IN THE SUPREME COURT OF THE STATE OF DELAWARE

BON AYRE LAND, LLC Appellant, Appellee Below, v. BON AYRE COMMUNITY ASSOCIATION, Appellee, Appellant Below.	: : : : : : : : : : :	No. 25, 2016 Appeal from the Superior Court C.A. No. K15A-05-002-WLW

APPELLEE'S ANSWERING BRIEF ON APPEAL

March 31, 2016

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NATURE OF THE PROCEEDINGS

The matter before the Court is the appeal of the Superior Court's reversal of the decision of an arbitrator[1] appointed by the Delaware Manufactured Home Relocation Authority to resolve a dispute over a landlord's proposed rent increase in a manufactured home community subject to the Rent Justification Act ("the Act"). 25 *Del. C.* §§ 7040-7046.

An arbitration hearing took place on April 13, 2015, and the arbitrator determined that the landlord, Bon Ayre Land, LLC (Bon Ayre) justified a rent increase in an amount slightly below the increase sought by the landlord and considerably above the statutory limit, the Consumer Price Index for all Urban Consumers in the Philadelphia-Wilmington-Atlantic City area (CPI-U). The manufactured home owners, represented by the Bon Ayre Community Association (BACA), a home owners association, appealed the arbitrator's decision to the Superior Court.

[1] Although the Rent Justification Act refers to this initial proceeding as an arbitration, 25 *Del. C.* § 7043(c), the proceeding is more akin to an administrative hearing than an arbitration. If the parties are unable to come to an agreement on the rent increase, the "arbitration" is the only forum available to resolve the dispute. It is not entered into by contractual agreement of the parties or by agreement to resolve a dispute without litigation. Similarly, court review of the decision is available as a matter of right and is called an "appeal" on the record. 25 *Del. C.* § 7044. This is unlike a non-binding arbitration, where the parties can essentially ignore the arbitration and start from scratch before the court. It is also unlike a binding arbitration, where review by the court is only available under very limited circumstances. Although BACA believes that this Court should consider the review of the "arbitration" as an appeal from an administrative agency decision, the terms arbitrator and arbitration are used in this brief to be consistent with the statutory language.

The Superior Court reviewed the arbitration record and held that Bon Ayre failed to justify its rent increase on two independent grounds. The Superior Court held that (1) Bon Ayre failed to show that the rent increase was directly related to operating, maintaining, or improving the community and that (2) the record did not contain the evidence of rents actually paid by recent new home owners required to support a rent increase based on "market rent." The Court also held that the Bon Ayre's arguments that the Act is unconstitutional were meritless.

SUMMARY OF ARGUMENT

I. THE SUPERIORCOURT ERRED IN REVERSING THE ARBITRATOR'S DECISION SINCE THERE IS SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO JUSTIFY THE ARBITRATOR'S DECISION AND RENT INCREASE. **DENIED: THE ARBITRATOR'S DECISION WAS BASED ON ERRORS OF LAW AND WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

II. THE MARKET RENT FACTOR DOES NOT REQUIRE THAT THE INCREASE BE RELATED TO OPERATING EXPENSES. **DENIED: THE RENT JUSTIFICATION ACT REQUIRES ALL RENT INCREASES GREATER THAN THE CPI-U TO BE DIRECTLY RELATED TO OPERATING, MAINTAINING, OR IMPROVING THE COMMUNITY.**

III. THE RENT JUSTIFICATION ACT IS INCONSISTENT, UNWORKABLE, AMBIGUOUS, VAGUE AND UNCONSTITUTIONAL. **DENIED: THE RENT JUSTIFICATION ACT IS CONSTITUTIONAL.**

STATEMENT OF FACTS

Affordability is important to Thomas O'Donnell, Carol Quirk and James Powers. As these members of the Bon Ayre Community Association prepared to live out their twilight years, they each chose a home that was affordable. They did not choose a community that is "vastly superior and exceptional," as Bon Ayre claims. Op. Br. at 9. They chose a more modest community without "many amenities that the other . . . 55+ communities have." (Op. Br. Ex. B. at 11). They oppose the excessive rent increase sought by Bon Ayre.

Thomas O'Donnell (age 80 years) retired to the Bon Ayre community from New Jersey. He selected this home because similar communities in Pennsylvania and New Jersey were too expensive. (A-35, A-36). Carol Quirk (age 76 years) considered the Barclay Farms community in Camden, Delaware, but chose the Bon Ayre community because the lot rent was more affordable. (A-36). James Powers (age 73 years) moved to Delaware when his wife retired. He receives disability income. He, too, found Barclay Farms, "out of my reach," financially. (A-37). The Bon Ayre community, located in Smyrna, Delaware, is a community of homes that are of the "manufactured" variety in that they are constructed off-site and moved onto the property. (A-50). The residents of Bon Ayre, including Mr. O'Donnell, Ms. Quirk and Mr. Powers, own their homes and rent the lot upon which the home sits from the community owner, Bon Ayre. As a 55+ community,

residency at the Bon Ayre community is limited, with some exceptions, to individuals who are 55 years of age or older. (A-50). Most of the homes at the Bon Ayre community are occupied by retired individuals or couples. (A-35, A-36, A-37). 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*.

