IN THE SUPREME COURT OF THE STATE OF DELAWARE

REHOBOTH BAY HOA, Appellant-Below, Appellant, v. HOMETOWN REHOBOTH BAY, LLC, Appellee-Below, Appellee.	:	No. 139,2020 D On Appeal from the Superior Court of the State of Delaware, C.A. No. S18A-03-003 CAK

APPELLANT'S CORRECTED OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

NATURE OF THE PROCEEDINGS

This appeal seeks review of the Superior Court's affirmance of an arbitrator's decision (the "Arbitrator's Decision"[1]) approving Appellee Hometown Rehoboth Bay MHC, LLC's ("Hometown") above-inflation monthly rent increase of $74.85 [2], subject to 25 *Del. C.* §§ 7040-7046, known as the *Rent Justification Act* (the "Act").[3]

The Rehoboth Bay community (the "Community") is a manufactured home community. [4] Because the rent increase it sought exceeded the CPI-U[5] of 0.7%, (A055) Hometown was required to comply with the provisions of the *Act.* The rent increase at issue in this appeal is predicated upon 25 *Del. C.* § 7042(c)(1), to recover expenses purportedly relating to capital improvements.

Objecting to the increase, Appellant, the Rehoboth Bay Homeowners' Association, (the "HOA") petitioned for arbitration.[6] The arbitration was held on January 16, 2018. The Arbitrator issued his decision granting most of the rent

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[1] The Arbitrator's Decision will be citied herein as "ArbD-*_".
[22] ArbD-*31.
[3] Effective December 19, 2019, the Act, was redesignated (*i.e.*, renumbered) and amended. This Brief will cite the statutes as they existed prior to the amendments. *See,* Delaware 2019 Session Laws, Chapter 38, H.B. No. 45 Sec. 42, 43.
[4] Arb.D-*2
[5] The CPI-U is the statutorily defined inflationary measure by which a community owner can increase the rent without having to go through the Act's justification and arbitration procedures. 25 *Del. C.* § 7042(a).
[6] 25 *Del. C.* § 7043; ArbD-*3.

increase on March 1, 2018.

The HOA filed a timely appeal with the Superior Court. The Superior Court affirmed the Arbitrator's decision. The Court ruled that there was substantial evidence in the record for the Arbitrator to conclude that the expense which provided the basis for almost all of the rent increase was a "capital improvement or rehabilitation work … as distinguished from ordinary repair, replacement and maintenance" within the meaning of 25 *Del. C.* § 7042(c)(1). (SuperOp-*9)

However, no Court in Delaware, not even the Superior Court below, has interpreted the statutory language, "capital improvement or rehabilitation work in the manufactured home community, *as distinguished from ordinary repair, replacement and maintenance*".[7] The type of work or investment that constitutes a capital improvement or rehabilitation work is not defined anywhere. In this case, the HOA will ask this Court to interpret this statutory language and hold that a repair, even if it is a big repair, is still a repair, not a capital improvement or rehabilitation work within the meaning of the Act.

Furthermore, the HOA will ask this Court to review the Arbitrator's decision to award Hometown the *full cost* of the purported capital improvement in the rent increase granted. This permanent rent increase means that Hometown will recover

[7] 25 *Del. C.* § 7042(c)(1) (emphasis added).

the full cost of the purported capital improvement in one year *and* the full cost of the purported capital improvement each and every year thereafter, in perpetuity. The multiple recovery occasioned by this unnecessary interpretation of this remedial statute leads to an absurd result. Despite the fact that HOA raised these issues below, the Superior Court ignored its request for review on the issues related to this problem: Does the Act require that the full cost of a capital improvement be recovered by the community owner in a rent increase in one year? If so, does the rent increase remain as a permanent rent increase? Should the Superior Court's decision in *December Corp v. Wild Meadows HOA*[8] be overruled because it wrongly holds that, despite the permissive language of the statute, the Act **requires** the imposition of a rent increase in the full amount of the capital improvement *and* that the rent increase must continue in perpetuity? The Superior Court's opinion below does not address these issues at all and consequently the HOA respectfully requests that this Court address these issues and correct this unreasonable and unwarranted interpretation of the Act.

[8] *December Corp v. Wild Meadows HOA,* 2016 WL 3866272 (Del. Super. July 12, 2016).

SUMMARY OF ARGUMENT

1. The Superior Court erred as a matter of law by finding that the repair to the bulkhead constituted a capital improvement pursuant to 25 *Del. C.* § 7042(c)(1).

2. The Superior Court erred in holding that there was substantial evidence in the record to support the Arbitrator's finding that the bulkhead repair constituted a capital improvement or rehabilitation work within the meaning of the Act.

3. The Superior Court erred in failing to address whether 25 *Del. C.* § 7042(c)(1) permits an arbitrator to fashion a rent increase that is reasonable and avoids multiple recovery.

STATEMENT OF FACTS

A. The Parties.

Hometown Rehoboth Bay MHC, LLC ("Hometown") is the owner of the Community in Rehoboth Beach, Delaware.[9] The Rehoboth Bay Homeowners' Association (the "HOA") represents the interests of the homeowners affected by Hometown's proposed rent increase.[10] The Act permits homeowners associations to file petitions for arbitration on behalf of affected homeowners. 25 *Del. C.* § 7043(c).

B. The Community.

In this Community, residents own their homes but rent the land on which the homes sit. Although the homes are technically "mobile" (and were once called mobile homes), these "homes are not so mobile, and there can be material costs in moving one from one community to another, if the homes can be moved at all."[11] This economic dynamic gives the community owner "disproportionate power in establishing rental rates,"[12] and allows community owners to "exploit the

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[9] ArbD-*2.
[10] 10A015.
[11] *Bon Ayre Land, LLC v. Bon Ayre Cmty. Ass'n ("Bon Ayre II")*, 149 A.3d 227 at 234 (Del. 2016)
[12] 25 *Del. C.* § 7040.

difficulties [faced by] homeowners".[13] This is the reason the *Rent Justification Act* was enacted.[14]

This Community, comprised of 525 rental lots, is located on the shore of Rehoboth Bay. Part of the community sits on a peninsula that juts out into the Bay. The Community also has a marina that can be used by homeowners and the public alike, for a fee. The Community, subject to the extreme conditions of coastal living, is and has been protected from the Bay by a bulkhead.

