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IN THE SUPREME COURT OF THE STATE OF DELAWARE

John Iacona and Robert Weymouth, Appellants-Below, Appellants, v. Hometown Rehoboth Bay, LLC, Appellee-Below, Appellee.	:	No. 296,2020D On Appeal from the Superior Court of the State of Delaware, C.A. No. S17A-04-001 RFS Date Filed: December 21, 2020

CORRECTED
APPELLANTS', JOHN IACONA'S AND ROBERT WEYMOUTH'S REPLY BRIEF

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1. THE BULKHEAD PROJECT WAS AN ORDINARY REPAIR WITHIN THE MEANING OF 25 *Del. C.* § 7042(c)(1) AND THEREFORE THE ARBITRATOR AND THE SUPERIOR COURT ERRED IN AWARDING A RENT INCREASE BASED UPON THE COSTS OF THAT PROJECT.

Hometown demanded a rent increase for 2017 pursuant to 25 *Del. C.* § 7042(c)(1) for more than 10 projects that it claimed were capital improvements.[1] The Arbitrator rejected most of Hometown's claims, finding most of them to be repairs, replacements or maintenance.[2] However, regarding one project, the bulkhead project, the Arbitrator awarded the full cost of the project in a permanent rent increase to Hometown.[3] Before the Court is the question of whether the Arbitrator erred in awarding this rent increase.[4] The Arbitrator erred because the he applied the incorrect legal standard in determining that the bulkhead project was not an ordinary repair and there were no facts in the record that supported the conclusion that the bulkhead was anything other than an ordinary repair. The Arbitrator also erred in imposing that increase as a permanent increase, providing Hometown with multiple recovery.

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[1] Arbitrator's Opinion, at *5-9.
[2] *Id.*
[3] *Id.*, at *8-9.
[4] Opening Brief, at *15-40.

The Arbitrator established and applied, for most of the projects involved in this case, a reasonable analysis of the Act, a judicious analysis, that provided a rational basis upon which to distinguish between projects in the manufactured home community that constitute ordinary repairs, replacements, and maintenance for which there is no basis for recovery of the costs, from projects for which the recovery of costs is permissible.[5] Appellants ask this Court to take note of the Arbitrator's analysis, accept and refine that analysis, and correct the Arbitrator's error by applying that analysis to the bulkhead project.[6] The Arbitrator's failure to apply his analysis consistently to all the projects Hometown completed led to legal error because, when it came to the bulkhead project, the Arbitrator simply threw up his hands and relied upon his gut and applied no meaningful legal standard to support his conclusion. His decision was not legally sound. The Arbitrator's decision was arbitrary, and this Court should not accord deference to the Arbitrator's conclusion regarding the bulkhead project.

It is clear from Hometown's Answering Brief that Hometown does not accept the Arbitrator's legal conclusions that the replacement of worn out swings, repairs to a trash truck, the replacement of a maintenance truck, sand replenishment, replacement of pool furniture and picnic equipment, driveway

[5] *See* Arbitrator's Opinion, at *5-9.
[6] *Id.*, at *8-9.

repairs and road repaving, replacing deck boards[7] and the replacement of sewer valves the repair of a broken pipe are not capital improvements.[8] The Answering Brief continues to refer to all projects, even those listed above, as capital improvements.[9] Rather than acknowledge this to this Court, Hometown claims that the Arbitrator found that Hometown did not "meet its burden" regarding these projects.[10] Not surprisingly, Hometown ignores the Arbitrator's inconsistent application of his analysis as applied to the bulkhead project.

Hometown erroneously claims that the statutory terms at issue in 25 *Del. C.* § 7042(c)(1) are clear and unambiguous: that the *ordinarily* accepted meaning of the word "*ordinary*" requires no interpretation.[11] The fact is, without this Court's intervention, 1) Hometown will receive a windfall, requiring the homeowners to pay again for that which they have already paid – the maintenance and repair of the bulkhead and 2) community owners, including Hometown will continue to use their own absurd interpretation of the statutory language, rejected by the Arbitrator, to extract unjustifiable rent increases. It is in Hometown's interest to maintain obscurity around this statute so that it can continue to mischaracterize projects in

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[7] Hometown concedes that replacement of one board would be an ordinary repair. Hometown's Closing Brief at Arbitration, at *5, AR001.
[8] Answering Brief, at *9.
[9] *Id.*, at *8, 9, 10, 17.
[10] *Id.*, at *12.
[11] *Id.*, at *28.

future rent increase demands.

