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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| JOHN IACONA and ROBERT WEYMOUTH,<br><br>Appellants Below,<br>Appellants,<br><br>v.<br><br>HOMETOWN REHOBOTH BAY, LLC,<br><br>Appellee Below,<br>Appellee. | ) | No. 296, 2020D<br><br>On Appeal from the Superior Court of the State of Delaware, C.A. No. S17A-04-001 RFS |

# APPELLEE, HOMETOWN REHOBOTH BAY, LLC'S 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.* § 7050 *et seq*. (the "Act").[1] Appellants are John Iacona and Robert Weymouth (collectively, the "Appellants"), homeowners in Hometown Rehoboth Bay, a manufactured housing community owned by Appellee, Hometown Rehoboth Bay, LLC ("Hometown" 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 2015-2016 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 2017 rent increase by presenting 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

[1] All citations to the Act will be cited to the post-December 10, 2019 changes to the Act.

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.* § 7052 (c) (1), (2), (4) and (5).

The Appellants, however, were 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 § 7052 issued his "Arbitration Order."[2] That decision found that Hometown had met the preconditions to seeking a rent increase, but had not justified the full amount of its 2017 rent increase. Rather, the arbitrator concluded that Hometown had justified a rent increase of $76.32 per month per lot plus the statutory "CPI-U" amount of 0.6%.

[2] The August 6, 2020 Order of the Honorable Richard F. Stokes is attached as Exhibit A and cited herein as "Opinion, p. ____." The Arbitrator's decision, his March 6, 2017 Arbitration Order, 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___." The arbitration transcript and selected exhibits from the arbitration are included in the Appellee's Appendix accompanying this Brief, and cited herein as "B____."

Hometown accepted the arbitrator's decision which resulted in an approximate **25% reduction** in the amount of its rent increase, and has not challenged any portion of the Arbitration Order.

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

On August 6, 2020, after considering the record evidence and the extensive briefings of the parties, the Honorable Richard F. Stokes issued his Opinion. In that Opinion, the Court held that Hometown's rent increase was directly related to improving the community and met the requirements of 25 *Del. C.* § 7052(c). Opinion, pp. 6-9. The Court further concluded that the Arbitration Order was free from legal error and that the findings by the Arbitrator were supported by substantial evidence. *Id*.

Not being satisfied with the conclusion in the Opinion, Appellants have now appealed to this Court.[3] This is Hometown's Answering Brief on appeal.

[3] As the Parties have informed the Court, the issues raised in this appeal are identical to those raised in a related matter, *Rehoboth Bay Homeowners' Association v. Hometown Rehoboth Bay, LLC*, No. 139, 2020, which arises from essentially the same factual background, with nearly identical parties, and identical legal issues. Oral argument in that matter has been continued by agreement of the Parties and Order of this Court to allow both of these matters to be heard together.

## SUMMARY OF ARGUMENT

1. Denied. The Superior Court appropriately determined that the Arbitrator had analyzed 25 *Del. C.* § 7052(c)(1) correctly and concluded that the Bulkhead Stabilization Project (as defined herein) was not an ordinary repair, but rather a capital improvement or rehabilitation work.

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 or rehabilitation work pursuant to the Act.

3. Denied. 25 *Del. C.* § 7052(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.

Appellants, John Iacona and Robert Weymouth, are residents of Hometown Rehoboth Bay, and represent certain homeowners in the Rehoboth Bay community who requested that they be represented by these individuals and who have not otherwise reached agreement with Hometown with respect to their rent for 2017.

### B. BACKGROUND.

Hometown Rehoboth Bay is a manufactured housing community consisting of 525 home rental lot sites fronting Delaware's Rehoboth Bay, and is conveniently located close to Delaware's beaches and the stores, shops, restaurants and healthcare providers of 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 2015-16 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 26, 2016, its statutorily required written notice of its rent increase (A018-19) and of the statutorily required formal meeting to take place on October 21, 2016 (the "Meeting"). *Id.* To ensure all residents were provided every opportunity to ask questions and discuss the proposed rent increase, Hometown held three (3) informal meetings with the homeowners prior to the final meeting, as well as the statutorily required formal meeting which took place on October 21, 2016 (the "Meeting"). *Id.*

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.* § 7053(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.* § 7052 (a).**

The Written Presentation confirmed that the two "door opener" provisions of 25 *Del. C.* § 7052 (a) (1) and (2) had been met. A028.[4] The Written Presentation further disclosed to the homeowners that Hometown was seeking its rent increase based upon CPI-U,[5] and its costs under the factors set forth in 25 *Del. C.* § 7052 (c), specifically, (c)(1), (2), (4) and (5). A027.

[4] 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.* § 7052 (c). 25 *Del. C.* § 7052 (a) (1) and (2) Appellants are not appealing the fact that Hometown met both of these door opener provisions.

