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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE, HOMETOWN REHOBOTH BAY, LLC'S CORRECTED ANSWERING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

Before the Court is an appeal from the Superior Court's decision affirming the results of an arbitration hearing relating to the manufactured housing rent increase "justification" process mandated by the Rent Justification Act, 25 *Del. C.* § 7040 *et seq*. (the "Act").[1] Appellant, Rehoboth Bay Homeowners Association ("Appellant" and/or "HOA"), represents certain homeowners in Hometown Rehoboth Bay, a manufactured housing community owned by Appellee, Hometown Rehoboth Bay, LLC ("Hometown" and/or "Appellee"). This Court is being tasked to determine whether the Superior Court's affirmation of the Arbitrator's decision was correct.

This matter arose as a result of Hometown seeking, consistent with the requirements of the Act, to increase the lot rent in the community to recoup the increased costs it incurred during the 2016-2017 fiscal year as such increased costs related to (i) capital improvements and rehabilitation work in the community and (ii) to certain other specific cost increases it had in managing, operating and maintaining the community.

Hometown, in good faith and with diligence, complied with the Act's "conditions" requiring the justification of its 2018 rent increase by presenting

[1] All citations to the Act will be cited consistent with the citations used in the Arbitration Decision and the Superior Court Opinion. For ease of reference, the provisions cited herein are translated in to their post-December 10, 2019 citations in Exhibit C.

written evidence about its reasons for increasing its rent, by offering documentary evidence concerning the increased costs which it incurred and paid and how those cost increases related to "operating, maintaining and improving" the manufactured home community and by demonstrating that such costs were justified as "capital improvements," "rehabilitation work" and other permitted "costs" under the Act. *See* 25 *Del. C.* § 7042 (c) (1), (2) and (3).

The Appellant, however, was not convinced that such rent increase had been justified by Hometown, and sought to arbitrate the matter as permitted under the Act. Following a day-long arbitration hearing and post-hearing submissions of the parties (the "Arbitration"), the independent arbitrator assigned to hear the case and render a decision "employing the standards set forth in § 7042 issued his "Arbitration Decision."[2] That decision found that Hometown had met the preconditions to seeking a rent increase, but had not justified the full amount of its 2018 rent increase. Rather, the arbitrator concluded that Hometown had justified a rent increase of $74.85 per month per lot plus the statutory "CPI-U" amount of 0.7%.

[2] The March 16, 2020 Order of the Honorable Judge Craig A. Karsnitz is attached as Exhibit A and cited herein as "Opinion, p. ____." The March 1, 2018 Arbitration Decision is attached as Exhibit B and cited herein as Arb.D., p. __." Appellant's Opening Brief is cited as "OB, p. ___." Appellant's Appendix is cited herein as "A___." Appellee's Appendix containing the arbitration transcript and selected exhibits from the arbitration are included in the Appendix accompanying this Brief, and cited herein as "B____."

Hometown accepted the arbitrator's decision which resulted in an approximate **10.76% reduction** in the amount of its rent increase, and does not challenge any portion of the Arbitration Decision in this appeal.

The Appellant, however, remained undeterred in its position that Hometown had not justified its rent increase, and, thereafter, appealed that Arbitration Decision to the Superior Court.

On March 16, 2020, after considering the record evidence and the briefings of the parties, the Honorable Craig A. Karsnitz issued his Opinion. In that Opinion, the Court held that that Hometown's rent increase was directly related to improving the community and met the requirements of 25 *Del. C.* § 7042(c). Opinion, pp. 8-10. The Court further concluded that the Arbitration Decision was free from legal error and that the findings by the Arbitrator were supported by substantial evidence. *Id.* After noting that the Arbitrator "held the appropriate hearing and issued a thoughtful and factually supported decision," the Court affirmed the Arbitration Decision. *Id.*, pp. 9-10.

Not being satisfied with the conclusion in the Opinion, Appellant has now appealed to this Court. This is Hometown's Answering Brief on appeal.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court appropriately determined that the Arbitrator analyzed 25 *Del. C.* § 7042(c)(1) correctly and concluded that the Bulkhead Stabilization Project was a capital improvement.

2. Denied. The Superior Court appropriately determined that there was substantial evidence in the record to support the finding that the Bulkhead Stabilization Project constituted a capital improvement pursuant to the Act.

3. Denied. 25 *Del. C.* § 7042(c)(1) requires an arbitrator to find, if the statutory mandates of the Act are met, that the rent increase sought has been justified, and does not permit an arbitrator to choose a rent increase amount other than in the amount that has been justified.

STATEMENT OF FACTS

A. THE PARTIES.

Appellee, Hometown, is a Delaware limited liability company whose business is managing the manufactured housing community known as Hometown Rehoboth Bay, a community subject to the provisions of the Manufactured Homeowners and Community Owners Act, 25 *Del. C.* § 7001 *et seq.* (the "Manufactured Housing Act"), and of the Act, which is included as part of the Manufactured Housing Act.

Appellant represents certain homeowners in the Rehoboth Bay community who requested that they be represented by this Appellant and who have not otherwise reached agreement with Hometown with respect to their rent for 2018.

B. BACKGROUND.

Hometown Rehoboth Bay is a manufactured housing community consisting of 525 home rental lot sites located beside Delaware's Rehoboth Bay, and is conveniently located close to Delaware's beaches, shopping, restaurants, healthcare providers and the communities of Lewes and Rehoboth Beach.

Hometown leases the manufactured home lots in the community to the homeowner tenants who own the home on the rental lot (collectively, the "homeowners"), and Hometown provides the property management infrastructure

and services which support that leasing activity for the benefit of those homeowners.

C. HOMETOWN'S COMPLIANCE WITH THE ACT.

Due to increases in certain general costs and extraordinary capital improvement and rehabilitation work expenses incurred in 2016-17 at Hometown Rehoboth Bay, Hometown sought to recoup those costs, as statutorily provided for under the Act, through a rent increase, and to do so, Hometown faithfully sought to comply with the terms of the Act.

In connection therewith, Hometown sent out, by letter dated September 30, 2017, its statutorily required written notice of its rent increase (A001-002) and of the statutorily required formal meeting to take place on October 21, 2017 (the "Meeting"). 25 *Del. C.* § 7043 (a); A003-004.

In conjunction with its obligations to disclose in good faith all of the material factors resulting in the decision to increase the rent (25 *Del. C.* § 7043 (b)), Hometown, at the Meeting, presented to the homeowners a written presentation, which was also made available in power point, that detailed Hometown's reasons for the rent increase, and provided the statutory information required for the homeowners to decide either to accept the rent increase, or to seek arbitration (the "Written Presentation").