Despite Hometown's claim that the Act is clear and unambiguous,[12] the Arbitrator rejected, in its entirety, Hometown's interpretation of the statutory language.[13] This, despite Hometown's claim in its closing brief to the Arbitrator that "common sense dictates" that its characterizations be sustained.[14] Hometown defined "ordinary repairs" as "a patch, a simple fix for missing elements or fixtures or a bulkhead board replacement . . ."[15] The Arbitrator rejected Hometown's claim that any project that cost more than $1,000 and extended the useful life of an asset[16] was a capital improvement and that an ordinary repair was something "simple" such as "tightening a screw".[17]

Hometown asserts that the Arbitrator merely concluded that Hometown "had not met its burden" for certain projects but "had met its burden, but only partially," for other projects.[18] Inasmuch as Hometown's choice of words suggests that there was some quantum of proof that was missing, it is misleading. The Arbitrator evaluated Hometown's interpretation of the Act and rejected it completely.[19] The

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[12] *Id.*, at *16-29.
[13] Arbitrator's Opinion, at *5-6.
[14] Hometown's Closing Brief at Arbitration, at *5, AR001.
[15] *Id*.
[16] Any expense that Hometown could "capitalize" pursuant to accepted accounting principles.
[17] Arbitrator's Opinion, at *6.
[18] Answering Brief, at *12.
[19] Arbitrator's Opinion, at *6.

Arbitrator reviewed the evidence presented by Hometown and concluded that most of the projects it claimed were capital improvements were not capital improvements.[20] The Arbitrator created his own framework for applying the statute and applied that. Now, while Hometown apparently clings to its incongruous statutory interpretation in the face of the Arbitrator's rejection, it is disingenuous that Hometown claims that the statutory language is clear and unambiguous.

Community owners are not entitled to rent increases based upon the cost of repairs to existing assets needed as the result of normal wear and tear. These costs are already contemplated in and paid for by the homeowners' monthly rent payment. 25 *Del. C*. § 7502(c)(6) provides, as one of the permissible bases for a rent increase, "[t]he need for repairs caused by circumstances *other than ordinary wear and tear* in the manufactured home community."[21] This provision allows for the recoupment of *unforeseeable* repairs such as those from natural disasters. Costs relating to new assets (capital improvements) or rehabilitation of assets that go beyond repairs necessitated by normal wear and tear are recoverable.[22] An overall increase in costs for repairs is also recoverable.[23] Read together, "as a

[20] *Id.*, at *6-8.
[21] 25 *Del. C*. § 7042(c)(6) (emphasis added).
[22] 25 *Del. C*. § 7042 (c)(1).
[23] 25 *Del. C*. § 7042 (c)(5).

harmonious whole"[24] the Rent Justification Act does not allow a community owner to increase rent based upon expenditures needed to address the problems related to deterioration caused by normal wear and tear.

The Answering Brief contains misstatements of fact or exaggerations that are not supported by the record and suggest inappropriately that Phase II of the bulkhead project was needed *because* of a hurricane and that the bulkhead project enhanced the bulkhead in some way. Hometown alleges that the repairs to the bulkhead were "made necessary by an unexpected natural disaster . . . Hurricane Sandy."[25] Hometown does not cite to the record to support this claim. The record does not support this claim. The record reveals that while some damage was done to the bulkhead during Hurricane Sandy, which damage was repaired with the help of an insurance payment, the occasion prompted in an inspection of the bulkhead.[26] That inspection revealed "deterioration" of the bulkhead, deterioration

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[24] *Bon Ayre Land, LLC v. Bon Ayre Cmty. Ass'n (Bon Ayre II)*, 149 A.3d 227, 233, fn 21(Del. 2016), *citing, Taylor v. Diamond State Port Corp.,* 14 A.3d 536, 538 (Del. 2011).

[25] Answering Brief, at *8.

[26] "So the storm came through. When they saw the damage that Sandy did, when they lifted up the wall, it showed that the wall was deteriorating. The insurance claim was only going to fix the portion that was torn up on top of the bulkhead, which was maybe a $25,000 fix, which was not going to be able to stabilize the wall. And no one knew the wall was deteriorating, until that was brought up. So we felt, as a company, that it was better to stabilize the entire wall in case another large storm came through and then it would demolish the wall." B-154-55.
"… the stabilization of what had been at that point a failing bulkhead." B-189.
"Again, we are arguing semantics. While there is repair work involved with re-

that no one knew about until the bulkhead was examined. The deterioration was so advanced that the stabilization project (Phase II and Phase III[27]) was needed to keep the bulkhead from collapsing under the strain of another storm. Hometown actually acknowledges this in a subsequent footnote where it notes that "[f]ollowing 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."[28] Problematic in this footnote, however, is Hometown's further unsupported claim that "stronger features to improve [the bulkhead]"[29] were used in the stabilization process. Hometown cites the testimony set forth in footnote 24 above in support of this but there is nothing in that testimony that speaks to "stronger features" or an improvement to the bulkhead.