On December 28, 2014 and again on January 23, 2015, Bon Ayre sent to BACA and to home owners notice of a rent increase exceeding the CPI-U of 1.6% and 1.5%. (B-1 through B-8). For most of the affected residents the proposed monthly increase was from $349 to $399, a 14.3% increase. (B-1). For one resident the increase was from $309 to $399, a 29% increase. (B-7). 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 January 23, 2015 and February 24, 2015. (B-1, B-7). At these "Good Faith" meetings, Bon Ayre's representative, Dick Draper, mentioned that the rent increase was attributable to "comparables," and distributed a packet of documents. (A-42). The homeowners objected to the rent increase and BACA filed for arbitration of each rent increase. (B-9 through B-12).

The arbitration was conducted on April 13, 2015. At the arbitration, Bon Ayre argued that, because it was seeking a rent increase based on "market rent," it did not have to prove that the rent increase sought was directly related to operating, maintaining, or improving the community. (B-16). Bon Ayre proffered no facts on this element of rent justification. Similarly, Bon Ayre proffered no evidence of the amount or rent paid by recent new home owners in the communities it suggested as comparable.

The arbitrator found that the proposed $50 rent increase was not justified, and, relying on the advertised rents in some of the "comparable" communities, granted an increase of $37.37 per month. (Op. Br. Ex. B at 11).

ARGUMENT

I. THE RENT JUSTIFICATION ACT IS CONSTITUTIONAL.

Questions Presented

Does the Act violate Bon Ayre's constitutional due process rights because it recommends use of the Delaware Rules of Evidence without providing for the means to compel the attendance of witnesses?

Is the Act unconstitutionally "inconsistent, unworkable, ambiguous, [and] vague?" Op. Br. at 27.

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

A. Bon Ayre has waived the issue of whether requiring use of the Delaware Uniform Rules of Evidence without the ability to compel attendance of witnesses violates its constitutional right to due process.

Bon Ayre's primary argument that the Act is unconstitutional centers on the "fact" that the Act requires the use of the Delaware Uniform Rules of Evidence (D.R.E.) but does not provide parties with a mechanism to compel the attendance

of witnesses.[2] Op. Br. at 27-29. Bon Ayre has waived its right to bring this issue to this Court. Bon Ayre did not raise this issue with the Arbitrator and did not raise it with the Superior Court through a cross appeal. Although it did raise some constitutional challenges to the Act in its answering brief to the Superior Court, (Super. Ct. Op. Br. at 22-25), it did not raise this particular issue. Therefore, Bon Ayre is prohibited from seeking review by this court unless "interests of justice so require." Supr. Ct. R. 8. Bon Ayre has failed to allege that the Arbitrator's use of the D.R.E. caused it any harm or that the "interests of justice" otherwise require that this question be reviewed.

Even if this issue was not waived, Bon Ayre's position is legally meritless.

B. The Act does not require the use of the Delaware Uniform Rules of Evidence.

In reality, the Act does not require the use of the D.R.E. during arbitrations. The Act and the Authority's regulations clearly state that the D.R.E. are to be used

[2] Bon Ayre suggests that this is a particular problem in Rent Justification cases because "it would be impossible to compel tenants or comparable communities to appear so as to obtain and introduce actual leases." Op. Br. at 28 (footnote omitted). The Superior Court's opinion does not state that actual leases are required by the Act. Rather, the Superior Court merely held that Bon Ayre had to provide evidence of "rental figures *actually charged* to new home owners." *Bon Ayre Cmty. Assoc. v. Bon Ayre Land, LLC*, 2016 WL 241864, at *10 (Del. Super. Jan. 12, 2016) (emphasis in original). For example, Bon Ayre's expert could have attempted to obtain this information from the comparable communities, included that information in his report, and relied upon it in making his conclusions. The fact that the underlying information may have been inadmissible hearsay would not have affected the admissibility of the expert's report and conclusions. *See* D.R.E. 703.

"*as a guide* . . . for admissibility of evidence." 25 *Del. C.* § 7043(d) (emphasis added); 1 Del. Admin. C. § 202-7.11.1. Thus, even if Arbitrator's strict application of the D.R.E. in this matter did deny Bon Ayre its constitutional right to due process,[3] this would have been an error of law by the arbitrator. The constitutionality of the Act in this regard is simply not at issue.

C. It was not an error of law for the Arbitrator to apply the D.R.E. at the Arbitration.

In support of its assertion that the use of the D.R.E. is only constitutional if the parties have the ability to compel the attendance of witnesses, Bon Ayre cites to only two cases, Op. Br. at 29, neither of which supports its position.

Bon Ayre first cites *Ward v. Tishman Hotel & Realty, L.P.*, 2010 WL 5313549 (Del. Super. Nov. 30, 2010). *Ward* is not relevant to this case. *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* says nothing about whether use of the rules of evidence requires the ability to compel the attendance of witnesses.

[3] As discussed *infra*, Section I C, use of the D.R.E. did not deny Bon Ayre of its constitutional due process right to present evidence.