C. The Rent Increase

On September 30, 2017, Hometown sent out rent increase notices informing Homeowners that their rent for 2018 would increase in an amount in excess of the CPI-U.[15] In addition to a 0.7% increase based upon the CPI-U, Hometown demanded an additional $86.12 per month of which $79.99 was attributable to "capital improvements or rehabilitation work". The "capital improvements or rehabilitation work" for which Hometown demanded the rent increase was based upon expenses related to the following seven (7) projects:

[13] *Bon Ayre II*, at 234.
[14] 25 *Del. C.* § 7040.
[15] A015-A031

Project	Cost	Proportional Share per Lot
Phase 3 of the bulkhead project	$441,189	$70.03
Millings added for Road to the Marina	$ 4,950	$ 0.79
Bladder Tank Replacements	$ 4,650	$ 0.74
Repaving 6 Driveways	$ 9,500	$ 1.51
Drain in Swale and 2 Drywells	$ 3,595	$ 0.57
Kayak Walkway	$ 4,930	$ 0.78
Boat Ramp Replacement	$ 35,140	$ 5.58

The Arbitrator denied Hometown's requested rent increase for four (4) of the claimed expenses because the work completed was for repairs, not for capital improvements or rehabilitation work. No appeal has been taken from these denials. The Arbitrator came to his conclusion by examining the language of Section 7042(c)(1). The Arbitrator stated,

> A cost is a "capital improvement" if it enhances the property value of the community or increases the useful life of the community. In turn, a cost is not a "capital improvement" if it is for customary, usual, and normal repair, replacement, and maintenance in the community. I apply that framework to each cost the Landlord contends is a "capital improvement."[16]

In applying that framework, the Arbitrator denied the claim that the road millings were a capital improvement, finding instead "that the addition of the millings to the road is more properly classified as ordinary repair or

[16] ArbD-*16.

maintenance."[17] The claim that the bladder tank replacements were capital improvements was also rejected because "bladder tanks were replaced in the normal course of maintaining the community's water system and thus are not capital improvements."[18] The cost for repaving driveways was also rejected because "repaving an existing driveway is an ordinary repair, replacement, or maintenance of a driveway…. [T]he repaving restored the driveways to their original condition."[19] Finally, Hometown's effort "to recover the cost of removing an old boat ramp and installing a new boat ramp as a capital improvement"[20] was also rejected. The Arbitrator stated that,

> [Hometown] replaced the old ramp with a new ramp. The installation of the new ramp did not add a new feature to the community. Instead, based on the evidence, it appears the old ramp was in poor condition so it was replaced. To me, that is an "ordinary … replacement under Section 7042(c)(1). This work restored the community's marina to its original condition – having a usable boat ramp."[21]

On the other hand, the Arbitrator found that the three (3) remaining projects were capital improvements and consequently allowed the cost of those projects to provide the basis for most of the rent increase. The HOA acquiesces with regard to two of the projects' characterizations. Hometown recovered "the cost of installing

[17] ArbD-*20.
[18] ArbD-*21.
[19] ArbD-*22.
[20] ArbD-*25.
[21] ArbD-*26.

two drywells and a [F]rench drain as a capital improvement.[22] This work created a new drainage system that was needed to resolve drainage issues.[23] Additionally, the creation of a new "walkway" to provide access to the water for kayaks in the Community was deemed a capital improvement. Both projects installed new capabilities to the community, enhanced the value of the Community and improved the homeowners' enjoyment of the Community. Together, the cost of these capital improvements comprises $1.35 of the rent increase.[24]

With regard to the third project, however, the HOA contests the Arbitrator's conclusion and the Superior Court's affirmance that the work related to the bulkhead is a capital improvement. As noted above, the Community sits directly on the shoreline of Rehoboth Bay. An established bulkhead protects the Community from the Bay. The bulkhead repair is, by far, the most expensive of the projects, and it accounts for $70.03 of the $71.38 of the rent increase for 2018.

At arbitration, testimony was offered by Hometown's employees describing the bulkhead. The testimony revealed that the bulkhead was in terrible shape and that the deteriorated structure needed repair. Hometown was concerned that the bulkhead may not survive another storm. The Arbitrator summarized this

[22] ArbD-*23.
[23] ArbD-*23.
[24] The total cost of the Kayak walkway and the drainage swale was $8,525. (ArbD-*2) There are 525 rental lots in the Community. Consequently, $8,525 divided by 525 lots and further divided by twelve months amounts to $1.35.

testimony in his decision as follows:

> [Hometown] testified that engineers and consultants reviewed the old bulkhead and concluded that the entire bulkhead was not stable and may not survive a storm. [It] also testified that the current bulkhead looked stable from the top, but the engineers and consultants determined that the area below the waterline was not stable. …. [Hometown's] regional assistant, testified that the bulkhead project was for "stabilization." … [Hometown's] community manager, testified that the "integrity of the entire bulkhead was in question." She testified that the old bulkhead could not be removed,[25] so the placement of the new riprap stabilized the bulkhead.[26]

The old bulkhead had deteriorated to the point where it was vulnerable to failure. Hometown worked with engineers and consultants to address the problem of the failing bulkhead. It was determined that the old bulkhead could not be removed. Consequently, Hometown decided to repair the problem by shoring up the existing bulkhead. On August 18, 2016, Hometown executed a contract with Precision Marine Company to fix the failing bulkhead. The contract provided,

> Contractor shall provide all labor, material except riprap, tools equipment, supervision, transportation services and other related items necessary for <u>installing Riprap in front of the existing bulkhead beginning at the end of Phase II and continuing for approximately 448 linear feet. As well as installing Piling and Deadmen to stabilize the bulkhead along</u>

[25] The Superior Court misconstrued the factual record in the Opinion below by writing that there was an "almost complete replacement of [the] bulkhead" and that the bulkhead was replaced by an alternate construction method." As noted by the testimony referenced by the Arbitrator, the bulkhead was not "replaced" at all but was repaired or stabilized.

[26] ArbD-*16-17.

the Lagoon and continue for approximately 1535 linear feet.[27]

Consequently, the bulkhead project, totaling 1,983 linear feet, utilized two (2) different methods to shore up the bulkhead. About 25% of the project utilized riprap (rock) which was installed up against the old bulkhead. The other 75% of the project utilized "deadmen", underwater pilings and tie rods, to secure the bulkhead. The total cost of the project was $441,192.53. Hometown paid $138,786.29 (31%) for the portion of the project that used riprap to shore the old bulkhead, and$270,802.24 (61%) for the portion of the project that used "deadmen"/pilings. Costs to restore the grounds were $31,604.00.[28]

D. The Arbitrator's Decision

The Arbitrator awarded Hometown a permanent rent increase of $74.85[29] per month, $70.03[30] of which was based upon the costs of the bulkhead project. In doing so, the Arbitrator tried to apply the analytical framework he had used with the other projects. However, the Arbitrator's analysis was not applied in a consistent manner. Furthermore, rather than evaluating what actually happened with the bulkhead project, the Arbitrator was swayed by the nomenclature that was