The information provided in the Written Presentation included the following:

1. Hometown's Compliance with *25 Del. C.* § 7042 (a).

The Written Presentation confirmed that the two "door opener" provisions of 25 *Del. C.* § 7042 (a) (1) and (2) had been met. A012.[3] The Written Presentation further disclosed to the homeowners that Hometown was seeking its rent increase based upon CPI-U,[4] and its costs under the factors set forth in 25 *Del. C.* § 7042 (c), specifically, (c)(1), (2) and (3). A010.

2. Hometown Justifies its Expenses under *25 Del. C.* § 7042 (c)(1), (2) and (3).

For fiscal year 2016-17, Hometown was required to incur and did incur and pay increased costs and expenses in three (3) categories: Capital expenditures, property tax increases and utility cost increases. A013-014, A016.

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[3] The Act has two (2) condition precedents to allowing a rent increase: (i) the Community Owner must not be found in violation of the Manufactured Housing Act that threatens the health and safety of the residents for more than 15 days, beginning from the day the Community Owner received notice of such violation, and (ii) the rent increase must be directly related to operating, maintaining or improving the manufactured home community, and justified by one or more factors listed under 25 *Del. C.* § 7042 (c). 25 *Del. C.* § 7042 (a) (1) and (2). Appellant is not appealing the fact that Hometown met both of these door opener provisions.

[4] Appellant has not challenged below, or in this appeal the amount of the rent increase that is statutorily permitted to all Community Owners, CPI-U. A010.

a. Capital Improvements and Rehabilitation Work, 25 *Del. C.* § 7042 (c)(1).

The list of capital improvement and rehabilitation work costs incurred by Hometown and permitted to be recouped under 25 *Del. C.* § 7042 (c) (1) included one large project, and several smaller improvements (collectively, "Capital Improvements"). The largest project was the third phase of a Bulkhead Stabilization Project, an extraordinary rehabilitation and capital improvement project in which the old bulkhead, on the bayside perimeter part of property, was stabilized and enhanced with an entirely new stone bulkhead on one portion, and tie rods and "deadmen" on another to allow the bulkhead to protect the community long into the future (the "Bulkhead Stabilization Project"). A025.

That rehabilitation work was done because the bulkhead was no longer stable, and was a liability to the manufactured home community's property. B0090-91, B0185. The total cost of the Project, as disclosed in the Written Presentation, was $441,189.53. A018.

The other portion of the costs of the Capital Improvements included the costs of: the addition of millings for a storage road, the replacement of bladder tank, the repaving of six (6) driveways and the installation of certain drainage work (a French drain and two drywells), a kayak walkway and a boat ramp. A018-024, A026. The total amount of these other Capital Improvements, as disclosed in the Written Presentation, was $62,765.00, for a total capital improvement and

rehabilitation work cost, including the Bulkhead Stabilization Project, of $503,954.53, or a total of $79.99 per lot per month. A018, A026.

These Capital Improvements, which were all disclosed to the homeowners in the Written Presentation, were treated as capital expenditures under standard accounting principles, and the Affidavit of Thomas Curatolo, a Certified Public Accountant, attested to that fact that these Improvements were incurred and paid for during the time period covered by the rental increase. A027.

b. Changes in Property Taxes and Utility Costs, 25 *Del. C.* § 7042 (c)(2) and (3).

Hometown incurred additional costs which are permitted to be recouped under 25 *Del. C.* § 7042 (c) (2) and (3), including a cost increase in property taxes, year over year, of $807.90, which came out to be $0.13 per lot per month (A026), and in utility costs, years over year, of $37,790.69, which came out to be $6.00 per lot per month. A027.

As a result of the costs incurred, the Written Presentation, as did the written notice sent out earlier, informed the homeowners that the rent increase as noticed would include the .7% CPI-U plus $86.12 per month per lot, and would become part of the new rent beginning January 1, 2018. A028.

D. THE ARBITRATION PROCEEDING.

Following the Meeting, Appellant filed a petition for arbitration pursuant to 25 *Del. C.* § 7043 (f).

The Delaware Manufactured Home Relocation Authority appointed Stephen A. Spence, Esquire, as the arbitrator (the "Arbitrator") to undertake the "non-binding" arbitration proceedings. On January 16, 2018, the Arbitration was conducted (A107), and on March 1, 2018, following the submission of the post-hearing written arguments of the parties, the Arbitrator issued the Arbitration Decision.

In that thorough and well-supported decision, "employing the standards set forth in § 7042," the Arbitrator concluded that Hometown had justified a rent increase in the amount of $74.85 per month, plus CPI-U – an approximately 10% reduction in the rent increase amount sought by Hometown in its original written notice of rent increase. Arb.D., p. 31.

In reaching that conclusion, the Arbitrator first addressed and concluded that the two (2) "door opener" provisions of Section 7042 (a) (1) and (2) of the Act had been met. Arb. D., pp. 5, n.19, 10. With those findings having been made, the Arbitrator was permitted to and did consider Hometown's basis for the rent increase under Sections 7042 (c)(1), (2) and (3).

The Arbitrator first recognized that Appellant had conceded that the portion of the rent increase based on Section 7042 (c) (2), changes in the costs of property taxes, had been met. Arb.D., p. 1, n.2.

With respect to changes in utility costs, the Arbitrator concluded that Hometown had only partially met its burden under Section 7042 (c) (3). Arb.D., pp. 27-30.

With respect to recouping Hometown's capital improvement and rehabilitation work costs, the Arbitrator first concluded that Hometown had shown that it had met its evidentiary burden and had justified, under 25 *Del. C.* § 7042 (c) (1), the entire cost of the Bulkhead Stabilization Project. Arb.D., pp. 13-19. Specifically, the Arbitrator wrote:

> I find that the Landlord has met its burden of proof to show that phase three of the bulkhead project qualifies as a capital improvement. There is no dispute that the work done by the contractors, including adding significant amounts of riprap, created a new feature of the bulkhead. The Landlord's witnesses testified credibly that the bulkhead project was done to stabilize the old bulkhead by adding the new supporting riprap. Ms. Nilson testified that the old bulkhead was left in place, with the riprap added in front of it. **All of this evidence shows that the bulkhead project enhanced the community's protective bulkhead with new riprap. This project protects the community, increases its value, and adds to the useful life of the bulkhead**.

Arb.D., pp. 17-18 (emphasis added).

With respect to recouping Hometown's other capital improvement and rehabilitation work costs under Section 7042 (c) (1), the Arbitrator concluded that Hometown had not met its burden relating to costs of the storage road millings, the bladder tank replacements, the driveways and the boat ramp (Arb.D., pp. 20-27),

but had met its burden relating to the costs of the drainage work and the kayak walkway. *Id.*

Appellant, pursuant to 25 *Del. C.* § 7044, thereafter appealed the Arbitration Decision to the Superior Court. Hometown did not appeal or cross-appeal from the decisions in the Arbitration Decision that reduced its rent increase by approximately 10%.