Similarly, *Goldberg v. Rehoboth Beach*, 565 A.2d 936 (Del. Super. 1989), does not support Bon Ayre's position. Although Bon Ayre rightly states that the court in *Goldberg* "recognized that procedural due process required the 'means of presenting evidence,'" Op. Br. at 29 (quoting *Goldberg*, 565 A.2d at 942), the opinion does not address whether the use of the rules of evidence requires the authority to compel the attendance of a witness. On the contrary, the court in *Goldberg* observed that some of the procedural safeguards that *may* be required to ensure due process include:

> (1) notice of the basis of the governmental action; (2) a neutral arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an opportunity to cross-examine witnesses or to respond to written evidence; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of reasons for the result. *Id.* (citing *Rogin v. Bensalem Township*, 646 F.2d 680, 694 (3d Cir. 1980)).

The authority to compel the attendance of witnesses as a requirement of due process does not appear anywhere in *Goldberg*. Bon Ayre's statement that a "'means of presenting evidence'. . . should include the ability to subpoena witnesses," Op. Br. at 29, is nothing more than wishful speculation.

Bon Ayre had the opportunity to fairly present its case to the Arbitrator and, in fact, prevailed before the Arbitrator. Bon Ayre does not allege that it failed to receive any of the procedural protections enumerated in *Goldberg*. As such, its due process argument is without merit. *See Bon*

Ayre Land LLC v. Bon Ayre Cmty Assoc., 2015 WL 893256, at *5 (Del. Super. Feb. 26, 2015), *rev'd on other grounds*, 2016 WL 747989 (Del. Feb. 25, 2016).[4]

D. If the Arbitrator erred in applying the D.R.E., that error was harmless.

Even if it was an error of law for the Arbitrator to apply the D.R.E. at the arbitration in this case, that error was harmless. There was no evidence that Bon Ayre proffered at the arbitration that the Arbitrator excluded.[5] Similarly, there is no record that Bon Ayre either (a) raised the issue with the Arbitrator so that the Arbitrator could consider relaxing the evidentiary standards or (b) possessed any evidence that it might have put forward if the evidentiary standards had been relaxed. Even if Bon Ayre knew that an attempt to admit certain evidence would have been unsuccessful, it could have made a note of this to preserve the issue on appeal. Bon Ayre was well aware of this, as it made a note to specifically preserve the issue that "the statute, as written, is unconstitutional and unworkable, inconsistent and . . . simply vague." (B-13). At no time, including in its opening brief to this Court, has Bon Ayre alleged any harm that it suffered as a result of the Arbitrator's decision to apply the D.R.E. As such, to the extent that applying the

[4] These cases involved a prior rent increase, arbitration, and appeals at which Bon Ayre did raise the due process issue. As noted *supra*, it did not raise this issue in this case until its opening brief to this Court.

[5] Bon Ayre did successfully exclude testimony from a BACA witness on a hearsay objection. (A-41). As such, to the extent there was an erroneous decision on admissibility, that error favored Bon Ayre.

D.R.E. at the arbitration was an error, this error caused Bon Ayre no harm, and correction of the error would change neither the Arbitrator's decision nor the Superior Court's decision. Therefore, it is not grounds to reverse the Superior Court's decision.

E. Bon Ayre's remaining constitutionality arguments are without merit.

Bon Ayre's remaining constitutionality arguments appear to boil down to a generalized allegation that the Act is unconstitutionally amibiguous. As noted by the Superior Court, in order to succeed on a claim that a statute is impermissibly vauge "the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Bon Ayre Cmty. Assoc. v. Bon Ayre Land, LLC*, 2016 WL 241864, at *11 (Del. Super. Jan. 12, 2016) (quoting *In re Kennedy*, 472 A.2d 1317, 1330 (Del. 1984). The Superior Court observed that Bon Ayre "failed to make an argument that the statute is impermissibly vague in all of its applications." *Id.* It has similarly failed to do so here. The two examples Bon Ayre uses to illustrate the "impermissible" ambiguity do not help its position.

First, Bon Ayre argues that the Superior Court referred to an arbitrator's decision as a "recommendation" in one case and, in a subsequent case, found the arbitrator's decision to be "untouchable." (Op. Br. at 31-32). As noted by the Superior Court, the second case hinged on whether the Superior Court had jurisdiction to hear the appeal, not whether the underlying arbitrator's decision

could be reviewed. *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *11. More importantly, if it was wrong for the Superior Court to refer to an arbitrator's decision as a "recommendation" in the first case or to dismiss the appeal in the second, those would have been legal errors by the Superior Court. The fact that the Superior Court may have made errors in other cases does not make the Act unconstitutionally vague, and Bon Ayre offers no authority suggesting that it does.

Bon Ayre's other attempt to prove that the Act is impermissibly vague is based on the Superior's court dicta, in a footnote, that "[n]othing in the [Act] prevents the retroactive application of an increase up to the CPI-U." *Id.* at *8 n.38. Bon Ayre argues that the Superior Court was suggesting that Bon Ayre could retroactively increase the rent on tenants for years where there had not been rent increases and that this proves that the Act is unconstitutionally vague because it would violate the tenants' leases. *See* (Op. Br. at 15-16, 33). Assuming, *arguendo*, that the Superior Court's statement in the footnote should be construed as Bon Ayre suggests and that this construction is improper, this would be a legal error by the Superior Court and would not affect the constitutionality of the Act.[6] Moreover, reading the footnote in its entirety shows that the Superior Court's point was that the Act might allow a landlord to increase the rent by the CPI-U multiplied by the number of years since the last rent increase. *Bon Ayre Cmty.*

[6] As dicta that did not affect the outcome of the case, any error in the footnote is harmless.

