



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding FRASER MARINE DRIVE HOLDINGS INC. suppressed to protect privacy]

DECISION

Dispute Codes ARI

Introduction

The landlord applies pursuant to s. 43(3) of the *Residential Tenancy Act* (the “Act”) for approval of a rent increase in an amount that is greater than the amount permitted and set by the Residential Tenancy Regulation that a landlord may impose annually under that section (the “permitted rent increase”).

The request is made on the basis that after the permitted increase, the rents for the rental units in question are significantly lower than the rent payable for other rental units similar to and in the same geographical area.

The listed parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Ms. V.P. for the landlord reported that matters had been resolved with the respondent tenant Ms. S.K. of unit 116 and no additional rent increase is sought from her in this proceeding. Ms. S.K. did not attend the hearing.

Two of the respondent tenants, Mr. J.E. of 214 and Mr. A.O. of 224 did not attend the hearing. Ms. V.P. showed that each had been duly served by registered mail (tracking numbers shown on cover page of this decision). Each appears to have signed for the registered mail. Neither filed material in opposition to the application.

Issue(s) to be Decided

After the rent increase permitted by the Regulation, are the rents for the four rental units significantly lower than rent payable for other rental units similar to and in the same geographic area as the rental units? Are any other factors relevant to approval of an additional rent increase?

Background and Evidence

The rental units are apartments in an older, two storey, 40 unit apartment building.

The landlord acquired the property in July 2013. All the respondent tenants were tenants of the building at that time.

Rental unit 124 was rented to the respondent Mr. N.M. in October 2012. Mr. N.M. did not attend the hearing. However, Mr. A.A. attended representing himself to be the tenant of 124, saying he took over the tenancy about three years ago. Ms. V.P. agreed and the style of cause has been amended to add Mr. A.A. as the respondent tenant of unit 124.

The rent charged for 124 in October 2012 was \$550.00 per month. The landlord has imposed permitted rent increases and the current rent is \$592.70. After the permitted rent increase for 2017 (3.7% as set by regulation), the rent would be \$614.63. The landlord seeks an additional rent increase of \$150.37 to bring the monthly rent up to \$765.00.

Rental unit 214 is rented to Mr. J. E. The tenancy started in December 2012 at a monthly rent of \$500.00. The landlord has imposed permitted rent increases and the current rent is \$547.43. After the permitted rent increase for 2017 the rent would be \$567.68. The landlord seeks an additional rent increase of \$197.32 to achieve a monthly rent of \$765.00.

Rental unit 215 is rented to Ms. N. A.-R. Her tenancy started in August 2012 at a monthly rent of \$500.00. The landlord has imposed permitted rent increases and the current rent is \$538.17. After the permitted rent increase for 2017 her rent would be \$558.08. The landlord seeks an additional rent increase of \$206.92 in order to bring the rent up to \$765.00.

Rental unit 224 was rented to Mr. A.O in October 2012 at a rent of \$500.00. After permitted rent increases over the years, that rent is now \$538.17. After the permitted rent increase for 2017 the rent would be \$558.08. The landlord seeks an additional rent increase of \$206.92 to reach a new rent of \$765.00.

In support of the landlord's claim, Ms. V.P. presents three comparable rental units in the same building. Like the rental units in question, they are all one bedroom apartments of a square footage between 480 and 487 square feet.

Apartment 222 was rent in May 2002 for \$595.00 per month. As the result of permitted rent increases over the years, the current rent for 222 is \$770.43 included a permitted rent increase that became effective January 1, 2017.

Apartment 223 was rented in December 2011 for \$750.00 per month. Ms. V.P. says the current rent is \$819.51, which appears to include a permitted rent increase that became effective January 1, 2017.

Apartment 114 was rented in October 2011 for \$750.00 per month. The rent is now \$836.59 as a result of permitted rent increases. This rent appears to include a permitted rent increase effective January 1, 2017.

Ms. V.P. has searched for comparable rental units in the same geographic area of this building but says they were difficult to find. She says that her search has failed to find any reasonably comparable units that were below the rents in question here. Basement rooms rented for \$700.00 to \$800.00. One bedroom apartments were about \$765.00 per month.