[27] A057 (underlining in the original).
[28] *See,* A057-A093. A table setting forth the relevant information contained within the cited pages can be found at A060 – A062.
[29] Property tax increase of $0.13, Capital improvement increase of $71.38, and utility charge changes $3.34.
[30] There are 525 rental lots in the Community. Consequently, $441,192.53 divided by 525 lots and further divided by twelve months amounts to $70.03.

used describing the work, seeing a distinction by virtue of the words used when, in fact, no difference exists in reality. The Arbitrator was persuaded that Hometown's self-serving characterization of the work as "stabilizing the bulkhead" instead of a repair,[31] the mere characterization of the riprap as "a better technology" by Hometown's manager, and, probably, the fact that the riprap could be seen, "created a new feature of the bulkhead" and "enhanced the community's protective bulkhead with new riprap.[32] There is nothing in the record that would support the conclusion that the work done on the bulkhead did *anything* to enhance the bulkhead's performance or capability beyond that which has existed for the life of the bulkhead while in good repair. There is nothing in the record that supports the conclusion that the riprap creates a new feature in the bulkhead beyond creating the means by which Hometown could keep the bulkhead from slipping into the Bay.

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[31] Hometown and its agents also referred to the project as the bulkhead repair *See,* A064, A069, A073, A076, A082, A85-91, A092, "a damageddrain pipe that they found while doing the bulkhead repair or rebuild" T-32 (A148), "There were three phases of the bulkhead that were repaired." T-42 (A149), "That's the reason why the entire bulkhead was repaired." T-42 (A149), "So I was there for the end of phase 1 and then the remaining phases specific to the bulkhead repair. I'm sorry. Stabilization to the bulkhead." T-87 (A152) "Phase 3, for the Lagoon side, for the repair [of the bulkhead]." T-115 (A153).

[32] The Arbitrator made no mention at all of the bigger part (61%) of the project, the installation of the deadmen under water in the lagoon section of the Community.

E. The Superior Court's Decision

The problem with these unsupported factual findings was compounded in the Superior Court's decision. The Superior Court misconstrued the factual record in the Opinion below by writing that there was an "almost complete replacement of [the] bulkhead" and that "[t]he bulkhead … was in poor shape and it was replaced by an alternate construction method."[33] As noted in the testimony referenced by the Arbitrator, the bulkhead was not "replaced" at all. Rather, the bulkhead remains in place and riprap, which was placed in one section of the bulkhead, and deadmen, which were placed in a different section, were added to repair the vulnerable condition by stabilizing the bulkhead. To affect this repair, riprap and deadmen were literally placed adjacent to the existing bulkhead to keep it from further collapsing into the Bay.

Furthermore, The Superior Court failed to conduct any analysis addressing the legal distinction between a repair[34] and a capital improvement or rehabilitation work within the meaning of the Act. The Act distinguishes between these two terms, providing the basis for a rent increase for each, albeit under different standards. The Superior Court erred in its legal conclusion that the work on the bulkhead amounted to a capital improvement.

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[33] SuperOp-*8-9.

[34] Increased costs relating to repairs are recoverable under a different section of the *Rent Justification Act*.

The HOA argued below that the Arbitrator erred by granting a rent increase that allows Hometown to recover the $449, 694[35] multiple times.[36] This multiple recovery occurs because the rent increase provided for 100% recovery of the expenditure in one year and, because the rent increase is permanent, Hometown would recover the same amount every year. The Superior Court ignored the legal issues raised by this problem, and did not address this problem at all.

Finally, most of the Superior Court's Decision overruled arguments offered by the HOA with regard to the "directly related" requirement of 25 *Del. C.*§ 7042(a)(2). The HOA does not appeal from those rulings.

[35] The total cost of expenditures for the projects deemed to be capital improvements
[36] Of the 525 homeowners renting in the Community, about 15 remain challenging this increase. Hometown has settled with the other homeowners. Nevertheless, the remaining homeowners continue to pay their share of the full cost of the bulkhead repair.

ARGUMENT

I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW BY FAILING TO ANALYZE 25 *Del. C.* § 7042(c)(1) AND THEREBY MISTAKING A REPAIR FOR A CAPITAL IMPROVEMENT.

A. Question Presented.

Did the Superior Court err as a matter of law by failing to analyze the meaning of 25 *Del. C.* § 7042(c)(1)? Specifically, if in failing to determine what a "capital improvement or rehabilitation work" is within the meaning of the Act, as opposed to a repair, did the Superior Court fail to apply the correct legal standard in concluding that the bulkhead project was a capital improvement and not a repair? Preserved at **A098-107; A129-135**.

B. Scope Of Review.

The HOA asks this Court to review the meaning of "capital improvement and rehabilitation work" pursuant to 25 *Del. C.* § 7042(c)(1). This is a matter of statutory construction. This Court reviews "the Superior Court's interpretation of the Act *de novo*."[37]

[37] *Sandhill Acres MHC v. Sandhill Acres HOA*, 210 A.3d 725, 728 (Del. 2109), citing *Bon Ayre II*, 149 A.3d at 233 (Del. 2016).

C. Merits of the Argument.

The distinction between a repair and capital improvement under the *Act* is important in a few of the Act's sections. Unfortunately, the terms are undefined. In one section, the Act allows community owners to recover rent increases as a result of expenditures for capital improvements[38] as opposed to "ordinary repair, replacement and maintenance."[39] In another, the Act specifically allows community owners to increase rent to recover for expenses related to operation and maintenance when the costs for repairs and other expenses, overall, have "changed".[40] In still another section, the Act allows for a rent increase to recover costs for repairs where the need for repair is caused by reasons other than normal wear and tear.[41]

To parse the meanings of these terms, examining the plain meaning of the Act will not be sufficient. In this matter, the terms "capital improvement", "ordinary" and "repair" have been misconstrued because the terms are ambiguous. Clear interpretation of the statutory language by this Court is crucial in order to correct the error made below and to properly address these issues in the future.

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[38] These rent increases must also be "directly related to operating, maintaining and improving the manufactured home community" as required by 25 *Del. C.* § 7042(a)(2).
[39] 25 *Del. C.* § 7042(c)(1).
[40] 25 *Del. C.* § 7042(c)(5).
[41] 25 *Del. C.* § 7042(c)(6).

1. The Statute

The *Rent Justification Act* "is effectively a rent control statute."[42] The General Assembly passed the Act to level the playing field between two competing interests: (i) homeowners' right to be protected "from excessive rent increases that exploit the difficulties for homeowners of moving their mobile homes somewhere else"[43] and (ii) community owners' right to preserve their original expected rate of return on their investment. *Id*. The Act emphasizes its core purpose quite clearly:

> [T]he purpose of this subchapter is to accommodate the conflicting interests of protecting manufactured home owners, residents and tenants from unreasonable and burdensome space rental increases while simultaneously providing for the need of manufactured home community owners to receive a just, reasonable and fair return on their property.[44]

The Act permits a community owner to justify the imposition of an above inflation rent increase if three conditions are met: (i) there are no

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[42] *Bon Ayre II*, 149 A.3d at 234.