[5] Appellants have not challenged below, or in this appeal, the amount of the rent increase that is statutorily permitted to all community owners, CPI-U. A032.

### 2. Hometown Justifies its Expenses under 25 *Del. C.* §7052(c)(1), (2), (4) and (5).

For fiscal year 2015-2016, however, Hometown had other increased costs, and during that year, Hometown was required to incur and did incur and pay costs and expenses in four (4) categories: Capital expenditures, property taxes increases, insurance and financing costs and expenses incurred relating to operating and maintaining the community. A031. Those costs, sought to be justified under 25 *Del. C.* §7052(c) (1), (2), (4) and (5), are outlined below:

#### a. Capital Improvements and Rehabilitation Work, 25 *Del. C.* § 7052(c) (1).

The list of capital improvement and rehabilitation work costs incurred by Hometown included one large project, and several smaller improvements (collectively, "Capital Improvements"). The largest project of those Capital Improvements, the bulkhead stabilization project (the "Bulkhead Stabilization Project"), was made necessary by an unexpected natural disaster which hit Delaware and the entire mid-Atlantic area in the fall of 2012, Hurricane Sandy.

This extraordinary rehabilitation and capital improvement project involved the stabilization of the old vinyl bulkhead, located on the bayside perimeter part of the property, with a new stone bulkhead. A085. A new concrete footer or "toe" was installed near the base of the existing bulkhead in Rehoboth Bay, and 1,317

linear feet of rock, also known as rip rap, was installed on filtercloth in front of the existing bulkhead.[6] A085.

In addition, "deadmen" and tie rods were added throughout the original bulkhead's length to stabilize and strengthen the existing bulkhead. A085. To complete that Project, heavy equipment was brought onsite, and over 200 truckloads of riprap were delivered to the community. A049-99. The effect of this monumental, four (4) month long project was to strengthen and improve the existing vinyl bulkhead, and to add new features including the concrete toe and rip rap. A033, A035, A083, A085, A096. The total cost of the Project, as disclosed in the Written Presentation, was $459,165.85. A033.

The other portion of the costs of the Capital Improvements included the costs of: the replacement and installation of playground equipment replacement (A034), trash truck repairs (A033), replacement and installation of a pier walkway (A036), the purchase of a new maintenance vehicle (A039), the improvement of the HVAC system for the maintenance shop (A033), the repair and replacement of a driveway (A033), upgrades to the pool/beach-picnic area (A037), the repaving of White Oak Drive (A038) and repairs to the Lift Station (A033).

[6] Following the inspection of the damage caused by Hurricane Sandy, it was realized that not only was the visible portion of the bulkhead damaged, but the portion under water had significantly deteriorated. B154-155. In order to protect the community, it was decided to rehabilitate the existing bulkhead and create new, stronger features to improve it. *Id.*

The total amount for these other Capital Improvements, as disclosed in the Written Presentation, was $110,735.01, for a total capital improvement and rehabilitation work cost, including the Bulkhead Stabilization Project, of $569,900.86, or a total of $90.46 per lot per month. A033.

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. A041.

**b. Changes in Property Taxes, Insurance and Financing Costs and Operating and Maintenance Costs, 25 *Del. C.* § 7052(c) (2)(4) and (5).**

Hometown incurred additional costs which were planned to be recouped under 25 *Del. C.* § 7052(c)(2)(4) and (5), including: a cost increase in property taxes, year over year, of $2,045.66 (or $0.32 per lot per month); a cost increase in its insurance and financing costs, year over year, of $4,826.72 (or $0.77 per lot per month); and an increase in Hometown's reasonable operating and maintenances expenses, year over year, in the amount of $47,038.51 (or $7.47 per lot per month).

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 .6% CPI-U plus $99.02 per month per lot, and would become part of the new rent beginning January 1, 2017. A042.

### D. THE ARBITRATION PROCEEDING.

Following the Meeting, on November 12, 2016, the Appellants filed a petition for arbitration pursuant to 25 *Del. C.* § 7053(c).

The Delaware Manufactured Home Relocation Authority appointed Jeffrey A. Young, Esquire as the arbitrator (the "Arbitrator") to undertake the "non-binding" arbitration proceedings. On February 16, 2017, the arbitration was conducted (B001), and on March 6, 2017, following the submission of the post-hearing written arguments of the parties, the Arbitrator issued his decision, the Arbitration Order.

In that thorough and well-supported Arbitration Order, "employing the standards set forth in § 70[5]2," the Arbitrator concluded that Hometown had justified a rent increase in the amount of $76.32 per month, plus CPI-U – an almost 25% reduction in the rent increase amount sought in Hometown's original written notice of rent increase. Arb.D., pp. 3, 10.

