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IN THE SUPREME COURT OF THE STATE OF DELAWARE

John Iacona and Robert Weymouth, Appellants-Below, Appellants, v. Hometown Rehoboth Bay, LLC, Appellee-Below, Appellee.	:	No. 296,2020D On Appeal from the Superior Court of the State of Delaware, C.A. No. S17A-04-001 RFS

APPELLANTS' OPENING BRIEF

Olga Beskrone (ID No. 5134)
Community Legal Aid Society, Inc.
100 W. 10th Street Suite 801
Wilmington, Delaware 19801
(302) 575-0660, ext. 216

Attorney for Appellants-Below, Appellants Rehoboth Bay HOA

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NATURE OF THE PROCEEDINGS

Appellants seek review of the Superior Court's affirmance of an arbitrator's decision[1] approving a substantial increase in monthly rent for calendar year 2017 for homeowners living in a manufactured home community.[2] This rent increase is subject to the requirements of 25 *Del. C.* §§ 7040-7046, known as the *Rent Justification Act* (the "Act").[3]

Because the rent increase exceeded the CPI-U[4] Appellee, Hometown Rehoboth Bay ("Hometown") was required to comply with the provisions of the Act. The rent increase at issue in this appeal is based upon 25 *Del. C.* § 7042(c)(1). Hometown, sought to recover expenses for ten projects that it claims relate to "capital improvements or rehabilitation work."

Objecting to the increase, Appellants, Iacona, acting on behalf of himself and other homeowners who indicated their intention to participate in arbitration and Weymouth, both acting *pro se*, (the "HOA") petitioned for arbitration.[5] The Arbitrator

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[1] The Superior Court's Opinion will be cited as "Opinion,*__"; the Arbitrator's Decision will be citied as "ArbD*_".
[2] ArbD*9.
[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] The CPI-U is a measure of inflation. A rent increase in the amount of the CPI-U does not require justification under the Act. 25 *Del. C.* § 7042(a).
[5] 25 *Del. C.* § 7043; ArbD*2.

issued his decision on March 6, 2017. Among other findings, the Arbitrator determined that most of the projects Hometown characterized as "capital improvements" were, in fact, ordinary repairs. Some projects, including the repair of a bulkhead, were determined to be rehabilitation work as distinguished from ordinary repair, replacement and maintenance. The Arbitrator's legal analysis with regard to the bulkhead project departed from his analysis of the other projects and consequently resulted in error. The HOA asks this Honorable Court to review the relevant statutory language, reverse the decisions below related to the bulkhead project, and provide guidance as to what "capital improvement or rehabilitation work as distinguished from ordinary repair replacement and maintenance" is as those terms are used in 25 *Del. C.* § 7042(c)(1). Furthermore, the HOA asks this Court to determine whether the full cost of a "capital improvement" must be recoverable in one year *and* in perpetuity, providing a community owner with the windfall of recovering the expenditure for that single project multiple times. In addressing this issue, the HOA asks the Court to overrule the 2016 Superior Court decision *December Corp. v. Wild Meadows HOA*[6] wherein the Superior Court held that an arbitrator must approve a rent increase, even if the rent increase is unreasonable and results in multiple recovery for the community owner.

The HOA filed a timely appeal with the Superior Court. The Superior Court

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

affirmed the Arbitrator's decision. The Superior Court failed to interpret the statutory language found at 25 *Del. C.* § 7042(c)(1) and sustained the decision that resulted from the Arbitrator's abandonment of an otherwise sound legal analysis.[7] Furthermore, the Superior Court erred in its holding that the rent increase was "appropriate" when it awards the *full cost* of capital improvement to be recovered in one year and made permanent.[8]

[7] Opinion,*8-9.
[8] Opinion,*8.

SUMMARY OF ARGUMENT

1. The Superior Court erred as a matter of law by holding that the bulkhead project was not an "ordinary repair" 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 was not an "ordinary repair" within the meaning of 25 *Del. C.* § 7042(c)(1).

3. The Superior Court erred in holding that the rent increase was "appropriate" pursuant to 25 *Del. C.* § 7042(c)(1) when the rent increase is unreasonable because is permits the community owner to receive multiple recovery.

STATEMENT OF FACTS

A. The Parties.

Appellants, John Iacona and Robert Weymouth are homeowners living in the community known as Rehoboth Bay, in Rehoboth Beach, Delaware (*hereinafter,* "the Community"). They, along with other homeowners living in the Community, dispute a rent increase for calendar year 2017 imposed upon them by Appellee, Hometown Rehoboth Bay MHC, LLC ("Hometown")[9]

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."[10] This economic dynamic gives the community owner "disproportionate power in establishing rental rates,"[11] and allows community owners to "exploit the difficulties [faced by] homeowners".[12] This is the reason the Rent Justification Act was enacted.[13]

This Community, comprised of 525 rental lots, is located on the shore of

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[9] ArbD*2.
[10] *Bon Ayre Land, LLC v. Bon Ayre Cmty. Ass'n ("Bon Ayre II")*, 149 A.3d 227 at 234 (Del. 2016).
[11] 25 *Del. C.* § 7040.
[12] *Bon Ayre II*, at 234.
[13] 25 *Del. C.* § 7040.

Rehoboth Bay.[14] Part of the community sits on a peninsula that juts out into the Bay.[15] The Community, subject to the extreme conditions of coastal living, is and has been protected from Rehoboth Bay by a bulkhead.[16] In 2016, the bulkhead was in a state of serious disrepair and it needed to be "stabilized".[17] Hometown spent $459,165.85[18] to repair the bulkhead so that it would not collapse into Rehoboth Bay.[19] This was done by shoring up the bulkhead with "deadmen"[20] in one area and by placing rocks or "riprap" in front of the bulkhead in another area.[21] The characterization of that repair as "extraordinary" and the conclusion that the work is "rehabilitation work" permitting the imposition of those costs upon the homeowners in the form of a substantial rent increase is the first issue of this appeal.

