Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ARI-C

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "**Act**") and the *Residential Tenancy Regulation* (the "**Regulation**") for an additional rent increase for capital expenditure pursuant to section 23.1 of the Regulation.

The landlord was represented at the hearing by its vice-president ("AW") and its property manager ("AA"). 11 tenants attended the hearing: tenants JI (unit 304), PQ (unit 504), KP (unit 503), ML (unit 602), FT (unit 603), DT (unit 703), MS (unit 702), TZG (unit 804), CA & MM (unit 1404), and OZ (unit 1402).

AW testified that the landlord served all the tenants with the notice of dispute resolution proceeding form and their supporting evidence packages either personally or by registered mail. All tenants in attendance confirmed that they received the landlord's documents in one of these two ways.

As such I find that all tenants have been served with the required materials in accordance with the Act.

Preliminary Issue – Withdrawal of application against new tenants

At the outset of the hearing, the AW stated that the landlord would like to withdraw its application against tenants LR (unit 302), TZG (unit 804), AR (unit 1001), FT (unit 2001), and LW (unit 1503). As such, I dismiss the application against these tenants. After having made this order, tenant TGZ disconnected from the call.

Issues to be Decided

Is the landlord entitled to impose an additional rent increase for capital expenditures?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The residential property is a 15-storey building containing 52 rental units. Two of the storeys are occupied by commercial tenants. Each remaining storey has four units each.

AW testified that he has not applied for an additional rent increase for capital expenditure against any of the tenants prior to this application.

AW testified that he was seeking to impose an additional rent increase for a capital expenditure incurred to pay for work done to the residential property's hot water tanks. He testified that the landlord replaced two hot water tanks (the "**Old Tanks**") with three new hot water tanks (the "**New Tanks**") and installed boiler controls (the "**Controls**") to regulate their temperature (collectively, the "**Work**"). The Tanks provide hot water to the residential levels only; the commercial levels are provided hot water by different hot water tanks.

AW testified the Work was done because the Old Tanks were starting to leak and that they were replaced pre-emptily before they failed catastrophically. AW testified that the Old Tanks were roughly 25 years old and that the landlord does annual preventative maintenance on them. He testified that the landlord started planning for their replacement in April 2021 and had the New Tanks installed on June 9, 2021. He testified that the life expectancy of the New Tanks exceeds five years. He testified that the landlord complied with the recommendation of the hot water tank provider when deciding to replace the two Old Tanks with the three New Tanks. He testified that having more smaller tanks makes it easier to regulate and maintain the water's temperature and provides a better backup system in the even one tank fails. The landlord submitted an invoice for $55,623.14 purchase of the New Tanks and their installation. AW testified this invoice was paid on July 15, 2021 and submitted a cheque stub confirming this date.

AW testified that it the Controls to help maximize the efficiency of the New Tanks. He testified that the Controls set and maintain the temperature for the water taking the time of day into account in order to ensure that water was not being kept unnecessarily heated 24 hours a day. AW testified that the Controls replaced a "dial-up" temperature control system which was over 25 years old and was much less efficient. The landlord submitted an invoice for $3,008.25 for the purchase and installation of the Controls dated August 26, 2021. AW testified this invoice was paid on September 30, 2021 and submitted a ledger entry confirming this date,

Each tenant was provided an opportunity to make submissions. Tenants JI, CA, and MM did not make any submissions.

Tenant KP stated that her tenancy started on May 1, 2021 after the landlord knew that would be purchasing the New Tanks and the Controls, but just prior to the landlord incurring these costs. She submitted that she should not be subject to an additional rent

increase, as theses costs were or should have been factored into her monthly rent rate when she entered into the tenancy agreement.

Tenant PQ testified that the cost of heat and water were included in her monthly rent rate and as such she should not have to pay any costs associated with providing these services to her including the cost of the New Tanks or the Controls.

Tenant ML stated that the tenants did not cause any damage to the Old Tanks or the "dial up" controls, so they should not be responsible for paying for their replacement, as they are not liable. She argued that it is unfair to expect tenants to pay capital expenditures for building maintenance, as maintenance is the landlord's responsibility.

Tenant MS acted as a translator for tenant FT. FT stated that he agreed with what the previous tenants had said and argued that as heat and water is included with his monthly rent he should not have to pay for any expenses related to their provision.

Tenant DT stated that the Old Tanks were 25 years old, and as such it was their "natural time to die". He stated that since this was the case, the tenants should not be responsible for upgrading the landlord's property.

Tenant MS argued that the failure of the Old Tanks was not the tenants' fault, and as such the tenants should not be responsible for paying for their replacement. He testified that he has been in the building for just over a year and does not think that it is his responsibility to replace the old tank, as he did not use it for any significant portion of its lifespan.

Tenant OZ stated that this procedure is very troubling. He acknowledged that for the past few years many landlords throughout the province were suffering but allowing landlords to impose this type of rent increase is unfair to tenants. Additionally, he argued that any rent increase the landlord was entitled to impose should be "walked back" once the landlord has recouped the cost of the Work. He argued that his tenancy started January of 2021, and it was unfair that he had to bear the cost of replacing the Old Tanks, when none of the previous tenants who occupied his unit before him had to. He stated that this "goes against the spirit of the law".