She produces copies of five ads for currently available rental units, which, she intimates, are in the same geographical area. Two are ads for one bedroom apartments in apartment buildings, seeking monthly rents of \$900.00 and \$1195.00. Two are ads for basement suites in homes, one "like new," for \$1100.00 and a second for \$1500.00. The fifth add is for a bedroom in a "community house for students," sharing cooking and bathroom facilities. The landlord seeks rents from \$650.00 to \$850.00, depending on which of seven bedrooms one chooses.

It is apparent from the spreadsheet provided by the landlord that prior to and after the year 2012, the rental units in this apartment building had commanded rents well in excess of the \$500.00 range. Ms. V.P. opines that the landlord of that time rented below market value, perhaps driven by cash flow problems, in an effort to fill up the building, which had many vacancies.

She says that despite imposing permitted rent increases annually the rents are still lower that other rents in the building and in the area.

Ms. V.P. says that the landlord has made many improvements to the building and common areas. It has renovated the exterior and the interior common areas. It has installed a dedicated laundry room for the tenants in the building. Formerly they had the use of a laundry facility in a nearby sister building. The security and fire protection for

the building has been updated. Balcony doors and railings have been upgraded and most suites have new appliances. Internet cable has been improved and the parking area has been resurfaced and lines painted.

The tenant Ms. A.-R. did not attend the second day of hearing and did not testify.

The tenant Mr. A.A. testifies that back in 2012 there was a bed bug and a drug user problem in the building. That is why people avoided renting apartments there.

He says that in his suite the carpets are from the 1970's, the kitchen cabinets are poor, there are mice in his unit and that some of the tiles in the bathroom are missing. He also indicated that he has a bed bug problem, though it would appear the landlord has not been officially informed of it before this hearing.

He agrees that the current landlord is more responsive than the old one and that it has made a lot of improvements to the building, but none to his unit save for a balcony and balcony door improvement.

In response Ms. V.P. agrees that there was a bed bug problem in the past. The landlord has engaged a pest control company to attend to it and will do so again if required.

She agrees that the neighbourhood is "not that great" but points out that the landlord has significantly improved the security at the building. She says the landlord now has a waiting list for new tenants.

Analysis

The Law

Section 43 of the *Act* establishes the framework for how and when a landlord may increase rent:

- 43 (1) A landlord may impose a rent increase only up to the amount
 - (a) calculated in accordance with the regulations,
 - (b) ordered by the director on an application under subsection (3), or (c) agreed to by the tenant in writing.
- (2) A tenant may not make an application for dispute resolution to dispute a rent increase that complies with this Part.
- (3) In the circumstances prescribed in the regulations, a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution.

(5) If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.

Section 22 of the Regulation sets out a formula for determining the amount by which a landlord may annually increase rent under s. 43(1)(a) of the *Act*:

22 (1) In this section, inflation rate means the 12 month average percent change in the all-items Consumer Price Index for British Columbia ending in the July that is most recently available for the calendar year for which a rent increase takes effect.

(2) For the purposes of section 43 (1) (a) of the Act [amount of rent increase], a landlord may impose a rent increase that is no greater than the percentage amount calculated as follows:
percentage amount = inflation rate + 2%

The permitted amount for 2016 was 2.9%. For 2017 it is 3.7%.

Section 23 of the Regulation sets out when a landlord may apply for an additional rent increase:

23 (1) A landlord may apply under section 43 (3) of the Act [additional rent increase] if one or more of the following apply:

- (a) after the rent increase allowed under section 22 [annual rent increase], 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,
- (b) the landlord has completed significant repairs or renovations to the residential property in which the rental unit is located that
 - (i) could not have been foreseen under reasonable circumstances, and
 - (ii) will not recur within a time period that is reasonable for the repair or renovation;
- (c) the landlord has incurred a financial loss from an extraordinary increase in the operating expenses of the residential property;
- (d) the landlord, acting reasonably, has incurred a financial loss for the financing costs of purchasing the residential property, if the financing costs could not have been foreseen under reasonable circumstances;
- (e) the landlord, as a tenant, has received an additional rent increase under this section for the same rental unit.