C. The Rent Increase

On September 23, 2016, Hometown sent out rent increase notices informing

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[14] ArbD*9.
[15] A058, 079.
[16] ArbD*8.
[17] Tr.*57.
[18] ArbD*8.
[19] A061, The repair work was designed to stop the bulkhead from "moving channelward".
[20] "Deadmen" are pilings driven on the water side of the bulkhead and twelve feet behind the bulkhead on the landside. They connected by galvanized steel tie rods. The "deadmen" provide support to the failing part of the bulkhead on the peninsula in the Community. A065
[21] A070-098.

Homeowners that their rent for 2017 would increase in an amount in excess of the CPI-U of 0.5 percent.[22] Hometown demanded an increase of $99.02 per month over the CPI-U.[23] Of that, $90.46 was attributable to "capital improvements or rehabilitation work".[24] The total increase demanded by Hometown exceeded $100.00 per month[25] The "capital improvements or rehabilitation work" for which Hometown demanded the rent increase was based upon expenses related to ten (10) projects totaling $569,900.86.[26]

D. The Arbitrator's Decision

The Arbitrator awarded Hometown a permanent rent increase of $76.32[27] per month. $72.88[28] was based upon the costs of one project: the bulkhead project.

In analyzing each of the ten (10) projects to determine whether the work amounted to a capital improvement pursuant to 25 *Del. C.* § 7042(c)(1), the Arbitrator distinguished between ordinary repairs, replacements and maintenance and actual

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[22] A018, 020. It is unknown why this changed to 0.6% at arbitration.
[23] A018, 022, 042.
[24] $7.47 was based upon alleged increased "operating and maintenance" costs. This claim was rejected by the Arbitrator. Another $1.09 was attributable to increased taxes and insurance costs. This increase was granted and the HOA does not appeal from that holding. A042.
[25] For the average rent of $595.96 (A049) this was more than a 17% increase. Only $3.58 was attributable to the CPI-U.
[26] Hometown's table outlining these projects and costs can be found at A033.
[27] Capital improvement increase of $75.23, property tax increase of $0.32, and insurance increase $0.77.
[28] There are 525 rental lots in the Community. (ArbD*10) Consequently, $459,165.85 divided by 525 lots and further divided by twelve months amounts to $72.88.

improvements to the community.[29] In doing so the Arbitrator rejected most of Hometown's claimed projects. The Arbitrator addressed each project as follows:

1) Playground Equipment

The $2,596.00 claim for playground equipment had elements of both repair and improvement. The Arbitrator stated,

> The evidence is that a swing set was already in place in the community, but the swings themselves were worn down….[T]his is the definition of a replacement of something that was suffering from wear and tear, and thus not a capital improvement or rehabilitation work. By contrast, adding a new camel climber …[is] an improvement to the property.

The Arbitrator awarded $1,767 for the cost of the camel climber and rejected the costs for replacement equipment.[30]

2) Trash Truck Repairs

$2,237.56 in repairs to its trash truck was rejected by the Arbitrator as capital improvements. "[T]he work done on the trash truck was simply repair work to keep it operational….[T]hat is the ordinarily accepted meaning of the word repair and maintenance, as opposed to a cost that has brought capital improvements to a community."[31]

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[29] ArbD*5-10.
[30] ArbD*6.
[31] *Id.*

3) Maintenance Truck

$34,191.43 spent to replace Hometown's old maintenance truck was rejected by the Arbitrator. "Once again, I do not see how that cost provides any new benefit or capital improvement to the community. Rather, this seems to me to be a replacement by the plain definition of that word."[32]

4) Pool/Beach/Picnic Area Upgrades

$9,288.94 for sand replenishment, tables, umbrellas and grills was also rejected by the Arbitrator. "…these items were [not] actual capital improvements, but rather appear to be repair, maintenance, replacement of previous items available to the community."[33]

5) Maintenance Shop HVAC

Hometown put a new heating/ air conditioning (HVAC) unit into the maintenance shed "in order to create a four season building." This expanded capacity/use constituted an improvement and therefore the project was deemed to be a capital improvement.[34]

6) Driveway Repair/Replacement

An expenditure of $10,300 for driveway repair and replacement was rejected by the Arbitrator. "[T]his strikes me as ordinary repair and maintenance work…to preexisting structures, and thus consistent with Black's Law Dictionary definition of

[32] *Id.*
[33] ArbD*7.
[34] *Id.*

maintenance, namely the upkeep or preservation of the condition of the property."[35]

7) Pier/Walkway Installation and Replacement

Hometown submitted $10,233.08 in expenses to "replace the wood on a crabbing pier, to add a loading dock, and to add a walkway in the area…. However, the invoices submitted indicate that the pier work [consisted] simply of removing[36] existing deck boards. Similarly, regarding the boat ramp walkway, the invoice indicated …[the work was for] the removal[37] of existing deck boards only. The balance of the amount was to install a 5 x 14 walkway bridge… The walkway bridge was a new structure and thus a capital improvement…" Therefore only the cost of the bridge, $1,820.00, was approved.[38]

8) Lift Station [Sewer] Repairs

$5,270 in lift station expenses were rejected by the arbitrator because "the invoices actually state that the work done was to repair and replace sewer valves, and to repair broken pipe in the lift station" not capital improvements.[39]

9) Road Work

$34,168 was claimed for repaving a road and the installing new driveways on

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[35] *Id.*
[36] The Arbitrator probably meant "replacing". That is what the invoice reflects. A101.
[37] This word should have been "replacement". A100.
[38] ArbD*7-8.
[39] ArbD*8.