Assoc., 2016 WL 241864, at *8 n.38 (noting that the CPI was "1.6% per year"). Whether the Act actually permits such an increase would be a question of first impression if it was raised, but it is not an issue in this appeal.[7] Regardless, the Superior Court's footnote does nothing to bolster Bon Ayre's assertion that the Act is unconstitutionally vague.

[7] Because it is not question before this Court at this time, BACA takes no position on this issue.

II. THE ARBITRATOR ERRED IN HOLDING THAT A RENT INCREASE BASED ON MARKET RENT WAS JUSTIFIED BECAUSE THE RECORD CONTAINED NO EVIDENCE OF RENTS ACTUALLY CHARGED TO NEW HOMEOWNERS IN THE COMPARABLE COMMUNITIES.

Question Presented

Was the Superior Court correct in holding that the Act requires a landlord to provide evidence of rents actually charged to recent new homeowners to establish "market rent?"

Scope of Review

The decision of the Arbitrator should be upheld if it is "based on substantial record evidence and not tainted by any error of law." *Bon Ayre Land, LLC v. Bon Ayre Cmty. Assoc.*, 2016 WL 747989, at *2 n.11 (Del. Feb. 25, 2016). Whether the Act requires evidence of rents actually charged to new homeowners to establish "market rent" is a question statutory construction that this Court reviews *de novo*. *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 380 (Del. 1999) (quoting *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992)).

Merits of Argument

A. The Arbitrator found that the evidence of rents paid by new tenants in Bon Ayre was insufficient to establish "market rent."

On appeal, Bon Ayre argues that it was "undisputed that Bon Ayre's current rent was '$399 per month for a one year least and starting at $389 per month for a nine year lease'" and that, based on this, the rent increase was justified. Op. Br. at 10. This statement is misleading. The record shows that, at the time of the arbitration, there was only one new tenant in Bon Ayre in either 2014 or 2015, and the Arbitrator made a *de facto* finding that this was insufficient to establish "market rent."

1. The record shows that, as of the date of the arbitration, only one new tenant moved into Bon Ayre in either 2014 or 2015.

The record shows that while Bon Ayre's witnesses testified that the "current rent" for lease renewals *or* new leases was $399 for a one year lease and $389 for a nine year lease, the witnesses did not distinguish leases for new tenants from lease renewals. (A-16) (answering a question about "new people or people that have resigned or renewed); (A-21 [Tr. at 98-99]) (answering a question about "everybody that has either had a lease renewed or has purchased a new home" and about "everybody . . . the new leases or new tenants"). At the time of the arbitration, Bon Ayre had only sold one home in 2015 with one more sale pending and did not sell any homes in 2014. (A-17). Thus, there was, at most, one new

homeowner who agreed to pay the "current" rent. No information about this homeowner was presented by Bon Ayre, but the record suggests that the homeowner was paying $389 per month, not $399. (A-16) (Bon Ayre's witness stating that no one had taken the one year lease at $399 per month).

2. The Arbitrator found that the single new tenant in Bon Ayre was not sufficient evidence to establish "market rent," and Bon Ayre has failed to allege that this finding was an error.

The Arbitrator made a *de facto* finding that the evidence of a single new tenant paying $389 per month was not sufficient evidence to establish "market rent." The Arbitrator was well aware of the single new tenant in Bon Ayre and that he or she was paying either $389 per month or $399 per month. (Op. Br. Ex. B at 5).[8] If the Arbitrator believed that this was sufficient to establish "market rent," the Arbitrator would have awarded Bon Ayre a rent increase to *at least* $389 per month. Instead, the Arbitrator granted Bon Ayre a lower increase based upon portions of the Rostocki Report. (Op. Br. Ex. B. at 10-11). In so doing, the Arbitrator made a *de facto* finding that Bon Ayre had failed to establish market rent based on the evidence of its new tenant. Bon Ayre did not allege that this finding was an error on appeal to the Superior Court and has not done so before this Court. It has therefore waived this issue. Supr. Ct. R. 8. To the extent that it has not waived the

[8] The Arbitrator's decision states in one place on this page that the rent was "$398 per month for a 9 year lease." This appears to be a typographical error, as this number appears nowhere in the record and is correctly cited as $389 everywhere else.

issue, the Arbitrator's finding was supported by substantial evidence because it was reasonable for the Arbitrator to find that a single new resident in more than a year was insufficient to establish "market rent."

