial brief, the Petitioner's position was unchanged:	
\$661,466,996	Total improvements value
<u>25,370,000</u>	Total land value
\$686,836,996	Total Assessed Value (Petitioner's Post-Trial Memorandum at 10)

The Intervenors are Prince George's County, Maryland, and Maryland-National Capital Park and Planning Commission, both of which derive revenue from the property tax paid on the subject assessment.

The Intervenors' computation of its proposed valuation is as follows:

Improvements (reproduction cost approach)

\$1,103,697,370	Hard and soft construction costs
<u>-3,311,092</u>	Depreciation (3%)
\$1,103,697,370	Total improvements value

Land (income approach)

\$220,853,565	Total land value
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Total Assessed Value

\$1,103,697,370	Total improvements value
<u>220,853,565</u>	Total land value
\$1,324,550,935	Total Assessed value (Intervenors' Exhibits 51-52 ("I-51-2"))

Intervenors' Post-Trial Memorandum reiterated the \$1.4 billion figure.

Applicable Authority

The goal of the Court is to determine the fair market value of the land and its improvements. In *United States v. Cartwright*, 411 U.S. 546, 551 (1973), fair market value is defined as "[t]he price at which the property would change hands between a willing buyer and a

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willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.’ ”²

The Code of Maryland contains two provisions especially relevant to this case. First, “[i]ntangible personal property is not subject to assessment and property tax.” MD. CODE ANN., TAX-PROP. § 6-101(b) (2023). This would apply, *inter alia*, to a gaming license. Second, section 6-102(a) states, “[e]xcept as otherwise provided in this section, a leasehold or other limited interest in property is not subject to property tax.” *Id.* at § 6-102(a). In this case, no other subsections apply, and therefore, the lease of the land is not subject to property tax.

The Assessment carries a presumption of correctness which other parties must overcome by affirmative evidence. MD. CODE ANN., TAX-GEN. § 13-528(b) (2023).

There are generally three approaches to value real property.³ While the Court often focuses on one approach to determine value, “[t]he three approaches are interrelated, and each involves the gathering and analysis of sales, income, and cost data. . . . One or more approaches may be used . . .” *Id.* at 42. The **Cost Approach** estimates value based on the typical cost of materials and labor necessary to build a structure of similar size and quality in that location, while accounting for depreciation due to age and condition. The **Sales Comparison Approach** estimates value based upon the price, in the local market, necessary to acquire a property of similar location, quality, size, age, and condition. The **Income Approach** estimates value based upon typical market income of a similar property.⁴

In *PPE Casino Resorts Maryland v. Supervisor No. 14-RP-AA-0503-(1-2)*, 2017 WL 6804854 (Md. Tax Dec. 26, 2017) (“PPE”), *aff’d*, No. 1248, Sept. Term 2019, 2021 WL

² The Supreme Court agreed with this definition as cited in Treas. Reg. § 20.2031-1(b), further stating: “The willing buyer-willing seller test of fair market value is nearly as old as the federal income, estate, and gifts taxes themselves, and is not challenged here.” *Cartwright*, 411 U.S. at 551.

³ Among the foundations of appraisal, “[the neoclassical school of value] influenced current value theory the most because its theories helped form the basis of appraisal’s three *established* methods of value estimation—the sale comparison, income capitalization, and cost approaches.” American Institute of Real Estate Appraisers, *The Appraisal of Real Estate*, 8th ed., 1983, 38–9 (emphasis added).

⁴ See also Arkansas Coordination Assessment Division, <https://www.arkansasassessment.com/real-property/three-approaches-to-value>, last accessed December 27, 2023.

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5071889 (Md App. Nov 2, 2021),⁵ the Tax Court stated, “[W]here the gross income, and through that the eventual rental payments, are unascertainable at the time of the lease’s signing and in actuality are a measure of the success (or lack thereof) of a business venture, the rental payments are hardly an expression of the land’s value.” *Id.* at 9.

