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's president ("**FD**") attended the hearing on behalf of the landlord. Eight tenants were present at the hearing: HW (unit 212), RG (unit 409), CR (unit 307), MT (unit 404), TH (unit 415), AM (unit 201), AB (unit 201) and YK (unit 412).

At the outset of the hearing, the landlord agreed to withdraw its application again tenant HW in unit 212. HW then left the hearing.

This hearing was reconvened from a preliminary hearing on July 20, 2022 before a different arbitrator, following which an interim decision was issued.

FD testified that an agent of the landlord served the tenants with copies of the notice of reconvened hearing and the interim decision on the tenants by posting them to the door of each rental unit. The tenants in attendance all confirmed that they received these documents in this manner. Accordingly, I find that all tenants have been served in accordance with the Act.

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 four-floor, wood frame apartment building built in 1973 (the "**building**"). FD testified that the building has 62 units. However, the landlord named only the tenants of rental units on the second, third, and fourth floors as respondents to this application.

The parties agreed that the landlord has not applied for an additional rent increase for capital expenditure against any of the tenants prior to this application.

FD testified that the landlord is seeking to impose an additional rent increase for a capital expenditure incurred to pay for a work done to rebuild the exterior balconies of the units on the second, third, and fourth floor of the building (the "**Work**").

FD testified that the balconies were original to the building. He testified that all the lumber in the balconies except for the horizonal joists had to be removed due to water ingress. Additionally, when the balconies were being removed, the contractor discovered that water had soaked into the lumber behind the exterior stucco walls. During the course of the Work, the landlord's engineer determined that there was insufficient structural support of the balconies, and had to add additional supports. In corroboration of this, the landlord submitted a letter from its engineer, which stated:

> During our field review services required us to assess unforeseen conditions that were exposed during the project and develop appropriate repair/renewal designs. During the project, we discovered the following unforeseen conditions:
>
> - Significant water ingress and associated structural damage to balcony columns and associated rim joists. This required temporary shoring along with removal and replacement of the damaged materials.
> - Water ingress and associated framing damage to exterior walls and curbs at balcony interfaces.
> - Inadequate joist bearing conditions at load bearing walls. This required the installation of additional joists and/or columns to provide suitable bearing conditions.
>
> The inadequate bearing and water damaged framing conditions were concealed by the original finishes, which is why the associated remedial work could only be designed and implemented after commencement of the project. The design and repairs of these unforeseen issues were completed during the project as part of contingency work.

The landlord submitted multiple photos of the water damage to the balconies, the repairs process, and the completed balconies.

FD testified that the balconies were rebuilt to the current building code and have aluminum and glass railings and a sloped plywood base with a glued membrane to prevent water entry. He stated that the balconies are expected to last more than 50 years.

FD testified that the landlord incurred $369,860.56 in capital expenditures when completing the Work, as follows:

Description	**Date Paid**	**Total**

Payment to engineer for 50% cost of drafting plans	15-Jan-21	$1,170.75
Payment to municipality for building permit	25-Feb-21	$10,475.00
Payment to contractor	08-Mar-21	$25,000.00
Payment to engineer for balance of cost of drafting plans	29-Mar-21	$1,050.00
Payment to engineer for 2 field reviews and engineering administration support	29-Apr-21	$3,312.75
Payment to contractor for construction of balconies	04-May-21	$117,648.32
Payment to engineer for 3 field reviews and engineering administration support	26-May-21	$2,457.00
Payment to engineer for 2 field reviews and engineering administration support	05-Jul-21	$1,430.85
Payment to engineer for 2 field reviews and engineering administration support	30-Jul-21	$3,206.44
Payment to contractor for construction of balconies	16-Aug-21	$50,000.00
Payment to contractor for construction of balconies	07-Sep-21	$150,000.00
Payment to engineer for 2 field reviews and engineering administration support	09-Sep-21	$1,410.94
Payment to engineer for 2 field reviews and engineering administration support	13-Oct-21	$1,546.13
Payment to engineer for engineering administration support	29-Oct-21	$1,050.00
Payment to engineer for engineering administration support	19-Jan-22	$102.38
		$369,860.56

The landlord provided invoices and ledger entries confirming the dates and amount of payment for all of these expenses.

Tenant AH stated that he has never received an assessment from the landlord that showed the Work needed to be undertaken. He argued that it only became clear that the Work was required after the balconies were starting to be removed. He suggested that the landlord undertook the Work only because it knew it would be able to impose an additional rent increase.

Tenant TT stated that the landlord had replaced all of the railing on the balconies roughly one year prior to the Work being undertaken. He stated that only a limited number of the units whose balconies had water damage and asserted that there was no problem with his balcony.

FD replied that the landlord has made cosmetic repairs to some of the unit's balconies in the past, by replacing individual wood pickets, but denied that there was any wide-scale replacement of railings throughout the building prior to the Work starting. MT stated that the landlord replaced all the pickets and crossbar of his balcony not that long before the Work was undertaken. FD did not dispute this.

Tenant YH testified that her balcony was in need of repairs and needed to be replaced. However, she argued that this amounts to building maintenance and therefore the landlord should bear the cost of the Work, not the tenants.

Tenant RG testified that she signed her tenancy agreement on April 15, 2021. She argued that as this was after the landlord knew it would be undertaking the Work and incurring the resulting cost before entering into the tenancy agreement with her, the landlord incorporated the cost of the Work into her rent already. As such, she does not believe she should have an additional rent increase imposed on her.