B. The record contains no evidence of rents charged to new homeowners in any other communities

It is uncontested that the record is devoid of any evidence of the actual rents charged to new homeowners in any of the comparable communities. Despite admitting in its opening statement that "the statute makes it crystal clear that what you a charging a new person that . . . can walk away is your market rent," (B-14), Bon Ayre made no effort to introduce evidence of rents actually charged to new homeowners in any other communities. The rent figures that Rostocki used in his report were the advertised rents from web sites and, in some cases, discussions property managers. (B-15). Rostocki did not know which communities he had called, (B-15), and there was no evidence that he inquired about rents actually charged to new home owners when he did call. Draper also testified as to "the rent" at various communities, *see, e.g.*, (A-14), but he never stated whether these were advertised rents, rents charged to existing homeowners renewing their leases, or rents actually charged to new homeowners.

Bon Ayre asserts that "there was no evidence to dispute Mr. Rostocki's testimony that the rent that the property managers told him was the current rents . .

. were different than the rents actually charged by those communities." (Op. Br. at 14). This statement is misleading because whether the rents were "actually charged by [the] communities" is irrelevant. The relevant question is whether the rents were actually charged to *new home owners*. 25 *Del. C.* § 7042(a)(7). It was Bon Ayre's burden to prove that its rent increase was justified under the terms of the Act. 1 Del. Admin. C. § 202-7.14; *see also* (B-14) (discussing ways Bon Ayre can prove that its rent increase was justified). It is certainly *possible* that the rents used by Mr. Rostocki were the rents actually charged to new home owners in the communities in his report. It is equally possible that none of the other communities had new home owners in the past year and that the rents used by Mr. Rostocki were either advertised rents that no one was paying or the rents charged to current home owners renewing their leases.[9] The record lacks any evidence that provides even a hint of whether there were any actual new home owners paying the rents used by Mr. Rostocki. It was Bon Ayre's responsibility to put that evidence into the record, and it failed to do so.[10]

[9] There are, of course, other possibilities, e.g., there might have been new home owners, but those home owners are paying a rent different from the advertised rent.

[10] Bon Ayre notes that BACA witnesses from two other communities testified about their rent. (Op. Br. at 11-12). As noted by the Superior Court, these were not new tenants in their respective communities. *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *8 n.50; *see also* (A-30, A-23), (statements from those witnesses that they had lived in their communities since 2003 in one case and 2010 in the other).

On appeal, Bon Ayre does not argue that the record contains evidence of rents charged to new homeowners in other communities. Rather, Bon Ayre simply makes the irrelevant statement that "[t]here was no evidence or basis whatsoever to support the Superior Court's decision that the rental information obtained by Bon Ayre's witnesses as to the comparable current rent was not the actual rent charged *to the tenants*." (Op. Br. at 14) (emphasis added). As previously stated, whether there are tenants paying a particular rent is irrelevant for determining market rent unless those tenants are "*recent new*" tenants. 25 *Del. C.* § 7042(a)(7) (emphasis added). More importantly, the Superior Court's finding was not, as Bon Ayre alleges "the rental information obtained by Bon Ayre's witnesses . . . was not the actual rent charged to the tenants." (Op. Br. at 14). The Superior Court found that Bon Ayre failed to present any evidence as to "rents charged to new home owners moving into a comparable community." *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *10. Bon Ayre does not allege that this finding was in error.

C. The Arbitrator did not make a factual finding as to the rents charged to new home owners in other communities and, to the extent that she did, that finding is not supported by substantial evidence.

Based on the language of the Arbitrator's decision, BACA believes that the Arbitrator made a legal error and used rents other than those charged to new home owners in awarding Bon Ayre its rent increase based on market rent. Specifically, the decision never refers to the rents used as rents actually charged to new home

owners (Op. Br. Ex. B at 4) ("Mr. Rostocki did testify that current new lot rents . . . ." (emphasis in original)); (Op. Br. Ex. B. at 11) ("I therefore took the current monthly lot rents . . . ."). Given that the rents cited by Rostocki were gathered from websites and possibly some confirmatory calls to property managers, (B-15), this strongly suggests that the Arbitrator did not make a finding that these rents were those actually charged to new home owners and, instead, determined that the Act allowed her to consider advertised rents or rents charged to current tenants.

Bon Ayre has alleged that the Superior Court's error in reversing the Arbitrator's decision was an error of law subject to *de novo* review, (Op. Br. at 9). Additionally, Bon Ayre's opening brief claims that the support for the Arbitrator's decision was the "rents charged by comparable communities in the competitive area," (Op. Br. at 13), without reference to recent new home owners. Thus, it appears that Bon Ayre concedes that the Arbitrator did not make a factual finding on this issue.

Assuming, *arguendo*, that the Arbitrator made a factual finding as to the rents charged to new home owners in the other communities, that finding is not supported by substantial evidence. "Substantial evidence is more than a mere scintilla, but less than a preponderance of the evidence." *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1098 (Del. 2006) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)). As noted both above, Section II B, and by the Superior

Court, *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *10, no information about rents actually charged to new home owners in other communities was placed into evidence by Bon Ayre. As such, to the extent that the Arbitrator made a factual finding as to the rents actually charged to new home owners in other communities, that finding is not supported by substantial evidence.

D. The Act requires that evidence of rents actually charged to recent new home owners be used to calculate "market rent."