[43] "The term 'mobile home' is somewhat misleading. Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992) (citation omitted).

[44] 25 *Del. C.* § 7040.

health and safety violations under the law,[45] (ii) the rent increase must be "directly related to operating, maintaining or improving the manufactured home community,[46] and (iii) there must exist at least one of eight bases provided in the Act:[47] Three of the eight bases provide for a rent increase due to costs related the maintenance and improvement of the community:

> (1) The completion and cost of any capital improvements or rehabilitation work in the manufactured home community, as distinguished from ordinary repair, replacement and maintenance;[48]
>
> (5) Changes in reasonable operating and maintenance expenses relating to the manufactured home community including, but not limited to: costs for water service; sewer service; septic service; water disposal; trash collection; and employees;[49]
>
> (6) The need for repairs caused by circumstances other than ordinary wear and tear in the manufactured home community…[50]

Crucial to this case is determining what a "capital improvement or rehabilitation work" is "as distinguished from ordinary repair, replacement and maintenance". The Act contains a "Definitions" Section that states,

> The definitions contained in § 7003 of this title shall apply to this subchapter. Unless otherwise expressly stated, if a word or term is not defined under § 7003 of

[45] 25 *Del. C.* § 7042(a)(1).
[46] 25 *Del. C.* § 7042(a)(2).
[47] 25 *Del. C.* §§ 7042(c)(1)-(8).
[48] 25 *Del. C.* § 7042(c)(1).
[49] 25 *Del. C.* § 7042(c)(5).
[50] 25 *Del. C.* § 7042(c)(6).

> this title, it has its ordinarily accepted meaning or means what the context implies.[51]

None of the relevant terms are defined in Section 7003 of Title 25 or in the Act itself. Consequently, one must look first to the "ordinarily accepted meaning" of the words or to the context.

The Arbitrator turned to dictionaries for guidance and proposed a definition for a capital improvement.[52] He determined that a capital improvement is something that "enhances the property value … or increases the useful life of the community.[53] Despite the inadequacy of this definition the Arbitrator applied the framework in a consistent manner with regard to all but one of the projects for which Hometown sought a rent increase based upon capital improvements. As noted above, projects that provided new capacity and new capability were appropriately accorded capital improvement status. Thus, the new drywells and the new kayak walkway were totally new and were, consequently, improvements. On the other hand, the replacement of bladder tanks in the water filtration system were properly characterized as normal replacements. The repaving of existing driveways was properly considered a normal repair. The installation of millings on a road was properly characterized as normal maintenance of a road. The Arbitrator rightly rejected Hometown's claim that the replacement of a boat

[51] 25 *Del. C.* § 7041.
[52] ArbD-*14.
[53] ArbD-*16.

rampwas a capital improvement. Rather, the Arbitrator held that the replacement was an "ordinary … replacement" of a boat ramp. Consequently, the Arbitrator recognized that an ordinary repair can very well be a substantial undertaking, an undertaking that brings a deteriorated asset, even a big asset, back to proper working condition.

The Arbitrator abandoned this reasonable analysis, however, when it came to the bulkhead project. The Arbitrator and the Superior Court misconstrued the meaning of "capital improvement" by holding that Hometown's method of repairing the unstable bulkhead created a "new feature" of the bulkhead. The Arbitrator was convinced that the nomenclature Hometown used to describe the purpose of the project, "stabilizing the bulkhead" was decisive, despite the fact that stabilizing the bulkhead is the same thing as repairing the bulkhead. This failure to fully analyze the meaning of the statutory terms and properly apply the correct meaning has led to this legal error.

The definitions of the statutory terms used by the Arbitrator are helpful as far as they go. They assisted the arbitrator in analyzing most of Hometown's projects properly. When it came to the bulkhead, however, the Arbitrator was distracted by the visible character of the repair and the claim that the riprap constituted a "better technology". The Arbitrator erred when he stated, "[t]here is no dispute that the work done by the contractors, including adding significant

amounts of riprap, created a new feature of the bulkhead." The installation of "new riprap" did not create a "new feature" of the bulkhead any more than the installation of the pilings and tie rods in the other area of the project. Both repairs allowed the existing bulkhead to continue to serve its purpose of protecting the Community from the Bay. While the presence of the riprap is obvious to the eye and is an impressive sight, there is no evidence that the riprap, even if it is a "better technology", created a stronger, better bulkhead than existed when the bulkhead was built. Certainly, the bulkhead was stronger and better than just before the repair was completed, but that will be the case with every repair. Every repair will stabilize, protect, enhance, increase value and add to the useful life of an asset. The legal question that must be addressed is, once work is completed on a deteriorated asset, how is the determination made as to whether the work resulted in a repair or an improvement? To what is the post-repair condition of the asset compared? The proper comparison cannot be between the condition of the asset just before the repair and after the repair. The proper comparison must be between the condition of the asset after the repair and when it was built or when it was last in proper working order.

Helpful guidance for what "capital improvement and rehabilitation work" means can be found in the regulations promulgated under the Internal

Revenue Code.[54] Under the tax code, expenditures made for repairs to an asset may be deducted from income in the year expended. Expenditures for improvements are required to be capitalized over time. The Tax Code uses the term "betterment" to describe what expenditures for improvements are as opposed to repairs. The regulations state,

> …An amount is paid for a betterment to a unit of property only if it-
>
> i. …. ;
>
> ii. Is for a material addition, including a physical enlargement, expansion, extension, or addition of a major component … to the unit of property or a material increase in the capacity, including additional cubic or linear space, of the unit of property; or
>
> iii. Is reasonably expected to materially increase the productivity, efficiency, strength, quality, or output of the unit of property.[55]

The IRS addresses directly the problem of determining whether an expenditure is made to create a betterment or is made to correct for normal wear and tear. The regulations continue:

> ….
>
> (2)(iv) *Appropriate Comparison* – (A) *In general.* In cases in which an expenditure is necessitated by normal wear and tear or damage to a unit of property … the determination of whether an expenditure is for the betterment of the unit of property is made by comparing the condition of the property immediately after the expenditure with the

[54] 26 USC 263(a).
[55] 26 CFR 1.263(a)-3(j)(1)(i), (ii) and (iii) (4/1/19 edition)(A113-114).

