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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BON AYRE LAND, LLC, Appellant,	:	No. 221-2015
v. BON AYRE COMMUNITY ASSOCIATION Appellee	:	Appeal from the Superior Court in and for Kent County C.A. No. K14A-08-001 WLW

APPELLEE'S ANSWERING BRIEF ON APPEAL

July 10, 2015

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STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

The matter before the Court addresses issues related to a process for the justification of rent increases in manufactured housing communities established by the General Assembly in 2013. This is a matter of first impression at the Supreme Court.

After an arbitration hearing on May 28, 2014, the arbitrator found that the Appellant Bon Ayre Land, LLC (Bon Ayre) failed to justify the rent increase it sought and authorized a smaller rent increase. Bon Ayre appealed to the Superior Court. The Superior Court reviewed the decision of the arbitrator. Under the statute applicable at the time, the reviewing Court's decision is based on the record and without a trial *de novo.* 25 DEL. CODE §7044. The Superior Court also recited, under the heading "Standard of Review," that "[t]he Court must independently address arguments of the parties as to whether the record created in the arbitration is sufficient to justify an increase in rent above the CPI-U." Appellant's Opening Brief, Exhibit C at 8. This element of review was not part of the statutory scheme until it was enacted by amendment to the statute on July 15, 2014. Attachment 1 to Answering Brief.

The Superior Court determined that Bon Ayre failed to comply with the process required to justify a rent increase and denied a rent increase above the statutory limit. Bon Ayre sought reargument and then appealed to this Court.

SUMMARY OF ARGUMENT

I. THE GENERAL ASSEMBLY PROPERLY EXERCISED ITS AUTHORITY IN PROMULGATING THE RENT JUSTIFICATION STATUTE, MAKING THE STATUTE CONSTITUTIONAL.

APPELLANT'S ARGUMENT THAT THE RENT JUSTIFICATION ACT IS UNCONSTITUTIONAL INCONSISTENT AND UNWORKABLE IS DENIED.

II. THE SUPERIOR COURT CORRECTLY FOUND THAT THE PARTIES STIPULATED ONLY TO THE FACT THAT GOOD FAITH MEETINGS TOOK PLACE AND NOT TO COMPLIANCE WITH THE NOTICE AND DISCLOSURE MANDATES OF THE STATUTE .

APPELLANT'S ARGUMENT THAT APPELLEE STIPULATED THAT APPELLANT HAD COMPLIED WITH §7043(b) AND THE SUPERIOR COURT ERRED IN RULING OTHERWISE IS DENIED.

III. BON AYRE'S FAILURE TO COMPLY WITH THE STATUTORY REQUIREMENTS FOR RENT JUSTIFICATION BARS A RENT INCREASE ABOVE THE STATUTORY MAXIMUM.

APPELLANT'S ARGUMENT THAT THE ARBITRATOR ERRED IN EXCLUDING RELEVANT AND ADMISSIBLE EVIDENCE IS DENIED.

IV. THE TESTIMONIAL AND DOCUMENTARY EVIDENCE OF JAMES ROSTOCKI WAS IRRELEVANT TO THE QUESTIONS PRESENTED IN THIS RENT JUSTIFICATION MATTER.

APPELLANT'S ARGUMENT THAT THE ARBITRATOR'S DECISION WAS CONTRARY TO THE LAW AND THE EVIDENCE IS DENIED.

V. THE DOCTRINE OF COLLATERAL ESTOPPEL IS INAPPLICABLE TO THIS MATTER.

APPELLANT'S ARGUMENT THAT THE ARBITRATOR ERRED IN NOT COMPLYING WITH THE LEGAL DOCTRINE OF COLLATERAL ESTOPPEL IS DENIED.

STATEMENT OF FACTS

Bon Ayre is a community of 194 homes located in Smyrna, Delaware. (B-28). The homes are of the "manufactured" variety in that they are constructed off-site and moved onto the property. (A-31). The residents of Bon Ayre own their homes and rent the lot upon which the home sits from the community owner, Bon Ayre Land, LLC. (A-88).

The Bon Ayre community is a 55+ community. Residency at the Bon Ayre community is limited, with some exceptions, to individuals who are 55 years of age or older. (B-28). Most of the homes are occupied by retired individuals or couples. (A-60). For example, homeowner Richard Dicks, affected by the proposed rent increase, retired to the Bon Ayre community from Atlantic City, New Jersey. (A-73). Many of the residents are members of Bon Ayre Community Association (BACA), a corporation organized to represent the interests of the home owners under Delaware's Manufactured Home Owners and Community Owners Act, 25 Del. C. §7001, *et seq*. (B-9).

On February 18, 2014 and again on March 10, 2014, Bon Ayre sent to BACA and to home owners notice of a rent increase exceeding the CPI-U[1] of 1.8% for March and 1.9% for April. (B-22, B-23). For most of the affected residents the proposed monthly increase was from \$309 to \$379, a 22.6% increase. (B-26). For

[1]Consumer Price Index for All Urban Consumers in the Philadelphia-Wilmington-Atlantic City area.

some of the residents, the proposed increase was from $349 to $419[2], a 20% increase. (B-26). For one resident the increase was from $349 to $379, a 9.2% increase. (A-83). Bon Ayre scheduled a meeting with the homeowners and BACA, as required by the statute, after each notice was sent. Those meetings took place on March 7, 2014 and April 8, 2014. (A-83, A-80).

