



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### Dispute Codes:

CNL, FF

### Introduction

This hearing was held in response to the tenant's Application for Dispute Resolution in which the tenants have applied to cancel a two month Notice to end tenancy for landlords' use of the property and return of the filing fee costs.

The two tenant applications were joined to be heard at the same time. The tenants each live in a duplex owned by the same landlord. Both tenants have been issued a two month Notice to end tenancy for landlord's use of the property.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. The hearing process was explained and the parties were given an opportunity to ask questions about the process.

The parties confirmed receipt of the hearing documents and evidence within the required time limits.

### Issue(s) to be Decided

Should the two month Notice to end tenancy for landlords' use of the property issued to each tenant on February 11, 2016 be cancelled?

### Background and Evidence

Tenants R.H. and K.H. moved into unit 1037 in October 2011. Tenant M.I. moved into unit 1035 in October 2004.

The tenants were each issued a two month Notice to end tenancy for landlords' use of the property on February 11, 2016. The Notice requires the tenants to vacate each rental unit effective April 30, 2016. The one reason on each Notice is:

*The landlord has all the necessary permits and approvals required by law to demolish the rental unit or repair the rental unit in a manner that requires the rental unit to be vacant.*

The landlord said that they purchased the properties in January 2016. They have assessed the 1948 structure and determined that there are maintenance issues that must be addressed that will require the tenants to vacate.

The landlord provided a copy of a February 15, 2016 report issued by an engineering firm. The report assessed the buried oil tank inspection and water egress issue, due to failed weep tile. The weep tile repair will require excavating of much of the existing concrete sidewalks and exterior basement stairs. The weep tile repair could include lowering of the basement floor and reconfiguring of the basement stairs.

Knob and tube wiring was encountered in the basements, along with some modern wiring. It is recommended that an electrician re-wire the majority of the duplex, with access to walls in all rooms required.

The engineer report concludes that substantial disruption to the building access and usage could occur. Most of the sidewalks would be dug up and repair of electrical deficiencies would require "disruptive access to the walls within all rooms." The report finds that *"the required work likely cannot be performed while tenants are living in the building."* The landlord submitted a number of photographs taken as part of the report preparation.

The landlord submitted a copy of a Plumbing Permit issued by the city on an application made February 23, 2016 for the units. The permit allows installation of drainage piping and an outside pump.

The landlord submitted a copy of a March 11, 2016 email regarding a quote for the drain tile work. The quote indicates that the owner of the property is to be responsible for site safety and security such as fencing.

A copy of an Electrical Permit issued by the city on March 3, 2016 as the result of a March 2, 2016 application was supplied as evidence. The permit is for all floors in unit 1035, for removal of knob and tube wiring and additional circuitry.

On February 23, 2016 the landlord sent tenant R.H. an email explaining that they had to end the tenancy as the engineering report was clear that the work would be extensive, inside and outside of the building. The landlord explained that the engineering report determined the work could not be performed while they remained living in the building.

The landlord said that they issued the Notices prior to obtaining the permits as they wished to give notice as early as possible. They realize locating a new rental unit could be difficult.

The landlord stated that the units have a lot of issues; there have been squirrels in the attic that could chew wiring; that perhaps two or three oil tanks are in the yard and could result in excavation of neighbouring yards. There is mildew in the basement and the tile drains are compromised. The basement was extended over existing drain so the floor may need to be removed. The knob and tube wiring runs everywhere and will require considerable work to be removed. The stairs in the basement must be removed and the basement may be jackhammered. There is a partition in the basement of unit 1035 that must be removed.

Tenant R.H. made submissions for both tenants.

The tenant responded that the electrical wiring has been updated and that only some of the wiring is knob and tube. The permits issued do not suggest any extensive work that would require the units to be vacant. The tenants also pointed out that much of the work referenced by the landlord is not included in any permit issued and that permits would be required for additional repairs mentioned by the landlord.

The tenants are willing to accommodate the landlord to allow the work to be completed. The tenant said the landlord could arrange temporary access to the unit while the yard work is completed and that fencing could be installed to ensure safety. The permits provided as evidence were issued after the Notices were issued and do not indicate that the units must be vacant.

The tenants referenced Supreme Court of B.C. decision *Berry and Kloet 2007 BCSC 257, paragraph 22*:

*Second, it must be the case that the only manner in which to achieve the necessary vacancy, or emptiness, is by terminating the tenancy. I say this based upon the purpose of s. 49(6). The purpose of s. 49(6) is not to give landlords a means for evicting tenants; rather, it is to ensure that landlords are able to carry out renovations. Therefore, where it is possible to carry out renovations without ending the tenancy, there is no need to apply s. 49(6). On the other hand, where the only way in which the landlord would be able to obtain an empty unit is through termination of the tenancy, s. 49(6) will apply.*

The tenants said that the Court has stated that there is no need to issue a Notice ending tenancy if the tenants will accommodate renovations.

The tenants raised the issue of good faith in relation to the extent of the work. This concept was discussed during the hearing and it was explained that the good faith argument would be based on the intention of the landlord and a possible ulterior motive. The tenants do not doubt the landlord's intention to complete the work.