> condition of the property immediately prior to the circumstances necessitating the expenditure.
> (B) *Normal wear and tear.* If the expenditure is made to correct the effects of normal wear and tear to the unit of property…, the condition of the property immediately prior to the circumstances necessitating the expenditure is the condition of the property after the last time the taxpayer corrected the effects of normal wear and tear (whether the amounts paid were for maintenance or improvements) or, if the taxpayer has not previously corrected the effects of normal wear and tear, the condition of the property when placed in service by the taxpayer.[56]

Applying this method to determining whether an expenditure is for a capital improvement or a repair will have the salutary effect of distinguishing between expenditures that actually improve the community from those that maintain the community. This will provide arbitrators and courts with a helpful framework to determine what expenditures, if any, rise above normal repairs and provide actual enhancement to the community, regardless of whether the expenditure is modest or significant.

In this case, extensive evidence of the expenditures made on the bulkhead project was provided by Hometown at arbitration. The contracts for the work were admitted into evidence as were all of the bills. From this evidence and from the testimony of Hometown's witnesses, it is clear that

[56] 26 CFR 1.263(a)-3(j)(2)(iv)(A) and (B) (4/1/19 edition)(A113-114).

one part of the failing bulkhead was shored up by the installation of 448 feet of riprap. The other 1,535 feet of the unstable bulkhead was shored up by the installation of pilings and tie rods under water. Work was also done to restore the landscaping to its normal condition after the work was done. What is not revealed, at all, is whether this work simply restored the bulkhead to its original capacity to protect the Community (an ordinary repair) or whether any of the work actually improved the bulkhead's ability to protect the Community (a capital improvement). In fact, no evidence whatsoever was presented that would indicate anything other than the repairs to the bulkhead restored the bulkhead's ability to protect the community as it had previously done.

Without comparing the condition/capacity of the bulkhead before the circumstances arose that necessitated the expenditure[57] (before the elements weakened it) and the condition after the expenditure, a finder of fact cannot determine whether the project resulted in an "improvement" to the bulkhead or simply a repair. By comparing the condition/capacity of an asset before the circumstances resulted in the need for the expenditure with the condition/capacity after the expenditure, small and large expenditures will be treated the same. By making this comparison, methods of repair, whether

[57] The record does not reflect how old the bulkhead is. It is simply characterized as "old".

visible or invisible, whether better technology or similar technology, will not mislead the finder of fact into concluding that the work is anything other than what it was, a repair or an improvement. If the installation of the pilings and tie rods or the riprap made the bulkhead stronger than it ever was, then those expenditures would be for a capital improvement. If the capacity of the bulkhead was not changed, then the expenditure is for an ordinary repair. Since this analysis was not done, the Arbitrator failed to apply the correct legal test in evaluating whether the bulkhead project repaired or improved the bulkhead. Indeed, the Arbitrator could not have conducted this analysis because no evidence of the effect of the riprap on the capability of the bulkhead was presented below. Accordingly, the rent increase based upon the bulkhead project should not have been allowed to justify a rent increase above CPI-U.

In addition to looking at the ordinary meaning of the operative terms in the statute, meaning can also be gleaned from reading § 7042(c)(1) and § 7042(c)(6) together. 25 *Del. C.* § 7042(c)(6) provides another basis for a rent increase is "(t)he need for repairs *caused by circumstances other than ordinary wear and tear*…" *Id.* (emphasis added) Read together, these two sections of the statute make one thing clear; the Legislature intended to permit community owners to recover expenses that are unexpected either because of a decision to improve the

property or because of unusual circumstances affecting the property like a disaster. Expected, ordinary care of the property should be budgeted and part of the base rent all homeowners have been paying. "Ordinary" should be read to mean normal, usual, expected, or anticipated. Ordinary should not be regarded as "minimal".

The intent of the Act is to protect homeowners from unreasonable lot rental increases caused by the disproportionate power between the community owner and the homeowner.[58] The Act is designed to assure a community owner a fair return on its investment. It should not create a permanent windfall, turning the Act into a vehicle for outrageous rental increases.

Homeowners have been paying rent every month to the community owner. Presumably, the costs of maintenance, operation and profit have been calculated into the rents already established. Consequently, the cost of the maintenance and repair of the bulkhead has been paid through these rents over the decades. Without an actual determination that the work done on the bulkhead resulted in a *better* bulkhead than was constructed in the first place, the homeowners should not be required to pay for this repair again, even if it is was a large repair.

[58] 25 *Del. C.* § 7040.

II THE SUPERIOR COURT ERRED IN HOLDING THAT THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE ARBITRATOR'S FINDING THAT THE BULKHEAD REPAIR CONSTITUTED A CAPITAL IMPROVEMENT OR REHABILITATION WORK WITHIN THE MEANING OF THE ACT.

A. Question Presented

Did the Superior Court err in holding that there was substantial evidence in the record to support the Arbitrator's finding that the bulkhead project constituted a capital improvement and not a repair within the meaning of 25 *Del. C.* § 7042(c)(1)? Preserved at: **A098-107; A129-135**.

B. Scope of Review

The Act states that appeals "will be on the record [and the Court will determine] whether the record created in the arbitration is sufficient justification for the arbitrator's decisions and whether those decisions are free from legal error."[59] This Court has ruled that "substantial evidence review is the appropriate standard of review for the arbitrator's factual findings."[60]

C. Merits of the Argument

The Superior Court ruled that,

> [t]he challenged claim involved the *repair and almost complete replacement* of a bulkhead at the cost of close to one-half million dollars. Homeowners vociferously argue

[59] 25 *Del. C.* § 7044.
[60] *Sandhill Acres*, 710 A.3d at 731, fn 37.

> that the work on the bulkhead is "ordinary repair and thus does not meet the § 7042(c)(1) standard. The short answer is that there is more than enough evidence in the record to support the Arbitrator's decision that the expense did qualify. The bulkhead in the community was in bad shape and *it was replaced* by an alternate construction method."[61]

The Superior Court misconstrued the facts in this case. None of the bulkhead was removed and none of it was replaced. Even if the bulkhead were completely removed and replaced, that in itself does not mean that such a replacement would be anything other than an ordinary replacement. While the Superior Court concluded that there was "more than enough evidence to support the Arbitrator's decision," the Superior Court did not articulate any of those facts or any evidence that would support the Arbitrator's findings. Consequently, the Superior Court misunderstood the facts of this case and the appropriate legal standard. Consequently the Superior Court's holding is not supported by the evidence or the law.

Nevertheless, deference should be accorded to the Arbitrator's decision if there is substantial evidence in the record to support the conclusion that the bulkhead project was a capital improvement.[62] Turning to the Arbitrator's Decision and to the record below, the HOA argues there is no basis upon which to accord deference to the Arbitrator's decision to award a rent

[61] SuperOp-*8-9 (emphasis added).
[62] *Sandhill Acres*, 710 A.3d at 731.

increase of $70.03 relating to the cost of the bulkhead.

