EFiled: Jan 11 2019 11:59AM EST
Filing ID 62852477
Case Number 525,2018D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SANDHILL ACRES MHC, LC, Respondent-Below, Appellant, v. SANDHILL ACRES HOME OWNERS ASSOCIATION, Petitioner-Below, Appellee.	: : : : : : : : : : : :	No. 525, 2018 On Appeal from the Superior Court of the State of Delaware, C.A. No. S17A-08-001 ESB

APPELLEE'S ANSWERING BRIEF ON APPEAL

Daniel S. Atlas (ID No. 6346)
Steven D. Adler (ID No. 6257)
920 North King Street
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Brian S. Eng (ID No. 5887)
Community Legal Aid Society, Inc.
840 Walker Road
Dover, Delaware 19904
(302) 674-8500, ext. 315

*Attorneys for Petitioner-Below, Appellee Sandhill Acres Home Owners Association**

DATED: January 11, 2019

*Appellee's counsel wish to recognize the assistance of CLASI student extern Stefanie Ramirez for her assistance with the drafting of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

DELAWARE STATUTES

DELAWARE REGULATION

OTHER AUTHORITIES

NATURE OF THE PROCEEDINGS

The matter before this Court is an appeal from the Superior Court's reversal of an arbitration[1] decision that granted a proposed rent increase in a manufactured home community subject to the Rent Justification Act (the "Act").[2] This Court is asked to determine whether the Superior Court's reversal of the Arbitrator's decision was correct.[3]

This matter was initiated by Sandhill Acres MHC, LC ("Sandhill") by sending notices to the residents of the Sandhill Acres Manufactured Home Community ("Sandhill Acres"), informing them of a rent increase exceeding the CPI-U[4] of 0.7%.

The parties could not resolve a dispute over the proposed rent increase, and the Sandhill Acres Home Owners Association ("SAHOA") formed for the purpose

---

[1] The relevant statute refers to these proceedings as "nonbinding arbitration proceedings." 25 *Del. C.* § 7043(c). Although called "arbitrations," these proceedings are, in fact, more akin to administrative hearings than arbitrations. They are statutorily created and the only mechanism by which a homeowner can challenge a rent increase. *Id*. Like an administrative hearing, appeal is available as a matter of right, but the scope of the appeal is limited. *Id.* § 7044.

[2] 25 *Del. C.* §§ 7040-7046. This section of the code, officially titled "Affordable Manufactured Housing," is known colloquially as the "Rent Justification Act."

[3] *Id.* § 7044.

[4] As defined by the Act, the CPI-U is the "average annual increase in the Consumer Price Index for All Urban Consumers in the Philadelphia-Wilmington-Atlantic City area ... for the most recently available preceding 36-month period." 25 *Del. C.* § 7042(a).

of seeking arbitration. The arbitration was conducted on May 23, 2017, and Arbitrator James P. Sharp, Esq. (the "Arbitrator") granted the rent increase by decision dated July 17, 2017. SAHOA appealed the decision to the Superior Court. On September 13, 2018, the Superior Court reversed the Arbitrator's decision because the Arbitrator had misinterpreted the Act and this Court's precedent in *Bon Ayre II*. The Superior Court determined that because Sandhill had failed to demonstrate an increase in its costs or a decline in its original expected return, it could not receive its proposed rent increase above the CPI-U. Sandhill thereafter filed its appeal in this Court.

SUMMARY OF ARGUMENT

1. Denied. Only the CPI-U portion of Sandhill's proposed rent increase was uncontested, and the Superior Court did not reverse that portion of the Arbitrator's decision. The Superior Court did not order that "the CPI-U rate increase was permitted as a matter of law." The Superior Court did not err in denying the additional $7.93 per lot per month portion of Sandhill's proposed rent increase that SAHOA has consistently contested.

2. Denied. The Superior Court correctly applied the Act and this Court's precedent when it held that the Arbitrator committed legal error, and therefore, reversed the Arbitrator's holding that Sandhill proved that its "proposed rent increase [was] directly related to operating, maintaining or improving the manufactured home community," as required by 25 *Del. C.* § 7042(a)(2).

STATEMENT OF FACTS

A. The Parties.

Sandhill is the owner of the Sandhill Acres in Sussex County, Delaware.

SAHOA is a homeowners association representing the interests of the Sandhill Acres' homeowners affected by Sandhill's proposed rent increase. The Act permits homeowners associations to file petitions for arbitration on behalf of affected homeowners.[5]

B. The Community.

Sandhill Acres is a leased land manufactured home community with 128 lots.[6] In communities like Sandhill Acres, residents purchase 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."[7] This gives the community owner[8] "disproportionate power

---

[5] 25 *Del. C.* § 7043(c).

[6] A-0295 (Tr. 63). Citations to the Appendix to Appellant's Opening Brief ("OB") are of the form "A-__." Citations to the arbitration transcript include a reference to the specific transcript page ("Tr. __").

[7] *Bon Ayre Land, LLC v. Bon Ayre Cmty. Ass'n ("Bon Ayre II")*, 149 A.3d 227, 234 (Del. 2016).

[8] Although the terms are different, the relationship between the parties in a manufactured home community is a landlord/tenant relationship. "Community owners" or "landowners" are the "landlords" and own the land (but not the homes themselves). "Homeowners" own the homes but not the land and are the "tenants."

in establishing rental rates"[9] and potentially gives community owners the ability to "exploit the difficulties for homeowners of moving their mobile homes somewhere else."[10] In order to level the playing field, the Legislature passed the Act in 2013.[11] The Act does not restrict community owners' rights to set the rent on new homeowners,[12] but it requires them to meet certain statutory requirements if they wish to increase the rent on existing homeowners above the CPI-U.[13]

C. Community Owners Must Satisfy Certain Statutory Requirements To Receive A Rent Increase Above The CPI-U.

Under the Act, a community owner must meet certain statutory requirements to increase its rent above the CPI-U. Specifically, a community owner must: (i) issue proper notices; (ii) meet with the homeowners; (iii) "[a]t or before the final meeting … in good faith, disclose in writing all of the material factors resulting in the decision to increase the rent"; and (iv) if a petition for arbitration is filed, prove that the rent increase is justified at arbitration.[14]

---

[9] 25 *Del. C.* § 7040.

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

[11] Sandhill continues its unjustified attack on the Act's legitimacy by suggesting that somehow the Act is not good law simply because it was passed "in the waning days of the 2013 Legislative session" and "ha[s] been amended several times." OB at 7-8; *see also* A-0691 (Sandhill's Answering Brief at 5) (same quotations).

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

[13] *Id.* at 230.

[14] 25 *Del. C.* §§ 7042-7043.

A community owner must satisfy three conditions to show that a rent increase is "justified" under the Act.[15] First, the community owner must demonstrate that there have been no persistent health or safety violations.[16] Then the community owner must prove both elements in 25 *Del. C.* § 7042(a)(2): (i) that the "proposed rent increase is directly related to operating, maintaining or improving" the community,[17] and (ii) that the rent increase fits into one or more of the eight categories in Section 7042(c).[18] In this case, Sandhill utilized the "market rent" factor[19] to justify its rent increase.