The landlord said that there is no doubt further permits will be required after the work commences.

## Analysis

After considering all of the written and oral evidence submitted I find that the landlord has failed to prove; on the balance of probabilities, that the rental unit must be vacant in order for the intended work to be completed.

The Supreme Court of B.C. decision *Berry and Kloet V. British Columbia (Residential Tenancy Act, Arbitrator) 2007 BCSC 257*, referenced by the tenants, provides guidance on the subject of eviction for the purpose of renovation to a rental unit. Paragraph 7 of that decision provides:

[7] *I note that when a landlord seeks to end a tenancy for purposes of renovation, s. 49(6) of the **Act** sets out three requirements:*

- (1) The landlord must have the necessary permits;*
- (2) The landlord must be acting in good faith with respect to the intention to renovate; and*
- (3) The renovations are to be undertaken “in a manner that requires the rental unit to be vacant”.*

The landlord has presented two permits, one for plumbing in each unit and one for electrical in unit 1035. There was no indication that the landlord is not acting in good faith and does not intend to carry out the renovations; however there appears to be an absence of a permit for electrical work in unit 1037.

The *Berry and Kloet* decision further assesses the need to evict a tenant for the purpose of renovation and the factors that may be considered when assessing a Notice to end tenancy:

[21] *First, the renovations by their nature must be so extensive as to require that the unit be vacant in order for them to be carried out. In this sense, I use “vacant” to mean “empty”. Thus, the arbitrator must determine whether “as a practical matter” the unit needs to be empty for the renovations to take place. **In some cases, the renovations might be more easily or economically undertaken if the unit were empty, but they will not require, as a practical matter, that the unit be empty.** That was the case in **Allman**. In other cases, renovations would only be possible if the unit was unfurnished and uninhabited.*

[22] *Second, it must be the case that the only manner in which to achieve the necessary vacancy, or emptiness, is by terminating the tenancy. I say this based upon the purpose of s. 49(6). The purpose of s. 49(6) is not to give landlords a means for evicting tenants; rather, it is to ensure that landlords are able carry out renovations. Therefore, where it is possible to carry out renovations without ending the tenancy, there is no need to apply s. 49(6). On the other hand, where the only way in which the landlord would be able to obtain an empty unit is through termination of the tenancy, s. 49(6) will apply.*

(Emphasis added)

The engineer report references work to the tile drain, much of which will occur outside of the rental unit. The landlord will be responsible for safety and fencing, which can accommodate the coming and going of the tenants. There is no mention of removal of the front stairs to the rental unit or the inability to provide temporary exit from the rear of the home, if required. The report states that it is "likely" the work cannot be completed while the tenants are in the home; yet the drain work will take place in the basement which appears, from the photos supplied, to be clear of most belongings.

I find that there was no evidence that work on the basement floor would impact the tenancy so severely that the home must be vacant and, if so, for what period of time that might be required. It may be more convenient or economical to have the tenants vacate, but there was no evidence before me that would support the need for vacancy. I find that to end a tenancy on the basis of the "likely" need for vacancy during the work, is not supported by the intention of section 49(6) of the Act. I found that statement in the engineers report overly broad. There was no schedule of work supplied or any other indication that the home must be vacant while the exterior work and basement drains were completed.

I find that to evict the tenants to allow the removal of knob and tube wiring appears more a case of convenience than necessity. There was no evidence before me that this work is anything more than wiring that could be accommodated by the tenants. Even if walls in each room must be opened, the tenants have indicated a willingness to accommodate that work. There was no evidence before me that removal of wiring would result in the demolition of the walls or disruption to the extent that the home must be emptied.

During the hearing I explained that to evict the tenants due to removal of oil tanks in the yard would not be supported. There was no evidence that this would have any impact on the tenancy, other than the lack of use of the yard for a period of time. The tenants have indicated a desire to accommodate this work.

Therefore, I find that the landlord has failed to prove that the work to be completed is so extensive that the units must be empty. It may be easier to complete the work if the units are vacant, but from the evidence before me I find that vacant possession is not required. There does not appear to have been consideration of the willingness expressed by the tenants, to accommodate the repair work. The tenants have recognized that they will be able to remain in the units while the work is completed and that accommodation of the repairs is possible.

Therefore, I find that the two month Notices to end tenancy for landlord's use issued for units 1035 and 1037 on February 11, 2016 are cancelled and of no force and effect. The tenancies will continue until they are ended in accordance with the Act.

The landlord is at liberty to supply the tenants with a schedule of work that will be completed within a reasonable period of time. The tenants have undertaken to accommodate the work that they can expect to be completed in an efficient and timely manner.

As the applications have merit I find, pursuant to section 72 of the Act, that the tenants are entitled to recover the \$100.00 filing fees which may be deducted from the next months' rent due.

Conclusion

The two month Notices to end tenancy for landlord's use of the property issued on February 11, 2016 are cancelled.

The tenants may deduct the \$100.00 filing fee from the next months' rent due.

This decision is final and binding and is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: April 15, 2016

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Residential Tenancy Branch