Regarding the bulkhead, the Arbitrator ruled that

> . There is no dispute that the work done by the contractors, including adding significant amounts of riprap, created a new feature of the bulkhead. The Landlord's witnesses testified credibly that the bulkhead project was done to stabilize the old bulkhead by adding the new supporting riprap. Ms. Nilson testified that the old bulkhead was left in place, with the riprap added in front of it. All of this evidence shows that the bulkhead project enhanced the community's protective bulkhead with new riprap. This project protects the community, increases its value, and adds to the useful life of the bulkhead.
> …
>
> [T]he HOA argues that the bulkhead project was a repair and thus not a capital improvement. The HOA points to contractor invoices that characterized the work as "repair." And the Landlord's witnesses used the term repair in their testimony as well. But, considering the entirety of the evidence on this point, I find that the bulkhead project is not properly classified as a repair. While the invoices used the term repair, the main contract described the work as done to "stabilize" the bulkhead. The Landlord's witnesses also used the term "stabilize" to differentiate from repair.[63] This project had an element of repair because the Landlord's agents found the bulkhead was in a troubled state. On the whole, however, the work that was performed to address the bulkhead's issues went beyond ordinary work by adding a new and better riprap[64]

[63] The Arbitrator referred to the following testimony of one of Hometown's witnesses: "So I was there for the end of phase 1 and then the remaining phases specific to the bulkhead repair. I'm sorry. Stabilization to the bulkhead." T87-6 to 11.

[64] No evidence was provided at arbitration regarding added value to the bulkhead because of the installation of riprap.

> feature that was not there before. That work improved the community's important bulkhead and thereby enhanced the community's value and useful life."[65]

The Arbitrator's holding that the installation of the riprap elevated the entire bulkhead project above a repair was erroneous for two reasons. First, there is no evidence that the installation of the riprap, even though Hometown management characterized it as "a better technology", actually improved the capability of the bulkhead beyond that which existed when the bulkhead was built. Second, the installation of the riprap was only a small part of the entire project, about 30 percent, so even if the riprap portion of the project were a capital improvement, there is no evidence that the larger, more expensive part of the project was anything other than a repair.

A review of the Arbitrator's Decision on this issue reveals that his findings were based upon the following:

1. the assessment by engineers and consultants that the bulkhead was unstable and would not survive another storm;
2. the bulkhead looked stable from above the water but below the waterline it was not stable;
3. "an entire new wall of stone called riprap was put in place; "a better technology";
4. the bulkhead project was for "stabilization";

[65] ArbD-*19 (footnotes omitted).

5. the integrity of the entire bulkhead was in question;

6. the old bulkhead could not be removed so the placement of the new riprap stabilized the bulkhead;

7. Riprap was placed along all of the waterfrontage to protect the homes and the entire community;

8. The relevant contract states that the work was done "to stabilize the bulkhead"; and

9. Photographs show that riprap was added to certain waterfront areas in the community.

Bulkheads, like all other assets, have expected lifespans, and they deteriorate and fail over time. Just like a new layer of roofing would increase the life expectancy of one's home and improve its value, it is still a roof, not a new feature. Bulkheads are subject to harsh conditions. The evidence clearly showed, and the Arbitrator found, that the bulkhead was worn out and in need of repair.

1. The Riprap

The Arbitrator's conclusion that the bulkhead project was a capital improvement, despite the fact "that the bulkhead project had an element of repair because the … bulkhead was in a troubled state",[66] was based in part upon the word Hometown used to describe the purpose of the project. The word "stabilization", in one form or another, was used interchangeably by Hometown and its contractors with the word "repair". Nevertheless, the

[66] ArbD-*19.

Arbitrator concluded that it was important that Hometown characterized the work as done "to stabilize the bulkhead". However, regardless of the words used, the stabilization of the bulkhead is exactly the same thing as a "repair" to the bulkhead. The project was designed to keep the bulkhead from falling into the Bay. The distinction the Arbitrator made in this case was illusory and to hold that a distinction existed that elevated the project from repair to capital improvement was in error.

It was also error for the Arbitrator to characterize the riprap as providing a "new and better" feature and thereby went "beyond ordinary work". The worn out bulkhead could not be removed and replaced. Consequently, a strategy was needed to correct the problem of the dilapidated bulkhead. Hometown used riprap to shore up the bulkhead.[67] Hometown management called the riprap "a better technology". The installation of riprap was needed in order to stabilize the bulkhead. Installation of riprap, while not there before, was simply the method used to repair the unstable condition of the bulkhead. It is not the type of "new feature" that can appropriately be a capital improvement. Before the riprap was installed, the community had a bulkhead. Now, the community has a bulkhead that has been repaired. There is no evidence that the riprap, even if it is a "better technology", will enhance the capacity of the bulkhead. There was no testimony at

[67] ArbD-*17; T137-138.

arbitration that addressed whether or not the bulkhead is now stronger than it was when it was built. Accordingly, the record does not support a finding that the portion of the bulkhead repaired with riprap was a capital improvement.

2. The Pilings and Tie Rods ("Deadmen")

The installation of the riprap was only a small part of the bulkhead project and a small part of the cost incurred. The majority of the work, in terms of linear feet and expense, involved the installation of the pilings and tie rods in the lagoon area. There was no testimony at all that addressed the pilings and tie rods. The evidence regarding this aspect of the work is documentary. The record in this case does not reveal anything about whether the installation of the pilings and tie rods increased the capacity of the bulkhead from when the bulkhead was originally built. Therefore there is no evidence in the record that the installation of the pilings and tie rods was anything other than a repair.

The Arbitrator made no findings at all with regard to the piling and tie rod part of the project. There is no finding that the installation of the pilings and tie rods enhanced the bulkhead at all. There was no finding that this aspect of the project was anything other than a repair.

Consequently, even if the Court were to accord deference to the Arbitrator and conclude that the riprap is a capital improvement, there should be no deference

with regard to the cost of the pilings and tie rods. There is not a scintilla of evidence in the record that the installation of the pilings and tie rods is a capital improvement. The Arbitrator erred in awarding a rent increase based on the entire cost of the bulkhead project. The costs for the installation of the pilings and tie rods, which totaled $270,802.24, or 61% of the total cost of the project should not be included in the rent increase.

III. THE SUPERIOR COURT ERRED IN FAILING TO ADDRESS WHETHER 25 *Del. C.* § 7042(c)(1) PERMITS AN ARBITRATOR TO FASHION A RENT INCREASE THAT IS REASONABLE AND AVOIDS MULTIPLE RECOVERY.

