Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Lori-Gay Holdings Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes ARI

Introduction

This was a hearing with respect to the landlord's application requesting an additional rent increase. The matter was originally set for hearing by conference call on January 5, 2016. The hearing was adjourned at the request of the landlord to allow the landlord an opportunity to submit limited evidence in replay to the tenants' affidavit evidence. The hearing was rescheduled to be conducted as an in person hearing at the office of the Residential Tenancy Branch in Burnaby on March 16, 2016. The landlord's representative, legal counsel and its witness as well as the named tenants and their legal advocate attended the hearing at the Residential Tenancy Branch, save for one tenant, who called into the hearing by telephone.

Issue(s) to be Decided

Is the landlord entitled to orders permitting it to impose additional rent increases with respect to each of the tenancies pursuant to section 43 of the *Residential Tenancy Act* and the provisions of the Residential Tenancy Regulation?

After the rent increase permitted by the Residential Tenancy Regulation, is the rent for the subject rental units significantly lower than rent payable for other rental units similar to and in the same geographic area as the rental units?

Background and Evidence

The rental property is a three and a half storey wood-frame construction apartment building with 17 rental suites. The landlord applied for an additional rent increase with respect to 12 units in the building. As of the date of the hearing the application is brought with respect to 10 units. There is no elevator in the building. The rental property is in East Vancouver near the intersection of Broadway and Commercial Avenue. The building was constructed in or about 1965. The landlord retained a real estate appraiser to conduct what was referred to as a: "Market Rental Survey and

Market Rental Valuation" for the rental property. The stated purpose of the report was to estimate the market rent for the landlord's interest in the rental property as of September 1, 2015. The report was intended to be used to allow the landlord to determine: "which suites in the subject building are significantly below rents payable for similar suites in the same geographic area, and for use in the application for an additional rent increase to the Residential Tenancy Branch."

In his report the appraiser adopted the following definition of Market Rent:

> The rental income that a property would most probably command in the open market; indicated by current rents paid and asked for comparable space as of the date of the appraisal.

The landlord's appraiser attended the hearing and testified with respect to the contents of his report.

The rental property and its surroundings are described in the appraisal report. The building is located near a Skytrain station and a high traffic commercial area including a theatre, stores, restaurants, banks and a Safeway shopping centre. The building has a flat tar and gravel roof. The exterior is stucco and wood trim. The hallways are carpeted and the units for the most part have their original hardwood floors with vinyl and ceramic tile in kitchens and bathrooms. There is a laundry room with two coin operated washers and two dryers. There have been some improvements and repairs since the building was constructed. The building has hot water baseboard heaters and the boilers for heating and hot water have been replaced. The windows and sliding doors in the units were replaced in 2010. The appraiser noted that the roof was nearing the end of its 25 year lifespan and the exterior was weathered and could benefit from repainting.

The rental units for which increases are sought:

Unit #	bedrooms	Current rent	Requested increase	Total rent
101	one	$813.00	$293.00	$1,106.00
102	one	$923.00	$208.00	$1,131.00
103	one	$900.00	$206.00	$1,131.00
104	three	$1,103.00	$831.00	$1,934.00
201	one	$813.00	$344.00	$1,157.00
202	one	$814.00	$317.00	$1,131.00

204	one	$950.00	$181.00	$1,131.00
305	one	$869.00	$314.00	$1,183.00
306	one	$826.00	$331.00	$1,157.00
401	one	$846.00	$337.00	$1,183.00

The landlord's appraiser selected 13 properties that are said to be in the surrounding market area of the rental property and comparable to the rental property. One of the "comparables" was a house and another was a duplex unit; they were selected because the appraiser was unable to find three bedroom apartments in the surrounding area to use as comparables.

In his analysis and conclusions, the appraiser said:

> In order to utilize the Comparison Approach to estimate an appropriate market rental rate for the Subject unit, it is necessary to make adjustments to the comparables to reflect the varying differences with the subject. As such the rental rate search utilized in this report was directed towards similar or similar use properties in the area of the Subject property.
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> The following discussion denotes the adjustment logic throughout the analysis of the comparables relative to the One and Three Bedroom Suites in the Subject building. Therefore, the following comparables will look at the these market types separately.
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> The process of adjustments traditionally involves the following;
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> | | |
> |---|---|
> | Location Factors | Time/Market Conditions |
> | Physical Characteristics | Motivating Forces and/or Conditions |
> | Zoning and Land Use Factors | Financing Terms |

With respect to location, physical characteristics and time/market conditions, the appraiser said that: "adjustments have been made where appropriate". He did not consider the other factors mentioned as considerations that required adjustment.

The appraiser then went on to rank the comparable properties as to their inferiority or superiority to the rental property and to pronounce upon the appropriateness of the rental rate for the comparable.

The comparables, referred to as “A” through “K” were apartment buildings or strata title apartment buildings. The following are descriptions of the selected comparables. Along with the appraiser’s comments his analysis and conclusions as stated in his final summary reflecting his “adjustments”

Comparable A is a 12 unit apartment building located across the street and one block west of the rental property. The appraiser described the property as a 1966 vintage wood frame walk up building in above-average, largely updated condition. The rental rates were reported to be $925.00, up to $1,025.00 for a one bedroom and $1,435.00 for a two bedroom. According to the appraisal, the tenants pay for electricity and the landlord recovers 80% of hot water costs from tenants. The appraiser concluded:

> This is a good comparable due to its very similar location, size, and age. Overall, with all factors weighed, I consider this comparable is slightly inferior as the Tenant pays utilities.