seven lots. Of that, $25,400 was attributable to the cost for the repaving of a road and denied by the Arbitrator because it amounted to "upkeep or preservation of a condition on the property or the restoration or renovation [of the road] … as opposed to a capital improvement." The cost for *new* driveways on seven different lots was deemed a capital improvement and the cost of $8,768 was granted.[40]

10) The Bulkhead

The bulkhead project was the most costly project with a total cost of $459,165.85.[41] When evaluating this project, the Arbitrator said that the project was for " 'stabilizing a failing section of existing bulkhead.' I think a strong argument can be made that "stabilization" of a preexisting condition could fall outside the scope of a capital improvement; simply preserving a condition is not necessarily an improvement."[42] Indeed this was the analysis that the Arbitrator applied to every other project. Nevertheless, the Arbitrator awarded Hometown the full cost of this project. In breaking from his analysis used with other projects, the Arbitrator looked at the "scale" and "scope" of the work. The Arbitrator also noted that the project focused "on the property itself and preservation…." Thus, the "character" of the work was

[40] *Id.*
[41] *Id.*
[42] ArbD*9.

impressive to the Arbitrator.[43]

What is missing from the Arbitrator's analysis, however, is any analysis revealing how the bulkhead project went beyond an ordinary repair. Certainly, the bulkhead is better now than when it was falling into the Bay. The real question, however, is whether the bulkhead project resulted in an actual improvement to the bulkhead. Not the bulkhead in its state of disrepair, but the bulkhead when it was functioning properly; when it was last in good working order. There is no evidence in the record of any enhancement to the bulkhead; that the project did anything other than to repair the effects of normal wear and tear. Therefore the Arbitrator erred in concluding that the project was anything other than an ordinary repair.

E. The Superior Court's Decision

On page 8 of its opinion, the Superior Court addresses the issue of "capital improvements". The Court states,

> A community owner must also prove one or more factors listed in 25 *Del. C.* § 7042(c). Appellee relies on , 25 *Del. C.* § 7042(c)(1) which states: "The completion and cost of any capital improvements or rehabilitation work in the manufactured home community, as distinguished from ordinary repair, replacement, and maintenance."[44]

Like the Arbitrator, the Superior Court did not apply a legal standard to differentiate

[43] ArbD*8-9.
[44] Opinion*8.

between an ordinary repair, replacement or maintenance and a capital improvement or rehabilitation work. Despite the ambiguity of the language in the statute, and despite Appellant's request to the Court that it apply appropriate rules of statutory construction in interpreting 25 *Del. C.* § 7042(c)(1),[45] the Court did not do so. Instead, the Court stated,

> The bulkhead was no longer stable and required substantial work. The arbitrator determined that the work done on the bulkhead went beyond ordinary repair, stating, '…this seems to be an extraordinary job by any reasonable definition, and fit more properly in the category of rehabilitation work." Moreover, the project involved a near complete replacement[46] of the bulkhead. The Court agrees with the arbitrator's finding the bulkhead project goes beyond ordinary repair.[47]

The Superior Court failed to conduct any analysis addressing the legal distinction between a repair and a capital improvement or rehabilitation work within the meaning of the Act. The Superior Court erred in its legal conclusion that the work on the bulkhead amounted to a capital improvement.

The Superior Court also erred in concluding that the rent increase, allowing

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[45] A124-135.

[46] The bulkhead was not "replaced". Rather, the bulkhead remains in place and riprap, which was placed in one section of the bulkhead, (A074, 089) and "deadmen", which were placed in a different section, (A053, 065) 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 in place. (A061) Furthermore, if the bulkhead had been replaced, then it still would not have constituted a capital improvement. It would have been an ordinary replacement.

[47] Opinion*8.

Hometown to recover, proportionally,[48] the full costs of capital improvements multiple times, is "appropriate". The Superior Court held,

> [T]he court finds the arbitrator's award to be appropriate. The arbitrator, in light of the improvements and costs, determined the rent increase of $76.32 per month to be appropriate. [49]

The rent increase is not appropriate because it allows for multiple recovery. The rent increase awards 100 percent recovery of the expenditure in one year *and*, because the rent increase is permanent, Hometown is recovering its one time expenditure every year. The Superior Court refused to address this problem. The Superior Court's concurrence with the Arbitrator's decision constitutes legal error.

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) . and that it had wrongfully been denied discovery by the community owner and the Arbitrator. The HOA does not appeal from those rulings.

[48] Of the 525 homeowners renting in the Community, about fifteen remain challenging this increase. Hometown has settled with the other homeowners. Nevertheless, the fifteen remaining homeowners continue to pay their share of the full cost of the bulkhead repair.
[49] Opinion*8.

ARGUMENT

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

A. Question Presented.

Did the Superior Court err as a matter of law by failing to determine what a "capital improvement or rehabilitation work as distinguished from ordinary repair, replacement or maintenance" is within the meaning of 25 *Del. C.* § 7042(c)(1) and thereby fail to apply the correct legal standard in concluding that the bulkhead project was not an ordinary repair? **Preserved A124, 125; 154-155; 162-164.**

B. Scope of Review.

The HOA asks this Court to review the meaning of "capital improvement and rehabilitation work, as distinguished from ordinary repair, replacement, and maintenance." pursuant to 25 *Del. C.* § 7042(c)(1). This is a matter of statutory interpretation and, consequently, a matter of law. The Supreme Court reviews issues of statutory construction and interpretation of the Act *de novo*."[50]

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

C. Merits of the Argument.

The Superior Court erred in affirming the Arbitrator's award of a rent increase based upon the costs related to the bulkhead stabilization project. The facts relating to this project are not in dispute. Hometown showed that the bulkhead protecting the community from Rehoboth Bay was failing and it needed to be repaired. There is no evidence in the record that the work that was done to the bulkhead improved the bulkhead in any way. The conclusion by the Arbitrator and Superior Court that the project was an "extraordinary"[51] job does not support the legal conclusion that the project amounted to a capital improvement or rehabilitation work. An analysis of the Act will show that the correct interpretation of the statutory language will show that an "ordinary repair" is any repair to or replacement of an asset needed because of normal wear and tear. A community owner must actually *improve* a community asset that is already in existence or install a new asset that improves the community in order to receive a rent increase based upon 25 *Del. C.* § 7042(c)(1)

In this case, the terms "capital improvement", "rehabilitation work", "ordinary" "repair" "replacement" and "maintenance" have been misconstrued, leading to legal error. Clear interpretation of the statutory language by this Court is needed in order to correct the legal error made below and to provide guidance so

[51] Opinion,*8, ArbD*9.

that these terms can be properly applied in future cases.