A. Question Presented

Did the Superior Court err in failing to decide whether 25 *Del. C.* § 7042(c)(1) permits an arbitrator to fashion a rent increase that is reasonable and avoids multiple recovery? Specifically, did the Superior Court err by failing to reverse the Arbitrator's decision that the *Rent Justification Act*, as interpreted by *December Corp. v. Wild Meadows HOA,*[68] required the Arbitrator to award a rent increase that will result in multiple recoveries for community owners by: (i) awarding a rent increase that will result in the recovery of the full cost of a capital improvement in one year and, at the same time, making that rent increase permanent. Preserved at: **A107-108; A136-138.**

B. Scope of Review

The HOA asks this Court to review the scope of an arbitrator's authority pursuant to 25 *Del. C.* § 7042(c)(1). This is a

matter of statutory construction. This Court reviews issues of statutory

[68] *December Corp v. Wild Meadows HOA,* 2016 WL 3866272 (Del. Super. July 12, 2016).

construction and interpretation *de novo*."[69]

C. Merits of the Argument

Hometown was awarded a rental increase for 2018 that allowed it to recover all of the one-time expenses it incurred in 2017 for capital improvements. As a result of this award, Hometown recovered all of the 2017 expenses[70] in 2018 and in 2019. Now, in 2020, Hometown is in the process of recovering the 2017 expenses for the third time. Unless this Court intervenes to correct this absurd result, Hometown will recover these expenses in perpetuity.

At arbitration, the HOA argued that this result provided a shocking windfall to Hometown, that the result was absurd, and the result represented the antithesis of the Act's purpose and legislative intent.

The Arbitrator, acknowledging these arguments, ruled that he was bound by the Superior Court's decision in *December Corp. v Wild Meadows HOA,*[71] wherein the Superior Court interpreted the Act to require the multiple recoveries described above. Consequently the Arbitrator awarded the rent increase that provides Hometown with multiple recoveries in perpetuity.[72]

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[69] *Sandhill Acres*, 710 A.3d at 728, citing *Bon Ayre II*, 149 A.3d at 233.
[70] The Community consists of 525 rental lots. The total cost of the capital improvements was prorated so that each lot was assessed an annual rent increase based upon 1/525 of the cost of the improvement.
[71] *December Corp.,* 2016 WL 3866272 at 7.
[72] ArbD-*26.

The HOA appealed to the Superior Court, requesting that it diverge from the non-binding holding in *December Corp*. and rule that the Act permits arbitrators to fashion a reasonable rent increase when expenditures for capital improvements have been proven pursuant to 25 *Del. C.* § 7042(c)(1) . The Superior Court did not address this issue, leaving in place the Arbitrator's holding without comment. Consequently, both the Arbitrator's and the Superior Court's decisions to allow for multiple recoveries, in perpetuity interprets 25 *Del. C.* § 7042(c)(1) and is subject to *de novo* review by this Court.

The statutory language at issue in *December Corp.* is:

> (a) A community owner *may* raise a home owner's rent … provided the community owner can demonstrate the increase is justified for the following conditions:
>
> (1) [There are no health/safety violations]…; and
>
> (2) The proposed rent increase is directly related to operating, maintaining or improving the manufactured home community, *and* justified by 1 or more factors listed under subsection (c) of this section.
>
> …
>
> (c) One or more of the following factors *may* justify the increase of rent in an amount greater than the CPI-U[73]

The Superior Court in *December Corp*. addressed three issues, two of which are relevant in this case. First, the Superior Court ruled that the arbitrator did not have any authority to deny the community owner the rent increase it demanded,

[73] 25 *Del. C.* § 7042(a) and (c) (emphasis added).

even if the community owner acted in bad faith. Second, the Superior Court, stated that when a community owner has demonstrated that it has created a capital improvement in the community, the community owner is entitled to an immediate rent increase that compensates the owner for the entire expenditure for the improvement and that the rent increase is permanent, allowing the community owner to recover its one-time costs multiple times. The Superior Court ruled this way despite recognizing the absurdity of allowing multiple recovery in perpetuity.[74] In deciding that the rent increase is to be permanent, the court stated that the issue

> … is controlled by the clear language of the statute. When interpreting statutes passed by the General Assembly, the courts are constrained by their plain meaning. A legislature is presumed to mean what it says. The Act provides that, if all criteria are met, then an "increase in rent in an amount greater than the CPI-U" *is* justified. (*citing*, 25 *Del. C.* § 7042(c)) To the contrary, the Act does not provide that a "one time cost recovery rider" is justified.[75]

However, 25 *Del C.* § 7042(c) does not say that if all the criteria are met then a rent increase *is* justified. The statute says, "One or more of the following factors *may* justify the rent increase…"[76] The General Assembly could have used

[74] "[T]he Homeowner's Association reasonably argues based on the intent of the statute that providing for a permanent increase in these situations could not have been intended by the General Assembly." *December Corporation, supra.* 2016 WL 3866272 at 7.
[75] *Id.* at 7 (emphasis added)(some footnotes omitted).
[76] 25 *Del. C.* § 7042(c).

the imperative "will" or "shall", but it did not. It could simply have omitted the permissive "may" stating that one or more of the factors justifies the rent increase. Instead, the General Assembly chose to use the permissive "may". This choice clearly evidences legislative intent to give arbitrators the ability, when appropriate, to fashion a rent increase that is not absurd. The General Assembly's drafting decisions should be respected. Arbitrators have the authority to award a rent increase in keeping with the purposes of the Act.

The Superior Court in *December Corp.* read the Act, which contains the permissive "may" two times, to community owners' advantage asserting that the interpretation is true to the "plain meaning" of the Act. The Superior Court stated,

> The Homeowners' Association argues that since the word 'may' is included in the statute, an arbitrator is free to award a rent increase or refuse to, based on the totality of the circumstances. Rather than providing that the arbitrator 'may' raise a home owner's rent, the Act provides that '**a community owner** may raise a home owner's rent…' The inclusion of the word 'may' in Section 7042(c) also does not give discretion to an arbitrator to deny an increase for reasons other than the statutory factors. That provision merely recognizes that not only are the first two criteria required but that at least one of the six (6) statutory factors included in subsection (c) is also required….[77]

The Superior Court in *December Corp.* erred in this conclusion, at least with regard to the word "may" in Section 7042(c). It is not the word "may" that indicates that the criteria in Section (c) are required in addition to the first two

[77] *December Corp.*, 2016 WL 3866272 at 5 (emphasis in the original).

criteria found in Section 7042(a). Rather it is the word "and" in Section 7042(a)(2) that makes that clear.[78] Where the Act states, "[o]ne or more of the following factors *may* justify the increase of rent in an amount greater than the CPI-U" it means that the factor may or it may not justify the increase, in total or in part.