At these "Good Faith" meetings, Bon Ayre's representative, Dick Draper, mentioned that the rent increase was attributable to "comparables," particularly the communities of Wild Meadows, Barclay Farms and Southern Meadows, along with Bon Ayre's location and wide streets. (B-29). Mr. Draper provided at these meetings no specific information about the rents or amenities at these so-called comparable communities. (B-29, A-80). The homeowners objected to the rent increase and BACA filed for arbitration of each rent increase. (B-22, B-23[3]). The arbitration was conducted on May 28, 2014.

[2]These lots are characterized as "premium," but the record has no information that distinguishes these lots from the others lots.

[3]The Delaware Manufactured Home Relocation Authority omitted the April 24, 2014 Request for Arbitrator from the record sent to counsel.

ARGUMENT

I. THE GENERAL ASSEMBLY PROPERLY EXERCISED ITS AUTHORITY IN PROMULGATING THE RENT JUSTIFICATION STATUTE, MAKING THE STATUTE CONSTITUTIONAL

Question Presented

Did the General Assembly properly exercise it's authority in promulgating the rent justification statute, making the statute constitutional?

Scope of Review

The Court reviews claims of violations of constitutional rights *de novo*. *Cohen v. State ex rel. Stewart*, 89 A.3d 65, 86 (Del. 2014).

Merits of Argument

Rent control legislation, including legislation addressing manufactured housing rent, has survived constitutional challenges over the last century, with the United States Supreme Court repeatedly upholding rent control laws as far back as 1921. *See, e.g., Block v. Hirst*, 256 U.S. 135, 156 (1921) ("Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."); *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988) (rejecting a challenge to a rent control ordinance under the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

In the rent justification statute, Delaware's General Assembly recognized manufactured housing as a vital source of affordable housing and that

manufactured home owners make substantial investments in their homes. The Legislature also observed that once a home is placed on a foundation, its owner is subject to the community owner who enjoys a disproportionate power to set rents. Consequently, the General Assembly enacted 25 Del, C. §7040, *et seq.*, the Affordable Manufactured Housing Act, requiring community owners to justify any rent increase above a designated consumer price index. 25 Del. C. §§7040, 7042(a).

The language of the rent justification statute clearly reveals that it was thoughtfully enacted to protect the welfare of its citizens. Therefore, the statute is a constitutionally legitimate exercise of the state's police power.

The focus of Bon Ayre's attack on the constitutionality of the rent justification statute is the absence of subpoena power at the arbitration hearing and the instruction that the Delaware Uniform Rules of Evidence serve as a guide to the admission of evidence in that hearing. App. Op. Br. at 15.[4]

The Superior Court addressed this claim by reviewing the federal and Delaware law on the relevant requirements of due process. App. Op. Br., Ex. A at 11-14. The Superior Court applied a *Mathews v. Elderidge* analysis to the rent justification procedure outlined in the statute and found sufficient "procedural safeguards." App. Op. Br. Ex. A at 13, citing *Mathews v. Eldridge*, 424 U.S. 319 (1976). Presumably in response to the Superior Court's observation that Bon Ayre provided no authority to support its claim that when hearsay applies, due process requires subpoena authority, Bon Ayre has offered the case *Ward v. Tishman Hotel*

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[4]Bon Ayre expressly waives the claims related to "taking" and to any right to a jury trial. Op. Br. at 15, n. 6.

& Realty, L.P., 2010 WL 5313549 (Del. Super. Nov. 30, 2010). *Ward* does not fill the authority void. *Ward* is a case which applies the doctrine of *forum non conviens* to personal injury litigation for an incident that happened in Puerto Rico but was filed in Delaware. No witnesses were subject to the Delaware Court's subpoena authority. The Delaware Court found that the Delaware was not the proper forum, as the other forum choices could compel witness testimony. *Id.* at *8. *Ward* has nothing to do with the constitutionality question.

Although Bon Ayre identifies the rent justification statute as the problem, it is really the arbitrator's application of the statute that gives rise to Bon Ayre's complaint. The statute itself does not require the strict application of the Delaware Rules of Evidence, but indicates that the DRE "shall be used as a guide . . . for admissibility of evidence submitted at the arbitration hearing." 25 Del. C. § 7043 (e).

Further, Bon Ayre can claim no harm resultant from the arbitrator's decision to exclude an affidavit about the rent charged at the Village Brook[5] community. Bon Ayre's expert considered Village Brook as a potential comparable community (A-43), but found that it was in inferior condition to the other comparable communities and that it was not a 55+ community. (A-46). Counsel to Bon Ayre actually referred to Village Brook as a "slummish trailer park" (A-9), hardly comparable to the Bon Ayre community, described by Bon Ayre's counsel as, "a

[5]Variously called both "Village Brook" and "Village Creek" by Bon Ayre. Op. Br. at 16.

vastly superior and exceptional community. . . . [N]ot a trailer park or anything resembling that." (B-35)

Had the arbitrator admitted the affidavit, it would have changed the decision not a whit. The arbitrator explained:

> Bon Ayre is a 55-and-older community in Kent County. Likewise, Wild Meadows and Barclay Farms are 55-and-older communities in Kent County. Both Landlord and BACA called witnesses to discuss Wild Meadows and Barclay Farms. As such, it is apparent that both Landlord and BACA consider these communities "in play" as being comparable. Other manufactured home communities (such as Southern Meadows) were not discussed as much as Wild Meadows and Barclay Farms, so my analysis will only involve these later [sic] two.

Op. Br. Ex. B at 7.

The rent justification statute was an act of the General Assembly that meets constitutional standards for the exercise of state authority.