Discussion

Credibility of witnesses. Each party presented an expert witness in valuing the improvements and land: Petitioner – David Lennhoff, Respondent – Shannon Porter, and Intervenor – Suzanne Mellen.

All three parties stipulated that each party’s valuation witness was an expert in the field (Joint Stip., at ¶ 25). The Court agrees with that designation and appreciates the depth of each’s knowledge, experience, and candor, and the detailed opinions, thoughtful explanations, and fair presentations of their own and opposing witnesses’ positions over the course of the three-day hearing. The Court found each to be highly credible.

Persuasiveness of positions. Based on the facts of this case, the testimony of the witnesses, and applicable language in the Tax Court’s previous PPE decision, the Court ranks the three valuation methods in order of priority as follows: cost is the best method for improvements near the beginning of an asset’s useful life, as is the case here. For this purpose, the Court finds that 1) actual costs minus exclusion costs and 2) reproduction costs (which do not have exclusion costs) are roughly equivalent. The sales comparison approach is best for land valuation. The income approach is best when other methods fail. That approach is the most subjective of the three methods because of the many choices that need to be made (e.g., which income to use, which capitalization rate to use, which time-period to use, etc.) and therefore the most difficult to label with certainty.

If the cost approach is to be used for the improvements in this case, all three parties agreed on removing exclusion costs, which are costs that would not be expected in a normal

⁵ The Court of Special Appeals did not report its affirmation.

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construction project, e.g., overtime, correction costs for mistakes, soil remediation costs, etc. Both users of actual costs as a starting point (Respondent and Petitioner) agree on the exclusion amount (\$180,810,366 to subtract from actual costs to arrive at improvement costs). Intervenors used reproduction costs which do not have exclusion costs in their figure.

The parties are divided about whether super-adequacy costs (e.g., high-end finishes), such as a larger-than-necessary spa, larger-than-necessary theater, and MGM branding items, are items that a willing purchaser would not need or want. Petitioner makes a very large deduction for such costs, on the order of \$400 million. The Court is of the opinion that super-adequacy is highly probative as a concept to incorporate into the computation; the question is how much of a reduction should be made.

Similarly, the parties are divided on whether the comparable sales approach favored for land value is more objective than income approach. As noted above, the Court finds that the comparable sales approach is preferred over the income approach.

The Court also finds that the value of the gaming license, an intangible asset, is not pertinent to this case. The main reason is that there was no testimony or other evidence that the value of the gaming license was part of any parties' computations of either the improvements or land so there is nothing to subtract out for a gaming license. Second, as will be noted below, the Court is not using an income approach for either the improvements or land value, and the value of a gaming license, if any, is only derivable, if at all, from an income approach. Moreover, the State exacted a separate fee for the gaming license in 2013 and there is no tie of that fee to the value of the real property. Finally, the holder of the license has no ability to transfer or sell the license; it is a contract between the State and the current holder, only, not an asset for a willing buyer to purchase from a willing seller.

After weighing all the evidence, the Court has concluded that this case requires a balancing of valuation approaches.

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Improvements. Using actual cost as a starting point for the value of the improvements is preferred, as those improvements are near the beginning of their useful life on January 1, 2019. The Respondent and Intervenor positions were plausible on this point.

Adding a factor for inflation to account for the time between actual construction (2014–16) and the finality date of January 1, 2019, also makes eminent sense. Thus, the Court agrees with Intervenor's increase by inflation of the Respondent's cost numbers.

The Court also agrees with Intervenor's use of 3% depreciation instead of 2% in the Assessment.

This brings the Court to a final cost figure of \$1,103,697,370, consistent with the Intervenor's, prior to consideration of a deduction for super-adequacy costs.

The Court agrees with Petitioner that there should be a recognition of, and deduction for super-adequacy costs for which a buyer would not pay. Petitioner's witness, Mr. Lennhoff, testified that super-adequacy costs can be found by subtracting replacement costs from reproduction costs. In this case, that would amount to a reduction of \$442,230,374 (\$1,103,697,370 reproduction costs of Intervenor's minus \$661,466,996 replacement costs of Petitioner). Unfortunately, as Intervenor's counsel skillful cross-examination discerned, Petitioner could not disaggregate that amount into component items for consideration individually, but that does not mean that super-adequacy should be dismissed. Even the Respondent's expert, Ms. Porter, testified that making a deduction for super-adequacy made sense.