Hometown may be comparing the condition of the bulkhead after the completion of the bulkhead project with the condition of the bulkhead immediately

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stabilizing the bulkhead, it is a major cost, as I think you all would agree, $400,000. It has a useful life. It is not something we would normally expense each year…" B-191. "It's not just a simple repair. It was a major repair work, the replacement of old, worn out pieces that would involve the bulkhead and the labor involved. That is something that we would consider a capital expenditure. *Id.*

[27] The rent increase based upon the costs related to this project are at issue in the matter of *Rehoboth Bay HOA v. Hometown Rehoboth Bay*, 139,2020D, currently pending before this Court.

[28] Answering Brief at *9, fn 6.

[29] *Id.*

before the repair took place. The condition of the bulkhead is certainly stronger and improved from its dilapidated condition. That, however, is a meaningless and inappropriate comparison. *Every* repair makes an asset stronger or improved from before the repair. The appropriate comparison is between the current condition of the bulkhead with the condition when it was new or in proper working order. There is no evidence that the condition of the bulkhead today is any stronger, better, or improved than when it was not deteriorated.

Hometown also inflates the record when it states that the testimony provided that "Hurricane Sandy severely damaged the entire area, resulting in an inspection of the bulkhead during which damage and deterioration were discovered." *Citing* B154.[30] This testimony is the same quoted above in footnote 5. Certainly, Hurricane Sandy caused a lot of damage throughout the Northeast. Inasmuch as this statement may imply that it was the hurricane that damaged the bulkhead resulting in the need for the stabilization project and not deterioration caused by normal wear and tear, it is not supported by the record. While the evidence supports the conclusion that some damage was caused by the hurricane, the need for the bulkhead stabilization project was caused by deterioration, a long-term process resulting from normal wear and tear. The bulkhead is long and old. When a bulkhead like this deteriorates to the point of near collapse, a great effort will be

[30] *Id.*, at 32.

needed to repair it. That effort may even take a long time and numerous truckloads of rock but that does not change the fact that the work was an ordinary repair to a massive asset already in service to the community.

Hometown alleges that the arbitrator and the Superior Court had before it "comprehensive engineering renderings of the plans and specifications…"[31] Again, an inflated characterization of the evidence since these plans were a simple drawing of rocks holding up the existing vinyl bulkhead. Hometown even characterizes the "toe" as a "concrete toe" a characterization not found anywhere in the record.[32]

Hometown also notes that the evidence they provided at arbitration was unrebutted by the Appellants. This point does not advance Hometown's claim. All of Hometown's evidence that they wanted to put before the Arbitrator was admitted. Nevertheless, the evidence does not show *anything* beyond the fact that the deteriorated bulkhead was repaired or stabilized. The repair was visible in parts and a lot of rock was used but Hometown failed to produce any evidence that the bulkhead is in any way better at protecting the community than it always has.

Hometown claims that Appellants are estopped from bringing expertise to the Court's attention that will assist the Court in establishing a rational test for

[31] *Id.*, at *33.
[32] *Id.,* at *8, 9, 34.

determining if a project is an ordinary repair, replacement or maintenance. First, Hometown points out that the Appellants, (who were appearing *pro se* at arbitration) took the position that "IRS rules do not 'govern or control' matters under the …Act."[33] Appellants asserted this to support their argument that an expense that may constitute a capital expenditure under IRS rules does not mean that the expense represents a capital improvement under the Act. As noted, the Arbitrator rejected Hometown's claim that "capital expenditures" are the same as "capital improvements". However, Appellants are not suggesting that the IRS rules that distinguish betterments from repairs "govern or control" this Court's interpretation of the Act. Appellants simply urge the Court to note that this rule, applicable nationwide, articulates the appropriate inquiry that goes to the heart of the distinction the General Assembly intended to make in Section 7042(c)(1). The Rule is compelling and persuasive authority. It is appropriate for the Court to take notice of the widespread use of the distinction between betterment and repair when evaluating what the General Assembly meant when it drafted Section 7042(c)(1).

Hometown also complains that Appellants did not bring the this "legal argument" before the tribunals below and should be precluded from raising it before this Court. Appellants are not raising new issues before this Court. Since this case was before the Arbitrator, Appellants have consistently argued that the

[33] *Id.,* at *25.

bulkhead project was an ordinary repair and not a capital improvement.[34] Appellants have argued that an ordinary repair is a repair that addresses problems caused by normal wear and tear, whether the repair was big or small. Appellants are making the same argument to this Court. Appellants are not raising a new issue that would be precluded by Supreme Court Rule 8.