II. THE SUPERIOR COURT CORRECTLY FOUND THAT THE PARTIES STIPULATED ONLY TO THE FACT THAT GOOD FAITH MEETINGS TOOK PLACE AND NOT TO COMPLIANCE WITH THE NOTICE AND DISCLOSURE MANDATES OF THE STATUTE

Question Presented

Was The Superior Court correct in finding that the parties stipulated only to the fact that Good Faith Meetings took place and not to compliance with the notice and disclosure mandates of the statute?

Standard of Review

At the time relevant to the case at bar, the rent justification statute required that review of arbitrator's decisions by the Superior Court was on the record and without a trial *de novo*. 25 *Del. C.* § 7044. Attachment to Appellee's Answering Brief, Att. 1. Although this is a new and unique review under Delaware statutory law, it is similar to the judicial review of a commissioner's order by the Family Court, a review that is "*de novo* based on the record below." *In re M.A.*, 2000 WL 33200946, at *1 (Fam. Ct. Dec. 5, 2000) (citing Fam. Ct. Civ. R. 53.1(e)). If the Family Court judge's decision is then appealed to this Court, this Court conducts a *de novo* review of questions of law. *Vincent v. Div. Child Support Enforcement / Emily Cartwright*, 2015 WL 894717, at *2 (Del. Mar. 2, 2015). This Court will not overturn the Family Court's findings of fact unless they are clearly erroneous. *Kraft v. Mason*, 2010 WL 5341918, at *2 (Del. Dec. 20, 2010). For convenience, BACA uses the term "commissioner review" to describe this scheme of judicial review. If the proper review scheme for this case is commissioner review, this Court reviews the Superior Court's decision, not the Arbitrator's decision, and the questions not

addressed by the Superior Court are not properly before this Court. Thus, if Bon Ayre is successful in this appeal, those issues would have to be addressed on remand to the Superior Court.

Bon Ayre, by directly addressing the decisions of the arbitrator instead of limiting its arguments to the decision of the Superior Court, appears to suggest that this appeal should be treated like an appeal from an administrative agency decision and not like the judicial review of a commissioner's order. When reviewing the decisions of an administrative agency, the Superior Court "must determine whether the agency ruling is supported by substantial evidence and free from legal error. *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992) (citation omitted). This Court's review then "mirrors that of the Superior Court." *Id.* This Court "does not review the decision of the intermediate court but, instead, directly examines the decision of the agency." *Id.* For convenience, BACA refers to this scheme of review as "administrative review."

Although there is logic to treating the arbitrator's decision as an administrative agency decision,[6] and administrative review may be the correct standard under the *current* version of the statute (which no longer requires *de novo* review) (Att. 2), this cannot be the correct review scheme for this case. In this case, the Superior Court reviewed the record *de novo* and came to a different factual finding than the Arbitrator on the question of whether the parties stipulated to the

[6] For example, consider the statutory nature of the arbitration, 25 *Del. C.* § 7043(c), compulsory participation therein, 1-202 Del. Admin. C. § 7.7, and the limited scope of judicial review. 25 *Del. C.* § 7044.

adequacy of the informal meeting. App. Op. Br., Ex. B at 5, Ex. C at 17. Under administrative review, the Superior Court's decision would be ignored, and the Arbitrator's decision would be accepted unless clearly erroneous. This creates a nonsensical result because Bon Ayre seeks to have this Court review the Superior Court's finding on the issue, not the arbitrator's. App. Op. Br. at 29. Thus, administrative review cannot be the correct scheme of review because it prevents this Court from addressing the very error Bon Ayre wishes to have reviewed.

For this reason, BACA suggests that this Court should adopt commissioner review to review this case and limit the scope of review to those issues addressed by the Superior Court. Thus, questions of law should be considered *de novo*, and the Superior Court's findings of fact should not be reversed unless clearly erroneous. Should this Court decide to review issues not considered by the Superior Court, this Court should uphold the arbitrator's rulings as long as they are supported by substantial evidence and free from legal error.

Merits of Argument

At the initial telephone conference prior to the arbitration in this matter, BACA's counsel put Bon Ayre and the arbitrator on notice that BACA intended to take issue with the lack of disclosures made by Bon Ayre during the two Good Faith meetings. App. Op. Br. Ex. B at 5. When BACA's counsel raised this issue during the arbitration on May 28, 2014, Bon Ayre responded by claiming that BACA stipulated that Bon Ayre fully complied with the statute, suggesting that BACA had waived any issue with the failure to make disclosures as required by the

statute. (A-67). In fact, BACA only stipulated that the Good Faith meetings took place as required by the statute, that is, within 30 days of the mailing of the rent increase notices. (B-24). BACA's counsel reminded Bon Ayre and the arbitrator that BACA raised this issue during a pre-arbitration telephone conference between counsel to both parties and the arbitrator on May 9, 2014. (B-34). Counsel put Bon Ayre on direct notice of the disclosure issue by informing Bon Ayre that counsel would proffer two arbitration decisions on this very issue of the failure to disclose information, at the arbitration. (Att. 1 & 3). Those decisions were proffered and accepted. (B-33). Counsel also raised the disclosure issue during the arbitration before Bon Ayre completed its case and rested. (A-15). Indeed, Bon Ayre made clear that it was aware of this issue during the arbitration but argued that the non-disclosure was non-prejudicial. (A-17).

The Superior Court reviewed in depth Bon Ayre's claims about this stipulation and concluded, consistent with this Court's holding in *Merritt v. United Parcel Service*, 956 A.2d 1196 (Del. 1996), that the stipulation, "[a] meeting between the parties was held pursuant to 25 Del. C. §7043(b)," was not a "judicial admission for anything other than the fact that a meeting took place." App. Op. r., Ex. C at 16, *citing Merritt,* at 1201.