In reaching that conclusion, the Arbitrator first addressed and concluded that the two (2) "door opener" provisions of the Act, sections 7052(a)(1) and (2) had "been met." Arb.D., p. 3. Having made those findings, the Arbitrator was

permitted to and did consider Hometown's basis for the rent increase under Sections 7052(c) (1), (2), (4) and (5)

The Arbitrator first concluded that Hometown had met, by a preponderance of evidence, its burden of demonstrating its portion of the rent increase based on Sections 7052(c) (2) and (4) changes in the costs of insurance and property taxes. Arb.D., p. 4. Conversely, the Arbitrator concluded that Hometown had not met its burden, under Section 7052(c) (5), with respect to changes in reasonable operating and maintenance expenses. Arb.D., p. 9.

With respect to recouping Hometown's capital improvement and rehabilitation work costs under Section 7052(c)(1), the Arbitrator concluded that Hometown had not met its burden for the costs relating to the trash truck repairs, the new maintenance vehicle, the pool/beach-picnic area upgrades, the driveway repair and replacement and the Lift Station repairs (Arb.D., pp. 6-8), but had met its burden, but only partially, for the pier walkway project, the playground equipment and the road work. *Id.*

Finally, the Arbitrator concluded that Hometown had, indeed, shown that it had met its evidentiary burden and had justified, under 25 *Del. C.* § 7052(c) (1), the costs relating to the maintenance shop HVAC replacement and the Bulkhead Stabilization Project. Arb.D., pp. 7-9.

In addressing the Bulkhead Stabilization Project, the Arbitrator found that the Project, because of its scope and character, "fit more properly in the category of rehabilitation work," and that Hometown "had met its burden to justify the increased rent based on the costs associated with the bulkhead work." Arb.D., p. 9.

The Arbitrator squarely addressed the requirement of the Act, of whether this Project was a "capital improvement" or "rehabilitation work" as distinguished from "ordinary repair, replacement and maintenance," and concluding that he was required to "apply [the] ordinary accepted meaning" of the terms in Section 7052(c) (1) (Arb.D., p. 5), the Arbitrator made the following findings based upon the law and the facts that were presented during the arbitration hearing and in the written closing arguments:

> That then brings us to the improvements versus maintenance issue. I think it is generally safe to characterize a project of this scale, which focuses on the property itself and preservation, as a capital improvement or rehabilitation work. That also seems consistent with the Black's Law Dictionary definition of improvement. . . . **Nevertheless, again focusing on the scope and character of the work, I do not believe that it is the type of 'ordinary repair, replacement, and maintenance' contemplated by the General Assembly as an item that would not justify rent increase**. Indeed, this seems to be an extraordinary job by any reasonable definition, and fit more properly in the category of rehabilitation work.

Arb.D., p. 9 (Emphasis added). The Arbitrator thereupon concluded that Hometown had "met its burden to justify the increase rent based on the costs associated with the bulkhead work." *Id.*

Appellants, pursuant to 25 *Del. C.* § 7054, thereafter appealed the Arbitration Order to the Superior Court.

**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 (Del. 2019) ("*Sandhill*"), the Superior Court affirmed the Arbitration Order. In doing so, the Court confirmed that the Arbitrator had not erred in determining that Hometown had demonstrated that it had met the "door opener" provisions of Section 7052(a)(2). Opinion, p. 7.

With respect to Appellant's challenge that the Arbitrator incorrectly applied 25 *Del. C.* § 7052(c)(1) in concluding that the Bulkhead Stabilization Project was not an "ordinary repair," but was instead a capital improvement or rehabilitation work, the Court wrote:

> The arbitrator determined the work done on the bulkhead went beyond ordinary repair, stating, ". . . this seems to be an extraordinary job by any reasonable definition, and fit more properly in the category of rehabilitation work." Moreover, the project involved a near complete replacement of the bulkhead. **The Court agrees with the arbitrator's finding that the bulkhead project goes beyond ordinary repair**. Appellants provided no competing evidence, which bring this Court to the conclusion the evidence in the records supports the arbitrator's decision the work done on the bulkhead constitutes a capital improvement or rehabilitation work, rather than ordinary repair, replacement, and maintenance.

Opinion, p. 8 (Emphasis added) (footnote omitted).

The Court, concluding that "the arbitrator's decision is supported by substantial evidence and free of legal error," affirmed the Arbitration Order. Opinion, p. 9.

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.* § 7052(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 "capital improvements or rehabilitation work" pursuant to 25 *Del. C.* § 7052(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 Terms "Capital Improvements" and/or "Rehabilitation Work" As Applied by the Arbitrator and did not Err in Finding that the Bulkhead Stabilization Project Constituted a "Capital Improvements or Rehabilitation Work" Under 25 *Del. C.* § 7052 (c)(1).