The community owner has the burden of proof at arbitration.[20] Sandhill was required to prove *all* of the above conditions in order for its rent increase to be justified.[21] As such, a failure to prove *any* such conditions would require that the rent increase above the CPI-U be denied as unjustified.

---

[15] *Id.* § 7042.

[16] *Id.* § 7042(a)(1).

[17] For brevity, "directly related to operating, maintaining or improving the manufactured home community" is abbreviated as "directly related" where appropriate, and Section 7042(a)(2)'s requirement that the proposed rent increase be "directly related" is referred to as the "directly related requirement" where appropriate.

[18] *Id.* § 7042(a)(2).

[19] *Id.* § 7042(c)(7).

[20] 1 Del. Admin. C. § 202-7.14.

[21] *Bon Ayre II*, 149 A.3d at 230, 233.

D. Sandhill's Proposed Rent Increase.

In accordance with the Act, Sandhill sent out rent increase notices dated January 30, 2017 and March 31, 2017 informing residents of a pending rent increase above the CPI-U.[22] The rent increase was based on an increase in "market rent" that raised tenants' rents to $455 per month.[23] The amount of the rent increase varied for each homeowner based on their rent from the prior year, but on average the rent increase was $35 per lot, per month.[24]

Sandhill later held final Section 7043(b) meetings on February 9, 2017 and April 18, 2017.[25] Homeowners who attended the meetings were provided with copies of a PowerPoint presentation (the "Written Presentation") and a market rent analysis.[26] No other written documentation about expenses in the community was provided.[27] The only materials provided within the Written Presentation that addressed whether the proposed rent increase was "directly related" were:

- one slide with the conclusory statement: "Last year, the community owner's costs went up such that the community owner's return on its property has declined. This rent increase is, therefore, necessary, and directly related to operating, maintaining or improving the manufactured home community";

[22] *E.g.*, A-0009-13; A-0082-86.

[23] *Id.*

[24] *Id.*

[25] A-0174-76; A-0211-12.

[26] A-0003-04; A-0141-279.

[27] A-0288 (Tr. 36); A-0291 (Tr. 48); A-0295 (Tr. 61-62).

- one slide describing a newly implemented water filtration system;
- the invoice for the water filtration system; and
- two slides containing pictures of the filtration system.[28]

The Written Presentation references neither Sandhill's sewer costs nor its Net Operation Income ("NOI").

E. The Arbitration Proceedings.

Following the rent increase meetings, SAHOA timely filed petitions for arbitration.[29] By agreement of the parties, the matters were consolidated into a single arbitration, conducted by the Arbitrator on May 23, 2017.[30]

At arbitration, Sandhill relied on the installation of a new water filtration system (total cost of $12,185) as proof that the proposed rent increase was "directly related."[31] The cost of the water filtration system divided among all of Sandhill's homeowners is $7.93 per lot.[32] Sandhill provided speculative testimony regarding a decrease in its NOI and additional sewer expenses that had allegedly increased since 2012. However, Sandhill failed to provide in writing any information regarding this issue at either Section 7043(b) meeting and failed to

[28] A-0149-56; A-0186-90.

[29] A-0004.

[30] A-0452-72.

[31] A-0292-93 (Tr. 52-53).

[32] $12,185.00 (filtration system)/128 (number of Sandhill lots)=$95.20 per lot annually=$7.93 per month.

provide any corroborating documentation at the arbitration.[33] It also did not provide testimony regarding specific changes to its profits or costs between 2015 and 2016.[34]

SAHOA argued that the proposed rent increase should be denied because Sandhill failed to meet its disclosure requirements under Section 7043(b)[35] and failed to prove that the proposed rent increase was "directly related."[36] SAHOA also argued, *arguendo*, that even if the rent increase was justified, the amount of the rent increase should be limited to the cost of the water filtration system divided by the total number of lots in the community.[37] Unrelated to this appeal, the parties also presented evidence regarding whether Sandhill adequately established "market rent" under 25 *Del. C.* § 7042(c)(7).

On July 17, 2017, the Arbitrator granted the proposed rent increase (the "Arbitrator's Decision"). The Arbitrator held that evidence of only Sandhill's $12,185 water filtration system established that the proposed rent increase was

---

[33] A-0295 (Tr. 62-63). As discussed in more detail below, Sandhill attempts to muddy the waters on the information it provided to SAHOA. Even a cursory review of the record shows that Sandhill failed to provide any information to SAHOA in writing about any other costs besides the water filtration system. *See infra* Section II.C.1.b.

[34] *Id.*

[35] *See* A-0469-71.

[36] *See* A-0457-59.

[37] *Id.* Sandhill attempts to turn this argument in the alternative into a concession by SAHOA. SAHOA made no such concession. *See infra* Section I.

"directly related";[38] therefore, Sandhill could increase SAHOA's rents to "market rent" even if that proposed increase exceeded Sandhill's proven expenses.[39] Although Sandhill was in part basing its rent increase on proving "market rent," the Arbitrator relied on statutory language and case law relating to capital improvements to justify its holding.[40] Using similar logic, the Arbitrator held that Sandhill provided adequate disclosures at the Section 7043(b) meetings.[41] The Arbitrator considered, but did not rely upon, Sandhill's testimony regarding its sewer costs and NOI in reaching his decision because the information was not provided to the homeowners in writing.[42]

F. The Superior Court Decision.

On September 13, 2018, the Superior Court reversed the Arbitrator's Decision (the "Opinion"). The court held that Section 7042(a)(2), as interpreted by this Court in *Bon Ayre II* and *Donovan Smith HOA v. Donovan Smith MHP* ("*Donovan Smith"*),[43] "requires a community owner to show that its costs have

---

[38] A-0457.

[39] A-0458-59.

[40] *Id*.

[41] A-0470-71.

[42] *See* A-0470 ("[T]he Landlord must make written disclosures at or before the community meeting of material factors resulting in the decision to increase the rent. It is clear to me that the Landlord has not made disclosures of financial statements showing reduced profits and increased costs[.]").

[43] 190 A.3d 997 (TABLE), 2018 WL 3360585 (Del. July 10, 2018).

increased in order to justify an increase to market rent for its existing tenants."[44] The court further elaborated that "[i]t is not merely enough for a community owner to show that it has incurred some costs. The community owner must show that its costs have increased" and that such increase "caused its original expected return to decline."[45] The Superior Court expressly rejected that "a mere investment, regardless of the amount, by the community owner can form the basis for an increase to market rent."[46] Moreover, the court noted a "lack of disclosure at the required meetings with the residents" regarding Sandhill's purported sewer costs and NOI was "not an issue on appeal because the Arbitrator did not rely on those matters to reach his decision."[47]

Based on its analysis and the clear record showing that Sandhill "only established that it spent $12,185 to improve the water filtration system," the Superior Court found that Sandhill did not establish an increase in its costs or that its expected return declined.[48] As such, the court held that the Arbitrator's holding that Sandhill met its burden at arbitration was erroneous and must be reversed.[49]

---

[44] OB Ex. A at 10.

[45] *Id.* at 10-11.

[46] *Id.* at 12.

[47] *Id.* at 8 n.11.

[48] *Id.* at 13.

[49] *Id.*

This appeal followed. First State Manufactured Housing Association ("FSMHA") filed an *amicus curiae* brief ("Amicus") on December 12, 2018.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT SAHOA CONTESTED SANDHILL'S ENTIRE PROPOSED RENT INCREASE IN EXCESS OF THE CPI-U.

