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 by an agent ("**LM**"), its property manager ("**RS**"), and its manager ("**TG**"). Four tenants were represented at the hearing: tenant RK of unit 101 was represented by an agent KT; tenant DB of unit 205 was represented by a support worker AC; tenant SR of unit 211; and tenant GR of unit 306. The landlord called two witnesses to give evidence: its contractor ("**AS**") and its architect ("**JY**")

LM testified that on December 16, 2021, TG served each tenant with the notice of dispute resolution hearing proceeding form, all supporting evidence, instructions for respondents, dispute resolution factsheet, additional rent increased factsheet, and an interim decision dated December 6, 2021. These documents were taped to the door of each rental unit, a mode of service explicitly permitted by the interim decision. The tenants in attendance confirmed that they received these documents in this manner. As such, I find that they have been served with the required evidenced in accordance with the Act.

Of the tenants in attendance only tenant GK provided evidence to the Residential Tenancy Branch (the "**RTB**"). However, he did not provide copies of these documents to the landlord in advance of the hearing. Additionally, these documents were provided to the RTB the day before this hearing (April 7, 2022). In the interim decision, the presiding arbitrator ordered that the tenants provide the RTB and the landlord which copies of all their documentary evidence no later than March 14, 2022. Tenant GK did not do this. As such I exclude these documents.

Preliminary Issue – Amendment of Application

At the outset of the hearing, LM stated that the landlord would like to amend its application to remove its claim for an additional rent increase on the basis of it incurring an increased cost in insurance, sewer, and water, as a result of work done to the residential property. The total cost of these expenditures was $19,878.53. LM stated

that, on further reflection, the landlord did not think that this amount would be recoverable by way of an additional rent increase. I agree, and I permit this amendment.

As such, I amend the landlord's application to reduce the amount of the capital expenditure that the landlord seeks to impose an additional rent increase on from $326,891.69 to $307,013.16.

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 three-storey apartment building (the "**building**"). LM testified that despite the unit numbers going from "00" to "18", there are only 17 units per storey, as the building does not have any units ending in "13". All told there are 51 units in the building.

LM testified that the landlord has not applied for an additional rent increase for capital expenditure against any of the tenants prior to this application. The landlord made this application on August 31, 2021.

LM testified that the landlord was seeking to impose an additional rent increase for a capital expenditure incurred to pay for a work done to the building's windows, siding, and patios (collectively, the "**Work**").

LM testified that woodpeckers caused damage in multiple spots to the wood siding of the building, and the landlord determined that it was necessary to replace the wood siding with vinyl siding so as to prevent further damage. He testified that the expected lifespan of vinyl siding is between 20 and 25 years.

LM testified that the prior windows were single pane and were not energy efficient, and that a few of the windows leaked. New double paned windows were installed which LM stated were more energy efficient. He stated that the expected lifespan of these new windows is 15 years.

LM also testified that when the original wood siding was removed, the landlord discovered rot behind the tar paper and the wood sheeting had to be removed and replaced. This rot was discovered to have spread to several patios which also had to have portions removed and replaced. He testified that he expected the new patios and the wood sheeting to last more than five years.

LM testified that the landlord replaced the windows and the siding at the same time because it would be more cost effective to do these as one prolonged job, and because the process for replacing the windows necessitated that work be done to the siding.

LM testified that all the elements replaced were original to the building, and that the building was built in 1977. He testified that the landlord purchased the building between 8 to 10 years ago.

JY testified that he has been an architect for over 20 years and is a member in good standing of the Architectural Institute of British Columbia. He testified that he submitted plans and drawings to the municipality in which the building is located and that these documents are required in order to get permits to allow the flashing, siding, and windows to be replaced. He testified that he made an inspection of the building on two separate occasions. He testified that the Work was “absolutely” necessary to ensure the maintenance, safety, and integrity of the building. He testified that elements replaced were failing due to their age and had been degrading due to natural causes.

The tenants were permitted to cross examine JY. On cross examination, JY admitted that there were delays in the undertaking of the Work which were caused by delays in the permitting process, as well as due to unfavorable weather. He was unable to state what the monetary cost of these delays might have been. He stated that the municipality issued a stop work order due to a lack of necessary permits and stated that such delays are becoming “more and more common” due to lags in municipal processing time. He testified that additional permits were required because the rot discovered affected the structure of the building and that he had to revise his original plans (which were just for the replacement of the siding and the windows) to reflect the broadened scope of the Work.

AS testified that he was a contractor with 15 years experience, and that his company was retained by the landlord to replace the windows, install vinyl siding and flashing, and install new “building paper and rain screens”. He testified that his company was involved in some of the removal and repair of the rot, but that the bulk of this was done by other contracting companies. He testified that this is not an uncommon practice.

AS testified that the life expectancy of the vinyl siding was 20 years. He confirmed LM's testimony that the windows replaced were single-paned and were not energy efficient. He testified that the new windows were double-paned, more energy efficient, and had a life expectancy of roughly 20 years.

On cross examination, AS stated that his company did not undertake the replacement of sliding doors on the backside of the building because these doors were against stucco walls and such replacement was outside the scope as the contract. He stated that in his experience it was not uncommon for contractor to replace some, but not all, of building elements during a particular job. He testified that his company did not investigate

whether or not rot existed beneath the stucco exterior, as that was outside the scope of his contract.

LM testified that aside from AS's company, the landlord hired three other contracting companies to assist in the removal of rotten wood, deck materials, siding, and small amount of stucco, from the building. Additionally, two of theses companies rebuilt damaged patios. He testified these contractors were hired in order to ensure that the Work was completed in a timely fashion. He testified that there is no duplication of work between these contractors.