1. **The Statute**

The Rent Justification Act limits rent increases in manufactured home communities. After preliminary requirements have been met, the Act states that:

> (c) One or more of the following [eight] factors may justify the increase of rent in an amount greater than the CPI-U:
> (1) The completion and costs of any capital improvements or rehabilitation work in the manufactured home community, as distinguished from ordinary repair, replacement and maintenance."[52]

The Act "is effectively a rent control statute."[53] 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"[54] and (ii) community owners' right to preserve their original expected rate of return on

[52] 25 *Del. C.* § 7042(c)(1)
[53] *Bon Ayre II*, 149 A.3d *234.
[54] "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). Consequently, when faced with an unreasonably large rent increase, a homeowner has no reasonable option but to pay it. They are captive in the market place.

their investment.[55] Unlike other consumers, homeowners in manufactured home communities cannot simply go elsewhere if the rent demanded by a community owner is too high. 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.[56]

There are no definitions of terms found in 25 *Del. C.* § 7042(c)(1) in the Rent Justification Act. Instead, the Act refers to definitions found in 25 *Del. C.* § 7003.[57] However, the relevant terms are not defined in Section 7003 either. Consequently, terms must be given their "ordinarily accepted meaning" or the meaning the context implies. Consequently, the Arbitrator looked to the "ordinarily accepted meaning" of the words, noting though, that "[i]n my mind, distinguishing an ordinary repair or replacement from a capital improvement or rehabilitation work *is no small task absent further guidance.*"[58]

The Arbitrator turned to Black's Law Dictionary for guidance. He found

[55] *Id*., 25 *Del. C.* § 7040.
[56] 25 *Del. C.* § 7040.
[57] 25 *Del. C.* § 7041.
[58] ArbD*5 (emphasis added).

definitions for "improvement",[59] "maintenance"[60] and "repair"[61] but concluded that, "[f]rankly, I am not sure that even the Black's Law Dictionary definitions provide bright lines in distinguishing capital improvements from repairs, replacements, or maintenance."[62] The Arbitrator rejected, out of hand, Hometown's method for determining whether a project constituted a capital improvement or rehabilitation work.[63]

The Arbitrator did not offer a definition of "ordinary repair". However, Black's online Law Dictionary defines "ordinary repair" as "repairs to assets caused by day-to-day wear and tear that are required to maintain the asset's functionality. These repairs do not increase the value of capital assets, they merely

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[59] "[A] valuable addition made to property (usually real estate)…amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes." ArbD*5.

[60] "[T]he upkeep or preservation of [the] condition of property, including cost of ordinary repairs necessary and proper from time to time for the purpose." *Id.*

[61] [T]o mend, remedy, restore, renovate. To restore to a sound or good state after decay, injury, dilapidation, or partial destruction.'" *Id.*

[62] *Id.*

[63] Hometown claimed anything other than a "simple repair" was appropriately categorized as a capital improvement or rehabilitation work. The Arbitrator rejected this by noting that Hometown claimed that a capital improvement as "an expenditure over $1,000 which extends the useful life of an asset….[Hometown] never offered an example of a cost to the community owner in excess of $1,000 which would <u>not</u> have qualified as a capital improvement per this definition. Rather, [Hometown] seemed to view a repair as something 'simple' such as 'tightening a screw'."ArbD-*5-6 (emphasis in the original), Tr.*173-74.

preserve value."[64]

Despite the difficulty in construing the meaning of the statutory terms, the Arbitrator established a framework that was judicious. As noted above,[65] the Arbitrator approved costs for projects that added a new asset, provided new capacity and new capability to the community (the camel climber, new driveways, HVAC system, and a new walkway bridge) and denied costs for projects that restored an existing asset after it suffered wear and tear (the swing set, trash truck, sand replenishment, replacement furniture, driveway repairs, replacing old deck boards, broken pipes, worn out valves, repaving a road for $34,000, and a new maintenance truck costing $31,000). Importantly, the Arbitrator also stated that, "[c]ertainly, there is no cost factor involved in the distinction in the statute."[66] Consequently, the Arbitrator recognized that an ordinary repair can very well be a substantial undertaking, one that brings a deteriorated asset, even a big asset, back to proper working condition.

With ambivalence, the Arbitrator abandoned this reasonable analysis when it came to the bulkhead project. The Arbitrator said,

> I think it is generally safe to characterize a project of this scale, which focuses on the property itself and

[64] https://thelawdictionary.org/ordinary-repair/ The Law Dictionary, Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.
[65] *Supra*., *8-12.
[66] ArbD*6.