The Superior Court correctly found that the stipulation entered by the parties did not alleviate Bon Ayre's requirement to prove it made the disclosures required by the rent justification statute.

III. BON AYRE'S FAILURE TO COMPLY WITH THE STATUTORY REQUIREMENTS FOR RENT JUSTIFICATION BARS A RENT INCREASE ABOVE THE STATUTORY MAXIMUM.

Question Presented

Did Bon Ayre's failute to comply with the statutory requirements for rent justification bar a rent increase above the statutory maximum?

Scope of Review

For the reasons stated above, pp. 9-11, *supra*, BACA believes that this question is not properly before this Court and should not be addressed in this appeal. To the extent that this Court chooses to review this question, this Court should uphold the arbitrator's rulings as long as they are supported by substantial evidence and free from legal error. *Id.*

Merits of Argument

Owners of manufactured home communities long enjoyed a protected market. Once a manufactured home owner planted a home on a leased lot, that home owner lived at the mercy of community owner who could increase rent once annually in any desired amount without worrying that the home owner would pull up stakes and move elsewhere. *See MHC Financing v. Brady*, 2003 WL 22064096 at *5 (Del. Super. Aug. 29, 2003). In 2013 Delaware's General Assembly took steps to balance the scales. Finding that manufactured housing is a vital source of affordable housing, that home owners make substantial investments in their homes, and that once a home is situated on a lot in a community, the community owner enjoys a disproportionate level of power to set rents, the General Assembly enacted

25 Del. C. §7040, *et seq.*, requiring community owners to justify any rent increase above the CPI-U. 25 Del. C. §§7040, 7042(a).

The rent justification statute requires that a community owner demonstrate that three conditions exist before raising rent to a level beyond the CPI-U. One condition is that there has been no violation of health and safety standards during the preceding 12 months. The second condition is that the rent increase is directly related to operating, maintaining or improving the community. Third is that the rent increase is justified by one or more of the factors listed in the statute, which include the market rent. 25 Del. C. §7042(a)(1) & (2). Bon Ayre's failure to satisfy that third statutory condition bars any rent increase above the CPI-U.

To justify a rent increase above the CPI-U, a community owner must engage the home owners in a process. The statute requires that a community owner notify home owners of a rent increase by written notice. After the notice, a meeting must convene and the community owner, "shall, in good faith, disclose all of the material factors resulting in the decision to increase the rent. The community owner shall disclose financial and other pertinent documents and information supporting the reasons for the rent increase." 25 Del. C. §7043(b). The record in this case makes clear that Bon Ayre failed to make the required disclosures.

First, Bon Ayre decided to increase the rent some time before the notice to home owners was mailed on February 18, 2013, and March 10, 2013. Bon Ayre received a market rental survey report on May 22, 2014, several weeks after the Good Faith meetings with the homeowners. (A-19). Clearly Bon Ayre decided to

increase rent without the information in the market rental survey report. Therefore, Bon Ayre either relied on other data to increase the rent or pulled the rent increases out of thin air. At the Good Faith meetings, Bon Ayre explained that the decision to raise rent was based on, "location, location, location and . . . wide streets." (B-31). No data about location, or the relative value of location, or of the relative value or cost of wide streets, were disclosed.

Despite the statutory mandate to "disclose all of the material factors resulting in the decision to increase the rent" and "disclose financial and other pertinent documents and information supporting the reasons for the rent increase," Bon Ayre provided nothing. According to home owners, "there was no information provided," (A-74) and "[a]bsolutely no information was provided. No kind of documentation of any kind." (A-80). While Bon Ayre mentioned the communities of Barclay Farms, Wild Meadows and Southern Meadow during the Good Faith meetings, Bon Ayre provided no specific information about comparable rents, services, facilities, amenities or management and supporting documentation was not made available to the meeting participants. (A-80).

Bon Ayre certainly was in possession of a great deal of information about the proposed rent increase at the time of the Good Faith meetings. Property manager Dick Draper had visited several so-called comparable communities, taken photographs and researched rental fees. These communities included Barclay Farms (A-7), Southern Meadow (A-8), Beechwood (A-8), Twin Maples (A-8), Dover East Estates (A-8), Kings Cliffe (A-8), and Village Brook (A-9). Bon Ayre

disclosed none of this information or documentation to home owners.

The Superior Court found that a recent Delaware Superior Court decision to be helpful in evaluating the actions of Bon Ayre. Superior Court Judge Graves addressed a similar situation and held that the failure to disclose material facts to home owners at a Good Faith meeting is fatal to a landlord's effort to justify a rent increase under this statute. In *Tunnell Companies, L.P. v. Greenawalt, et al.*, Judge Graves recognized the importance of the public policy implications of the Good Faith meeting requirements:

> The purposes of the requirement under the law for full disclosure of all reasons and documentary support for a rent increase are clear. First, full disclosure allows the home owners the opportunity to understand the community owner's reason for raising the rents in excess of the CPI-U and therefore encourage s [*sic*] agreement if the increase is justified. Second, this requirement is designed to level the playing field at arbitration should that remedy be necessary.

Id., 2014 WL 5173037 n. 62 (Del. Super. October 14, 2014) (quoting the Arbitration Decision of Richard S. Gebelein, Esq.).

Judge Graves found that the community owner's failure to disclose material factors, in writing and in good faith, prevented the Court from making a determination as to whether the rent increases sought were justified. *Id.*, at p. 12. For that reason, according to Judge Graves, the community owner failed to justify the rent increase and the rent increase was denied. *Id.*, at p. 12 - 13.