A. Question Presented.

Whether the Superior Court correctly held that SAHOA (i) disputed that Sandhill was entitled to any portion of the proposed rent increase above the CPI-U and (ii) did not dispute the CPI-U portion of the proposed rent increase (0.7%).

B. Scope Of Review.

This Court reviews "the Superior Court's interpretation of the Rent Justification Act" *de novo*.[50]

C. Merits Of Argument.

Sandhill contorts the Arbitrator's Decision, the Opinion, as well as SAHOA's previously articulated positions in a desperate attempt for this Court to find some error in the Opinion. Even a cursory review of the record below indicates that Sandhill's positions are meritless.

1. The Superior Court properly held that SAHOA never conceded that Sandhill was entitled to any disputed portion of Sandhill's proposed rent increase.

Contrary to Sandhill's assertion in its Opening Brief, SAHOA has consistently contested Sandhill's *entire* proposed rent increase above the CPI-U

[50] *Bon Ayre II*, 149 A.3d at 233; *see also December Corp. v. Wild Meadows Home Owners Ass'n*, 2016 WL 3866272, at *4 (Del. Super. Ct. July 12, 2016) (citation omitted).

throughout the course of this litigation. Any claim otherwise is untrue. SAHOA has argued that Sandhill failed to prove that any of the proposed rent increase in excess of the CPI-U was justified under the Act. However, SAHOA did argue *in the alternative* if the Superior Court and the Arbitrator disagreed with SAHOA's principal argument. An argument in the alternative is not a concession. SAHOA argued that *even if* Sandhill's evidence were sufficient to prove a decrease in its return on its property, Sandhill's proposed rent increase could be limited to only $7.93 based on the evidence Sandhill adequately presented at the final meeting with homeowners and at arbitration—its $12,185 water filtration system. This was not a concession.

As its "proof" that SAHOA conceded to $7.93 of Sandhill's proposed rent increase, Sandhill improperly cites to several sections of SAHOA's opening brief in the Superior Court and twists SAHOA's positions out of context. Specifically:

- Sandhill cites SAHOA's argument articulated at A-0484 as evidence of its purported "concession."[51] No such concession occurred. SAHOA's full argument reads: "SAHOA also argued, ***arguendo*, that even if the rent increase was justified**, the amount of the rent increase should be limited."[52] *Arguendo* means "for the sake of argument."[53] That was SAHOA's entire point in presenting such an argument—as an alternative position. As such, SAHOA never conceded that any portion of Sandhill's proposed rent increase in

[51] OB at 3, 22.

[52] A-0484 (emphasis added).

[53] *https://www.merriam-webster.com/legal/arguendo* (last visited Jan. 8, 2019).

excess of the CPI-U is justified under the Act.

- Sandhill misguidedly attempts to prove SAHOA's purported concession by citing a section of SAHOA's briefing titled: "*Even If* The Evidence Presented By Sandhill Was Adequate To Prove That Sandhill's Profits Were Down Because Its Costs Were Up, the Arbitrator's Decision To Grant A Rent Increase In Excess Of The Proven Expenses Was Erroneous."[54] SAHOA concludes its argument in the alternative regarding $7.93 per lot by writing, "[t]hus, assuming, *arguendo*, that Sandhill's water filtration system expense is sufficient to be considered 'directly related to operating, maintaining or improving' the community, **which it is not**…."[55] Sandhill's argument that the Superior Court committed legal error in light of this evidence is disingenuous.

- Sandhill writes: "Appellee confirmed that 'SAHOA never argued that the [water filtration] expense cannot be used as evidence to show that *a portion* of the rent increase is 'directly related' under Section 7042(a)(2).'"[56] This is inaccurate. SAHOA made such statement in response to the Arbitrator's misunderstanding of SAHOA's argument and inexplicable invocation of the portion of Section 7042 regarding not using past capital improvements to justify future rent increases. The statement is accurate, in part, as SAHOA agrees that the water filtration system's cost could have been used *in conjunction with other evidence* to meet its burden to prove that its profits decreased because its costs increased. The fact that SAHOA never argued that the expense must be *categorically* excluded from calculations of Sandhill's costs does not mean that SAHOA did not contest that portion of the rent increase.

SAHOA never conceded that Sandhill was entitled to receive $7.93 per lot of rent increase; therefore, the Superior Court correctly held that Sandhill's entire proposed rent increase above the CPI-U should be denied.

[54] A-0499 (emphasis added).

[55] A-0510 (emphasis added).

[56] OB at 23 (emphasis in original).

2. The Superior Court correctly held that Sandhill was entitled to the CPI-U portion of its proposed rent increase.

Sandhill suggests that the Superior Court erred by denying the CPI-U portion of its rent increase when it states that "the Superior Court erred as a matter of law when it disallowed all of Sandhill's Rent Increase."[57] This is false. The Superior Court made no such error. Sandhill itself admits that "the Superior Court clarified it *did not* reverse the Arbitrator's ruling on the CPI-U rate increase."[58]

The Superior Court did not reverse the Arbitrator on this issue. The parties have *never* disputed Sandhill's right to recover the CPI-U portion of its rent increase.[59] As such, the Superior Court correctly did not address the non-issue.

---

[57] *Id.* at 21.

[58] *Id.* at 22 (emphasis added).

[59] *See* OB Ex. B at 1 ("As to the CPI-U portion of the rent increase, *that was not disputed and was not the subject of my decision*. Since it was not disputed, I see no reason to address it.") (emphasis added).

II. THE SUPERIOR COURT CORRECTLY HELD THAT SANDHILL FAILED TO PROVE THAT ITS PROPOSED RENT INCREASE WAS DIRECTLY RELATED TO OPERATING, MAINTAINING OR IMPROVING THE MANUFACTURED HOME COMMUNITY.

A. Question Presented.

Whether the Superior Court correctly denied Sandhill's rent increase above the CPI-U because Sandhill's only verified expense of $12,185 fails to prove that its costs increased such that its expected return declined, as required by 25 *Del. C.* § 7042(a)(2) and this Court's precedent.

B. Scope Of Review.

This Court reviews "the Superior Court's interpretation of the Rent Justification Act" *de novo*.[60]

C. Merits Of Argument.

At its core, this appeal boils down to a single question: Did Sandhill prove that its proposed rent increase was "directly related?" Community owners are not entitled to any rent increase above the CPI-U unless they can show that the rent increase is "directly related."[61] Because rent increases are considered annually, Sandhill's proposed rent increase is the annual cost of the rent increase for all of Sandhill's lots. With an average increase of approximately $35 per lot per month[62]

---

[60] *Bon Ayre II*, 149 A.3d at 233; *see also December Corp.*, 2016 WL 3866272, at *4 (citation omitted).

[61] 25 *Del. C.* § 7042(a)(2).

[62] A-0296 (Tr. 66).

and 128 lots in the community,[63] Sandhill's proposed rent increase is approximately $53,760. The question, therefore, is whether $53,760 is in fact "directly related."

