Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ARI-C

Introduction

A preliminary hearing was originally held on April 8, 2022, and adjourned to August 11, 2022 to deal with the Landlord's application pursuant to the Residential Tenancy Act (the "Act") section 43 and the Residential Tenancy Regulation (the "Regulation") section 23.1 for an additional rent increase for capital expenditure. On August 11, 2022, the landlord's request for an adjournment was granted in order to allow the landlord to properly serve all tenants with a copies of the hearing documents and application.

One tenant, AM, attended the November 18, 2022 hearing. AM stated that they were also representing two other tenants, MC and SM. The remaining Tenants did not attend this hearing, although I left the teleconference hearing connection open until 11:15 a.m. in order to enable these Tenants to call into this teleconference hearing scheduled for 9:30 a.m. The Landlord was represented at the hearing by legal counsel, MD, as well as three agents for the landlord, SG, RV, and PV. The hearing commenced at 9:30 a.m., and ended at 11:15 a.m. in order to give all parties who were in attendance a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties were also clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour Both parties confirmed that they understood.

Counsel for the landlord noted that the list of tenants have changed since the time when the landlord first filed this application on December 28, 2021. The limitations of the Dispute Information and Submission Site does not allow the landlord or staff of the RTB to amend the style of cause to reflect the names of the current tenants. Some tenants have moved out, while other tenants have moved in. I allowed the landlord to submit an updated list of tenants on the hearing date of November 18, 2022. The landlord also provided proof of service to support that all current tenants have been served with the landlord's application, Notice of Dispute Resolution Proceedings containing the calling

instructions for the original hearing, and evidence package in accordance with sections 88 and 89 of the *Act,* The landlord also served the tenants with the Interim Decisions dated April 8, 2022 and August 11, 2022. I am satisfied that the tenants were sufficiently served with the landlord's application, Notice of Dispute Resolution Proceedings, Interim Decisions, and evidence in accordance with the *Act.* The landlords confirmed that they have not been served with any written evidence for this hearing by the tenants.

Preliminary Issue: Document Requests by Tenants

Although the landlord was not formally served with any written evidence for this hearing, the landlord did receive some requests for documents by the tenants. On June 30, 2022, a tenant, SM, submitted a copy of a letter sent to the landlord on June 29, 2022 by some tenants requesting copies of documents and information for the August 11, 2022 hearing.

The tenant in attendance, AM, testified that the tenant MC had previously requested specific information and documents from the landlord. The tenant expressed concern that the landlord did not produce all the requested documents as requested, including the purchase agreement, inspection reports, and other relevant documents and information related to the maintenance history of the building.

The landlord responded that despite the fact that no formal summons requests were made by the tenants for this dispute, the landlords had spent a significant amount of time and energy in an exhaustive effort to provide the requested documents to the tenants for this hearing. The landlord notes that they have worked with the tenants to respond to their requests as a gesture of good faith, as supported by the documents submitted.

The landlord submitted in evidence the correspondence that was sent to MC in response to MC's requests. In an email dated August 30, 2022, counsel for the landlord sent MC an email with attached quotes that the landlord received for the fence and balcony projects. Counsel informed MC that the landlord had searched its records again, and does not have any documents related to a 2014/2015 inspection. Counsel also wrote that the landlord has no record of which third party conducted the inspection, and despite having reached out to third parties to determine the company used, the landlord was unsuccessful. The landlord submitted in evidence a copy of the documents sent to MC. The landlord also submitted a follow up email from MC dated November 14, 2022, which stated "I write to advise that I will not be taking any position with respect to [the landlord's] application before the residential tenancy board set to be heard on November 18, 2022. I will not be attending the said hearing".

The landlord also submitted a copies of email correspondence between them and the tenant AM. On October 7, 2022, AM had written to the landlord to request documents related to the building purchase by the landlord, as well as additional photos of the balconies showing visible damage prior to the work being done. On October 17, 2022, AM again requested details listed in the purchase agreement that may disclose the condition of the balconies at the time of purchase. AM also asked if any balcony repair requests by tenants were made between the purchase of the property to when the balconies were replaced. AM, who was in attendance at the hearing, testified that they have been a tenant at the building for twelve years, and was present for, and aware of inspections performed. AM testified that they feel that the contract of purchase would have noted pre-existing issues.