E. THE SUPERIOR COURT PROCEEDING.

Following several rounds of briefing, the last of which briefing focused on this Court's then recently issued decision in *Sandhill Acres MHC, LC v. Sandhill Acres Home Owners Ass'n*, 210 A.3d 725, 728 (Del. 2019) ("*Sandhill*"), the Superior Court affirmed the Arbitration Decision. In doing so, the Court first dispatched the Appellant's then argument that the Arbitrator had erred in determining that Hometown had demonstrated that it had met the "door opener" provisions of Section 7042(a)(2). Opinion, pp. 4-8. Indeed, in applying this Court's direction in *Sandhill*, the Court concluded that the Arbitrator was correct in finding that Hometown proved that its "costs relating to operating, maintaining and improving the community had increased…." *Id*., pp. 5-6.

With respect to Appellant's challenge that the Arbitrator incorrectly applied 25 *Del. C.* § 7042(c)(1) in concluding that the Bulkhead Stabilization Project was a capital improvement or rehabilitation work, the Court wrote:

> The challenged claim involved the repair and almost complete replacement of a bulkhead at a cost of close to one-half million dollars. Homeowners vociferously argue that the work on the bulkhead is "ordinary repair" and thus does not meet the §7042 (c)(1) standard. The short answer is that there was more than sufficient evidence in the record to support the Arbitrator's Decision that the expense did qualify. The bulkhead in the community was in poor shape and it was replaced by an alternate construction method. **I agree with the Arbitrator's Decision that this cost was for capital improvements or rehabilitation work, and not ordinary repair, replacement and maintenance.** All other items found by the Arbitrator to be within the boundaries of §7042(c)(1), (2) or (3) are supported by substantial evidence and I affirm his findings. I also note that the Arbitrator rejected some of Landowner's claims, and no appeal was taken as to these determinations. The Arbitrator's mathematical calculations are accurate.

Opinion, pp. 8-9 (emphasis added).

The Court, after noting that the "Arbitrator held the appropriate hearing and issued a thoughtful and factually supported decision," affirmed the Arbitration Decision. Opinion, pp. 9-10.

This appeal followed.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN FINDING THAT THE BULKHEAD STABILIZATION PROJECT CONSTITUED A VALID JUSTIFICATION UNDER 25 *Del. C.* § 7042(c)(1) FOR THE REQUESTED RENT INCREASE.

A. Question Presented.

Whether the Superior Court erred as a matter of law when it found Hometown's completion of the Bulkhead Stabilization Project constituted a "capital improvement or rehabilitation work" pursuant to 25 *Del. C.* § 7042(c)(1) justifying the requested rent increase?

B. Scope of Review.

This Court reviews the Superior Court's interpretation of the Act *de novo*. *Sandhill*, 210 A.3d at 728.

C. The Superior Court Affirmed the Unambiguous and Ordinarily Accepted Meaning of the Term "Capital Improvement" and/or "Rehabilitation" and did not Err in Finding that the Bulkhead Stabilization Project Constituted a "Capital Improvement" Under 25 *Del. C.* § 7042 (c)(1).

A largest portion of Hometown's rent increase was sought to be justified based upon 25 *Del. C.* §7042(c)(1), which permits reimbursement for the "completion and cost of … **capital improvements or rehabilitation work** in the manufactured home community, as distinguished from ordinary repair, replacement and maintenance…." 25 *Del. C.* §7042(c)(1) (emphasis added). The capital improvements and/or rehabilitation work Hometown sought to rely upon

consisted of several different projects including work performed on the boat ramp, the drainage system, a walkway to provide access to the water for kayaks, and on the largest project, the Bulkhead Stabilization Project -- the final phase of the multi-year project to rehabilitate the existing bulkhead and install new rip rap in front of it along a portion of its length.

Both the Arbitrator, after a thorough review of the record made before him at the Arbitration, and the Superior Court, after an in depth review of that same record, concluded that the Bulkhead Stabilization Project was indeed a "capital improvement" as that term is used in Section 7042(c)(1), thereby justifying the requested rent increase in the amount that was based on that Project.[5]

1. The Terms "Capital Improvement" and "Rehabilitation" as Used in the Act are Not Ambiguous.

The primarily claim of error in this appeal by Appellant relates to the factor described in Section 7042(c)(1), and the Arbitrator's application of that Section to the Bulkhead Stabilization Project. OB, pp. 16-26. Specifically, Appellant alleges that the Arbitrator failed to not only distinguish repair work from improvement, but also "misconstrued the meaning of 'capital improvement,'" and as a result, according to Appellant, the Arbitrator's decision, and Superior Court's Opinion, to award Hometown the proportionate rent increase based the Bulkhead Stabilization

[5] Appellant itself lists nine (9) facts in the record upon which the Arbitrator, and subsequently the Superior Court, relied upon in determining the Bulkhead Stabilization Project was in fact a "capital improvement." OB, pp. 30-31.

Project was in error. *Id*. at 20. There is no such error sufficient to warrant the reversal of the Opinion.

In support of its argument, Appellant contends that the term "capital improvement" is "ambiguous," and because of that ambiguity such term has been "misconstrued." OB, p. 16. There is, of course, no ambiguity with respect to the term "capital improvement," and the Arbitrator and the Superior Court correctly concluded that such term should be given its ordinarily accepted meaning as required by 25 *Del. C.* § 7003.

Section 7003 of the Manufactured Housing Act provides definitions for various terms used throughout the Act. While neither the term "capital improvement" nor "rehabilitation work" is defined, this Section does provide guidance as it requires "if a word or term is not defined under this section, it has its ordinarily accepted meaning or means what the context implies." 25 *Del. C.* § 7003. This guidance offered by the Manufactured Housing Act is acknowledged by Appellant. OB, pp. 19-20.

In complying with this guidance, the Arbitrator appropriately used, and applied the common dictionary definition of "capital improvement" which stated "[a] cost is a 'capital improvement' if it enhances the property value of the community or increases the useful life of the community." Arb.D, p. 16 (*citing* "thelawdictionary.org").

Not only is this definition an "ordinarily accepted meaning" for the term "capital improvement," but more significantly **it was the very definition that was proffered by Appellant to the Arbitrator in its Closing Argument to be used by him in his analysis of just what a "capital improvement" should mean under the Act**. A100 (*citing* "thelawdictionary.org"). Accordingly, having the dual benefits of being the actual plain meaning of the term "capital improvement" and of such definition receiving the blessing of the Appellant, this definition was adopted by the Arbitrator and provided the "analytical frame work" by which the Arbitrator considered each of the capital improvement projects Hometown identified as a basis for seeking its above-inflation rent increase. Arb.D., p. 16.