The largest portion of Hometown's rent increase sought to be justified was based upon 25 *Del. C.* § 7052(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.* § 7052(c)(1) (emphasis added). The

capital improvements and/or rehabilitation work Hometown sought to rely upon consisted of several different projects including the largest project, the Bulkhead Stabilization Project -- the second phase of the multi-year project to stabilize the existing bulkhead by installing several new features and by rehabilitating that original bulkhead through the placement in Rehoboth Bay of almost two hundred truck-loads of large stone rip rap along the front of that bulkhead.

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 clearly not an "ordinary repair," but rather a capital improvement and/or rehabilitation work as those terms are used in Section 7052(c)(1), thereby justifying the requested rent increase in the amount that was based on that Project.

### 1. The Terms Capital Improvements and Rehabilitation Work are Not Ambiguous.

The primary claim of error in this appeal by Appellants relates to the factor described in Section 7052(c)(1), and the Arbitrator's application of that Section to the Bulkhead Stabilization Project. OB, pp. 16-39. Specifically, Appellants allege that the Arbitrator failed to not only distinguish ordinary repair work from improvement, but also misconstrued the meanings of "capital improvements" and "rehabilitation work," and that, as a result, according to Appellants, the Arbitrator's decision, and Superior Court's Opinion to award Hometown the

proportionate rent increase based upon the Bulkhead Stabilization Project was allegedly in error. OB, p. 16. There is no such error sufficient to warrant the reversal of the Opinion.

In support of their argument, Appellants contend that the terms in Section 7052(c)(1) are "ambiguous," and because of that ambiguity, this Court should intervene to "provide a clear interpretation of the statutory language." OB, p. 22-23. There is, of course, no ambiguity with respect to the terms used in Section 7052(c)(1), and the Arbitrator, and the Superior Court in adopting the Arbitrator's findings, correctly concluded that those terms should be given their ordinarily accepted meaning as required by the Manufactured Housing Act.

Section 7003 of the Manufactured Housing Act provides definitions for various terms used throughout the Act. While neither "capital improvements," nor "rehabilitation work" are defined in the Act, Section 7003 does provide guidance as it requires that "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 Appellants. OB, p. 18.

Moreover, Section 7052(c)(1) itself makes a distinction between the first two factors, "capital improvements or rehabilitation work," and "ordinary repair, replacement and maintenance." Thus, those permitted items are directly contrasted

from the non-permitted items, those involving ordinary repair, replacement and maintenance.[7]

In support of their argument, Appellants contend that the Arbitrator's reasoning and adopted guidance -- the ordinary accepted meaning approach -- and, thereafter, the Superior Court's affirmation of such alleged "judicious"[8] framework, should now be set aside. OB, pp. 20-22. There is, however no basis for any such set aside as the record and analysis by both the Arbitrator and Superior Court in applying the statutory mandate to use the "ordinarily accepted meaning" of the terms "capital improvements" and "rehabilitation work" is proper in all respects, and demonstrates, convincingly, that the "scale," "focus" and its "preservation" of the community as dispositive factors in coming to the identical

[7] As discussed in more depth *infra*, while Appellants argue the Arbitrator, and, therefore the Superior Court, erred in failing to recognize an ordinary repair from capital improvement or rehabilitation work, Appellants themselves consistently fail to make the same distinction by repeatedly using the term "repair" in their argument as compared to "ordinary repair" – the actual term used by the statute. Such distinction is clear in the Superior Court's Opinion in which the Court explicitly noted that the Bulkhead Stabilization Project was certainly not an "ordinary repair," and, therefore, met the standard found in 25 *Del. C.* § 7052(c)(1).

[8] *See* OB, p. 20. Indeed, Appellants on one hand acknowledge the Arbitrator's well-reasoned analytical framework applied to the record; yet, concurrently argue that such framework should not be applied to the largest aspect of the costs associated with the rent increase -- the project that is the sole issue on appeal, the Bulkhead Stabilization Project.

conclusions that the Bulkhead Stabilization Project satisfied the requirements of 25 *Del. C.* § 7052(c)(1) and justified an above CPI-U rent increase.[9]

Yet, Appellants essentially wish this Court to ignore such analysis, rationale, and the unrebutted record, and request that this Court provide that a "clear interpretation" of the language in Section 7052(c)(1) be provided by this Court."[10] However, it is apparent that Appellants do not simply want this Court to interpret the statute. Rather, Appellants want the Court to rewrite it in a way that favors their personal views about how the Act should be interpreted. There is, of course, no need for this Court to rewrite the statute as proposed by Appellants, nor is the Court able to do so.

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[9] *See* Arb.D., p. 9 and Opinion, p. 8.