The landlord maintains that they had produced, without obligation, the requested documents that are relevant to this application. The landlord maintains that the contract of purchase and sale is not relevant to this dispute, and argued that normally the contents of the contract of purchase and sale are private, and does not contain the requested information.

SG, the senior operating manager, was in attendance at the hearing, confirmed that although an inspection was done, they were unsuccessful in locating any copies of any reports. SG testified that the building was purchased in 2015, which was almost eight years ago. SG testified that due to lengthy passage of time, repairs that were required in 2015 would be irrelevant to this application.

Section 5.3 of the RTB Rules of Procedure states the following:

5.3 Application for a summons
On the written request of a party or on an arbitrator's own initiative, the arbitrator may issue a summons requiring a person to attend a dispute resolution proceeding or produce evidence. A summons is only issued in cases where the evidence is necessary, appropriate and relevant. A summons will not be issued if a witness agrees to attend or agrees to provide the requested evidence.

A request to issue a summons must be submitted, in writing, to the Residential Tenancy Branch directly or through a Service BC Office, and must:
- *state the name and address of the witness;*
- *provide the reason the witness is required to attend and give evidence;*
- *describe efforts made to have the witness attend the hearing;*
- *describe the documents or other things, if any, which are required for the hearing; and*

• *provide the reason why such documents or other things are relevant.*

Rule 5.4 clarifies when a summons may be made:

5.4 When a request for a summons may be made
A written request for a summons should be made as soon as possible before the time and date scheduled for a dispute resolution hearing.

In circumstances where a party could not reasonably make their application before a hearing, the arbitrator will consider a request for a summons made at the hearing.

Although I acknowledge the tenants' concerns that the landlord has not provided all the requested evidence in relation to past maintenance and repairs, the onus is on the tenants to request and obtain this evidence prior to the hearing date. As noted in Policy Guideline #37, "If there are certain documents a tenant requires that are in the possession of the landlord or someone else (like a tradesperson), such as maintenance records or grant applications, tenants should request these from the relevant person in advance of the hearing. If the landlord or other person fails to provide the requested documents, tenants may, as soon as possible before the hearing, apply for the production of these documents pursuant to Rules 5.3 and 5.4 of the Rules of Procedure. A tenant can also apply to the director for a summons requiring a person to attend a hearing and give evidence. The tenant must provide conduct money for a witness in accordance with Rule 5.5 of the Rules of Procedure".

As stated above in Rule 5.3, a summons is only issued in cases where the evidence is necessary, appropriate and relevant. The summons request must meet all three criteria.

In this case, I find that the tenants had ample time and opportunity to prepare for this hearing, and obtain and present relevant evidence. In this case, a preliminary hearing was held on April 8, 2022, followed by two hearing dates of August 11, 2022 and November 18, 2022. I find that the landlord had demonstrated a willingness to work with the tenants to provide the requested documents and materials, even in the absence of a summons request. I note that on November 14, 2022, MC wrote that they would not be taking any position with respect to [the landlord's] application before the residential tenancy board set to be heard on November 18, 2022.

In light of the evidence before me, and absence of any summons requests by the tenants, I find that the landlord had fulfilled their obligations in relation to the production of requested documents from the tenants.

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

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This application pertains to a residential property that contains 47 individual dwelling units.

A landlord may apply for an additional rent increase if they have incurred eligible capital expenditures or expenses to the residential property in which the rental unit is located. To raise the rent above the standard (annual) amount, the landlord must have either the tenant's written agreement, or apply to the RTB for either an Additional Rent Increase for Expenses (ARI-E) or an Additional Rent Increase for Capital Expenditures (ARI-C).

The landlord is seeking to impose an additional rent increase for a total capital expenditure of $568,251.07 incurred to pay for work done for this property. The two capital expenditures listed in this application include a balcony replacement and repair project in the amount of $521,253.07, and the replacement of an old fence in the amount of $46,998.00. The landlord submitted a sworn affidavit by SG in relation to these two capital expenditures. Some of the details are reproduced below.