Comparable B is a one bedroom strata unit in a three storey 57 unit building. The building is located on the south side of Broadway, two blocks west of the rental property. The building was described as constructed around 1980, above average wood frame building with an elevator and coin laundry. Each suite has a balcony. Tenants pay their own utilities. The rent was reported to be $990.00 as of September, 2015. The appraiser said the rent might be low because it was rented by a private individual. He concluded that:

> This comparable is less desirable, due to its slightly inferior location and the added Utility bills.

Comparable C is a one bedroom unit located on the south side of Broadway, some four blocks west of the rental property. The rent for a one bedroom third floor unit was reported to be $940.00 as of September, 2015. The appraiser reported that the comparable was a circa 1967 three storey building in average condition, said to be in inferior condition to the rental property. There is no elevator. Each suite has a balcony. There is a coin-op laundry and heat and hot water as well as cable is included in rent. The appraiser said:

> I consider this comparable is Inferior, and will mark the lower end of the range for the Subject, due to its inferior location, and condition.

Comparable D is a one bedroom unit in a three storey building on the north side of Broadway, seven blocks west of the rental property close to the Vancouver Community College campus. The building is described as built in 1958, in average condition, without balconies, heat and hot water provided and a coin-op laundry. The building is described as less desirable than the rental property. The appraiser reported that the advertised rent was $1,000.00 in September, 2015. He concluded that:

> I consider this comparable is overall Net Inferior when I consider the inferior location and Inferior building.

Comparable E is described as a one bedroom suite in a newer four storey strata-titled apartment building. The location is described as a low traffic area, one block north of East Broadway and three blocks west of Commercial drive. It is described as having: "more desirable influences than the Subject, as it is three blocks west of the Subject, in a quieter area, but with the ease of access to East Broadway, and Commercial drive areas. The building has an elevator, balconies and underground parking. There is a coin-op laundry. Units have dishwashers. Heat is not included in rent and tenants pay all utilities. According to the appraiser rent is $1,050.00 for a one bedroom and $1,400 to $1,450.00 for a two bedroom. It was reported that there is a "wait list". The appraiser said:

> I consider, after weighing all the factors noted above, this comparable is overall Net Similar to the Subject.

Comparable F is a 1980 era, four storey apartment building located across the street from comparable E. It is also described as having: "more desirable influences that the Subject". There are elevators and underground parking. Appliances include a dishwasher. Tenants pay all utilities. The asking rent for a one bedroom was reported to be $1,125.00, with a reported actual rent of $1,050.00 pursuant to a wait list. The asking rent for a two bedroom was reported as $1,400.00 to $1,450.00. The appraiser said:

> I consider, after weighing all the factors noted above, this comparable is overall Net Similar to the Subject.

Comparable G is a 54 unit strata-title apartment building, constructed in 1983. It is located in a low traffic area, five blocks north of the rental property; a more desirable location than the rental property. It has dishwashers, balconies, underground parking and coin-op laundry. Tenants pay all utilities. Rent for a one bedroom is repaired as

$1,150.00 and for a two bedroom, $1,500.00. The reported rent is said to be based on a wait list. The appraiser said:

> I consider, after weighing all the factors noted above, this comparable is overall Net Similar to the Subject.

Comparable H is a three to four storey strata title apartment building, located in a quieter, more desirable area, five blocks north of the rental property. The building, constructed in 1981, has underground parking and an elevator. Units have balconies, fireplaces and dishwashers. Utilities are not included in rent. The reported "wait list" rents are $975.00 for a bachelor, $1,150.00 for a one bedroom and $1,600.00 for a two bedroom. The appraiser said:

> I consider, after weighing all the factors noted above, this comparable is overall Net Similar to the Subject.

Comparable I is a 15 unit strata title four storey apartment building, located five blocks north of the rental property. It is described as a more desirable, low traffic area. The building has an elevator and balconies and fireplaces. The building was constructed circa 1983 and is in good condition. Utilities are not included in rent. One bedroom apartment rents are reported as $1,095.00 to $1,125.00. The appraiser said:

> I consider, after weighing all the factors noted above, this comparable is overall Net Similar to the Subject.

Comparable J is a four storey apartment building constructed in 1993. The building is located in a high traffic area near the Nanaimo Skytrain station. The building has an elevator and underground parking. Units have dishwashers. There is a fitness room and a rear garden. Tenants pay for utilities, but hot water is included in rent. The appraiser said the comparable has: "more desirable on-site influences, but said the comparable was overall inferior to the rental property. Rents for a bachelor plus den were $850.00 and $995.00 for a one bedroom, said to be based on a September wait list. The appraiser concluded that:

> I consider, after weighing all the factors noted above, this comparable is overall an Inferior comparable due to its location, and Tenant pays for Heat.

Comparable K is a seven unit apartment building, six blocks north of the rental property in a quieter area. The building was constructed in 1983, but the units were completely renovated 2012 to 2013. The occupants were evicted before the renovations were

carried out. One bedroom units were reported to be rented for $1,250.00 to $1,275.00 and a three bedroom unit was rented for $2,100.00. The appraiser said:

> After weighing all the factors, I consider this comparable is Net Superior, and will mark the upper end of the range for the Subject, due to its condition, and quiet location.