The parties agreed that the landlord has not imposed an additional rent increase pursuant to sections 23 or 23.1 of the Regulations in the last 18 months.

Analysis

1. Statutory Framework

Sections 21.1, 23.1, and 23.2 of the Regulation set out the framework for determining if a landlord is entitled to impose an additional rent increase for capital expenditures. I will

not reproduce the sections here but to summarize, the landlord must prove the following, on a balance of probabilities:

- the landlord has not successfully applied for an additional rent increase against these tenants within the last 18 months (s. 23.1(2));
- the number of specified dwelling units on the residential property (s. 23.2(2));
- the amount of the capital expenditure (s. 23.2(2));
- that the Work was an *eligible* capital expenditure, specifically that:
    - the Work was to repair, replace, or install a major system or a component of a major system (s. 23.1(4));
    - the Work was undertaken for one of the following reasons:
        - to comply with health, safety, and housing standards (s. 23.1(4)(a)(i));
        - because the system or component:
            - was close to the end of its useful life (s. 23.1(4)(a)(ii)); or
            - had failed, was malfunctioning, or was inoperative (s. 23.1(4)(a)(ii));
        - to achieve a reduction in energy use or greenhouse gas emissions (s. 23.1(4)(a)(iii)(A)); or
        - to improve the security of the residential property (s. 23.1(4)(a)(iii)(B));
    - the capital expenditure was incurred less than 18 months prior to the making of the application (s. 23.1(4)(b)); and
    - the capital expenditure is not expected to be incurred again within five years (s. 23.1(4)(c)).

The tenants may defeat an application for an additional rent increase for capital expenditure if they can prove on a balance of probabilities that the capital expenditures were incurred:

- for repairs or replacement required because of inadequate repair or maintenance on the part of the landlord (s. 23.1(5)(a)); or
- for which the landlord has been paid, or is entitled to be paid, from another source (s. 23.1(5)(a)).

If a landlord discharges their evidentiary burden and the tenant fails to establish that an additional rent increase should not be imposed (for the reasons set out above), the landlord may impose an additional rent increase pursuant to sections 23.2 and 23.3 of the Regulation.

2. Prior Application for Additional Rent Increase

The landlord has not made any prior application for an additional rent increase against any of the tenants.

3. Number of Specified Dwelling Units

Section 23.1(1) of the Act contains the following definitions:

> "dwelling unit" means the following:
> (a) living accommodation that is not rented and not intended to be rented;
> (b) a rental unit;
> […]
> "specified dwelling unit" means
>
> (a) a dwelling unit that is a building, or is located in a building, in which an installation was made, or repairs or a replacement was carried out, for which eligible capital expenditures were incurred, or
> (b) a dwelling unit that is affected by an installation made, or repairs or a replacement carried out, in or on a residential property in which the dwelling unit is located, for which eligible capital expenditures were incurred.

As such, based on the testimony of AW, I find that there are 52 specified dwelling units on the residential property.

4. Amount of Capital Expenditure

Based on the invoices submitted into evidence I find that the landlord incurred cost of:

a) $55,623.14 for the purchase and installation of the New Tanks on July 15, 2021; and
b) $3,008.25 for the purchase and installation of the Controls on September 30, 2021.

5. Is the Work an *Eligible* Capital Expenditure?

As stated above, in order for the Work to be considered an eligible capital expenditure, the landlord must prove the following:

- the Work was to repair, replace, or install a major system or a component of a major system
- the Work was undertaken for one of the following reasons:
  - to comply with health, safety, and housing standards;
  - because the system or component:
    - was close to the end of its useful life; or
    - had failed, was malfunctioning, or was inoperative
  - to achieve a reduction in energy use or greenhouse gas emissions; or
  - to improve the security of the residential property;
- the capital expenditure was incurred less than 18 months prior to the making of the application;
- the capital expenditure is not expected to be incurred again within five years.

I will address each of these in turn.

a. Type of Capital Expenditure

The Work amounted to upgrades to the buildings' mechanical system.

RTB Policy Guideline 37 states:

> Major systems and major components are typically things that are essential to support or enclose a building, protect its physical integrity, or support a critical function of the residential property. Examples of major systems or major components include, but are not limited to, the foundation; load bearing elements such as walls, beams and columns; the roof; siding; entry doors; windows; primary flooring in common areas; pavement in parking facilities; electrical wiring; heating systems; plumbing and sanitary systems; security; systems, including things like cameras or gates to prevent unauthorized entry; and elevators.

I find that the New Tanks and the Controls amount to "major components" of the residential property's mechanical system, which is itself a "major system". Providing hot water to dwelling units is a critical function of a residential property.

As such, I find that the Work was undertaken to replace "major components" of a "major system" of the residential property.]

b. Reason for Capital Expenditure

I accept AW's testimony that the Old Tanks and the "dial up" controls were approximately 25 years old, that the Old Tanks were starting to leak and needed to be replaced before they failed catastrophically, and that the Controls are more energy efficient than the "dial up" controls.

