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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

# AMICUS FIRST STATE MANUFACTURED HOUSING ASSOCIATION REPLY BRIEF

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| ***Spielberg v. State*,** **558 A.2d 291 (Del. 1989)** | **11** |
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## ARGUMENT

### II. THE MARKET RENT FACTOR DOES NOT REQUIRE THE INCREASE BE RELATED TO OPERATING EXPENSES

### QUESTION PRESENTED

Whether the market rent factor requires that the increase be related to operating expenses? (Preserved in the Notice of Appeal from the Superior Court).

### SCOPE OF REVIEW

The issue presented in this appeal is one of law, which is subject to plenary or *de novo* review by this Court, ***Connell v. Baker*, 488 A.2d 1303 (Del. 1985); *Public Water Supply Company v. DiPasquale, et al.*, 735 A.2d 378 (Del. 1999).**

### MERITS OF ARGUMENT

#### A. 25 *DEL. C.* §7042 IS AMBIGUOUS, THEREFORE IT MUST BE CONSTRUED IN A MANNER THAT BEST FURTHERS THE LEGISLATIVE PURPOSE AND PUBLIC POLICY GOALS THAT UNDERLIE THE ENACTMENT OF THE RENT JUSTIFICATION ACT

In an attempt to avoid the ambiguous statutory language found in 25 *Del. C.* §7042 ("Section 7042") of the Rent Justification Act (the "Act"),

Bon Ayre Community Association ("BACA") misstates the statutory text of the Act. BACA reads Section 7042(a) as follows:

> "Section 7042(a) is not ambiguous. It clearly states that rent increases greater than the CPI-U must be 'directly related' and 'justified by 1 or more of the factors listed under subsection (c). 2 *Del. C.* §7042(a)(2). 'Market rent' is one of the eight subsection (c) factors. As the Superior Court observed, the requirements for a rent increase greater than CPI-U are a 'two prong conjunctive test consist[ing] of three distinct elements.' *Bon Ayre Cmty. Assoc.*, 2016 WL 241864, at *4. The first element involves violations of health and safety, 25 *Del. C.* §7042(a)(1) and is not at issue in this case. <u>The second and third elements are that the increase be 'directly related' and that the increase fall into one or more of the eight factors in Section 7042(c)</u>. 25 *Del. C.* §7042(a)(2)."(Emphasis Added). Answering Brief, page 29.

This new test selectively redacts the text and sets forth a new standard that differs from the Superior Court's interpretation in this case and previous case precedent construing Section 7042. BACA would like the Court to read out the language immediately following the words "directly related" in Section 7042(a)(2).

However, Section 7042(a)(2) provides:

"(a) A community owner may raise a home owner's rent for any and all 12-month periods governed by the rental agreement in an amount greater than the average annual increase of the Consumer Price Index For Al Urban Consumers in the Philadelphia-Wilmington-Atlantic City area ('CPI-U') for the most recently available preceding 36-month period provided the community owner can demonstrate the increase is justified for the following conditions:

* * * * *

"(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."

While BACA's argument for circumventing the obvious ambiguity in this section is creative, it is simply not an accurate presentation of what the statute actually says. Section §7042(a)(2) clearly states that, "[t]he 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." "[D]irectly related" cannot be parsed

out from the language "to operating, maintaining or improving the manufactured home community." "[D]irectly related" is modified by and is inseparable from the language that immediately follows. In essence, BACA would like this Court to believe that the language immediately following "directly related" does not exist.

BACA's rephrasing of Section 7042(a)(2) is also contrary to the Superior Court's reading of that subsection in this very case. The second element is not that the rent increase must be "directly related" to one or more of the Section 7042(c) factors, rather the increase must be directly related to operating, maintaining, or improving the community *and* justified by one or more factors in Section 7042(c). The Superior Court reads Section 7042(a) as follows:

> The conditions are conjunctive. The first condition requires the community owner not have been found in violation of any of the provisions of title 25, chapter 70 that threatened the health or safety of residents, visitors or guests that persisted for more than fifteen days in the previous twelve month period. <u>The second condition requires the proposed rent increase be directly related to operating, maintaining, or improving the community</u>

*and* justified by one or more factors in section 7042(c)[1].

As stated by the Superior Court in ***Tunnell Companies, L.P. v. Greenawalt***:

> A community owner may increase rent for any and all 12 month period rental agreements in an amount greater than the CPI–U only if the community owner can demonstrate the increase is justified. To justify such an increase, the community owner must demonstrate: (1) it has not had any health or safety violations that persist more than 15 days after it received notice of the violation during the previous 12–month period; (2) the proposed increase is directly related to operating, maintaining, or improving the manufactured home community; and (3) the increase is justified by at least one of several factors.[1]

Simply put, BACA's selective redacting of the statutory language attempts to distract the Court's attention from the fact that Section 7042 is ambiguous and that the Superior Court's interpretation is contrary to the letter and intent of the Act. The Superior Court's interpretation of Section §7042, which requires that a rent increase based on market rent must be

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[1] *Bon Ayre Community Association, Inc. v. Bon Ayre Land, LLC*, 2016 WL 241864, at *6 (FSMHA -E6) (Del. Super. 2016)(emphasis added)(Exhibit A) (FSMHA – E1 to 14).
[2] 2014 WL 5173037, at *2 (Del. Super. Oct. 14, 2014)(emphasis added).

directly related to "operating, improving or maintaining the manufactured house community" renders 25 *Del.C.* §7042(c)(7) meaningless. Any increase under Section 7042(c)(7) will not be related to "operating, improving or maintaining" the community, but rather an increase in market value in rent. The Superior Court's interpretation "effectively eliminates profit on investment as an acceptable part of the equation" by requiring proof that an increase beyond the CPI-U must be spent on operating, maintaining or improving the community[3]This reading of the Act produces a result not intended by the Legislature, namely that it does not enable the landowner to receive a fair return on his/her investment.