In *Bon Ayre II*, this Court laid out a simple test for the "directly related requirement": a community owner "must show that its original expected return has declined, because the cost side of its ledger has grown."[64] Applying that test, the Superior Court correctly held that Sandhill failed to show that the water filtration system expense of $12,185 either increased its overall costs or resulted in a decline in its original expected return.[65] Each one of Sandhill's and FSMHA's arguments (and many hypotheticals), discussed herein, fails to rebut the Superior Court's determination that Sandhill failed to satisfy this Court's "directly related" test based on the factual record the Arbitrator developed.

1. Sandhill failed to prove that its original expected return declined because of increased costs.

(a) Sandhill's water filtration system costs do not prove that its proposed rent increase is "directly related."

This Court interpreted the "directly related requirement" as requiring community owners to show "that [their] original expected return has declined,

---

[63] A-0288 (Tr. 36).

[64] 149 A.3d at 234.

[65] OB Ex. A at 13. Moreover, it is apparent that $12,185 is not directly related to the proposed rent increase of $53,760.

because the cost side of its ledger has grown."[66] Unless the community owner can show that its costs have increased, the Act "preserves the initial relationship the [community owner] creates between its revenue and its costs."[67] In this way, "the homeowner … is protected from material increases in rent unrelated to the benefits of costs of living in the community, and the [community owner] receives the return it originally anticipated."[68] Simply put, unless the community owner can prove that its profits decreased because its costs increased, it cannot prove that the rent increase is "directly related" and therefore cannot receive a rent increase above the CPI-U. A community owner cannot even "open[] the door" to the point where 25 *Del. C.* § 7042(c) factors are considered.[69] As such, despite Sandhill's and FSMHA's coordinated efforts to minimize Sandhill's burden, the "directly related requirement" is a substantive provision, not merely a "gatekeeping" or "door opener" provision.[70]

Although this Court referred to the burden to meet the "directly related requirement" as "modest," *Bon Ayre II* makes clear that the community owner

---

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

[67] *Id.* at 235.

[68] *Id.*

[69] *Id.* at 234.

[70] OB at 25; A-0692-93; Amicus at 2. *See* SAHOA's Superior Court reply brief for a more detailed discussion on why the "directly related requirement" is not a "gatekeeping" condition. A-0924-29.

must "produce evidence suggesting that the 'return' on its 'property' has declined."[71] "Modest" simply refers to the ease at which a community owner can prove "that the 'return' on its 'property' has declined."[72] "It is not merely enough for a community owner to show that is has incurred *some* costs."[73]

Here, Sandhill failed to present any evidence into the record showing how its proposed rent increase of $53,760 is "directly related." Notwithstanding Sandhill's attempts to cloud the record regarding sewage costs, the record shows that Sandhill only incurred an expense of $12,185 for a water filtration system. But Sandhill did not prove—in any way—how this onetime expense affected its overall costs or its "original expected return[,]" as required by *Bon Ayre II.*[74]

An expense, without further evidence that the community owner's profits decreased because the "costs have gone up,"[75] cannot prove that a proposed rent increase is "directly related." Sandhill's testimony that the company's costs increased because of its new water filtration system does not prove that "the cost

---

[71] *Bon Ayre II*, 149 A.3d at 235-36 (citation omitted).

[72] *Id.* (citations omitted). Sandhill suggests that the "modest burden" language somehow means that it need only make a "modest" investment in the property in order to justify an increase up to market rent, regardless of the increase's magnitude. *See, e.g.*, OB at 33-34. This is a blatant misreading of *Bon Ayre II*, which states that the "modest burden" is the requirement to show that its "'return' on its 'property' has declined." 149 A.3d at 235-36.

[73] OB Ex. A at 10 (emphasis added).

[74] A-0457-59.

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

side of its ledger has grown."[76] It merely shows that one entry grew.[77] Sandhill needed to prove that its expenses increased *overall*. For instance, Sandhill could very likely have reduced or offset other costs, such as labor or utilities, by implementing its new water filtration system. Only by providing additional evidence at arbitration could Sandhill have satisfied its burden and confirmed that its profits decreased as a result of increased costs.

Despite the clear rule set forth in *Bon Ayre II*, Sandhill failed to meet its burden at arbitration and "show that its costs ha[d] gone up" in order to "open[] the door to a rent increase based on § 7042(c)'s factors, including market rent."[78] Accordingly, the Superior Court properly denied Sandhill's rent increase above the CPI-U.

(b) Sandhill did not provide additional evidence regarding increased sewer costs because it failed to meet its statutory obligations under 25 *Del. C.* § 7043(b).

Realizing that its position is untenable and that it failed to provide the necessary evidence at arbitration, Sandhill also argues that it proved that its profits

---

[76] *Id*.

[77] Community owners must provide "some level of detail that is meaningful" to justify a rent increase, as even "summarized financial information and brief testimony," let alone a single ledger entry, are insufficient to satisfy the "directly related requirement." *Pot-Nets Lakeside, LLC v. Lakeside Cmty. Homeowners Ass'n, Inc.*, 2017 WL 3168969, at *11 (Del. Super. Ct. July 17, 2017).

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

decreased because its sewer costs increased.[79] Sandhill's argument relies on one of its witness's vague testimony at arbitration that between 2012 and 2016, Sandhill's sewer costs increased $83 per lot per month, decreasing its NOI $57 per lot per month.[80] However, regardless of the testimony's validity, Sandhill's reliance on this purported evidence is futile because Sandhill did not provide this evidence in writing to the homeowners at or before the final meetings.

Under Section 7043(b), Sandhill was required to provide, in writing, all of the material factors resulting in the decision to increase the rent. A community owner cannot merely "discuss"[81] the rent increase at a final meeting; it must disclose in writing *all relevant material* information to homeowners. Here, the record proves that Sandhill provided no written disclosures of its sewer costs or NOI to SAHOA, **as recognized by both the Arbitrator and the Superior Court.**[82] Even Sandhill's own witness admitted that "there was nothing provided

---

[79] OB at 18-19, 34-35.

[80] *Id.* Specifically, the witness, Mr. Ruais, provided the vague and imprecise statement that the $83 per lot per month increase in sewer costs "meant that the NOI was down in the same period, *like, 50 -- probably used the number $57*." A-0295 (Tr. 62) (emphasis added).

[81] OB at 9-10.

[82] *See* A-0470 ("[T]he Landlord must make written disclosures at or before the community meeting of material factors resulting in the decision to increase the rent. It is clear to me that the Landlord has not made disclosures of financial statements showing reduced profit margins and increased costs[.]"); OB Ex. A at 6 ("Although there was some testimony about an increase in other expenses since the beginning of 2012, nothing was provided in writing about those expenses at the

in writing" regarding this information.[83] Furthermore, assuming Sandhill did actually discuss its sewer costs and its impact on NOI, it only discussed these issues at *one* of the two final meetings, meaning certain homeowners never heard about these costs anyway.[84] It is therefore clear that Sandhill failed to meet its Section 7043(b) disclosure obligations pertaining to its purported increased sewer costs.

Notably, in an attempt to obscure the record, Sandhill argues that it provided SAHOA information regarding sewer costs and their effect on its NOI "through the Written Presentation."[85] That is false. The Written Presentation contained no such information.[86] The Written Presentation states that "[*l*]*ast year*, the community owner's costs went up such that the community owner's return on its property has declined. This rent increase is, therefore, necessary, and directly related[.]"[87] The very next presentation slide, titled "Increased Costs Affecting Profit[,]" states:

---

meetings with residents or at the arbitration hearing. Therefore, the only expense received into evidence and provided to SAHOA in writing was for the water filtration system.").