[10] OB, p. 22. While Appellants argue the statutory guidance is "ambiguous," this Court can take judicial notice of the fact that the question of whether the Bulkhead Stabilization Project constitutes a capital improvement or rehabilitation work as provided by the statute has now been reviewed by two (2) separate and independent judicial officers and two (2) separate quasi-judicial officers (The two in this case, and the two in the companion action). *See Rehoboth Bay Homeowners' Association v. Hometown Rehoboth Bay, LLC*, No. 139, 2020 (Matter on appeal arising from the same factual background and containing identical legal questions where both the Arbitrator and Superior Court also found the Bulkhead Stabilization Project to constitutes a capital improvement or rehabilitation work pursuant to 25 *Del. C.* § 7052(c)). In each instance, each of the four (4) fact finders, applying the same statute, have come to the same conclusion: the Bulkhead Stabilization Project satisfies the statutory requirements of 25 *Del. C.* §7052(c)(1). This clearly demonstrates that the statutory language is certainly not ambiguous.

It is evident that the plain meaning of the statutory language in Section 7052(c)(1) is already clear. There is no ambiguity with respect to the terms "capital improvements" or "rehabilitation work," and the Arbitrator correctly concluded that such terms should be given their ordinarily accepted meanings, as required by 25 *Del. C.* § 7003, and the Superior Court, in adopting such analysis, affirmed the Arbitrator's findings without error.

For the Bulkhead Stabilization Project, 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," and concluded that:

> [I]t is generally safe to characterize a project of this scale, which focuses on the property itself and preservation, as a capital improvement or rehabilitation work. . . again focusing on the scope and character of the work, I do not believe that it is the type of "ordinary repair, replacement and maintenance" contemplated by the General Assembly as an item that would not justify[sic] rent increase.

Arb.D., p. 9.

Thus, the Arbitrator applied the Act as written, and concluded that, based on the totality of the circumstances -- the "scope," "scale" and "character" of this "extraordinary" project, which "focuses on the property itself and preservation" -- the Project was of the type of work the General Assembly would have contemplated as capital improvement or rehabilitation work, as contrasted against

ordinary repair, replacement and maintenance. Arb.D., p. 9. There simply is no error in the Arbitrator's application of the statutory language.

The Appellants' overly narrow focus on the term "repair" is also misplaced. OB, pp. 24-25. Like with much of Appellants' argument, the use of this word is taken out-of-context, and their reliance on it ignores the actual intent and language of the Act itself.

In furtherance of the Act's purpose,[11] the Act permits community owners above inflation rent increases if they "complete capital improvements or rehabilitation work in the manufactured home community, as distinguished from **ordinary repair**, replacement, and maintenance." 25 *Del. C.* § 7052(c)(1) (emphasis added). Yet, Appellants repeatedly use the term "repair" in characterizing the Bulkhead Stabilization Project which fails to properly place this term in proper context, and is contrary to exactly what the Arbitrator and Superior Court did below which was to distinguish the extraordinary Bulkhead Stabilization Project from an "ordinary repair," the actual language used in the Act. 25 *Del. C.* § 7052(c)(1). Of course, the record makes clear there was nothing "ordinary"

[11] The Act's actual purpose, as opposed to the one incorrectly asserted by Appellants (OB, pp. 25-26), is to "accommodate the conflicting interest of protecting manufactured homeowners, residents, and tenants from unreasonable and burdensome space rental increase while simultaneously providing for the need of manufactured home community owners to receive a just, reasonable, and fair return on their property." 25 *Del. C.* § 7050.

about this Project, and both the Arbitrator and the Superior Court so found. Arb.D. p. 9; Opinion, p. 8.

In the end, the Appellants do not offer any cogent or legally cognizable reason for why the terms "capital improvements" and "rehabilitation work" are allegedly ambiguous, and since those terms are unambiguous, and easily defined by their 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 giving these terms their plain meaning is exactly what the Arbitrator did, relying on the plain meaning offered by the dictionary definition, there is simply no manner in which this Court (i) can create and impose, out of whole cloth, new definitions as Appellants wish and favor, (ii) conclude that the Arbitrator erred in analyzing and applying such plain meaning definitions or (iii) determine that the Superior Court erred in adopting the Arbitrator's finding that the Project "goes beyond ordinary repair." Opinion, p. 8.

Appellants' argument that the terms in Section 7052(c)(1) are ambiguous and must be construed in a manner other than their plain meanings is meritless and cannot be the basis to overturn the Superior Court's Opinion.

### 2. The Superior Court Applied the Correct Legal Standard in Concluding the Bulkhead Stabilization Project was a Capital Improvement and/or Rehabilitation Work and Not an Ordinary Repair.

As best as Appellee can discern it, Appellants' next argument is that they seek the imposition by this Court of a novel analysis under Section 7052(c)(1), and they contend that because the Arbitrator failed to apply their favored "legal test" analysis "in evaluating whether the bulkhead project repaired or improved the bulkhead," the "Superior Court erred in affirming the Arbitrator's award of a rent increase based upon the costs related to the bulkhead stabilization project." OB, p. 16, 33. Appellants' argument is without merit as it rests on a new and novel legal standard neither found in or supported by the Act, nor properly before this Court.