The landlord had testified that they had purchased the property in 2015. The 3 storey building was built in 1976. The landlord submits that the capital expenditures were incurred in an effort to comply with their obligations to maintain and repair the property in accordance with section 32(1)(1) of the *Act.*

The landlord submits that the balconies were old, deteriorating, and rotting. The old and deteriorating balconies were relaced with new balconies with aluminum posts and picket railings. The landlord notes that the engineering company observed substantial rot, which posed a falling hazard. The engineering company also observed prior local repairs attempted by the previous owner(s), which were not compliant with current building codes. The recommendation was for immediate repairs and replacement to comply with health, safety, and housing standards required by law. The landlord submitted photos of the old balconies, as well as the new ones.

The landlord noted that the old fence had significantly deteriorated, and was unsturdy and unstable. The landlord provided pictures of the old and new fencing.

The landlord testified the above work was required, and the capital expenditures were incurred within the 18 months before this application was filed on December 28, 2021. The landlord testified that they did not expect that these expenditures would re-occur in the next 5 years.

The landlord submitted copies of invoices supporting the referenced capital expenditures. The final invoice for the balcony repair project is dated March 16, 2021,

with the 30% holdback cleared on April 21, 2021. The invoice for the fence replacement is dated September 2, 2021.

None of the tenants provided written consent for the applied increase. 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.

Some tenants have voiced their concerns about the possibility that the referenced expenditures were incurred due to inadequate maintenance or repair on part of the landlord, or previous landlord.

AM presented some questions and requests of the landlord at the November 18, 2022, including:

1) The audited financial documents showing net profit and expenditures for 2019, 2020, and 2021.
2) Whether the landlord has an annual reserve for capital expenditures
3) If the landlord does not have an annual reserve, why are the tenants being forced to pay for neglect?

AM noted concerns about how there was a difference between neglect and maintenance, and how it was challenging for the tenants to make ends meet. AM expressed concern about how the projects were over budget.

The landlord responded that they had attempted to respond to all the tenants' request and questions prior to the hearing, and that the landlord should have been provided the proper opportunity to review any additional request or concerns, and respond prior to the hearing.

Analysis

1. Statutory Framework

Sections 21 and 23.1 of the Regulations sets 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 made an application for an additional rent increase against these tenants within the last 18 months;
- the number of specified dwelling units on the residential property;
- the amount of the capital expenditure;
- 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
    - 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
            - because it 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.

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, or
- for which the landlord has been paid, or is entitled to be paid, from another source.

If a landlord discharges their evidentiary burden and the tenants fail 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

Based on the testimony of the parties, I am satisfied that the landlord has not previously imposed an additional rent increase on any of the tenants within the last 18 months.

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 the specified work was performed pertains to work on the property and common areas accessible by tenants in all the buildings, I find that all units located at this address (47 in total) are "specified dwelling units". The *Act* requires that all units in the building where the repairs or replacement was carried out be considered specified dwelling units, whether vacant or not.

4. Amount of Capital Expenditure

The landlord provided a comprehensive list of expenditures incurred in the 18 months prior to the filing of this application. See below for a specific analysis of each expenditure.

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
    - because it 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.

a. Type of Capital Expenditure and Reason for Expenditure

1) Fencing

I find that the fencing meets the definition of a major component for the purposes of this application, and the fence had reached its useful life. I find that the landlord incurred this expenditure in order to replace this aging component, and therefore I find that this expenditure qualifies.

2) **Balcony Repair/Replacement Project**

I find that the balconies qualify as a major components or system. I am satisfied that the repairs and replacement of the balconies qualify for the purposes of the rent increase application as the work was required to maintain and repair the balconies accordance with section 32(1) of the Act.

b. Timing of Capital Expenditure

I accept that the balcony project was a substantial one, and which took place over a period of time, with partial payments made at different stages of the project. I am satisfied that the landlord had provided sufficient evidence to support that the balcony project was completed in March 2021, as shown by the final invoice. I accept that the landlord has met the timing requirements for this application, and that the incurred expenses occurred within 18 months of the landlord making this application.

c. Life expectancy of the Capital Expenditure

According to RBT Policy Guideline #40, the useful life of a wooden fence is 15 years, while the useful life of a deck or porch is 20 years. The useful life of a metal balcony railing is 15 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 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 expenditures incurred to undertake the Work described are eligible capital expenditures, as defined by the Regulation.