[83] A-0295 (Tr. 62).

[84] *See* A-0295 (Tr. 62) (Mr. Ruais stating: "I do remember *one meeting* I did talk about [the sewer costs and NOI.]") (emphasis added). The homeowners who were invited to attend the February meeting were entirely different from those invited to attend the April meeting. *Compare* A-0060-61 *with* A-0118; A-0134; A-0138.

[85] OB at 35; *see also id.* at 19, 34.

[86] *See* A-0295 (Tr. 62) (Ruais admitting that "there was nothing provided in writing" regarding NOI and sewer costs).

[87] A-0149; A-0186 (emphasis added).

"[*l*]*ast year* ... Sandhill Acres incurred a cost of $12,185 for [the water filtration system] improvement."[88] No Sandhill slide discusses sewer costs or its NOI.[89] Sandhill's comments to the contrary are simply false, and, therefore, its arguments regarding this evidence must be rejected.

Mr. Ruais' unsupported testimony is also immaterial because it only relates to Sandhill's NOI from 2012-2016, not the relevant time period of 2015-2016.[90] As noted above, Sandhill disclosed to its residents in the Written Presentation that Sandhill was increasing rents because of changes in costs from "[l]ast year." Sandhill could have easily presented evidence (particularly in writing) that its profits had decreased from 2015-2016.[91] It chose not to. Thus, Sandhill's NOI evidence is immaterial to satisfying Sections 7042(a)(2) and 7043(b).

Sandhill failed to meet its statutory obligations under 25 *Del. C.* § 7043(b). As a result, the Superior Court correctly noted that Sandhill cannot rely upon this information to show that its expected return has declined, and its costs went up.

---

[88] A-0150; A-0187 (emphasis added). The following three slides contain the invoice and pictures of the water filtration system: A-0151-153; A-0188-190.

[89] *See* A-0141-73; A-0178-210.

[90] *See infra* Section II.C.4.a.

[91] The Act does not require the use of the immediately preceding year as the comparison point for rent justification. There could be situations where a larger time span would be more appropriate to consider. Yet, Sandhill chose to limit the comparison to 2015 and 2016 in the Written Presentation. It should be held to that decision.

2. Sandhill's and FSMHA's tortured interpretation of Section 7042(a)(2) is inconsistent with the plain language of the Act and *Bon Ayre II*.

Sandhill argues that "the Superior Court committed legal error by failing to consider the [] Act as a whole."[92] However, it is Sandhill and FSMHA who fail to consider and give meaning to each provision of the Act and this Court's precedent. Specifically, in what seems to be in furtherance of its concocted "gatekeeping" distinction, Sandhill argues that its rent increase is based solely on "market rent," not the water improvement expense (or even its sewer costs).[93] Sandhill makes this argument even though it has continuously relied on the water improvement expense as a basis to satisfy the "directly related requirement."[94]

Sandhill essentially argues that it satisfied the Act's requirements by proving the need to match "market rent," and not whether the rent increase is "directly

---

[92] OB at 32; *see also id.* at 37-38.

[93] *Id*. at 27 ("**Sandhill's rent increase is based on market rent.** Sandhill simply used its water improvement expense … to satisfy the second gatekeeping provision of the Rent Justification Act.") (emphasis added). Sandhill also argues that the Superior Court erred by finding that the rent increase was based on the installation of the water filtration system, not the rent increase. *Id.* Sandhill's argument misses the mark. The Superior Court recognized that Sandhill was utilizing market rent to justify its rent increase. *See* OB Ex. A at 4, 7. However, the Superior Court also understood that the "directly related requirement" must be met and that "[t]he sole issue on appeal [was] whether the expenditure by Sandhill Acres of $12,185 for the improved water system is sufficient" for the rent increase. *Id.* at 8. Sandhill also understood that this was the sole issue on appeal. A-0707. Therefore, the Superior Court correctly analyzed whether the $12,185 expense was "directly related" to and a proper basis for the rent increase.

[94] *See* A-0457; OB at 29-34.

related." The Superior Court recognized that this Court rejected this rationale in *Bon Ayre II*.[95]

Furthermore, Sandhill and FSMHA argue that Sandhill can meet Section 7042(a)(2)'s requirement that the rent increase be "directly related" by showing a single increased expense—the water filtration system expense—and then stating that its profits would have been higher if it had not incurred that expense.[96] In doing so, Sandhill and FSMHA further misinterpret the Act and this Court's precedent by eliminating the "directly related requirement" from the Act.

(a) Sandhill and FSMHA rely on the Arbitrator's misinterpretation of 25 *Del. C.* § 7042(a)(2) and *Bon Ayre II* for the proposition that Sandhill did not need to prove that its profits decreased because its costs increased.

Like the Arbitrator, Sandhill and FSMHA misinterpret 25 *Del. C.* § 7042(a)(2) by disregarding this Court's ruling in *Bon Ayre II* that a community owner must show a reduction in profits to receive a rent increase above the CPI-U. The Arbitrator's decision was based on his determination that "[a] landlord need not demonstrate both a decrease in its rate of return as well as the cost of improvement in order to advance to the second part of the rent justification

[95] OB Ex. A at 8.

[96] OB at 29-34; Amicus at 7-11.

analysis."[97] However, the Superior Court correctly found that the Arbitrator misinterpreted the core holding from this Court in *Bon Ayre II*. As the Superior Court stated, the Arbitrator incorrectly relied upon an "incomplete" and "isolated statement [from *Bon Ayre II*] to reason that a mere investment, regardless of the amount … can form the basis for an increase to market rent."[98]

Similarly here, Sandhill and FSMHA again rely on the same incomplete and isolated statement from *Bon Ayre II* for the same proposition.[99] The statement, in its full context, explains that a community owner has the burden to first prove an increase in costs such that its expected return has declined before it can seek higher-than-inflation rent increases.[100] Sandhill and FSMHA conveniently ignore this Court also stating in *Bon Ayre II*: "But, *unless the landowner has seen its costs increase* for 'operating, maintaining *or improving* the manufactured home

---

[97] A-0471.

[98] OB Ex. A at 11-12.

[99] *See* OB at 15, 30-33; Amicus at 6. Notably, although never stated in *Bon Ayre II*, Sandhill cites directly to *Bon Ayre II* for the proposition that a community owner only needs to *invest* in the community to prove that its rent increase is "directly related." OB at 15 ("[T]his Court has held that if a community owner can show that its original expected return has declined because its costs have gone up *or* that it has invested in its community, then the door is open to justify a rent increase[.]") (citing *Bon Ayre II*, 149 A.3d at 234) (emphasis added); OB at 32-33 (arguing this Court explained in *Bon Ayre II* that "a community owner must show that its costs have gone up *or* that it has invested in its development") (citing *Bon Ayre II*, 149 A.3d at 235) (emphasis added).

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

community,' the Rent Justification Act preserves the initial relationship the landowner creates between its revenue and its costs."[101]

The Superior Court correctly reversed the Arbitrator's decision in which he dismissed the requirement set forth in *Bon Ayre II* by suggesting that a community owner can "clear the first hurdle of 25 *Del. C.* § 7042(a)(2)" by simply showing any improvement "expense which benefits the community." Likewise, Sandhill's and FSMHA's unsupported argument that Sandhill only needed to show that it "invested" in its property, regardless of the amount, fails.