Appellant's own acquiescence in the common meaning of the term "capital improvement" by having offered it to the Arbitrator belies its argument that such term is allegedly "ambiguous." OB, p. 16. Having admitted that it was the appropriate definition to be used by the Arbitrator, Appellant is now precluded, by its own admission, that this term should not be defined in the manner it accepted, offered and was thereafter used and relied upon by the Arbitrator.

Yet, Appellant now argues that the Arbitrator and Superior Court, in using Appellant's favored definition as applied to the Bulkhead Stabilization Project, somehow "misconstrued the meaning of 'capital improvement,'" despite the identical definition being evenly applied against each project and despite the fact

that it was Appellant that invited the Arbitrator, in the first instance, to use such definition. OB, p. 20.[6]

In essence, Appellant is satisfied with the definition used by the Arbitrator only to the extent that its application resulted in a finding that such work did not constitute a capital improvement or rehabilitation work.[7] Indeed, Appellant explicitly states "[t]he definitions of the statutory terms used by the Arbitrator are helpful **as far as they go**. They assisted the arbitrator in analyzing most of Hometown's projects **properly**." OB, p. 20 (emphasis added). Of course, such a position is not rational, especially in light of Appellant's original promotion of such a definition.

Therefore, it is clear that the common meaning definition of "capital improvement" in the Act, as determined by the Arbitrator, is anything but ambiguous, as such ordinarily accepted definition was applied equally to each project with Appellant acquiescing to it which is certainly not grounds for legal error. To the contrary, it bolsters the Superior Court's own analysis and adoption

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[6] Appellant certainly has not contested the fact that its proffered definition of "capital improvement," as adopted and applied by the Arbitrator, and subsequently the Superior Court, to the work performed by Hometown which was found **not** to constitute a capital improvement or rehabilitation work, *i.e.*, the boat ramp, road millings, bladder tanks and driveway repaving.

[7] This is not to say that Appellant agrees with the Arbitrator and Superior Court's analysis of the record to this definition, clearly it does not. However, a disagreement regarding the analysis does not result in ambiguity with the definition.

of the Arbitrator's framework as a reasonable basis of the terms' "common meaning" as required by Section 7003. Opinion, p. 6.

Most importantly, Appellant fails to identify how the definition of "capital improvement" adopted by the Arbitrator is anything other than its common meaning pursuant to 25 *Del. C.* § 7003. Appellant argues that the definition used and applied by the Arbitrator, and thereafter Superior Court, is "inadequa[te]," but Appellant fails in any manner to proffer a basis as to why the Arbitrator's most simple and legally supportable of approaches, in compliance with the Act's requirements, is legal error. OB, p. 19.

In the end, the Appellant does not offer any cogent or legally cognizable reason for why the term "capital improvement" is allegedly ambiguous, and since that term is unambiguous, and easily defined by its common, ordinarily accepted meaning, the Court is required to give the words in the Act their "plain meaning." *Bon Ayre Land, LLC v. Bon Ayre Cmty. Ass'n*, 149 A.3d 227, 233, n.21 (Del. 2016) ("*Bon Ayre II*"). Since this is exactly what the Arbitrator did, relying on the plain meaning offered by the dictionary definition and offered by the Appellant itself, there is simply no manner in which this Court can conclude that the Arbitrator relied on an alleged inappropriate definition of "capital improvement."

2. Appellant's Newly Proffered Definition of "Capital Improvement" Violates 25 *Del. C.* § 7003 as it is a Term of Art Used by the IRS for Tax Purposes.

Rather than analyze any perceived error made by the Arbitrator in the adoption of Appellant's then preferred definition, Appellant offers up to this Court another definition, the "IRS Tax Definition," now more to its liking, which new definition was never offered for consideration to the Arbitrator or to the Superior Court. OB, pp. 22-24. Appellant simply cannot now ask this Court to adopt a new definition, after having originally proffered one of its own, and seek a reversal of the Arbitration Decision and the Opinion, based on a definition that was never even offered for consideration in the Arbitration or in the appeal of the Arbitration Decision.

Having advocated for its preferred definition, the actual dictionary/common meaning definition, and the Arbitrator and the Superior Court having accepted such definition based upon Appellant's advocacy for such, Appellant is judicially estopped to now argue that another definition, one that it now prefers after the one it advocated for did not provide the results it desired, should be considered by this Court. *Motorola Inc. v. Amkor Tech.*, 958 A.2d 852, 859-60 (Del. 2008)("[J]udicial estoppel also prevents a litigant from advancing an argument that contradicts a position previously taken that the court was persuaded to accept as the basis for its ruling.").

Nevertheless, if this Court wishes to now consider what the Arbitrator and the Superior Court were not offered to be consider by this Appellant in the first instance, this Court will still conclude that the plain meaning definition, the definition adopted by the Arbitrator, was the appropriate definition to consider what is a capital improvement under the Act.

As discussed *supra*, Section 7003 requires that an undefined term found within the Act be provided its "ordinarily accepted meaning or means what the context implies." This is the exact guidance the Arbitrator correctly applied. Indeed, the Arbitrator went beyond simply applying the common meaning of "capital improvement," by further analyzing such term in its context within the Act – i.e. as compared to "ordinary repair, replacement or maintenance." 25 *Del. C.* § 7042(c)(1).

Yet, rather than look to the authorizing statute for guidance as the Arbitrator and Superior Court did, Appellant now requests this Court adopt a technical, term of art definition found within the federal tax code, the IRS Tax Definition. OB, pp. 22-24. Appellant does so despite the fact that Appellant previously argued in its Closing Argument before the Arbitrator that such technical type of definition should **not** be used and the fact that the Arbitrator accepted such position. A100-

01.[8] Again, Appellant is judicially estopped to make this argument. *Motorola Inc.*, 958 A.2d at 859-60.

Notwithstanding all of that, Appellant once again fails to identify any legal error as it does not offer to this Court any legal or evidentiary basis to show that the dictionary definition, the very same one it proffered, and which was adopted and applied by the Arbitrator and the Superior Court, is in violation of Section 7003. Indeed, the record is devoid of any evidence which this Court can rely upon to refute the analytical framework undertaken by either the Arbitrator or Superior Court. The Arbitrator acknowledges exactly that, having found Appellant "offered no testimony to rebut the Landlord's claim, even though [the Bulkhead Project] made up a great majority of the requested rent increase." Arb.D., p. 18.