In support of their argument to import a new "inquiry" into Section 7052(c)(1), Appellants urge this Court to adopt, in evaluating whether a project constitutes "capital improvements or rehabilitation work … as distinguished from ordinary repair," a new standard that would purportedly require the arbitrator and/or court to determine (i) "whether the work needed [was] as a result of the effects of normal wear and tear," and (ii) "whether the asset is different functionally than when it was new or when it was last in working order." OB, p. 25. Of course, no such two-part inquiry requirement is found in the Act, in the

common meaning of the terms "capital improvements or rehabilitation work," or otherwise in the decisions of this Court.

Not surprisingly, Appellants entire support for this standard is not the Act itself, or the actual language used in Section 7052(c)(1), but rather that it is, allegedly, the "approach" taken in the U.S. Tax Code and regulations. OB, p. 26. And, having asserted that this is allegedly the correct "approach," the remainder of Appellants' argument consists, not of explaining why and how this Court allegedly has the authority to adopt this approach, but rather consists almost entirely of Appellants applying certain facts to this new standard as a demonstration of how this new standard should operate. OB, pp. 27-34.

Not only is the Court precluded from considering this new and unprecedented argument on this appeal, but even if the Court wishes to consider it, the Court will conclude that there is no basis for adopting a standard based on IRS Tax Code definitions in the interpretation of the Act.

First, Appellants are estopped to make this argument. The Appellants argued in their Closing Argument before the Arbitrator that such IRS rules do not "govern or control" matters under the Manufactured Housing Act. A154. Having argued for this position before the Arbitrator, the Appellants cannot now be heard to repudiate it, and cannot assert, for the first time in this Court, that the Arbitrator should have adopted such Tax Code definitions and approach in making his

determination as to what comprises capital improvements and rehabilitation work as distinguished from ordinary repair, replacement and maintenance. *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.").

Second, and even more compelling is the fact that Appellants never made this argument, the adoption of this new legal test, at any point below, and Appellants cannot now be heard to make such new argument, when neither the Arbitrator nor the Superior Court on the appeal were asked to consider such a test. *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983, 989 (Del. 2012); *see also* Del. Sup. Ct. R. 8.

Nevertheless, even if this Court wishes to now consider what the Arbitrator was told by these Appellants he could not consider, or that which was not offered by these Appellants to the Superior Court to consider, this Court must still conclude that the ordinary accepted meaning standard, the standard adopted by the Arbitrator, was the appropriate analysis to consider in applying Section 7052(c)(1).

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 applied. Arb.D, pp. 5-

6. Indeed, the Arbitrator went beyond simply applying the ordinary accepted meaning definitions "capital improvements" and "rehabilitation work" by further analyzing such terms in their context within the Act -- i.e. as compared to "ordinary repair, replacement or maintenance." Arb.D, p. 9; *cf.* 25 *Del. C.* § 7052(c)(1). Those conclusions, applied identically and consistently by the Arbitrator to analyze each and every request under Section 7052(c)(1) sought by Appellee, were correct as a matter of law. *See supra*, pp. 16-23.

Notwithstanding all of that, Appellant again fails to identify any legal error by the Arbitrator or the Superior Court which can be overturned, as they do not offer to this Court any legal or evidentiary basis to show that the ordinary accepted definitions, which were adopted and applied by the Arbitrator and relied upon by the Superior Court, are in violation of the Act. 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 acknowledged exactly that, having found Appellants "offered no expert testimony, lay testimony or really evidence of any kind to support their position that all of the costs incurred were not capital improvements or rehabilitation work." Arb.D., pp. 5-6. Clearly, without having shown that there is legal error to have adopted the ordinarily accepted meaning of the terms "capital improvements" and

"rehabilitation work," such arguments to adopt some other definitions or some other test fail, not only procedurally, but factually and legally.

Looking at the record and standard required by the only source of authority before the Arbitrator and Superior Court - 25 *Del. C.* § 7052(c)(1) - the analysis and application of the common meaning of the term "capital improvement or rehabilitation work" by the Arbitrator and Superior Court were free from legal error. 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, pp. 8-9.

In sum, the Court is left with nothing more than an unsupported argument -- not offered to the Arbitrator or the Superior Court in the first instance -- that this Court should adopt a new standard from an area of law which has nothing to do with the Act and that this Court must do so in contradiction to the Manufactured Housing Act's command that that these undefined terms found within the Act be provided with their "ordinarily accepted meaning." Accordingly, the Court need not seek out or even rely on the proffered U.S. Tax Code approach when the common meaning of the terms the Arbitrator adopted and what the Superior Court affirmed was correct in all respects.