The appraiser went on to discuss comparables related to the three bedroom unit in the rental property. He undertook calculations that took into account rents for two bedroom units in arriving at a market rent for the three bedroom rental unit. The appraiser stated his conclusions as to the estimated market rent for the subject units in the form of a table as follows:

Suite	**Est. Rent**	**Suite**	**Est Rent**
101	$1,075.00	301	$1,150.00
102	$1,100.00	302	$1,125.00
103	$1,075.00	303	$1,150.00
104	$1,880.00	304	$1,125.00
201	$1,125.00	305	$1,150.00
202	$1,100.00	306	$1,125.00
203	$1,125.00	401	$1,150.00
204	$1,100.00		
205	$1,125.00		
206	$1,100.00		

The landlord's representative testified at the hearing. He also submitted a detailed statutory declaration to provide background information and to respond to the tenant's evidence. The landlord's provided evidence at the hearing as to the history of the rental property and its upkeep. The building was constructed by his father in 1964 and his family lived in the three bedroom unit. The landlord's representative's father lived in the rental property until 1982. The rental property is now owned by a family corporation The father managed the property and set the rents until 2015. There was a resident caretaker living in the building until April, 2014. Since then the landlord's representative has taken over the caretaking duties and manages the rental property. The landlord employs a tenant in the rental property to perform cleaning duties. The landlord said that several units have been excluded from the application for an additional rent increase because the landlord is currently charging rents for those units that are in line with rents for similar unit in the area. The landlord's representative said that on January 16, 2016 he rented unit 203 at a monthly rent of $1,125.00 excluding parking.

He said he received 12 rental inquiries before renting the suite. The landlord withdrew its application with respect to this unit.

The landlord's representative referred to tenants' complaints regarding maintenance issues expressed in some of the tenants' declarations. He disputed that there have been neglected maintenance issues. The landlord has replaced all the windows and sliding glass doors throughout the building. In July, 2015, in response to security complaints the landlord installed a six foot fence and locked gate between the back of the building and the parking lot. He said this appeared to have resolved the problem of intruders accessing the rear of the building. The landlord referred to complaints that the mailboxes were broken into. He said he was not aware of any break-in. Canada Post advised him that the lock was loose and needed adjustment. The landlord had the lock repaired.

The landlord testified that unit 205 was rented in March, 2015 for $1,050.00. Unit 206 was rented December, 2015 for $1,075.00 per month. Unit 301 was rented July 15, 2015 for $1,100.00 per month. The rent for unit 303 was raised from $825.00 per month to $1,150.00 effective July 1, 2016 by agreement with the tenants. Unit 304 was rented September, 2015 at a monthly rent of $1,125.00.

The tenants each submitted statutory declarations and testified at the hearing. The tenants raised similar issues in their declarations. The landlord addressed some of these matters in his testimony. He disagreed that the rents had been routinely increased in the past and he disagreed with statements concerning repair and maintenance issued in the rental property and individual units.

In their testimony the tenants each gave evidence with respect to the condition of the rental property, the state of their individual units, the building amenities and the nature and character of the immediate neighbourhood around the rental unit.

Most of the tenants said that the units are older and the interior finishings and appliances are simple and worn but serviceable. Tenants complained of noise transmitted inside the building and coming from outside. They said that there is a lot of street noise and traffic. A theatre is located next door and there are lineups and late night noise. Tenants also complained about people using drugs and many said they do not consider the neighbourhood to be safe. Several tenants complained that the controls for heat were ineffective and the units were often too warm. A tenant said that her mail was stolen from the mailbox and she became a victim of credit card fraud as a result. Several tenants complained that the lighting in the building was poor and the hallways were dark. The tenants submitted photos of the building, including pictures of

the common areas. The pictures are said to show dark hallways, dirty walls in need of repainting and stained and aging carpets.

Several of the tenants commented on the comparables discussed in the appraisal report. They disagreed that some of the selected units were truly comparable. They submitted that some of the buildings were located in quieter, more residential areas. It was also submitted that some selected comparables were newer and had more amenities, such as a building elevator.

Counsel for the landlord referred to the statutory basis for a rent increase application under section 23 (1) (a) of the Regulation; the landlord may apply for an increase if the rent for the rental unit is significantly lower than the rent for other rental units that are similar to and in the same geographic area as the rental unit. She emphasized that the requirement for similarity does not impart a requirement that the comparables be identical.

Counsel for the landlord referred to the decision of the Supreme Court of B.C. in *Berezowski v. Residential Tenancy Branch and Metro Housing Corporation*, 2014 BCSC 363 (Canlii). In that decision Madam Justice Fiztpatrick analyzed the decision of an arbitrator with respect to a landlord's application for an additional rent increase. In the Supreme Court decision the judge quoted the arbitrator's finding with respect to similarity as follows:

> [88] DRO Bell specifically rejected the Tenants' argument that some of ``these other units submitted by MVHC were not similar. DRO Bell states:
>
> > Notwithstanding the Tenant's argument that similar units must be the same in all these areas, I accept the Landlord's argument that if all items must be the same the units used as comparables would have to be identical and not similar. Therefore, I find that in order to determine market value rent of the Tenants' unit I must consider rents currently being charged for other units in the same geographic area while comparing other unit's size, age (of unit and building), construction, interior and exterior ambiance (including view), and sense of community and considering all similarities and differences.

The judge noted that the arbitrator then went on to set out two tables of units found to be "significantly similar" to the rental unit and those found to be "similar". Madam Justice Fitzpatrick commented as follows with respect to the arbitrator's analysis:

[90] With respect to the Group A units (those in Semlin Terrace), DRO Bell made certain calculations of rents payable at the outset of these rentals and applied premiums (notional rent increases in following years) and discounts (renovations). This issue is raised in relation to Issue E discussed below.

[91] With respect to the Group B units (those outside of Semlin Terrace), DRO Bell was required to critically consider, as she stated she did, both the similarities and the differences between these units and that of the Tenants. In assessing the extent of the similarity of these Group B units, DRO Bell accepted the submissions of MVHC that:

> … the statutory requirement allows me to consider similarities of these units as long as I take into consideration the differences between townhouses and apartments when looking at the market rent in comparison to the Tenants' current rent.