Further, Appellant raises new issues and questions which were never before the Arbitrator or otherwise made part of the record (OB, pp. 19-22), and is asking this Court to "correct" the Court and Arbitrator on issues which were never

[8] Appellant argued in its Closing Argument at the Arbitration that "the general definitions used in accounting cannot be used, because the general definitions used in accounting include projects that would be ordinary replacement or ordinary maintenance." A100-01. It should be noted that the Arbitrator, when asked to adopt Hometown's "CPA's definition of capital expenditure," agreed with Appellant, and flatly rejected it as failing to adequately "distinguish capital improvements from ordinary work as required by Section 7042(c)(1)." Arb.D., pp. 15-16.

properly before them.[9] In doing so, Appellant raises nothing more than mere speculation and rhetoric to bolster its argument (OB, pp. 19-22), but this leaves absolutely no substantive argument upon which this Court may consider whether the Opinion and the Arbitration Decision were legally incorrect. Clearly, without having shown that there is legal error to have adopted the ordinary accepted meaning definition of the term "capital improvement," such arguments fail not only procedurally, but factually and legally.

In the end, the Court is left with nothing more than an unsupported argument that it should adopt a technical term of art from an area of law which has nothing to do with the Act and that Court must do so in contradiction of the Manufactured Housing Act's command that that this undefined term found within the Act be provided its "ordinarily accepted meaning." Accordingly, the Court need not seek out or even rely on the so called "IRS Tax Definition," or what Appellant calls "[h]elpful guidance" for the meaning of capital improvement (OB, p. 21), when the common meaning of that term is what the Arbitrator adopted, what the Superior Court affirmed was correct, and what this Appellant asserted at the time of the Arbitration was the appropriate definition to be used for purposes of the Act.

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[9] Appellant spends considerable pages of its brief arguing how the Arbitrator and Superior Court allegedly erred in applying the facts to this new, arbitrary definition. *See* OB, pp. 19-21. Indeed, Appellant uses the terms "new capacity" and "new capability" in defining a "capital improvement" – but such terms were not used or adopted by the Superior Court, and certainly are not found within the Act or even the definition proposed by Appellant. *See* A100.

3. The Superior Court Applied the Correct Legal Standard in Concluding the Bulkhead Stabilization Project was a Capital Improvement and Not a Repair.

Appellant's next argument, that the Superior Court erred in failing to properly analyze whether the Bulkhead Project constituted a "capital improvement" or "ordinary repair," fails because Appellant's analysis uses a definition of "capital improvement" that was never previously before the Superior Court or Arbitrator. Here again, Appellant improperly and inconsistently intertwines its arguments which are not based upon the record. Indeed, as discussed in detail *supra*, despite proffering and agreeing with the definition of "capital improvement" upon which the Superior Court ultimately affirmed, Appellant bases its argument on a new definition which it urges this Court to adopt which necessitates the determination that to constitute a "capital improvement," the bulkhead's "capacity" must have increased. OB, p. 25. Of course, no such requirement is found in the Act, in the common meaning of the term "capital improvement," or otherwise in the decisions by the Arbitrator and Superior Court.

The analysis and application of the common meaning of the term "capital improvement" by the Arbitrator and Superior Court was free from legal error. The Arbitrator squarely addressed the requirement of the Act as to whether this Project was a "capital improvement" or "rehabilitation work," as distinguished from "ordinary repair, replacement and maintenance." Arb.D., p. 16. Applying the

framework of Section 7042 (c)(1), the Arbitrator made the legally correct and appropriate distinction, finding that:

> A cost is a 'capital improvement' if it enhances the property value of the community or increases the useful life of the community. In turn, a cost is not a 'capital improvement' if it is for customary, usual, and normal repair, replacement, and maintenance in the community.

Arb.D., p. 16.

Applying the correct standard, the Arbitrator found that Hometown "met its burden of proof to show that phase three of the Bulkhead Project qualifie[d] as a capital improvement," specifically finding that the "project protects the community, increases its value, and adds to the useful life of the bulkhead." Arb.D., pp. 17-18.

Subsequently, the Superior Court adopted such reasoning in coming to its own conclusion that "there was more than sufficient evidence in the record to support the Arbitrator's Decision that the expense did qualify[.]" and, therefore, "this cost was for capital improvements or rehabilitation work, and not ordinary repair, replacement and maintenance." *See* Opinion, p. 9.

Thus, the Superior Court correctly applied the Act as written, and concluded that, based on the totality of the circumstances and the undisputed facts before the Court, the Project was of the type of work that would be considered a capital improvement or rehabilitation work, as contrasted against ordinary repair, replacement and maintenance. Opinion, p. 9.

Despite the consistent application by both the Arbitrator and the Superior Court about what the term "capital improvement" means, Appellant argues:

> If the capacity of the bulkhead was not changed, then the expenditure is for an ordinary repair. Since this analysis was not done, the Arbitrator failed to apply the correct legal test in evaluating whether the bulkhead project repaired or improved the bulkhead.

OB, p. 25.

Of course, this argument is misguided as "capacity" is not an item included within the ordinary meaning of the term capital improvement, and its tendered use by Appellant applies an overly narrow definition not based under the guidance provided in Section 7003. Appellant's argument further ignores the remaining factor under Section 7042(c)(1) which provides such cost would justify the increase in rent if it is a "capital improvement **or** rehabilitation work. . ." (emphasis added).

Appellant next goes on to contend that the Arbitrator was "distracted by the visible character of the repair and the claim that the riprap constituted a 'better technology.'" OB, p. 20. The Arbitrator was not "distracted," as the installation of the riprap absolutely created a new feature, enhanced the property value of the community and increased the useful life of the community, all as confirmed by the

record. B0090-941, B0135, B0186-87. The long-term protection provided by the Bulkhead Stabilization Project was and continues to be invaluable.[10]

Finally, the Appellant contends that the Superior Court's Opinion was flawed because it should have determined that the Bulkhead Stabilization Project was "not the type of 'new feature' that can appropriately be a capital improvement." OB, p. 21. Yet, there is nothing other than Appellant's say so that this is or should be the case, and Appellant's unsupported and self-serving statement is in direct conflict with (i) the uncontroverted record to the contrary (B0090-91, B0135, B0186-87), (ii) the Arbitrator's finding based on that record developed during the Arbitration, on the scope, scale and nature of the work done (Arb. D., pp. 17-18), and with (iii) the conclusion of the Superior Court, after considering the entire record, that the Project's cost "was for capital improvements or rehabilitation work, and not ordinary repair, replacement and maintenance." Opinion, p. 9.