> preservation, as a capital improvement or rehabilitation work….On the other hand, as noted in Arbitration Exhibit 11, the Contractor Agreement, the work to be performed was for 'stabilizing a failing section of existing bulkhead.'[67] I think that a strong argument can be made that 'stabilization' of a preexisting condition could fall outside the scope of a capital improvement; simply preserving a condition is not necessarily an improvement. Nevertheless, again focusing on the scope and character of the work, I do not believe that it is the type of 'ordinary repair, replacement, and maintenance' contemplated by the General Assembly as an item which would not justify a rent increase. Indeed, it seems to be an extraordinary job by any reasonable definition, and fit more properly in the category of rehabilitation work.[68]

The Superior Court reiterated the Arbitrator's "seems to be" standard without analyzing or establishing any legal standard for differentiating between those projects that constitute capital improvements and rehabilitation work and those that do not. Furthermore, the Superior Court misconstrued the facts of the case by saying that the project involved a near complete replacement of the bulkhead, when nothing was replaced.[69]

This Court should reject the idea that a substantial repair is a "capital improvement or rehabilitation work" simply because of its "scope", "scale", its "focus on the property" or its focus on "preservation". Not only does such a

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[67] A049.
[68] ArbD*9.
[69] If the bulkhead had been replaced, the Act would still require the community owner to demonstrate that the project resulted in an improved bulkhead, not an ordinary replacement of the bulkhead.

definition rely on the credulousness of the reader, there is no statutory basis for this standard. A large repair is still an ordinary repair if the work restores the asset to the functionality it always has had. The Arbitrator was correct when he opined that the stabilization of a preexisting condition is a repair, absent evidence that the work accomplished more than a repair. The bulkhead project is exactly the type of project the General Assembly meant to exclude as a capital improvement when they consciously declined to include repair costs as the basis for *any* rent increase unless the cost of repairs in a community owner's overall budget went up (and then limited to the increase)[70] or the repair was caused by a catastrophe.[71] An extensive repair to a significant asset needed as a result of normal wear and tear is still a repair, an ordinary repair. The Arbitrator's struggle with this issue and the Superior Court's acceptance of the inconsistent application of the Arbitrator's internal analysis makes clear that this Court's intervention is needed to provide a clear interpretation of the statutory language.

In construing statutory language, a court must first give the "plain meaning" to the words. However, where the meaning of the statutory language is ambiguous, the Court will apply rules of statutory construction to reveal the

[70] 25 *Del. C.* § 7042(c)(5).
[71] 25 *Del. C.* § 7042(c)(6).

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).[72]

The statutory language found at 25 *Del. C.* § 7042(c)(1) is ambiguous, because the language in the Act is imprecise and there are no definitions of operative terms. In this case, the ambiguity in the statute led to the misclassification of a repair as an improvement. Given the ambiguity, it is appropriate for this Court to look to the purpose of the Act articulated by the General Assembly in construing the Act's meaning. The purpose is fully set forth in the Act.[73]

The Rent Justification Act is a remedial statute. It was enacted to minimize

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[72] *Bon Ayre II,* at 233 fn 21, *citing, Taylor v. Diamond State Port Corp.,* 14 A.3d 536, 538 (Del. 2011).
[73] 25 *Del. C*. § 7040.

the repercussions caused by the imbalance of bargaining power in the market place between a manufactured home community owner and homeowner. It "is effectively a rent control statute."[74] 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 in establishing rents, and that unreasonable and burdensome rent increases diminish the value of manufactured home owners' substantial and sizable investments by transferring that value to the community owner.[75] The purpose of the Act is to achieve these goals, while ensuring that community owners receive a fair return on their investment.[76]

"[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 goal of the Act is to avoid unreasonable and burdensome rent increases. No increase above the CPI-U is permitted if the community has outstanding code violations[77] or if the increase is not "directly related to operating, maintaining or improving the manufactured community."[78] Rent increases are allowed only for the reasons enumerated in the Act. Rent increases are *not* permitted for repair

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[75] *Id.*
[76] *Id.*
[77] 25 *Del. C.* § 7042(a)(1).
[78] 25 *Del. C.* § 7042(a)(2).

costs, replacement costs or maintenance costs *unless* 1) the community's costs have increased[79] and 2) if "the need for repairs [was] caused by circumstances other than ordinary wear and tear in the manufactured home community."[80] If the community's costs for repairs have gone up, the community is limited in its rent increase to the amount of the increase in costs only. If property requires repair due to an occurrence such as a natural disaster, that unexpected cost may be spread among the homeowners. Otherwise, the cost of repairs is the community owner's responsibility. After all, the community owner collects rent for that very purpose. Homeowners pay rent and rightly expect, in return, that the community will be maintained. They should not have to pay again for that which they have already paid.

2. **Distinguishing between a Repair and an Improvement**

In evaluating whether a project is a "capital improvement or rehabilitation work … as distinguished from ordinary repair…" the appropriate inquiry should be twofold: 1) whether the work needed as a result of the effects of normal wear and tear and 2) whether the asset is different functionally than when it was new or when it was last in working order. If the asset is functionally the same, then the repair is an ordinary repair, no matter how much the project cost or how different

[79] 25 *Del. C.* § 7042(c)(5).
[80] 25 *Del. C.* § 7042(c)(6).

the asset looks. For instance, if a bulkhead was capable of withstanding a 10 year storm when it was new and the project enhanced the bulkhead's capability to withstand a 50 year storm, then the aspect of the project that increases that capability would be an improvement. If the project does not do anything to increase the capability, then the project has simply maintained the bulkhead. The community still has a bulkhead that does the same job it has always done. Other methods of distinction will allow subjective details like cost and appearance to influence the determination. This objective standard provides consistency in the application of the law.

This is the approach taken in the U.S. Tax Code[81] and regulations. Expenditures made for repairs to an asset (a "unit of property") may be deducted from income in the year expended. Expenditures for improvements are required to be capitalized over time. To distinguish between an improvement and a repair, the IRS compares the current condition of an asset to the condition of the asset when it was new, or when it was last in proper working order. The Tax Code uses the term "betterment" to describe improvements.[82] 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

[81] 26 USC 263(a).
[82] *Id.*

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.[83]

Betterments can be confused with repairs when work is done to correct for the effects of 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 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.[84]

Applying this method to determine whether a project results in a capital improvement/rehabilitation work or a repair within the meaning of 25 *Del. C.* §

[83] 26 CFR 1.263(a)-3(j)(1)(i), (ii) and (iii) (4/1/19 edition)(A113-114).
[84] A142-143, 26 CFR 1.263(a)-3(j)(2)(iv)(A) and (B) (4/1/19 edition)(A113-114).