[92] This type of approach is not unlike that taken by an appraiser whose task is also generally to consider similarities and differences between properties and apply certain premiums and discounts in order to compare "apples to apples" as opposed to "apples to oranges". In order to calculate a median rent of these "similar units", she was required to disregard certain of these units since they would otherwise have unfairly skewed the calculation:

> When calculating the median market value rent of the similar units listed above I did not consider the unit being rented for $1,700.00 as this unit is significantly larger, nor did I include the last unit rented at $1,250.00 per month as there is no indication of the number of bedrooms or the size of this unit. Furthermore, I took into account that the first unit listed at $1,550.00 was 55 sq ft larger, and while it had numerous other similarities, it was not similar enough to utilize in my calculation. Therefore, I considered only one of the above units as being similar ...

[93] In my view, the approach of DRO Bell was exactly what was contemplated by the Act, the Regulation and the Guideline in respect of this issue; namely, that she firstly identified and found that these four Group B units were "similar" units and then secondly, she derived a calculation of the median of the applicable market rent for those units. In respect of the first part of this analysis, she considered any differences in terms of how they might affect the second part, namely the rental amount being paid. Having this information, together with the information derived from the "significantly similar" Group A unit analysis discussed below, DRO Bell was satisfied that MVHC had met the statutory requirement to prove that the Tenants' rent was "significantly lower" than the rent payable for these other rental units which were in the same geographic area.

Counsel for the landlord submitted that the approach taken by the landlord's appraiser when he made "adjustments" in order to take into account factors that made selected comparables superior or inferior to the rental property was explicitly approved by Fitzpatrick J. in the *Berezowski* decision when she commented at paragraph 133 of the decision that: "I see no error in the approach taken by DRO Bell in adjusting for these circumstances." The judge went on to say that:

> [134] In addition, as stated above, DRO Bell adjusted the market rental values for the "significantly similar" Group A units downward for the renovation differences, based on the submissions of MVHC, which she accepted. The table addressing these units indicates that these other Group A units had been updated with new kitchens and bathrooms, paint, curtains and flooring. The Tenants' unit has not undergone this updating. After finding the median rental value of the Group A units to be $991 (using the adjusted rent increases noted above), she applied a $100 discount to arrive at an adjusted median rental amount of $891.
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> [135] The Tenants submit that DRO Bell was incorrect in adjusting the rental amounts, again relying on the Guideline as to the meaning of "similar units":
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> > "Similar units" means rental units of comparable size, age (of unit and building), construction, interior and exterior ambiance (including view), and sense of community.
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> [136] The Tenants submit that the above definition is conjunctive and accordingly, the comparable units had to be "similar" in all respects. Therefore, since the renovations to the interior of these other units are such that they are not "similar", the definition could not be met.
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> [137] In essence, the strategy of the Tenants was to exclude all or most of the proposed comparables so as to create a situation where their unit could not be adequately compared to any similar unit (see Clements, para. 38). In that way, it would be impossible for MVHC to meet the statutory test under s. 23(1)(a) of the Regulation and the Tenants would succeed in opposing any increase of their rent.
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> [138] As discussed above under Issue D, DRO Bell rejected the Tenants' argument that these renovations were so extensive so as to make the units "dissimilar", a decision which in my view was a reasonable conclusion based on the evidence. DRO Bell rejected the Tenants' argument that all aspects of the unit must be "similar" since in essence, that argument would confine one to only identical or almost identical units. Again, I see nothing wrong with this conclusion as the approach proposed by the Tenants would clearly defeat the objectives of the Act and s. 23(1)(a) of the Regulation. As with the adjustments for the rental

> amounts for the Group A units, DRO Bell's adjustment for the renovation differences reflected a fair and reasonable way to make a true comparison between the units. Indeed, this particular adjustment worked to the benefit of the Tenants by decreasing the median rental amounts in Group A so it is somewhat strange that they complain about it, other than as a strategy to defeat the comparison exercise altogether.
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> [139] In my view, DRO Bell made no error in using the Group A units as "similar units" and also made no error in applying this discount to reflect the differences in the renovations done or not done to the respective units.

Counsel submitted that the appraiser's reliance on advertised rents, wait listed rents and reported rents as well as actual rents paid by other occupants at the rental property was appropriate and justified by the *Berezowski* decision. She relied upon the judge's finding that the phrase 'rent payable' in the Regulation is not restricted to actual rent paid for other units. At paragraph [130] of the decision the judge said:

> [130] I do not agree that the phrase "rent payable" in s. 23(1)(a) of the Regulation is restricted to the actual rent for these other units in these unique circumstances. The Shorter Oxford English Dictionary, 6th ed., defines "payable" as:
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> > 1 Of a sum of money, a bill, etc.: that is to be paid; falling due (usu. at or on a specified date or to a specified person. LME.
> >
> > 2 Able to be paid. L17.
> >
> > …
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> Further, Black's Law Dictionary, 9th ed., defines "payable" as:
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> > (Of a sum of money or a negotiable instrument) that is to be paid. An amount may be payable without being due. Debts are commonly payable long before they fall due.
>
> Neither of these definitions support an interpretation of "rent payable" to be restricted to the amount of actual rent being paid. Rather, they are broad enough to allow for circumstances such as those here, where DRO Bell considered the notional increased rental amounts. This approach is also consistent with the "broad and liberal" approach to interpretation of the Act (and I would add the Regulation), as adopted in Barosso, as quoted above.

It is the landlord's position that the units selected by the appraiser as similar to the subject units support the position that the rents for the subject units are significantly lower than similar units in the same geographic area.

The tenants' advocate submitted that the landlord has not satisfied the burden of proof necessary to establish that an additional rent increase should be awarded. The tenants submitted that the must show that:

- The rents for the tenants' units are significantly lower than the rent payable in comparator units;
- The comparator units are similar to the tenants' units; and
- The comparator units are in the same geographic area as the tenants' units.