A court must give the "plain meaning" to the words used in the statutes it interprets. However, where the meaning of the statutory language is ambiguous, the Court will apply rules of statutory construction to reveal the legislative intent. On this point, addressing the interpretation of the *Rent Justification Act* directly, this Court has stated,

> The goal of statutory construction is to determine and give effect to legislative intent. *LeVan v. Indep. Mall, Inc.,* 940 A.2d 929,932 (Del. 2007) … The rules of statutory construction are well settled. First, we must determine whether the statute under consideration is ambiguous. It is ambiguous if it is susceptible of two reasonable interpretations. If it is unambiguous, then we give the words in the statute their plain meaning. If it is ambiguous, however, then we consider the statute as a whole, rather than in parts, and we read each section in light of all others to produce a harmonious whole. We also ascribe a purpose to the General Assembly's use of statutory language, construing it against surplusage, if reasonably possible…. (citations omitted).[79]

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[78] *See, Bon Ayre II,* 149 A.3rd at 231 ("[W]e affirm the well-reasoned decision of the Superior Court giving effect to the key word "and" in § 7042.")

[79] *Bon Ayre II,* at 233 fn 21, *citing, Taylor v. Diamond State Port Corp.,* 14 A.3d 536, 538 (Del. 2011).

This Court has also stated that a statute is ambiguous "if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature."[80]

The *Rent Justification Act* is an ambiguous statute, both because the language in the Act can be confusing, and because a literal reading is leading to an absurd result. *December Corp.* held that the plain reading of the Act *requires* arbitrators to award the community owners rent increases that the Court itself recognized[81] are obviously unreasonable. This, despite the fact that the Act contains the permissive "may" in two separate places.[82]

Given this ambiguity, it is appropriate for this Court to examine the purpose of the Act articulated by the General Assembly. The purpose is fully set forth in the Act.[83]

The *Rent Justification Act* is a remedial statute. It was enacted to minimize the deleterious effects of the imbalance of bargaining power between community owner and homeowner. It "is effectively a rent control statute."[84] It was enacted to protect the affordability of manufactured housing, recognizing that there is a crisis in affordable housing, that community owners have disproportionate power

[80] *LeVan,* 940 A.2d at 933.
[81] *December Corp.,* 2016 WL 3866272 at 7.
[82] 25 *Del. C*. 7042(a) and (c).
[83] 25 *Del. C*. § 7040.

in establishing rents and that unreasonable and burdensome rent increases diminish the value of manufactured home owners' substantial and sizable investments.[85] The purpose of the Act is to achieve these goals, while ensuring that community owners receive a fair return on their investment.[86]

"[I]t is a traditional principle of statutory construction that remedial statutes are to be construed liberally in order for the goal of the statute to be attained." *Sheehan v. Oblates of St. Francis De Sales*, 15 A.3d 1247, 1256 (Del. 2011).

The main goal of the Act is to avoid unreasonable and burdensome rent increases. By virtue of the Superior Court's decision in *December Corp.* unreasonable rent increases are inevitable when the rent increase is sought pursuant to 25 *Del. C.* § 7042(c)(1) by virtue of the fact that community owners will receive multiple recoveries every time. Indeed, under *December Corp*., the more costly the capital improvement project, the bigger the windfall for the community owner. Rather than furthering the purposes of the Act, the decision in *December Corp* undermines the Act by creating a mechanism that allows community owners to make expenditures and then recover that money many times over from the very people the Act was meant to protect.

In *Bon Ayre II*, the Court also noted that if a statute is ambiguous, the Court will "consider the statute as a whole, rather than in parts, and we read each section

[85] *Id.*
[86] *Id.*

in light of all others to produce a harmonious whole. We also ascribe a purpose to the General Assembly's use of statutory language, construing it against surplusage, if reasonably possible…."[87] The last sentence in Section 7042 states,

> [a] community owner also shall not utilize as justification for any future rent increase the cost of capital improvements or rehabilitation work, once that cost has been fully recovered by rental increases that were incorporated into a prior rental increase in excess of the CPI-U, where the prior rental increase was properly implemented under this subchapter.[88]

This provision reveals the General Assembly's intention to forbid multiple recovery for capital improvement costs to community owners. The Superior Court in *December Corp.* recognized the existence of this language, but rejected the argument that the provision evidences the intent to avoid multiple recoveries. Instead, the Superior Court referred to this language and stated, "the only language in the statute addressing any limitations regarding whether these one time costs can be included as 'rent', provides a limitation regarding future rental increases." This reading suggests that the community owner, once it receives a rent increase based upon expenses may not return in a future year and demand another increase based on those same expenses. While the language, read literally, may support that reading this is clearly not what was intended. The General Assembly would not have placed this language in the statute to preclude a community owner using the

[87] *Bon Ayre II,* 149 A.3rd at 233 fn 21.
[88] 25 *Del. C.* § 7042(c).

same expenses in successive years to obtain multiple rent increases. To accord the statute this meaning renders the provision meaningless because such a scenario is patently ridiculous. No arbiter would allow the same debt to be the basis of multiple actions for recovery. Furthermore, as noted above, the Superior Court in *December Corp.* read the word "may" in Section 7042(c) in a manner that obviates the need for the word in the statute at all.

In both instances, the Superior Court in *December Corp.* should have looked at the statutory language and considered the statute as a whole, rather than in parts, reading each section in light of all others to produce a harmonious whole. Purpose should have been ascribed to the "General Assembly's use of statutory language, construing it against surplusage, if reasonably possible…."[89]

It must be noted that *December Corp.* was decided in July, 2016, four months before this Court decided *Bon Ayre II*[90] in October, 2016. In *Bon Ayre II* the rules of statutory interpretation were applied to the Act differently and more liberally than the Superior Court did in *December Corp.* The interpretation given to the Act in *December Corp.* should be explicitly rejected by this Court.

[89] *Bon Ayre II,* 149 A.3rd at 233 fn 21.
[90] *Bon Ayre II*

Consequently, even if Hometown has established that the bulkhead costs constitute capital improvements, the HOA respectfully requests that this Court reverse the Arbitrator's decision awarding the $71.38 part of the rent increase, based upon capital improvements, for more than one year and forever.

CONCLUSION

For the reasons stated above, the HOA respectfully requests that this Court interpret the "capital improvement and rehabilitation costs" in a manner that distinguishes them from repairs. Furthermore, the HOA requests that this Court direct that rent increases pursuant to 25 *Del. C.* § 4072 (c)(1) may not result in multiple recovery for the community owner. Consequently, the HOA requests that the decisions of the Superior Court and the Arbitrator be reversed.

Respectfully submitted,

/s/ Olga Beskrone

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