The Act clearly states that, when determining market rent "relevant considerations include rents charged to *recent new home owners* entering the subject community and/or by comparable manufactured home communities." 25 *Del. C.* § 7042(a)(7) (emphasis added). As noted by the Superior Court, the reference to recent new homeowners was added in the 2014 amendment to the Act. *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *8 ("The statute now requires information that is more *specific"*); 79 Del. Laws c. 304 §§ 1, 6. Logically, the purpose of the 2014 amendment was either (a) to clarify the original intent of that section of the Act or (b) to change the meaning of the that section of the Act. In either case, the amendment makes it clear that, for the purpose of determining market rent, the relevant rents are those charged to "recent new home owners entering the subject . . . community and/or by comparable manufactured home communities." The requirement to use recent new home owners as the standard for comparison is consistent with the Act's definition of market rent as "that rent

which would result from market forces absent an unequal bargaining position between the community owner and the home owners." 25 *Del. C.* § 7042(a)(7). As noted elsewhere in the Act, community owners have "disproportionate power in establishing rental rates," 25 *Del. C.* § 7040, for existing tenants due to "the difficulty and cost of moving the home."[11] *Id.* The factors contemplated by a new home owner deciding whether to move in to a community and accept a particular monthly rent are very different from those contemplated by an existing tenant deciding a rent increase warrants moving the home to another community.[12] Thus, the rents paid by existing tenants (i.e. not recent new home owners) are necessarily excluded from the definition of market rent in the Act. As such, the Act is clear that market rent must be determined by the rents paid by recent new home owners.

"Statutory interpretation is ultimately the responsibility of the courts." *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999). "A reviewing court will not defer to [an agency interpretation of a statute administered by the agency] merely because it is rational or not clearly erroneous." *Id.* at 382-83 (footnote omitted). In order to determine whether a statute needs to be construed, "a court must determine whether the provision in question is ambiguous."

[11] Although it is not a contested fact in this appeal, it is worth noting that, while manufactured homes are sometimes referred to as "mobile" homes, moving them is not a simple operation. This is especially true for "double-wide" homes like those in Bon Ayre.

[12] For example, a tenant who would be unwilling to pay $500 per month in rent if she were a new home owner choosing a community to live in might be willing to accept a rent increase to $500 to avoid the difficulty and cost of attempting to move her home to a new community.

Doroshow, Pasquale, Krawitz & Bhaya v. Nantikcoke Memorial Hosp. Inc., 36 A.3d 336, 342 (Del. 2012). A provision is only ambiguous when it is "capable of being reasonably interpreted in two or more different senses." *Id.* (citation omitted). "If the statute is unambiguous, then there is no room for judicial interpretation and 'the plain meaning of the statutory language controls.'" *Id.* at 342-43 (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

While there may be sections of the Act that are ambiguous, the definition of market rent as requiring evidence of rents paid by "recent new home owners" is not among them. As such, the plain language of the Act, which requires the use of rents charged to recent new home owners, should control. To the extent that the requirement to use rents charged to "recent new home owners" is ambiguous, the only reasonable interpretation of Section 7042(a)(7) is one that requires the use of the rents charged to recent new home owners. As already stated, only recent new home owners are those whose rent is rent agreed to "absent an unequal bargaining position between the community owner and the home owner[]." 25 *Del. C.* § 7042(a)(7). Bon Ayre offers no alternative construction of the statute.

E. Advertised rents are not equivalent to rents charged to recent new home owners.

Because the Act requires that rents actually charged to recent new home owners be used to calculate market rent, the rents advertised in communities cannot be

used to calculate market rent in the absence of evidence that there are recent new home owners in those communities paying the advertised rent. At the arbitration, Bon Ayre acknowledged that advertised rental rates are not a reliable indication of the actual rents being paid by home owners. (A-41). In response to a BACA witness's attempt to provide information from a community's website, Bon Ayre responded that "I really do object to the web site because the web site is nothing more than an advertisement piece . . . and you don't really know what the situation is and it doesn't really give a true picture." *Id.* In the absence of any evidence that there are actual recent new home owners paying the advertised rents, advertised rents are nothing more than the community owner's unaccepted offer. It cannot be "market rent" unless the market, *i.e.* new homeowners, actually accepts the offer.

In concert with additional evidence, it might be possible to support a conclusion that recent new tenants are paying advertised rents. For example, if there was evidence that a community had a large number of new home owners in the past year, and there was evidence that the community owner's general practice is not to give rent discounts, that might be enough to support an inference that the recent new home owners are paying the advertised rent. The record contains neither evidence that *any* of the communities Bon Ayre considers "comparable," (Op. Br. at 5-6), had *any* new home owners in the past year nor evidence of what those new home owners, if they exist, pay in rent.

F. It would not be impossible for Bon Ayre to find out the rents paid by recent new home owners in other communities.

In its opening brief, Bon Ayre argues that it cannot be required to produce evidence of rents paid by recent new home owners because "it would be impossible to obtain the testimony of actual tenants [of other communities] or their leases." (Op. Br. at 14); *see also* (Op. Br. at 28). This statement is irrelevant and misleading. The Superior Court held that the Act requires evidence of "rental figures *actually charged* to new home owners." *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *10 (emphasis in original). According to Mr. Rostocki's report, it is "typical" for appraisers to use "signed market leases at competitive, similar properties" to calculate market rent. (A-64). The record contains no evidence that Mr. Rostocki attempted to acquire this information for his report. Had he done so, perhaps through inquiries to the owners of other communities, he could have included that information in his report.[13] This would then have been relevant evidence on which market rent could have been determined.