7042(c)(1) will distinguish between expenditures that actually improve the community from those that maintain the community. This will provide a logical framework to determine what expenditures, if any, rise above ordinary repairs and provide actual enhancement to the community, regardless of whether the expenditure is modest or significant, obvious or hidden. Furthermore, since this method is the standard used nationwide to differentiate between improvements and repairs, it was likely that this was the distinction General Assembly intended.

In this case, extensive evidence of the expenditures made on the bulkhead project was provided by Hometown at arbitration. Hometown testified that the bulkhead was no longer stable and that it was a liability to the property.[85] The bulkhead was examined because Hurricane Sandy had caused some damage to the bulkhead. That examination revealed that the "wall was deteriorating….No one knew that the wall was deteriorating" until that examination …. "So, we felt, as a company, that it was better to stabilize the entire wall in case another large storm came through and then it would demolish the wall."[86]

A contract for the project,[87] as noted by the Arbitrator, characterizes the work as "stabilizing a failing section of the bulkhead."[88] This contract describes

[85] Tr.*57.
[86] Tr.*154-55.
[87] A049
[88] ArbD*9.

the" Scope of Work" as follows:

> The purpose of this project is to stabilize a failing section of the existing bulkhead by driving new pilings in front of the bulkhead, then driving new Deadman piling 12 feet behind the existing bulking (sic) and then connecting the two with a galvanized steel tie rod. Once completed, this new system will stop the bulkhead from moving channelward from its current point.[89]

The invoices characterize the project as "bulkhead repair", bulkhead repair project", "the lagoon repair using piling and deadmen".[90]

With regard to the part of the project that used riprap to stabilize the bulkhead, Hometown's contract with Precision Marine Construction Inc. stated, "Contractor shall provide…[everything except rock] necessary for installing Riprap in front of the existing bulkhead…."[91] The Engineering Plans and Specifications included in the contract as Exhibit C-1 include a diagram which is captioned, "Proposed Bulkhead Repair with Riprap Installation". The diagram shows that rock was simply placed in front of the existing bulkhead.[92] All of the invoices from Precision Marine characterize the work they were doing as "Bulkhead Repair w/ Riprap". Those same invoices also state the number of

[89] A061.
[90] A068, 069.
[91] A070.
[92] A085.

"Linear Feet of Riprap installed against your existing bulkhead.[93]

From this evidence, it is clear that one part of the unstable bulkhead was shored up by the installation of riprap. The other part of the failing bulkhead was shored up and kept "from moving channelward" by the installation of "deadmen": pilings bound together by galvanized steel tie rods. What is not revealed in the evidence, is whether this work actually improved the bulkhead. In, fact, no evidence whatsoever was presented that would indicate anything other than the repairs to the bulkhead restored the bulkhead to a functioning bulkhead after it became decrepit.

Because of the extensive and in some places obvious nature of the repair to the bulkhead confusion occurred. The Arbitrator did not have difficulty seeing this distinction between an improvement and a repair when it came to every other project for which Hometown sought a rent increase. "[T]he repaving of White Oak Drive, strikes me as the *upkeep or preservation of a condition on the property*…"[94] "I do not see how [the cost of the new, replacement maintenance truck] provides *any new benefit* or capital improvement to the community."[95] "The evidence was that the swing set was *already in place* in the community, but the swings themselves were worn down. It seems to me that this is the definition of a

[93] A090-098.
[94] ArbD*8.
[95] ArbD*6.

replacement of something that was *suffering from wear and tear*, and thus not a capital improvement or rehabilitation work."[96] "…[T]he work done on the trash truck was simply repair work *to keep it operational*."[97] Sand replenishment and new, replacement furniture were not capital improvements, but rather are upkeep of items that *had been available to the homeowners*.[98]

The work done on the bulkhead, an asset that was already in place, constituted upkeep or preservation of the bulkhead, a condition on the property. The bulkhead was suffering from wear and tear and the bulkhead project was needed to keep it operational. The bulkhead had been available to the homeowners and there is no evidence that the project provides any new benefit to the community.

Despite the fact that the analysis the Arbitrator applied to every other project was equally applicable to the bulkhead project, he abandoned the analysis when it came to the bulkhead. He said, " 'stabilization' of a preexisting condition in the community could fall outside the scope of a capital improvement; simply preserving a condition is not necessarily an improvement. ." In fact, based upon his analysis of every other project, simply preserving a preexisting condition is *definitely not* an improvement.

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[96] *Id.*
[97] *Id.*
[98] ArbD*7.

Instead, he looked to the "scale" and "scope and character" of the project, saying that the General Assembly contemplated that this type of project would justify a rent increase. The General Assembly did not want repairs to be the basis of an above-inflation rent increase except in certain defined situations not relevant here. The General Assembly did not intend to allow above-inflation rent increase just because the repair project is big in scope and scale. The General Assembly, however, wanted to prohibit unreasonable rent increases and maintain affordability.

The Arbitrator was also persuaded by the fact that the bulkhead project "focuses on the property itself and preservation". However, all the projects focused either on the property itself or the preservation of an asset. The distinctions offered by the Arbitrator reveal no differences except for size and expense.

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. Focusing on the appropriate comparison will result in consistent application of the law. If the installation of the pilings and tie rods or the riprap gave the bulkhead capacity to withstand stronger storms than ever before, then those projects would be capital improvements or rehabilitation work. If the project only corrected the effects of

the elements, then the project is 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 costs related to the bulkhead project should not have been allowed to justify a rent increase pursuant to 25 *Del .C.* § 7042(c)(1).