Tenant CR stated that she had never seen any inspection to assess the damage to the balconies prior to the Work starting. She argued that had the landlord been more proactive in inspecting the building, it would have identified the cause of damage sooner, and the cost of the Work would have been less. Tenants TH and AM agreed with CR.

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 a 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

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 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.

Residential Tenancy Branch (the "**RTB**") Policy Guideline 37 states:

> A specified dwelling unit must be included in the calculation if it is located in a building (or is the unit) for which the capital expenditure was incurred or, if not located in the building, is affected by the capital expenditure at the residential property. For example:

> • If the roof of a building has been replaced, all dwelling units located in the building are specified dwelling units.
>
> […]
>
> Unless they are located in the building where the capital expenditure was incurred, dwelling units that are not affected by the capital expenditure must not be used in the calculation.
>
> For example, if there are two rental buildings on the residential property and the landlord performs $1,000,000 in eligible capital expenditures on the first building, the dwelling units in the second building are not specified dwelling units and must not be used in the calculation.
>
> [emphasis added]

As such, I find that the number of specified dwelling units for the purposes of the Work is equal to the number of units in the building (62 total). I note that the landlord only applied to impose additional rent increases for this capital expenditure against the second, third, and fourth floor tenants. The Regulation requires that all units in the building where the repairs or replacement was carried out be considered specified dwelling units.

Policy Guideline 37 exempts dwelling units not located in the building where the capital expenditure was incurred, not those which are located in the building, but not affected.

For clarity, even though I find that the dwelling units on the first floor are "specified dwelling units" this does not mean that the landlord may impose the additional rent increase sought in this application against their occupants. The first-floor tenants were not named as parties to the application and I cannot make an order against someone whom the landlord has not made a claim against.

4. Amount of Capital Expenditure

Based on FD's testimony, supported by the invoices and ledgers submitted into evidence, I find that the landlord incurred $369,860.56 in capital expenditures associated with the Work. The cost of permits, creation of architectural drawings, and engineer site visits are all costs which were necessary for the Work to be undertaken. Accordingly, I find that these costs, along with the cost of the contractor, are properly considered a capital 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
    - 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

Section 21.1 of the Regulation defines “major system” and “major component”:

> "major system", in relation to a residential property, means an electrical system, mechanical system, structural system or similar system that is integral
> (a) to the residential property, or
> (b) to providing services to the tenants and occupants of the residential property;
>
> "major component", in relation to a residential property, means
> (a) a component of the residential property that is integral to the residential property, or
> (b) a significant component of a major system;

RTB Policy Guideline 37 provides examples of major systems and major components:

> 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.

The Work amounted to rebuilding the building’s balconies. These are part of the building’s structural system. The Regulation explicitly identifies a residential property’s structural system as a “major system”. As such, the balconies amount to significant components of the structural system, which cause them to be “major components”, as defined by the Regulation.

As such, I find that the Work was undertaken to replace “major components” of a “major system” of the building.

b. Reason for Capital Expenditure

RTB Policy Guideline 40 sets out the useful life of decks or porches as 20 years. This policy guideline does not list *any* building element as having a useful life of over 48 years (how old the balconies’ structure was at the time the Work started). As such, I find that the balconies were past their useful life when they were replaced.

Additionally, I accept that most of the components of the balconies and associated building structure were water-damaged and required replacement. The landlord did not provide any documentary evidence regarding the initial assessment of the balconies, or its motivation for starting the Work, so I cannot say what knowledge the landlord was aware of the balconies’ condition before the Work started. However, in light of YH’s testimony that the balcony was “very dangerous”, and in light of the fact the landlord new the age of the balconies, and committed to undertaking a costly repair process, I find it likely that the landlord had some idea as to the damage to the balconies. Undoubtedly, as the Work progressed, the landlord became aware of the extent of the damage, and the expanding scope of the required repairs.

I find that the Work was undertaken because the balconies were past their useful life and because they were failing.

c. Timing of Capital Expenditure

The landlord made this application on February 9, 2022.

RTB Policy Guideline 37 states:

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

Based on the ledger entries submitted into evidence, I find that all of the capital expenditures were incurred within 18 months of the landlord making the application.

d. Life expectancy of the Capital Expenditure

As stated above, the useful life of decks and patios is 20 years. FD testified that these balconies are expected to last 50 years. No matter which number I accept as accurate, I find that the life expectancy of the balconies 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.

I will address some of the points raised by the tenants at the hearing.

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.

The Regulation specifically permits a landlord to make an application to cover the cost of repairs. I accept that the Act requires the landlord to repair and maintain the building. However, such a requirement does not mean that the landlord is required to bear the cost of the repairs. The additional rent increase for capital expenditure process is specifically designed as a method for landlords to recover the cost of such repairs.

I do not find that minor repairs to balconies' pickets or railing have the effect of negating the landlord's claim. Such repairs did not obviate the need to the Work to be undertaken.

I cannot say whether earlier inspections of the balconies by the landlord would have minimized the cost of the Work. I note that the much of the structural damage was not discovered until after the Work was underway. I cannot see how earlier inspections would have detected damage not visible on the exposed parts of the balconies.

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 62 specified dwelling units and that the amount of the eligible capital expenditure is $369,860.56.

So, the landlord has established the basis for an additional rent increase for capital expenditures of $49.71 ($369,860.56 ÷ 62 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 37, 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 $49.71. 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 23, 2022

Residential Tenancy Branch