6. Tenants' Rebuttals

Although I acknowledge the concerns brought up in the tenants' evidence and in the hearing, 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.

Although I am sympathetic about the financial hardship a rent increase of any amount may pose for tenants, as stated above, the Regulation limits the reasons which a tenant may raise to oppose an additional rent increase for capital expenditures.

I find the tenants have not met the burden of proof under section 23.1(5), which includes proving that that the repairs or replacement were due to inadequate repairs or maintenance on part of the landlord, or that the landlord has been paid, or is entitled to be paid, from another source.

The tenants challenged whether the above qualifying expenditures were the result of the landlord's, or previous landlord's, failure to maintain the building and perform required repairs. The tenants also questioned whether the landlord had properly budgeted through an annual reserve for these repairs.

Residential Tenancy Policy Guideline #37 states the following:

If an amount of a capital expenditure is recovered or could have been recovered through grants, rebates or subsidies, insurance plans or claim settlements, that amount becomes ineligible, and must be deducted from an order for an additional rent increase (see below). For example, a landlord may be eligible to receive a rebate for installing a high-efficiency boiler. Repairs required due to a fire are typically covered by an owner's insurance. Similarly if repairs become necessary because of inadequate work by an earlier tradesperson, those repairs can often be claimed through a lawsuit.

Tenants bear the onus to establish on a balance of probabilities (in other words that it is more likely than not) that what is otherwise an eligible capital expenditure is ineligible. Tenants should gather and submit any relevant evidence before the dispute resolution hearing.

As noted above, a capital expenditure is not eligible if it has been established that the amount of the capital expenditure is recovered, or could have been recovered, through grants, rebates or subsidies, insurance plans, or claim settlements. First of all, as noted in the Policy Guideline, the onus is on the tenants to prove the ineligibility on these grounds. In this case, I am not satisfied that the capital expenditures have been funded through any other source. I also note that that how a landlord budgets for these expenditures has no bearing on the landlord's right to apply for an additional rent increase for capital expenditures as it is not one of the criteria set out in the legislation.

The tenants also raised the issue of lack of maintenance records produced by the landlord for this application. As noted above, the tenants bear the onus to prove inadequate maintenance. Although I acknowledge the tenants' concerns that the landlord has not provided evidence to support past maintenance and repairs, especially dating back to the purchase in 2015, or the period right before the sale of the property, the onus is on the tenants to request and obtain this evidence prior to the hearing date. As noted earlier in this decision, the onus is on the tenants to adequately prepare for the

hearing, including making proper requests for documents, including a formal request for a summons if required.

The tenants bear the onus to prove inadequate maintenance. In this case, I find that the tenants had ample time and opportunity to prepare for this hearing, and obtain and present relevant evidence, especially since a preliminary hearing was held on April 8, 2022, and the hearing was adjourned on August 11, 2022 to November 18, 2022. I find that despite the absence of any formal applications for a summons, the landlord still communicated with the tenants in a timely and professional manner in an effort to provide any available documents. I am satisfied that the landlord had exceeded their obligations to provide detailed, organized, and forthright evidence that is relevant and available for this application. On the other hand, I am not satisfied that the tenants' suspicions of inadequate maintenance are supported in evidence.

I find that the tenants had a fair opportunity to prepare for this hearing, and present evidence and call witnesses, but failed to establish that the otherwise eligible capital expenditures are ineligible.

7. Outcome

Summary

I find the landlord has met the burden of proof on a balance of probabilities that the following are eligible capital expenditures in the total amount of **$568,251.07.** I find the landlord has established all elements necessary for an additional rent increase for the eligible capital expenditures as set out in their application.

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 47 specified dwelling units, and that the amount of the eligible capital expenditures is **$568,251.07.**

Accordingly, I find the landlord has established the basis for an additional rent increase for capital expenditures of eligible capital expenditure as noted above ÷ number of units for that specific building ÷ 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

I grant the application for an additional rent increase for capital expenditures as specified above. 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: December 18, 2022

Residential Tenancy Branch