Further interpretive guidance is found when the "statute [is considered] as a whole, rather than in parts, and … [the Court] read[s] each section in light of all others to produce a harmonious whole."[99] 25 *Del .C.* § 7042(c)(6)[100] permits a community owner to receive an above inflation rent increase for repairs caused by circumstances other than ordinary wear and tear. Community owners are entitled to rent increases for repairs caused by catastrophic circumstances, not for repairs caused by normal wear and tear. Read together, Sections (c)(1) and (c)(6) make one thing clear; the Legislature intended to permit community owners to recover repair expenses when repair expenses are unexpected like a disaster. Expenses for expected, ordinary care of the property caused by normal wear and tear should be budgeted and paid for from the base rent all homeowners pay and have been

[99] *Bon Ayre II,* at 233 fn 21.
[100] (6) The need for repairs caused by circumstances other than ordinary wear and tear …25 *Del. C.* § 7042 (c)(6).

paying.

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 though it was a large repair.

II THE SUPERIOR COURT ERRED IN HOLDING THAT THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE ARBITRATOR'S FINDING THAT THE BULKHEAD PROJECT WAS NOT AN ORDINARY REPAIR.

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 Hometown was entitled to a rent increase pursuant to 25 *Del. C.* § 7042(c)(1) based upon the costs of the bulkhead project? 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."[101] This Court has ruled that "substantial evidence review is the appropriate standard of review for … factual findings."[102]

C. Merits of the Argument

Bulkheads, like all other assets, have expected lifespans, and they deteriorate and fail over time. Bulkheads are subject to harsh conditions. The evidence clearly showed that the bulkhead was worn out and in need of repair. In fact, the

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[101] 25 *Del. C.* § 7044.
[102] *Sandhill Acres*, 710 A.3d at 731, fn 37.

Arbitrator recognized that the bulkhead project was completed to stabilize the bulkhead.[103],

The Superior Court stated that,

> The bulkhead was no longer stable and required substantial work. The arbitrator determined that the work done on the bulkhead went beyond ordinary repair, stating, '…this seems to be an extraordinary job by any reasonable definition, and fit more properly in the category of rehabilitation work." Moreover, the project involved a near complete replacement of the bulkhead. The Court agrees with the arbitrator's finding the bulkhead project goes beyond ordinary repair.[104]

The Superior Court misconstrued the facts in this case. None of the bulkhead was replaced. 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. Even if the bulkhead had been completely replaced, that in itself does not mean that such a replacement would be anything other than an ordinary replacement of a bulkhead.

In any case the Superior Court agreed with the Arbitrator that "the bulkhead

[103] One part of the bulkhead was moving "channelward". (A061)
[104] Opinion*8.

project goes beyond ordinary repair", but, like the Arbitrator, it did not articulate any facts or point to any evidence that would support that finding. The Arbitrator's decision did not make any findings of fact that would support his conclusion that "the bulkhead project goes beyond ordinary repair".

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 or rehabilitation work.[105] However, there is no evidence to support such a finding.

Neither the Arbitrator's nor the Superior Court's conclusions are based on the facts of this case. The Superior Court and the Arbitrator were impressed by the "scale" and "scope" of the project, the fact that the project "focuses on the property itself" and on "preservation".[106] The Superior Court was also impressed by the cost.[107] However, neither the Superior Court nor the Arbitrator addressed the fact that the project was undertaken to repair damage caused by normal wear and tear and whether the results of the project provided an improvement to the Community.

Turning to the record at arbitration, there is no evidence upon which to accord deference to the Arbitrator's decision with regard to the bulkhead. Reviewing all the evidence relating to the bulkhead including the transcript, the

[105] *Sandhill Acres*, 710 A.3d at 731.
[106] ArbD*9.
[107] Opinion *8, fn 25.

contracts between Hometown and Precision Marine[108] and the numerous invoices from Precision Marine, there is not even a scintilla of evidence to show that the bulkhead project was anything other than a repair. The Contracts, the invoices and the testimony clearly show that the project was a repair. 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 only evidence presented supports that undertaking was successful. There is no evidence, however, that the installation of the riprap and the "deadmen" actually improved the bulkhead.

Installation of riprap in front of the worn out bulkhead and the installation of "deadmen" to keep the bulkhead from collapsing, while not there before, were simply the methods used to repair the unstable condition of the bulkhead. Before the riprap and "deadmen" were installed, the Community had a bulkhead that had deteriorated due to normal wear and tear. Now, the Community has a bulkhead that has been repaired. There is no evidence that the riprap and "deadmen" did anything other than restore the bulkhead to its normal function. There is no basis from which to conclude that the bulkhead is better now than before. Accordingly, the record does not support a finding that the bulkhead repair was a capital improvement or rehabilitation work.

[108] The contractor hired to repair the bulkhead.

The Arbitrator erred in awarding a rent increase based on the cost of the bulkhead project and the Superior Court erred in its affirmance. The costs for the bulkhead repair which totaled $459,165.85should not be included in the rent increase because the bulkhead project was an ordinary repair.

III. THE SUPERIOR COURT ERRED IN CONCLUDING THAT THE RENT INCREASE IS "APPROPRIATE" BECAUSE IT FAILED TO ADDRESS WHETHER 25 *Del. C.* § 7042(c)(1) AUTHORIZES A RENT INCREASE THAT PROVIDES MULTIPLE RECOVERY TO THE COMMUNITY OWNER.

A. Question Presented

In failing to interpret 25 *Del. C.* § 7042(c)(1) did the Superior Court err in concluding that the rent increase was "appropriate" even though the rent increase results in multiple recovery to the community owner? Specifically, did the Superior Court err by failing to address whether the Rent Justification Act permits an 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 thus providing 100 *per cent* recovery of a one-time expense every year thereafter? Appellant asks this Court to overturn *December Corp. v. Wild Meadows HOA*,[109] a Superior Court decision that holds that an arbitrator is required to award the full amount of a capital improvement and to make that increase permanent despite the fact that this leads to unreasonable rent increases and awards multiple recovery to the community owner.