Neither the Superior Court nor the Arbitrator applied the wrong legal standard in determining that the Bulkhead Stabilization Project was a capital improvement or rehabilitation work, and not an ordinary 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 WORK 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 or rehabilitation work pursuant to 25 *Del. C.* § 7052(c)(1)?

### B. Scope of Review.

This Court undertakes a "substantial evidence review" of the Arbitrator's factual findings. *Sandhill,* 210 A.3d at 731, n.37.

### C. The Record and Evidence Submitted at the Arbitration Clearly Support the Arbitrator's finding and the Superior Court's Affirmation of Such Finding in Favor of Hometown.

#### 1. The Superior Court Did Not "Misconstrue" the Facts In this Matter.

Appellants next contend that the Superior Court "misconstrued" the facts in this case, contending that the Superior Court's assertion that the Bulkhead Stabilization Project "involved a near complete replacement of the bulkhead" was somehow incorrect. OB, p. 36. It is, of course, Appellants who are incorrect. Rather than misconstruing the facts, the Superior Court's observation demonstrates that the Court fully understood the substantial evidence of record -- uncontroverted facts that fully justified its conclusion that the work done on the Bulkhead

Stabilization Project "constitutes a capital improvement or rehabilitation work rather than ordinary repair, replacement, and maintenance." Opinion, p. 8.

The record, unrebutted by Appellants at the Arbitration hearing, is replete with the relevant and dispositive evidence submitted during the Arbitration,[12] and this substantial evidence demonstrates that this Bulkhead Stabilization Project was not a "repair," but rather, in reality, "an extraordinary job by any reasonable definition," a job which the Arbitrator found, and the Superior Court affirmed, fit "more properly in the category of rehabilitation work." Opinion, p. 8.

As the testimony confirmed, Hometown contracted for the Bulkhead Stabilization Project, the completion of the second phase of the bulkhead rehabilitation and improvement project, in order to stabilize the beachfront area for the protection of the community. B057-58. As testified to during the arbitration hearing, the work was done because "the bulkhead was no longer stable, and it was a liability to the property." B057. The elicited testimony further provided that such instability was only discovered after Hurricane Sandy severely damaged the

[12] While Appellants' argue the evidence submitted by Appellee is insufficient to warrant the findings of both the Arbitrator and the Superior Court, Appellants' fail to mention that they failed in, all respects, to submit any evidence, let alone any evidence to refute Appellee's case that the Bulkhead Stabilization Project was a capital improvement or rehabilitation work.

entire area, resulting in an inspection of the bulkhead during which damage and deterioration were discovered.[13] B154.

The work on the Project was "not just a simple repair," as confirmed by Hometown's evidence. B191. The contract for the Bulkhead Stabilization Project, which described in detail what was being done in this second phase of the Project, confirmed that this was both a capital improvement and rehabilitation project of enormous size and scope (the "Project Contract").

The extraordinary nature of this Project was fully detailed in the Project Contract that was admitted into evidence in the arbitration and which was part of the record before the Superior Court:

> "SECOND PHASE OF RIPRAP SHORELINE PROJECT
>
> Talking Points
>
> - Scope of Work – Install Rip rap **in front of the existing bulkhead** beginning at the end of Phase One and continuing **for approximately 1317 linear feet**.
>
> Prepare the DNREC permit application including all drawings and forms.
>
> Install a 'Toe' as a footer **in the floor of the Bay adjacent to the bulkhead**.
>
> Place Marifi Filtercloth **on the bay floor and into the Toe**.
>
> Place **riprap weighing between 200 and 400 pounds** on a 1.5:1 slope from the Toe to the top of the existing bulkhead.

[13] *See* 25 *Del. C.* § 7052(c)(6) which distinguishes repair work caused by ordinary wear and tear, from work required as a result of factors other than ordinary wear and tear.

> Place **riprap weighing between 50 and 150 pounds** as needed to chink the larger riprap.
>
> Place riprap [known] as M-12 **behind the existing bulkhead**, in the void between the two bulkheads and then connecting the large riprap."
>
> Place fill in any ruts caused by placing the riprap.

B083 (Emphasis added).

Just how out-of-the-ordinary was this Project? The Project was to last almost four (4) months, weather permitting (B083), and needed mountainous amounts of delivered riprap to complete. In fact, the Project Contract confirmed the extraordinary character and scope of the Project:

- 106 truckloads of 200 to 400 pound rocks to cover 1053 linear 10 feet in width.
- 33 truckloads of 200 to 400 pound rocks to cover 264 linear 8 feet in width.
- 25 truckloads of 50 to 150 pound "chinking" rocks.
- 25 truckloads of B-3 rock.

B084.