Because Section 7042 is ambiguous, it must be construed in a manner that best furthers the legislative purpose and public policy goals that underlie the enactment of the Act.[4] The stated purpose of the Act 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

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[3]*Bon Ayre Community Assoc. v. Bon Ayre Land, LLC*, Arbitration Decision Docket Nos. 03, 04, & 05 (FSMHA – 220) (*Gebelein*, Aug. 24, 2015) (Exhibit E) (FSMHA – 211 to 219).
[4]*Progressive Northern Ins. Co. v. Mohr*, 47 A.3d 492, 500 (Del. 2002).

return on their property.[5] The Act notes that Delaware "has experienced a difficult economic climate which has resulted in a crisis in affordable housing availability."[6]

The Delaware State Housing Authority and AARP Public Policy Institute echo the concern of the Legislature regarding the scarcity of affordable housing in Delaware, however *Amicus* believes that the Superior Court's interpretation of the Act will only make the affordable housing problem worse.[7] The Superior Court's construction of the Act would compound the affordable housing problem by preventing the manufactured housing community owner from realizing the true value of the land. In essence, any profits above CPI-U due to an increase in market rent must be spent on the operation, maintenance or improvement of the community. This result will likely dissuade developers from building manufactured housing communities or will increase the pressure upon landowners to

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[5] 25 *Del. C.* §7040 (emphasis added).
[6] 25 *Del. C.* §7040.
[7] *Manufactured Housing in Delaware: A Summary of Information and Issues* (December 2008), pg. 20 (FSMHA – E34). *Available at*: http://www.destatehousing.com/FormsAndInformation/Publications/manu_homes_info.pdf ; *Manufactured Housing Community Tenants: Shifting the Balance of Power: AARP Public Policy Institute*, pg. 3 (FSMHA – 64). *Available at*: http://assets.aarp.org/rgcenter/consume/d18138_housing.pdf *(Exhibit C) (FSMHA - E59 to 209).*

convert their manufactured housing communities to other, more profitable uses.

## BACA'S SUGGESTION THAT MANUFACTURED HOUSING COMMUNITY OWNERS CAN INCREASE RENT TO ACHIEVE A FAIR RATE OF RETURN ON THEIR INVESTMENT IS NOT POSSIBLE UNDER THE SUPERIOR COURT'S INTERPRETATION OF THE ACT

BACA's argument that a "community owner could seek a rent increase if he believed that he was no longer able to make a reasonable and fair rate of return on his investment without an increase in rent" is not possible under the Superior Court's decision.[8] BACA and the Superior Court's interpretation of the Act require that any increase in rent for existing tenants above CPI-U based on an increase in market rent must be directly related to operating, maintaining or improving the community. In other words, this interpretation requires that any profit above CPI-U must be justified by operating expenses. *Amicus* agrees with BACA that the need to make a fair and reasonable return is directly related to owning a

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[8] *Appellee's Anws. Br.* p. 32.

manufactured home community. However, the Superior Court's holding prevents a landowner from making a fair rate of return on his investment because he is required to reinvest those funds in the community, rather than as a profit.

## THE ACT DOES NOT INTEND TO REGULATE MANUFACTURED HOUSING COMMUNITY OWNERS AS PUBLIC UTILITIES

This Court should reject BACA's argument that manufactured housing communities are analogous to and should be regulated as public utilities. The Public Service Commission regulates "investor-owned public utilities" and "works to ensure safe, reliable and reasonably priced cable, electric, natural gas, wastewater, water and telecommunications services for Delaware Consumers."[9] "In Delaware, the primary objective of rate-making by the Commission is to fix rates sufficient to yield a fair rate of return to the utility upon the present value of the property dedicated to public use[10]." Manufactured housing communities are neither "investor-owned public utilities," nor are they "dedicated to public use" or regulated by any commission. Manufactured housing community owners are private

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[9]http://depsc.delaware.gov/about.shtml

[10]*Public Service Comm. of DE v. Wilmington Suburban Water Co.*, 467 A.2d 446, 447 (Del. 1983)(citations omitted).

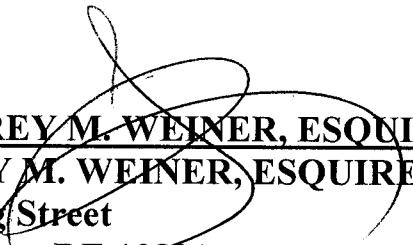
landowners with property rights and freedom of contract, and are not regulated as public utilities[11]

[11]"When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract. Such public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations." *Libeau v. Fox*, 880 A.2d 1049, 1056–57 (Del. Ch.2005)(citation omitted), aff'd in pertinent part, 892 A.2d 1068 (Del.2006)

## CONCLUSION

Based upon the reasons and authorities set forth in *Amicus* Opening and Reply Briefs, the decision of the Superior Court should be reversed.

**Respectfully submitted,**



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