Subsection (3) outlines the factors that the director must consider in deciding whether to approve an application for additional rent increase:

(3) The director must consider the following in deciding whether to approve an application for a rent increase under subsection (1):

- (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.

Residential Tenancy Policy Guideline No. 37, titled "Rent Increases" provides assistance regarding when to allow an additional rent increase. The Guideline reads;

Additional Rent Increase under the Residential Tenancy Act

The Residential Tenancy Act allows a landlord to apply to a dispute resolution officer for approval of a rent increase in an amount that is greater than the basic Annual Rent Increase. The policy intent is to allow the landlord to apply for dispute resolution only in "extraordinary" situations. The Residential Tenancy Regulation sets out the limited grounds for such an application. A landlord may apply for an additional rent increase if one or more of the following apply:

- (a) after the allowable Annual Rent Increase, 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 Guideline details the concept of significantly lower rent:

Significantly lower rent

The landlord has the burden and is responsible for proving that the rent for the rental unit is significantly lower than the current rent payable for similar units in the same geographic area. An additional rent increase under this provision can apply to a single unit, or many units in a building. If a landlord wishes to compare all the units in a building to rental units in other buildings in the geographic area, he or she will need to provide evidence not only of rents in the other buildings, but also evidence showing that the state of the rental units and amenities provided for in the tenancy agreements are comparable.

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.

"Similar units" means rental units of comparable size, age (of unit and building), construction, interior and exterior ambiance (including view), and sense of community.

The "same geographic area" means the area located within a reasonable kilometer radius of the subject rental unit with similar physical and intrinsic characteristics. The radius size and extent in any direction will be dependant on particular attributes of the subject unit, such as proximity to a prominent landscape feature (e.g., park, shopping mall, water body) or other representative point within an area.

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 dispute resolution officer 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.

The landlord must clearly set out all the sources from which the rent information was gathered. In comparing rents, the landlord must include the Allowable Rent Increase and any additional separate charges for services or facilities (e.g.: parking, laundry) that are included in the rent of the comparable rental units in other properties. In attempting to prove that the rent for the rental unit is significantly lower than that for similar units in the same geographical area, it is not sufficient for the landlord to solely or primarily reference Canada Mortgage and Housing Corporation (CMHC) statistics on rents. Specific and detailed information, such as rents for all the comparable units in the residential property and similar residential properties in the immediate geographical area with similar amenities, should be part of the evidence provided by the landlord. 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, a dispute resolution officer can approve an additional rent increase that brings the subject unit(s) into that range. For example, a dispute resolution officer 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.

Comparable Rental Units in the Same Geographic Area

The five nearby rental units presented by the landlord as comparable are, I find, not reasonably comparable.

Two are basement suites in homes, which may well offer more or less amenities to a tenant than a rental unit in this apartment building.

The two nearby apartments for rent are not comparable. The apartment building containing the four units in question in this application is a two level apartment building above commercial premises on a busy street, as shown by the landlord's photographs. The nearby units said to be comparable appear to be in quiet, exclusively residential areas. One ad describes the building to be in a "desirable area" with an elevator, in-suite storage and a live-in caretaker. The other is a new apartment.

The fifth unit offered as a comparable rental unit is a rooming house. Tenants have exclusive possession of a bedroom only and must share bathrooms, kitchens and a living room. Such an arrangement is quite different from the four self-contained rental units the subject of this application.

Additionally, 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 two units. It is meant to be a contrast with the spectrum of rents being paid for the other rental units, not merely with the current "market" rents being obtained for newly rented units or the asking rents for vacant units. As the Policy Guideline states," [i]t 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."

Similarly, it is not sufficient for a landlord to make that claim based on the asking rents for other similar rental units nearby.

Comparable Rental Units in the Building

I find that the three rental units in this apartment building, proposed by the landlord as comparable units, are reasonably comparable to the four suites in question. The photographs presented by the landlord show that the suites contain similar flooring, cabinets and sinks. They look virtually identical. I accept Ms. V.P.'s evidence that they are all about the same size.