Here, the Court takes a cautious and measured approach. The Court does not deduct as much as Petitioner requests, but believes a 33% deduction of suggested super-adequacy costs are reasonable to apply under the present circumstances to eliminate the MGM branding items and overbuilding for which a willing buyer would be loath to pay. This accounting recognizes that the remaining items of alleged super-adequacy would be attractive to a willing buyer. Thus, a super-adequacy deduction of one-third of \$442,230,374, or \$147,410,125, is deemed appropriate. The final cost of improvements, then, is \$1,103,697,370 minus \$147,410,125, or \$956,287,245.

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Land. The Court prefers a comparable sales approach for land and generally agrees with Petitioner on its attempt to use nearby per acre sales prices as a reasonable approach for valuing the land in question. This particular piece of land, however, has attributes far superior to those parcels selected by Petitioner. The Petitioner's expert, Mr. Lennhoff, testified that he used five properties to compute a cost per acre. They were:⁶

- 1) A 155-unit senior living facility on a site zoned for mixed use in Bowie, Maryland,
- 2) A vacant lot zoned for mixed use in Upper Marlboro, Maryland,
- 3) A grocery store on a commercially zoned site in District Heights, Maryland,
- 4) A vacant mixed-use lot in Suitland, Maryland, and
- 5) Another vacant lot on a mixed-use property in Upper Marlboro, Maryland.

The subject property, on the other hand, contains the following unique features, not one of which can be claimed by any of the properties used in the Petitioner's valuation:

- 1) Six interstates (I-95, -195, -295, -395, -495, and -695) with easy and convenient access to three international airports (Ronald Reagan Washington National Airport, Dulles International Airport, and Baltimore/Washington International Thurgood Marshall Airport), and four major cities (Washington, D.C., Alexandria, VA, Columbia, MD, and Baltimore, MD),
- 2) A hill overlooking the Potomac River and Woodrow Wilson Memorial Bridge,
- 3) A commanding view of Alexandria, VA and Washington, D.C., including the Washington Monument and the Washington National Cathedral,
- 4) Bike paths connecting Maryland, D.C., and Virginia, and
- 5) A metropolitan area easily accessible to over 10 million people.

Recognizing these differences between the subject property and the chosen comparable properties, however, does not require an abandonment of the comparable sales approach. Rather, it requires a recognition that the land value ascertained using the available sale properties be increased proportionately to the value of land that has the attributes of the property to be valued.

⁶ See P-15 at 73-6.

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Increasing Petitioner's land value from \$25M to \$48M recognizes that the Court believes a willing buyer would pay nearly double the going rate for land with the unique and desirable features present here, that is, not as much as the \$10M per acre for casino land in Las Vegas, as testified by Ms. Mellen, but a premium over what the Petitioner's valuation found.

The Court finds that the super-adequacy concept is valid only as to improvements and does not apply to land.

Conclusion

For the above reasons and findings of facts, the Court finds that the value of the Subject Property as of January 1, 2019, is as follows:

Improvements

\$1,103,697,370	Reproduction costs of improvements
<u>-145,936,023</u>	Super-adequacy costs
\$957,761,347	Total improvements value

Land

<u>\$48,000,000</u>	Total land value
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Total assessed value

\$1,005,761,347	Total value
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**CERTIFIED TRUE COPY
TEST: Andrew Berg, Clerk**

NOTICE: You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.

Cc: Jeffrey Comen and William Hammond, Counsel for the State Department of Assessments and Taxation

Herman Rosenthal, Kevin Hroblak, and Jordan Halle, Counsel for Petitioner

Harris Eisenstein, Jamar Brown, and Alexander Greenspan, Counsel for Intervenors