The tenant's advocate submitted that the approach taken by the landlord's appraiser was flawed. The tenants submitted that an overall comparability approach relying upon adjustments to align disparate properties may be appropriate for determining market rents for advertising and marketing to new tenants, it does not satisfy the requirements of the *Residential Tenancy Act* and Regulation.

The tenants submitted that the rental units are 50 years old, simple, with few appliances, amenities or upgrades. There are repair issues in some units, including difficulty controlling heat. Many of the landlord's comparables are newer and have additional amenities and improvements.

The tenants' submission is that mere distance between buildings is not sufficient to satisfy the test that the comparables be in the same geographic area; the comparables must be within a reasonable kilometer radius of the subject property, but they must also be located In an area with similar characteristics. The tenants noted that the rental property is located at a busy commercial intersection. There are high traffic volumes and it is on a busy bus route. There is a nearby live theatre and there are consistent reports of drug use and illegal activity around the rental property. It was submitted that comparator units although located just a few blocks away from the rental property are in a much quieter and more residential area removed from the busy intersection. As support for the position that proximity may not always be an indicator of similarity, the tenant's advocate referred me to the Supreme Court of British Columbia decision in *Clements v. Gordon Nelson Investments Inc.*, 2010 BCSC, 31 and in particular to the judge's determination that the arbitrator's failure to exclude from consideration certain properties rendered her decision patently unreasonable. The judge reached this conclusion because the arbitrator stated that she would not consider certain properties

in the West End of Vancouver to be comparable if they were very near to shopping and other attractions that might increase rental value, but then went on to include several properties within that description. The tenant's advocate submitted that the decision makes it clear that buildings within a few blocks of the subject property may not be truly comparable.

In the tenants' written submission the tenant's advocate provided a chart in which the tenants set out their analysis and conclusions as to whether or not they regarded the appraiser's selected units as truly comparable to the subject units. The tenants' submission is that the preponderance of the selected units are not truly comparable. According to the tenants' submissions, comparables A through C and E through K are not truly comparable. With respect to the majority of these comparables the tenants' position is that they are not truly comparable because they are much newer, with more desirable influences; that they are located in quieter areas and in some cases with views, with some or all of the following additional features and amenities: elevator, underground parking, dishwashers, balconies for all units, in-suite storage, fireplaces, fitness room and shared garden.

The tenants' submitted that the landlord's appraisal report left out several important factors. In the appraisal report it was stated that the subject and none of the comparables have views, but as set out in the online listings several of the comparables mention views as a feature. As well the appraisal does not consider in-suite storage and individual thermostats as features worthy of consideration. The tenants submit that of the selected comparables, only comparable "D" meets the requirements of being similar to the subject units and in the same geographic location. The tenants considered that it was unclear whether comparable "A" was truly comparable because of the limited information provided and noted that all units had balconies and should not be compared to units in the rental property without balconies.
The tenants submitted that the landlord failed to provide evidence of actual current rents paid in the selected comparable units. And submitted that evidence as to market rent does not equate to the "current rent payable" as stated in the Policy Guideline.

The tenants referred to and relied upon the Policy Guideline with respect to rent increases. The tenants also referred me to the decision of the BC Supreme Court in *Barosso v. Fazer Plaza Ltd.*, 2011 BCSC 11448 wherein Madam Justice Wedge said that:

> [11] I accept the petitioners' submission that the purpose of the Act as a whole is to confer a benefit or protection on tenants. The Act provides protection such as the rent control provisions that would not exist at common law.

> The Act must be construed broadly and liberally to achieve that purpose. Any ambiguity in its language must be resolved in favour of the tenant: Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator), 2007 BCSC 257 (CanLII).

The tenants relied on the findings of an arbitrator who addressed a landlord's application for an additional rent increase in a January, 2015 decision. In that decision the arbitrator said:

> The evidentiary requirement imposed on a landlord is to show that the rent for the rental unit in question is significantly lower "than the rent payable for other rental units" similar to and in the same areas as the subject rental unit. It is meant to be comparison of the spectrum of rents <u>currently being paid</u> by tenants of other rental units, not merely a comparison with the current "market" rents being obtained for newly rented units or the asking rents for vacant units.

The arbitrator went on to say that:

> Similarly, it is not sufficient for a landlord to show that a rental unit has a significantly lower rent than similar units in the same geographic area recently rented out or being offered to rent. Evidence of what is commonly called "market rent" is of only limited value.
>
> This may be seen to impose an almost impossible evidentiary burden on the landlord. Requesting information about the current rents being received for similar accommodation in the area would be requesting information that neighbouring landlords and tenants may very well not wish to divulge. Likely that is why the application form issued by the government and the Policy Guideline itself are for the most part directed to apartment building style rental units, where a landlord has control over sometimes hundreds of similar apartments in the same geographical area.

The arbitrator concluded that:

> From another viewpoint, were it otherwise, then the statutory scheme of rent control legislated by the *Act* would be rendered ineffective. In a rising market a landlord could bypass the permitted rent increase rules for existing tenancies set by regulation each year, by making an application for an additional rent increase based solely on the climbing rents being obtained for similar accommodation in the area.

The tenants referred to a statement obtained from the occupant of an apartment on Broadway, directly across the street from the rental property. She said that she occupies a one bedroom apartment with a balcony and a mountain view. She has lived there for five years and pay $725.00 per month. The address of the rental unit was not disclosed in her statement.