Preserved at: **T107-108; A136-138.**

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

B. Scope of Review

The HOA asks this Court to review whether the Rent Justification Act permits arbitrators to award unreasonable rent increases that result in multiple recovery to the community owner. This is a matter of statutory construction. This Court reviews issues of statutory construction and interpretation *de novo*."[110]

C. Merits of the Argument

Hometown was awarded a rental increase for 2017 that allowed it to recover all of the one-time expenses it incurred in 2016 for capital improvements in one year. As a result of this award, the homeowners paid, proportionally, all of the 2016 expenses in 2017, again in 2018, and again in 2019. Now, in 2020, Hometown is in the process of recovering the 2016 expenses for the forth time. Unless this Court intervenes to correct this absurd result, Hometown will recover these expenses in perpetuity. This result provides Hometown with a shocking windfall. The bigger the project is, the bigger the windfall. The result is absurd, and represents the antithesis of the Act's purpose and legislative intent.

The HOA appealed to the Superior Court, claiming that the Arbitrator misinterpreted the law by awarding the full cost of the capital improvement, in perpetuity. At oral argument, the Superior Court advised that it would not consider

[110] *Sandhill Acres*, 710 A.3d at 728, citing *Bon Ayre II*, 149 A.3d at 233.

the HOA's legal argument on this issue because another, nonbinding Superior Court decision[111] had addressed the issue, had not been appealed to the Supreme Court and was therefore determinative. The HOA asks this Court to overrule the Superior Court's decision concluding that the rent increase in this case is "appropriate" and overrule the Superior Court's decision in *December Corp.*[112] The HOA requests that this Court interpret the Act to permit arbitrators to fashion reasonable rent increases when expenditures for capital improvements have been proven pursuant to 25 *Del. C.* § 7042(c)(1)

In *December Corp* the Superior Court addressed three issues relating to the Act, two of which are relevant in this case. First, the Superior Court ruled that an arbitrator could not consider a community owner's "bad faith" in denying a rent increase. Second, it held that when a capital improvement is proven, the rent increase must include the entire expenditure for the improvement. Third, it held that the rent increase is permanent, allowing one-time costs to be recovered multiple times. The Superior Court ruled this way despite recognizing the absurdity of allowing multiple recovery in perpetuity.[113] In deciding that the rent increase is to be permanent, the court stated that the issue

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[111] *December Corp.,* 2016 WL 3866272 (Del. Super. July 12, 2016).
[112] *Id.*
[113] "[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

> … 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.[114]

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…"[115] The General Assembly could have used 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 unreasonable or absurd. Arbitrators should have the authority to award a rent increase in keeping with the purposes of the Act.

December Corp held that the Act, which contains the permissive "may" two times, as mandatory and asserted that the interpretation is true to the "plain meaning" of the Act. The Superior Court stated,

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been intended by the General Assembly." *December Corporation, supra.* 2016 WL 3866272 *7.

[114] *Id.* *7 (emphasis added)(some footnotes omitted).

[115] 25 *Del. C.* § 7042(c).

> 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. … The inclusion of the word 'may' in Section 7042(c) … 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….[116]

December Corp. erred in this conclusion. It is not the word "may" that indicates that the criteria in Section (c) are required in addition to the first two criteria found in Section 7042(a). Rather it is the word "and" in Section 7042(a)(2) that makes that clear.[117] 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. It is up to the Arbitrator to look at the totality of the circumstances and to avoid unreasonable rent increases.

As briefed above, a court must give the "plain meaning" to the words used in the statutes it interprets.[118] A statute is ambiguous if the words are unclear or if a plain reading of the statute leads to absurd results. Where the meaning of the statutory language is ambiguous, the Court will apply rules of statutory

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

[117] *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.")

[118] *Supra.,* *22-25.

construction to reveal the legislative intent. *December Corp.*, both misread the plain meaning of the Act and imposed an absurd result.

Unreasonable rent increases are inevitable under 25 *Del. C.* § 7042(c)(1) if *December Corp* is sustained. Indeed, under *December Corp*., the more costly the capital improvement project, the bigger the rent increase and therefore the windfall for the community owner. Rather than furthering the purposes of the Act, the decision in *December Corp* undermines the Act.

As noted above,[119] courts consider ambiguous statutes as a whole, rather than in parts. Courts read" each section in light of all others to produce a harmonious whole." Courts "also ascribe a purpose to the General Assembly's use of statutory language, construing it against surplusage, if reasonably possible…."[120]

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.[121]

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[119] *Supra.,* *35.
[120] *Bon Ayre II,* 149 A.3rd at 233 fn 21.
[121] 25 *Del. C.* § 7042(c).

December Corp. recognized this language, but rejected the argument that the language evidences the intent by the General Assembly to avoid multiple recoveries. Instead, the Superior Court 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."[122] This reading suggests that the community owner, once it receives a capital improvement rent increase may not return in a future year and demand another increase based on those same expenses. This is clearly not what was intended. This meaning renders the provision meaningless because such a scenario is patently ridiculous. The same expenditure would never be the basis of rent increases in succeeding years.

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

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 100 percent of the capital improvement, costs in one year and forever.

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[122] *December Corp.,* 2016 WL 3866272 *7.

CONCLUSION

For the reasons stated above, the HOA respectfully requests that this Court interpret the "capital improvement and rehabilitation costs as distinguished from ordinary repair, replacement and maintenance" in a manner that recognizes that ordinary repairs are repairs to the manufactured home community required as the result of normal wear and tear. 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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Olga Beskrone
Delaware Bar # 5134
Community Legal Aid Society, Inc.
100 W. 10th Street, Suite 801
(302) 575-0660 x 216
Attorney for Appellant
obeskrone@declasi.org

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