LM also testified that the landlord hired a roofing company to install flashing on the perimeter of the roof as part pf the installation of the new vinyl siding and to bring the roof up to code. He testified that the flashing which was replaced was original to the building.

The landlord seeks to impose an additional rent increase to recover the following capital expenditures:

Description	Date Paid	Amount
Windows and siding installation (AS's company)	May 4, 2021	$191,553.82
Project management of all contractors during the project	November 1, 2021	$12,600.00
Landscaping drawings required for permits	April 1, 2020	$1,575.00
Removing siding and stucco as well as cleaning to prep site	August 25, 2020	$3,990.00
Removed siding as well as wood rot and patio repairs	October 2020	$35,066.89
Install metal flashings around the perimeter of the roof	December 16, 2020	$15,504.30
Repairing wood rot found during the replacement of the exterior walls including patio repairs	October 31, 2020	$33,279.41
Architect fees	March 14, 2020	$7,488.17
Cost of permits	May 14, 2020	$5,955.57
Total		**$307,013.16**

The landlord submitted receipts and invoices for me these amounts.

The tenants did not dispute the cost of the Work. Only KT made submissions in opposition to the application. She stated that while the Work was being undertaken, an agent of the landlord advised her that the sliding door in RK's unit would be replaced, as the building was sinking. She testified that it was not replaced.

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. <u>Prior Application for Additional Rent Increase</u>

Based on the evidence presented at the hearing, I find that the landlord has not made a previous successful application for an additional rent increase against any of the tenants.

3. Number of Specified Dwelling Units

Section 23.1(1) of the Regulation 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.

Based on the evidence before me, I find that the building has 51 dwelling units. Each of these dwelling units is located within the building where the Work is being done, and as such each is a “specified dwelling unit” as defined by the Regulation.

4. Amount of Capital Expenditure

The landlord submitted receipts and invoices for each of the capital expenditures claimed. I find that these receipts and invoices are genuine, and corroborate the landlord’s claim that it incurred $307,013.16 in capital expenditures associated with the Work.

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

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.

As such, I find that the replacement of the windows and siding are major systems or components thereof. Additionally, I find that the patios are load bearing elements of the building and therefore their repair was a repair of a major component of a major system.

Additionally, I find that any ancillary costs incurred in the course of undertaking the Work (for example, architectural fees, permitting fees, or fees for demolition and disposal of materials) are costs that were necessary for the undertaking of the Work, and as such should be considered as part of the work needed to replace major components or major systems of the building.

b. Reason for Capital Expenditure

I accept LM's undisputed testimony that the patios, windows, flashing, and siding that were repaired or replaced were all original to the building, and that the building was built in 1977. As such, all of these elements were over 40 years old at the time the Work was undertaken. The useful life of any of these elements, per Policy Guideline 40, is less than 40 years. As such all of the elements were past their useful life.

I accept LM's and AS's undisputed testimony that the new double-paned windows are more energy efficient than the single-paned windows that they replaced.

I accept LM's and AS's is testimony that the patios had started to rot needed to be repaired.

I accept LM's testimony that woodpeckers had damaged the siding of the building, and that this damage, coupled with the age of the siding, required that the siding be replaced.

Each of the aforementioned reasons is a reason set out in the Regulation for a landlord to make capital expenditures which could qualify for an additional rent increase.

c. Timing of Capital Expenditure

Residential Tenancy Branch Policy Guideline 37 states:

> A capital expenditure is considered "incurred" when payment for it is made.

The landlord made this application on August 31, 2021. 18 months prior to this date was March 2, 2020.

Based on the receipts submitted into evidence I find that each of the capital expenditures claimed by the landlord were incurred within 18 months prior to the landlord making this application.

d. Life expectancy of the Capital Expenditure

Residential Tenancy Branch Policy Guideline 40 sets out the useful life of building elements. It lists the useful life of decks and porches at 20 years, of windows at 15 years, and of siding at between 20 and 25 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 this Policy Guideline. For this reason, I find that the life expectancy of the components replaced 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 by the landlord 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), a 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.

The regulation does not include any clause which allows tenants to dispute the amount of the capital expenditure based on cost overruns (either of a reasonable or of an unreasonable nature). Rather, the Regulations enable a landlord to recover the *actual* cost of a capital expenditure. As such, any suggestion that will landlord did not reasonably plan for cost overruns, or that unnecessary delays caused the cost to increase, are not relevant to the question of whether or not the landlord is entitled to recover the full amount of the capital expenditure incurred. The Regulation requires me only to look at the amount paid by the landlord for the capital expenditure. Accordingly, I do not need to consider whether delays in the undertaking of the Work were reasonable or were the result improper planning on the part of the landlord.

Similarly, the Regulation does not allow me to strike down an application for additional rent increase on the basis that the capital expenditures did not go far enough (for example did not replace RK's sliding glass door).

If the landlord has failed to undertake necessary repairs, an individual tenant may apply to the RTB for an order that the landlord undertake these repairs. The present application is not the proper forum for an arbitrator to make such orders.

None of the tenants spoke to either of the statutory defined bases on which they could defeat this application. As such I find that the tenants failed to discharge their evidentiary burden.

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. 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 51 specified dwelling units and that the amount of the eligible capital expenditure is $307,013.16.

So, the landlord has established the basis for an additional rent increase for capital expenditures of $50.17 ($307,013.16 ÷ 51 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 $50.17. The landlord must impose this increase in accordance with the Act and the Regulation.

I order the landlord to serve the tenants with a copy of this decision in accordance with section 88 of the 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, 2022

Residential Tenancy Branch