Because the record contains no evidence of rents actually paid by recent new homeowners in other, comparable communities, the Arbitrator erred in awarding a rent increase based on the rents paid in those communities, and the Superior Court correctly reversed that decision.

[13] Although not at issue in this case, it is worth noting that Rostocki could have relied on this information in his report under D.R.E. 703 even if it would be inadmissible hearsay if proffered by a non-expert witness.

III. THE SUPERIOR COURT CORRECTLY DENIED BON AYRE'S RENT INCREASE WHERE BON AYRE FAILED TO PROVE THAT INCREASE DIRECTLY RELATED TO THE OPERATING, MAINTAINING OR IMPROVING THE BON AYRE COMMUNITY.

Question Presented

Does the Act require that rent increases proposed using the "market rent" justification be "directly related to operating, maintaining or improving the manufactured home community?"

Scope of Review

The decision of the Arbitrator should be upheld if it is "based on substantial record evidence and not tainted by any error of law." *Bon Ayre Land, LLC v. Bon Ayre Cmty. Assoc.*, 2016 WL 747989, at *2 n.11 (Del. Feb. 25, 2016). Whether the Act requires a community owner to prove that a rent increase is directly related to operating, maintaining, or improving the community is a question statutory construction that this Court reviews *de novo*. *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 380 (Del. 1999) (quoting *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992)).

Merits of Argument

At the Arbitration, Bon Ayre made no attempt to prove that its proposed increase was "directly related to operating, maintaining or improving the

manufactured home community."[14] 25 *Del. C.* § 7042(a)(2). Instead, Bon Ayre took the position that the Act does not require rent increases based on market rent to be "directly related." (B-16). The Arbitrator adopted Bon Ayre's construction of the Act, and the Superior Court reversed. *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *3, 4-8.

A. The Act is unambiguous and requires that all rent increases greater than the CPI-U be "directly related."

On appeal, Bon Ayre attempts to frame this issue as whether the Act requires "that the increase [based on market rent] be related to operating expenses." (Op. Br. at 17); (Op. Br. at 19). Bon Ayre reads the Act much too narrowly and therefore poses the wrong question. The proper question, which was addressed by the Superior Court, is whether the Act requires that all increases greater than the CPI-U be "directly related." A community's operating expenses are, of course, "directly related," but "directly related to operating, maintaining or improving" covers many things that are not operating expenses.

"Statutory interpretation is ultimately the responsibility of the courts." *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999). "A reviewing court will not defer to [an agency interpretation of a statute administered by the agency] merely because it is rational or not clearly erroneous." *Id.* at 382-83

[14] Hereinafter refered to as "directly related" for brevity.

(footnote omitted). In order to determine whether a statute needs to be construed, "a court must determine whether the provision in question is ambiguous." *Doroshow, Pasquale, Krawitz & Bhaya v. Nantikcoke Memorial Hosp. Inc.*, 36 A.3d 336, 342 (Del. 2012). A provision is only ambiguous when it is "capable of being reasonably interpreted in two or more different senses." *Id.* (citation omitted). "If the statute is unambiguous, then there is no room for judicial interpretation and 'the plain meaning of the statutory language controls.'" *Id.* at 342-43 (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

Section 7042(a)(2) is not ambiguous. It clearly states that rent increases greater than the CPI-U must be "directly related" and "justified by 1 or more of the factors listed under subsection (c)." 25 *Del. C.* § 7042(a)(2). "Market rent" is one of the eight subsection (c) factors. As the Superior Court observed, the requirements for a rent increase greater than the CPI-U are a "two prong conjunctive test consist[ing] of three distinct elements." *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *4. The first element involves violations of health and safety, 25 *Del. C.* § 7042(a)(1) and is not at issue in this case. The second and third elements are that the increase be "directly related" and that the increase fall into one or more of the eight factors in Section 7042(c). 25 *Del. C.* § 7042(a)(2).

Bon Ayre does not argue that these three elements do not exist. Instead, it argues that rent increases based on market rent are somehow exempt from being "directly related" and that, despite the clear statutory language to the contrary, this must have been the intent of the Legislature. (Op. Br. at 19-20). Especially when one considers that "directly" related is much broader than "operating expenses," Bon Ayre's argument is clearly meritless. The language of Section 7042(a)(2) is clear, and it requires that rent increases greater than the CPI-U be "directly related" regardless of which 7042(c) factor is applicable.

B. Construing the statute consistent with its plain language is not "redundant."

The Arbitrator held that applying the "directly related" element in cases involving market rent would be "redundant . . . [because] a community owner could never justify a rent increase by relying solely on 'market rent.'" (Op. Br. Ex. B at 9). While technically correct, this statement misconstrues the intent of the Act and, more importantly, fails to give meaning to all of the words of the Act. Under the Act, a community owner can never justify a rent increase "by relying solely on" any of the eight Section 7042(c) factors. The community owner must also show that the rent increase is "directly related." While this may be easier with certain 7042(c) factors than with others, it is always required. Similarly, there are

reasons that a community owner might want to increase rent that are "directly related" that could only be justified under the "market rent" factor.