(b) The elective nature of Sandhill's expense is irrelevant under Section 7042(a)(2), and an elective improvement expense does not automatically increase Sandhill's costs or reduce its expected returns.

In its latest attempt to make its proposed rent increase satisfy the Act's requirement, Sandhill creates an artificial distinction between *elective* improvement expenses and maintenance or operation costs, despite no distinction existing for elective expensive in either Section 7042(a)(2) or this Court's precedent. Sandhill argues that its water filtration system expense "was a direct reduction of Sandhill's expected return because it was an elective improvement made to the community … not simply a cost of maintenance or operation for the

[101] *Id.* at 234-35 (citation omitted) (emphasis added).

community."[102] Sandhill states that the Superior Court did not give proper weight to the fact that the water improvement cost is an elective improvement cost.[103]

But Sandhill fails to explain—because it cannot—how an elective improvement cost is a "direct reduction of Sandhill's expected return" any more than a maintenance or operational cost.[104] The optionality of an expense is irrelevant as to whether that expense raised overall costs, decreased revenue or impacted Sandhill's expected return. In fact, if an expense is truly optional, it is *more likely* built into the community owner's budget, and thus would not impact its expected return.

Sandhill further argues that the Superior Court "failed to defer to the Arbitrator" regarding the elective nature of the water filtration system and how the expenditure affected Sandhill's expected returns.[105] This argument fails for two reasons. First, the Arbitrator never discussed—and Sandhill provided no cite to the

---

[102] OB at 31-32.

[103] *Id*. Sandhill infers that the Superior Court erred by not recognizing that the water filtration system improvements were elective improvements because "the water quality issues had not been present in the past year," even though the Superior Court correctly stated that the community had previously experienced water issues. OB at 31(quoting A-0522). However, Sandhill fails to explain any standards for determining how or why a particular improvement is elective. Regardless, the Superior Court did not address whether Sandhill's actions were elective because such a determination is not relevant under 25 *Del. C.* § 7042(a)(2).

[104] OB at 31.

[105] *See id.* at 32.

contrary—the elective nature of the expense. Second, and more importantly, the Arbitrator found that Sandhill failed to provide any evidence of how the expense of the water filtration system affected Sandhill's costs and expected return.[106] Therefore, the Superior Court properly deferred to the record before the Arbitrator on this issue.

Furthermore, Sandhill's argument that merely incurring the expense of $12,185 automatically reduced its expected return by $12,185 is unfounded.[107] As previously discussed, evidence of a water filtration system does not prove that "the cost side of its ledger has grown," let alone show a decline in its expected return.[108] This is best proven by Sandhill's own testimony. At arbitration, Sandhill's witness, Mr. Ruais, testified that between 2012 and 2016, its water and sewer costs had presumably increased $83 per lot per month, and, as a result, "that meant that the NOI was down in the same period like, 50 -- probably used the number $57."[109] The fact that Sandhill's water and sewer expenses increased by $83, yet its NOI decreased by only $50 or $57, undeniably proves that there is no direct relation

---

[106] *See* A-0470 ("It is clear to me that the Landlord has not made disclosures of financial statements showing reduced profit margins and increased costs….").

[107] OB at 16, 33. Without providing citation, Sandhill asserts that SAHOA acknowledges that the $12,185 "resulted in a $7.93 reduction in expected returns per lot per month." *Id.* at 33. However, as discussed *supra* section I, SAHOA has never made any such acknowledgment.

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

[109] A-0295 (Tr. 62).

between one isolated expense and a community owner's overall costs or expected return.

As such, Sandhill failed to show how its expense of $12,185, elective or not, increased its overall costs or affected its expected return, and, therefore, Sandhill did not satisfy Section 7042(a)(2).

(c) Sandhill and FSMHA fail to consider the Act as a whole because their interpretation of the Act eliminates the "directly related requirement."

Sandhill argues that the Superior Court erred by not considering the Act as a whole based on Legislative intent and because SAHOA's interpretation of the Act renders Section 7042(c)(7) meaningless.[110] However, it is SAHOA's interpretation that gives meaning to every provision of the Act, including Section 7042(c)(7). Both Sandhill and FSMHA misinterpret the Act because their assertion that *any* expense, regardless of the amount, satisfies the "directly related requirement" would eliminate the requirement from the Act.[111]

If any *de minimis* increase in expenses is sufficient to justify a rent increase up to market rent (regardless of the rent increase's magnitude), the "directly related

[110] OB at 32-33, 35-38.

[111] *See id.* at 33, 37 (asserting that a community owner only needs to show that "it incurred a cost of an improvement in the community" and that such cost does not need to be equivalent to a proposed rent adjustment); Amicus at 8-11 (asserting that the mere existence of an investment expense is enough to meet the "directly related requirement").

requirement" becomes completely ineffective for market rent increases. For example, under Sandhill's and FSMHA's flawed interpretation of the Act, a community owner spending just a single penny would satisfy the "directly related requirement." As previously stated by Sandhill, "the General Assembly 'is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction.'"[112] If the Legislature intended for the "directly related requirement" to be effectively meaningless for market rent increases, it could have excluded the requirement entirely from the Act or specified that it did not apply to the "market rent" factor of Section 7042(c)(7). It chose not to. By making the "directly related requirement" apply to all "proposed rent increase[s]" above the CPI-U, the Legislature intended the requirement to have relevance for *all* proposed rent increases, including those under Section 7042(c)(7).

Rather than address the reality that its interpretation eliminates the "directly related requirement," Sandhill instead asserts that SAHOA's interpretation leaves Section 7042(c)(7) "meaningless."[113] Sandhill bases its argument on the premise that the Legislature created Section 7042(c)(7) to provide a method in which a community owner could raise the rent to the market rate for the limited number of

---

[112] A-0712 (Sandhill's Superior Court Answering Brief at 26 n.14 (quoting *Pot-Nets Coveside Homeowners Ass'n v. Tunnell Cos.*, 2015 WL 3430089, at *4 (Del. Super. Ct. May 26, 2015))).

[113] OB at 36-38.

homeowners who pay less than market rate.[114] Sandhill argues that under SAHOA's interpretation of the Act, a community owner cannot use Section 7042(c)(7) for those homeowners paying less than market rent because:

> The only means open for a community owner to increase the rent to market rate would be to complete an investment improvement project that would justify the specific amount of that increase [to meet the "directly related" requirement], then apply that amount to *all* homeowners as a pass through on a capital improvement through Section 7042(c)(1).[115]

However, Sandhill's argument falls flat because a community owner is not limited to incurring Section 7042(c)(1) capital improvement expenses to meet the "directly related requirement" to increase rent up to the market rate. While this is one way that a community owner could increase rent to the market rate, it is not the only way. In fact, a community owner need not show any *specific* types of expenses in order to show that the rent increase is "directly related" so that it can raise its rent up to market rent. For example, a community owner could see a decrease in its profits due to increased expenses in areas that cannot be used under Section 7042(c) to justify a rent increase, such as "ordinary repair, replacement and maintenance"[116] or repairs due to "ordinary wear and tear."[117] Furthermore, a community owner could use these expenses (or a combination thereof) to meet the

---

[114] *Id.* at 37.