In making this finding I have taken into account the testimony of Mr. A.A. regarding the state his rental unit.

The average rent for the three comparable rental units in the building is \$808.84. Comparing that average rent with the lowest and highest rents of the four rental units in question, after taking into account the permitted rent increase, shows a difference in rents of \$194.21 to \$250.26 from the average for the other, similar rental units. Percentage wise, the four tenant respondents to this application are paying between 69% and 76% of the rent being paid by other tenants in the building for similar suites. They are paying considerably lower rent.

Having regard to the wording of the Policy Guideline, I find that this is a significant difference. The four tenant respondents to this application are paying significantly lower rent than the rent for other similar units in the same building.

Other Factors

A. Landlord Improvements

The landlord has made improvements to the apartment building since acquiring it in 2013. The exterior has been modernized. There appears to be new carpet in the hallways. The security has been updated. The parking area has been improved. The building now has its own laundry room. All of these changes have no doubt made the apartment building a more attractive place to live, allowing the landlord to seek higher rents from prospective tenants.

Section 23(3) of the Regulation requires that I consider “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.” Unfortunately, the provision does not say how such a change is to be considered: whether in terms a change for the better or for the worse or in terms of the money expended or saved by a landlord to making the change or the amenity gained or lost by a tenant.

Ms. V.P. did not specify when the landlord’s improvements took place, whether over the last 12 months or before

There is no direct provision in the *Act* or the Regulation permitting a landlord to seek an additional rent increase based on expenditures for voluntary improvements to a rental unit, units or a common area. Had that been the intention of s. 23(3) of the Regulation it could have been clearly expressed in those terms. Having regard to the fact that the *Act* confers a benefit and protection to tenants and that ambiguities in the interpretation of the *Act* should be resolved in favour of tenants (*Samji v. HFBC Foundation* 2012

BCSC 1367, Masuhara J.) I find that the landlord's improvements to the apartment building are not a factor in considering its application for an additional rent increase.

B. Exceptional Circumstances

The Policy Guideline indicates that an additional rent increase is to be granted only in "exceptional circumstances." It gives the example of a situation where a landlord has kept the rent low for a long term renter.

Here, the circumstances are unusual. The landlord's spreadsheet of tenancies and rents in the building shows that the rents negotiated for tenancies before the year 2011 and then after 2013 were all significantly higher than rents negotiated in 2012.

I find that in the year 2012 the landlord was suffering a high vacancy rate, possibly as the result of the apartment building having acquired a bad reputation for bed bugs and/or drug users, and that the landlord was compelled by financial circumstances and market forces to offer units for rent significantly below the rents previously charged.

I find there are no "exceptional circumstances" within the tenor of the Policy Guideline in this case. At the time the relevant tenancy agreements were negotiated, the parties settled on what was then "market rent" or fair rent for a one bedroom rental unit in this building. There is no evidence to suggest that the lower rents would be only temporary or for a fixed period of five years. The landlord has regularly imposed the approved rent increase since then. There is no suggestion that the landlord was or has been bestowing some unilateral benefit on the tenants.

Both landlords and prospective tenants are free to benefit from the ebbs and flows of the rental market. In this case, the tenants might be seen to have rented their units at an opportune time, given that new rents have increased and the amenity of the building has improved over the following years. Yet, the landlord is obliged to keep its end of the bargain.

C. Tenant Nonattendance

Two of the four respondent tenants did not attend this hearing and a third, Ms. A.-R. attended only the first day. The Policy Guideline provides that the landlord has the burden of proving any claim for a rent increase of an amount is greater than the prescribed amount, whether a tenant attends or not. I find that despite any significant evidence to the contrary, the landlord has failed to do so.

Conclusion

The respondent tenants' rents are significantly lower than the rent payable for other, similar rental units in the apartment building but there are no exceptional circumstances to justify an additional rent increase. The landlord's application is dismissed.

The landlord is relegated to imposing the permitted rent increase allowed under the *Act* as it has done in the past.

I have considered all relevant factors listed in s. 23(3) of the Regulation.

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: March 24, 2017

Residential Tenancy Branch