Bon Ayre also failed to honor the process required to increase rent above the statutory maximum. Bon Ayre's failure deprived the home owners of their right and opportunity to review any of the information collected by Bon Ayre, along

with supporting documentation. Bon Ayre failed to disclose the reason for the rent increase that preceded the market rental survey report, or any other reason for the rent increase. These failures bar Bon Ayre from increasing the rent more than the CPI-U.

IV. THE TESTIMONIAL AND DOCUMENTARY EVIDENCE OF JAMES ROSTOCKI IS IRRELEVANT TO THE QUESTIONS PRESENTED IN THIS RENT JUSTIFICATION MATTER.

Question Presented

Was the testimonial and documentary evidence of James Rostocki irrelevant to the questions presented in this rent justification matter?

Scope of Review

For the reasons stated above, pp. 9-11, *supra*, BACA believes that this question is not properly before this Court and should not be addressed in this appeal. To the extent that this Court chooses to review this question, this Court should uphold the arbitrator's rulings as long as they are supported by substantial evidence and free from legal error. *Id.*

Merits of Argument

Bon Ayre claims that "market rent" justifies rent increases of up to 22.6%. To support that claim, Bon Ayre proffered the report and testimony of a real estate appraiser, James Rostocki. (A-18, A-57 through 63, A-19 through 56). This evidence does not have the evidentiary value suggested by Bon Ayre. Both the written report and the testimony offered by Mr. Rostocki are irrelevant, incomplete, inconsistent and illogical.

The proffer of the Rostocki evidence does not conform to the process required by the rent justification statute for rent justification. The process, as it is

clearly spelled out in the original statutory language[7], mandates that a community owner who seeks to increase rent take these steps:

1. Give 90 days written notice to each affected home owner and to the home owners association of the rent increase. 25 Del. C. §7043(a).
2. Participate in a meeting with home owners to discuss the reasons for the increase. At this meeting, the community owner "shall, in good faith, disclose all of the material factors resulting in the decision to increase rent. The community owner shall disclose financial and other pertinent documents and information supporting the reasons for the rent increase." 25 Del. C. §7043(b).

The record clearly indicates that the Rostocki market study report was not disclosed to BACA and the homeowners as required by the statute. Indeed, it was never intended for disclosure to BACA or the home owners. By its very terms, it was "intended and restricted to use solely by Mr. Lee Ramunno to determine the market rent of the subject property as part of an on-going mandatory arbitration and is <u>not to be relied upon or shown to any other party</u>." (emphasis added). (A-20).

Even if the Rostocki evidence was created before and disclosed at the Good Faith meetings, it would fail to justify a rent increase. The Rostocki analysis is fundamentally flawed in several ways. It relies on the wrong definition of "market rent," it elevates a characteristic of comparison (i.e., location) that is not even contemplated by the rent justification statute, it arbitrarily assigns value to some amenities and characteristics and assumes no value for others, and it is rife with mistakes.

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[7]This is the language that was effective at the time of the rent increase notice, Good Faith meetings, and arbitration. The language was amended by the General Assembly through House Substitute 1 for House Bill 234, with amendments, signed into law by Gov. Markell July 15, 2014. (B-6).

A primary and essential problem with the Rostocki evidence is the "market rent" definition problem. The appraiser relied on the standard definition of the term "market rent" that he would use in other appraisal jobs:

> the rental income that a property would most probably command in the open market; indicated by the current rents paid and asked for comparable space as of the date of the appraisal. (A-45).

The appraiser ignored the statutory definition of "market rent":

> that rent which would result from market forces absent an unequal bargaining position between community owner and home owners. In determining market rent, relevant considerations include rents charged by comparable manufactured home communities in the applicant's competitive area. To be comparable, a manufactured home community must offer similar facilities, amenities and management."

25 Del. C. §7042(c)(7).

Significantly, the appraiser failed to recognize that these definitions are mutually exclusive.

The context for the standard industry definition is, "the open market;" however, the statutory definition recognizes the reality that there exists, "an unequal bargaining position between community owner and home owners," the opposite of an open market. The statute specifically speaks to the "difficulty and cost" of replacing the property. 25 Del. C. §7040.

> Once a manufactured home is situated on a manufactured housing community site, the difficulty and cost of moving the home gives the community owner disproportionate power in establishing rental rates. The continuing possibility of unreasonable space rental increases in manufactured home communities threatens to diminish the value of manufactured home owners' investments."

25 Del. C. §7040.

The statute makes clear that the construct of an open market does not hold in the rent justification scenario. These conflicting contexts cannot be harmonized. Just as illness is not health and as crooked is not straight, an unequal bargaining position is not an open market.

The Rostocki evidence might have been useful to Bon Ayre in setting a rent amount had the report been limited to rent amounts used to attract new residents who have choices about where to place their home[8], but it is of no use in this case. In courting new tenants, Bon Ayre and other community owners compete with other communities in the area. Once the home is set on the ground, the competition, and the courtship, stop. The Rostocki evidence is of no help to Bon Ayre, or to the trier of fact, or to this Court, on the question for which the statute requires an answer: what have new tenants agreed to pay? The Rostocki evidence does not make the critical distinction between rents for established tenancies and rents for new tenancies. It completely missed that mark. It is irrelevant.