[115] *Id.* at 37 (emphasis added).

[116] 25 *Del. C.* § 7042(c)(1).

[117] *Id.* § 7042(c)(6).

"directly related" requirement and then use the "market rent" factor to raise the rent to the market rate for the *limited* number of homeowners who pay less than the market rate. As such, SAHOA's interpretation of the Act does not leave Section 7042(c)(7) meaningless. To the contrary, SAHOA's interpretation of the Act correctly gives meaning to the entire statute for all types of potentially justifiable rent increases.

Because Sandhill's interpretation fails to give meaning to every provision of the Act, it is incorrect, and the Superior Court correctly found that it was legal error for the Arbitrator to adopt it.

3. FSMHA erroneously interprets *Donovan Smith* beyond its "case-specific, narrow basis" in an attempt to argue that the existence of any individual cost can support an arbitrator's holding that the community owner's original rate of return has declined.

Even if this Court had not expressly stated that the decision in *Donovan Smith* was "case-specific" and "narrow," the records and arbitration decisions in *Donovan Smith* and this case are markedly different. Specifically:

- In *Donovan Smith*, "neither party was represented by counsel" at the arbitration.[118] Here, both parties were represented by counsel.

- In *Donovan Smith*, the homeowners did not raise the issue of the "directly related requirement" until their closing argument.[119] Here,

[118] *Donovan Smith*, 2018 WL 3360585, at *1.

[119] *Id.*

the question as to whether the proposed rent increase was "directly related" was squarely before the Arbitrator.[120]

- In *Donovan Smith*, the arbitrator neither held that the community owner could forgo proving that its "return [on the property] ha[d] declined"[121] nor suggested that *Bon Ayre II* permits a community owner to prove a decline in its return by merely demonstrating any "improvement." On the contrary, the arbitrator held that the community owner was required to prove that its return on the property had declined and found that the record was sufficient for the community owner to meet its burden.[122]

  Here, the Arbitrator made specific rulings on the proper interpretation of the Act.[123] Specifically, the Arbitrator held that SAHOA's position that *Bon Ayre II* requires a community owner to "show its original expected return has declined" was a misinterpretation of *Bon Ayre II*.[124] The Arbitrator also held that "if the rent increase is directly related to an expense for an improvement of the community, a

---

[120] A-0282 (Tr. 10) (showing that the Arbitrator, at the beginning of the arbitration, stated that one of the two issues in the case was "whether or not the proposed rent increase is directly related to operating, maintaining or improving the manufactured home community").

[121] *Donovan Smith*, 2018 WL 3360585, at *3

[122] *Id.* This Court deferred to the arbitrator's finding, in part, because the homeowners failed to properly raise this argument prior to their closing argument. *Donovan Smith*, 2018 WL 3360585, at *3. This Court did not address the arbitrator's interpretation of Section 7042(a)(2).

[123] Without explanation, the Arbitrator discussed Sandhill's responsibility under Section 7042(a)(2) in the section of its decision addressing Sandhill's disclosure obligations under Section 7043(b). *See* A-0470-71.

[124] A-0470-71. As noted by the Superior Court, and as discussed *supra* in Section II.C.2.a., the Arbitrator used one sentence from *Bon Ayre II* out of context, and the Arbitrator's interpretation ignores multiple instances in *Bon Ayre II* where this Court clearly indicated that community owners are required to show a decrease in their returns on their properties.

> landlord may also clear the first hurdle of 25 *Del. C.* § 7042(a)[(2)] independently of showing a decline in rate of return."[125]

In *Donovan Smith*, this Court looked at a bare record and an arbitration decision that, on its face, appeared to be a factual finding using the appropriate legal standard.[126] This Court declined to find the arbitrator's inferences unreasonable and gave the arbitrator's factual finding due deference.[127] The arbitrator in *Donovan Smith* may have had the wrong legal standard in mind when he wrote his decision, but there is no facially obvious legal error in the text thereof. As this Court noted, had the parties raised the issue more fully before and at the arbitration, the result may have been different.[128]

However, in this case, the parties raised and argued the "directly related" issue fully before the Arbitrator, and the Arbitrator made explicit, incorrect holdings as to the meaning of Section 7042(a)(2) and *Bon Ayre II*.[129] The Arbitrator did not rely upon an inference that the record was sufficient to satisfy "the modest requirement of producing evidence that suggests the return on the

---

[125] A-0471 (emphasis in original).

[126] *See Donovan-Smith MHP (Tenants/HOA) v. KDM Dev. Corp.*, Docket No. 2-2017, p. 3 (Delaware Manufactured Home Relocation Authority ("DEMHRA") Arb. May 4, 2017) (attached hereto as Exhibit A).

[127] *Donovan Smith*, 2018 WL 3360585, at *3.

[128] *Id.*

[129] A-0459; A-0470-71.

property has declined."[130] Instead, the Arbitrator found that Sandhill "[had] not made disclosures of financial statements showing reduced profit margins and increased costs,"[131] yet ruled in Sandhill's favor because it simply had spent $12,185 to "improve" the community.[132] The Arbitrator accurately assessed the facts around the question of whether the proposed rent increase was "directly related," but simply applied the wrong legal standard. It is this error that the Superior Court addressed in the Opinion, as the court correctly declined to give deference to the Arbitrator's legal analysis.

FSMHA asks this Court to support and affirm a factual inference that is the opposite of what the Arbitrator actually found. This Court should dismiss FSMHA's request for the Court to greatly expand the "case-specific" and "narrow" result in *Donovan Smith* because the cases are not analogous.

4. FSMHA's interpretation of Section 7042(a)(2) and this Court's case law ignore this Court's decisions in *Bon Ayre II* and *Donovan Smith.*

In addition to arguing that this Court should affirm a factual finding that is the opposite of the record below, FSMHA argues that such an inference should be unnecessary because the mere existence of an "improvement" expense is always

---

[130] *Donovan-Smith MHP (Tenants/HOA) v. KDM Dev. Corp.*, Docket No. 2-2017, p. 3 (DEMHRA Arb. May 4, 2017).

[131] A-0470.

[132] A-0471.

sufficient to meet the "directly related requirement." According to FSMHA, any time a community owner invests in the community, "the community owner has thereby suffered a decrease in its expected return, a decrease that can be measured by an amount no less than the full cost the community owner invested in that community.... no substantive additional evidence [is] needed."[133] FSMHA further argues that community owners are never required to provide any sort of financial information because this Court's precedent only requires them to show increases in costs, not profits.[134] Despite FSMHA stating that it bases this position on this Court's decisions in *Bon Ayre II* and *Donovan Smith*, FSMHA relies on a selective misreading of those decisions that distorts this Court's rulings therein.

(a) FSMHA's hypotheticals are nonsensical and moot.

FSMHA's argument contains hypothetical situations that are not logically sound. FSMHA uses its first hypothetical to argue that the Opinion prevents someone purchasing a community from ever increasing the rent above the CPI-U for the first two years of ownership.[135] No party has argued such a position. A new owner of an existing community would step into the shoes of the prior owner and have all of the same rights and responsibilities as the prior owner. If the prior owner could have justified a rent increase, the new owner could do the same.