The tenants submitted that the *Berezowski* decision relied upon by the landlord should be considered to be limited to the particular facts of that case. It was submitted that the landlord in the *Berezowski* case was a low income housing provider. The landlord is that case was changing its rental scheme from one whereby a below market rent was charged to all tenants to a needs based program whereby tenants could apply for a rent subsidy based on income and other factors, including family composition and those tenants who do not qualify for a subsidy would pay market rent. The landlord sought to increase the rents without regard to the additional rent increase provisions of the *Residential Tenancy Act* upon the assumption that the landlord was exempt from the rent increase provisions. It was determined in a 2011 Residential Tenancy Branch decision that the landlord was not exempt from the rent increase provisions of the *Act* and the landlord then applied for an additional rent increase. The landlord's application was granted by an arbitrator in a decision dated June 25, 2012 and her decision was affirmed by the B.C. Supreme Court. In the Tenants' submission the landlord's application in the *Berezowski* case was made to raise the tenant's rent from a "non-market rent" to a "market rent" and it is therefore distinguishable from the present circumstances where none of the tenants have been paying a "non-market rent".

I note in the Residential Tenancy Branch decision that was the subject of the judicial review in *Berezowski*, the arbitrator said at page 11 of her decision that:

> **Exceptional circumstances** - To determine the exceptional circumstances I must consider the relevant circumstances of the tenancy, the duration of the tenancy, and the frequency and amount of rent increases given during the tenancy.
>
> Upon review of the evidence I find it supports that in this case rents were kept artificially low due to the Landlord's previous operating agreement and mandate. Furthermore, rents have not been increased annually as the Landlord transitioned over to their new operating mandate. Accordingly, I find there are exceptional circumstances which have kept the Tenants' rent below market value.

The tenants' submission is that additional rent increases should only be granted in extraordinary or exceptional circumstances and the landlord has not demonstrated exceptional circumstances and has not provided sufficient evidence to prove its entitlement to an additional rent increase. The tenants requested that the landlord's application be dismissed.

The tenants requested, in the event that increases are allowed, that they be phased in over time.

Analysis

The landlord has applied for rent increases on the ground that after the allowable annual rent increase is added the rent for the rental unit is significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as, the rental unit.

The landlord provided the current rent for each unit as the starting point for comparison purposes, rather than the rent after the allowable increase was added. The current allowable rent increase for 2016 is 2.9%. The current rent and the rent after the allowable increase is added are as follows:

Unit #	bedrooms	Current rent	Allowable increase	Rent after increase
101	one	$813.00	$23.58	$836.58
102	one	$923.00	$26.77	$949.77
103	one	$900.00	$26.10	$926.10
104	three	$1,103.00	$31.99	$1,134.99
201	one	$813.00	$23.58	$836.58
202	one	$814.00	$23.61	$837.61
204	one	$950.00	$27.55	$977.55
305	one	$869.00	$25.20	$894.20
306	one	$826.00	$23.95	$849.95
401	one	$846.00	$24.53	$870.53

The test that I must apply is whether the rent **after** this increase is applied is significantly lower, so the starting point for determining whether rents are significantly lower is the increased rental amount.

The Regulation sets out factors that I must consider in deciding whether to approve a rent increase under subsection (1). They are as follows:

> (a) the rent payable for similar rental units in the residential property immediately before the proposed increase is intended to come into effect;
>
> (b) the rent history for the affected rental unit in the 3 years preceding the date of the application;
>
> (c) a change in a service or facility that the landlord has provided for the residential property in which the rental unit is located in the 12 months preceding the date of the application;
>
> (d) a change in operating expenses and capital expenditures in the 3 years preceding the date of the application that the director considers relevant and reasonable;
>
> (e) the relationship between the change described in paragraph (d) and the rent increase applied for;
>
> (f) a relevant submission from an affected tenant;
>
> (g) a finding by the director that the landlord has contravened section 32 of the Act *[obligation to repair and maintain]*;
>
> (h) whether, and to what extent, an increase in costs with respect to repair or maintenance of the residential property results from inadequate repair or maintenance in a previous year;
>
> (i) a rent increase or a portion of a rent increase previously approved under this section that is reasonably attributable to the cost of performing a landlord's obligation that has not been fulfilled;
>
> (j) whether the director has set aside a notice to end a tenancy within the 6 months preceding the date of the application;
>
> (k) whether the director has found, in dispute resolution proceedings in relation to an application under this section, that the landlord has
>
> (i) submitted false or misleading evidence, or

(ii) failed to comply with an order of the director for the disclosure of documents.

The landlord provided evidence that the rent payable for five similar units in the rental property ranges from $1,025.00 per month to $1,150.00 per month. Some of the rents are amounts paid by new tenants and one, the reported amount of $1,150.00 is a negotiated increase to become effective July 1, 2016.

The landlord submitted records of past rent increases; the rents have been raised annually by the allowable amounts for the past three years.

The landlord has not made any changes to provided services or facilities in the past 12 months. The landlord ceased to employ a resident caretaker in April, 2014.

The landlord's operating expenses and capital expenditures have not been considered.

There have been no prior rent increase applications and there have been no recent dispute resolution proceedings and there have been no findings of misconduct by the landlord in any past proceedings.

In their argument and written submissions the tenants have alleged that the preponderance of the selected comparables are not truly comparable and the tenants dispute the landlord's use of market rent and "adjustments" to take account of differences between the subject property and chosen comparables. The tenants submit that the analysis used in *Berezowski* should be confined to its unique facts and a market rent analysis should not be applied in this case.

I do not agree that the analysis in the *Berezowski* decision should be confined to its facts and I find that it is an appropriate technique to make adjustments when comparing units that are regarded as similar, but have different amenities, finishings or newer construction. To hold otherwise would amount to the imposition of a requirement that comparables be identical, or very nearly so.