[10] Before the Court is an issue of significant importance, that has been widely debated in the public. Due to an increase in water level, there has been growing inundation of coastal lands, putting coastal areas, like the area surrounding the Hometown Rehoboth Bay, under siege. Flooding and erosion are real and significant threats to homeowners and property owners in coastal areas. The Bulkhead Stabilization Project was undertaken to protect every homeowner in the community and Hometown undertook this massive project to protect the homeowners in its community. There was nothing more significant that Hometown could do; they were under no obligation to do so; they undertook this massive project to protect its investment and the homeowners' investments. The project was an investment in, and a benefit to the community.

Neither the Superior Court nor the Arbitrator applied the wrong legal standard in determining that the Bulkhead Stabilization Project was a capital improvement and not a repair. As a result, the Opinion must be affirmed.

II. THE SUPERIOR COURT CORRECTLY AFFIRMED THAT THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDING THAT BULKHEAD PROJECT CONSTITUTED A CAPITAL IMPROVEMENT OR REHABILITATION PURSUANT TO THE ACT.

A. Question Presented.

Whether the Superior Court erred in its holding that the Arbitrator's decision was supported by substantial evidence that the Bulkhead Project constitutes a capital improvement pursuant to 25 *Del. C.* § 7042(c)(1)?

B. Scope of Review.

This Court undertakes a *de novo* review of the Superior Court's interpretation of the Act. *Sandhill,* 210 A.3d at 728.

C. The Superior Court did Not Misconstrue the Facts Contained in the Record.

Appellant first contends that that the Superior Court "misconstrued the facts in this case," asserting that the Court's comment that "the bulkhead in the community was in bad shape and it was replaced by an alternate construction method" meant that it had "misunderstood the facts of this case" and that the Court's decision "is not supported by the evidence or the law." OB, p. 28. Appellant is mistaken.

Appellant's argument is simply a gross overreading of the Opinion. Without any other support, Appellant uses this phrase, "it was replaced," out of context, to

leap to the far-fetched conclusion that the Superior Court misunderstood the entire nature of the record and evidence submitted during the Arbitration.

The work performed for the Bulkhead Stabilization Project was certainly, at a minimum, an extraordinary capital improvement, and a vast improvement over the original bulkhead. B0186-87. Indeed, as Appellant itself acknowledges, the work performed made the bulkhead "stronger and better." OB, pp. 10, 21. It is undisputed in the record that the bulkhead was at the end of its useful life, such that even Appellant acknowledges that the record indicates "[t]he old bulkhead had deteriorated to the point where it was vulnerable to failure." OB, p. 10; B0090. The record is further undisputed that the new bulkhead was built using "a better technology." B0091. This undisputed record evidence corroborates the finding by the Superior Court, based on its review of the record, that the old bulkhead was "in poor shape," and further corroborates the Court's conclusion that the new bulkhead was of an "alternate construction method," as also recognized by the Arbitrator. Arb.D., pp. 16-17 (a "better technology"). Clearly, the Superior Court knew, and understood (i) the facts and the evidence of record, and (ii) exactly what that evidence supported.

There is simply no manner in which this Court can read the Opinion to conclude that the Superior Court misconstrued the facts, or misconstrued them in such a way that would require the Opinion to be reversed.

D. The Record Contains Substantial Evidence to Warrant the Superior Court Affirming the Arbitrator's Decision.

As Appellant's own Opening Brief itself illustrates, there was more than substantial evidence produced at the Arbitration which would allow the Superior Court to affirm the Arbitration Decision.

Hometown's burden of proof at the Arbitration was most basic and minimal: It was required to show by a preponderance of the evidence that it justified the rent increase by the factor it chose under Section 7042(c) of the Act, specifically for the purposes of this appeal, factor (c)(1).

As directed by this Court in *Sandhill*, the Arbitration Decision should be accorded deference (*Sandhill*, 210 A.3d at 731), and that Decision is replete with evidence to support a rent increase of $70.03 related to the Bulkhead Stabilization Project.

The Arbitrator accurately described the ample evidence in the record that Bulkhead Stabilization Project was a capital improvement. Thus, the Arbitration Decision notes the following evidence adduced at the arbitration hearing:

- Ms. Edmonds, Hometown's regional manager, testified that (i) engineers and consultants reviewed the old bulkhead and concluded that the entire bulkhead was not stable and may not survive a storm (ii) the current bulkhead looked stable from the top, but the engineers and consultants determined that the area below the waterline was not stable and that (iii) an entire new wall of stone called riprap was put in place; "a better technology." Arb.D., pp. 16-17; B0090-91.

- Ms. Fluharty, Hometown's regional assistant, testified that the Bulkhead Project was for "stabilization." Arb.D., p. 17; B0135.

- Ms. Nilson, Hometown's community manager, testified that (i) the integrity of the entire bulkhead was in question," (ii) the old bulkhead could not be removed, so the placement of the new riprap stabilized the bulkhead, and (iii) the new riprap was placed along all of the waterfrontage to protect the homes and the entire community. Arb.D., p. 17; B0186-87.

Moreover, Appellant, while arguing that the record does not contain sufficient evidence to find in favor of Hometown, explicitly identifies nine (9) findings of fact upon which the Arbitrator and Superior Court relied in finding the Bulkhead Project was a capital improvement, and further cites an entire page of the Arbitration Decision which clearly lays out the Arbitrator's reasoning for concluding that the project was a capital improvement, and not an ordinary repair. OB, pp. 29-30 (*citing* Arb.D., p. 19).

The Arbitrator's holding that the installation of riprap elevated the Bulkhead Stabilization Project to a capital improvement is not erroneous. The testimony regarding that Project is unequivocal and uncontroverted. The testimony revealed that an entire new wall of riprap was put in place and that is was a better technology. B0090-91; Arb.D., pp. 16-17. Further, the project was necessary to the integrity of the bulkhead and the riprap was placed to protect the HOA members' homes as well as the entire community. B0186-87; Arb.D., p. 17. The original bulkhead, obviously, would not last forever. However, this is not the case

of adding "a new layer of roofing."[11] This was the installation of a new stone (riprap) wall in front of the old one to protect the entire community. B0090-91, B0186-87.

That the Project was "not just a simple repair," is fully supported in the record created at the Arbitration. The contract for the Bulkhead Stabilization Project, which described in detail what was being done in this third phase of the Project, confirmed that this was a both a capital improvement and rehabilitation work project of enormous size and scope (the "Project Contract"). Thus, as detailed in the Project Contract that was admitted into evidence in the Arbitration:

> The Work. …[I]nstalling Riprap in front of the existing bulkhead beginning at the end of Phase II and continuing for approximately 448 linear feet. As well as, installing Piling and Deadmen to stabilize the bulkhead along the Lagoon and continue for approximately 1535 linear feet**.**

B0001 (emphasis added).