The second major problem with the Rostocki evidence is that the appraiser makes crystal clear that "location" is the most important factor in his comparison of properties to determine market rent. (A-11, A-22). The General Assembly did not agree with this approach. The rent justification statute spells out specifically those factors that must be compared, and those factors are limited to facilities,

[8]Arbitrator Gebelein recognized this problem in *Tunnell v. Greenawalt, et al.*, ultimately resolved by the Superior Court in 2014 WL 5173037. "Had the report based rent estimates on newly negotiated rents where home owners had a choice it could have been considered." (Att. 1 at 7)

services, amenities and management. "Location" is not mentioned. 25 Del. C. §7042 (c)(7). The emphasis of the market rent study is directly offensive to the directives of the statute. "When a statute is unambiguous, and there is no reasonable doubt as to its meaning, this Court is bound by the statutory text. Consequently, 'where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls.'" *Cede v. Technicolor, Inc.*, 758 A.2d 485, 494 (Del. 2012) *quoting Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989).

Another problem with the Rostocki evidence is the arbitrarily nature of the valuations it suggests. For example, an amenity of both the Barclay Farms and Wild Meadows communities is a swimming pool. (A-64, A-69). The Bon Ayre community does not have a swimming pool. (A-73). Evidence in this record indicates that access to a nearby swimming pool for Bon Ayre residents would cost at least $350. (B-30, A-80). Curiously, the Rostocki evidence suggests that access to <u>all</u> the community amenities, including a pool, with no other difference in the amenities assumed, is worth as little as $263.25[9] to residents of Wild Meadows, a so-called comparable community. (B-22). Thus, not only does Mr. Rostocki understate the value of a pool to the community, he makes no adjustment for all of the other amenities available to Wild Meadows residents but not to Bon Ayre residents, like the library in the clubhouse, the jacuzzi, the bocce and shuffleboard courts, and a larger clubhouse (A-46, A-65, A-70).

[9]5% of Wild Meadows annual rent ($5,265 X .05 = $263.27). (A-46)

Fourthly, the Rostocki analysis completely ignores the statutorily mandated consideration of management for comparison purposes, yet management provides one of the most dramatic differences between the subject community (Bon Ayre) and the alleged comparables (Wild Meadow and Barclay Farms).[10] At Barclay Farms, management provides a full-time lifeguard at the swimming pool. (A-69). Barclay Farms also enjoys the services of activity director who coordinates (and cooks for) events, including holiday parties, monthly coffee/doughnut and wine/cheese get-togethers, monthly birthday and anniversary celebrations, and pool parties. (A-70). The activities director also publishes a monthly newsletter. (A-70). Management of Barclay Farms are also provides to residents free maintenance services for their home needs. (A-70). For the residents of Wild Meadows, a lifestyle coordinator, provided by management, functions in much the same way as does the Barclay Farms activity director, organizing events (sight-seeing and shopping trips, baseball games and shows) and sponsoring parties. (A-66). At Bon Ayre, it is the residents, not management, that sponsor, organize, fund and run all of the social activities. (A-1, A-2). It is the group of residents, not Bon Ayre management, that makes Bon Ayre a "very friendly community." (A-1). The service of management is one of the many differences between Bon Ayre and other communities that lead Jill Fuchs to remark, "there is no comparison" between

[10]Although Bon Ayre proffered Village Brook and Southern Meadow as comparable communities, Village Brook is a community of single wide "trailers" with a completely different community character than Bon Ayre (A-9), and Bon Ayre proffered little substantive evidence on the facilities, services, amenities and management of Southern Meadow.

Barclay Farms and Bon Ayre (A-70).

The final reason the Rostocki evidence has no probative value is that it is full of inaccuracies. A partial explanation for these inaccuracies may be that, despite Mr. Rostock's claim that he "made a personal inspection of the property that is the subject of [the] valuation," (A-48) there is no evidence in the record that he actually set foot on the Bon Ayre property. He admitted that he acquired the photographs used in the market rent survey from the internet. (A-58). He also admitted that he did not visit Barclay Farms, Wild Meadows or Southern Meadow. (A-60). Irrespective of the cause of the inaccuracies, the effect on the market rent study report is serious. For example, Mr. Rostocki testified that the homes in Bon Ayre and the Homes in the alleged comparables were similar in cost. (A-61). His speculation in this regard is contradicted by the testimony of people who actually spent the money on those homes. Mr. Dicks purchased his home at Bon Ayre for $105,000, while Mr. Neil purchased his Wild Meadows home for $137,000, and Ms. Fuchs acquired her Barclay Farms home for $180,000 (A-73, A-64, A-70). Mr. Rostocki used photos of homes, not the actual costs of the homes, as an "element of comparison," despite the fact that the disparity in costs was as much as 71%.[11] Mr. Rostocki also missed the mark on the size of the Wild Meadows community, which he testified was 80 homes, but in fact includes 223 homes. (A-419, A-64, A-69). Similarly, on a question that would be of critical importance, that of rent, Mr. Rostocki overstated the rent at Barclay Farms, which he claimed to

[11]180,000 - 105,000 = 75,000. 75,000/105,000 = 71.43%

be $470 per month, but which is actually $458 per month. (A-35, A-69).

The testimonial and report evidence of James Rostocki has no probative value and does not justify any rent increase.

V. THE DOCTRINE OF COLLATERAL ESTOPPEL IS INAPPLICABLE TO THIS MATTER.

Question Presented

Does the doctrine of collateral estoppel apply in the matter?

Scope of Review

For the reasons stated above, pp. 9-11, *supra*, BACA believes that this question is not properly before this Court and should not be addressed in this appeal. To the extent that this Court chooses to review this question, this Court should uphold the arbitrator's rulings as long as they are supported by substantial evidence and free from legal error. *Id.*

Merits of Argument

In a case involving some Bon Ayre residents that preceded the case at bar, BACA and 8 home owners invoked the rent justification process to arbitration in December 2013. (Att. 2). The case at bar involves 10 different home owners, none of whom were involved in any way with the December 2013 arbitration. Bon Ayre argues that the December 2013 arbitration decision controls the destiny of the remaining 186 home owners in the community, including the 10 who are the subject of this matter. Bon Ayre's argument is misplaced.