Hometown has had an opportunity to explain to this Court, substantively, why the parallel to the IRS regulation is not compelling. Hometown has not offered any counter argument of any substance.

Expected, ordinary care of the property should be budgeted and part of the base rent all homeowners have been paying. "Ordinary" should be read to mean normal, usual, expected, or anticipated. Ordinary should not be regarded as "minimal". The Arbitrator recognized that "there is no cost factor involved in the distinction in the statute."[35] Hometown should have expected to repair the bulkhead when it deteriorated in the ordinary course. While the project was not small, it was, nevertheless, ordinary.

[34] A-124-135, A-154, B-173, B-176, B-181, B-183.
[35] Arbitrator's Opinion, *6.

2. HOMETOWN'S NARROW VIEW OF THE SCOPE OF THE ARBITRATOR'S AUTHORITY IS NOT SUPPORTED BY THE ACT

Hometown argues that the "natural way to read and understand Section 70[4]2(c)"[36] imposes mandatory requirements upon arbitrators to impose rent increases even if they are unreasonable, in complete derogation of the purpose of the Act. Hometown complains that Appellants only rely upon the "use of one word, 'may' . . ."[37] Hometown points to the Superior Court's decision in *December Corp. v. Wild Meadows Homeowners' Ass'n,*[38] in support of their claim.

As argued in Appellants' Opening Brief,[39] Hometown's reading of the statute, as supported by *December Corp.* must be rejected by this Court and will not be restated here.

In its Answering Brief, Hometown states, essentially, that tribunals, including this Court have no authority to interpret the meaning of the statutory language of the Rent Justification Act.[40] This argument is so strained that Appellants can only respond by noting that statutory interpretation is one of the Court's fundamental prerogatives.

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[36] Answering Brief, at *41.
[37] *Id.*, at *40.
[38] *December Corp v. Wild Meadows HOA,* 2016 WL 3866272 (Del. Super. July 12, 2016).
[39] Opening Brief, at *40-46.
[40] Answering Brief, at *25, 38, 39.

Hometown argues that the word "may" in Section 7042(c) does not give an arbitrator discretion in awarding a rent increase. Section 7042(c) states, "One or more of the following factors *may* justify the increase of rent in an amount greater than the CPI-U…"[41] Hometown states that the word "may" "is referring to the fact that a community owner need not meet all the factors listed in Section (c)."[42] This strained reading ignores the fact that the statute expressly states that "one or more" of the factors can be used. The use of the word "may" means that the community owner's reliance upon any given factor or multiple factors may or may not justify the increase it seeks. Under Hometown's interpretation of the Act, the General Assembly would have chosen the word "shall." Because the permissive "may" was used in the Act and not a mandatory term, arbitrators should evaluate the circumstances surrounding the rent increase demanded and fashion a rent increase that is justified, fair, reasonable and does not allow for multiple recovery.

Hometown argues and *December Corp.* holds that 7042(a) mandates the right to a community owner to rent increases, no matter that the increase demanded provides for multiple recovery and is wholly unreasonable. The Act does not mandate this and this interpretation provides another reason that this Court should overrule *December Corp.* on this issue. The Act states, "A community owner *may*

[41] 25 *Del. C*. § 7042 (c) (emphasis added).
[42] Answering Brief, at *40.

raise a homeowner's rent. . . provided the community owner can demonstrate the increase is justified for all of the following conditions. . ." Again, the permissive "may" is being read to mean "shall." The use of the word "may" in Section 7042(a) reveals that the General Assembly intended arbitrators to exercise judgment in fashioning reasonable rent increases.

CONCLUSION

Appellants respectfully request that this Court reverse the Superior Court's Order affirming the Arbitrator's decision to award Hometown a rent increase based upon the costs related to the bulkhead repair and interpret the statutory language "capital improvement and rehabilitation costs as distinguished from ordinary repair, replacement and maintenance"[43] in a manner that recognizes that ordinary repairs are repairs to the manufactured home community required as the result of normal wear and tear. Furthermore, Appellants request that this Court limit the rent increase awarded for the projects deemed capital improvements so that Appellants are not required to pay for Hometown's one-time expenditure each and every year resulting in multiple recovery to Hometown. Consequently, Appellants request that the decisions of the Superior Court and the Arbitrator be reversed.

Respectfully submitted,

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[43] 25 *Del. C.* § 4072(c)(1).