---

[133] Amicus at 8-9 (emphasis in original).

[134] *Id.* at 11-14.

[135] *Id.* at 15.

FSMHA's second hypothetical involves a community and a three-year time span.[136] Although the argument is unclear, it appears that FSMHA argues that it is unreasonable for a community owner to be locked into comparing the current year's profits to the year immediately prior. As SAHOA has previously stated:

> [t]he Act does not require the use of the immediately preceding year as the comparison point for rent justification. There could be situations where a larger time span would be more appropriate to consider. It was Sandhill's decision to limit the comparison to 2015 and 2016 in its presentation. It should be held to that decision.[137]

Before the Arbitrator, Sandhill chose to limit its comparison to the then-present year and the prior year. While Sandhill should be held to that decision in this case, that decision does not impact future Sandhill rent increases or those in other communities. Again, because it is arguing against a position that no one has taken, FSMHA's hypothetical is moot.

(b) FSMHA's position relies on a selective misreading of *Bon Ayre II* and *Donovan Smith*.

FSMHA makes much ado over the fact that *Bon Ayre II* and *Donovan Smith* do not mention the terms "profit" or "net income."[138] This ignores the fact that *Bon Ayre II* and *Donovan Smith* refer to the need for the community owner to show that its *return* on its property has declined. Puzzlingly, yet unsurprisingly,

---

[136] *Id.* at 16-17.

[137] A-0934.

[138] Amicus at 12-15.

FSMHA quotes *Donovan Smith* quoting *Bon Ayre II* but completely ignores the first part of the quotation:

> this Court's decision in *Donovan Smith,* makes clear that the focus remains on costs, with the adoption of the language in *Bon Ayre II* that "*the landowner must show that its original expected return has declined*, because the **cost** side of its ledger has grown. If a landowner can show that its **costs** have gone up, that opens the door to a rent increase based on § 7042(c)'s factors, including market rent."[139]

FSMHA's reliance on the absence of the word "profit" is a distinction without a difference in the face of the many times this Court references "original expected return" in *Bon Ayre II* and *Donovan Smith*. FSMHA's argument that this means that "costs" are the only things that matter is a misreading of the case law.

Similarly, FSMHA argues that "**neither** *Bon Ayre II* nor *Donovan Smith* supports an interpretation of the Act that would require community owners to provide profit and loss statements showing decreased overall 'profits' to meet the requirements of Section 7042(a)(2)."[140] It does so despite *Donovan Smith*'s clear statement that "it is not the case that a landowner may proceed ... to argue that it is entitled to an above-inflation rent increase without also being willing to produce documents to contesting homeowners that allow them to fairly test that

[139] *Id*. at 14 (quoting *Donovan Smith*, 2018 WL 3360585, at **1-2) (bold and underline in original) (italics added).

[140] Amicus at 13 (emphasis in original).

assertion."[141] This Court expressly stated that homeowners can "fairly demand discovery of the landowner's books and records relevant to the question of whether the proposed above-inflation rent increase is 'directly related to operating, maintaining or improving the manufactured home community."'[142] FSMHA's argument that *Donovan Smith* supports its position that community owners are never required to produce books and records is also a misreading of the case law. Even Sandhill recognizes that this argument is unsustainable, which is why it now attempts to correct its failure to introduce evidence about its NOI.[143]

5. The Superior Court was not required to remand this case to the Arbitrator.

FSMHA, not Sandhill,[144] urges this Court (assuming it affirms the Superior Court's legal standard) to remand this matter to the Arbitrator.[145] Yet, neither *December Corp. v. Wild Meadows Home Owners Ass'n*[146] nor 25 *Del. C.* § 7044 precludes the Superior Court from applying the appropriate legal standard to the

---

[141] *Donovan Smith*, 2018 WL 3360585, at *3.

[142] *Id.*

[143] *See supra* Section II.C.1.b; OB 34-35.

[144] As previously discussed in SAHOA's Opposition to FSMHA's Motion To Intervene As *Amicus Curaie* (Dkt. 10), this Court should decline to consider this argument. *See Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994) (applying the "well-established principle of appellate procedure that if a party appellant is represented by counsel, an *amicus curiae* cannot raise separate or additional issues for the consideration of an appellate court").

[145] Amicus at 18-21.

[146] 2016 WL 3866272 (Del. Super. Ct. July 12, 2016).

Arbitrator's factual findings. In *December Corp.*, the arbitrator expressly declined to make factual findings on the relevant statutory provisions.[147] Therefore, to force the arbitrator to finally make factual findings, the Superior Court remanded the case.[148]

Here, the Arbitrator made factual findings,[149] but applied the wrong legal standard. Because the Arbitrator already made factual findings, the Superior Court used those findings and applied the correct legal standard. This action is not the first time the Superior Court has done so, as it often exercises its discretion to reverse without remand when appropriate.[150] Neither 25 *Del. C.* § 7044 nor *December Corp.* requires appellate courts reversing arbitration decisions to remand

---

[147] *Wild Meadows Home Owners Ass'n v. December Corp.*, Docket No. 5-2014, p. 13 (DEMHRA Arb. Mar. 30, 2015) ("I need not reach a decision on whether the construction work falls within the scope of § 7042(c)(1) or (6). Indeed, the actions and omissions of December Corporation *leading up to* the construction work, as analyzed in detail below, defeat its case overall.") (emphasis in original) (attached hereto as Exhibit B).

[148] *December Corp.*, 2016 WL 3866272, at *6 ("[T]he matter is remanded to the arbitrator to provide factual findings regarding whether the statutory criteria for such an increase were met.").

[149] A-0457 (finding that "[t]he record is clear and undisputed that the cost of the system totaled $12,185.00" and that "[i]t seems clear that the water filtration system was clearly a benefit to the community"); A-0470 ("It is clear to me that the Landlord has not made disclosures of financial statements showing reduced profit margins and increased costs….").

[150] *Compare Bon Ayre Cmty. Ass'n v. Bon Ayre Land, LLC*, 2016 WL 241864, at *11 (Del. Super. Ct. Jan. 12, 2016)*, aff'd, Bon Ayre II*, 149 A.3d 227 (Del. 2016) (reversing an arbitrator's decision without remanding the case), *with December Corp.*, 2016 WL 3866272, at *6.

the case, and neither Sandhill nor FSMHA argues that there was a particular reason to do so in this case.[151] As such, this Court should affirm the Superior Court's opinion, which reverses the Arbitrator's decision.

[151] FSMHA states in its brief that the Superior Court "concluded that the arbitrator had misapplied the law, *and had never made the required [factual] findings*." Amicus at 21 (emphasis added). The second half of that statement is untrue. The Superior Court did not hold that the Arbitrator failed to make the required factual findings.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Opinion, as it is free from legal error.

Respectfully submitted,

/s/ Daniel S. Atlas
Daniel S. Atlas (ID No. 6346)
Steven D. Adler (ID No. 6257)
920 North King Street
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

/s/ Brian S. Eng
Brian S. Eng (ID No. 5887)
Community Legal Aid Society, Inc.
100 W. 10th St., Suite 801
Wilmington, DE 19801
(302) 575-0660, ext. 239

Attorneys for Petitioner-Below, Appellee Sandhill Acres Home Owners Association

DATED: January 11, 2019