I have reviewed the comparables selected by the appraiser and considered his adjustments based on his judgment as to the inferiority or superiority of the comparables to the rental property.

The appraiser ranked comparable A as slightly inferior to the rental property despite the fact that it is updated and in better condition than the rental property. The appraiser

based his determination of inferiority on the fact that the tenants pay for utilities. The tenants do not accept this property as truly comparable. In their submission the landlord provided insufficient evidence to prove that the units are similar. I note that comparable A is located only a short distance west of the rental property and it is described as having the same influences as the rental property. I consider this property as truly comparable, although I disagree with the appraiser's ranking of the property as net inferior. The property is admittedly in better condition and recently updated. The appraiser ranked it as inferior, in part because the tenants pay for utilities. I note that the respondents pays for electricity, but not heat or hot water and I find that the appraiser appears to give undue influence to the provision of heat as an offsetting factor. Because the units are in better condition and updated, I find they should not be regarded as inferior. I find this to be a true comparable

Comparable B was ranked as less desirable although it was a newer building in better, updated condition. The location was said to be inferior because it is further from amenities. I note that it is also further from the theatre venue and the high traffic and noise of the Broadway/Commercial intersection. I do not consider the location to be inferior. Once again the fact that tenants pay for heat and hot water was a factor in determining the unit to be inferior. The tenants' position is that this unit is not comparable because it is much newer, is in better condition and has an elevator and in-suite storage. I consider this unit to be comparable to the rental property.

The appraiser ranked Comparable C as inferior because it was described as being in inferior condition and further from amenities. The appraiser referred to the rent of $940.00 per month as lower end of the range for the subject property. The tenants noted that every suite has a balcony. The unit is described as in good condition, with a mountain view and is located next to a park, in a less busy location. I note that the rent for the comparable includes heat, hot water and cable. I do not find the comparable to be inferior to the rental property. It is 2.5 blocks away from the rental property and I find it to be a direct comparable with some advantages, including the adjacent park and the inclusion of cable service.

Comparable D is an older building without elevator or balconies. It has updated flooring, cabinets, windows and blinds. The appraiser said that it has less desirable influence because it is six blocks west of the rental property, but there was no other analysis for this conclusion. The tenants regard this property as a true comparable. I agree with that assessment because it is similar in age and location and heat and hot water are included in rent.

Comparable E was described by the appraiser as “Net similar” to the rental property although it is a newer, larger property in better updated condition with elevator, underground parking and dishwasher, in a quieter area. The appraiser appears to regard it as net similar because tenants pay for heat and hot water and because it is said to be further from amenities. The tenants reject this as a comparable because it is a much newer building, all units have balconies, it is in a quieter area and the additional amenities mentioned. I agree with the tenants’ assessment. Because of the quieter residential location the much newer construction and the additional amenities I consider that this comparable is significantly superior to the rental property. The inclusion of heat in the rent is an inadequate offsetting factor to regard these properties as similar.

Comparable F was also described as net similar to the rental property. The tenants reject this unit as comparable for all the reasons discussed above with respect to comparable E. I agree with the tenants’ analysis and I find that this property is significantly superior to the rental property because of its location and amenities.

Comparable G is again reported to be net similar to the rental property, but once again, it is a larger, newer strata title building in quieter area, one block west of Commercial Drive. It has superior amenities with underground parking, an elevator, dishwasher, balconies and in-suite storage. I find that the quieter location newer construction and additional amenities make this property superior to the rental property notwithstanding the fact that heat and hot water is not included.

Comparable H was reported as net similar to the rental property. The tenants reject this unit as a comparable because it was built in 1981; it has an elevator, dishwashers, fireplaces, underground parking, views and in-suite storage. The property is in a quieter location one half block from Commercial Drive. The appraiser did not provide any detailed discussion as to how these factors were weighed in arriving at his conclusion of net similarity. Although heat and hot water are not included in rent I find this property to be markedly superior to the rental property and not truly comparable.

Comparable I was reported to be net similar to the rental property, it was described by the appraiser as “slightly newer”, in “slightly better, updated condition” although it was constructed in 1983. It is in a quieter area, has more desirable influence and has an elevator, balconies for all suites, underground parking and fireplaces. I find this comparable to be superior to the rental property and not a true comparable.

Comparable J was reported to be inferior to the rental property. It is several kilometers away from the rental property. Apparently it was selected because it is similar to the rental property in that it is located near the Skytrain station at Nanaimo Street. The

building is much newer. It has an elevator, underground parking, balconies, fitness room and shared garden. Although it was described as having more desirable influences it was described as being located in a similarly busy, but more remote area. The appraiser did not define “remoteness” for the purpose of his determination. The tenants do not regard this property as comparable because of all the additional amenities not present at the rental property. The advertised rent for a one bedroom is $995.00. I regard this property as superior to the rental property, but not comparable because it is not in the same geographic area as the rental property, although the location may be analogous to the location of the rental property because it is near a transportation hub.

Comparable K was acknowledged by the appraiser to be superior to the rental property; it was completely renovated in 2013. It has an elevator and is located in a quieter more desirable area. The tenants submitted that it is not a valid comparable. The appraiser said that the rent for a one bedroom unit at $1,275.00 was at the upper end of the range for the rental property. I find this comparable to be much superior to the rental property and in a more desirable location and therefore not a valid comparable. The appraiser submitted that the three bedroom unit in this property was a valid comparable for the three bedroom unit in the rental property. He considered that the rental could be rented for a similar or lower amount than the $2,100.00 monthly rent for the comparable.

Although I accept the premise that adjustments may be a legitimate tool in making comparisons, I do not accept the findings of net similarity in many of the examples presented. I have found that examples A, B, C, and D are true comparables to the rental property units. The reported one bedroom rental rates for these examples are $925.00, $990.00, $940.00 and $1,000.00. The average rent for the four units is $964.00. The median rent is $965.00.