RTB Policy Guideline 40 states that the useful life of a commercial hot water tank is 20 years. It does not include a useful life for a device which controls the temperature within a hot water tank, but I find it reasonable that such a device would have a similar life expectancy to that of the hot water tank whose temperature it regulates.

As such, I find that the Work was undertaken to replace "major components" which were at the end of their useful life, and either were malfunctioning (in the case of the Old Tanks) or used more energy than their newer replacement (in the case of the Controls).

c. Timing of Capital Expenditure

Residential Tenancy Branch Policy Guideline 40 states:

A capital expenditure is considered “incurred” when payment for it is made.

I accept AW’s uncontroverted evidence that the cost of the New Tanks was incurred on July 15, 2021 and the cost of the Control was incurred on September 30, 2021. Both of these dates are within 18 months of the landlord making this application (which was made on October 7, 2021).

d. Life expectancy of the Capital Expenditure

As stated above, the useful life for the components replaced all exceed five years. There is nothing in evidence which would suggest that the life expectancy of the components replaced would deviate from the standard useful life expectancy of building elements set out at RTB Policy Guideline 40. For this reason, I find that the life expectancy of the New Tanks and the Controls will exceed five years and that the capital expenditure to replace them cannot reasonably be expected to reoccur within five years.

For the above-stated reasons, I find that the capital expenditure incurred to undertake the Work is an eligible capital expenditure, as defined by the Regulation.

6. Tenants’ Rebuttals

As stated above, the Regulation limits the reasons which a tenant may raise to oppose an additional rent increase for capital expenditure. In addition to presenting evidence to contradict the elements the landlord must prove (set out above), the tenant may defeat an application for an additional rent increase if they can prove that:

- the capital expenditures were incurred because the repairs or replacement were required due to inadequate repair or maintenance on the part of the landlord, or
- the landlord has been paid, or is entitled to be paid, from another source.

None of the tenants made submissions which relate to either of these two points. While I understand the concerns of the tenants, the Regulation restricts the grounds on which I made deny a landlord's application for an additional rent increase to the two points set out above.

There is nothing in the Regulation which prevents a landlord from claiming an additional rent increase against a tenant whose tenancy started after the landlord knew it was going to incur the capital expenditure. There is no requirement that the landlord incorporate this cost into that tenant’s rent at the start of the tenancy.

I am not persuaded by the argument that the rent increase should not be imposed against tenants whose tenancy agreements include the cost of heat and water in the monthly rent. A clause in a tenancy agreement to provide heat and water indicates that the landlord should bear the monthly cost of providing these services to the tenant

which are charged by the utility provider. Such a clause does not extend to include the cost of the infrastructure.

The Regulation specifically permits a landlord to make this type of application, as such I do not find that such an application is "against the spirit of the law". Implicit in the Regulation is that these applications must be made against current tenants and not past occupants, as I am unsure how a landlord would be able to make an application for a rent increase against a prior occupant, as they no longer pay any rent which could be increased.

The Regulation does not contain any provision which would cause an additional rent increase for capital expenditure to be discontinued once the full cost of that capital expenditure has been recovered. Any rent increases imposed pursuant to the Regulation are permanent.

I should note that I do not find that any of the tenants caused any damage whatsoever to either the "dial up" controls or the Old Tanks. Any rent increase imposed on a tenant does not connote liability. Rather, the rent increase is simply a mechanism of the Regulation which allows a landlord to recover the cost of eligible capital expenditures from the tenants. The tenants may not think that such a mechanism is fair or equitable, however it is beyond the scope of my authority to strike down portions of the Regulation. It is my responsibility to apply the Regulation as written.

7. Outcome

The landlord has been successful. It has proved, on a balance of probabilities, all of the elements required in order to be able to impose an additional rent increase for capital expenditure (set out above). Section 23.2 of the Regulation sets out the formula to be applied when calculating the amount of the additional rent increase as the number of specific dwelling units divided by the amount of the eligible capital expenditure divided by 120. In this case, I have found that there are 52 specified dwelling units and that the amount of the eligible capital expenditure is $58,631.39.

So, the landlord has established the basis for an additional rent increase for capital expenditures of $9.39 ($53,631.39 ÷ 52 units ÷ 120). If this amount exceeds 3% of a tenant's monthly rent, the landlord may not be permitted to impose a rent increase for the entire amount in a single year.

The parties may refer to RTB Policy Guideline 40, section 23.3 of the Regulation, section 42 of the Act (which requires that a landlord provide a tenant three months' notice of a rent increase), and the additional rent increase calculator on the RTB website for further guidance regarding how this rent increase made be imposed.

Conclusion

The landlord has been successful. I grant the application for an additional rent increase for capital expenditure of $9.39. The landlord must impose this increase against the remaining respondents (those whom the landlord has not withdrawn its claim against) in accordance with the Act and the Regulation.

I order the landlord to serve all tenants with a copy of this decision in accordance with section 88 of the Act within three days of receiving it from the RTB.

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: April 22, 2022

Residential Tenancy Branch