Collateral estoppel does not apply to the case at bar because the issues presented and the affected home owners in the case at bar are different than those in the 2013 arbitration. In order to assert collateral estoppel in this matter, Bon Ayre has the burden to establish four criteria:

> (1) the issue previously decided is identical to the issue at bar,
> (2) the prior issue was finally adjudicated on the merits,
> (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and
> (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Betts v. Townsends, Inc., 765 A.2d 531, 534 (Del. 2000) (quoting *State v. Machin,* 642 A.2d 1235, 1239 (Del.Super.1993)). Failure to prove the first criterion implies failure to prove the fourth criterion as well. *The Reserves Dev. Corp. v. Esham*, 2009 WL 3765497, at *7 (Del. Super. Nov. 10, 2009).

"Originally, many courts required mutuality to assert collateral estoppel. Mutuality requires a party attempting to bar an adversary from relitigating an issue to have been a party in the prior litigation or in privity with a party in the prior litigation." *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216-17 (Del. 1991) (quoting *Bernhard v. Bank of America Nat. Trust & Savings Ass'n*, 122 P.2d 892, 894 (Cal. 1942). Delaware has abandoned the requirement of mutuality and allows non-mutual collateral estoppel thus altering the third factor by no longer requiring "that a litigant have been a party in the prior litigation or in privity with a party in the prior litigation in order to assert collateral estoppel. It is sufficient that the party against whom collateral estoppel is asserted was a previous party." *Id.* at 1217. Even with a more lenient adaptation of the third factor, Bon Ayre can not establish that criteria one, three or four of this analysis are satisfied; therefore, Bon Ayre's reliance on the doctrine of collateral estoppel in this case is futile.

A. The issue previously decided is not identical to the issue at bar.

The issue in the prior arbitration is not the same issue before the Court in this

case. "A claim will be collaterally estopped *only if* the same issue was presented in both cases, the issue was litigated and decided in the first suit, and the determination was essential to the prior judgment." *Sanders v. Malik*, 711 A.2d 32, 33-34 (Del. 1998) (emphasis added).

Bon Ayre cites as authority *Foltz v. Pullman, Inc.*, a case involving a widow's attempt in two different actions to seek recompense for the death of her husband. 319 A.2d 38 (Del. Super. 1974), *reversed, in part, on other grounds, Messick v. Star Enterprise*, 655 A.2d 1209, 1213 (Del. 1995). In that case, the Industrial Accident Board (IAB) decided to deny the widow benefits related to the death of her husband, finding that the widow failed to carry her burden of proof that her husband's death was due to working conditions at the plant where he was employed. *Id.* at 39. The widow also filed a separate wrongful death action against entities who were not the employer of her deceased husband, but who designed the equipment that contributed to the conditions of the workplace. *Id.* at 40. Because the IAB decided that the workplace conditions did not cause the husband's death, the widow's tort claim on the same factual basis was barred. *Id.* at 42.

The issue in this case is not the same issue presented during the December 2013 arbitration. The issue in the December 2013 arbitration was a rent increase from $309 per month to $349 per month. In the case at bar, the increase proposed is from $309 to $379 (and for two homeowners, $349 to $419, and for one, $349 to $379). *Foltz* does not apply.

Further, "once an arbiter concludes that a claim is not arbitrable, the arbiter

does not have jurisdiction to resolve other disputes." *Id.* Similar to the judge in *Gull Point v. Utility Systems*, 2004 WL 1965923 (Del. Super. Aug. 2, 2004), who limited his holding to one issue, the December 2013 Arbitrator in this case acknowledged that his decision would not affect future issues. The December 2013 Arbitrator clearly indicated in his decision that it was unnecessary to decide anything about future rent increases. The Arbitrator could hardly be more explicit about the limits of his decision to the December 2013 case, and to the impropriety of applying his decision to future cases. His decision left the issue of comparable properties is wide open.

> It is stipulated that this decision only affects eight tenants and that more tenants will be addressing these problems in the future. This decision should not be considered controlling on whether future rent increases could be justified. Arguably, with more knowledge and more specific information the parties will be able to develop a better record for or against any future rent increases.

Bon Ayre Community Association v. Bon Ayre Land, LLC, Docket No. 4-2013 (Dec. 30, 2013, Grady, Arbitrator), at 6. (Att. 2).

B. The parties against whom collateral estoppel is invoked were not all parties or in privity with parties to the prior adjudication.

Even if it is determined that the issues are identical, Bon Ayre still fails to prove that collateral estoppel applies to the case at bar. While in this case, BACA is the same party, BACA acts in a representative role that falls within an exception to the general rule of representation. Unlike the widow in *Foltz* who was the claimant in both suits, in this case, BACA represents different home owners than those it represented in the December 2013 arbitration and as such, the home owners

in this case were not previous parties to the prior adjudication and are not barred by collateral estoppel whether mutual or not.

Bon Ayre's contention that collateral estoppel precludes BACA from relitigating this issue is without merit. Bon Ayre may contend that BACA is a "representative" for the purposes of a representative action. BACA is a representative for the purposes of this matter because the court in *Tunnell,* in determining if the HOA's had standing, addressed their role as intended by the Delaware Manufactured Home Relocation Authority and equated them to an automatic designated representative. *Tunnell Co., L.P. v. Greenawalt*, 2014 WL 5173037, at *5 (Del. Super. Oct. 14, 2014).