Finally, both the Arbitrator and the Superior Court had before them comprehensive engineering renderings of the plans and specifications of the Bulkhead Stabilization Project and detailed photographs of the completed Project, demonstrative evidence confirming the overwhelming size and scope of what was

required and then accomplished, and visual confirmation that this Project was more than any "ordinary repair." A035; A085.

Thus, the substantial evidence of record regarding the character and scale of the Bulkhead Stabilization Project, as demonstrated above, confirms that this Project was beyond any "repair," as Appellants would like this Court to view it as. Installing, in Rehoboth Bay itself, a fully engineered heavy stone riprap bulkhead with concrete footer **in front of** the existing bulkhead (A083, A085, A096, A085) is clearly an improvement, an enormous capital improvement, over what was previously existing.

The only evidence during the arbitration hearing as to the scope and nature of the work done came from Hometown. The Appellants offered **no** testimony, expert or otherwise, and presented no evidence regarding whether this work was anything other than capital improvements or rehabilitation work. *See* Opinion, p. 8. In short, the only evidence before the Arbitrator and the Superior Court, the same record that is before this Court, is that this was a major rehabilitation and capital improvement project, the size and scope of which made it well beyond "ordinary," just as the Superior Court found following its independent review of the record. *Id.*

Notwithstanding that, Appellants contend that neither the Arbitrator's nor Superior Court's decisions were "based on the facts of this case." OB, p. 37. In

support of their argument, Appellants argue the Arbitrator and Superior Court ignored the fact "the project was undertaken to repair damage caused by normal wear and tear, and whether the results of the project provided an improvement to the Community." *Id.* Of course, Appellants do not cite to the record to support this conclusion for the simple reason such alleged facts do not exist. Rather, Appellants seem to adopt the same strategy implemented at the arbitration itself – proffering legal conclusions while not providing evidence to substantiate such conclusions.

Inexplicably, in light of such overwhelming evidence, let alone the substantial evidence of record regarding the scope, character and effect of the Bulkhead Stabilization Project, Appellants continue to steadfastly argue "there is not even a scintilla of evidence to show that the bulkhead project was anything other than a repair." OB, p. 38.[14] Of course, in reviewing the record set forth above, such steadfastness in the face of the evidence before the Arbitrator, and, thereafter the Superior Court, only serves to undermine the credibility of Appellants' arguments as it is quite obvious that all of the evidence supports the findings made by the Arbitrator and Superior Court that the scope and character of this Project "goes beyond ordinary repair." Opinion, p. 8.

[14] Appellants are again applying the wrong standard to the Bulkhead Stabilization Project, relying on the word "repair" rather than on the statutory language of "ordinary repair."

Furthermore, the issue of whether there must be a finding that the "property was improved," as Appellants assert, is irrelevant as the Arbitrator concluded, and the Superior Court affirmed, that the work was properly categorized as "rehabilitation work." Arb.D., p. 9; Opinion, p. 8. Given the statutory framework, there is no requirement a project necessarily "improve" the property, although it is intuitively obvious the Bulkhead Stabilization Project did do just that, as well as serving to substantially protect the community from future storms such as Hurricane Sandy. Thus, Appellants' entire argument falls of its own weight.

In any event, and most importantly, as discussed above, there is **no** evidence that this Arbitrator applied the wrong standard. To the contrary, the Arbitrator recognized the distinction being made within Section 7052(c)(1), and concluded, based upon all the facts before him and after "focusing on the scope and character of the work," all of which he had before him, that he did "not believe that it is the type of 'ordinary repair, replacement, and maintenance' contemplated by the General Assembly as an item that would not justify rent increase." Arb.D., p. 9.

The undisputed and substantial record evidence, as detailed above, corroborates the finding by the Superior Court, based on its review of the record, that the old bulkhead was "no longer stable and required substantial work," and further corroborates the Court's conclusion that the new bulkhead project "goes beyond ordinary repair." Opinion, p. 8. Clearly, the Superior Court knew, and

understood (i) the facts and the substantial 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.

## III. 25 *DEL. C.* § 7052(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.* §7052(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 § 7052." 25 *Del. C.* § 7053(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.* § 7054. 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. 43-44. 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 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.* § 7052(c). OB, pp. 43-44. 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.* §§ 7053(j) and 7054.

Given the mandatory requirement of Section 7052(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.* § 7052(a)(1) and (2) and is justified by any one or more of the eight factors in Section 7052(c) chosen by the Community Owner** (25 *Del. C.* § 7052(a)), the use of the word "may" in Section 7052(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 7052(c), and interpreting this provision some other way, as Appellants here argue, (i) eviscerates 25 *Del. C.* § 7052(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.* §§ 7053(j) and 7054.

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, 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 Home Owners Ass'n*,

2016 Del. Super. 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." *December Corp.*, 2016 Del Super. LEXIS 336, at *21. 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 70[5]2(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.* § 704[5](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. [15]

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.

[15] 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 C. 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 Appellants request 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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