Certain costs incurred by a community owner are identified as specific rent increase justifications. A rent increase may be based upon the completion of any capital improvements or rehabilitation work, 25 *Del C*. § 7042 (c)(1), for repairs, 25 *Del. C.* § 7042(c)(6), changes in taxes, 25 *Del. C*. § 7042(c)(2), changes in utility charges, 25 *Del C*. § 7042 (c)(3), changes in insurance and financing costs, 25 *Del C*. § 7042 (c)(4), and changes to operating and maintenance expenses such as water, sewer and septic service, trash collection and staff costs. 25 *Del C*. § 7042 (c)(5). This list is expansive, but it is not exhaustive. Rather than attempt to include every possible expense in the list, the Legislature wisely allowed community owners to recover *any* expense incurred as long as (1) the expense was "directly related" and (2) the rent increase was supported by "market rent." Bon Ayre itself provides some examples of expenses that might not fit into another 7042(c) factor but would be "directly related." Incentives provided to new homeowners as part of a marketing campaign, such as a "free vacation[] or flat screen TV," (Op. Br. at 23) would certainly be "directly related," but it is unclear that they would fit within any of the 7042(c) factors.

Another example of a rent increase that would be "directly related" but not covered by another rent justification factor is a community owner seeking to raise rent to cover the cost of a capital improvement prior to the completion of the project. For example, a community owner renovating his property might prefer to increase the rent prior to starting the project so that he could avoid the need to finance the project. He could not do so under Section 7042(c)(1), because that only allows rent increases for the completion of the work. The market rent justification would allow him to do so, if market supported the increase.

Similarly, a community owner could seek a rent increase if he believed that he was no longer able to make a reasonable and fair rate of return on his investment without an increase in rent. Manufactured home communities are businesses, and the ability to make a fair and reasonable rate of return on investment is key to any business. As such, the need to make a fair and reasonable rate of return is "directly related" to operating a manufactured home community. The concept of a need to make a fair rate of return as a foundational, and constitutionally protected, part of all businesses is a well-developed one, particularly in the context of the work of the state's Public Service Commission. *See* 26 *Del. C.* § 311; *see also*, *PSC v. Wilmington Suburban Water Corp.*, 467 A.2d 446 (Del. 1983); *see also Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938); *Michigan Bell*

Telephone Co. v. Engler, 257 F.3d 587, 594-95 (6th Cir. 2001); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 857 (Cal. 1997).

C. Requiring rent increases to be "directly related" is consistent with the legislative intent

The Superior Court analyzed the goals of the rent justification statute and found that the requirement that a market rent increase be directly related to operating, maintaining or improving the community is not merely consistent with those goals, but also that it is necessary to "balance the rights of the home owner and the community owner". *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *8. The Superior Court explained the rent justification statutory scheme allows a community owner to protect the investment from degradation by permitting increases in rent to offset costs while at the same time protecting home owners from unreasonable or burdensome increases when there is no threat to the community owner's return on investment. *Id.* at *7. The Superior Court pointed out that in the case at bar, the community owner sought rent increases in the range of 14.4% to 22.6%. *Id.* at *8.

On appeal, Bon Ayre offers nothing in response other than conslusory statements that the Legislature must have intended for community owners to make justify "market rent" increases merely by proving market rent. In so doing, Bon Ayre actually makes BACA's point. Bon Ayre claims that the Act was passed after "land . . . in Sussex County . . . became too valuable . . . [and some

community owners] . . . increase[d] the rent so that the owner could at least come closer to realizing the value of the land. [This] accordingly caused the tenants' outcry that led to the Rent Justification Act." (Op. Br. at 21). Assuming, *arguendo*, that Bon Ayre's recitation of the history is correct, the Act was passed specifically to stop community owners from increasing rent in response to increases in the market value of their properties. Eliminating the requirement for increases to be "directly related" eliminates the Act's ability to serve that purpose.

Bon Ayre's interpretation of the Act leads to absurd results. Consider a hypothetical: A community owner purchases land, builds amenities, sets a rent that allows for a reasonable profit, and begins accepting tenants in 2016. Tenants agree to that rent and move in. In 2017, it is announced that a major theme park will open nearby, and property values skyrocket. The community owner is free to enjoy this windfall by charging *new* tenants much higher rents. The question is whether he can also increase the rents of existing tenants solely to achieve greater profits.[15] Under Bon Ayre's interpretation of the Act, the community owner is free to double or triple the rent for existing tenants if the new market rent is that high. This is precisely the kind of rent increase the Act was created to avoid. As it creates an absurd result, Bon Ayre's construction of the Act should be avoided.

[15] If the community owner's taxes increased as a result of the increase in property value, this would be a justified increase under 25 *Del. C.* § 7042(c)(2).

CONCLUSION

For the reasons explained in this, Appellee's Answering Brief, the judgment 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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