[11] Appellant's comparison of the Bulkhead Stabilization Project to the replacement of a roof as a demonstration of how such work was an "ordinary repair" is misguided, and actually demonstrates that, like a new roof on a structure, the Bulkhead Stabilization Project was indeed a capital improvement. OB, p. 31. Indeed, Appellant admits that adding a "new layer of roofing" on a home would "improve its value – the very definition of "capital improvement" as used by the Arbitrator and affirmed by the Superior Court. *Id.* Such comparison clearly demonstrates that a half-million dollars of steel and rock was not only extra-ordinary, but created a new bulkhead, with a better technology that extended its useful life while adding value to the community.

Just how out of the "ordinary" was this Project? The Project was to last almost five (5) months, weather permitting (B0002), and needed "mountainous" amounts of delivered riprap to complete. *Id.*

Thus, the character and scope of the Bulkhead Project, as demonstrated above, is beyond any "ordinary" repair, as the Appellant would like this Court to view it. Installing, in Rehoboth Bay itself, a brand-new riprap bulkhead **in front of** the existing bulkhead (B0001, B0185-86), is clearly an improvement to the community, an enormous capital improvement, over what was remaining there which not only protected the resident's homes, but Hometown's business venture as well.

1. The Riprap.

Appellant's argument regarding the comparison of the words "stabilize" and "repair" is not based in the record, and the Arbitrator's distinguishing of such terms is certainly not "illusory." OB, p. 32. Appellant's argument fails to ground itself in the record, but rather is based upon conjecture and speculation. As discussed *supra*, Appellant never produced or submitted any of its own evidence for the Arbitrator to consider. Arb.D., p. 16. Without such fundamental ground work, Appellant's argument cannot succeed as the record cannot support it.

The term "stabilization" is not synonymous with "repair" as Appellant argues. Appellant proffers such statement, but is unable to cite to any fact or

question, even on cross examination, where Hometown's witnesses were asked about this distinction, and is unable point to any piece of evidence in the record which would corroborate its unsupported belief that to "stabilize" something means under all circumstances that it is a "repair" of that thing, especially in light of the fact that there are things that are not broken or in need of repair, such a large sand or rock piles, but which might be desirable to be stabilized for one reason or another. Without a basis in the record, the presumptive conclusion that the Arbitrator's distinction between these phrases was "illusory" has no merit.

In any event, testimony presented at the Arbitration, and part of the record on this appeal, characterized the riprap as a "new and better feature," "a better technology" and important for the safety of the community. B0090-91, B0186-87, Arb.D., p. 19. As Appellant produced no evidence to the contrary, therefore, its argument that these statements are untrue rings hollow. The bulkhead is certainly stronger with an enhanced capacity after the completion of the Project. B0186-87. Without the Project, the prior bulkhead was unstable and unlikely to survive a storm. B0090. As the record clearly supports a finding that the Bulkhead Stabilization Project, in particular the rip rap used and installed, was a capital improvement, there is no manner in which Superior Court could have erred in affirming the conclusion in the Arbitration Decision that such was the fact.

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

Appellant also makes an argument, not made before the Arbitrator or the Superior Court, that the cost of the installation of the "pilings" and "tie rods/deadmen" should have been removed from cost of the Bulkhead Project for purposes of the rent justification. OB, pp. 33-34. Having not raised this issue below, Appellant's newly created argument cannot now be considered on appeal.

Notwithstanding the foregoing, Appellant again applies its own definition of "capital improvement" to the record to conclude, not surprisingly, that the record does not support such finding that those "pilings" and "tie rods/deadmen" are not capital improvements. Appellant again focuses on the increase of "capacity" of the bulkhead, and makes no argument with respect to whether the work "enhance[d] the property value or [] increased the useful life of the property." A0100, OB, p. 33. With Appellant failing to make any argument about why its newly concocted theory about the "pilings" and "tie rods/deadmen" should not be treated as capital improvements under the commonly accepted definition of that term and by failing to offer expert testimony to support its theory, there was just no basis for this Court to now conclude that a portion of the entire cost of the Bulkhead Stabilization Project the Arbitrator found to have been a justified cost should now be excluded and certainly no basis for this Court to find that the Arbitration Decision must be overturned.

In the end, all of the record evidence was before the Arbitrator and used to form his decision. That record demonstrates that Appellant offered **no** testimony or evidence regarding whether this work was anything other than capital improvement or rehabilitation work. Arb.D., p. 18. In short, the only evidence before the Arbitrator was that this was a major rehabilitation and capital improvement work, the size and scope of which made it well beyond "ordinary."

The Superior Court wholly accepted the definition and findings of the Arbitrator with respect to the Bulkhead Stabilization Project. The Superior Court correctly fulfilled its statutory obligations on appeal by finding the record was "sufficient justification for the arbitrator's decisions" and further independently affirmed such decisions were "free from legal error." 25 *Del. C.* § 7054. This was all that was required, and this was exactly was done.

III. 25 *DEL. C.* § 7042(C)(1) DOES NOT PERMIT AN ARBITRATOR OR THIS COURT TO FASHION A RENT INCREASE OTHER THAN IN THE AMOUNT THAT HAS BEEN JUSTIFIED IN ACCORDANCE WITH THE RENT JUSTIFICATION ACT.

A. Question Presented.

Whether 25 *Del. C.* §7042(c)(1) does not permit an arbitrator to fashion a rent increase other than in the amount that has been justified in accordance with the Act?

B. Scope of Review.

This Court reviews the Superior Court's interpretation of the Act *de novo*. *Sandhill*, 210 A.3d at 728.

C. The Rent Justification Act Mandates the Approval of the Requested Rent Increase Once it has Been Justified Pursuant to its Provisions.

The sole role of the arbitrator following an arbitration under the Act is to render a decision "employing the standards set forth in § 7042." 25 *Del. C.* § 7043(j). The sole role of this Court is to address the arguments of the parties "as to whether the record created in the arbitration is sufficient justification to the arbitrator's decisions and whether these decisions are free from legal error." 25 *Del. C.* § 7044. Those provisions not only outline the entire role of the arbitrator and the Court, but they define the General Assembly's view of the limited scope of the State's involvement in a community owner's business judgment in running its

community – an involvement in which, absent the Act, this State has historically had no say.

Yet, in a blatantly obvious effort to have this Court redefine the role of the arbitrator and the Court, Appellant now claims that even if a Community Owner makes the required showing that it has justified its rent increase, first the arbitrator and now this Court has been bestowed with some unwritten inherent discretionary right to deny the Community Owner its noticed and now sufficiently justified rent increase. OB, pp. 35-45.[12] No such inherent and unfettered discretion is afforded by the Act.