The appraiser excluded comparables B, C and D from consideration in arriving at estimated rents for the one bedroom units in the rental property. All of the comparables selected by the appraiser in his analysis, save for example “A”, I have rejected as being notably superior to the rental property for the reasons I have given. I therefore do not accept the appraiser’s calculations as to the appropriate estimated rent for the one bedroom units.

I have not considered the tenants’ evidence in the form of a statement from a neighbour concerning her rent, because the rental address was not provided and there is no supporting documentary evidence.

The Residential Tenancy Policy Guideline with respect to rent increases provides some guidance with respect to determining whether rents are “significantly lower”. The guideline provides that:

> The rent for the rental unit may be considered “significantly lower” when (i) the rent for the rental unit is considerably below the current rent payable for similar units in the same geographic area, or (ii) the difference between the rent for the rental unit and the current rent payable for similar units in the same geographic area is large when compared to the rent for the rental unit. In the former, $50 may not be considered a significantly lower rent for a unit renting at $600 and a comparative unit renting at $650. In the latter, $50 may be considered a significantly lower rent for a unit renting at $200 and a comparative unit renting at $250.

The rent for the subject one bedroom units after the allowable increase is applied ranges from a low of $836.00 to a high of $977.00. The landlord has recently rented some units at a monthly rent of $1,125.00.

The Policy Guideline also states that:

> Additional rent increases under this section will be granted only in exceptional circumstances. It is not sufficient for a landlord to claim a rental unit(s) has a significantly lower rent that results from the landlord’s recent success at renting out similar units in the residential property at a higher rate. However, if a landlord has kept the rent low in an individual one-bedroom apartment for a long term renter (i.e., over several years), an Additional Rent Increase could be used to bring the rent into line with other, similar one-bedroom apartments in the building. To determine whether the circumstances are exceptional, the arbitrator will consider relevant circumstances of the tenancy, including the duration of the tenancy, the frequency and amount of rent increases given during the tenancy, and the length of time over which the significantly lower rent or rents was paid.

I find that the rents for units 101, 201, 202 and 306 after the allowable increase is taken into account are significantly lower than the rent for the units I have found to be comparable. The rent for the least expensive of these four units is more than 15% below the median rent for the comparables. I consider this to be significant. I do not consider that the rents for the other one bedroom units to fit the description of “significantly lower” because there is a difference of 10% or less for these units. The Policy Guideline comments that:

> The amount of a rent increase that may be requested under this provision is that which would bring it into line with comparable units, but not necessarily with the highest rent charged for such a unit. Where there are a number of comparable units with a range of rents, an arbitrator can approve an additional rent increase that brings the subject unit(s) into that range. For example, an arbitrator may approve an additional rent increase that is an average of the applicable rental units considered. An application must be based on the projected rent after the allowable rent increase is added. Such an application can be made at any time before the earliest Notice of Rent Increase to which it will apply is issued.

With respect to unit 101, I consider it to be the least desirable unit because it is partially below grade and has no patio, whereas each of the other three units are above grade and have balconies. I allow the landlord's application with respect to these four units and allow a rent increase for units 201, 202 and 306 to the amount of $965.00, being the median rent for the comparables. With respect to unit 101, because of its lower desirability, I allow an increase to the amount of $940.00.

The three bedroom unit in the rental property is unusual; there are few rental units that could be considered comparable. For that reason the appraiser considered the rental rates for dissimilar units, including two bedroom units in similar properties in order to assign a specific value to a third bedroom. He referred to comparable properties A, E, F, G and H to highlight the difference in rental rates between one and two bedroom units in the same building. Of those examples, I found that only unit A was a true comparable. The appraiser's opinion was that the three bedroom in comparable K was the best comparable, however I have excluded that property because of the superior factors set out above. The rent for the three bedroom unit, after including the allowable increase is $1,134.99 which is significantly less than the rent for a two bedroom in comparable A at $1,435.00. I find a three bedroom unit will attract a higher rent than a two bedroom unit and that this is a case where adjustments should be made to ascertain an appropriate increased rent. I find that it has not been established that a three bedroom unit will attract an additional rent equivalent to the difference in rent between a one and a two bedroom unit. I do find that the rent for unit 104 is significantly lower than the rent for a comparable two bedroom unit. The appraiser estimated a rent of $1,880 for this unit and the landlord requested an increase to $1,934.00 per month.

I find that the rent should be increased to an amount exceeding that of a comparable two bedroom unit. Although there is only one sample of a two bedroom unit amongst the properties I have found to be comparable, I find that it is reasonable to extrapolate

from the rental amounts for one bedroom units in those properties to arrive at an adjusted rent payable for a comparable two bedroom rental unit. Taking into account the two bedroom comparable A and the rates for the other comparable units, I find that an appropriate two bedroom rental rate of $1400.00 is reasonable. I find that an additional but smaller amount should be added to account for the third bedroom and I find that a comparable rent payable for this albeit adjusted three bedroom unit would be $1,650.00. I allow the landlord's application for an increase to rent for unit 104 to the amount of $1,650.00.

Conclusion

The landlord has been granted additional rent increases for the five units in the amounts stated as follows:

- Unit 101: $940.00
- Unit 201: $965.00
- Unit 202: $965.00
- Unit 306: $965.00
- Unit 104: $1,650.00

The application with respect to all other units is dismissed. The landlord may give the affected tenants notices of the increased rents and the rent increases will take effect three months after the notices are served as provided by section 42 of the *Residential Tenancy Act.*

This decision 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: May 11, 2016

Residential Tenancy Branch