While BACA is a representative, this is not a representative action within the interests of the represented person. The Restatement (Second) of Judgments § 62 (1982) states "a representative may bind a non-party to a judgment when a person who is represented by a party is bound by the judgment in an action involving the representative party, under the conditions and with the qualifications stated in §§ 41 and 42." A representative action is defined as:

> (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:
> (d) An official or agency invested by law with authority to represent the person's interests.

Id. at § 41(1)(d). Relevant to the case at bar is the following exception: A person is not bound by a judgment for or against a party who purports to represent him if

"[t]he subject matter of the action was not within the interests of the represented person that the party is responsible for protecting." *Id.* at § 42 (1)(b). BACA is invested by law with authority to represent Bon Ayre home owners, to be sure, but the homeowners in the case at bar were not eligible to participate in the December 2013 arbitration, as they had not received any notice of rent increase. The subject matter of the December 2013 arbitration was not within their interests. Therefore, the homeowners are not bound by the judgment of the December 2013 arbitration and are not barred by collateral estoppel in bringing this cause of action.

Furthermore, non-mutual collateral estoppel is also inapplicable in this case because:

> While *Foltz* suggests that Delaware does not require mutuality to apply collateral estoppel, it in no way allows a victorious defendant to assert that other plaintiffs, not parties to the prior action, are barred from relitigating facts found in that litigation. Rather, the law is clear that the party invoking the doctrine as a defense must show "that the party against whom collateral estoppel is asserted was a previous party."

Kohls v. Kenetech Corp., 791 A.2d 763, 768 (Del. Ch. 2000) *aff'd,* 794 A.2d 1160, 1217 (Del. 2002) (quoting *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991) (holding that a group of shareholders litigating an issue after a similar litigation by a different group of shareholders was not barred by collateral estoppel, despite the fact that all were shareholders of the same corporation because the subsequent litigants were not bound by the prior decision).

Lastly, it is the intent of the rent justification statute to provide access to a neutral forum for all manufactured homeowners and to protect them "from

unreasonable and burdensome space rental increases" because of the unequal leverage the community owner has once the manufactured home is situated on the leased lot. 25 Del. C. § 7040. Applying collateral estoppel in this context would preclude the very access the legislation is intending to provide. *See Messick v. Star Enter.*, 655 A.2d 1209, 1212 (Del. 1995) (holding that mutuality must be retained in instances, as here, where the desire to end litigation and avoid conflicting decisions is overshadowed by statutory public policy and by principles of fairness and justice).

C. The party against whom the doctrine is raised did not have a full and fair opportunity to litigate the issue in the prior action.

The ten home owners in this case did not have a full and fair opportunity to litigate a 9% -22.6% rent increase in the December 2013 arbitration. A party has not had a full and fair opportunity if he or she was unable to present critical evidence in the initial proceeding." *First Nat. Bank of Palmerton v. A.E. Simone & Co.*, 1998 WL 437147 (Del. Super. May 18, 1998) at *3, (citing *Snider v. Consolidation Coal Co.*, 973 F.2d 555, 559 (7th Cir. 1992)). "Some litigants– those who never appeared in a prior action– may not be collaterally stopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Blonder-Tohgue Labs, Inc. V. Univ. Of Ill. Found.*, 402 U.S. 313, 329 (1971).

In a case presenting similar collateral estoppel arguments to the case at bar, *K/B Fund II v. New Castle County Dept. of Finance*, the Court considered the implications of a Delaware Supreme Court decision of a similar case. 1999 WL 459164, at *1 (Del. Supr., Mar. 22, 1999). In the two cases, a property owner/taxpayer and the New Castle County Department of Finance ("County") disputed tax valuations of properties. *Id.* at *1. The property owner/taxpayer argued in *K/B Fund II* that collateral estoppel barred litigation of the case because of the prior case against the County. *Id.* at *2. However, the Court held that although the cases were very similar, they were involved two different properties with different tax valuations. *Id.* at *3. Due to this dissimilarity, the Court determined that the County did not have a fair and full opportunity to litigate the presenting issue in the prior action, although it was a party to that action. *Id.*

The Bon Ayre home owners in the case at bar did not have an opportunity to present critical evidence in the December 2013 arbitration proceeding. In fact, the arbitrator in the December 2013 proceeding recognized this probability and observed,

> [i]t is stipulated that this decision only affects eight tenants and that more tenants will be addressing these problems in the future. This decision should not be considered controlling on whether future rent increases could be justified. Arguably, with more knowledge and more specific information the parties will be able to develop a better record for or against any future rent increases.

(Att. B, p. 6 - 7).

In the arbitration of the case at bar, the home owners presented witnesses with "more knowledge and more specific information" about the so-called comparable

communities. Fred Neil spoke about Wild Meadows (A-63 through 68), and Jill Fuchs described Barclay Farms (A-68 through 73).

Unlike the widow in *Foltz*, who had an opportunity at the IAB hearing to persuade the board that her husband's workplace conditions caused his death, the ten home owners of Bon Ayre who face this rent increases of 9 - 22.6% have not exercised their right to claim a benefit provided to them by the rent justification law. As with the two sets of shareholders in *Kohls*, similarity of position is not enough to invoke privity. Similar to New Castle County in *K/B Fund II*, the home owners and the properties in this case are different, and the invocation of collateral estoppel would prevent those home owners from an opportunity to fair and full litigation.

CONCLUSION

For the reasons explained in this, Appellee's Answering Brief, the judgement of the Superior Court should be affirmed and the application of Appellant Bon Ayre Land, LLC, to increase rent should be denied.

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/S/James G. McGiffin, Jr.

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