Given the lack of historical role by third-parties in considering rent increase matters in manufactured housing communities, if there is some right to deny a Community Owner that which an arbitrator and the Courts have found has been sufficiently justified under the Act, there must be some well-defined and identified statutory provision which provides the authority of the arbitrator and our Courts to

[12] The Appellant contends that the Arbitrator awarded the rent increase that "provides Hometown with multiple recoveries in perpetuity," and that it is essentially inequitable for the Arbitrator to have interpreted the Act to permit such a one-time cost to continue to generate a permanent increase in rent, asserting that "[u]nless this Court intervenes to correct this absurd result, Hometown will recover these expenses in perpetuity." OB, p. 36. Thus, Appellant wishes this Court to find somewhere within the penumbras of that Act that the Arbitrator and this Court have the discretion to reduce the amount of the rent increase after one year. *Id*., p. 45.

act to limit or outright deny such increase. Yet, such a statutory provision just does not exist within the Act.

Indeed, the Court will note that:

- The Act contains **no** equitable exception allowing the Arbitrator, this Court, or the Superior Court, as a Court of law, based on its views of the "equities" of the matter, to limit the amount of the rent increase which it finds has been sufficiently justified;

- The Act contains **no** language of discretion, giving the Arbitrator or this Court judicial "free rein" to do as it sees fit about a sufficiently justified rent increase; and

- The Act contains **no** verbiage, as it well could have, that would have left to the Arbitrator and then our Courts the decision on what the rent increase should be based upon the "totality of the circumstances."

Nonetheless, Appellant contends that such discretion assuredly flows from the use of one word, "may," in 25 *Del. C.* § 7042(c). OB, pp. 38-39. The word "may" in that location in the Act does not rewrite the entire context of the Act, nor does it magically insert discretion when that power otherwise would have been required to have been included in the provision setting forth the role of the Arbitrator and this Court. *See* 25 *Del. C.* §§ 7043(j) and 7044.

Given the mandatory requirement of Section 7042(a), which provides that a Community Owner is entitled to its rent increase **if the rent increase is found to be justified by the conditions imposed by 25 *Del. C.* § 7042(a)(1) and (2) and is justified by any one or more of the eight factors in Section 7042(c) chosen by the Community Owner** (25 *Del. C.* § 7042(a)), the use of the word "may" in

Section 7042(c) is not adding some heretofore undisclosed discretionary application of these factors. Rather, it is referring to the fact that a Community Owner need not meet all of the factors, may demonstrate that one, or some apply, and clearly presages, not the discretionary application of the right to an increase, but the fact that not all such factors asserted by the Community Owner, under the specific facts advanced by it on the record, may sufficiently demonstrate such an increase.

That is the natural way to read and understand Section 7042(c), and interpreting this provision some other way, as Appellant here argues, (i) eviscerates 25 *Del. C.* § 7042(a), which **mandates** the right of the Community Owner to a rent increase if the conditions are met and the justification has been demonstrated and (ii) renders meaningless the very clear roles defined for the arbitrator and this Court in 25 *Del. C.* §§ 7043(j) and 7044.

In short, the provisions relating to the roles of the Arbitrator and this Court, and to the mandatory obligation of the Arbitrator to award the rent increase once the requirements of the Act are met and the rent increase has been justified are not "ambiguous," as Appellant would have this Court conclude (OB, p. 41), but rather they are unambiguous, and the Court is required to give the words in the Act their "plain meaning." *Bon Ayre II*, 149 A.3d at 233, n.21. Doing that here requires that

the Court give the plain meaning to the mandatory requirements in the Act, and to honor the limited role the Act provides for the Arbitrator and the Courts.

Not surprisingly, given the clear and unambiguous language in the Act, our Superior Court, when it was asked to consider the identical argument now being presented by Appellant, succinctly rejected such an argument in a prior rent justification appeal. In *December Corp. v. Wild Meadows HOA*, 2016 LEXIS 336 (Del. Super. July 12, 2016), the Court held, as exactly argued by Hometown herein, that there is no discretion, equitable or otherwise, afforded to an arbitrator to award something other than the justified amount of the rent increase, because "the plain reading of the statute provides that the community owner is entitled to raise the rent provided three criteria are met," and that "upon a finding that a proposed increase in excess of the CPI-U meets those three elements, the arbitrator would be required to authorize the increase." *Id.*, at *13-18.

In specifically addressing the desire of the homeowners to have a one-time only cost recovery rider, as Appellant here argues, the Court held that it is not permitted under the Act, because "the . . . issue is controlled by the clear language of the statute." As the Court there found, "The Act does not provide that a 'one time cost recovery rider is justified. . . ," rather the Court concluded that the mandatory obligation in Section 7042(c) controlled, quoting that Section and noting that the "Act provides that, if all criteria are met, then an 'increase in rent in

an amount greater than the CPI-U' is justified." *Id.*, at n.37 (*quoting* 25 *Del. C.* § 7042(c)). The Court concluded that this one-time cost recovery rider issue must be addressed at the discretion of the General Assembly, "and not an arbitrator charged with implementing the statute, or a reviewing court charged with reviewing that decision." *Id.*, at *22. [13]

In sum, there is, therefore, no "stealth" discretion provision in the Act changing this rent justification statute into one that provides the Arbitrator and then our Courts with complete discretion over the amount of the rent increase permitted to a Community Owner in the face of a rent increase that has been justified under the provisions of the Act.

The Arbitration Decision, finding that *December Corp. v. Wild Meadows HOA* was "directly on-point (Arb.D., p. 26), was therefore not a legal error, and the Opinion, affirming the Arbitration Decision, must be affirmed.

[13] The General Assembly has considered amending the Act to afford homeowners the very extra-judicial relief that is sought to be judicially mandated in this case. *See* Exhibit D. Even with the full public knowledge of the result in *December Corp. v. Wild Meadows HOA* decided now over four (4) years ago, the General Assembly has not passed legislation to do what Appellant requests that this Court do without legislation being signed into law. Importantly, the existence of this bill, to roll back rent increases based on capital expenditures after the amount of the expenditure is recaptured, further confirms that the Act as currently written does not provide for the Arbitrator and our Courts to authorize such a roll back.

CONCLUSION

WHEREFORE, Appellee, Hometown Rehoboth Bay, LLC respectfully requests that the Court affirm the Decision of the Superior Court.

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Dated: August 11, 2020

CERTIFICATE OF SERVICE

I, Michael P. Morton, Esquire, do hereby certify that on this 11th day of August, 2020, Appellee's Corrected Answering Brief on Appeal was served on the following via File & ServeXpress:

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